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Concussions May Prove to Be a Major Headache for the NFL

Players' Class Action Suit Places a Bounty on the League

By Joseph M. Hanna

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EUGENE C. GERHART
(1912 – 2007)
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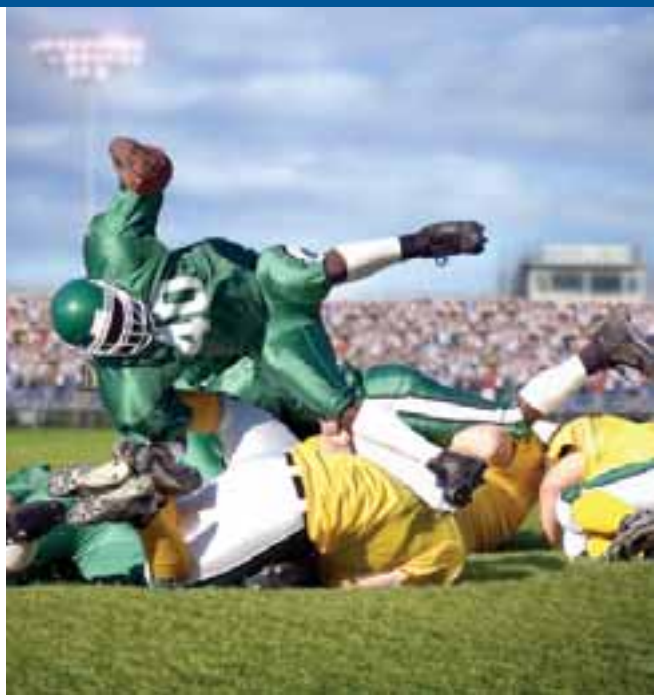

DEPARTMENTS

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SEYMOUR W. JAMES, JR.

Expanding Our Role on the National Stage

It was a busy and exciting summer for the New York State Bar Association, with the American Bar Association's Annual Meeting standing out as a special highlight. We have been working to amplify our involvement in the ABA over the past several years, and the August meeting in Chicago included some wonderful milestones and special honors for attorneys in New York State.

At every Annual Meeting, the ABA names a new president and selects a president-elect. After months of anticipation during his uncontested campaign, New York attorney James Silkenat was officially named president-elect. We are very proud to have a New Yorker, and a leader in our association, assuming the presidency of the ABA in August 2013.

Jim has been active with the State Bar and the ABA for years. He has been a member of the ABA's House of Delegates since 1990 and served as New York State Delegate and chair of our delegation from 2000 to 2009. Jim has chaired the ABA's Nominating Committee Steering Committee, its Section Officers Conference and its International Law Section, as well as its committees on Membership, Constitution and Bylaws, the Latin American Legal Initiatives Council and the ABA Museum of Law. He co-founded the ABA Solo and Small Firm Leadership Coalition and chairs the ABA's Legal Opportunity Scholarship Fund for Minority Law Students Fundraising Committee. He has also served on the ABA Commission on Women in the Profession since 2008. In addition to his many ABA activities, Jim has served on the State Bar's House of Delegates since 1998, belongs to our International Section, and has served on our Special Committee on Association Governance, as well as our Membership and Nominating Committees.

Jim continues to demonstrate a strong commitment to the legal profession through his extraordinary professional accomplishments and his many contributions to the State Bar, the ABA and the greater legal community. He has said that he will work to advance existing ABA priorities including state court funding, legal education, diversity and enhancing access to justice. He also hopes to address some new issues including immigration, gun violence, court reform and the death penalty. I am confident that the ABA will have a phenomenal year under his leadership.

Adding to the excitement surrounding Jim Silkenat's election, NYSBA received an ABA Partnership Award at the Annual Meeting, in recognition of our President's Section Diversity Challenge. The Partnership Award recognizes bar association projects that support the advancement of lawyers of color and other underrepresented populations in the legal profession. Our President's Diversity Challenge, established by then-President Vince Doyle when he began his term in 2011, encouraged our 25 Sections to develop and execute new diversity initiatives and evaluate their results. We were thrilled that the Sections did such a tremendous job embracing the spirit of the challenge and formulating unique and effective strategies for increasing their diversity. This tremendous honor is especially energizing as we enter the next phase of our Diversity Challenge – "Reaching the Next Level" – which will focus on quantifying our results and further enhancing our inclusiveness.

This and other recent ABA meetings have also placed a spotlight on the achievements of individual NYSBA members and members of the New York State legal community, who have received several prestigious awards: Former NYSBA President Anthony R. Palermo of Rochester was honored with the John H. Pickering Award for distinguished service to the profession and his community; Amy W. Schulman of New York City won the Margaret Brent Women Lawyers of Achievement Award for excellence in her field and for paving the way for other women lawyers; Seth Rosner of Saratoga Springs received the ABA Michael Franck Professional Responsibility Award for his career efforts on behalf of legal ethics, disciplinary enforcement and lawyer professionalism; and Alexander D. Forger of New York City won the inaugural Alexander D. Forger Award for sustained excellence in HIV legal services and advocacy. In addition, the Appellate Division, Fourth Department, was recognized with the Pro Bono Publico

SEYMOUR W. JAMES, JR., can be reached at sjames@nysba.org.

Award for its efforts under Presiding Justice Henry J. Scudder to create a policy that would increase pro bono participation by appellate court attorneys and legal staff.

On a personal note, I was privileged and honored to receive the ABA Government and Public Sector Lawyers Division's Dorsey Award, which recognizes exceptional work by a public defender or legal aid lawyer. I am proud to have spent nearly four decades working for The Legal Aid Society, and this award speaks volumes about the tremendous job that the attorneys, social workers and other Legal Aid Society employees do every day to serve people in need. It also demonstrates the ABA's commitment to recognizing organizations like The Legal Aid Society and supporting efforts to improve access to justice for all.

At the State Bar, we are always eager to work with the American Bar Association to advance our shared goals. Our increased involvement with the ABA began in 2008 under the leadership of then-NYSBA President Bernice Leber, with a resolution related to the federal government's holding of prisoners at the Guantanamo Bay detention facility. That was the first of many successes, including State Bar-sponsored resolutions supporting funding for civil legal services, opposing the ranking of law firms and encouraging law schools to provide legal education that more effectively prepares their graduates for the actual practice of law. Last year, we were proud to participate in the ABA's nationwide state court funding initiative by issuing our report highlighting the impact of court funding cuts in every judicial district of the state, which drew a great deal of attention to that critical issue and was cited by immediate past ABA President Wm. T. (Bill) Robinson III as an example for other state bar associations. We are very grateful for the extraordinary contributions of past NYSBA President Mark Alcott, who is the current chair of the New York delegation to the ABA and has done a remarkable job leading our efforts. In the coming months and years, we look forward to additional opportunities for NYSBA/ABA collaboration and further developing our strong relationship with the ABA. ■

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October 3–4 New York City (live session)
Albany; Buffalo
(video conference from NYC)

Practical Skills: Basic Matrimonial Practice
October 10 New York City
October 11 Syracuse
October 15 Westchester
October 16 Albany
October 17 Buffalo; Long Island

The Comprehensive Second Circuit: Practice in the 2d Circuit Court of Appeals
October 10 Syracuse (1:00 – 4:30 p.m.)
October 26 New York City (1:30 – 5:00 p.m.)

Attorney Escrow Accounts 101 – What Every Attorney Needs to Know in New York
(9:00 a.m. – 1:00 p.m.)
October 12 Albany
October 19 Buffalo
October 25 New York City
October 26 Long Island

Commercial Litigation Academy
October 18–19 New York City

Update 2012
October 22 Syracuse
November 5 New York City

Matrimonial Trial Institute II
October 26 Buffalo
November 2 Long Island
November 16 Syracuse
December 7 Albany
December 14 New York City

New York False Claims Act
(9:00 a.m. – 1:00 p.m.)
October 29 New York City

Practical Skills: Mortgage Foreclosures and Workouts
October 29 Buffalo
October 30 Albany; Westchester
October 31 New York City; Rochester
November 1 Long Island; Syracuse

Women on the Move
(9:00 a.m. – 1:00 p.m.)
October 30 New York City

Representing Purchasers and Sellers of Residential Condominiums, Co-Operatives and Homeowners Associations
November 1 Albany; Long Island
November 6 Buffalo
November 8 Westchester
November 9 New York City

Representing the DWI Defendant in New York From Arraignment to Disposition
November 1 Rochester
November 15 Long Island
November 16 New York City
November 29 Albany

Building a Successful Law Firm
November 2 New York City

Emerging Issues in Environmental Insurance
(9:00 a.m. – 1:00 p.m.)
November 2 New York City

Developing an Elder Law Practice
(9:00 a.m. – 12:45 p.m.)
November 8 Rochester
November 16 Long Island
November 28 Albany
December 7 New York City
December 14 Westchester

†10th Annual Sophisticated Trusts and Estates Institute
(two-day program)
November 8–9 New York City

Henry Miller – The Trial
November 13 Albany
November 30 New York City

Securities Arbitration and Mediation
November 14 New York City

Counseling a Distressed Business: Before and During Bankruptcy
November 14 Albany
December 13 New York City

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November 15 New York City

The ABC's of Adoption: What Family Law Practitioners Need to Know
November 15 New York City
November 16 Albany

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Administrative Hearings Before New York State Agencies
November 27 New York City
December 5 Albany

Accounting for Lawyers
November 28 New York City
December 6 Albany

Practical Skills: Basics of Intellectual Property Law Practice
November 29 New York City
November 30 Albany (Live & Webcast)

Construction Site Accidents: The Law, The Trial 2012
November 30 Long Island
December 7 New York City
December 14 Albany

Persuasive Legal Writing for Lawyers
December 3 Westchester (6:00 – 9:00 p.m.)
December 4 New York City (6:00 – 9:00 p.m.)
December 5 Long Island (6:00 – 9:00 p.m.)
December 6 Albany (1:30 – 4:30 p.m.)

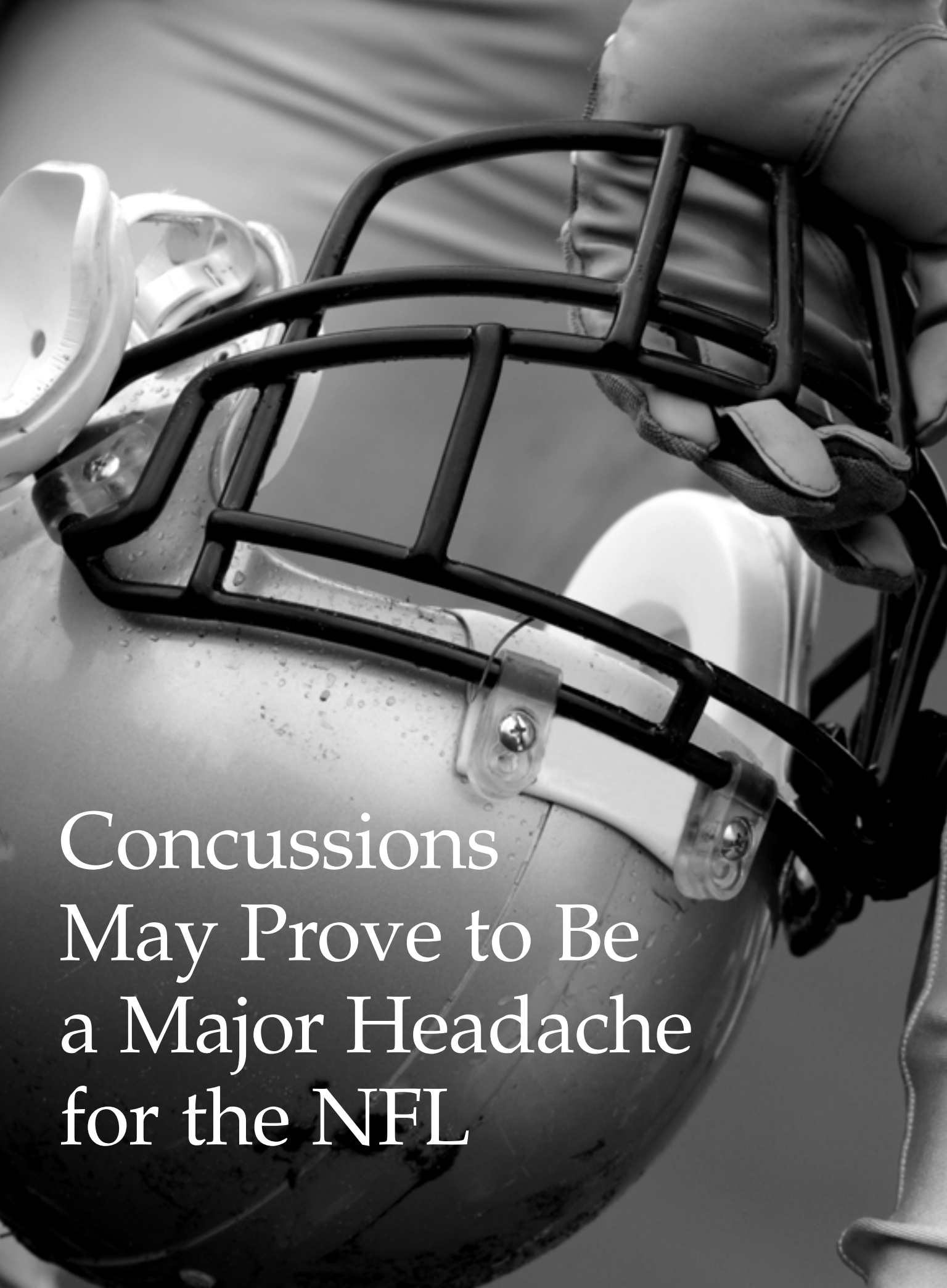
Practical Skills: Probate and Administration of Estates
December 3 Albany
December 4 Long Island
December 5 Rochester
December 10 New York City; Syracuse; Westchester
December 11 Buffalo

Reel Life Vs. Real Life Legal Ethics
(9:00 a.m. – 1:00 p.m.)
December 3 New York City
December 6 Long Island; Syracuse
December 7 Buffalo
December 10 Albany
December 13 Westchester
December 14 Rochester

Buying or Selling a Small Business
December 5 New York City
December 11 Albany

2012 Advanced Real Estate Transactions
December 6 New York City

HITECH for Health Care Attorneys
Live & Webcast (1:00 – 3:00 p.m.)
December 7 Albany



Concussions May Prove to Be a Major Headache for the NFL

Players' Class Action Suit Places a Bounty on the League

By Joseph M. Hanna

Introduction

The plight of NFL players suffering from concussion-related injuries has long been the subject of widespread media coverage, scientific debate and fan interest.[1] Still, recent events – such as the deaths/suicides of several NFL alumni, groundbreaking clinical studies and, most important, a giant class-action lawsuit which threatens the financial livelihood of the league itself – have once again brought the topic to the forefront of national attention. The question on everyone's mind is whether the NFL will face liability for its arguably deficient efforts to inform players of the risks associated with football-induced head trauma. While the league is not without its own defenses to liability, it will still be interesting to see how the lawsuit unfolds in the months to come.

Game-Changing Science

In 2005, a series of clinical studies performed by independent scientists determined that multiple concussions cause problems such as depression and early-onset dementia. Dr. Bennett Omalu and Dr. Robert Cantu examined the brain tissue of three deceased NFL players (Mike Webster, Terry Long, and Andre Waters),[2] who had suffered multiple concussions throughout their NFL careers.[3] Prior to their premature deaths, all three had presented neurologic symptoms of sharply deteriorated cognitive function and psychiatric symptoms such as paranoia, panic attacks, and major depression.[4] The brain tissue of all three presented with neurofibrillary tangles, neurotrophil threads, and cell dropout, and Omalu concluded that chronic traumatic encephalopathy (CTE), triggered by

Joseph M. Hanna (jhanna@goldbergsegalla.com) is a partner at Goldberg Segalla LLP, where he leads the firm's Sports and Entertainment Practice Group. He represents active and retired professional athletes, along with management, ownership, and companies that serve the sports and entertainment industries, in a wide range of commercial and litigation matters. Mr. Hanna is the founder and president of Bunkers in Baghdad, a nonprofit organization that collects and ships golf equipment to U.S. soldiers and Wounded Warriors across the world.

multiple concussions, represented a partial cause of their deaths.[5]

CTE is a neurological disorder first discovered in athletes (such as boxers) who sustained multiple blows to the head. Initially, CTE presents through symptoms such as poor concentration/memory, dizziness, and headaches, but can result in increased irritability, outbursts of violent behavior, and general confusion.[6] Later, the disorder may progress into dementia or Parkinsonism, with symptoms such as a general slowing in muscle movement, hesitancy in speech, and hand tremors.[7]

In response, the NFL Concussion Committee (NFL Committee) denied a link between concussions and cognitive decline, claimed that more research was needed to reach a definitive conclusion, and asked the editor of *Neurosurgery* to retract Omalu's July 2005 article.[8] The NFL Committee's stance was clear: *We own this field. We are not going to bow to some no-name Nigerian with some bull-- theory*.[9] Noting that (ironically) none of the NFL Committee members was a neuropathologist, Omalu questioned the integrity of the committee. How can doctors who are not neuropathologists interpret neuropathological findings better than neuropathologists?[10]

A 2005 clinical study, performed by Dr. Kevin Guskiewicz, found that retired players who sustained three or more concussions in their NFL career had a fivefold prevalence of mild cognitive impairment (MCI) diagnosis compared to NFL retirees who had no history of concussions.[11] To reach this finding, Dr. Guskiewicz had conducted a survey of more than 2,550 former NFL athletes.[12] NFL Committee member Dr. Mark Lovell attacked Guskiewicz's study, stating, "We want to apply scientific rigor to this issue to make sure that we're really getting at the underlying cause of what's happening. . . . You cannot tell that from a survey."[13]

Finally, in 2007, congressional scrutiny coupled with mounting media pressure (including from Alan Schwarz of the *New York Times* and Chris Nowinski of the Sports Legacy Institute) compelled the NFL to address the long-term effects of player concussions. Consequently, in June 2007 the league scheduled its first league-wide Concussion Summit. Independent scientists were invited to present their findings to team medical staffs and National Football League Players Association (NFLPA) representatives. Scientists, fans, and players were hopeful the summit indicated a newfound willingness on the NFL's part to revise its antiquated concussion policies.

Unfortunately, the NFL's concussion pamphlet to players, revealed in a press release issued on August 14, 2007, stated: "[T]here is no magic number for how many concussions is too many"[14] – suggesting that the research of independent scientists fell on unresponsive NFL ears. And, the NFL added: "[C]urrent *research* . . . has *not* shown that having more than one or two concussions leads to *permanent problems*."[15]

Later, in 2008, Dr. Ann McKee of Boston University studied the brain tissue of deceased NFL alumni John Grimsely and Tom McHale, finding that both exhibited distinct signs of CTE.[16] McKee believed that decreasing the number of concussions would decrease the incidence of athlete CTE, stating, "There is overwhelming evidence that *[CTE] is the result* of repeated sublethal brain trauma."[17] Even after the results of this study were published in 2009, Dr. Ira Casson (the former NFL Committee co-chair) maintained that "there is not enough valid, reliable or objective scientific evidence at present to determine whether . . . repeat head impacts in professional football result in long-term brain damage."[18]

NFL alumni are diagnosed with Alzheimer's disease (or other similar memory-related disorders) vastly more often than the national population – at 19 *times* the normal rate for men ages 30 to 49.

Watershed Congressional Hearing

The debate over the long-term effects of multiple concussions reached a boiling point in September 2009, when an NFL-commissioned University of Michigan study found that NFL alumni are diagnosed with Alzheimer's disease (or other similar memory-related disorders) vastly more often than the national population – at 19 *times* the normal rate for men ages 30 to 49![19] Several weeks after the release of this study, Congress announced that it would hold a hearing to discuss "legal issues relating to football head injuries."[20]

On October 28, 2009, members of the House Judiciary Committee sharply criticized the NFL's concussion policy. NFL Commissioner Roger Goodell was directly asked whether players' multiple concussions contribute to the early onset of cognitive decline, but he wisely deferred to medical judgment on the issue.[21] Though the NFL's leading medical voice on the subject (Casson) was not present to answer this critical query, the committee played an *HBO Real Sports* recording of Casson denying all potential links between multiple head injuries and later-life cognitive decline.[22]

The most poignant moment of the hearing occurred when Representative Linda Sanchez of California analogized the NFL's denial of a causal link between concussions and cognitive decline to the tobacco industry's denial of the link between cigarette consumption and ill health effects.[23] Extending this logic further, Rep. Sanchez encouraged Commissioner Goodell to get "ahead on this issue, if only to cover [the NFL] legally."[24] Sanchez seemed to suggest that the NFL might avoid tobacco industry-like liability if the NFL Committee simply issued adequate warnings to NFL players.

Remedial Measures in NFL Concussion Policy

The NFL took several remedial measures after the 2009 hearing. First, Casson and fellow co-chair Dr. David Viano both resigned from their NFL Committee positions.[25] A new committee was formed and Commissioner Goodell replaced Casson and Viano with two well-credentialed neurologists – Dr. H. Hunt Batjer[26] and Dr. Richard G. Ellenbogen.[27] Second, the NFL partnered with the Center for the Study of Traumatic Encephalopathy (CSTE) by pledging to donate $1 million to support its research.[28] Third, NFL spokesperson Greg Aiello made the following admission: "It's quite *obvious* from the medical research that's been done that concussions . . . lead to long-term problems."[29] Fourth, each team was required to make an independent doctor available to examine players and determine whether a player should return to play after sustaining a concussion.[30]

Legal Implications of Prior NFL Committee Policies – Offense and Defense

Since at least 2005, the NFL Committee has been on notice of multiple medical studies linking head injuries to later-life cognitive decline. While it eventually reversed its stance on the issue, it now faces huge potential liabilities for its previous inaccurate and arguably misrepresentative statements to players. Recently, more than 2,000 NFL alumni have joined a single class-action suit, arguing that the league should be liable for its failure to provide adequate warning about the causal link between multiple concussions and later-life cognitive decline.[31] The NFL has several defenses at its disposal, however, so predictions regarding the disposition of this litigation are (at this time) speculative at best.

CBA Preemption

Initially, the NFL may seek dismissal of the concussion litigation on the grounds that it is preempted by the NFL players' collective bargaining agreement and the NFL Constitution and Bylaws (the CBAs) under § 301 of the Labor Management Relations Act.[32] Because the plaintiffs allege that the league has breached its duty to minimize the risk of concussion-related harm to NFL players, and the CBAs outline the obligations of the NFL regarding the issuance of warnings and player safety (i.e., the resolution of state law claims requires interpretation of a collective bargaining agreement), this is a labor dispute.[33] Therefore, federal labor law principles preempt the state law principles.[34] And, because the CBAs stipulated to arbitration proceedings in the event of a dispute (as they did here), the matter must be submitted to arbitration.[35] Based on prior, similar suits against the NFL, there appears to be some precedent in support of this defense.[36] Still, the success of this request for arbitration will depend on whether or not the court accepts the premise that the plaintiffs' claims "arise under" the CBAs.

Failure to Warn

A duty to warn arises when one should realize either through special facts within one's knowledge or acquired through a special relationship that an act or omission exposes another to an unreasonable risk of harm through the conduct of a third party.[37] Because the NFL has been on constructive notice of medical studies linking multiple head injuries with later-life cognitive decline since at least 2005, by intentionally downplaying the risk posed by multiple concussions,[38] the league arguably encouraged players to treat their concussive conditions with less than due care, exposing NFL players to an unreasonable risk of harm. Thus, several players might have aggravated their concussive injuries by returning to play in reliance on the NFL's arguably inadequate warning.

Duty

The NFL might argue that the NFL Committee's mere awareness of independent studies did not by itself impose a legal duty to warn players about such studies.[39] This argument is based on the legal distinction between action and inaction, or "misfeasance" and "non-feasance."[40] Absent some special relationship or special duty, the NFL might argue that it is under no affirmative duty to warn league players about the cognitive consequences of concussions such as CTE, dementia, and depression.

Further, the NFL can argue that, because NFL players are employees of their respective teams and not the league, there is no special relationship stemming from employment that would trigger an affirmative duty to warn NFL players about the long-term risks associated with concussions. Prior courts have supported this classification of the NFL-to-player relationship.[41]

In response, players might argue that the NFL's voluntary creation of its internal Concussion Committee created a duty on the part of the NFL to exercise reasonable care. Once an actor begins to render voluntary assistance to a third party, the actor undertakes a duty to proceed with reasonable care when such third party relies on the actor's assistance.[42] Players relied on the information contained in the NFL's 2007 concussion pamphlet to represent a complete and accurate synopsis of "current research" on the topic: "We want to make sure all NFL players . . . are *fully informed* and take advantage of the

most up-to-date information and resources as we continue to study the long-term impact of concussions."[43] If the NFL Committee wanted players to be "*fully* informed," players may argue, why did it withhold from players the findings of Doctors Guskiewicz, Cantu, and Omalu indicating a causal link between multiple concussions and later-life cognitive decline?

Cause

An actor's tortious conduct must be a factual cause of another's physical harm in order for liability to be imposed.[44] Conduct is a factual cause of harm when such harm would not have occurred "but for" the tortious conduct.[45] The NFL might point to a number of causes that might have contributed to deceased NFL players' cognitive decline. Pittsburgh Steelers' trainer and NFL Committee member Dr. Joseph Maroon argues that steroids, drug abuse, and other substances caused the damaged brain tissue of former NFL players Webster, Long, and Waters.[46] Similarly, when NFL Commissioner Roger Goodell was asked about the trademark signs of CTE found in deceased NFL player Justin Strzelczyk's brain tissue, Goodell issued the following response: "He may have had a concussion swimming. . . . A concussion happens in a variety of different activities."[47]

In response, players could argue that the NFL's failure to warn (i.e., the league's tortious conduct) must be only one cause of their cognitive injuries.[48] When there are multiple causes, each of which is sufficient to cause a plaintiff harm, supplementation of the "but-for" standard is appropriate.[49] NFL players may concede that they sustained concussions in a variety of other contexts, but if players can prove that they aggravated their cognitive injuries as a result of the NFL's failure to warn, supplementation of the "but-for" standard is appropriate. Again, by asserting that "there is *no magic number* for how many concussions is *too many*,"[50] players likely returned to play after sustaining multiple concussions. Therefore, the NFL Committee's concussion management likely caused players to aggravate their cognitive injuries.

Assumption of Risk

The NFL could argue that players assumed the risk of all the injuries inherent in football. Generally, athletes assume the risks of injury normally associated with the sport.[51] However, players must have actual knowledge – not constructive notice – of the *specific* risk at issue in order to invoke the assumption of risk doctrine.[52] Logically, an athlete cannot make an intelligent choice to confront a risk if he or she lacks actual knowledge of the danger.

NFL alumni concede that they had actual knowledge of traditional risks normally associated with professional football (i.e., broken bones, torn ligaments, etc.). However, players lacked actual knowledge of the long-term cognitive consequences of concussions. Former player Brian Westbrook stated: "[A] lot of football players didn't know, and I include myself, that if you have two, three, four concussions you're at a higher risk of [incurring] dementia, early-onset of Alzheimer's, [etc.]."[53] Again, by concealing the findings of troublesome scientific research, the NFL Committee arguably stripped players of their right to make intelligent choices about the long-term risks associated with concussive injuries.

Contributory Negligence

Contributory negligence – i.e., the defense that there can be no recovery of damages for negligence if the injured person, by his own negligence, proximately contributed to the injury[54] – is the strongest argument at the NFL's disposal. While contributory negligence is similar to the assumption of risk doctrine, it is a separate and distinct defense.[55] Assumption of risk involves a plaintiff's actual knowledge of danger and intelligent acquiescence in it, whereas contributory negligence is a matter of the plaintiff's fault or departure from the standard of reasonable conduct.[56]

The NFL could argue that players negligently contributed to their own injury by (1) failing to report their concussive conditions to team doctors and (2) returning to play before their concussion symptoms completely disappeared. The NFL's 2007 informational pamphlet instructs players to self-report their concussion symptoms, indicating that concussion symptoms should be immediately reported to team medical personnel,[57] and that players should be asymptomatic before returning to play.[58]

Thirty of 160 NFL players surveyed by The Associated Press (AP) in November 2009 replied that they either failed to report or underreported concussion symptoms.[59] Further, some players admitted that they returned to play despite "feeling 'dazed' or 'woozy' or having blurred vision."[60] The NFL could argue that players negligently contributed to their own cognitive injuries by failing to report these concussion symptoms and returning to play before becoming symptom free.[61]

Players will respond by arguing that the NFL's contractual scheme incentivizes them to withhold their concussion symptoms from team management. NFL player contracts do not guarantee player payment beyond the season in which an injury occurs.[62] This contractual structure maximizes the risk of players incurring permanent cognitive problems because it incentivizes players to withhold their concussion symptoms and play through multiple head injuries. Dan Morgan's concussive injuries (at least five during his tenure with the Panthers) serve as a prime example of this problem. Faced with the alternative of termination, Morgan "agreed to restructure his $2-million roster bonus into payments of $125,000 for each game played. . . . [This] contract gave Morgan [a] financial incentive not to reveal any concussion for treatment."[63] Quarterback Derek Anderson articulates how

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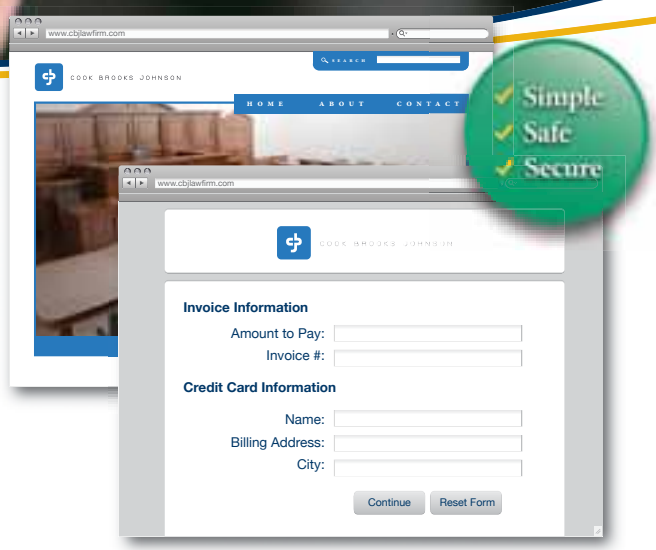

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player contracts incentivize NFL athletes to withhold injury symptoms: "Guys play with [injuries] they've got no business playing with. . . . [Y]our job security is not there to sit out for a month."[64]

Even if players are found contributorily negligent, they could still recover damages in jurisdictions that adhere to comparative negligence principles. While traditionally a plaintiff's contributory negligence served as a total bar to his or her recovery, most jurisdictions adhere to a fairer comparative negligence mandate. Under a "pure comparative negligence" approach, damages are apportioned between a negligent defendant and a contributorily negligent plaintiff, regardless of the extent to which either party's *negligence* contributed to the plaintiff's harm. In other words, a plaintiff who is 60% to blame for an accident could recover 40% of his losses. Thus, a jury might find a player contributorily negligent for withholding symptoms and returning to play before becoming asymptomatic. However, if a jury finds the NFL is at least 1% to blame for a player's cognitive injuries, the player can recover damages in the amount of that 1%.

"Section 88" / Indemnification

The Section 88 amendment to the 2006 NFL CBA provides that NFL alumni may receive payment of up to $88,000 per year for medical claims specifically "related to dementia."[65] Section 88 is funded by the various NFL clubs and "jointly administer[ed]" by the NFLPA and the NFL.[66] Defense attorneys might argue that a player's acceptance of Section 88 funds indemnifies the league against any future civil liability. However, this defense is not persuasive given that Section 88 contains no indemnification language.

Statute of Limitations – "Discovery Rule"

Football-related head trauma can be likened to asbestos exposure in that damage caused by both can take up to 20 to 40 years to manifest. One study noted that while the average age of onset for CTE symptoms was 42.8,[67] patients as young as 25 and as old as 76 years of age presented CTE symptoms.[68] More important, however, this study found that the onset of CTE symptoms occurred, on average, approximately eight years after an athlete had retired.[69]

Initially, this indeterminate "gestation" period appears problematic. Normally, a cause of action for personal injury will accrue at the time of injury, and a plaintiff will have only two to four years to file a claim based in tort.[70] However, to be fair to people with latent injuries, most states have adopted what is known as the "discovery rule," where a cause of action does not accrue until a plaintiff knows or reasonably should have known that he or she was injured as a result of the defendant's conduct.[71] NFL alumni should be able to invoke the discovery rule because cognitive illnesses caused by multiple concussions (e.g., CTE, dementia, Alzheimer's, depression) represent exactly the type of latent injuries the rule was intended to address.

The Bounty System

In 2010, the NFL began investigating the New Orleans Saints after receiving allegations that the team was intentionally attempting to injure other players during the 2009–2010 season.[72] The investigation revealed that the team's "Pay for Performance" program would reward players through a "bounty" system. These payments, often worth thousands of dollars, went to whoever inflicted game-ending injuries on opposing players.[73] Though this investigation initially resulted in the suspension of several players, these suspensions were later reversed and remanded (to Commissioner Goodell) for further consideration by a three-member appeals panel.[74] To date, only Defensive Coordinator Gregg Williams and Head Coach Sean Payton have actually endured discipline by the league.[75]

Yet, it seems unlikely that the allegations of a bounty system will have a profound impact on the pending class-action lawsuit. If such programs had been prolific *and* the NFL could show that it was unaware of them, it could argue that it had no duty to warn against unknown dangers and should not be liable for any resulting injuries. Alternatively, it could attempt to shift a proportionate share of its fault to participating bounty system players under the aforementioned principles of comparative liability.

Individually injured players could also pursue claims against specific players, coaches or teams. While players won't normally be liable for the injuries they inflict on each other during the course of playing the game, flagrantly violent conduct that shows a reckless disregard for the safety of another player could be grounds for imposing liability.[76]

Still, individual teams could defend against liability resulting from bounty program actions under the doctrine of respondeat superior – i.e., they will not be liable for the tortious acts of its employees who act outside the scope of their employment.[77] The NFL Constitution expressly prohibits the intentional targeting of individual players in connection with any sort of bounty system.[78] Accordingly, prohibited actions such as these could absolve individual teams from vicarious liability resulting from bounty-program-related injuries.

The problem with these theories is one of causation. In all likelihood, smoking gun evidence does not exist, and the wide breadth of possible causes for player head trauma makes linking a particular action to a particular injury speculative at best.

Recent Developments

On December 17, 2009, Cincinnati Bengals wide receiver Chris Henry, 26, died after falling (or jumping) out of the

back of a pickup truck.[79] When Omalu and Dr. Julian Bailes[80] performed a postmortem study on Henry's brain tissue, they discovered trademark signs of CTE.[81] Notably, these signs were not caused by the accident, as signs of CTE develop slowly over time.[82] This finding was significant, as Henry, the 22nd professional football player to be diagnosed with CTE, died while s*till active in the NFL*; he had developed CTE by his mid-20s.[83] This raises the question of how many current NFL players might have the condition without knowing it.

Shortly thereafter the NFL picked prominent neurologists Dr. Hunt Batjer and Dr. Richard Ellenbogen to co-chair a new NFL Committee: the NFL Head, Neck and Spine Medical Committee.[84] The selection of Batjer and Ellenbogen eliminated the potential conflicts of interest that jeopardized the integrity of the prior committee's findings, because they had no ties to any NFL teams and did not receive compensation beyond their expenses.[85] Both Batjer and Ellenbogen were zealously committed to distancing themselves from the old NFL Committee. At one point Batjer stated:

> We all had issues with some of the methodologies . . . , the inherent conflict of interest . . . that was *not acceptable* by *any modern standards* or not acceptable to us . . . we don't want our professional reputations damaged by conflicts that were put upon us.[86]

During a May 2010 congressional hearing, then Representative Anthony Weiner of New York addressed the following comment to Batjer and Ellenbogen: "You have years of an *infected system* here, [and] your job is . . . to mop [it] up."[87] Undoubtedly, a critical step in the cleanup process would be the issuance of a warning to NFL players about the causal link between multiple concussions and cognitive decline.

A Step in the Right Direction

In June 2010, the *New York Times* hinted that the NFL was working with the NFLPA and the Centers for Disease Control (CDC) on a concussion brochure worded far more strongly than the one given to players since 2007.[88] Later, the NFL shocked the concussion study community by conceding for the first time that multiple head injuries can cause severe cognitive health problems:[89]

> "[T]raumatic brain injury can *cause* a wide range of short- or long-term changes affecting thinking, sensation, language, or emotions." These changes may lead to problems with memory and communication, personality changes, as well as *depression* and the *early onset of dementia*. Concussions and conditions resulting from repeated brain injury can change your life and your family's life forever.[90]

While this warning was overdue, the NFL deserves credit for finally embracing the findings of independent scientists.[91]

Official changes in the concussion policy aside, the NFL has taken proactive measures with regard to the prevention of concussion-related injuries. In February 2011, the new NFL Committee announced that team medical personnel would implement a standardized sideline concussion-assessment protocol consisting of a limited neurological/cognitive examination and a balance assessment.[92] Following an incident in December 2011, when Cleveland Browns quarterback Colt McCoy suffered a concussion after an illegal hit but was returned to the game *after two plays*, the NFL issued a memo stating that third-party athletic trainers would be placed in each stadium to help with the monitoring of player concussions.[93] During an interview with Peter King in July 2012, Commissioner Goodell hinted that the league was in the process of developing a test for a tablet or iPad which, when used on the sideline, could determine whether or not a player had suffered a concussion.[94]

Still, these measures were all taken *after* the class-action suits against the NFL had been filed, and not everyone is truly convinced of the league's commitment to protecting its players. Recently, Terry Bradshaw noted that "[t]hey're forced to care now because it's politically correct to care. Lawsuits make you care. I think the PR makes you care."[95]

The Tragedy Continues

Sadly, Henry's death and subsequent diagnosis of CTE was no isolated incident. In February 2011, former Chicago Bears defenseman Dave Duerson shot himself fatally in the chest after experiencing deteriorating cognitive symptoms that he believed were linked to CTE.[96] Before his death, Duerson left specific instructions to his family: "Please, see that my brain is given to the N.F.L.'s brain bank," presumably to confirm his self-diagnosed suspicions.[97] In May of that year, the CSTE confirmed

that Duerson had "indisputable" evidence of CTE in his brain tissue samples, noting that there was "no evidence" of any other mental disorder.[98]

Later, in April 2012, NFL alumnus Ray Easterling, a former Atlanta Falcons safety, also committed suicide, dying of a self-inflicted gunshot wound at his home in Virginia.[99] Prior to his death, Easterling had experienced a variety of classic CTE symptoms: memory loss, hand tremors, personality changes, and, eventually, dementia.[100] Notably, Easterling had been the lead plaintiff in the first class-action lawsuit filed against the NFL, which alleged that the league had ignored and concealed the dangers of concussions for years.[101]

Just two weeks after Easterling's death, in an incident frighteningly reminiscent of Duerson's suicide, Junior Seau, a 20-year veteran of the NFL and the San Diego Chargers, also committed suicide by a self-inflicted gunshot wound to the chest.[102] Prior to his death, Seau had struggled with depression and other personal problems, going as far as driving his car off a cliff following an argument with his girlfriend.[103] His family has agreed to donate his brain to researchers to look for signs of trauma and CTE.[104]

More disturbing than these events, however, is the possibility that the NFL concussion problem extends much further than the current media hype. While the high-profile deaths and current litigation have brought the issue to the forefront of national attention, the progressive nature of the disease and the unstated societal stigma toward mental illness have undoubtedly resulted in under-reporting of CTE symptoms and concussion-related afflictions. One study of 34 retired NFL players (with a mean age of 62) by the Center for Brain Health at the University of Texas revealed that these individuals suffered higher instances of cognitive defects and depression compared to the control subjects.[105] While this hardly seems surprising in light of Dr. Omalu's (and other, similar) findings, it is significant because many of the players were clinically depressed – i.e., exhibiting symptoms such as difficulty sleeping, weight gain/loss, and decreased energy levels – and had no idea.[106] More important, the study noted that depression associated with concussions doesn't have a mood component, and that affected players wouldn't necessarily experience the emotional volatility traditionally associated with the disorder.[107] In effect, many CTE sufferers could be unaware that a problem exists until the disease has progressed further into its intermediate/advanced stages. This, in turn, helps to disguise the true breadth of CTE prevalence among NFL alumni.

Scientific Research Takes Off

Fortunately, the recent media coverage has garnered significant attention for CTE throughout the scientific community. One study of over 100 active and retired NFL players strongly indicated that these athletes face a significantly higher risk of incurring permanent brain damage, including a susceptibility to dementia much higher than the national average.[108] Elsewhere, the CSTE has begun recruiting participants for the DETECT (Diagnosing and Evaluating Traumatic Encephalopathy Using Clinical Tests) study, which will include 150 former NFL players, ages 40 to 69, and 50 same-age athlete control participants, to develop methods for diagnosing CTE during life.[109]

Football-related head trauma can be likened to asbestos exposure in that damage caused by both can take up to 20 to 40 years to manifest.

Yet another study conducted by researchers at the Albert Einstein College of Medicine of Yeshiva University reveals progress in the area of diagnosing concussions and related traumatic brain injuries.[110] Using a new technology known as diffuse tensor imaging (DTI), researchers were able to detect unique abnormalities in the brains of those who have had a concussion, where other methods of detection (i.e., CT scans or MRIs) have failed to do so.[111] This study also found that the microstructural integrity of brain tissue found in those who had suffered concussions was abnormally low in comparison to the microstructural integrity of the brain tissue in control groups (those who had not suffered concussions).[112] Worse still, the study revealed that these abnormal regions of brain tissue could retain this reduced level of structural integrity for up to *an entire year* following the concussive injury.[113]

Although this research appears to support the findings of Dr. Omalu, it does little to propose a solution so much as it defines new problems. In the coming years, the issue will be not whether concussions are linked to football-induced head trauma, but what can be done to reduce player susceptibility to CTE, and whether an adequate warning would have made a real difference. For now, it appears that little can be done for those already suffering from the disorder.

NFL Players' Class-Action Lawsuit

With research on CTE stalled at the diagnostic stage, former NFL alumni took legal action by filing several suits against the NFL, alleging in part that the league

"deliberately and fraudulently concealed from its players the link between football-related head impacts and long-term neurological injuries."[114] The football helmet manufacturer Riddell, Inc., was also named as a defendant, undoubtedly because of advertisements stating that Riddell helmets reduced the risk of concussions.[115] Eventually, these suits were collapsed into one "master complaint" in the Eastern District of Pennsylvania.[116] As of this writing, the NFL was ordered to file a motion to dismiss by August 30, 2012,[117] with reply briefs due by December 17, 2012. New plaintiffs continue to file suit and will likely join the main class action in the coming months. Only one such suit has targeted individual teams for liability so far, likely because workers' compensation exclusive remedy laws bar employees from suing employers for work-related injuries.[118]

Given the complexities of the case and the sheer scope of this litigation, it seems likely that the NFL and Riddell would be inclined to settle the case (if the lawsuit survives the motion to dismiss) to avoid Big Tobacco-like liabilities. Still, not everyone is convinced that drawing comparisons to the Big Tobacco cases is an accurate read of the situation. For one thing, unlike tobacco use, the effect of individual concussions on a football player remains unclear.[119] Further, the NFL retains trainers and medical personnel on the sideline who are employed specifically to detect and prevent player injuries, whereas smoker plaintiffs were given no such attention.[120] Last, because NFL players could have sustained permanent mental injuries at any point throughout their career (such as during high school, college, etc.), the causal chain – i.e., that the NFL's failure to warn resulted in injury – is weak, and muddy at best.[121] While this scenario could change with discovery, it appears that, for now, the various plaintiffs' attorneys have their work cut out for them.

Conclusion

Undeniably, cognitive illnesses are significantly more prevalent among NFL alumni in comparison to the national population. Studies performed by the nation's scientists confirm a causal link between multiple NFL concussions and later-life cognitive decline. Presently, researchers are actively pursuing diagnostic techniques in an attempt to prevent further injuries caused by unnoticed head injuries. Unfortunately, the NFL Committee has been aware of these causal studies since at least 2005, and despite being on notice of such studies, the NFL failed to issue adequate warnings to league players from 2005 to 2010.

The league's current efforts to combat CTE cannot rectify the harm suffered by many of these severely injured players. As a result, NFL alumni have targeted the league with Big Tobacco-like failure-to-warn claims to recover for their cognitive injuries. Still, the NFL has a number of persuasive – and potentially exonerating – defenses at its disposal. In any event, the next few months will determine the NFL's ultimate liability for its actions – and could very well determine the financial survival or failure of the league. ■

1. *See, e.g.*, Jeanne Marie Laskas, *Game Brain*, GQ (Oct. 2009), *at* http://www.gq.com/sports/profiles/200909/nfl-players-brain-dementia-study-memory-concussions; Malcolm Gladwell, *Offensive Play: How Different Are Dogfighting and Football?*, New Yorker (Oct. 19, 2009) *at* http://www.newyorker.com/reporting/2009/10/19/091019fa_fact_gladwell; Bob Simon, *A Blow to the Brain*, 60 Minutes (Oct. 11, 2009) *at* http://www.cbsnews.com/video/watch/?id=5377319n&tag=related;photovideo.

2. *See* Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 Neurosurgery 128 (2005) (Omalu, *CTE Part I*) (examining the brain tissue of 50-year-old Mike Webster); Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player: Part II*, 59 Neurosurgery 1086 (2006) (Omalu, *CTE Part II*) (examining the brain tissue of 42-year-old Terry Long); Robert C. Cantu, *Chronic Traumatic Encephalopathy in the National Football League Player*, 61 Neurosurgery 223 (2007) (finding that Andre Waters exhibited the same type of neurological damage as Webster and Long).

3. *See* Cantu, *supra* note 2, at 223.

4. *See id.*

5. *See id.* These are several trademark symptoms of CTE.

6. *See* Michael Saulle & Brian D. Greenwald, *Chronic Traumatic Encephalopathy: A Review*, Rehabilitation Review & Practice 3-4 (2012), *at* http://www.hindawi.com/journals/rerp/2012/816069. These symptoms will often cause one suffering from CTE to develop mood/behavioral disorders such as depression, placing afflicted individuals at an increased risk of suicide.

7. *See* Cantu, *supra* note 2, at 223–24.

8. *See* Laskas, *supra* note 1.

9. *See id.*

10. *See id.*

11. Kevin M. Guskiewicz et al., *Association between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players*, 57 Neurosurgery 719, 722 (2005).

12. *Id.* at 719–22.

13. Alan Schwarz, *Expert Ties Ex-Player's Suicide to Brain Damage from Football*, N.Y. Times (Jan. 18, 2007), at A1.

14. Press Release, National Football League, NFL Outlines for Players Steps Taken to Address Concussions (Aug. 14, 2007), *at* http://www.nfl.com/news/story?id=09000d5d8017cc67&template=without-video&confirm=true.

15. *See id.* (emphasis added).

16. *See* Ann McKee et al., *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy After Repetitive Head Injury*, 68 J. Neuropathology & Experimental Neurol. 709, 732 (2009).

17. *Id.* (emphasis added).

18. *Legal Issues Relating to Football Head Injuries (Part II): Hearing Before the House Comm. on the Judiciary*, 111th Cong. 334–36 (2010) (statement of Dr. Ira R. Casson).

19. *See, e.g.*, Alan Schwarz, *Dementia Risk Seen in Players in N.F.L. Study*, N.Y. Times (Sept. 30, 2009), at A1.

20. *See, e.g.*, Alan Schwarz, *Congress to Hold Hearing on N.F.L. Head Injuries*, N.Y. Times (Oct. 3, 2009), at D2; *see also Legal Issues Relating to Football Head Injuries (Part I): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 111-82 (2010).

21. *See, e.g.*, *Legal Issues Relating to Football Head Injuries (Part I): Hearing Before the House Comm. on the Judiciary*, 111th Cong. 86 (2010) (inquiry of Rep. Conyers, Chair, House Comm. on the Judiciary).

22. *See, e.g.*, *Legal Issues Relating to Football Head Injuries (Part I): Hearing Before the House Comm. on the Judiciary*, 111th Cong. 113 (2010) (statement of Rep. Sanchez, Member, House Comm. on the Judiciary); *see also* Toni Monkovic, *Concussions and Congress and the Future Game*, N.Y. Times 5th Down Blog (Nov. 1, 2009), *at* http://fifthdown.blogs.nytimes.com/2009/11/01/concussions-and-congress-and-the-future-game/ (providing video footage of Rep. Sanchez).

23. *Id.*

24. *Id.*

25. *See, e.g.*, Alan Schwarz, *Concussion Expert's Removal Is Sought*, N.Y. Times (Nov. 20, 2009), *available at* http://query.nytimes.com/gst/fullpage.html?res=9D04E6D81E3FF933A15752C1A96F9C8B63 (explaining that the NFLPA called for the removal of Dr. Casson as co-chair of the NFL Committee due to his efforts to discredit independent and league-sponsored evidence linking NFL careers with heightened risk for dementia and cognitive decline); *see also*, Alan Schwarz, *N.F.L. Head Injury Study Leaders Quit*, N.Y. Times (Nov. 25, 2009), at B11.

26. *See* Alan Schwarz, *N.F.L. Picks New Chairmen for Panel on Concussions*, N.Y. Times (Mar. 17, 2010), at B1 (Batjer was the chairman of neurological surgery at Northwestern Memorial Hospital).

27. *See id*. (Ellenbogen was the chief of neurological surgery at Harborview Medical Center).

28. *See, e.g.*, Alan Schwarz, *N.F.L. Acknowledges Long-Term Concussion Effects*, N.Y. Times (Dec. 21, 2009), at D1 (noting that league spokesman Greg Aiello communicated that the NFL could donate $1 million or more to CSTE); *see also* Alan Schwarz, *N.F.L. Gives $1 Million to Brain Researchers*, N.Y. Times (Apr. 21, 2009), at B14 (confirming the league's official donation of $1 million to further CSTE's research efforts).

29. *See* Schwarz, *N.F.L. Acknowledges Long-Term Concussion Effects*, *supra* note 28 (emphasis added).

30. *See* Bruce Klopfleisch, *NFL Announces New Concussion Policies*, Suite 101.com, *at* http://national-football-league-nfl.suite101.com/article.cfm/nfl_and_concussions#ixzz0qkOJK2SJ (listing seven remedial measures made to NFL concussion policy in the wake of the October 2009 Congressional hearing).

31. *See* Sam Farmer, *Former NFL Players to Consolidate Concussion Lawsuits Against NFL*, L.A. Times (June 6, 2012), *at* http://www.latimes.com/sports/sportsnow/la-nfl-concussion-20120606,0,4024336.story.

32. *See* Defs.' Mot. to Dismiss, Nov. 11, 2011, *at* http://www.scribd.com/doc/77899568/NFL-Motion-to-Dismiss-Copy (providing a copy of the NFL's motion to dismiss the original Easterling complaint back in November 2011).

33. *See* 48B Am. Jur. 2d Labor & Labor Relations § 2428 ("A final adjustment by a method agreed upon by the parties is the desirable method for settlement of grievance disputes over the application or interpretation of an existing collective-bargaining agreement. If a party sidesteps contractual-grievance machinery by suing in federal court without having attempted to invoke the grievance mechanism, the claim must be dismissed.").

34. *See, e.g.*, *Singh v. Estate of Lunalilo*, 779 F. Supp. 1265, 1269 (D. Haw. 1991).

35. *See* 48B Am. Jur. 2d Labor & Labor Relations *supra* note 33 (noting that failure to exhaust contractual remedies may bar suit).

36. *See, e.g.*, *Givens v. Tenn. Football, Inc.*, 684 F. Supp. 2d 985, 990–91 (M.D. Tenn. 2010) (suit by player alleging that team withheld medical scan information about his injured knee was preempted by § 301); *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894, 909–11 (S.D. Ohio 2007) (wrongful death suit brought by wife of player that died of heat stroke during NFL practice preempted by § 301); *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172, 1177–79 (N.D.N.Y. 1990) (suit of former player alleging that team employer failed to provide adequate medical care and withheld medical information preempted by § 301; *Jeffers v. D'Allessandro*, 681 S.E.2d 405, 412 (N.C. Ct. App. 2009) (claims of negligent retention and intentional misconduct brought against team physician by injured player preempted by § 301).

37. *See* Restatement (Second) of Torts § 302B (1965).

38. *See* Press Release, National Football League, *supra* note 13 ("there is *no magic number* for how many concussions are *too many*") (emphasis added).

39. *See, e.g.*, Restatement (Second) of Torts § 314 (1965).

40. *See id*. at cmt. c.

41. *See, e.g.*, *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1252 (2d Cir. 1982).

42. *See, e.g.*, Restatement (Third) of Torts § 42 (2005).

43. *See* Press Release, National Football League, *supra* note 13 (emphasis added).

44. *See* Restatement (Third) of Torts § 26 (2002).

45. *Id*.

46. *See* Les Carpenter, *Compromise Reigns at Summit on Concussions*, Wash. Post (June 20, 2007), at E01.

47. *See*, Alan Schwarz, *12 Athletes Leaving Brains to Concussion Study*, N.Y. Times (Sept. 24, 2008), at D1.

48. Tortious conduct by an actor need only be *one* of the causes of another's harm. *See* Restatement (Third) of Torts § 26, cmt. c. (2002) (emphasis added); *see, e.g.*, *Alaska v. Abbott*, 498 P.2d 712, 726 (Alaska 1972); *Peterson v. Gray*, 628 A.2d 244, 246 (N.H. 1993) (defendant's tortious conduct must be *a* cause of harm, not "the" cause); *see also Dedes v. Asch*, 521 N.W.2d 488, 490–92 (Mich. 1994) (rejecting argument that statutory language, "the proximate cause," meant that defendant's conduct must be the *only* cause of harm); David A. Fischer, *Causation in Fact in Omission Cases,* 1992 Utah L. Rev. 1335, 1338 (1992) ("Clearly, however, there can never be a single cause of an event. A very complex set of circumstances must be present for any effect to occur.").

49. *See, e.g.*, Restatement (Third) of Torts § 27 (2005).

50. *See* Press Release, National Football League, *supra* note 14 (emphasis added).

51. *See, e.g.*, *Niemcyzk v. Burleson*, 538 S.W.2d 737, 740 (Mo. Ct. App. 1976).

52. *See, e.g.*, Prosser, Law of Torts 3d; *see also* Restatement (Second) of Torts § 466 (1965).

53. *See Brian Westbrook on concussions and his future in the NFL: Deleted scenes from his Dan Rather Reports interview*, at http://www.youtube.com/watch?v=W3kYWD_LEIA.

54. *See* 38 Am. Jur. 2d *Negligence* § 174.

55. *See* E.H. Shopler, *Distinction Between Assumption of Risk and Contributory Negligence*, 82 A.L.R.2d 1218 (2012).

56. *Id*.

57. *See* Press Release, National Football League, *supra* note 14 (emphasis added).

58. *Id*.

59. These players chosen for the study were taken from various teams throughout the league, and included a number of different player positions. *See* Howard Fendrich, *AP Impact: NFL Players Hide, Fear Concussions*, ABC News, *at* http://abcnews.go.com/Sports/wireStory?id=9123270; *see also* Associated Press, *Survey: Concussions Inevitable*, espn.com *at* http://sports.espn.go.com/nfl/news/story?id=4668106.

60. *Id*.

61. *Id*.

62. *See* NFL CBA (2006) app. c, § 9 at 251.

63. *See* Alan Schwarz, *For Jets, Silence on Concussions Signals Unease*, N.Y. Times (Dec. 22, 2007), *at* http://www.nytimes.com/2007/12/22/sports/football/22concussions.html?pagewanted=all.

64. *See* Tony Grossi, *Concussion Ends Jamal Lewis' Career, as Cleveland Browns Running Back Goes on Injured Reserve*, cleveland.com, http://www.cleveland.com/browns/index.ssf/2009/12/concussion_may_end_jamal_lewis.html.

65. *See* NFL CBA (2006) Article XLVIII-D 88 Benefit.

66. *Id*.

67. *See id.* (noting that the mean age of onset post-retirement was eight years, with a standard deviation of 10.7 years).

68. *See* Brandon E. Gavett, et al., *Chronic Traumatic Encephalopathy: A Potential Late Effect of Sport-Related Concussive and Subconcussive Head Trauma*, Clinical Sports Med. (Jan. 2011) (noting that while the mean age of onset for CTE symptoms was 42.8, the standard deviation was 12.7 years).

69. *See id.*

70. Pennsylvania – 42 Pa.C.S. § 5524 two-year statute of limitations on personal injury; New York – CPLR 214 three-year statute of limitations on personal injury. See CPLR 214(c) for discovery rule re: asbestos. *See also Cochran v. GAF Corp.*, 542 Pa. 210, 666 A.2d 245 (Pa. 1995) (discussing the discovery rule).

71. *See, e.g.*, *Cornell v. E.I. Du Pont de Nemours & Co.*, 841 F.2d 23, 24 (1st Cir. 1988).

72. *See* NFL Says Saints Created "Bounty" Program from 2009-2011, NFL.com, http://www.nfl.com/news/story/09000d5d82757bcd/article/nfl-says-saints-created-bounty-program-from-2009-to-2011.

73. *See id*.

74. *See* Judy Battista, *Suspensions Vacated for Players in Bounty Case*, N.Y. Times (Sept. 8, 2012) at D1, *at* http://www.nytimes.com/2012/09/08/sports/football/appeals-panel-vacates-suspension-of-saints-in-bounty-scandal.html; *Will Brinson, Saints Players Win Approval Versus NFL on Bounty Suspensions*, CBSSports.com, http://www.cbssports.com/nfl/blog/eye-on-football/20094247/saints-players-win-appeal-versus-nfl-on-bounty-suspensions (last visited Sept. 20, 2012).

75. *See id.* Gregg Williams was suspended indefinitely; Sean Payton's suspension was for one year (the 2012–2013 NFL season).

76. *See, e.g.*, *Hackbert v. Cincinnati Bengals*, 601 F.2d 516, 521 (10th Cir. 1979) ("the intentional striking of a player in the face or from the rear is prohibited by the playing rules as well as the general customs of the game . . . . Undoubtedly these restraints are intended to establish reasonable boundaries so that one football player cannot intentionally inflict a serious injury on another.").

77. *See* 27 Am. Jur. 2d *Employment Relationship* § 402.

78. *See* NFL Constitution and Bylaws §§ 9.1(C)(8), 9.3(F)–(G) (2011) ("No bonus or award may directly or indirectly be offered, promised, announced, or paid to a player for his or his team's performance against a particular team or opposing player or a particular group thereof. No bonuses or awards may be offered or paid for on field misconduct (for example, personal fouls to or injuries inflicted on opposing players).").

79. *See* Alan Schwarz, *Former Bengal Henry Found to Have Had Brain Damage*, N.Y. Times (June 29, 2010), at B10.

80. Dr. Bailes is the chairman of the Department of Neurosurgery at West Virginia University. *Id*.

81. *Id*. Henry's brain sample demonstrated brown discolorations, a tau protein buildup, inflammation, and white matter changes. *See* Madison Park, *Young Player Had Brain Damage More Often Seen in NFL Veterans*, cnn.com, http://www.cnn.com/2010/HEALTH/07/02/brain.damage.henry/index.html. In healthy brain tissue, virtually no protein tangles, which show up as brown spots, are visible. *Id*.

82. *Id*.

83. *Id*. Like many of the other players found to have had CTE after their deaths, Henry had behavioral problems in his final years that might have been at least partly a result of the disease, which is linked to depression, poor decision making and substance abuse. *Id*. He was arrested five times in a 28-month stretch for incidents involving assault, driving under the influence of alcohol and marijuana possession. *Id*. The league suspended him several times for violating its personal-conduct policy. *Id*.

84. *See* Alan Schwarz, *N.F.L. Picks New Chairmen for Panel on Concussions*, N.Y. Times (Mar. 17, 2010), at B11.

85. *Id*.

86. *See* Alan Schwarz, *Concussion Committee Breaks with Predecessor*, N.Y. Times (June 2, 2010), at B12.

87. *See* Alan Schwarz, *House Panel Criticizes New N.F.L. Doctors*, N.Y. Times (May 25, 2010), at B10.

88. *See* Schwarz, *supra* note 79.

89. See Alan Schwarz, *N.F.L. Asserts Greater Risks of Head Injury*, N.Y. Times (July 27, 2010), at A1.

90. Press Release, National Football League, Concussion: A Must Read for NFL Players (July. 26, 2010) (emphases added).

91. Dr. H. Hunt Batjer and Dr. Richard Ellenbogen directed the poster project in conjunction with the CDC. *See* Schwarz, *supra* note 86. Still, it is important to note that the term CTE does not appear in the league's new warning poster.

92. *See NFL Announces New Sideline Concussion Assessment Protocol*, NFL.COM, http://www.nfl.com/news/story/09000d5d81e78cc4/article/nfl-announces-new-sideline-concussion-assessment-protocol.

93. *See* Jason La Confora, *NFL Stationing Trainers in Stadiums to Monitor Concussions*, nfl.com, http://www.nfl.com/news/story/09000d5d82540bae/article/nfl-stationing-trainers-in-stadiums-to-monitor-concussions.

94. *See* Peter King, *Goodell Focused on Helping Players During and After Their Careers*, Sports Illustrated, *at* http://www.cbssports.com/nfl/blog/eye-on-football/19331359/roger-goodell-nfl-could-have-sideline-concussion-test-on-tablets-possible-this-year.

95. *See Terry Bradshaw: I Don't Think the NFL Cares About Concussions*, Detroit Free Press, *at* http://www.freep.com/apps/pbcs.dll/article?AID=/20120615/SPORTS18/206150444/Terry-Bradshaw-nfl-concussions (discussing Bradshaw's comments from the *Tonight Show with Jay Leno*).

96. *See* Alan Schwarz, *Before Suicide, Duerson Said He Wanted Brain Study*, N.Y. Times (Feb. 19, 2011), SP1, *at* http://www.nytimes.com/2011/02/20/sports/football/20duerson.html?_r=1&scp=1&sq=dave%20duerson&st=cse.

97. *See id.*

98. *See* Alan Schwarz, *Duerson's Brain Trauma Diagnosed*, N.Y. Times (May 3, 2011), at B11, *at* http://www.nytimes.com/2011/05/03/sports/football/03duerson.html.

99. *See Ray Easterling, of Atlanta's Grits Blitz, Dies at 62*, N.Y. Times (Apr. 22, 2012), at A22, *at* http://www.nytimes.com/2012/04/22/sports/football/ray-easterling-of-atlantas-grits-blitz-dies-at-62.html.

100. *See* Mike Tearney, *Former Player's Suicide Won't End his Widow's Fight*, N.Y. Times (May 4, 2012), at B9, *at* http://www.nytimes.com/2012/05/04/sports/ray-easterlings-widow-to-keep-fighting-for-retired-nfl-players-with-head-injuries.html?pagewanted=all. At times, Easterling would go for a job and become disoriented, prompting his wife to initiate one-woman search parties in the early hours of the morning. *See id.*

101. *See* Gary Mihoces, *Hearing Signals Start of Fight Between Players, NFL*, USA Today (Apr. 24, 2012), *at* http://www.usatoday.com/sports/football/nfl/story/2012-04-24/NFL-concussions-lawsuit-Ray-Easterling/54515054/1.

102. *See* Mary Pilon, *Family of Seau Decides to Give Brain for Study*, N.Y. Times (May 5, 2012), at D3, *at* http://www.nytimes.com/2012/05/05/sports/team-chaplain-says-seau-family-will-donate-brain-for-research.html.

103. *See* Marty Graham, *Former NFL Linebacker Junior Seau Dies in Apparent Suicide*, Chicago Tribune (May 2, 2012), *at* http://articles.chicagotribune.com/2012-05-02/business/sns-rt-usa-seaudeath--update-2-pixl1e8g2h-cg-20120502_1_apparent-suicide-gunshot-wound-oceanside-police.

104. *See* Pilon, *supra* note 102.

105. *See* Robert Wilonsky, *UT Dallas Brain Prof Discovers Some ex-NFL Players Living in North Texas Are Depressed – and Didn't Even Know It*, Dallas Morning News, *at* http://thescoopblog.dallasnews.com/2012/06/ut-dallas-brain-prof-discovers-some-former-nfl-players-living-in-north-texas-are-depressed-and-dont-even-know-it.html (describing results of forthcoming unpublished scientific study).

106. *See id.*

107. *See id.*

108. *See* Daniel G. Amen, *Impact of Playing American Professional Football on Long-Term Brain Function*, J. Neuropsychiatry & Clinical Neuroscience 23:1 (Winter 2011), *at* http://www.howardschneider.ca/resources/Dr%20Amen%20NFL%20Head%20Trauma%20Study.pdf.

109. *See Clinical Studies*, Boston Univ. Ctr. for the Study of Traumatic Encephalopathy, *at* http://www.bu.edu/cste/our-research/clinical-studies.

110. *See* Charles Feng, *Novel Brain Scan Can Detect Concussions*, ABC News, *at* http://abcnews.go.com/Health/detecting-concussions-brain-scan/story?id=16520620 (discussing Michael L. Lipton, et al., *Robust Detection of Traumatic Axonal Injury in Individual Mild Traumatic Brain Injury Patients: Intersubject Variation, Change Over Time and Bidirectional Changes in Anisotropy*, Brain Imaging & Behavior (2012)).

111. *See id.*

112. *See Concussion Victims Have Unique Spatial Patterns of Brain Abnormalities That Change Over Time*, News Med. (June 8, 2012), *at* http://www.news-medical.net/news/20120608/Concussion-victims-have-unique-spatial-patterns-of-brain-abnormalities-that-change-over-time.aspx (discussing the results of the Albert Einstein School of Medicine Study).

113. *See id.*

114. *See* Farmer, *supra* note 31.

115. *See* Darren Heitner, *Why Football Helmet Manufacturer Riddell Should Be Very Concerned About Concussion Litigation*, Forbes, *at* http://www.forbes.com/sites/darrenheitner/2012/06/21/why-football-helmet-manufacturer-riddell-should-be-very-concerned-about-concussion-litigation.

116. *See id.*

117. Paul Anderson, *It Feels Good to Be Back*, NFL Concussion Litig. (July 26, 2012), *at* http://nflconcussionlitigation.com; *see* Ken Belson, *In Court, Easterling Suicide Is the Focus*, N.Y. Times N.F.L. Blog (Apr. 25, 2012), *at* http://fifthdown.blogs.nytimes.com/2012/04/25/in-court-easterling-suicide-is-the-focus/.

118. *See* Paul Anderson, *Latest Concussion Lawsuit Targets Teams*, NFL Concussion Litig. (June 27, 2012), http://nflconcussionlitigation.com.

119. *See Concussion Lawsuits Are Next Big U.S. Litigation*, USA Today (July 1, 2012), *at* http://www.usatoday.com/sports/football/nfl/story/2012-06-30/concussion-lawsuits-are-next-big-US-litigation/55948928/1.

120. *See id.*

121. *Id.*

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A *[Single]tree* Grows in Manhattan

Introduction

September's column promised to continue to discuss the issues raised in *Doe v. Sutlinger Realty Corp.*[1] However, on September 11, 2012, the First Department decided *Garcia v. New York*,[2] a case of sufficient importance to warrant preempting the scheduled column, which will appear, belatedly, in the November/December issue of the *Journal*.

Singletree

In *Garcia*, the First Department appears to adopt a rule of practice of several years' duration in the Second Department, set forth in the Second Department's 2008 decision in *Construction by Singletree, Inc. v. Lowe*.[3] *Singletree* held that a court may preclude an expert's affidavit offered in opposition to a post-note of issue summary judgment motion where the expert was *not* disclosed prior to the filing of the note of issue. *Singletree* and its Second Department progeny were discussed extensively in previous columns.[4] Subsequent decisions from the Second Department have held that it was an abuse of discretion for a court to consider the expert's affidavit where an excuse was not proffered for the failure to exchange the expert prior to the filing of the note of issue.[5] A 2011 Second Department case, *Stolarski v. DeSimone*,[6] held that a party moving for summary judgment, as against opposing the motion, was also to be held to the *Singletree* requirement that the expert whose affidavit was to be used on the motion had to be disclosed pre-note of issue.

Two earlier First Department decisions had signaled that *Singletree* might be followed in that department, but each decision held out the possibility that the rule might not be strictly applied. In 2010, in *Harrington v. City of New York*,[7] the court, noting the conclusory nature of the expert's report, concluded that "[i]n any event, the motion court properly declined to consider the expert's affirmation because plaintiff failed to timely disclose his identity."[8] A year later, citing *Harrington*, the court in *Clarke v. Catamount Ski Area*,[9] after once again finding the proferred expert's findings conclusory, concluded that "[f]urther, the court properly declined to consider the affidavit of plaintiff's expert, given that plaintiff failed to timely disclose the expert's identity." Both cases spoke of a failure to timely exchange the expert, without referencing the filing of the note of issue, although the first decision, *Harrington*, cites the Second Department decision in *Wartski v. C.W. Post Campus*,[10] which succinctly synthesizes a number of Second Department decisions upholding preclusion on that basis:

> The plaintiff's expert affidavit should not have been considered in determining the motion since the expert was not identified by the plaintiff until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and the plaintiff offered no valid excuse for her delay in identifying the expert.[11]

Garcia

In *Garcia*, the First Department carefully chronicled the timing elements in the case under consideration, from the service of the defendant's demand for an expert exchange, the retention by the plaintiff of the expert, the filing of the note of issue, and the subsequent submission of the un-exchanged expert's affidavit in opposition to the defendant's motion for summary judgment:

> In apparent reliance upon the affidavit of plaintiff's liability expert, the court found an issue of fact as to whether defendants "deviated from appropriate and accepted practice." For reasons that follow, the court should have instead rejected the expert's affidavit outright. Defendants served their demand for expert disclosure in May 2004. Plaintiff never responded to the demand, although the expert had apparently been engaged as of July 31, 2007 when he claims to have inspected the site of the incident. Plaintiff filed a note of issue and certificate of readiness in January 2010. Plaintiff submitted the expert's affidavit in November 2010 in opposition to the instant motion for summary judgment.[12]

The First Department held that the motion court erred in denying summary judgment based upon the expert's affidavit submitted by the plaintiff in opposition to the motion:

> The expert's affidavit should not have been considered in light of plaintiff's failure to identify the expert during pretrial discovery as required by defendants' demand. Were we to consider the expert's affidavit, we would find it lacking in probative value because it is not supported by evidence in the record.[13]

While examining the delay between the retention and disclosure of the plaintiff's expert, the First Department zeros in on the failure to identify the expert "during pretrial discovery," i.e., prior to the filing of the note of issue. Accordingly, with the *Garcia* decision, the two departments appear to be in alignment on this issue.

CPLR 3101(d)(1)(i)

One statute in New York addresses the issue of expert timing, CPLR 3101(d)(1)(i), which provides:

> (d) Trial preparation.
>
> Experts.
>
> (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.[14]

CPLR 3101(d)(1)(i) makes no mention of the filing of the note of issue *vis-à-vis* the exchange of experts, and, in fact, the only reference point stated for the exchange of experts refers to "an insufficient period of time before the commencement of trial . . ."

A Second Department case, *Browne v. Smith*,[15] decided a year after *Singletree*, referenced the statute and denied preclusion:

> The plaintiffs, however, raised a triable issue of fact with their submission of an expert affidavit. "CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information 'at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute,' unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party." Here, the Supreme Court did not improvidently exercise its discretion in considering the expert materials submitted by the plaintiffs in opposition to the defendants' summary judgment motion since there was no evidence that the failure to disclose was intentional or willful, and there was no showing of prejudice to the defendants. Moreover, the defendants had sufficient time to respond to the plaintiffs' submissions.[16]

Browne applied CPLR 3101(d)(1)(i)'s statutory factors in denying preclusion. *Browne* does not state whether the plaintiff's expert was exchanged pre- or post-note of issue, though it appears likely to have been post-note of issue given the context of the case, and the outcome of the motion was in no way related to the filing of the note of issue.

Three appellate cases cite *Browne*, though to be clear none reference the filing of the note of issue. In the first, *Kopeloff v. Arctic Cat, Inc.*,[17] the Second Department affirmed the motion court's preclusion of the opposing expert:

> The plaintiff did not provide any excuse for failing to identify the expert in response to the plaintiff's discovery demands. Indeed, the defendant was unaware of the expert until the defendant was served with the expert's affidavit in response to its summary judgment motion, even though the record discloses that the expert had been retained by the plaintiff approximately 18 months earlier.[18]

In the second, *Hayden v. Gordon*,[19] the Second Department denied preclusion of the expert affidavit, stating, "Supreme Court did not improvidently exercise its discretion in considering the expert affidavit submitted by the plaintiffs, since there was no evidence that the failure to disclose the identity of their expert witness pursuant to CPLR 3101(d)(1)(i) was intentional or willful, and there was no showing of prejudice to the appellant."

In the third, *Serbia v. Mudge*,[20] from the First Department, the court took the "pox on both your houses" approach in affirming the trial court's admission of the opposing expert's affidavit, holding that "[t]he preclusion of plaintiff's expert neurologist's and radiologist's reports was an improvident exercise of discretion, since defendants relied on plaintiff's neurologist's report, were equally untimely in serving their radiologist's report and thus cannot show prejudice by the lateness of the exchange."[21]

Avoiding *Singletree/Garcia* Preclusion

A party faced with a potential *Singletree/Garcia* objection to the use of an expert affidavit where the expert was not exchanged prior to the filing of the note of issue must be proactive in offering a "valid excuse"[22] for the failure to exchange the expert pre-note of issue. The party opposing the motion with the expert affidavit should proffer the "valid excuse" even if the moving papers do not raise a *Singletree/Garcia* argument, since a clever moving party can wait for its reply papers, after the expert affidavit has been offered, to claim surprise and argue for preclusion at that point.

The proponent of the expert affidavit must also argue that *per se* preclusion of an expert affidavit where the expert is exchanged post-note is in contravention of the only applicable statute, CPLR 3101(d)(1)(i).

Finally, it is critical for a party at risk of preclusion of its expert affidavit, due to a *Singletree/Garcia* objection, to make certain to consider alternative means of proof.

In *McAllister v. 200 Park, L.P.*,[23] the plaintiff was able to proffer sufficient non-expert proof to demonstrate entitlement to summary judgment under Labor Law § 240(1):

> The defendants contend that the expert's affidavit proffered by the plaintiff could not properly be considered in opposition to their motion and in support of the plaintiff's cross motion. However, regardless of whether the expert's affidavit could properly be considered, the plaintiff made a prima facie showing of his entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1). Contrary to the defendants' contention, the evidence demonstrated that the plaintiff's injury was the result of an elevation differential within the scope of Labor Law § 240(1). Although the base of the scaffold was at the same level as the plaintiff and the scaffold only fell a short distance, given the combined weight of the device and its load, and the force it was able to generate over its descent, this difference was not de minimis. Thus, the plaintiff suffered harm that "'flow[ed] directly from the application of the force of gravity to the [broken scaffold].'"
>
> In addition, the plaintiff's deposition testimony established that the statute was violated. Given that two of the scaffold's wheels failed in the course of the plaintiff's task, the scaffold with which the plaintiff was furnished was plainly inadequate for the work being performed.
>
> Furthermore, the record demonstrated that the accident was the direct consequence of the inadequate scaffold. Had the front two wheels of the scaffold remained intact, the plaintiff would not have had to squat beneath the scaffold to compensate for their loss. Moreover, when the foreman pushed, the scaffold simply would have rolled ahead horizontally rather than tipping forward and pinning the plaintiff against the wall. Accordingly, a device that was appropriate for the work being performed would have prevented the accident.
>
> Thus, the plaintiff demonstrated, prima facie, his entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1).[24]

Conclusion

Some readers will remember the 1960s television sci-fi series *Lost in Space*. While certainly not memorable from a dramatic or special-effects perspective, it was memorable for the pithy warning offered by the sole non-human member of the crew, the Robot, who was best friends with the youngest member of the crew, Will Robinson. Faced with any threatening situation, the Robot would incant, "Danger, Will Robinson, danger."

Practitioners engaging in motion practice would be wise to keep the Robot's warning in mind any time they are marshalling proof for or against a summary judgment motion: "Danger, [insert name of practitioner], danger." ■

1. 96 A.D.3d 898 (2d Dep't 2012).
2. 2012 N.Y. Slip Op. 06112 (1st Dep't Sept. 11, 2012).
3. 55 A.D.3d 861 (2d Dep't 2008).

4. David Horowitz, *Burden of Proof: What About the CPLR?*, N.Y. St. B.J. (Jan. 2009), p. 20; *see also* David Horowitz, *Burden of Proof: It's the Note of Issue, Stupid*, N.Y. St. B.J. (May 2009), p. 16.

5. *King v. Gregruss Mgmt. Corp.*, 57 A.D.3d 851 (2d Dep't 2008) ("The Supreme Court erred in denying Jones's cross motion for preclusion. Raymus's expert affidavit should have been rejected since the plaintiff did not identify him in pretrial disclosure between 1996 and 2006, and the defendants were unaware of Raymus until they were served with his affidavit in response to the summary judgment motions, made after the plaintiff filed a note of issue and certificate of readiness.").

6. 83 A.D.3d 1042 (2d Dep't 2011).

7. 79 A.D.3d 545 (1st Dep't 2010).

8. The First Department cited *Wartski v. C.W. Post Campus*, 63 A.D.3d 916 (2d Dep't 2009).

9. 87 A.D.3d 926 (1st Dep't 2011).

10. 63 A.D.3d 916 (2d Dep't 2009).

11. *Id.* at 917 (citations omitted).

12. 2012 N.Y. Slip Op. 06112, *2 (1st Dep't Sept. 11, 2012)

13. *Id.* (citations omitted).

14. CPLR 3101(d)(1)(i).

15. 65 A.D.3d 996 (2d Dep't 2009).

16. *Id.* at 997 (citations omitted).

17. 84 A.D.3d 890 (2d Dep't 2011).

18. *Id.* at 891.

19. 91 A.D.3d 819, 820 (2d Dep't 2012) (citations omitted).

20. 95 A.D.3d 786 (1st Dep't 2012).

21. *Id.* at 786–87 (citations omitted).

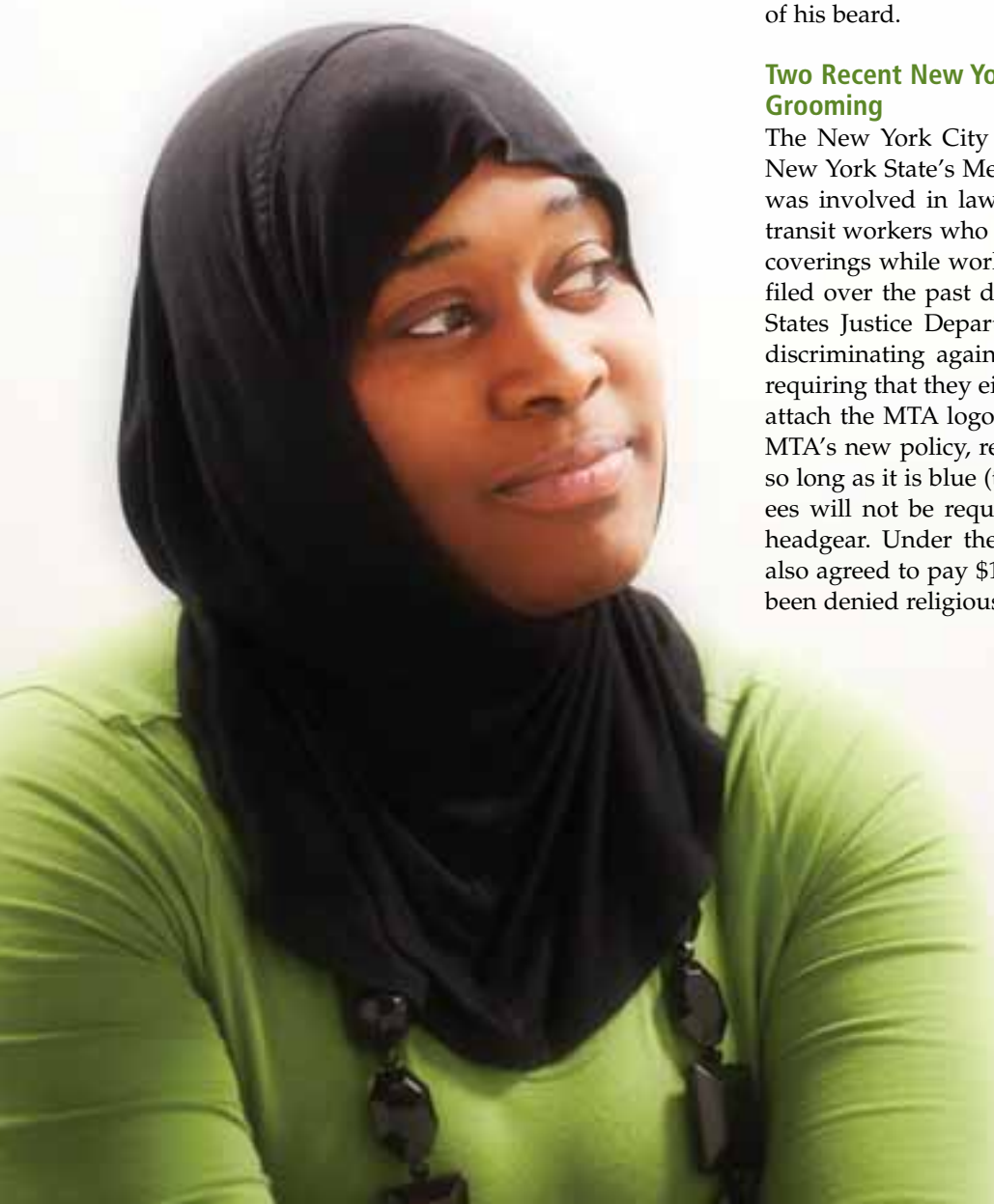
22. Arguments to be raised in opposition to an attack on the expert affidavit are discussed in the earlier columns. *See supra* note 4.

23. 92 A.D.3d 927 (2d Dep't 2012).

24. *Id.* at 928–30 (citations omitted).

Uniforms, Dress Codes and an Employee's Religious Observance

By Debbie Kaminer



Turbans, headscarves and beards have been at the center of lawsuits filed by workers whose employers were not accommodating the employees' religious grooming needs. One such suit, recently settled after approximately a decade of litigation, involved the right of employees to wear religious headgear. Another, just making its way through the courts, involves an employee who claims he was fired because of the length of his beard.

Two Recent New York Cases Involving Religious Grooming

The New York City Transit Authority, which is run by New York State's Metropolitan Transit Authority (MTA), was involved in lawsuits brought by Sikh and Muslim transit workers who wanted to wear their religious head coverings while working.[1] A number of these suits were filed over the past decade, including one by the United States Justice Department, claiming that the MTA was discriminating against Muslim and Sikh employees by requiring that they either remove their head coverings or attach the MTA logo to their head coverings. Under the MTA's new policy, religious headgear will be permitted, so long as it is blue (the color of the MTA logo). Employees will not be required to attach the MTA logo to the headgear. Under the terms of the settlement, the MTA also agreed to pay $184,500 to eight employees who had been denied religious accommodation.

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In the newer case, a Hasidic Jewish New York Police Department (NYPD) recruit, Fishel Litzman, claims that he was illegally fired after refusing, for religious reasons, to cut his beard.[2] While the Police Academy accommodates religious recruits by permitting them to have beards no longer than one millimeter in length, Mr. Litzman's religious beliefs forbid him from ever cutting or trimming his beard, which is naturally short. Mr. Litzman was highly regarded by his peers and was in the top 1% of his classes. He was told that he would only need to cut his beard once, and that after he graduated from the academy, he would be permitted to allow it to grow. According to the complaint filed by his attorney on June 15, 2012, "[s]ince the NYPD permits police officers to grow beards after they graduate from the Police Academy, there is no legitimate purpose in directing him to trim his beard to a length that does not exceed one millimeter while he is in the Police Academy."[3]

Overview of Religious Accommodation Under § 701(j) of Title VII

Title VII of the 1964 Civil Rights Act, as originally passed, treated religion the same as the other protected categories and prohibited discrimination based on religious belief or status, but it did not mandate religious accommodation. In 1972, Congress amended Title VII to include an affirmative obligation of accommodation. Under § 701(j), "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[4]

It should be noted at the outset that the New York State Executive Law[5] and the New York City Administrative Code[6] also prohibit religious discrimination and mandate religious accommodation in the workplace. These laws both require a higher level of accommodation than § 701(j), since they define undue hardship as "an accommodation requiring significant expense or difficulty."[7] The City adopted this definition of "undue hardship" from the New York State Executive Law in 2011 when it passed the Workplace Religious Freedom Act. This article, however, will focus on the requirements of religious accommodation under federal law, § 701(j).

The U.S. Supreme Court has twice interpreted § 701(j) and both times has narrowly defined an employer's obligation.[8] In *Trans World Airline v. Hardison*, the Court defined "undue hardship" as any cost greater than de minimis.[9] Relying on *Hardison*, the lower courts have required minimal accommodation of religious employees and routinely hold that employers are not required to incur any economic or efficiency costs in accommodating an employee's religion. This does not mean, however, that an employer can simply refuse to accommodate a religious employee or rely on a hypothetical, as opposed to an actual, hardship. Rather, the employer must be able to show that it either offered a reasonable accommodation or that no such accommodation was possible without undue hardship.[10] The Supreme Court has also held that while employers must reasonably accommodate religious employees, they do not need to provide employees with their preferred accommodation.[11] The most common types of cases under § 701(j) involve employees requesting either time off from work to observe religious holy days or accommodation of their religious dress and grooming needs.

A number of recent cases address at what point accommodation of an employee's religious grooming needs would cause an undue hardship to the employer. In these cases, employers rely primarily on one of two types of undue hardship: the accommodation could raise health or safety concerns or the accommodation could negatively impact the employer's image. Courts have routinely held that employers do not need to accommodate religious grooming requirements that would actually cause a health or safety hazard or that would harm the employer's image.

Health, Safety and the Appearance of Neutrality

As noted, courts routinely hold that employers do not need to accommodate religious employees if to do so would compromise health or public safety,[12] determining that such risks constitute more than a "de minimis" cost. This issue is most likely to arise with employers who are in the business of dealing with public safety, such as police departments and prisons. Courts have similarly upheld dress codes based on the importance of the appearance of neutrality and the need to "promote an environment of discipline and *espirit de corps*."[13]

In 2010, the Third Circuit held that the Geo Group Inc. (Geo), a private company which had a contract to run the George W. Hill Correctional Facility in Pennsylvania (the Hill Facility), was not required to permit female Muslim employees to wear khimars, Muslim headscarves that cover the hair, forehead, sides of the neck, shoulders and chin.[14] In an attempt to improve the security and performance of the prison, the Hill Facility had instituted a dress policy that prohibited all individuals who entered the facility from wearing hats, caps, scarves, or hooded jackets. Three Muslim employees requested an exception to the policy, claiming that the Islamic religion required that they wear the khimar.

The Third Circuit held that such an exception could lead to safety concerns and therefore would create an "undue hardship." The court agreed with Geo that head coverings could be used to smuggle contraband into the prison and to conceal the identity of the wearer. Loose head coverings, such as the khimars, could also be used against prison employees or other inmates in an attack. "Even assuming khimars present only a small threat of the asserted dangers, they do present a threat which is something that Geo is entitled to attempt to prevent."[15]

The Geo court, relying on a Ninth Circuit decision, concluded that it had an obligation "to comply with the Supreme Court's direction that we not substitute our judgment for that of corrections facility officials."[16]

The Third Circuit also recently held that the Philadelphia Police Department was not required to accommodate a female Muslim officer who wore a traditional Muslim headscarf (a khimar or hijab) to work.[17] The headscarf, in this case, would have covered her head and the back of her neck but would not have covered her face; however, the Philadelphia Police Department had a strict uniform policy which did not permit officers to wear religious symbols. The court held that accommodating the plaintiff would cause an undue hardship because the department had a crucial interest in its "uniform as a symbol of neutral government authority, free from the expressions of personal religion, bent or bias."[18]

Similarly, the Fifth Circuit held that the Arlington, Texas, police department was not required to accommodate a policeman who, for religious reasons, wore a small, gold cross pin on his uniform. The department had a policy that forbade officers from wearing buttons, badges, medals and other similar items and symbols. The court concluded that forcing a police department to permit officers to add religious symbols to their uniform would be an undue hardship.[19]

Employers who are not in the business of dealing with public safety, and who claim that accommodating a religious employee would cause an undue hardship based on health or safety risks, tend to be less successful in such cases.

The Tenth Circuit held that an employer had violated § 701(j) when it refused to hire as a truck driver a man who, as a member of a Native-American church, occasionally used peyote for religious reasons. The employer, said the court, could have reasonably accommodated the employee by requiring that he take a day off whenever he used the peyote.[20]

In a recent case involving a food service employee, a federal district court in Florida denied summary judgment for employers who had fired an employee for wearing a nose ring.[21] The employee claimed that her religious beliefs required her to wear the nose ring. The case involved two defendants, the Papin entities (Papin), which owns two Subway shops under a franchise agreement with the second defendant, the Doctor's Associates Inc. (DAI), the owner of the trade name "Subway." Both Papin and DAI claimed that they followed strict food-safety rules which included a no-facial-jewelry policy. Permitting the employee to wear the nose ring would therefore be an undue hardship because it would impact health and food safety.

In denying summary judgment to Papin, the court emphasized that Papin had offered to accommodate the employee by permitting her to wear the nose ring so long as she left the restaurant when the compliance auditor was doing an inspection. The court explained that Papin "did not care whether [the employee] wore the nose ring or not; [it] only cared whether DAI found a store out of compliance for allowing an employee to wear a nose ring while working."[22]

> The employee, a cashier, was a member of the Church of Body Modification and claimed that her religious beliefs required her to wear and display facial piercings at all times.

The court also denied summary judgment to DAI on the issue of undue hardship. While the court found that DAI did seriously enforce its no-facial-jewelry policy, it also noted that DAI seemed willing to make an exception for the employee if she could prove the sincerity of her religious beliefs. Furthermore, DAI permitted employees to wear watches and wedding rings, both of which are contrary to the food safety guidelines on which DAI relied.

Similarly, and prior to the settlement discussed above, a federal district court had denied summary judgment to the New York Transit Authority in the case involving its refusal to permit employees to wear turbans and khimars unless the MTA logo was attached.[23] The court determined that "this is not a case in which the uniform requirement at issue is obviously justifiable based on safety concerns or other legitimate business concerns."[24]

The current case involving the Hasidic Jewish NYPD recruit may be another where the employer cannot successfully rely on safety concerns. While this case does involve an employer in the business of public safety, the NYPD told the recruit that he would only have to trim his beard once and that after he becomes a police officer he would no longer be required to do so. Thus, as Litzman's lawyer noted, it may be difficult for the police department to argue that it is an undue hardship for a recruit to grow a beard, when it permits officers to have beards.

Impact on the Employer's Image

Employers have also claimed that accommodating a religious employee's grooming needs would cause an undue hardship because these would negatively impact the employer's image. This is most likely to be an issue in cases where the religious employee has regular contact with members of the public, such as in retail sales.[25] Employers are not uniformly successful in these cases, however.

In 2011, a federal district court in Oklahoma held that the retail clothing store Abercrombie & Fitch Stores, Inc. (Abercrombie) had violated § 701(j) when it refused to hire a Muslim teenager because she insisted on wearing a headscarf for religious reasons. Abercrombie has a "Look Policy" which requires employees to wear clothing consistent to that sold in their stores.[26] This policy specifically prohibits employees from wearing "caps" but does not mention other head coverings.

Executives at Abercrombie testified that permitting an exception would cause an "undue hardship" because it would negatively impact both the brand and sales. They explained that the Look Policy led to a better "in-store experience" and more repeat customers and emphasized that the company used no television advertising and minimal print advertising and that its "brand identity" was primarily communicated through the in-store experience.

The federal district court granted summary judgment in favor of the EEOC. Abercrombie did not cite examples or conduct any studies illustrating that granting an exception to the Look Policy would harm the brand and thus constitute an undue hardship; Abercrombie's reasoning was therefore too speculative. The court also relied on the fact that Abercrombie had already granted numerous exceptions to the Look Policy over the last decade and in eight or nine of these instances had specifically permitted other employees to wear headscarves.

However, a federal district court in Massachusetts granted summary judgment to Costco Wholesale Corporation (Costco), holding that it was not required to accommodate a religious employee's grooming needs.[27] The employee, a cashier, was a member of the Church of Body Modification and claimed that her religious beliefs required her to wear and display facial piercings at all times, which violated Costco's dress code. While the court did not explicitly question the sincerity of the plaintiff's religious beliefs, it did express skepticism and indicated that the desire to wear facial piercings at all times was a "personal preference"[28] as opposed to a religious belief. Even if the plaintiff had a sincerely held religious belief, the employer had offered a reasonable accommodation by permitting the employee to cover her facial piercings with a bandaid or wear a retainer. Any additional accommodation would have caused undue hardship since "Costco ha[d] a legitimate interest in presenting a workforce to its customers that is, at least in Costco's eyes, reasonably professional in appearance."[29]

A federal district court in Washington denied summary judgment for an employer who had fired a server in its restaurant, based on the employee's refusal to cover small tattoos on his wrist.[30] The employee practiced Kemetecism, a religion that started in ancient Egypt, and he believed that intentionally covering his tattoos was a sin. The employer relied heavily on *Cloutier v. Costco*, arguing that permitting the employee to work with his tattoos uncovered would negatively impact its image as a family-friendly restaurant, and would therefore constitute an undue hardship.

In denying summary judgment the court distinguished *Cloutier*, explaining that the tattoos were small and most customers would not even notice them. Furthermore, there was no evidence of any customer complaints about the tattoos during the six months the employee had worked as a server with his tattoos uncovered, and the employer presented no evidence that the tattoos would harm the employer's image as a family-friendly restaurant. Eventually, the employer settled the lawsuit with the EEOC, agreeing to pay $150,000 and make changes to its policies to ensure that management understood its religious accommodation obligations.[31]

Cloutier was also distinguished in two of the cases previously discussed. The Florida federal district court, in the case involving the Subway employee who claimed she wore a nose ring for religious reasons,[32] held employers could not successfully claim that they needed to enforce their no-facial-jewelry policy to protect their public image and at the same time offer other exceptions to the policy. The New York federal district court that denied summary judgment to the New York City Transit Authority, determined that the NYCTA would not suffer an undue hardship if employees were permitted to wear turbans and khimars without the MTA logo attached.[33]

It may be similarly difficult for the NYPD to successfully claim that that its image would be harmed if it were forced to accommodate the Hasidic police recruit and permit him to wear his beard untrimmed. Police officers, who can wear their beards untrimmed, have more contact with the public than recruits do. Therefore, it seems that the department's public and professional image would not be harmed if the recruit was granted an exception to the trimmed beard policy.

Conclusion

Employers clearly have an obligation under § 701(j) to reasonably accommodate an employee's religious dress and grooming needs unless such accommodation would cause undue hardship. Courts are most likely to find undue hardship when the employer is in the business of dealing with public safety and can claim that the requested accommodation would cause safety risks. Courts have also determined that religious grooming accommodations that harm an employer's image can constitute an undue hardship – particularly in cases where the employee deals with the public; however, an employer's success is not a foregone conclusion. Employers should therefore carefully determine the impact of a religious accommodation before denying an employee's request for accommodation. ■

1. Matt Flegenheimer, *M.T.A. Agrees to Allow Its Workers to Wear Religious Headgear*, N.Y. Times, May 30, 2012; Ted Mann, *MTA Settles Bias Suit*, Wall St. J., May 31, 2012 at A21.

2. Julia Greenberg, Hasidic NYPD Recruit Says He Was Fired Over Beard Length, CNN, June 10, 2012, http://religion.blogs.cnn.come/2012/6/10/hasid.

3. *Fishel Litzman v. City of N.Y., N.Y. City Police Dep't & Raymond Kelley, as Comm.*, No. 12 Civ. 4682 (S.D.N.Y. June 14, 2012) (compl.).

4. 42 U.S.C. § 2000e(j).

5. Exec. Law § 296(10).

6. N.Y.C. Admin. Code §§ 8-102, 8-107.

7. Exec. Law § 296(10)(d); N.Y.C. Admin. Code § 8-107(3)(b).

8. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986); *TWA v. Hardison*, 432 U.S. 63 (1977).

9. *Hardison*, 432 U.S. at 84.

10. Courts rely on a two-part procedure when analyzing § 701(j) claims. First, a plaintiff must establish a prima facie case of religious discrimination. Once a plaintiff has done so, "the burden shifts to the employer to produce evidence showing that it cannot reasonably accommodate the worker without incurring undue hardship."

11. *Ansonia Bd. of Educ.*, 479 U.S. 60.

12. *See, e.g., EEOC v. The Geo Grp.*, 616 F.3d 265 (3d Cir. 2010); *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995); Debbie Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 Berkeley J. Emp. & Lab. L. 2 (2000).

13. *The Geo Grp.*, 616 F.3d at 273.

14. *Id.*

15. *Id.* at 274.

16. *Id.* at 277 (citing *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 968 (9th Cir. 2010)).

17. *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009).

18. *Id.* at 261.

19. *Daniels v. City of Arlington, Tx.*, 246 F.3d 500 (5th Cir. 2001).

20. *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989).

21. *EEOC v. Papin Enter., Inc. & Doctor's Assocs., Inc.*, 2009 WL 961108 (M.D. Fla.) (2009).

22. *Id.* at *6.

23. *United States v. N.Y. City Transit Auth.*, 2010 WL 3855191 (E.D.N.Y. 2010).

24. *Id.* at *21.

25. *See, e.g., EEOC v. Abercrombie & Fitch Stores Inc.*, 798 F. Supp. 2d 1272 (N.D. Okl. 2011); *Cloutier v. Costco*, 311 F. Supp. 2d 190 (D. Mass. 2004).

26. *Abercrombie & Fitch Stores Inc.*, 798 F. Supp. 2d 1272.

27. *Cloutier*, 311 F. Supp. 2d 190.

28. *Id.* at 199.

29. *Id.* at 200.

30. *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 WL 2090677 (W.D. Wash. 2005).

31. Press Release, U.S. Equal Employment Opportunity Commission, "Burger Chain to Pay $150,000 to Resolve EEOC Religious Discrimination Suit" (Sept. 16, 2005) *at* http://www.eeoc.gov/eeoc/newsroom/release/9-16-05.cfm.

32. *EEOC v. Papin Enter., Inc. & Doctor's Assocs., Inc.*, 2009 WL 961108 *6 (M.D. Fla.) (2009).

33. *United States v. N.Y. City Transit Auth.*, 2010 WL 3855191 (E.D.N.Y. 2010).

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Discretionary Stays on Appeal by Court Order: A Refresher

By Joseph F. Castiglione

Civil Practice Law and Rules (CPLR) 5519 provides the primary means for litigants in civil judicial proceedings to obtain a stay of enforcement of a judgment or order, pending appeal of that judgment or order. The statute identifies several categories of possible "automatic" stays provided to parties, with the application of each category of automatic stay predicated upon the occurrence of specified facts and/or events in each case. For example, a stay is automatically provided in cases when a notice of appeal or an affidavit of intention to move for permission to appeal is served, and the "judgment or order directs the payment of a sum of money, and an undertaking in that sum" is provided by the appealing party. A stay is also automatically provided when "the judgment or order directs the execution of any instrument, and the instrument is executed and deposited in the office where the original judgment or order is entered." And, as is well known amongst the bar, an automatic stay is afforded when "the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state."[1]

While the terms of CPLR 5519 list specific circumstances when a stay is "automatically" imposed in a case, what about situations when the judgment or order appealed from doesn't meet the prerequisites for an "automatic" stay under § 5519(a) or (b)? Those cases fall within the general "catchall" stay provided by § 5519(c), known as the "discretionary stay" by court order.

This article provides practitioners with a refresher on the "discretionary stay" provisions of CPLR 5519(c). Our review includes the history of the stay provision, the availability and/or prerequisites for seeking a discretionary stay, and the standard employed by courts, including

the facts and law that have been considered by the courts, when deciding an application for a discretionary stay under CPLR 5519(c).

CPLR 5519(c): Its History and Availability in Civil Judicial Proceedings

The terms in CPLR 5519(c) afford litigants in civil judicial proceedings with the opportunity to obtain a court-ordered stay of a judgment or order in the discretion of the court, pending appeal. The relevant provisions of the statute are as follows:

> (c) Stay and limitation of stay by court order. The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision . . . [2]

The stays "provided for in subdivision (a) or subdivision (b)" are the specified "automatic" stays of proceedings to enforce certain judgments or orders appealed from, when the identified prerequisites listed in § 5519(a) and (b) are satisfied for those certain judgments or orders. A stay provided by either subsection (a) or (b) is considered to be "automatic" because, once the identified criteria or events are satisfied under each respective subsection, a stay is imposed by the terms of the statute itself "without [any] court order."[3] Contrary to subsections (a) and (b), a stay under § 5519(c) can be obtained only "by court order."[4]

The present language in § 5519(c) was enacted in 1963 as part of the Legislature's promulgation of the then-new Civil Practice Law and Rules.[5] Before CPLR 5519, the methods for obtaining stays on appeals were supplied by various different provisions throughout the former Civil Practice Act and other rules of civil practice. The provisions in "CPLR § 5519 consolidate[d] all of the provisions of the State's [prior] civil procedure code regarding stays pending appeal."[6]

Relative to discretionary stays by court order, § 598-a of the former Civil Practice Act (CPA) allowed courts to issue a "Stay of execution, pending appeal, by order."[7] Specifically, § 598-a provided, in relevant part:

> [A] stay of the execution of the judgment or order results only when the appellant gives the undertaking prescribed in section five hundred and ninety-three and the supreme court or appellate division or the court of appeals *or a judge of any of said courts grants a stay in the exercise of discretion upon such terms as to security or notice or otherwise as justice requires*.[8]

Seemingly different than the former § 598-a, the current discretionary stay provisions provide the courts with two express grants of authority: a court can either "stay all proceedings" or alternatively "grant a limited stay" of proceedings.[9] Similar to the former § 598-a, the current statute provides moving parties with three options to pursue a stay: by applying to "[t]he court from or to which an appeal is taken or the court of original instance."[10] In other words, on an appeal from the trial court in the New York State Supreme Court, the trial court or the appellate court can grant a stay; and on an appeal from the Appellate Division of the Supreme Court, the statute allows an applicant to initially seek a stay from the Appellate Division (as the court "from . . . which an appeal is taken"), or the Court of Appeals (the court "to which an appeal is taken"), or the trial court (as "the court of original instance").[11]

By its terms, the CPLR provides "the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."[12] The discretionary stay provisions of § 5519(c) therefore apply in civil judicial proceedings in the supreme court, but practitioners should take care to determine if the stay provisions apply in their particular proceedings. For example, in *In re John H.*, the Appellate Division, Third Department, determined that the New York Family Court Act preempted the automatic stay provisions of CPLR 5519(a)(1) but did not preempt the court-ordered discretionary stay provisions of § 5519(c).[13] The appellate court explained that "[f]inally, the specific language of Family Court Act § 1114 (a) – that the filing of a notice of appeal from a Family Court order does not give rise to a stay – abrogates the more general automatic stay provision of CPLR 5519(a)(1) – providing an automatic stay where the state or a political subdivision, such as petitioner, is the appellant[.]"[14] The court concluded, however, that "[n]ot having *moved for a stay*, petitioner was required to comply with Family Court's order despite the prosecution of this appeal."[15] Based upon its acknowledgement of the lack of a motion for a stay, the appellate court appeared to endorse the application of the court-ordered discretionary stay provisions of § 5519(c) to family court proceedings under the Family Court Act.

Even in civil proceedings in the N.Y. State Supreme Court, there are prerequisites that must be satisfied for a court-ordered discretionary stay to be available to litigants. For example, the Supreme Court, Bronx County, in *Plowden v. Manganiello*, held that "none of the stays authorized by CPLR 5519 may be granted" in proceedings where "there is no currently appealable paper in existence."[16] In *Plowden*, the City of New York asserted that it had filed an affidavit of intention to move for permission to appeal to the Court of Appeals from an alleged "final judgment."[17] The City alleged "that its 'affidavit of intention' relates to the appeal which it will seek to take to the Court of Appeals from the final judgment which will eventually be entered in this case."[18] Even though the matter had not been finally resolved by the trial court, the City's affidavit of intention asserted that "at such time as a final, appealable order is entered in this matter,

said defendants intend to move for leave to appeal to the Court of Appeals from said judgment."[19] After serving its purported affidavit of intention under CPLR 5519(a), the City moved before the trial court "pursuant to CPLR 5519, to enjoin plaintiffs 'from executing on and enforcing the $1 million dollar money judgment entered [t]herein against the City until final resolution of th[e] case can be had in the Court of Appeals.'"[20]

The Standard Employed by Courts and Courts' Considerations in Deciding an Application for a Stay Under CPLR 5519(c)

The language in § 5519(c) does not include any specific criteria or hard-and-fast rule for issuing a discretionary stay by court order; rather, the operative word in applying the discretionary stay provisions under § 5519(c) is "may." New York courts have interpreted that language as meaning that "granting of a stay pending appeal rests in the sound discretion of the court."[25] That interpretation is consistent with the express language employed in the former CPA, which allowed courts to issue "a stay in the exercise of discretion upon such terms as to security or notice or otherwise as justice requires."[26] This discretionary authority has been applied as allowing courts to impose conditions on the issuance of a discretionary stay on appeal.[27]

The CPLR provides "the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."

In holding that there was no actual final appealable paper in the case to support the City's purported affidavit of intention in *Plowden*, the supreme court explained that

> [t]he language of CPLR 5519 necessarily implies that the section applies only to extant orders and judgment. Thus, the introductory part of CPLR 5519(a) refers to a stay of "all proceedings to enforce the judgment or order appealed from." The entire structure of CPLR 5519 relies on the premise that a stay affects only the immediate order or judgment involved, not any other order in the same case.[21]

Concluding that all of the provisions of CPLR 5519 applied to an immediate order or judgment only, and not a theoretical eventual final judgment in a case, the court determined that the automatic stay provided by CPLR 5519(a)(1) did not exist; however, the court further held that, as the City's "motion also invokes the court's discretion pursuant to CPLR § 5519(c) . . . [t]hat application must be denied for the same reason as indicated above. There is no extant order from which an appeal can be taken."[22]

Related to the final, extant appealable paper requirement discussed in *Plowden*, the Appellate Division, First Department, has similarly determined that there is "no basis for a discretionary stay" under § 5519(c), where a party "did not appeal the judgment or post a bond."[23] Besides having an extant, final order or judgment that the party is actually appealing, an applicant for a discretionary stay must affirmatively oppose the relief requested that is ultimately awarded in the extant final judgment or order. The Fourth Department, in *Caruana v. Klipfel*, directly denied a discretionary stay because the movant had failed to oppose the relief requested by its adversary before the lower court, which was then awarded in the final judgment that the movant was seeking to stay on appeal under § 5519(c).[24]

The standard for granting a court-ordered stay is based solely upon the court's discretion, so litigants have no clear direction for preparing such an application to the court. There is, however, a seemingly endless number of cases discussing various facts and legal positions courts have reviewed when deciding if a stay was appropriate. These cases show that courts consider a plethora of factors when exercising their discretionary authority.

A primary factor considered by the courts is whether the party seeking a discretionary stay has demonstrated that the underlying appeal itself "may have merit."[28] In fact, the Court of Appeals has unequivocally held that a "court considering the stay application may consider the merits of the appeal."[29] In *Rosenbaum v. Wolff*, the Appellate Division, Second Department, denied a "motion for a stay of a pending [ ] appeal . . . for lack of a meritorious showing" of the underlying appeal on the stay application itself.[30] Thus, the merits of the appeal, and the application itself, should both be sufficiently addressed by an applicant through both supporting evidence and legal arguments.

Besides the merits of the underlying appeal, courts have considered the possible impacts on the "progress of [ ] important public work involved" if a stay is granted or denied in a case,[31] and whether the stay will "prejudice" other parties.[32] Relative to the prejudice arising from a stay consideration, the Court of Appeals has directly held that "the court entertaining the application is duty-bound

to consider the relative hardships that would result from granting (or denying) a stay."[33] Practitioners should take note that, practically speaking, the "relative hardships" of a stay could be projected beyond those immediately involved in any given order or judgment. Such hardships that arise from a stay seemingly could extend to identifying hardships suffered by non-parties.

A discretionary stay has also been reviewed in the context of staying an action on appeal, pending resolution of another action. In *Eisner v. Goldberger*, the Appellate Division, First Department, determined that the applicant for a discretionary stay "failed to show good cause [for] a stay" of a judgment in one action, "pending resolution of an action [the applicant had] more recently commenced" against the assignee of the judgment challenging the validity of the judgment.[34] "A stay of one action pending the outcome of another is appropriate only where the decision in one will determine all the questions in the other, and where the judgment in one trial will dispose of the controversy in both actions."[35] In holding that the lower court "did not improvidently exercise its discretion in denying the stay," the First Department determined that the request "appear[ed] to be merely an effort to avoid enforcement of the judgment."[36] In their review, courts look for evidence demonstrating that a motion for a stay is "taken primarily for the purpose of delay" and, if found, may deny applications for a discretionary stay under CPLR 5519(c).[37]

Courts also consider whether an appeal may become "moot" and "academic."[38] In *Van Amburgh v. Curran*,[39] for example, the court addressed a request to stay execution of an order pending appeal of a proceeding "to modify a subpoena served upon [six of the petitioners] requiring them to attend private hearings of the State Investigation Commission in the City of New York." The court, holding "in the exercise of discretion, the application is granted pursuant to the provisions of CPLR 5519(c)," determined that "[a]bsent a stay pending appeal petitioners would be required to attend hearings in New York City . . . and thus the appeal would be rendered academic."[40]

The potential application of CPLR 5519(c) is seemingly broad, as the singular standard is the "discretion" of the court. However, practitioners should not assume the availability of a discretionary stay under CPLR 5519(c). Courts may consider a party's access to other, more appropriate, stay provisions.[41] The Court of Appeals has directly denied applications for discretionary stays, based upon the party's apparent right to pursue alternative relief under the "automatic" stay provisions in CPLR 5519(a)(2).[42]

Apart from the vague guidance provided by the word "may," which implies the court's discretion, there are no express criteria to look to when asking a court to invoke its discretionary powers under § 5519(c). Some courts have discussed whether exercising their discretion on such an issue was "just or reasonable" based upon the facts and law before the court,[43] but a decision that something is "just or reasonable" is still made under the subjective discretion of any given court. However, while discretion in considering an application for a stay under § 5519(c) may be subjective, it is ultimately subject to the general abuse of discretion standard of review by an appellate court.[44] Practitioners must take note that, while a determination to issue a stay is discretionary and subject to the abuse of discretion standard of review, the Court of Appeals has been clear that "there is no entitlement to a stay" under CPLR 5519(c).[45]

Conclusion

Discretionary stays under CPLR 5519(c) are a powerful tool for parties in litigation and are potentially available in the broad array of cases that are otherwise excluded by CPLR 5519(a) and (b). The key is to stay focused. If not, practitioners may find themselves on the wrong side of a client's exercise of discretion for their continued employment. ■

1. *See* CPLR 5519(a)(2), (5), (1).
2. *See* CPLR 5519(c).
3. *See* CPLR 5519(a).
4. *See* CPLR 5519(c).
5. *See* CPLR 5519 (citing to the 1962 N.Y. Laws ch. 308, as first enacting CPLR 5519); *see also* CPLR 101.

6. *See Summerville v. City of N.Y.*, 97 N.Y.2d 427, 430 (2002).

7. *See* CPA § 598-a; *see also* 1945 N.Y. Laws ch. 841.

8. *See* CPA § 598-a (emphasis added); *see also* 1945 N.Y. Laws ch. 841, § 598-a.

9. *See* CPLR 5519(c).

10. *See id.*

11. *See id.*

12. *See* CPLR 101.

13. *See* 56 A.D.3d 1024, 1026–27 (3d Dep't 2008).

14. *See id.*

15. *See id.* at 1027 (emphasis added).

16. 143 Misc. 2d 446, 448 (Sup. Ct., Bronx Co. 1989).

17. *See id.* at 448.

18. *See id.* at 449.

19. *See id.* at 448 (internal quotes and brackets omitted).

20. *See id.*

21. *See id.*

22. *See id.* at 449–50.

23. *See Levine v. Neiva*, 58 A.D.3d 411 (1st Dep't 2009).

24. *See* 135 A.D.2d 1146, 1146–47 (4th Dep't 1987).

25. *See In re Mott*, 123 N.Y.S.2d 603, 608 (Sup. Ct., Oswego Co. 1953) (citing *Genet v. Delaware & Hudson Canal Co.*, 113 N.Y. 472 (1889)); *see also Navy Yard Hous. Dev. Fund, Inc. v. Carr*, 2002 WL 1174711, *2 (Civ. Ct., Kings Co. 2002); *Russell v. N.Y. City Hous. Auth.*, 160 Misc. 2d 237, 239 (Sup. Ct., Bronx Co. 1992) (reiterating "discretionary stay under CPLR 5519(c)"); *Grisi v. Shainswit*, 119 A.D.2d 418, 421 (1st Dep't 1986).

26. *See* CPA § 598-a; *see also* 1945 N.Y. Laws ch. 841.

27. *See Gettys v. Ryan*, 267 A.D. 1029, 1029 (3d Dep't 1944); *see also Cavanagh v. Hutcheson*, 232 A.D. 470, 471 (1st Dep't 1931).

28. *See Wilkinson v. Sukiennik*, 120 A.D.2d 989, 989 (4th Dep't 1986); *see also Navy Yard Hous. Dev. Fund, Inc.*, 2002 WL 1174711, *2 (noting that relevant factors to consider in deciding to issue a stay include "'the presumptive merits of the appeal,'" and holding that "Defendant has failed to establish any grounds to justify a stay pending appeal in this action"); *see also Herbert v. City of N.Y.*, 126 A.D.2d 404, 407 (1st Dep't 1987) (holding that "stays pending appeal will not be granted, or where the stay is automatic, [or] continued, in cases where the appeal is meritless").

29. *See also Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990).

30. 270 A.D. 843, 843 (2d Dep't 1946) (citing *Black v. Maitland*, 1 A.D. 6 (2d Dep't 1896)).

31. *See In re Mott*, 123 N.Y.S.2d at 608 (quoting *Horton v. Thomas McNally Co.*, 153 A.D. 905 (2d Dep't 1912)).

32. *See Russell*, 160 Misc. 2d at 239; *see also Navy Yard Hous. Dev. Fund, Inc.*, 2002 WL 1174711, *2 (noting that relevant factors to consider in deciding to issue a stay include "'any exigency or hardship confronting any party.'").

33. *See Da Silva*, 76 N.Y.2d at 443 n.4.

34. 28 A.D.3d 354, 354 (1st Dep't 2006).

35. *See id.*

36. *See id.* at 355.

37. *See, e.g., Herbert v. City of N.Y.*, 126 A.D.2d 404, 407 (1st Dep't 1987); *see also In re Mott*, 123 N.Y.S.2d at 608–09.

38. For a discussion on "mootness" in civil litigation, see Joseph F. Castiglione, *A "Moot Point" Is an Ongoing Concern for Everyone*, N.Y. St. B.J. (Feb. 2010), p. 38.

39. 73 Misc. 2d 1100, 1100 (Sup. Ct., Albany Co. 1973).

40. *See id.* at 1100.

41. *See Sullivan v. Troser Mgmt., Inc.*, 30 A.D.3d 1118, 1118 (4th Dep't 2006) (holding "[b]ecause appellant can obtain an automatic stay (*see* CPLR 5519(a)(4), (5)), a discretionary stay is not available pursuant to CPLR 5519(c)"); *see also Norcross v. Cook*, 199 A.D.2d 1079, 1079 (4th Dep't 1993).

42. *See Hill v. St. Clare's Hosp.*, 65 N.Y.2d 689, 690 (1985); *see also Pan Am. World Airways v. Overseas Raleigh Mfg.*, 49 N.Y.2d 780, 780 (1980).

43. *See Bethlehem Baptist Church v. Trey Whitfield Sch.*, 2003 WL 21262379, *2 (N.Y. City Civ. Ct. 2003); *see also 64 B Venture v. Am. Realty Co.*, 179 A.D.2d 374, 375 (1st Dep't 1992).

44. *See State of N.Y. v. Spodex*, 89 A.D.2d 835, 836 (1st Dep't 1982); *see also In re Foley*, 140 A.D.2d 892, 893 (3d Dep't 1988) (stating "we see no abuse of discretion here"); *see also Varkonyi v. S.A. Empresa De Viacao Airea Rio*, 22 N.Y.2d 333, 337 (1968); *64 B Venture*, 179 A.D.2d at 375–76 (reviewing the duration of a stay granted by trial court, the appellate court stated that "it was an improvident exercise of the court's discretion"); *MacLeod v. Shapiro*, 20 A.D.2d 424, 428 (1st Dep't 1964) (noting that, as to duration of a stay, "[j]udicial power should not be so abused"); *Navy Yard Hous. Dev. Fund, Inc. v. Carr*, 2002 WL 1174711, *2 (Civ. Ct., Kings Co. 2002).

45. *See Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990).

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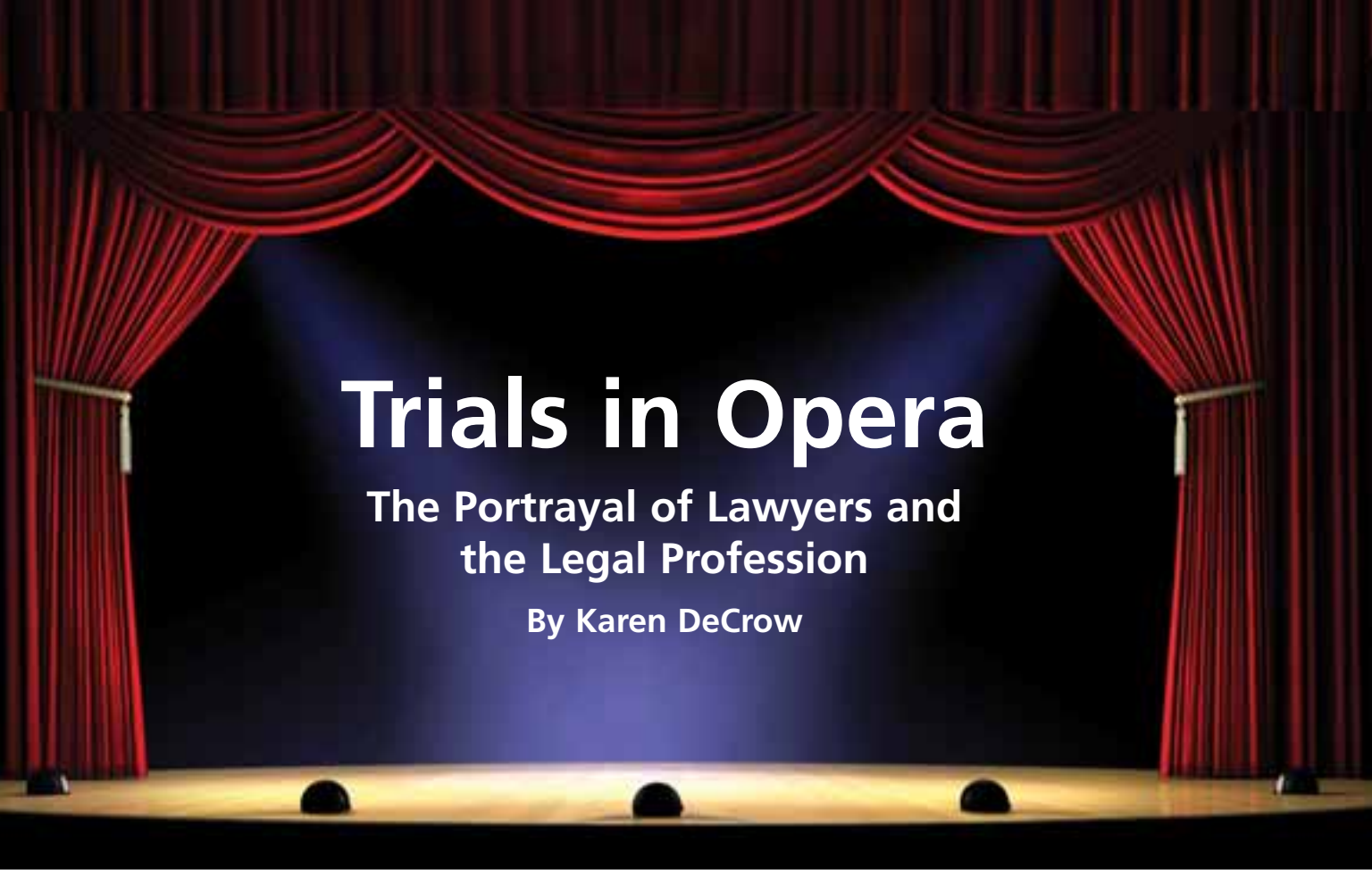

Trials in Opera

The Portrayal of Lawyers and the Legal Profession

By Karen DeCrow

Los Angeles is home to the Lawyers' Philharmonic, Gary S. Greene maestro. "Greene has brought surprising harmony out of his herd of jurist trumpeters, litigator cellists, law-clerk vocalists and brought us an evening of enjoyment," wrote Marc Haefele in his review of a performance by the orchestra.[1] He goes on to suggest that Greene start the Los Angeles Lawyers' Opera. What could be more genuine than lawyers playing lawyers? "It seems a natural to me, since lawyers love to stand up and declaim, and plenty of operas have the law and lawyers wrapped up in their plots."

It is provocative, perhaps even enlightening, to see how our profession has been portrayed in opera. And no creators of opera, maybe no creators in any art form, have had more fun at the expense of lawyers and the legal profession than Gilbert and Sullivan – music by Sir Arthur Sullivan, words by W.S. Gilbert.

The pair portray utter contempt for lawyers, and the law. Even judges are mocked. Who knows where their attitude originated? Maybe their experience with *H.M.S. Pinafore* turned them sour on the law. *Pinafore* was very successful, but popularity didn't necessarily pay. In the absence of international copyright law they were uncompensated for pirated productions of *Pinafore* by American companies. This made them so cautious that they did not at first even publish the libretto of the *Pirates of Penzance.*

Gilbert and Sullivan Portray the Law

While a number of Gilbert and Sullivan operas poke fun at the legal system, the pair's satirical take is epitomized in their 1875 opera *Trial by Jury*.

The story concerns a breach of promise of marriage lawsuit. The proceedings are introduced by the Usher, who tells the Jury to listen to the Plaintiff's case but also

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Ms. DeCrow would like to thank her law clerks, Elizabeth Weeks and Derek Wheeler, for their assistance in researching and writing this article, which was inspired by U.S. Supreme Court Justice Ruth Bader Ginsburg's program, "Opera and the Law," at the Glimmerglass Festival on August 11, 2012, in Cooperstown, NY.

tells them they "needn't mind" what the Defendant has to say. He adds, "From bias free of every kind, this trial must be tried." When the Defendant arrives, the Jurymen greet him with hostility, even though they have no idea of the merits of the case.

The conduct of the court and its officers, alongside that of the Jury and disputing parties, is comical and goofy. All involved insist that everybody abide by proper court decorum. The somber tone of the Jurymen would lead one to believe that they take their charge seriously. They dramatically drop to one knee to take the court's oath. They profess an overwhelming sense of justice, where "justice" is defined as a strong assumption of the Defendant's guilt. And they are unpersuaded by the Defendant's argument that his former bride "became a bore." While sympathizing with his wandering eye, having also been "shocking young scamps of a rover," the Jurymen declare that they are now gentlemen with "a virtue resplendent" and so could not possibly find him innocent.

The Jury nevertheless vacillates on the issue throughout the opera due, primarily, to the Judge's influence. Designed to be the embodiment of state authority, the Judge is easily one of the most satirical characters in the opera. He is a spoony older man – with a roving eye of his own – who still maintains a commanding presence. One is not sure at this point whether it is the Judge or the law that is being mocked, as each of his blatantly flirtatious whims still manages to receive approving nods from all parties.

For example, the Jury derides the Defendant for leaving his bride but has little to say about the "good judge's" own sordid past:

> In Westminster Hall I danced a dance, Like a semi-despondent fury;
>
> For I thought I should never hit on a chance
>
> Of addressing a British jury –
>
> But I soon got tired of third-class journeys, And dinners of bread and water;
>
> So I fell in love with a rich attorney's
>
> Elderly, ugly daughter. [...]
>
> At length I became as rich as the Gurneys –
>
> An incubus then I thought her,
>
> So I threw over that rich attorney's
>
> Elderly, ugly daughter.
>
> The rich attorney my character high
>
> Tried vainly to disparage
>
> And now, if you please, I'm ready to try
>
> This Breach of Promise of Marriage!

When the Plaintiff and her bridal party enter, the Judge is immediately taken with one of the bridesmaids, and sends her a love note. That is, he is smitten until he spots the bride herself, at which point the Judge directs the Usher to take back the love note and give it instead to the bride. Despite her broken heart, the bride kisses the note and hides it in her bosom. The Jury also finds her to be very beautiful and warns the "Monster" to

> dread our fury! There's the Judge and we're the Jury,
>
> Come, substantial damages!

The bride, feeling faint, leans against her counsel, then against the Jury, and eventually seeks solace on the Judge's breast. All court officers find this argument especially persuasive.

The Defendant, sensing the hostility behind his new nickname, begins to craft an alternative argument: he cannot marry the Plaintiff because he is already married, and it is a crime to have two wives. The damages for the breach would also have to be small. According to the Defendant:

> I smoke like a furnace – I'm always in liquor, A ruffian – a bully – a sot;
>
> I am sure I should thrash her, perhaps I should kick her,
>
> I'm such a very bad lot!
>
> I'm not prepossessing, as you may be guessing, She couldn't endure me a day;
>
> Recall my professing, when you are assessing
>
> The damages Edwin must pay!

The wise Judge proposes an experiment: the Court will get the Defendant "tipsy" to see if he ends up thrashing and kicking the Plaintiff. All but Edwin, who is enthusiastic about testing the Judge's hypothesis, object to this.

The opera finally concludes when the Judge, tiring of the proceedings, decides to marry the Plaintiff himself. Despite previous objections to multiple wives and insistence of damages, everybody is satisfied with this ending.

Trial by Jury began as a one-page illustrated comic piece for *Fun* magazine. Titled "Trial by Jury: An Operetta," the piece drew on Gilbert's training and brief practice as a barrister in the 1860s. It detailed a breach of promise trial going awry, in the process spoofing the law and the legal system.[2]

Gilbert read the *Trial by Jury* libretto to Sullivan on February 20, 1875. Sullivan was enthusiastic, later recalling, "Gilbert read it through . . . in the manner of a man considerably disappointed with what he had written. As soon as he had come to the last word, he closed up the manuscript violently, apparently unconscious of the fact that he had achieved his purpose so far as I was concerned, inasmuch as I was screaming with laughter the whole time."[3]

The original production of *Trial by Jury* was sent abroad from London. It went as far as Australia. Unauthorized pirate productions quickly sprang up in United States, taking advantage of the fact that U.S. courts did not enforce foreign copyrights.[4]

Trial by Jury is performed extensively and is even cited in law cases, such as *Askew v. Askew*.[5] That decision includes an extensive reference to *Trial by Jury* as an introduction to its discussion of suits for breach of promise and the potential for abuse inherent in such lawsuits.

Gilbert and Sullivan and the U.S. Supreme Court

Iolanthe by Gilbert and Sullivan concerns a band of immortal fairies who find themselves at odds with the House of Peers. This opera, which satirizes the legal system, and indeed the entire British government, was cited by then Associate Justice William H. Rehnquist in his dissent in *Richmond Newspapers, Inc. et al. v. Commonwealth of Virginia et al*.[6] Rehnquist was a great Gilbert and Sullivan fan. When he became Chief Justice of the U.S. Supreme Court, he added four golden stripes to the sleeves of his judicial robes, imitating the costume worn by the Lord Chancellor in a production of *Iolanthe*.[7]

In *Richmond*, the majority held that absent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public. Rehnquist dissented.

In his dissent, he ironically quoted the Lord Chancellor: "The Law is the true embodiment/Of everything that's excellent/It has no kind of fault or flaw/And I, My Lords, embody the Law." Then he argued:

> [T]o rein in, as this Court has done over the past generation, all of the ultimate decision-making power over how justice shall be administered, not merely in the federal system but in each of the 50 States, is a task that no Court consisting of nine persons, however gifted, is equal to. Nor is it desirable that such authority be exercised by such a tiny numerical fragment of the 220 million people who compose the population of this country . . .
>
> However high-minded the impulses which originally spawned this trend may have been, and which impulses have been accentuated since the time Mr. Justice Jackson wrote, it is basically unhealthy to have so much authority concentrated in a small group of lawyers who have been appointed to the Supreme Court and enjoy virtual life tenure. Nothing in the reasoning of Mr. Chief Justice Marshall in *Marbury v. Madison,* 1 Cranch 137, 2L.Ed. 60 (1803), requires that this Court through everbroadening use of the Supremacy Clause smother a healthy pluralism which would ordinarily exist in a national government embracing 50 states.[8]

He also quoted Mr. Justice Jackson: "We are not final because we are infallible, but we are infallible only because we are final."[9]

The plot of *Iolanthe* begins with the fairy queen commuting the sentence of Iolanthe, who was banished for life because she would not leave her human husband. At the time, fairy law criminalized mixed marriages between fairies and humans.

When Iolanthe introduces her son, Strephon, she tells them that he is fairy from the waist up, and human from the waist down. As if on cue, Strephon falls in love with Phyllis, a full-blooded fairy and ward of the Lord Chancellor. Unfortunately for Strephon, the Lord Chancellor – and the bulk of the House of Lords – have similar feelings for Phyllis. Strephon is thus legally denied the opportunity to pursue any marriage proposal for Phyllis.

The Lord Chancellor, much like the Judge in *Trial by Jury*, fancies pretty young ladies to whom he has some legal obligation or responsibility. When Rehnquist quoted the Lord Chancellor as the "embodiment of the law," he left out the remainder of that stanza:

> The constitutional guardian I
>
> Of pretty young Wards in Chancery, All very agreeable girls – and none
>
> Are over the age of twenty-one. A pleasant occupation for
>
> A rather susceptible Chancellor!

Two others in the House of Lords – Lord Tolloller and Lord Mountararat – are especially keen on marrying Phyllis, to the point where they misinterpret a hug between Iolanthe and Strephon as something more romantic rather than familial. This so-called betrayal forces Phyllis to seriously consider the marriage proposals of the two lords. Being unable to decide, she leaves it up to them to hash out. They ultimately decide against marrying her altogether, as that would require one man to duel the other, and they deem their friendship to be more important.

In the midst of all this, the Fairy Queen grants Strephon membership in Parliament and the ability to pass any bill. By Act II, Strephon is advancing a bill to open the peerage to competitive examination. The peers ask the fairies to put a stop to this, because the House of Peers is not susceptible of any improvement.

Strephon tells Phyllis the truth about his origins, and Iolanthe agrees to plead Phyllis's case before the Lord Chancellor. This dispute is quickly rendered moot, as the rest of the fairies have chosen mortal husbands, the punishment for which is death. The Queen has no desire to kill virtually all fairies. Thankfully, the Lord Chancellor, being a man of the law, comes up with the solution:

> Allow me, as an old Equity draftsman, to make a suggestion. The subtleties of the legal mind are equal to the emergency. The thing is really quite simple – the insertion of a single word will do it. Let it stand that every fairy shall die who **doesn't** marry a mortal, and there you are, out of your difficulty at once!

The Queen, to save her own life, marries a nearby sentry, and the opera concludes with everyone going away to fairyland.

Other Operas

The Marriage of Figaro (1786), with music by Wolfgang Amadeus Mozart and a libretto by Lorenzo da Ponte, was and is a huge success. The opera was first banned in Vienna because it satirized the aristocracy. This was in the period before the French Revolution, and there was much hesitation about making fun of the ruling class.

In the opera, there is a brief trial about whether a contract should be enforced. Bartolo, who is depicted as arrogant, is a doctor from Seville who is also a practicing lawyer. He is hired by Figaro's former housekeeper, Marcellina. Figaro had promised to marry her if he should default on a loan she had made to him, and she intends to enforce that promise.

Figaro's trial follows, and the judgment is that Figaro must marry Marcellina. Figaro argues that he cannot get married without his parents' permission, because he was stolen from them when he was a baby. At this point one should advise readers to enjoy the beautiful music, and not take too seriously the muddled, sometimes silly, plot.

The Devil and Daniel Webster, music and libretto by Douglas Stuart Moore, however, depicts the legal profession in a positive light. The opera was based on a short story by Stephen Vincent Benet. Benet's story, published in 1937, centers on a New Hampshire farmer who sells his soul to the Devil. When the farmer wants to break the contract, he hires Daniel Webster, a fictional version of the famous lawyer and orator.

The farmer, Jabez Stone, is plagued with endless bad luck, and finally swears that "it's enough to make a man want to sell his soul to the devil!" Stone is visited the next day by a stranger, one "Mr. Scratch," who offers Stone seven years of prosperity in exchange for his soul. Stone agrees. After seven years, Stone bargains for an additional three years. After the three years pass, Mr. Scratch refuses any further extension of time. Stone convinces Daniel Webster to accept his case.

This is no easy task: the signature and the contract are clear. Webster demands a trial, and says Mr. Scratch can select the judge and the jury. The jury turns out to be composed of the damned, "with the fires of hell still upon them." The judge is John Hawthorne, the executor of the Salem witch trials. The trial is thus rigged against Webster.

Daniel Webster's oratory is so compelling: ". . . the freshness of a fine morning . . . the taste of food when you're hungry . . . the new day that's every day when you're a child" and how "without freedom, they are sickened" that it moves the jury to "find for the defendant, Jabez Stone." "Perhaps 'tis not strictly in accordance with the evidence, but even the damned may salute the eloquence of Mr. Webster." Mr. Scratch congratulates Daniel Webster and the contract is torn up.

Webster extracts the promise that Mr. Scratch is "never to bother Jabez Stone nor his heirs or assigns nor any other New Hampshire man till doomsday!" It has been said that the devil never did come back to New Hampshire.

Gianni Schicchi, a 1918 opera by Giacomo Puccini, libretto by Giovacchino Forzano, involves a family trying to find a way to void a will after the death of its patriarch.

When old Buoso dies, and the will is located, it turns out Buoso has given his considerable fortune to the monastery. The relatives are, as expected, furious. One of the cousins, Simone, calls on the lawyer Gianni Schicchi for advice.

Realizing that no one outside of the relatives presently gathered knows that Buoso has died, Schicchi gets the idea of impersonating Buoso and making a new will. With the wholehearted support of the relatives, Schicchi changes into Buoso's clothes, climbs into Buoso's bed and signs a new will, redistributing the estate. He makes the bequests conditional on Simone's distributing the estate within 15 days, otherwise everything will go to charity. Unbeknowst to the relatives, Schicchi has left a considerable chunk of the estate to himself, which they find out when the reading of the will takes place. Part of Schicchi's purpose is to supply a dowry for his daughter, who wants to marry one of Buoso's nephews.

The opera was developed from a few lines in Canto 30 of Dante's *Inferno*. Dante condemns Schicchi to Hell for this trickery, but in the opera Schicchi asks the audience to find extenuating circumstances.

In 2008, Woody Allen made his operatic directing debut with *Gianni Schicchi*, starting the production with a montage of old film clips. (This should come as no surprise.) He also changed the ending – dispensing justice by having one of the cousins stab Schicchi to death.[10]

Perhaps an entertaining *Journal* article could be written about the image in the movies of legal systems, lawyers, and trials. One can see Atticus Finch now. But that is for another article. Another day. ■

1. Marc Haefele, *Grand New Opera*, Metro. News-Enter. (May 10, 2012), *at* http://www.metnews.com/articles/2012/snip051012.htm.
2. W.S. Gilbert, *The Bab Ballads*, Fun, Apr. 11, 1868, *at* http://math.boisestate.eclu/gas/bab-ballads/html/trial.html.
3. Michael Ainger, Gilbert and Sullivan: A Dual Biography 109 (2002).
4. Kurt Ganzel, The British Musical Theatre, Vol. 1: 1865–1914 95 (1986).
5. 22 Cal. App. 4th 942 (4th Dist. 1994).
6. 448 U.S. 555 (1980) (Rehnquist, J., dissenting).
7. John Q. Barrett, *A Rehnquist Ode on the Vinson Court*, The Green Bag, Vol. 11, No. 3, Spring 2008, *available* at http://www.greenbag.org/v11n3/v11n3_barrett.pdf.
8. *Richmond Newspapers, Inc.*, 448 U.S. at 606.
9. *Brown v. Allen*, 344 U.S. 443 (1953).
10. Anthony Tommasini, *At the Los Angeles Opera, Puccini With a Sprinkling of Woody Allen Whimsy*, N.Y. Times, Sept. 7, 2008, http:/lwww.nytimes.com/2008/09/08/arts/music/08trit.html?_r=1&pagewanted=all.

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More *Burns v. Varriale*

Lessons for Workers' Compensation Third-Party Action Attorneys

By Justin S. Teff

New York law permits the victim of a work-related injury to maintain both a workers' compensation claim and a separate liability action against certain third-party tortfeasors. In order to prevent a double recovery and to shift the ultimate burden of loss to the party most responsible, the compensation carrier is afforded statutory lien and offset rights as against the claimant's net third-party recovery. Given the substantial benefit that thereby accrues to the carrier, however, the law fairly requires that it contribute to this equation its equitable share of the expense incurred by the claimant in obtaining the third-party recovery.

For counsel that tangle with thorny issues of compensation lien and offset rights, there is important news on the subject of equitable apportionment of third-party litigation expenses. By way of their respective decisions in *Bissell v. Town of Amherst*[1] and *Stenson v. New York State Department of Transportation I*[2] and *II*,[3] the Court of Appeals and the Third Department have refined key elements of the law in this area. While the decisions afford needed clarity, they and their precedent weave a patchwork of rules that must be well understood in order to ascertain when and in what manner a carrier should be required to make a contribution relative to its future offset right. As proper handling of these issues can significantly affect an injured worker's rights and overall recovery, counsel should be fully familiar with these decisions and their practical implications.

Background

While an injured worker may maintain both a compensation claim and a third-party action (TPA), Workers' Compensation Law (WCL) § 29 provides the insurance carrier in the compensation claim statutory lien and offset rights against the TPA recovery.[4] The carrier's lien, the sum of payments it has made for medical expenses and lost wages, is repaid at the time the TPA is finalized, and the carrier is then permitted to offset, or withhold, additional compensation payments, for both medical expenses and lost wages, in a sum equal to the claimant's remaining net third-party recovery.[5] The period of non-payment is referred to as a "holiday." Once the holiday has expired, the carrier is again liable for actual payment, known as deficiency compensation.[6] Under WCL § 29 as initially crafted, the carrier was allowed to recoup its lien, and enjoy its full offset right, with no contribution to the injured worker for the costs associated with obtaining the TPA recovery.

On recommendation of the Law Revision Commission, the Legislature amended WCL § 29(1) in 1975 to provide the injured employee a right to "apply on notice to such lienor to the court in which the third party action

was instituted, or to a court of competent jurisdiction if no action was instituted, for an order apportioning the reasonable and necessary expenditures, including attorney fees, incurred in effecting such recovery."[7] As a result of this addition, a carrier could collect its lien, but subject to a proportionate deduction (one-third is commonly used, though not technically accurate) representing the percentage cost of litigation (PCOL) in the TPA, or the percentage costs and fees borne in relation to the gross recovery. This deduction/contribution – technically reimbursement to the claimant for TPA expenses – represented the carrier's equitable share of the costs incurred in obtaining the substantial benefit of full recoupment of its payouts to date. At this juncture, however, the carrier was still permitted to take its full offset with no additional contribution for the further benefit derived from the ongoing compensation holiday.

So it was until 1983 when, in *Kelly v. State Insurance Fund*,[8] the Court of Appeals announced that inasmuch as the carrier obtains two separate benefits from the claimant's third-party recovery, the right to lien recoupment and the future offset right, it should be required to contribute its equitable share of the costs of TPA litigation in proportion to the "total benefit" it receives and not merely with regard to the lien it recovers. Pursuant to *Kelly*, the carrier was thereafter required not only to reduce its claimed lien by the PCOL to satisfy its statutory obligation under WCL § 29(1), but also to contribute additionally for the benefit derived from its future offset, typically by further reducing or extinguishing the lien, or even by contributing so-called fresh money, a cash payment in addition to full lien negation. The law continued as such until the decisions of the Third Department and Court of Appeals in *Burns v. Varriale*[9] again substantially altered the lien/offset landscape.

In *Burns*, the Appellate Division and Court of Appeals concluded that while an up-front *Kelly* contribution (i.e. lien reduction beyond the PCOL or fresh money) is proper when a compensation claim involves death, permanent total disability, and schedule loss of use, the value of future benefits that may accrue to a claimant with a non-schedule permanent partial disability (PPD) under WCL § 15(3)(w) is too speculative to be reasonably ascertained and reduced to present value at the time of TPA recovery.[10] Rather, because these future PPD benefits might change or even stop, for any number of reasons, a carrier should not be forced to pre-pay for the proportionate costs of TPA expenses relative to these benefits until they actually accrue and hence are no longer speculative.

The Court noted, however, that because a carrier should be required in all instances to pay its equitable share of expenses for its total benefit, and specifically its offset (reaffirming, in essence, the underlying principle of *Kelly*), an alternative means of reimbursement – in the way of a periodic or "pay-as-you-go" arrangement – could be fashioned by the courts or by agreement, in order to fulfill the obligation. These payments made by the compensation carrier during the holiday, which are technically reimbursement for litigation expenses incurred in obtaining the accrued benefits, have come to be known as *Burns* payments, and are typically equal to the PCOL of the claimant's actual ongoing compensation benefit.

Since *Burns*, some notable clarifications and refinements have been injected by the Third Department in *Stenson I* and *II*, and by the Court of Appeals in *Bissell*. A review of these decisions is worthwhile in setting the context for the rules as they presently stand. In brief, however, a distinction now appears to exist, as a result of *Bissell* in particular, between the rules of equitable contribution relative to the carrier's right to offset future wage benefits versus the right to offset ongoing medical costs.

Contribution for Future Wage Benefits per *Stenson*

While there has arisen no groundbreaking alteration of the essential parameters of the *Burns* holding since 2007, the decisions of the Third Department in *Stenson v. New York State Department of Transportation I* and *II* have clarified a few essential points of professional disagreement that had emerged relative to the carrier's indemnity offset right.

In short, the Third Department has made clear that *Burns* reimbursement is available even in compensation cases that, as of TPA finalization, have no finding of permanent disability. If another rule can be taken from *Stenson*, it is that if in negotiations a carrier does not make a *Kelly* contribution (i.e., does not discount the lien beyond the PCOL), but wishes also to make no further payments under *Burns*, it must "plainly and unambiguously" disclaim its *Burns* obligation in its TPA consent letter. Absent such a disclaimer, the carrier is liable, as it should be, for ongoing *Burns* reimbursement.

The Problem After *Burns*

In the period after *Burns*, the Workers' Compensation Board (the Board) issued a series of decisions sharply limiting that decision's applicability, and hence the availability to injured workers of ongoing contribution during the carrier's holiday, even when no *Kelly* contribution had been made. The Board's narrow view was rejected by the court in *Stenson I.*

The predicament presented in the context of TPA lien recoveries – which, owing to the legal landscape post-*Burns*, included neither an up-front *Kelly* contribution nor an explicit statement as to future *Burns* liability. *Burns* held that an order of immediate *Kelly* contribution was available only if a compensation case involved death, permanent total disability, or schedule loss of use. As such, a trial court was without power to order a *Kelly* contribution in PPD cases, or where no permanency finding had been made, and the carrier often would not agree to or include the same in settlement negotiations

(in many cases, in fact, standard practice involved simply not accounting for the future offset right if no finding of permanency had been implemented). At the same time, the carrier's consent letter would contain standard language reserving full future offset rights pursuant to WCL § 29(4), but would not make specific mention of liability for equitable contribution pursuant to *Burns*. In numerous instances, claimants made application to the Board, in light of the absence of an offset contribution per *Kelly*, for ongoing reimbursement as envisioned by *Burns*.

Prior to *Stenson I*, the majority of the Board's decisions denied *Burns* reimbursement based upon several indications which *Stenson I* ultimately disaffirmed. First, the Board determined that, based upon the precise language in *Burns*, ongoing equitable contribution was available only if a claimant had been formally classified with a PPD at the time of TPA finalization, but not if there had been as of yet no finding of permanency in the compensation claim. Second, the Board held that *Burns* contribution was applicable only if embodied in a court order or otherwise agreed to in specific language in the carrier's letter of consent to settle the TPA. Finally, the Board decreed, in conjunction with the foregoing point, that it had no jurisdiction to alter the terms of the carrier's consent, and thus if the carrier's consent letter did not contain a specific agreement to make *Burns* payments, the Board could not order it to do so. Because at the time many letters of consent did not specifically address *Burns*, the Board effectively held that the claimant had waived the right to *Burns* reimbursement.

> A distinction now appears to exist between the rules of equitable contribution relative to the carrier's right to offset future wage benefits versus the right to offset ongoing medical costs.

Stenson I and *II*

The Third Department flatly rejected these notions in *Stenson v. New York State Department of Transportation (Stenson I)*, and recently reiterated its stance on the matter in *Stenson II*.[11] Kai Stenson was involved in a work-related motor vehicle accident, and instituted both a compensation claim and third-party lawsuit. During settlement negotiations, the carrier agreed to reduce its lien by approximately the PCOL (34.1%), but no specific provision was made for additional reimbursement relative to the offset right; in its consent letter, the carrier simply reserved its full future offset rights utilizing standard language.[12] At the time of the TPA settlement, the claimant had not yet been classified with a permanent partial disability under the WCL.[13]

The claimant later made application to the Board for *Burns* contribution, which was denied for all of the above reasons. In *Stenson I*, the Third Department first determined that while the *Burns* decision limited a *Kelly* order to cases involving death, permanent total disability, and schedule loss of use, there was no requirement that a claimant actually be classified with a PPD in order to invoke the carrier's obligations under *Burns*.[14] The court next disagreed with the Board's conclusion that *Burns* could apply only by way of a court order, and held that given the carrier's clearly established legal obligation under *Burns*, which existed at the time of settlement in *Stenson*, the carrier could disclaim this obligation only by a showing that it had expressed its release from *Burns* liability "plainly and unambiguously" in its consent letter.[15] Finally, the court resolved that inasmuch as the Board always retained jurisdiction to determine, as a question of fact, the sufficiency of reservation and the extent of a carrier's offset right, it possessed such jurisdiction in this and similar instances.[16]

On remand in *Stenson*, the Board held that based upon the language of its consent letter, the carrier did not plainly and unambiguously disclaim its *Burns* obligation, and thus was required to make reimbursement relative to accrued benefits; the Board calculated and ordered the precise amount of reimbursement.[17] The carrier again appealed to the Third Department.

In *Stenson II*,[18] the Appellate Division once more rejected the carrier's contentions, agreeing with the claimant and the Board that the carrier's "current appeal is primarily an effort . . . to relitigate issues that were resolved against [it] on the prior appeal."[19] The court explained that the Board's findings on remand were questions of fact, decided in accordance with the legal parameters set forth in *Stenson I*, and as these decisions were supported by the substantial evidence of record, they would be affirmed.[20] With regard to the precise finding on remand that the carrier had not plainly and unambiguously disclaimed its *Burns* obligation, the Third Department found this to be supported as well, noting, "Specifically, the carrier's letter and form consenting to the settlement make no reference to that subject."[21]

While again these decisions do not dramatically alter the *Burns* landscape, they do raise important practical implications for those who tangle with lien and offset issues, implications that are explored more fully below.

Contribution for Future Medical Costs per *Bissell*

Through the noted evolution of the equitable contribution rules, the focus was generally fixed on the carrier's

right to stop its wage replacement payments during the compensation holiday. Indeed, the value of future medical expenses was often, but not always, factored into the *Kelly* calculation. While *Burns* addressed the issue of contribution regarding the carrier's right to offset future wage payments, it did not squarely pass on the separate question of whether a *Kelly* contribution was truly proper relative to the carrier's right to offset future medical costs. Given that the carrier withholds payment for all causally related medical costs during the holiday, however, this aspect of the offset has very tangible value; it was perhaps only a matter of time before the courts were called upon to consider the subject.

The *Bissell* Case

Peter Bissell sustained a work-related injury, while employed by a roofing company and working on property owned by the Town of Amherst, rendering him a paraplegic.[22] Mr. Bissell commenced both a compensation claim and a third-party action against the town, and ultimately obtained an amended judgment in the TPA in the amount of $23,400,000, of which $4,650,000 ($4,259,536 at present value) was allocated to future medical expenses.[23]

Pursuant to WCL § 29, the carrier asserted its lien in the amount of $219,760. It acknowledged its obligation under *Kelly* to contribute relative to the future offset for wage loss benefits, given that the claimant was classified with a permanent total disability in the compensation claim.[24] The carrier refused, however, to make a similar contribution for the value of future medical expenses as awarded by the jury, arguing that this aspect of the offset right was too speculative to be reasonably ascertained and reduced to present value for these purposes.[25]

The claimant commenced a proceeding seeking not only to extinguish the lien, but also demanding $1,399,734 in fresh money for the carrier's equitable share of the cost of recovering the $4,259,536 in future medical expenses that it would not pay by virtue of its holiday.[26] Supreme court granted the claimant's petition, and the carrier appealed to the Fourth Department.[27] The Appellate Division agreed with the carrier that the value of future medical expenses should not be included in a forced up-front *Kelly* contribution and remitted the matter for recalculation of the carrier's proper share of litigation expenses.[28]

A unanimous Court of Appeals affirmed the Fourth Department, agreeing that the value of future medical expenses the carrier would be relieved of paying under the WCL could not be included in a forced *Kelly* contribution.[29] The Court reaffirmed the essential principles of both *Kelly* and *Burns*, noting that the carrier did receive a tangible benefit in the form of being relieved from payment of future medical expenses, and it should therefore be obligated to reimburse the claimant for its equitable share of the costs associated with this future benefit.[30]

As to the timing and manner of reimbursement, however, the Court emphasized that the future medical expenses the claimant might incur are speculative, and as such, the actual benefit which the carrier would derive from being relieved of payment for these expenses was also speculative, and could be distinguished from the jury's one-time assessment of projected future medical costs.[31] While the jury might by necessity be constrained to a one-time assessment in this regard, not so is the Compensation Board, said the Court; the Compensation Board would determine the claimant's entitlement to medical coverage in each instance, under its own rules, and as a question of fact.[32] Hence, though an up-front *Kelly* contribution still may be appropriate relative to the future wage offset, the *Burns* formulation is (at least in *Bissell*) the appropriate vehicle for reimbursement regarding the offset against future medical expenses.[33]

While *Bissell* may be read as fact-specific, the holding germane only to cases involving a permanent total disability, it does not appear from the language of the decision that it should or will be so constrained. First, the Court did not reference the value of future medical expenses under the WCL in connection only with a permanent total disability claim, but rather carved out a wholly separate category of liability for purposes of analyzing how a carrier should contribute for the offset. Moreover, because medical expenses are calculated and paid in all compensation claims in the same manner irrespective of how wage-loss benefits are paid (if they are paid at all), the rationale of *Bissell* is universally valid. For purposes of this article, then, it is assumed that *Bissell* will be accepted by insurance carriers and their counsel to have general application, or if necessary, will be expanded by the courts.

Practical Implications

These developments pose important practical implications for both TPA attorneys and workers' compensation counsel.

First, the rules have obviously been refined regarding when and how the carrier must make its offset contribution, altering as such what TPA counsel can reasonably expect or demand. However, the analytical starting point has not changed. TPA counsel must be aware of the claimant's precise legal disability status under the WCL at the time of finalization. For these purposes, the compensation case will involve one of the following: (1) a work-related death; (2) a permanent total disability; (3) a schedule loss of use; (4) a non-schedule permanent partial disability; or (5) no finding of permanency.

Here a dichotomy emerges between the contribution rules relative to the carrier's right to offset future indemnity versus medical benefits. In terms of the medical offset, the *Bissell* rationale provides full application of the *Burns* method to account for the carrier's equitable contribution. Not only are TPA counsel therefore likely

powerless to demand an up-front *Kelly* payment for the medical offset, but given the holding in *Stenson* (carrier must specifically disavow in consent letter), one must be very cautious not to let the carrier disclaim this undisputed obligation.

As to the offset for wage benefits, all categories of legal disability under the WCL are now specifically covered by either *Kelly* or *Burns*. In the wake of *Stenson*, it is clear that if a compensation case involves a work-related death, permanent total disability, or scheduled loss of use, a *Kelly* contribution remains legally proper and may be ordered by the trial court, but in cases involving a non-schedule PPD or no finding of permanency, *Burns* applies. Of course, parties have always been free to negotiate their own contribution structure, and often a *Kelly* contribution is made by agreement even in PPD cases as a matter of preference.

The next important point, in light of *Stenson*'s cue that a carrier must specifically disclaim in order to avoid *Burns* liability, is that TPA counsel must be more vigilant than ever not to accept a consent letter that unnecessarily prejudices the claimant's rights. Indeed, counsel must obtain or at least protect – either via a properly drawn consent letter or other stipulation, or failing this, a court order – the full value of the carrier's offset contribution, per *Kelly*, *Burns*, or both.

At the outset it is often forgotten in negotiations that an initial lien discount of the PCOL (e.g., one-third) constitutes fulfillment of the carrier's obligation under WCL § 29(1) only, and is neither a *Kelly* nor a *Burns* reimbursement, but merely the fair cost of lien recoupment. Both *Kelly* and *Burns* involve contribution for the offset right, either up-front (lien reduction beyond the PCOL or fresh money) or pay-as-you-go. TPA counsel simply cannot accept an offer and/or a consent letter that fails to adequately address reimbursement for both the carrier's lien and its offset.

The need for circumspection, in this regard, cannot be overstated. Even as a general matter, letters of consent have grown increasingly complex in the wake of *Stenson*. But furthermore, these letters often contain syntax that carries implications only an experienced compensation attorney might recognize at first pass. As one recent example, a consent letter submitted in a case in which the claimant had no permanency finding at the time of TPA settlement contained the line: "The parties agree that, effective on the date that the claimant becomes classified, [the carrier] will exercise credit in accordance with *Burns v. Varriale*, 9 NY3d 207, at a litigation expense rate of 35.03%."

While innocuous on its face, the line suggests by implication that the carrier will not make any *Burns* reimbursement to the claimant even if compensation benefits are ongoing, unless and until the claimant has a formal finding of permanency, which is of course in contradiction to the rule in *Stenson I*. Such a letter cannot be accepted.[34] A consent letter such as this, which makes specific *Burns* arrangements, albeit improper ones, is final and binding upon exchange of funds and general release. The point is particularly noteworthy in that under the law applicable to accidents occurring on or after March 13, 2007, the overall duration of benefits is limited upon a formal finding of non-schedule PPD. Claimants therefore generally attempt to avoid such a finding for as long as reasonably possible. If negotiation proves plainly unproductive, counsel must consider a motion on notice in order to correctly resolve these issues.

As to the future medical offset, it cannot be disputed that *Bissell* is legally correct, and in general *Burns* is the more equitable means of calculating reimbursement. *Bissell* does raise practical concerns, however, inasmuch as the post-TPA realities of the situation work clearly to the detriment of the injured worker. In reality, the claimant pays for medical care at fair market value subsequent to the TPA resolution, while the reimbursement available in compensation court is limited to the PCOL percentage of the carrier's benefit, which is technically causally related to medical expenses pursuant to the Board's 2010 Medical Treatment Guidelines, subject to the Board's Fee Schedule. Even if the claimant hoards every receipt, reimbursement is on a scale proportionately far less than the claimant's actual payment for services. The carrier is also hereby permitted to dispute, at every turn, causality and/or whether services would have been necessary and permissible; most claimants likely will not bother with actual reimbursement. Yet again, there is value in this future right to PCOL reimbursement for medical costs, especially in cases of large-scale expenditures, and for purposes of global settlement.

In point of fact, what will always remain, in the wake of any modification of the *Burns* framework, is the potential for global settlement that inures to the benefit of all involved. Best practice, particularly after *Stenson* and *Bissell*, involves coordination by TPA and compensation counsel, as often such a global settlement, including a workers' compensation Section 32 Agreement for the value of ongoing and potential residual/deficiency entitlement, is in the best interests of all involved. Not only can such a settlement ultimately be in the claimant's best interest, especially when a Social Security offset is involved, but these settlements will hopefully provide, in the long run, a cost savings to insurance carriers, a savings they can pass on to their clients. ■

1. 18 N.Y.3d 697 (2012).
2. 84 A.D.3d 22 (3d Dep't 2011).
3. 96 A.D.3d 1125 (3d Dep't 2012).
4. *See* WCL § 29(1), (4). If a work-related accident involves a motor vehicle covered under New York's no-fault laws (Insurance Law art. 51), different rules will likely apply for lien and offset issues. In such cases, a carrier has no lien for its compensation outlay to the extent these payments were made "in lieu of first party benefits which another insurer would have otherwise been obligated to pay under article fifty-one of the insurance law." WCL § 29(1-a).
5. *See* WCL § 29(1).
6. *See* WCL § 29(4).

7. *See* WCL § 29(1); Recommendation of Law Rev. Comm. to Legislature, McKinney's 1974 Session Laws of NY, pp. 1904–1906; Chapter 190 of the Laws of 1975.

8. 60 N.Y.2d 131 (1983).

9. 34 A.D.3d 59 (3d Dep't 2006), *aff'd*, 9 N.Y.3d 207 (2007).

10. *See id*.

11. Later in 2011, the Appellate Division reaffirmed the *Stenson* principles in *Morphew v. Aero Transporters, Inc.*, 90 A.D.3d 1459 (3d Dep't 2011), a case argued by the author.

12. *Stenson I*, 84 A.D.3d at 24.

13. *See id*.

14. *See id*. at 27.

15. *See id*.

16. *See id*. at 27–28.

17. *In re N.Y. State Dep't of Transp.*, 2011 N.Y. Wrk. Comp. 60505286, 2011 N.Y. Wrk. Comp. LEXIS 3510 (July 1, 2011).

18. 96 A.D.3d 1125 (3d Dep't 2012).

19. *Id*. at 1126.

20. *Id*.

21. *Id*. at 1127.

22. *Bissell v. Town of Amherst*, 18 N.Y.3d 697, 700 (2012).

23. *Id*. at 700.

24. *Id*.

25. *Id*.

26. *Id*.

27. *Id*. at 701.

28. 79 A.D.3d 1638 (4th Dep't 2010).

29. *See Bissell*, 18 N.Y.3d at 699–700.

30. *Id*. at 701–02.

31. *Id*.

32. *Id*.

33. *Id*.

34. After modification, the acceptable consent letter in the referenced case now reads: "Consistent with *Burns v. Varriale*, 9 NY3d 207, [the carrier] acknowledges its obligation to pay its equitable share of litigation costs incurred by the claimant in securing continuous benefits as they accrue. [The carrier] will satisfy this obligation by issuing equitable apportionment payments to the claimant. These payments will be a percentage of what claimant is now receiving in lost wage compensation from [the carrier], which percentage is determined by the amount of the settlement paid in costs of litigation. In this matter, 35.03% of the $100,000 settlement has been paid in litigation costs. Claimant is currently receiving $371.02 per week in lost wages compensation from [the carrier], which has been paid through June 20, 2012. Accordingly, as of June 20, 2012, [the carrier] will suspend issuance of the $371.02 per week compensation payment pursuant to its credit rights accorded to it by WCL Sec. 29(4) mentioned above, but will immediately begin issuing equitable apportionment payments to the claimant in the amount of $129.97 per week, which is 35.03% of the lost wages compensation rate."

BY JONATHAN STEVENS

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It's a Risky Business!

The Importance of Legal Risk Mapping

If you wander through the graveyards of corporate history, you will find the headstones of many companies that have died not of natural causes but because of poor legal risk management. Enron, Worldcom, Arthur Andersen, and Lehman Brothers are the names that everyone knows, but there are many others. And there are even more companies that have suffered serious damage because of poor legal risk management, including the likes of Siemens, Microsoft and Bank of America.

In a world where regulation and risk appear to be on the rise, the markets and investors hold great store by the ability of a company to identify and manage risk. A well-run company is a safer harbor in these stormy times.

What Is Legal Risk Mapping?

Legal risk mapping is an important part of an overall risk-mapping exercise that every business should undertake. It involves analyzing your business with all its service lines, geographies and jurisdictions, and identifying all the legal risks that the business could face.

Having captured the potential legal risks the next tasks are to

1. map the probability of each risk materializing,
2. map the impact or consequence that the business would face if the risk did materialize, and
3. map the measures necessary to avoid or mitigate that risk.

But what is a "legal risk"? A clear definition of legal risk is needed before any mapping exercise can begin. The fact that a risk has a legal consequence does not make it a legal risk. The risk itself has to be legal. So, for example, the occurrence of an earthquake is not in itself a legal risk, but if your company has premises in a country prone to earthquakes, there will be risks the company can potentially face that would undoubtedly generate legal consequences (e.g., frustrated contracts, liability to pay rent on empty premises, etc.). But if local laws require the company to take certain precautionary measures to deal with earthquakes – with sanctions for non-compliance – then failure to adhere to the laws properly would be a legal risk. Legal risk mapping should therefore capture only the risks of non-compliance with a law or legal obligations. This distinction is important in a legal risk mapping exercise to ensure the process is consistent and coherent.

Why Do It?

A company that does not know the legal risks its operations face is taking a chance; and even if the risks don't materialize, the consequences to investors, shareholders, insurers, creditors and major contractors of not knowing those risks could be costly. It is imperative to know the legal risks a company faces in its activities. The aim is to reduce the uncertainty, since the uncertainty itself creates risks.

The benefits the company can get from a legal risk-mapping exercise are various:

- It is a management tool of the company for the business.
- It secures the decision making.
- It promotes consistency in the actions taken by the company.
- It promotes the competitiveness of the company.
- It protects the good reputation of the company.
- It helps to avoid sanctions against the company.
- It will be used to review the company's insurance coverage.

Arguably the most important reason to undertake a legal risk-mapping exercise is to give confidence to the market and the shareholders.

Who Should Do It?

Some of the best-placed people to assess legal risk are, not surprisingly, the company's in-house lawyers. Indeed the in-house legal team, led by the General Counsel, is uniquely qualified for the task. It is, after all, within the role of the in-house counsel to anticipate the risks the company can face.

The in-house lawyer in charge of the legal risk mapping cannot do this alone. Depending on the size of the company, the attorney should rely on the expertise of the other in-house lawyers (labor, health and safety, data protection, compliance, corporate affairs, etc.), and will also have to work with many people in the business to capture

the risk and then to map the probability, consequences and measures that are in place and those that are still needed. The internal audit, tax, risk management, communications, HR, and insurance departments of the company will all need to support the exercise. Finally, don't forget to request the assistance of your panel law firms. They will not only know your business but will also be able to draw on their experience in acting for other clients. Asking your panel law firms to check the risks you have captured is part of the pro bono value added client service you should expect from them, considering the long-term relationship you have built or plan to build with them.

Do not underestimate the magnitude of this exercise – it is a time-consuming, albeit genuinely interesting, task, so it is important to use all available resources. If you have the funds, there are specialized consultants willing to help.

How Should It Be Done?

In Zambia they have a saying that you can only eat an elephant in pieces. Make no mistake this is a big exercise . . . but if you make no exercise, that is a big mistake.

Phase 1: Identifying the Risk

Clearly you can't map the risk of what you have not captured. But the number of potential legal risks is almost infinite and you cannot expect to capture them all. The identification or capture of the risks consists of listing all the actual and potential risks for each category defined. This is a long exercise, and it is where all the lawyers with their related areas of expertise and all the subject matter experts (SMEs) should start their collaboration.

The classification of the legal risks is always somewhat arbitrary, but here are the 15 broad categories of legal risk we propose:

- Contracts
- Crime
- IP
- Health and safety
- Environmental
- Compliance
- Corporate governance
- Company law
- Data protection
- Competition and trade
- Labor
- Media
- Bankruptcy and insolvency
- Insurance
- Products liability

Within each of these categories you need to identify the specific legal risks that your business does, or could, face. There is inevitably a crossover between the categories and, for example, breaches of some compliance and health and safety regulations can result in criminal consequences.

Phase 2: Assessing the Risks

The two main measures that should be taken into account in the exercise of the assessment of risks are the *likelihood* of the risk (or its frequency) and the *impact* the occurrence of this risk can have on the company.

But the assessment of the risk can also be more comprehensive, depending on the size of the company, for example, breaking down the categories by country and/or service line. You may want to establish whether the risk has already been faced by the company.

Of course, the more precise the assessment is, the longer it will take to achieve the exercise, but the more conclusive the exercise will be for the company.

At the end of the exercise, it is imperative to capture all significant risks the company can face – that is, all the risks likely to occur and that would have a significant impact on the company.

Phase 3: Drafting the Scenarios

For each significant risk identified at the end of the assessment phase you should draft a scenario. This helps identify and illustrate the circumstances in which the risk can materialize. Ignore the risks that, when you look at probability and consequence, are de minimis.

This phase is key for the significant risks because it will be a good opportunity for the in-house attorney to "explain" the risk to the business, and will help the attorney to identify and advise on the proper measures to mitigate this risk.

Phase 4: Identifying the Measures to Be Taken to Control the Risks

Measures to mitigate can be as numerous as the risks can be. The most obvious measures include updating/drafting policies, renegotiating insurance coverage, adding new clauses to a contract, issuing alerts, providing training, and effecting changes in business practices. You need help here – the likes of internal audit, risk management, health and safety and human resources departments are all needed to step up and help identify the measures relevant to their fields and to help implement them. The focus should be to identify measures required to deal with significant risks.

Measures are generally of two types:

1. they either help to prevent the risk before it materializes, or
2. they mitigate the consequences of the risk and the seriousness of the impact on the company once the risk materializes.

There are four ways to deal with a risk that has been identified:

1. Eliminate the risk.
2. Transfer the risk (transfer to another party).
3. Reduce the risk (reduce its severity).
4. Keep the risk (if the measures to eliminate/transfer/reduce the risk are not worth taking or are not cost effective).

Phase 5: Presenting to the Business

Lawyers think in words, accountants think in numbers, but businesses and businesspeople think in pictures – so using a graph is probably the best way to present your legal risk-mapping results.

The challenge here is to present something complex in a clear and simple manner. Three colors are usually used for the graph: green for the low risks, orange for the medium risks, and red for the severe risks.

The horizontal axis of the graph will be the impact on the company. It can range from "insignificant" to "disastrous," with those in between being "limited," "significant," and "critical."

The vertical axis of the graph will be the likelihood for the risk to materialize. It can range from "unlikely" to "frequent," with those in between being "rare," "moderate," and "occasional."

And, of course, don't forget to present your scenarios at the meeting to promote better understanding of the risks.

What Do You Do When It Is Finished?

It takes, on average, 18 to 24 months for a large company to complete a legal risk-mapping exercise, except that a risk-mapping exercise should never be considered as completed. By its very nature, the exercise needs to be updated and refined every year.

Consider other benefits that could result from the mapping exercise. For example, can the final risk map be used to review the company's insurance coverage – are there some risks that are low but could be covered by insurance?

Legal risk mapping is not a goal but a means of achieving improved practices and lower risks. This can be achieved only by getting the support of the business and the engagement of those involved.

Conclusion?

Napoleon Bonaparte said, "Being defeated is forgivable, being surprised is unpardonable." He sums up rather nicely the very essence of legal risk mapping. ■

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A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

THE NEW YORK BAR FOUNDATION

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

My firm has long represented Edward Entrepreneur (Eddie).

Eddie calls one day and tells me that he and Paul Partner (Paul) want to set up a hedge fund. Eddie and Paul tell me that they do not want to incur the expense of multiple lawyers to draw up the agreements, and because you are the preeminent lawyer in the field, they want you to draft them all. Are there any problems with this request? If so, can I fix them and how?

During the representation, Eddie asks my firm to set up Hedge Fund GP, in which Eddie and Paul are equal partners. My firm draws up the papers for Hedge Fund GP to become the general partner of an onshore fund that my firm has organized called Hedge Fund Partners. Because of my firm's long relationship with Eddie, I saw no need to send Eddie an engagement letter for this work, and I chose not to run a conflict check. (1) What are the consequences of the failure to run a conflict check or to send an engagement letter under these circumstances; and (2) what should the engagement letter have said?

Lastly, during the course of my firm's representation of Eddie and Paul, I participated in numerous confidential communications with each of them pertaining to their joint venture. To whom does the attorney-client privilege for those communications belong? Eddie has asked me to keep certain confidential information which he has disclosed to me secret from Paul. Is this a problem? What if the information relates to work that I performed for Eddie concerning his other business ventures?

Sincerely,

I. Needa Lawyer

Dear I. Needa Lawyer:

Joint Representation of Multiple Clients

The joint representation of Eddie and Paul implicates Rule 1.7 (Conflict of interest: current clients) of the New York Rules of Professional Conduct (NYRPC). Under Rule 1.7(a)(1), a lawyer shall not represent multiple clients if the clients have "differing interests." Rule 1.0(f) broadly defines "differing interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." The main purpose of this rule is to prevent a lawyer from taking on a new client or new matter that may require the lawyer to take certain steps or positions on behalf of one client that could be materially adverse to the interests of another client, unless the lawyer can satisfy all the terms of Rule 1.7(b). *See* Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 240 (2012 ed.) (Simon's NYRPC).

Rule 1.7(b) permits a representation despite a concurrent conflict under Rule 1.7(a) if (1) the lawyer "reasonably believes" that the he or she can provide "competent and diligent" representation to each affected client, (2) the representation is not prohibited by law, (3) "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal," and (4) "each affected client gives informed consent, confirmed in writing."

The first issue that must be considered is whether the joint representation of Eddie and Paul involves "differing interests" under Rule 1.7(a)(1). Even though the creation of their partnership and the hedge fund is a common goal shared by both Eddie and Paul, and even though the common representation involves a transactional matter, not litigation, it is possible that your clients may have potentially different interests now or in the future.

In view of the fact that you appear to have a potential conflict within the meaning of Rule 1.7(a)(1), the analysis shifts to whether it is consentable under Rule 1.7(b)(1). In other words, do you reasonably believe that you can provide "competent and diligent representation" to both clients, particularly in light of your firm's long-standing relationship with Eddie? The answer is fact specific and will depend on the circumstances. Rule 1.7, Comment 28. As counsel, you must determine whether your loyalty to Eddie, as a result of the firm's prior relationship, will impair your competence and diligence on behalf of the new client Paul, and, vice versa, whether your loyalty to Paul as a new client might impair your competence and diligence on behalf of Eddie. For example, do you have confidential information in your possession from the firm's prior representations of Eddie that would in any way adversely affect your independent professional judgment in representing Paul? Should you determine, at any point, that your continuing duty of confidentiality to Eddie would prevent you from providing competent and diligent representation to Paul, then the conflict is non-consentable and you would be required to withdraw from the common representation.

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

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

If you "reasonably believe" that you can provide competent and diligent representation to both Eddie and Paul, the common representation would fall within the category of a consentable conflict. Comment 28 of Rule 1.7 gives an illustration that provides guidance here. It states that while a lawyer may not represent multiple parties in a negotiation if their interests are fundamentally antagonistic to one another, common representation is permissible where the clients are generally aligned in interest, even though there may be some difference in interest among them such as when the lawyer is helping to organize a business in which two or more clients are entrepreneurs. *See also* Rule 1.7, Comment 29 and N.Y.C. Bar Ass'n, Comm. on Prof. and Jud. Ethics Op. No. 2001-2 (stating that "[i]n a transaction where common interests predominate over issues in dispute, the possibility of an adverse effect on the exercise of the lawyer's independent professional judgment is significantly mitigated" and opining that a lawyer may represent multiple parties in a single *transaction* where interests of represented clients are generally aligned or not directly adverse, with disclosure and informed consent, so long as the "disinterested lawyer" test is satisfied).

Your joint representation of Eddie and Paul appears to be a consentable conflict; as long as an actual conflict has not yet arisen between them, you may be able to rectify the situation and avoid future difficulties if you immediately take steps to obtain the "informed consent" of both clients, confirmed in writing. Obviously, the best practice here would have been to get informed consent before the joint representation began, or within a reasonable time thereafter. That ship has sailed, but you cannot ignore the problem. You must act to obtain informed consent and a waiver of any conflicts as between these clients at this time before the representation proceeds any further.

To obtain the "informed consent" of Eddie and Paul under Rule 1.7(b)(4), means that you must explain the implications of the common representation, which should include a discussion about the advantages and risks involved, the effect on the attorney-client privilege, and the material and reasonably foreseeable ways that the conflict could affect the interests of each client. *See* Rule 1.7, Comment 18. As part of the discussion, you should advise the affected clients that in the event a dispute were to arise between themselves, there would be no expectation of privacy as to any privileged communications they had with you in connection with this matter. *See* Restatement (Third) of the Governing Lawyers § 75. Further, you should address how you and the affected clients would proceed in the event that an actual conflict arose between them or in the event either client changed his mind and revoked consent. Absent the informed consent of each affected client in such circumstances, you may be forced to withdraw from representing all affected clients pursuant to Rule 1.9(a) (Duties to Former Clients) and Rule 1.7(a)(1).

Significantly, the rules do not require that the informed consent and/or conflict waiver be signed by the client; they simply require that the informed consent be *confirmed* in writing. Rule 1.0(e) provides an attorney with a choice of three methods to memorialize the informed consent: (i) the lawyer may obtain a writing from the client confirming that the client has given consent; (ii) the lawyer may promptly transmit a writing to the client memorializing the client's oral consent; or (iii) the lawyer may obtain a statement by the client made on the record of any proceeding before a tribunal. Under Rule 1.0(x), an electronic transmission constitutes a writing.

It is possible that you have already discussed the risks and advantages of this common representation with both clients and have advised Paul of your prior representation of Eddie. If that is the case, we suggest that you immediately confirm those conversations and the clients' agreement to waive any conflicts in writing. If you have not had any such discussions, we recommend that you do so now, and that you confirm the discussions contemporaneously in writing and obtain the appropriate conflict waivers. You may consider using the following or similar language to confirm the informed consent and conflict waivers of the affected clients in writing:

> Mr. Edward Entrepreneur and Mr. Paul Partner:
>
> As you know, our Firm has in the past represented and currently represents Mr. Entrepreneur, in connection with matters unrelated to your venture to set up Hedge Fund GP and Hedge Fund Partners (the "Hedge Fund Venture"). As we have indicated to you, your interests may currently and in the future be adverse for purposes of the ethics rules by which lawyers are bound, and pursuant to those rules we would be unable to represent you in connection with the Hedge Fund Venture unless you both consent to this representation.
>
> Pursuant to my discussions with you both, Mr. Partner has consented to the Firm's representation of him and Mr. Entrepreneur in connection with your partnership and Hedge Fund Venture even though we have represented Mr. Entrepreneur in the past and may continue to represent him in the future. While we will act in a manner which we believe to be in your best interests, we have advised you that you should consider consulting separate counsel in connection with the Hedge Fund Venture as your interests may be better served by independent counsel.
>
> You both acknowledge and agree that: (1) you have been informed of the potential conflicts of interest that may arise in our joint representation of Mr. Entrepreneur and Mr. Partner generally, and in connection with your partnership and Hedge Fund Venture specifically, and we have advised you that retaining separate counsel may better represent your interests; (2) you waive those potential conflicts; (3) we will continue to represent Mr. Entrepreneur in connection with matters unrelated to the partnership and Hedge Fund Venture;

(4) if your respective interests come into conflict with each other, we may continue as counsel to Mr. Entrepreneur; and (5) any confidential information that either of you provides to the firm in connection with this representation will be shared with the other client and may not be protected by the attorney-client privilege, as against the other, and that disclosure of such information may be compelled in any future litigation between you.

The Failure to Issue an Engagement Letter or Run a Conflict Check

The failure to issue an engagement letter or run a conflict check is a potentially serious problem. Both the NYRPC and the joint rules of the Appellate Division require that lawyers have written engagement letters and fee agreements with clients. Part 1215 of the joint Appellate Division rules (Part 1215), which became effective on March 2, 2002, provides that

- an engagement letter is required for any client who first became a client after March 2, 2002;
- an engagement letter must explain the scope of the legal services to be provided, the fees and expenses to be charged, billing practices to be followed, and the right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator;
- the letter must be issued to the client before the commencement of the representation, or within a reasonable time thereafter;
- the letter is not required where the expected fee is less than $3,000 or where the attorney's services are of the "same general kind" as services previously rendered to and paid for by the client;
- the letter *is* required, even for existing clients, "[w]here there is a significant change in the scope of representation" (e.g., an existing corporate client became a litigation client, etc.), or "the fee to be charged" (e.g., fees based on hourly rates to a fixed fee, etc.); and
- a written retainer agreement will suffice if the agreement addresses the required matters.

Although as originally enacted it did not create an ethical obligation, that changed in April 2009 when New York adopted the Rules of Professional Conduct and a lawyer's obligation to issue an engagement letter became a matter of professional responsibility. *See* Rule 1.5(b).

Under these rules, you were required to issue an engagement or retainer letter to Eddie and Paul. As to the consequences for non-compliance with these rules, Part 1215 is silent as to what penalty, if any, should be assessed. *Seth Rubenstein, P.C. v. Ganea*, 41 A.D.3d 54, 61 (2d Dep't 2007). In practice, however, a lawyer's failure to abide by this rule has resulted in dismissal of fee collection claims based on a breach of contract theory, but courts have usually allowed recovery on a quantum meruit or account stated basis (*see id.*; *Miller v. Nadler*, 60 A.D.3d 499, 500 (1st Dep't 2009) (allowing recovery of legal fees under theories of account stated and quantum meruit, despite plaintiff's failure to comply with the rules on retainer agreements); *Egnotovich v. Katten Muchin Zavis & Roseman LLP*, 55 A.D.3d 462, 464 (1st Dep't 2008); *see also Constantine Cannon LLP v. Parnes*, 2010 N.Y. Slip Op. 31956U, at *17 (Sup. Ct., N.Y. Co. July 22, 2010) (holding that an attorney's "failure to comply with 22 NYCRR § 1215.1 is not, in and of itself, a basis for disgorgement" or a bar to an attorney's recovery for services properly rendered to the client)).

As the court in *Seth Rubenstein, P.C.*, explained, attorneys have "every incentive" to comply with Part 1215 and are at a "marked disadvantage" if they fail to do so, because absent a letter of engagement or written retainer agreement, attorneys will have greater difficulty "meeting the burden of proving the terms of the retainer and establishing that the terms were fair, understood, and agreed upon." *Id.* at 64. Absent a clearly written engagement or retainer agreement, there is no "guarantee . . . that the fact finder will determine the reasonable value of services under *quantum meruit* to be equal to the compensation that would have been earned" under a clearly written agreement. *Id.* Additionally, under Rule 1.5(b) of the NYRPC, a lawyer who fails to issue an engagement letter has committed an ethical violation that can be the subject of disciplinary action and may also jeopardize the right to collect a fee.

Your failure to run a conflict check also raises ethical issues. Rule 1.7(a) (addressed above) and Rule 1.10(e) of the NYRPC are implicated here. Rule 1.10(e) provides:

> A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:
>
> (1) the firm agrees to represent a new client;
>
> (2) the firm agrees to represent an existing client in a new matter; . . . .

Id. This rule requires law firms to make a written record of each new engagement "promptly" (i.e., at or near the time of the new engagement), because otherwise a conflicts check made between the time the new engagement commences and the time the engagement is recorded may miss a conflict with the new matter. Simon's NYRPC at 496. Moreover, the rule requires the law firm to implement and maintain a system for checking for conflicts of interest for each proposed engagement each time the firm agrees to represent a new client or agrees to represent an existing client in a new matter. *See* Rule 1.10(e), Comment 9.

Under Rule 1.10(f), a substantial failure to keep adequate records or to implement a conflict check under Rule 1.10(e) may subject the law firm as well as the attorney to professional discipline regardless of whether an improper conflict occurs. *See also* Rule 1.10(g) ("Where a violation of paragraph (e) by a law firm is a substantial factor in

causing a violation of paragraph (a) by a lawyer, the law firm as well as the individual lawyer, shall be responsible for the violation of paragraph (a)."). Therefore, if the phrase "no harm, no foul" was ever applicable with respect to checking for conflicts of interests, it is no longer true today under the new rules. *See* Simon's NYRPC at 510.

You seem to have violated Rule 1.10(e) on three separate grounds. First, from the facts provided, it does not appear that you made a written or electronic record of the new engagement, which would allow the members of your firm to check whether any of the firm's former, current or prospective clients have any conflict with Eddie or Paul either presently or going forward. Second, although you have taken on a new client under Rule 1.10(e)(1) with Paul, you have not run a conflict check to determine whether (1) the firm is currently opposed to Paul in any matter, (2) Paul is opposed to any of the firm's former clients in a substantially related matter; and (3) Paul will be a co-plaintiff or co-defendant in any contemplated or ongoing litigations with any of the firm's current or former clients. As discussed below, this will present serious consequences for you and potentially for the firm under the imputation rules of Rule 1.10(a) if it is ultimately determined that Paul has conflicting interests with either a former or current client of the firm. Third, notwithstanding the firm's long relationship with Eddie, Rule 1.10(e)(2) requires that whenever an existing client brings a new matter to the firm, that new matter needs to be checked for conflicts against every pending and past matter in the firm's database. These checks are essential because, absent the proper conflict check, you and your firm will be unable to determine whether the firm has a conflict under, *inter alia*, Rules 1.7(a) and 1.9(a)–(b) (involving duties to former clients), or whether any conflict arising under Rule 1.7(a) is non-consentable under Rule 1.7(b)(1)–(3). Moreover, absent the proper conflict check, your firm would lack the information necessary to obtain "informed consent" to the conflict from each affected client under Rule 1.7(b)(1) and (4).

While we have not seen any authority analyzing the penalties for a violation of Rule 1.10(e), one can infer that the penalties applied to lawyers who have failed to detect a conflict and have continued to represent conflicting interests under Rule 1.7(a) without having obtained the appropriate conflict waiver would also be applicable here. The most common consequence likely to be encountered is disqualification of the lawyer and firm from representing any of the affected clients. *See Alcantara v. Mendez*, 303 A.D.2d 337, 338 (2d Dep't 2003) (disqualifying attorney from continuing to represent any plaintiffs in the action). In addition, the attorney's ethical violation may jeopardize the firm's ability to recover its fees. An illustrative case is *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012), where the Ninth Circuit recently held that a law firm which represented multiple clients with conflicting interests, but which neglected to obtain a conflict waiver from them, was deprived of all compensation for the representation, notwithstanding that the firm achieved a $49 million recovery for its clients, and notwithstanding that the law firm's ethical breach appeared to have caused no damage to any of the clients. *Id.* at 655, 658 (applying federal law; reasoning that the "representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees"); *see also Silbiger v. Prudence Bonds Corp.*, 180 F.2d 917, 920 (2d Cir. 1950) (the usual consequence where an attorney represents opposed interests "has been that he is debarred from receiving any fee from either [client], no matter how successful his labors"); *Quinn v. Walsh*, 18 A.D.3d 638 (2d Dep't 2005) (denying an attorney legal fees for services rendered during his conflicted representation of plaintiffs, in violation of DR 5-105(a) (now, Rule 1.7)). Other risks you may face for failing to detect and disclose a conflicting representation include liability for breach of your fiduciary duty to the client (*see Schlissel v. Subramanian*, 25 Misc. 3d 1219(A), 2009 N.Y. Misc. LEXIS 2954, at *24–25 (Sup. Ct., Kings Co. 2009); *Macnish-Lenox, LLC v. Simpson*, 17 Misc. 3d 1118(A), 2007 N.Y. Misc. LEXIS 7138, at *21–23 (Sup Ct., Kings Co. 2007)) and/or a potential complaint to the Grievance Committee and public censure (*see In re Drysdale*, 27 A.D.3d 196, 199 (2d Dep't 2006) (attorney censured for professional misconduct for engaging in a pattern of impermissible conflicts of interest)).

Accordingly, you would be well-advised to run the necessary conflict checks for the new matter and new client immediately and deal with the consequences of its results, rather than ignore the conflict check process and face even more dire consequences in the future.

There Is No Expectation of Confidentiality Between Joint Clients

In response to your question concerning the attorney-client privilege for communications in a common representation, the prevailing rule is that, while those confidential communications are generally protected from disclosure to third parties, as between jointly represented clients, no privilege attaches. In other words, if a litigation were to ensue between Eddie and Paul arising from the partnership and hedge fund venture, there would be no privilege as between Eddie and Paul and neither should have any expectation of privacy. *See Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 137 (1996) ("where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients").

Moreover, if one client asks the lawyer not to disclose information to the other client relevant to the joint representation, this is generally inappropriate because the lawyer has an

equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interest and also has the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4; *see also* Rule 1.7, Comment 31. Therefore, the lawyer will be required to withdraw if one client insists that information material to the joint representation should be kept secret from the other. Rule 1.7, Comment 31 ("as part of the process of obtaining each client's informed consent, the lawyer should advise each client that . . . the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other"). In certain limited circumstances, the lawyer may proceed with the representation if the affected clients have agreed, after being properly informed, that the lawyer will keep certain information confidential even as among the jointly represented clients. *Id*. In other words, the lawyer must obtain the other client's informed consent before doing so.

Based on the foregoing, Eddie's request that you keep certain information secret from Paul does present a problem and may require you to withdraw from the representation if the information is material to the partnership and hedge fund venture. However, if the confidential information relates solely to Eddie's other business ventures and does not adversely affect your representation of Paul and Eddie in connection with the partnership and hedge fund venture, you may be able to oblige Eddie's request. *See id*. ("lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the two clients and agree to keep that information confidential with the informed consent of both clients"). However, you must inform Paul of the circumstances without divulging Eddie's confidential information, and confirm his consent in writing. Lacking Paul's informed consent, you would have to withdraw from the common representation. For the future, this is one of the areas that you should address in your engagement letter when representing multiple clients (*see supra*) and for which you should obtain the appropriate waivers.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq., and
Maryann C. Stallone, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I represent Wishful Thinking Development (WTD). In 2007, WTD took out a multi-million dollar mortgage on a piece of commercial real property which it owns in midtown Manhattan.

After approximately four years, WTD ceased paying its mortgage and the lender instituted a foreclosure action by filing a summons and complaint in Manhattan Supreme Court in early 2012.

The complaint was personally served upon Inover Hishead (IH), the principal of WTD, at his office in downtown Manhattan on February 1, 2012. On the morning of February 13, IH called to inform me that he was previously served with the complaint, and I advised him that we needed to respond to the complaint within 20 days, which would require a response by February 21, 2012. The complaint contained 10 separate causes of action against WTD, which consisted of nearly 200 paragraphs of allegations. Because of the complexity of these allegations, I consulted with IH and we decided that it would be appropriate to request a 30-day extension of time from the lender's counsel so that we could respond to the foreclosure complaint. In addition, I needed an extension of time as well because last fall I was scheduled to begin a weeklong trial in federal court in California on February 16.

Later that day, I telephoned opposing counsel and advised him that I was just retained to represent WTD and requested a 30-day extension to respond to the complaint both because of the time required to address the complex nature of the lender's allegations in the complaint as well as my upcoming trial on the West Coast. The lender's counsel informed me that his client wanted to aggressively pursue this action and foreclose on the property immediately. In short, I was informed by my adversary that the lender wanted a "take no prisoners" approach in the case and was instructed by his client not to grant any requests to extend deadlines or courtesies to me or my client. Although I explained to opposing counsel that an extension of time is a basic courtesy and would not prejudice the lender, he responded that his client was "sick and tired of lawyers being nice to each other" and told me that my request for an extension was denied. He further informed me that if I did not answer or move to dismiss the complaint by February 21, 2012, then he would immediately file a motion for a default judgment against WTD.

Isn't my adversary's conduct a violation of the Rules of Professional Responsibility and the Standards of Civility? Are there ethical considerations that have to be addressed? Does opposing counsel's conduct warrant or require a report to the Disciplinary Committee?

Sincerely,
Concerned Counsel

judgment regardless which CPLR 3211 ground you've moved under.

Joinder of issue isn't a prerequisite for a court to treat a motion to dismiss as a motion for summary judgment.[14] Thus, a court may convert a pre-answer motion to dismiss into a motion for summary judgment; it may grant summary judgment before joinder of issue.[15]

Issue must be joined, however, before a party moves for summary judgment.[16] (The *Legal Writer* will discuss summary-judgment motions in the next issue.) If a party moves for summary judgment before issue is joined, the court may treat the motion as a motion to dismiss and then convert it to a summary-judgment motion.[17]

The court may also convert an untimely motion to dismiss to a motion for summary judgment.

If a party moves to dismiss under CPLR 3211 and another party cross-moves for summary judgment, the court shouldn't "consider [the summary-judgment motion] unless it is premised on grounds related to the motion to dismiss."[18]

Once the court treats the motion as a summary-judgment motion, the court's judgment is a judgment on the merits.[19] The judgment has res judicata effect.

Converting a motion to dismiss to a motion for summary judgment is "drastic."[20] The court must give the parties notice that it's treating the motion to dismiss as a motion for summary judgment. When the court has determined that it's treating the motion as a motion for summary judgment, the court will inform the parties by mail or any other method the court chooses to ensure that the parties have been notified. The court might give the parties a specific date to submit any additional evidence or additional argument. The parties may then submit additional proof or a supplemental brief for the court to consider.

The court, however, need not give notice to the parties that it's converting the motion to a summary judgment motion[21] when the motion presents only questions of law.[22] Also, the court need not give notice to the parties that it's converting the motion to a summary-judgment motion when the parties requested that the court convert the motion to a summary-judgment motion.[23] Further, the court need not give notice to the parties when the parties have "'charted the course' for summary judgment by fully revealing their proof on the issues presented"[24] — providing evidence in the motion to dismiss (and opposition papers) in the form of affidavits and documentary proof.[25]

Immediate Hearing Under CPLR 3211(c)

A court may order an immediate trial on an issue of fact raised in a CPLR 3211 motion "when appropriate for the expeditious disposition of the controversy."[26] The court's power is "broad, but is exercised when the immediate trial has some potential for ending the litigation."[27] It's appropriate for the court, for example, to order a trial on a CPLR 3211(a)(8) motion for lack of jurisdiction. It would be a waste of judicial resources to "preserve a case and put it through pretrial processing only [for the court] to dismiss it for want of jurisdiction later."[28] A trial would also be appropriate on a CPLR 3211(b) motion to strike a defense if doing so has the potential to end the case on the merits. What governs a court's discretion to order an immediate trial is "this case-ending prospect, though of course not its certainty."[29]

The immediacy of a trial will depend on a judge's calendar and other court rules and considerations.

If the court orders an immediate hearing or trial, it may also allow some limited disclosure on the issue the court will decide at trial.[30]

Will the trial be a bench trial or a jury trial? If the claim would have been tried by a jury and a court's granting the motion will put an end to the case, the issue in dispute "must be tried by jury if either party requests it."[31] If a court's granting a motion will not prevent a party from starting a new action for the same relief, the issue must be resolved by a judge, not a jury, "even though the main claim itself, were its merits reached, would be."[32] A traverse hearing is an example. Even if the court finds that service was improper, the plaintiff may begin another case seeking the same relief.

The court may convert a motion to dismiss to a motion for summary judgment regardless which CPLR 3211 ground you've moved under.

Affidavits, Exhibits, and Briefs

Unlike a summary-judgment motion, nothing compels a party to submit an affidavit in support of a motion to dismiss. CPLR 3211(c) permits a party to submit any evidence that a court would consider on a summary-judgment motion. To support a motion to dismiss under CPLR 3211(a)(1) through (a)(11), you as the moving party have the burden of coming forward with evidence. You can do this by attaching an affidavit. If you're also attaching documentary evidence, explain the documents and lay a proper foundation for them in the affidavit(s). In the affidavit(s), refer to all the evidence you attach to your motion.

The affidavit must comply with CPLR 2101. Among other things, it must contain a caption. It must have the affiant's signature with the affiant's

Using an attorney's affirmation to argue law isn't the preferred practice. Lawyers shouldn't swear to the truth of their legal arguments.

printed name under the signature. Consult CPLR 2106 if you're submitting an affirmation from an attorney, physician, osteopath, or dentist.

The contents of the affidavit must be based on the affiant's personal knowledge. The affiant must have firsthand knowledge of the information contained in the affidavit. The affiant cannot speak of facts that are based on hearsay. Affiants must also state in their affidavits that they have personal knowledge of the information contained in the affidavit.

You may submit a brief, or memorandum of law, in support of your motion to dismiss. Instead of a brief, many practitioners use an attorney's affirmation to discuss issues of law and how the law applies to the facts in the case. Using an attorney's affirmation to argue law isn't the preferred practice, however. Lawyers shouldn't swear to the truth of their legal arguments.

As a practitioner, be careful what you include in your affirmation. Many of the facts that attorneys include in their affirmation aren't based on personal knowledge. You'll need an affidavit from an individual with personal knowledge who can attest to the facts you need to support your motion.

Affirmations, affidavits, and exhibits are considered motion papers. Briefs or memorandums of law aren't. Thus, affirmations, affidavits, and exhibits are included in the record on appeal, whereas briefs and memorandums of law are not.[33]

In the next issue of the *Journal*, the *Legal Writer* will discuss how to draft summary-judgment motions. ■

Gerald Lebovits, a New York City Civil Court judge, teaches part time at Columbia, Fordham, and NYU law schools. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's email address is GLebovits@aol.com.

1. 1 Byer's Civil Motions at § 27:03 (Howard G. Leventhal 2d rev ed. 2006; 2012 Supp.), *available at* http://www.nylp.com/online_pubs/index.html (last visited Aug. 28, 2012).
2. David D. Siegel, New York Practice § 269, at 465 (5th ed. 2011).
3. *Id.* § 269, at 465.
4. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 36:531, at 36-40 (2006; Dec. 2009 Supp.).
5. *Id.* § 36:534, at 36-40.1.
6. Siegel, *supra* note 2, at § 269, at 465.
7. Barr et al., *supra* note 4, § 36:531, at 36-40 (citing *Becker v. Elm Air Conditioning Corp.*, 143 A.D.2d 965, 966, 533 N.Y.S.2d 605, 606 (2d Dep't 1988)).
8. Siegel, *supra* note 2, at § 269, at 466.
9. Barr et al., *supra* note 4, § 36:54, at 36-40.1 (citing *Mojica v. New York City Transit Auth.*, 117 A.D.2d 722, 723–24, 498 N.Y.S.2d 448, 449 (2d Dep't 1986)).
10. Byer's Civil Motions, *supra* note 1, at § 27:03.
11. Siegel, *supra* note 2, at § 269, at 466.
12. *Id.* § 269, at 466 (citing *Riland v. Todman & Co.*, 56 A.D.2d 350, 352, 393 N.Y.S.2d 4, 5 (1st Dep't 1977); *Butler v. Catinella*, 58 A.D.3d 145, 150, 868 N.Y.S.2d 101, 105 (2d Dep't 2008).
13. Gerald Lebovits, The Legal Writer, *Drafting New York Civil-Litigation Documents: Part XVI — Motions to Dismiss Continued*, 84 N.Y. St. B.J. 64, 64 (June 2012).
14. Siegel, *supra* note 2, at § 270, at 467.
15. Barr et al., *supra* note 4, § 36:680, at 36-48.
16. CPLR 3212.
17. Barr et al., *supra* note 4, § 36:680, at 36-48 (citing *Historic Albany Found. v. Breslin*, 282 A.D.2d 981, 984, 724 N.Y.S.2d 113, 116 (3d Dep't 2001)).
18. *Id.* § 36:680, at 36-48 (citing *Primedia Inc. v. SBI USA LLC*, 43 A.D.3d 685, 686, 841 N.Y.S.2d 528, 529 (1st Dep't 2007)).
19. Siegel, *supra* note 2, at § 270, at 467.
20. *Id.* § 270, at 467.
21. Barr et al., *supra* note 4, at § 36:672, at 36-48 (citing *Wiesen v. New York Univ.*, 304 A.D.2d 459, 460, 758 N.Y.S.2d 51, 52 (1st Dep't 2003) ("There are, however, three exceptions to the notice requirement: (1) where the action in question involves no issue of fact, but only issues of law which are fully acknowledged and argued by the parties; (2) where the parties specifically request the motion be treated as one for summary judgment; and (3) where the parties deliberately lay bare their proof and make it clear they are charting a summary judgment course.").
22. *Id.* § 36:671, at 36-47 (citing *Tops Market, Inc. v. S & R Co. of W. Seneca*, 275 A.D.2d 988, 988, 713 N.Y.S.2d 796, 797 (4th Dep't 2000)).
23. *Id.* § 36:671, at 36-47 (citing *Shah v. Shah*, 215 A.D.2d 287, 290, 626 N.Y.S.2d 786, 789 (1st Dep't 1995)).
24. *Id.* § 36:681, at 36-48 (quoting *Huggins v. Whitney*, 239 A.D.2d 174, 174, 657 N.Y.S.2d 50, 51 (1st Dep't 1997)).
25. *Id.* § 36:671, at 36-47 (citing *Kavoukian v. Kaletta*, 294 A.D.2d 646, 647, 742 N.Y.S.2d 157, 158 (3d Dep't 2002)).
26. CPLR 3211(c); *see* CPLR 2218 ("The court may order that an issue of fact raised on a motion shall be separately tried by the court or a referee. If the issue is triable of right by jury, the court shall give the parties an opportunity to demand a jury trial of such issue. Failure to make such demand within the time limited by the court, or, if no such time is limited, before trial begins, shall be deemed a waiver of the right to trial by jury. An order under this rule shall specify the issue to be tried.").
27. Siegel, *supra* note 2, at § 271, at 468.
28. *Id.* § 271, at 468.
29. *Id.*
30. Barr et al., *supra* note 4, § 36:703, at 36-49.
31. Siegel, *supra* note 2, at § 271, at 468.
32. *Id.* § 271, at 469.
33. Barr et al., *supra* note 4, § 36:591, at 36-43.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: The word *sanction* seems to mean two opposite things. Am I right in thinking that "to sanction something" is to permit it, but that "a sanction" is a penalty?

Answer: Attorney Stan Towne, who sent this question, is correct: *sanction* has two almost opposite meanings, making it one of the "problem words" of the English language. As Attorney Towne noted, the opposite meaning is true both of verbs (his first example) and of nouns (his second example).

The English language contains many problem words. One is *oversight*, which can mean "unintentional error" or "intentional watchful supervision":

> The Brief was filed late due to an oversight by the defendant's attorney.
>
> The Committee has oversight over its subcommittee's proceedings.

The word *effectively* can mean either "well" or "actually":

> The matter was effectively discharged. (well discharged)
>
> The matter was effectively discharged. (discharged, in effect)

The word *presently* can mean either "now" or "soon":

> I said I would join the group presently. (soon)
>
> I am presently unemployed. (jobless)

When people use the word *ultimately* they might mean "at the end" or "in the beginning":

> The two phrases were ultimately cognates. (in the beginning)
> She ultimately got her reward. (at the end)

The small word *may* can indicate either possibility or permission.

> Students may adhere to the new dress code. (It is possible that they will.)
>
> Students may adhere to the new dress code. (It is permissible for them to do so.)

The adjective *moot* may mean "already settled" or "arguable."

> The question is moot. (The question has already been settled.)
>
> The question is moot. (The question must be settled before a decision is possible.)

Two other words, both adjectives, now have two meanings, but because the original meaning is almost ignored, their loss seems inevitable. The adverb *momentarily* once usually meant "for the moment," so it appeared in a sentence like: "He lost his memory momentarily." Now *momentarily* has come to mean, "in a moment": "Your room will be ready momentarily." The adjective *problematic* once meant "questionable," as in, "Which candidate will win is problematic." But *problematic looks* like "a problem," so that it is what is has come to mean.

Then there is this expression, which I recently heard a political analyst make on radio: "The President must be more offensive." Unfortunately, *offensive* has two meanings: the analyst meant "on the offensive," but to many listeners, *offensive* means "disagreeable or causing offense." During a political campaign, this is not a happy choice of language.

Finally, "confusing pairs" are words that ought to be listed. Avoid using these words unless you know that they are not synonyms. All lawyers should know that *affect* and *effect* are not interchangeable, but some lawyers don't. The verb *affect* means "influence." The verb *effect* means "bring about or accomplish." (One can *affect* an *effect* – and that causes the confusion.)

Credible and *credulous* are also confusing. Only human beings can be "credulous," which means "believing" – or "believing too readily" – thus "gullible." Both events and humans can be incredulous, which means "incredible" – "unbelievable." Both words are used negatively more often than affirmatively.

Journalists are likely to err in the use of *forgoing* and *foregoing*, although lawyers recognize that the *e* in "foregoing" indicates "before." The prefix *for* – without the *e* – includes the sense of "exhaustion." You see it in archaic words like *forspent*, and *forswear*, and in current words like *forsake*, *forbid*, and *forgo*.

One more recent mis-match seen in the usage of many people, including well-educated individuals who ought to know better, is the belief that *reticent* means "reluctant" and can be substituted for that adjective. It cannot. Calvin Coolidge was said to be reticent – that is, "characteristically silent or reserved." On the contrary, a *reluctant* witness is either unwilling or hesitant to testify.

The word *enormity* should be reserved for something that is monstrous – excessively outrageous; but *enormous* refers only to size. An evil deed may be an enormity; an elephant is enormous.

Some words are losing distinctions they once had. The tiny word *in* once referred to a stable position: You are now *in* a room, but to get there you had to go *into* the room because *into* included a change of position. Currently, however, the words are being interchanged; *into* has been mostly lost, and only language purists seem to regret that loss.

The difference between *bring* and *take* has also been forgotten. The orientation of the speaker traditionally determined which word to select: The verb *bring* was correct for an item that one brought to the speaker or to his residence when the speaker was there. Thus, *bring* your notes to me or *take* them elsewhere. The distinction paralleled that of *come* and *go*.

Finally, *eager* and *anxious* are now almost always thought of as synonyms, but not in the past. If you were "anxious" to see someone, the implication once was that you felt worried or fearful at the prospect. Using the word "eager" implied the expectation of pleasure. ■

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XIX — Motions to Dismiss Continued

In the last issue, Part XVIII of this series, the *Legal Writer* discussed motions to dismiss, specifically motions made under CPLR 3211(a)(8) through (a)(11). We continue with motions to dismiss.

Plaintiff's Motion to Dismiss a Defense Under CPLR 3211(b)

As the plaintiff, you may move to dismiss the defendant's defense(s) — also called moving to strike a defense — under CPLR 3211(b).[1] You may move to dismiss, or strike, one or more defenses, or all the defenses. Moving under CPLR 3211(b) obviates the need for a plaintiff to wait until trial to challenge a defendant's affirmative defenses.

Under CPLR 3211(b), you may move to dismiss on the ground that a defense "is not stated or has no merit." You may challenge a defense on its face on the basis "that it fails even to verbalize a defense — or go behind a perfectly pleaded defense to test its merit."[2] You may argue that the defendant's defense isn't stated and therefore that it fails as a matter of law. Or you may argue that the defendant's defense has no merit as a matter of fact — no factual basis for the defense. Along with your motion papers, you should submit an affidavit or other evidence to show that the defense has no merit. Once you challenge a defense on a factual basis, the defendant will have the burden in its opposition papers to raise an issue to warrant a trial.

If you attack a defense on its face and argue it isn't stated, a court will assume the truth of the allegations of the defense.[3] A court will presume as true the facts that the defendant pleaded in its answer.[4]

If you attack the merits of a defense, you must present admissible evidence such as affidavits or other extrinsic proof that the defense doesn't apply or is improper. The defendant will have to show facts that support its defense; the defendant will have to show that a factual dispute exists.[5] The court will draw all reasonable inferences in favor of the defendant's defense.[6] The court will give a defendant's answer "the benefit of every reasonable [interpretation]."[7] The assumptions and inferences a court makes on a CPLR 3211(b) motion are similar to how a court disposes of a motion under CPLR 3211(a)(7) for failing to state a cause of action. (For more information on CPLR 3211(a)(7), see Part XVII of this series.)

When you're moving to dismiss a defense under CPLR 3211(b), the court has the power to search the record to dismiss any cause of action.[8] Even though your motion seeks to dismiss a defense in the defendant's answer, the court may examine the complaint and dismiss it if you've failed to state a cause of action.[9] The court may dismiss the complaint even if your adversary didn't cross-move to dismiss your complaint.[10]

Some controversy existed on whether the defense of failing to state a cause of action may be included in an answer as a defense or in a motion to dismiss.[11] The Second Department has now adopted the First Department's standard: Including the defense of failing to state a cause of action in an answer is "surplusage at worst and that it therefore isn't necessary for the plaintiff to move to strike it."[12]

Right to Replead

On a CPLR 3211(b) motion to dismiss a defense for insufficiency, the party whose defense is attacked will likely want a chance to replead if the court grants the motion. If you're opposing a motion under CPLR 3211(b), specifically request in your opposition papers that the court allow you to replead if the court grants the motion. (See Part XVI of this series for information on motions for leave to replead,[13] in which the *Legal Writer* discussed the right to replead when moving under CPLR 3211(a)(7).) The same information applies when you're opposing a motion under CPLR 3211(b).

> A court will presume as true the facts that the defendant pleaded in its answer.

Converting a Motion to Dismiss to a Motion for Summary Judgment Under CPLR 3211(c)

Under CPLR 3211(c), a court may convert a motion to dismiss into a summary-judgment motion. This conversion often occurs when a party moves to dismiss under CPLR 3211(a)(7) for the plaintiff's failure to state a cause of action or when a party moves under CPLR 3211(b) to dismiss a defense. But the court may convert a motion to dismiss to a motion for summary

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