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SERVING THE INTEREST OF JUSTICE

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THE PRACTICE PAGE

RECENT CPLR AMENDMENTS

HON. MARK C. DILLON *

Recent amendments to the CPLR have been passed by the state legislature, some of which were signed into law by Governor Hochul, while others of interest have been vetoed by her.

CPLR 3101(f). New provisions of CPLR 1301(f) became effective December 31, 2021 (L.2021, ch. 832, sec. 2). Previously, the subdivision required that defendant parties provide insurance information upon demand. The new statute is more aggressive, in requiring under subdivision (f)(1) that the contents of insurance agreements be automatically disclosed within 60 days of a party's answer, including primary, excess, and umbrella coverages. The disclosing party must provide copies of the insurance contracts' declarations, conditions, exclusions, and endorsements; contact information for claims adjusters for disclosed insurance contracts; the amount of available coverage per policy; insurance policy applications; and any other law suits and identified attorneys' fees that have reduced the amount of available coverage. CPLR 3101(f)(2) now also requires that the disclosing party update the accuracy and completeness of insurance information within 30 days of any change.

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THE PRACTICE PAGE

RECENT CPLR AMENDMENTS

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CPLR 4549. A newly-created CPLR 4549 became effective December 31, 2021 regarding the admissibility of statements by employees (L.2021 ch. 833, sec. 1). The statute relaxes the admissibility of the statements of an opposing party made in the course of employment, consistent to the rule already in effect in the Federal Rules of Evidence 801(d)(2)(D). Formerly, under state case law, employees not in charge of the business had no implied authority to speak on behalf of the employer and make admissions binding upon themselves. CPLR 4549 alters that rule and nullifies prior contrary case law, by allowing as evidence statements made in the scope of an existing employment relationship, if the statements relate to an activity that the employee was charged to undertake. Thus, if an employee is driving a vehicle in the scope of employment, has an accident, and makes a statement at the scene that inculpates the employee or employer, that statement will now be admissible without the introducer having to prove that the employee was given authority by the employer to speak about the accident.

CPLR 5004. This interest-related statute is amended effective April 30, 2022 (L.2021, ch. 831, sec. 1). The incumbent version of the statute merely set the legal rate of interest at 9%. The amendment creates a carve-out provision, where judgments against a natural person arising out of consumer debt shall instead accrue interest at a rate of 2%. The statute is therefore consumer friendly. The statute applies to two sets of interest calculations. The first is for judgments entered after the statute's effective date. The second is for judgments entered prior to the statute's effective date, to the extent such judgments are unpaid as of April 30, 2022. CPLR 5004(b) defines the "consumer debt" that is within the scope of the new statute.

Governor Hochul vetoed an amendment to CPLR 5003 on December 29, 2021, proposed in Assembly Bill A2199 and Senate Bill S0473. CPLR 5003 directs that interest accrue on judgments upon their entry. Currently, if a court denies a plaintiff's motion for summary judgment and the court's order is later reversed on appeal, no interest accrues during the interim period when summary judgment was erroneously denied by the trial court. The proposed amendment would have changed that, to allow interest to retroactively compute to the entry of the original summary judgment determination. The veto of the bill by the governor leaves CPLR 5003 unchanged from the version that has been in effect since 1962.

On December 31, 2021, Governor Hochul vetoed the enactment of a newly-proposed CPLR 301-a and the amendment of related statutes (A7769, S7253). Had it been enacted, foreign corporations registered to do business in New York would automatically be subject to the general jurisdiction of New York courts under the current version of CPLR 301, thereby nullifying the contrary holding of the Court of Appeals in *Aybar v Aybar*, 37 NY3d 274 [2021]). *Aybar* remains good law. The veto was out of concern that the new legislation would deter corporations from coming to New York to do business.

**Mark C. Dillon is a Justice of the Appellate Division, 2nd Judicial Dept., and adjunct professor of New York Practice at Fordham Law School, and a contributing author to the CPLR Practice Commentaries in McKinney's.*

TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

TIM J. HIGGINS, ESQ., *LEMIRE & HIGGINS, LLC*

Damages in death case not limited to economic loss of survivors.

Hauser v. Fort Hudson Nursing Center, Inc. (Garry, P.J., 12/23/21)

Damages in most death cases in New York are limited to injuries to the decedent *before* death (EPTL 11-3.3(a)) and the pecuniary (economic) losses of surviving family members resulting from the death (EPTL 5-4.3(a)). Here, plaintiff's decedent lived at the defendant's residential health care facility for a few months before he died, after which an action was brought alleging, among other claims, negligence, conscious pain and suffering, wrongful death and violations of Public Health Law §§ 2801-d and 2013-c. Supreme Court (Muller, J., Washington Co.) denied the defendants' motion in limine which sought to preclude any claim for damages to the decedent for his "death", and the Third Department affirmed, finding that "the express language" of PHL § 2801-d makes a nursing home liable to a patient for certain injuries which by definition include "death of a patient". As such, said the Appellate Division, any other interpretation of the law would detract from "the statute's overall goal of deterring nursing homes from depriving patients of their rights".

Rebutting statutory "presumptive consent" to drive vehicle.

Matter of Progressive Specialty Ins. Co. (Colangelo, J., 12/30/21)

After a car-truck accident, Travelers (which insured the truck) disclaimed coverage; contending the driver didn't have permission from his employer (the insured) to use the truck. An injured claimant from the car then brought an uninsured motorist claim against her insurer, Progressive, which objected to the Travelers' disclaimer and brought a proceeding to permanently stay (CPLR 7503) an uninsurance arbitration. Supreme Court (Buchanan, J., Schenectady Co.) granted Progressive's application, finding that the truck driver had his employer's presumptive consent (V&T Law § 388) to operate the vehicle. The Third Department reversed, finding that Travelers had offered the necessary "substantial evidence" rebutting the presumption of consent, including the truck driver's written statement acknowledging that he was permitted to drive the vehicle only on "company time", and evidence that the employer had previously taken specific action to prevent unauthorized use of the vehicle (including removal of a fuel pump fuse to make the truck inoperable).

State's governmental immunity defense fails.

P.R.B. v. State of New York (Colangelo, J., 1/20/22)

The claimant was sexually assaulted in her SUNY Albany dorm room by a recent parolee who had no authority to be in the building, and alleged in her suit that defendants failed to install proper security devices and failed to take security measures needed to prevent non-students from accessing the dorms. The Court of Claims (Hard, J.) denied defendants' motion for summary judgment, finding that the State's non-police negligent acts were undertaken in a proprietary, not governmental, capacity - and thus were not immune from liability. Claimant's security expert found that the claimant's suite door could be set to an unlocked position, which he found improper given that the lobby of the building was not staffed with a person to screen visitors. Focusing on the defendants' actions in the role of landlord, the Third Department agreed with the trial court and affirmed, noting that "the types of safety measures that [landlords] are reasonably required to provide is almost always a question of fact for the jury".

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

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Labor Law § 240(1).

Russo v. Van Dale Properties, LLC (Egan, J.P., 12/23/21)

Plaintiff, a machine equipment operator whose employer operated out of property leased from defendant, was injured when a damaged overhead door suddenly closed on him, after a co-worker manipulated the door with a crowbar. Supreme Court (Cahill, J., Ulster Co.) granted plaintiff's motion for summary judgment on liability under Labor Law § 240(1), which the Third Department affirmed. Although the defendant retained the responsibility to make certain repairs to the property, the leasing employer was permitted to make emergency repairs, it was "undisputed that the door had been so damaged by an accident earlier that day", and there was no question that a safety device should have been used to prevent the door from falling while it was being fixed.

Capuzzi v. Fuller (Aarons, J., 12/23/21)

Supreme Court (Fisher, J., Ulster Co.) denied the defendant property owner's motion for summary judgment, which relied on the exemption in Labor Law §§ 240 and 241(6) for homeowners "who contract for but do not direct or control the work". Plaintiff, injured when he fell some 14 feet while installing floor joists across the span of a concrete foundation, contended that the defendant discussed work orders, materials and architectural drawings and even took part in some of the on-site activities (moved rocks and applied tape to plywood). The Third Department reversed and dismissed the complaint in its entirety, finding it critical that "there was no evidence indicating that defendant directed plaintiff on how to install the floor joists or to climb on them as part of the installation process".

Jury's defense verdict survives post-trial motion and appeal.

Wright v. O'Leary (Egan, Jr., J.P., 1/27/22)

The 16-year old plaintiff was hurt when a John Deere utility vehicle ("Gator") in which he was a passenger – operated by his 14-year old friend – tipped over. The accident happened as the operator turned left; the Gator eventually tipping over on its right side and pinning the plaintiff's ankle underneath it. A jury concluded the teen operator was not negligent and his defendant father was not negligent in allowing him to drive the Gator. Supreme Court (Mott, J., Columbia Co.) denied plaintiff's motion to set the verdict aside, and the Third Department affirmed, noting conflicting versions of the accident in trial testimony from the two teenagers that created a factual dispute that was proper for jury resolution. Two dissenting justices thought otherwise, finding that there was "simply no fair interpretation" of the defendant operator's testimony – that he knew the Gator was not intended as a recreational vehicle, and that he disregarded the manufacturer's safety warnings on speed and seat belt usage – that could have led to the verdict that defendant was not negligent.

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TORTS AND CIVIL PRACTICE:

Selected Cases from the Appellate Division, 3rd Department

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Plaintiffs' actions reinstated.

Bodden v. Holiday Mtn. Fun Park, Inc. (Lynch, J., 12/23/21)

The plaintiff, age 16 on the date of accident, was a first-time skier who paid for a private, 1-hour lesson from the defendant's ski instructor. After the lesson (conducted on a 'bunny hill' slope), the instructor took the plaintiff to an intermediate level trail - on which the plaintiff gained too much speed, lost control and was injured after crashing into a safety fence. Relying on the assumption of risk doctrine, defendant successfully moved for summary judgment, with Supreme Court (Schreibman, J., Sullivan Co.) finding that this type of injury was inherent to skiing "and should have been comprehended even by a novice". The Third Department reversed, concluding there were still factual disputes to be resolved, including whether the plaintiff had expressed reservations whether she was ready to progress to the intermediate trail and whether the instructor had taught the plaintiff how to safely fall if she couldn't remain "in the pizza wedge formation".

Duvernoy v. CNY Fertility, PLLC (Lynch, J.P., 2/17/22)

Plaintiff's medical malpractice action was commenced in April 2015, but 25 months later, no depositions had been taken and plaintiff's BOP and discovery responses remained outstanding. Defendant served plaintiff with a 90-day demand to file a note of issue (CPLR 3216), after which discovery responses were served and plaintiff's counsel proposed dates for inclusion in a scheduling order for the completion of discovery. Defendant did not respond to the proposed scheduling order; and 2+ years later, Supreme Court (Muller, J., Washington Co.) granted the defendant's motion to dismiss the complaint for failure to prosecute. With guidance from the Court of Appeals that CPLR 3216 "is extremely forgiving of litigation delay", the Third Department reversed and reinstated the complaint, noting that a "party that fails to cooperate in completing discovery should not be entitled to rely on CPLR 3216 for relief".

WE HAVE (NOT) TAKEN AN ACTION ON YOUR CASE. WHAT ABOUT THE H-1B CAP EXEMPTION?

DAVID W. MEYERS, ESQ., *MEYERS & MEYERS, LLP*

I added the "not" into the title of this piece. I was sitting at home over the weekend when I received an email from U.S. Citizenship and Immigration Services ("USCIS") indicating that they had taken action on at least one of my cases. At this time of year, that's a good sign for some (but not all) of our clients. That's because USCIS had apparently completed it's annual H-1B lottery registration process (although they've thus far not officially indicated that it's been completed) and I received the email from USCIS titled "We Have Taken an Action on Your Case." Some of my clients were selected in the H-1B lottery, others were not.[1]

[1] As a reminder, there's a quota on the number of available H-1B visas of 65,000 in each government fiscal year, plus an additional annual quota of 20,000 for beneficiaries who have earned a master's or higher degree from a United States institution of higher education. In the last few years, there's been between 201,000 and almost 275,000 registrations for these coveted 85,000 visa numbers.

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WE HAVE (NOT) TAKEN AN ACTION ON YOUR CASE. WHAT ABOUT THE H-1B CAP EXEMPTION?

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For those clients who were not so fortunate to have been selected in the H-1B lottery, some will explore other visa options. For others, the H-1B visa could still actually be an option. That is, some employers are eligible to file what are called "cap-exempt" H-1B nonimmigrant petitions if they are an institution of higher education, a non-profit entity which is "related to" or "affiliated with" an institution of higher education, a non-profit research organization, or a government research organization. Let's delve into this a bit.

There is an exemption from the H-1B cap for certain employees of educational and nonprofit institutions. Specifically, a foreign national will not be subject to the H-1B cap if he or she "is employed (or has received an offer of employment)" at any of the following institutions: (a) an "institution of higher education"; (b) a nonprofit entity related to or affiliated with an institution of higher education; (c) a "nonprofit research organization"; or (d) a "governmental research organization." [2] Although some of the above exemptions may seem obvious (e.g., employees of colleges or universities), there's a lot packed into these four exemptions, some of which have regulatory guidance that allow for some very creative lawyering and business opportunities.

For example, some private employers may petition under this provision if the employee will physically work "at" the institution of higher education or related or affiliated nonprofit and there is "nexus" between the work performed and the normal purpose of the institution of higher education. In this instance, the private employer would be considered a "third party petitioner". According to USCIS's regulatory guidance, a third party petitioner is one who petitions on behalf of an H-1B worker who will work "at" a qualifying institution, but where the alien is or will be employed by the third party petitioner, not the qualifying institution.

To qualify as an affiliated entity under these regulations, the private employer would have to show that it has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the private employer and the institution for purposes of research or education, and a fundamental activity of the private employer is to directly contribute to the research or education mission of the institution of higher education.

The reasoning behind this broadening of the cap exemption appears in USCIS's legacy Adjudicator's Field Manual:

> Congress deemed certain institutions worthy of an H-1B cap exemption because of the direct benefits they provide to the United States. Congressional intent was to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or governmental research organizations. In effect, this statutory measure ensures that qualifying institutions have access to a continuous supply of H-1B workers without numerical limitation.
>
> Congress chose to exempt from the numerical limitations … aliens who are employed 'at' a qualifying institution, which is a broader category than aliens employed 'by' a qualifying institution. This broader category may allow certain aliens who are not employed directly by a qualifying institution to be treated as cap exempt when needed to further the essential purposes of the qualifying institution. [3]

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2 INA §214(g)(5) (citing 20 USC §1001(a)); H-1B Visa Reform Act of 2004, Pub. L. No. 108-447, §425; American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, §103 (Oct. 17, 2000).

3 AFM 31.3(g)(13)(A)(i).

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WE HAVE (NOT) TAKEN AN ACTION ON YOUR CASE. WHAT ABOUT THE H-1B CAP EXEMPTION?

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So, how does this play out in the real world? If a petition is filed by a company that is not one of the four obvious types seemingly eligible for an exemption, but the beneficiary of that petition will spend the majority of his or her work time at a qualifying cap exempt entity (e.g., an exempt non-profit hospital, or a college or university), the H-1B petition may still be exempt from the cap, provided the job duties directly and predominately further the essential purpose, mission, objectives, or functions of the qualifying cap exempt entity. That is, the H-1B petitioner must show a "nexus between the work performed by the H-1B" and the purpose or functioning of the qualifying entity.

Creative lawyering? Maybe. Or perhaps not. Often times employers have relationships with qualifying entities that may already be eligible for the H-1B cap exemption, or with a little tinkering, could be. It just takes a little looking into.

For those that do not, over the next few months, I will continue to explore alternatives to the H-1B visa program. Often times if employers or foreign nationals are willing to think creatively, or take a longer view of a process that may involve multiple steps, a solution can come into a view and goals can be achieved.

BOOK REVIEW – COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (FIFTH EDITION)

STEVEN D. GREENBLATT, *THE LAW OFFICE OF STEVEN D. GREENBLATT, PLLC*

For more than twenty-five years, "Commercial Litigation in New York State Courts" (Thomson Reuters) has been the go-to resource for those seeking guidance as to nearly any aspect of New York State commercial litigation practice. Now, Robert L. Haig, Esq., Editor in Chief of the multi-volume treatise since its inception, has supervised the release of a newly updated Fifth Edition that builds on the widely-praised previous editions with twenty-eight new chapters, and significant revisions to and expansions of much of the previously existing material.

For those unfamiliar with previous editions, the now ten-volume "Commercial Litigation in New York State Courts" consists of 156 individual chapters, each written by a prominent commercial litigator or judge, and each devoted to a particular substantive or procedural aspect of, as the title suggests, commercial litigation in New York State Courts. As in past editions, users will find chapters concerning specific substantive practice areas (such as "Products Liability" by The Hon. James M. Catterson, James D. Herschlein, and Angela R. Vicari of Arnold & Porter Kaye Scholer LLP, and "Broker-Dealer Litigation and Arbitration," by Stephen L. Ratner and David A. Picon of Proskauer Rose LLP), to procedural tutorials for situations commonly encountered during commercial litigation ("Selection of Experts, Expert Disclosure and the Pretrial Exclusion of Expert Testimony," by J. Peter Coll, Jr. and Thomas N. Kidera of Orrick, Herrington & Sutcliffe LLP, and "Removal to Federal Court" by Evan R. Chesler and J. Wesley Earnhardt of Cravath, Swaine & Moore LLP).

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BOOK REVIEW – COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (FIFTH EDITION)

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The basics of commercial litigation are also covered in chapters such as “Jurisdiction,” by Mitchell A. Lowenthal and Boaz S. Morag of Cleary Gottlieb Steen & Hamilton LLP, or “The Complaint,” by Clifford Thau of Vinson & Elkins LLP and Evan S. Fensterstock of Fensterstock, P.C., while several chapters cover broader issues regularly encountered in nearly any litigation scenario, such as “Admissibility Issues” by Sharon L. Nelles and Thomas C. White of Sullivan & Cromwell LLP, or “Litigation Avoidance and Prevention” by Mitchell J. Auslander and Sameer Advani of Willkie Farr & Gallagher LLP, “Ethical Issues in Commercial Cases” by The Hon. Stewart D. Aaron of the United States District Court for the Southern District of New York, and Manvin S. Mayell of Arnold & Porter Kaye Scholer LLP, and “Negotiations” by Michael J. McNamara of Seward & Kissel LLP. There are also a wide variety of practical guides to commercial litigation trial practice that are particularly notable for their clarity, organization, and comprehensiveness (many of these have been contributed by attorneys currently or previously at Proskauer Rose LLP, such as “Trials,” by Steven Obus, “Presentation of the Case in Chief,” by Edwin M. Baum, and “Graphics and Other Demonstrative Evidence,” by Bradley I. Ruskin). New chapters include both procedural and substantive topics not covered in previous editions, such as “Personal Injury” by Gregory Katz and Matthew P. Cueter of Lewis Brisbois Bisgaard & Smith LLP, “Private Equity” by James C. Dugan and Martin L. Seidel of Willkie Farr & Gallagher LLP, “Fiduciary Duty Litigation” by David B. Hennes and Martin J. Crisp of Ropes & Gray LLP, “Admissibility Issues” by Sharon L. Nelles and Thomas C. White of Sullivan & Cromwell LLP, and “Privileges” by Margaret A. Dale of Proskauer Rose LLP. And of particular note, the Fifth Edition includes, for the first time, chapters on such of-the-moment topics as “Diversity and Inclusion” by Ellen V. Holloman of Cadwalader, Wickersham & Taft LLP, “Artificial Intelligence” by The Hon. Katherine B. Forrest of Cravath, Swaine & Moore LLP, and “Career and Practice Development” by John P. Langan and Mitchell J. Katz of Barclay Damon LLP.

Whether fresh out of law school or a seasoned veteran litigator, all attorneys will find a wealth of value in the various chapters of this new edition of the treatise, each of which could serve equally well as either a refresher on the given topic or as an introduction of new material to those unfamiliar with a particular topic. As with past editions, the sections of the Fifth Edition remain helpfully organized for maximum practical benefit. Initial chapters are ordered roughly chronologically in line with how various procedural issues are likely to arise during the course of actual litigation (i.e., chapters on jurisdiction, venue selection, and initial case evaluation are succeeded by those on pleadings, discovery, motion practice, trial and appeals). Attorneys looking for guidance on such a procedural topic can, therefore, easily scan the first part of the table of contents to quickly locate the chapter concerning the particular aspect of litigation procedure in which they are presently involved. Moreover, while scanning the table of contents in that manner, the practitioner will likely also come upon other chapters of the treatise with information pertinent to other aspects of the matter on which he or she is working, or the other useful chapters on practice management or commercial litigation practice more generally. Because the substantive chapters of the treatise cover a wide variety of specific types of cases regularly encountered by commercial litigators, practitioners can also use these volumes to gain understanding of the unique ways in which the previously mentioned procedural aspects of commercial litigation practice play out in specific substantive circumstances. Of course, the treatise also includes a robust index and tables of statutes, rules, and cases, allowing one to quickly locate specific material (be it a topic, a case, or a rule or statute) anywhere in the treatise.

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BOOK REVIEW – COMMERCIAL LITIGATION IN NEW YORK STATE COURTS (FIFTH EDITION)

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The extraordinary composition and content of "Commercial Litigation in New York State Courts" is due in no small part to Mr. Haig, editor in chief of these volumes since the first edition came out in 1995. At present a partner in the New York City office of Kelley Drye & Warren LLP, Mr. Haig has held a variety of positions over the past three decades that have kept him at the center of commercial litigation in New York State. Most prominently, he was selected in 1995 as the co-chair of the Commercial Courts Task Force, the panel established by then-Chief Judge Judith S. Kaye and Chief Administrative Judge E. Leo Milonas to create and develop the Commercial Division of the New York State Supreme Court – now universally recognized as one of the finest systems in the nation, federal or state, in which to seek adjudication of commercial disputes. Among other accolades he has received throughout his distinguished career, Mr. Haig has served as President of the New York County Lawyers Association, and Chair of the New York State Bar Association's Commercial and Federal Litigation Section, Committee on Federal Courts, and Committee on Multi-Disciplinary Practice, and is a member of the American Law Institute and a frequent lecturer, author, and editor.

The Fifth Edition of "Commercial Litigation in New York State Courts" remains, therefore, an unparalleled compendium of both extraordinary breadth and depth that in both substance and pedigree continues to have no equal. The chapters are well written and engaging, and as a whole, it possesses a practical usefulness for litigators of every level of experience. Several years ago, I reviewed the Fourth Edition of "Commercial Litigation in New York State Courts," and my conclusion after spending time with the Fifth Edition is the same: if you were to choose only one treatise for your or your firm's bookshelf to provide practical support for the commercial litigation matters that come through your office – and particularly if you regularly practice before the Commercial Division of the New York Supreme Court – this is the treatise to have.

THE NYS SPOUSAL SUPPORT FORMULA: MATH OR MADNESS?

BARBARA KING, ESQ., *TULLY RINCKEY PLLC*

As many couples going through divorce or separation in New York are quickly learning, a few years back, the legislature decided that creating a mathematical formula for calculating spousal support (also known as spousal maintenance) was a good idea. For years, New York has had a formula for calculating child support, so why not create one for spousal maintenance?

Well, good idea or not, relegating the reallocation of a couple's combined income to a simple calculation has begun to be the easy way out for attorneys and the courts. (Domestic Relations Law Section 236[B][6][c], [d]. Let's face it; math doesn't lie. But that does not mean that the results are always fair. Just because, at the time of a separation or divorce, one party makes more than the other does not mean that paying maintenance—because the formula says so—is a reasonable outcome.

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THE NYS SPOUSAL SUPPORT FORMULA: MATH OR MADNESS?

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For example, a childless couple married for 16 years where the Wife makes 92,000 and the Husband makes 42,000 would result in the formula requiring the Wife to pay the Husband approximately $10,712 a year for between 4.8 and 6.4 years. And that may make sense in that scenario, barring any issues over a party being underemployed or similar factors that could influence a court to deviate from the math. Aside from the formula's impact on the sum to be paid, there is a scale for duration. For a couple married between 0-15 years, the scale requires support be paid for a minimum of 15% and a maximum of 30% of the length of the marriage. And the scale goes up. For marriages lasting between 15-20 years, the duration is a minimum of 30% to a maximum of 40%; for marriages of 20 years or more, the duration is 35% to 50% of the length of the marriage.

But math and duration scales aside, the Appellate Division for the Third Department recently, in a case called Hughes v. Hughes, (2021 WL 6066467, 2021 N.Y. Slip Op. 07322 3d Dept., 2021) circled back to the original and underlying reason for maintenance, acknowledging that just because a statutory calculation results in an amount of support to be paid, doesn't mean it should be paid.

In the Hughes case, while the formula resulted in a calculation that would have required the wife to pay the husband support, the Court, rather than simply applying the math and entering an award, declined to order any spousal support. Why? Because the Court noted that statutory formulas, while all well and good, should not cause them to ignore the longstanding and unchanged maintenance precept—that spousal support is meant to be rehabilitative in nature; it is meant to provide relief to a lower-income spouse where a marriage is of long duration; a spouse has been out of the workforce for a number of years; and has sacrificed their career to make non-economic contributions to the marriage.

The Court noted that Mr. and Mrs. Hughes, married less than 5 years, were in proportionately the same income positions as they were when they got married at the time of their divorce. While Mrs. Hughes had a higher income (approx. $102,000 vs. Husband's $41,300), the Court also noted that Mr. Hughes had the ability to earn more and had in fact turned down opportunities to further his career and education. These factors led the Court to conclude that the Husband demonstrated no career sacrifices during the marriage nor did he contribute to the Wife's career and job success. This, coupled with the Wife's obligation to pay off her student loans, led the Appellate Court to affirm the trial court's denial of spousal support to the Husband despite the statutory formula demonstrating that an award would result.

The takeaway from this very insightful case is that, despite what the math says, the result should not be madness. The law remains driven by logical and reasonable factors and should not be relegated solely to calculations. To obtain a favorable result, attorneys need to work with their clients to determine all the underlying facts of their case that could argue for deviations from the statutory formula.

For well over two decades, Barbara has been representing parents, spouses and other parties from Long Island to the Capital Region, as well as clients nationally and internationally, in a wide range of family and matrimonial matters. She can be reached at info@tullylegal.com or at (518) 556-2294.

"TRUTH IN VACCINATION" BILL SEEKS TO IMPROVE STATE RESPONSE TO FALSE VACCINATION RECORDS

ZACHARIAH ZALLO, ESQ., *TULLY RINCKEY PLLC*

On December 22, 2021, Governor Kathy Hochul signed a package of legislation focused on improving New York's response to the continued threat of the COVID-19 pandemic. While much of the legislation was targeted at getting New Yorkers vaccinated, one of the most crucial aspects of the bill makes the falsification of COVID-19 vaccination records a crime (NY Penal Law §170.05).

With the reports of record sales for fake vaccine cards among many high-profile athletes, medical professionals, and NYPD officers, it is no surprise that authorities would hurry to address this ever-growing crisis. However, as these crimes have continued to spread around the state, many New Yorkers are curious as to how this new legislation will help businesses and the general public stay safe amid the growing number of COVID cases across the state due to the Omicron variant.

So what punishments are being leveraged against those who do choose to misrepresent their vaccination history?

Effective immediately, the forgery or falsification of any COVID-19 vaccination cards is now considered a class A misdemeanor. For the sake of the forgery statute, a COVID vaccination card is considered to be a written instrument, which is a crime punishable by up to 1 year in jail or potentially 3 years of probation. Even if you were not the one to physically make or tamper with the card, carrying a written instrument that you know contains false information and presenting it in public can still make you liable for Criminal Possession of a Forged Instrument. Things only begin to compound if you choose to present it to a government agency or an employer database so you can get back to work or obtain an Excelsior Pass. If this situation were to occur, you will have also committed Falsifying of Business Records and Offering a False Instrument for Filing.

However, this bill does not just cover physical cards, as it is also now considered a class E felony to tamper with any computer materials relating to your vaccination status (NY Penal Law §156.25). While the bill doesn't specifically spell out what is considered tampering or not, the governor's office released a statement summarizing that any "intentional entering, alteration or destruction of 'computer material' regarding COVID-19 vaccine provisions" would be examples that could be grounds for a case. I expect that there could be some nuanced issues regarding the definition of computer material in future vaccine fraud cases. Regardless, class E felonies can be punished with up to four years in prison, so authorities are hoping that this new bill will serve as a strong deterrent to prevent people from lying or tampering with their vaccination status.

What effects will this have moving forward?

While New York has already begun to crack down on those who have been selling or carrying these fake vaccination cards with this bill having been passed, I expect many of these cases to be more open and shut as New York looks to put its foot down on the recent increase in fake vaccine cards. No matter what your stance is on the vaccine, however, it is important to know that if you purchase or alter any of your vaccine information, you may very well end up being prosecuted to the full extent of these new laws. Even outside of the potential jail time, the consequences of a felony conviction can be detrimental to your personal and professional life.

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"TRUTH IN VACCINATION" BILL SEEKS TO IMPROVE STATE RESPONSE TO FALSE VACCINATION RECORDS

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If you do find yourself in this situation, it is important that you respectfully remain silent and ask to consult with experienced legal counsel immediately. Don't think you'll be able to talk yourself out of it alone. With your personal and professional life at stake, it's important to give yourself every advantage should you end up in this position.

A native of Syracuse, Zachariah has worked as a criminal defense lawyer focusing mainly on DWI defense from the misdemeanor to the felony level. No matter the task, Zachariah focuses on bringing the highest quality of legal analysis and preparation in his legal work. He can be reached at (315) 492-4700 or at info@tullylegal.com.

AREA LAW FIRM ANNOUNCES NEW OFFICE:

E. Stewart Jones Hacker Murphy LLP is pleased to announce the official opening of its new Albany office at 41 State Street, Suite 604-05, Albany, NY 12207.

Partner and Co-Founder of the firm, E. Stewart Jones, stated, "We are grateful for the opportunity to be a part of the downtown Albany business community and look forward to making our legal services more easily available to a larger geographical area."

The firm of E. Steward Jones Hacker Murphy LLP was founded in 1898 and provides expert legal services in Personal Injury, Criminal Defense, Commercial Litigation, Property Tax Disputes and Eminent Domain.

The 19-attorney law firm has additional offices located in Troy, Saratoga and Schenectady.

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LEMERY GREISLER LLC PROMOTES MEGHAN M. BREEN TO MEMBER

Saratoga Springs, NY – Lemery Greisler LLC, a leading Capital Region business law firm, has announced the promotion of Meghan M. Breen to Member.

Meghan Breen focuses her practice in the areas of bankruptcy, creditors' rights, and commercial litigation. In the area of bankruptcy, Ms. Breen represents creditors, trustees and business debtors in Chapter 11, 13 and 7 cases with respect to a full range of issues, including stay relief, Code § 363 sales, and other related disputes or adversary proceedings. In non-bankruptcy matters, Ms. Breen represents lending institutions and private lenders in creating commercial loan workout solutions, including restructuring and forbearance, and in state court litigation including foreclosure, replevin, and actions on notes and guarantees.

Ms. Breen is pleased to include certain nonprofit companies as her clients.

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LEMERY GREISLER LLC PROMOTES MEGHAN M. BREEN TO MEMBER

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Prior to joining Lemery Greisler, Ms. Breen previously practiced with a law firm in New York City where she represented creditors, equity holders, and creditors' committees in Chapter 11 restructurings. Ms. Breen has been with Lemery Greisler for eight years.

Ms. Breen is admitted to practice in all of New York's State and Federal Courts and is a member of the New York State Bar Association. Ms. Breen currently serves as the Vice President of the Capital Region Bankruptcy Bar Association and previously co-chaired its nationally recognized annual bankruptcy conference.

Contact Meghan M. Breen via email at mbreen@lemerygreisler.com.

About Lemery Greisler LLC
Lemery Greisler LLC is a business law firm with offices in Saratoga Springs and Albany. The firm is dedicated to providing insightful and experience-based legal advice to help businesses succeed in themarketplace. For more information on Lemery Greisler, please call 518.581.8800 or visit www.lemerygreisler.com.

JUSTICE CROWELL JOINS AREA LAW FIRM

E. Stewart Jones Hacker Murphy LLP is pleased to announce that the Hon. Ann C. Crowell, JSC (retired) is joining the firm as Of Counsel. She will concentrate on alternative dispute resolutions, including mediations and arbitration in personal injury, medical malpractice and commercial disputes.

Justice Crowell was elected to the Saratoga County Supreme Court bench in 2011, the first woman to be elected to the Supreme Court in the Fourth Judicial District of New York State. First as a Principal Law Clerk and then as a Justice, she has decades of experience in assisting attorneys and their clients in successfully negotiating settlements in a multitude of cases. She first began mediating cases as a Certified Community Mediator in 1997. Justice Crowell recently completed the "Mediating the Litigated Case" course at Pepperdine University's Straus Institute for Dispute Resolution and the Commercial Mediation and Advanced Commercial Mediation courses sponsored by the New York State Bar Association. She is also a designated neutral for the United States District Court for the Northern District of New York's ADR program.

E. Stewart Jones Hacker Murphy LLP has offices in Troy, Schenectady, Saratoga Springs and Albany.

CONTACT:
Hon. Ann Crowell (ret.)
acrowell@joneshacker.com
518-791-3384 (cell)

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