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CPLR UPDATE 2022

FACULTY

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Suffolk County Bar Association, New York

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Patrick M. Connors is the Albert and Angela Farone Distinguished Professor in New York Civil Practice at Albany Law School where he has taught New York Practice and Legal Ethics since 2000. Commencing with the January 2013 supplement, Professor Connors became the author for the treatise Siegel, New York Practice. The publication's sixth edition, "David D. Siegel & Patrick M. Connors, New York Practice (6th ed. 2018)," was released in March, 2018. The treatise has been cited in thousands of reported decisions and has been called "The Bible" for litigation in New York State courts.

He received his B.A. degree from Georgetown University and his J.D. degree from St. John's University School of Law, where he was an editor of the Law Review and research assistant to Professor David D. Siegel. Upon graduation from St. John's in 1988, Professor Connors served as a personal law clerk to Judge Richard D. Simons of the New York Court of Appeals until 1991. From 1991 until May of 2000 he was an associate and then member of the litigation department at Hancock & Estabrook, LLP, in Syracuse, New York.

Professor Connors is also the author of the McKinney's Practice Commentaries for CPLR Article 22, Stay, Motions, Orders and Mandates, Article 23, Subpoenas, Oaths and Affirmations, Article 30, Remedies and Pleading, and Article 31, Disclosure. He also authored the Practice Commentaries for the former New York Rules of Professional Conduct and several articles in the Surrogate's Court Procedure Act. He is currently an author of the New York Practice column and the annual Court of Appeals Roundup on New York Civil Practice, which are published in the New York Law Journal. From 1992 through 2003, he was a Reporter for the Committee on New York Pattern Jury Instructions ("PJI"), the panel of New York State Supreme Court Justices that drafts and oversees the frequent revisions of the standard jury charges in civil cases. His publications have been cited in hundreds of reported cases.

He was a member of the New York State Bar Association's Committee on Professional Ethics from 1996 through 2016. He served on the New York State Attorney Grievance Committee for the Fifth Judicial District from 1997 until 2000. He was the Reporter for the New York State Bar Association's Special Committee on the Code of Judicial Conduct, which published a report recommending substantial amendments to New York's Code of Judicial Conduct. He was also the Reporter for the New York State Bar Association's Task Force on Non-lawyer Ownership of Law Firms. He is a member of the Office of Court Administration's Advisory Committee on Civil Practice and served as a member of the New York State Bar Association's CPLR Committee from 2003 through 2007.

Professor Connors is a frequent lecturer at continuing legal education seminars on recent developments in New York Practice, professional ethics and legal malpractice. He has also served as an expert witness and consultant on issues pertaining to attorney ethics, legal malpractice, and civil procedure.

CPLR UPDATE 2022

CONTINUING LEGAL EDUCATION

SUFFOLK ACADEMY OF LAW

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Much of the material in this outline is treated in greater detail in Siegel & Connors, New York Practice and the most current supplement. The treatise can be obtained at Thomson Reuters online store: https://store.legal.thomsonreuters.com/law-products/Practice-Materials/New-York-Practice-6th-Practitioner-Treatise-Series/p/106154332

I. General Municipal Law Section 50-e. Notice of claim.

First Department Reconsiders Its Position and Holds That General Municipal Law § 50-e Does Not Require That Defendant Employees of Municipal Entity Be Named in Notice of Claim

There was a conflict in the appellate division regarding whether employees of a municipal entity who are named as defendants in actions against their municipal employers must also be named in the notice of claim. *See* Siegel & Connors, New York Practice § 32. In *Wiggins v. City of New York*, 201 A.D.3d 22 (1st Dep't 2021), the First Department reconsidered its own prior precedents, the decisions in the three other departments addressing the issue, and the statutory language, and joined the other departments in holding that "[GML] § 50–e (2) does not mandate the naming of individual municipal employees in a notice of claim."

The Court of Appeals has not yet addressed this issue.

II. Uniform Rules for the Supreme Court and County Court

Uniform Rules for Supreme and County Courts Amended to Add 29 Provisions from Uniform Rules of Commercial Division

On December 29, 2020, the Chief Administrative Judge signed Administrative Order 270/20, which became effective February 1, 2021. The order incorporated 29 provisions similar to those in the Rules of Practice for the Commercial Division ("Commercial Division Rules"), *see* 22 N.Y.C.R.R. § 202.70, into the Uniform Rules. *See* 22 N.Y.C.R.R. § 202. The rules were amended again through Administrative Order AO/141/22, which became effective on July 1, 2022. *See* AO/141a/22 (subsequent administrative order effective July 27, 2022 issued to correct typographical

errors in AO/141/22 pertaining to Uniform Rule 202.16, which governs in matrimonial actions).

The revised Uniform Rules address many important aspects of civil practice, including motions in general, and summary judgment motions in particular, *see, e.g.*, 22 N.Y.C.R.R. §§ 202.8-a, 202.8-b (imposing a maximum length on papers on motions and cross-motions), 202.8-g (prescribing a procedure for submitting a statement of material facts), and procedures for moving by order to show cause. *See* 22 N.Y.C.R.R. § 202.20-d.

One of the more controversial additions to the Uniform Rules imposes a bookmarking requirement for each electronically-submitted memorandum of law, affidavit, and affirmation exceeding 4,500 words. 22 N.Y.C.R.R. § 202.5(a)(2). That may be a difficult rule to negotiate for those who do not have technological support in their law office. *See* Patrick M. Connors, Revised Uniform Rules Amendments Effective July 1, 2022, 268 N.Y.L.J., no. 11, July 18, 2022, at p. 3, col. 1 (examining one of the more controversial and important revised rules, Uniform Rule 202.8-g, titled "Motions for Summary Judgment; Statements of Material Facts" and relevant caselaw); Patrick M. Connors, Riffing on Rules: The Recent Amendments to the Uniform Rules, N.Y.L.J., July 19, 2021, at 3 (discussing status of revised rules and early caselaw applying them).

Several provisions in the revised rules address appearances at conferences before the court, including preliminary conferences. A new subparagraph (f) to section 202.1 now provides:

> Counsel who appear before the court must be familiar with the case with regard to which they appear and be fully prepared and authorized to discuss and resolve the issues which are scheduled to be the subject of the appearance. Failure to comply with this rule may be treated as a default for purposes of Rule 202.27 and/or may be treated as a failure to appear for purposes of Rule 130.2.1.

This new provision would certainly govern a preliminary conference required under section 202.12 of the Uniform Rules. *See* Siegel & Connors, New York Practice § 77D. It is somewhat duplicative of section 202.12(b), which already required attorneys appearing at preliminary conferences to be "thoroughly familiar with the action and authorized to act on behalf of the

party." The use of per diem lawyers to cover such conferences is a common practice in many parts of the State. *See, e.g.*, New York State Bar Association Ethics Opinion 1113 (2017), 2017 WL 527373 (discussing ethical issues arising when lawyer hires per diem lawyer to perform services for clients). Lawyers hiring per diem attorneys need to ensure that they are in compliance with both section 202.1(f) and section 202.12(b) of the Uniform Rules.

For the most current details on the revised Uniform Rules, see Siegel & Connors, New York Practice § 3 (January 2023 Supplement).

The revised Uniform Rules are addressed in several sections of this outline.

III. CPLR 201. Application of article.

Governor Tolls Statute of Limitations Due to COVID-19 Disaster Emergency

Executive Order 202.8 states:

> any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.

Then, in a series of Executive Orders issued approximately every 30 days, the Governor extended the COVID-19 Toll "until November 3, 2020." *See* Executive Order 202.14 (April 7, 2020) (continuing the toll in Executive Order 202.8 "until" May 7, 2020); Executive Order 202.28 (May 7, 2020) (continuing the tolls in Executive Orders 202.8 and 202.14 "until" June 6, 2020); Executive Order 202.38 (June 6, 2020) (continuing the tolls in Executive Orders 202.8, 202.14, and 202.28 "until" July 6, 2020); Executive Order 202.48 (July 6, 2020) (continuing the tolls in Executive Orders 202.8,

202.14, 202.28, and 202.38 "through August 5, 2020"); Executive Order 202.55.1 (August 6, 2020)(continuing the tolls in Executive Orders 202.8, 202.14, 202.28, 202.38, and 202.48 "through September 4, 2020"); Executive Order 202.60 (September 4, 2020)(continuing the tolls in Executive Orders 202.8, 202.14, 202.28, 202.38, 202.48, 202.55, and 202.55.1 "through October 4, 2020"); Executive Order 202.67 (October 4, 2020) (continuing the toll "contained in Executive Orders 202 up to and including … 202.28, …, 202.38, … 202.48, …, 202.55 and 202.55.1, as extended, and Executive Order 202.60" in civil cases "until November 3, 2020"); Executive Order 202.72 (November 3, 2020)(noting that the COVID-19 Toll "is hereby no longer in effect as of November 4, 2020").

Executive Order 202.67 extends the toll in "Executive Order 202.8, as modified and extended in subsequent Executive Orders," but notes that "for any civil case, such suspension is only effective until November 3, 2020, and after such date any such time limit will no longer be tolled." That means the COVID-19 Toll will be 228 days, and parties should begin counting relevant time periods again beginning on November 3, 2020. *See* Siegel & Connors, New York Practice § 33 (January 2023 Supplement).

The COVID-19 Toll tolls any statute of limitations in the CPLR, but also those contained in other "procedural laws of the state." This would include the 2-year statute of limitations for wrongful death actions in the EPTL and the 4-year statute of limitations for breach of contract or warranty with respect to the sale of goods. *See* Siegel & Connors, New York Practice § 35 ("Statutes of Limitations Periods Outside the CPLR").

Second Department Holds That COVID-19 Toll Is, in Fact, a Toll!

"These motions raise the issue of whether a series of executive orders issued by Governor Andrew Cuomo, as a result of the COVID-19 pandemic, constitute a toll or, alternatively, a suspension of filing deadlines applicable to litigation in the New York courts. For the reasons that follow, we conclude that the subject executive orders constitute a toll of such filing deadlines." *Brash v. Richards*, 195 A.D.3d 582 (2d Dep't 2021); *but see Baker v. 40 Wall Street Holdings Corp.*, 2022 WL 70014 (Sup. Ct., Kings County 2022)("Plaintiff's counsel misinterprets the *Brash* decision, which explains that the Governor did not toll all statutes of limitation, but only suspended them, due to the COVID-19 Pandemic, and that he terminated the

suspension on November 3, 2020. Here, the statute of limitations did not run until April 30, 2021, and as such, was not affected in any way by the Governor's Executive Orders. The court is cognizant that several court decisions have interpreted *Brash* as plaintiff's counsel has, but is not bound by them, and does not agree with those interpretations.").

In *Foy v. State*, 2021 WL 866035 at *3 (Ct. Cl. 2021), the Court of Claims ruled that the Governor did, in fact, have the power to toll time periods based on his power in Executive Law section 29-a(1) to "temporarily suspend any statute." Therefore, the court tolled the time to file a claim in the Court of Claims. The Second Department's decision in *Brash*, above, cited to the *Foy* decision in reaching its conclusion that the Governor did have the power to toll statutes of limitation under Executive Order 202.8. The *Foy* court also confirmed that the COVID-19 Toll is 228 days, and parties should begin counting relevant time periods again beginning on November 3, 2020. *See Foy*, 2021 WL 866035, *3.

Plaintiff Misses the Statute of Limitations by 1 Day!

In reckoning a statute of limitations, the day of accrual is excluded and the count begins the next day. *See* Siegel & Connors, New York Practice § 34 With a limitation period measured in years, this makes the event's anniversary date in the last year the last day for the commencement of the action. Applying this rule in *Roy v. Ulysse*, NYLJ, Mar. 31, 2021 at p.17, col.1. (Sup. Ct., Queens County 2021), the court dismissed plaintiff's action, ruling that it was commenced one day after the 3-year statute of limitations expired. Plaintiff's motor vehicle accident occurred on September 23, 2015 and plaintiff filed the summons and complaint on September 24, 2018.

IV. CPLR 202. Cause of action accruing without the state.

Court Discusses Application of Borrowing Statute During COVID-19 Toll

In *Cavalry SPV I, LLC v King*, 72 Misc.3d 980 (N.Y. City Civ. Ct. 2021), plaintiff had purchased a credit card debt from Citibank and sued the defendant for the balance remaining on the credit card. Plaintiff moved for summary judgment under CPLR 3212 and under CPLR 3211(b) to dismiss

all of defendant's affirmative defenses, including a statute of limitations defense. The defendant argued that the action was untimely under CPLR 202, New York's borrowing statute, because South Dakota's 6-year contract statute of limitations should apply. *See* Siegel & Connors, New York Practice § 57. While New York also has a 6-year statute of limitations governing actions for breach of contract, *see* CPLR 213(2), defendant argued that it was in fact longer than South Dakota's statute of limitations because of the COVID-19 Toll. While the South Dakota Supreme Court issued an order at the outset of the COVID-19 emergency, it did not create a uniform tolling period but rather left individual judicial circuits within the State to determine the issue of tolling.

Defendant argued that the statute of limitations expired on July 18, 2020, 6 years after she made her last partial payment on July 18, 2014. The court held, however, that "New York executive orders tolling the statute of limitations are applicable to the instant action, commenced in New York, during the height of the global COVID-19 pandemic." Therefore, the commencement of the action on July 21, 2020, in the middle of the COVID-19 Toll, was deemed timely and the court awarded plaintiff summary judgment.

It is difficult to reconcile the court's holding in *Cavalry SPV I* with the application of CPLR 202.

V. CPLR 205(a). Six Month Extension.

Action Dismissed for Failure to Comply with RPAPL 1304's Prior Notice Requirements Can Invoke CPLR 205(a)'s Six-Month Extension

RPAPL 1304 requires that a plaintiff provide certain notices to the borrower 90 days before commencing a foreclosure action on a "home loan." The "failure to comply with RPAPL 1304 is a defense that may be raised at any time prior to the entry of judgment of foreclosure and sale." *U.S. Bank N.A. v. Krakoff*, 199 A.D.3d 859 (2d Dep't 2021). The Second Department requires strict compliance with the statute. *See, e.g., Bank of America, N.A. v. Kessler*, 202 A.D.3d 10 (2d Dep't 2021)(requiring that the requisite notices under RPAPL 1304 be mailed in an envelope separate from any other notice).

If an action is dismissed for failure to comply with RPAPL 1304, it appears that CPLR 205(a)'s six month extension is available. *See Merino v. Wells Fargo Bank, N.A.*, 195 A.D.3d 489 (1st Dep't 2021)("This Court's June 11, 2019 dismissal of Wells Fargo's prior, 2013 foreclosure action on RPAPL 1304 grounds triggered the six-month grace period provided by CPLR 205(a)"); *CitiMortgage, Inc. v. Moran*, 188 A.D.3d 407 (1st Dep't 2020).

VI. CPLR 208. Infancy, insanity & CPLR 214-g. Certain child sexual abuse cases.

Child Victims Act of 2019 Creates Lengthy Tolling Provision and Revives Claims for Child Sexual Abuse

CPLR 208 was amended effective February 14, 2019 by adding a new subsection (b), with the existing material in CPLR 208 becoming subsection (a). The amendment is part of the Child Victims Act, which contained a package of amendments to several procedural laws designed to protect victims of child sexual abuse. Under the new CPLR 208(b), the infant victim of such sexual abuse, as defined by various statutes noted in the subsection, can commence an action seeking damages up until the date they turn 55. This toll will apply "[n]otwithstanding any provision of law which imposes a period of limitation to the contrary and the provisions of any other law pertaining to the filing of a notice of claim or a notice of intention to file a claim as a condition precedent to commencement of an action or special proceeding." CPLR 208(b).

The Act also created a new CPLR 214-g, entitled "Certain child sexual abuse cases," which revives actions for child sexual abuse that had become time barred and allows suit on them for one year from August 14, 2019. CPLR 214-g also revives actions for child sexual abuse that were previously dismissed before February 14, 2019 "on grounds that such previous action was time barred, and/or for failure of a party to file a notice of claim or a notice of intention to file a claim." Any action that is revived under CPLR 214-g will be entitled to a preference under a new CPLR 3403(a)(7). *See* Siegel & Connors, New York Practice §§ 38 (discussing revival statutes); 373 (discussing preferences).

In response to the COVID-19 pandemic, Governor Andrew M. Cuomo signed Executive Order No. 202.29 on May 8, 2020, extending the window to file claims under the Child Victims Act by 5 months until January 14, 2021. Then, on August 3, 2020, Governor Cuomo signed legislation (S7082/A9036) extending the filing period once again, now giving victims of certain child sexual offenses until August 14, 2021 to file claims, a full year beyond what was originally provided under the Child Victims Act. CPLR 214(g).

The Child Victims Act also amended the General Municipal Law in two important respects so its provisions, which govern tort claims against municipal entities, would not create a barrier to victims of child sexual abuse. *See* Siegel & Connors, New York Practice § 32 (discussing notice of claim requirements). Section 10 of the Court of Claims Act, which governs the time to file claims or to serve a notice of intention to file a claim against the State, was similarly amended to exclude its short time frames from actions against the State by victims of child sexual abuse, as defined therein. *See* Court of Claims Act § 10(10).

A new section 219-d of the Judiciary Law was also enacted to require the chief administrator of the courts to "promulgate rules for the timely adjudication of revived actions brought pursuant to section [214]-g of the civil practice law and rules." The new rules are contained in 22 N.Y.C.R.R. section 202.72.

The procedural aspects of the Child Victims Act are discussed in further detail in Siegel & Connors, New York Practice §§ 38, 54, 373 (January 2023 Supplement).

VII. CPLR 213. Actions to be commenced within six years: where not otherwise provided for; on contract; on sealed instrument; on bond or note, and mortgage upon real property; by state based on misappropriation of public property; based on mistake; by corporation against director, officer or stockholder; based on fraud.

Court of Appeals Addresses Issues of Accrual in Mortgage Foreclosure Actions

In the thousands of mortgage foreclosure actions that have been commenced in New York State courts over the last fifteen years, there have been many disputes concerning whether there was an acceleration of the entire debt due and, if so, whether the foreclosure action was timely commenced. In *Freedom Mortgage Corp. v. Engel*, 37 N.Y.3d 1, 146 N.Y.S.3d 542, 169 N.E.3d 912 (2021), there were four cases before the Court and each one involved the application of the statute of limitations.

The *Freedom Mortgage* Court confirmed that "a cause of action to recover the entire balance of the debt [secured by a mortgage] accrues at the time the loan is accelerated, triggering the six-year statute of limitations to commence a foreclosure action (*see* CPLR 203[a], 213[4] . . .)." *Freedom Mortg. Corp.*, 37 N.Y.3d at 21-22, 146 N.Y.S.3d at 549, 169 N.E.3d at 919. Under New York's longstanding jurisprudence, a valid acceleration can occur upon the filing of a verified foreclosure complaint or through an overt and unequivocal notice of acceleration communicated to the borrower in, for example, a default letter. The *Freedom Mortgage* Court applied these rules in two of the four actions before it on the appeal. *See GMAT Legal Title Trust 2014–1, U.S. Bank National Ass'n v. Wood*, 192 A.D.3d 1285, 1287 (3d Dep't 2021)(holding that letter to borrower providing that if the default was not cured "on or before June 10, 2008, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time" was not an unequivocal notice of acceleration because the letter was "'merely an expression of future intent that fell short of an actual acceleration,' which could 'be changed in the interim'").

In certain instances, such as the two other actions before the Court in *Freedom Mortgage*, banks commenced foreclosure actions, but then voluntarily discontinued them after attempting to work things out with the

borrower. *See* CPLR 3217; Siegel & Connors, New York Practice § 297. When a repayment plan failed, the bank commenced another foreclosure action and the homeowner often argued that the 6-year statute of limitations ran from the acceleration of the debt that occurred upon commencement of the initial foreclosure action. In response, the bank often argued that the voluntary discontinuance of the prior foreclosure action revoked the acceleration, and thereby prevented the running of the 6-year statute of limitations from that event.

The *Freedom Mortgage* Court adopted a uniform rule in these situations in holding "that where the maturity of the debt has been validly accelerated by commencement of a foreclosure action, the noteholder's voluntary withdrawal of that action revokes the election to accelerate, absent the noteholder's contemporaneous statement to the contrary." *Freedom Mortg. Corp.*, 37 N.Y.3d at 19, 146 N.Y.S.3d at 547, 169 N.E.3d at 917.

The Court also addressed other timeliness issues unique to foreclosure actions, and attorneys practicing in this arena should thoroughly review the majority opinion, the concurrence, and the dissent (in part) in *Freedom Mortgage*.

VIII. CPLR 214-i. Certain actions arising out of consumer credit transactions to be commenced within three years.

New CPLR 214-i Provides 3-Year Statute of Limitations in Certain Claims Arising from Consumer Credit Transactions

Effective April 7, 2022, the new CPLR 214–i provides a 3-year statute of limitations for "[c]ertain actions arising out of consumer credit transactions." These claims were previously subject to a 6-year statute of limitations under CPLR 213(2), which now contains an express exception for claims governed by CPLR 214-i. The consumer credit transactions that reap the benefit of the shorter statute of limitations are those "where a purchaser, borrower or debtor is a defendant." CPLR 214–i; *see* CPLR 105(f) (defining "consumer credit transaction" to mean "a transaction wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes").

The new law contains three exceptions: (1) rent overcharge claims that have a 6-year statute of limitations under CPLR 213-a; (2) sales contracts subject to Article 2 of the Uniform Commercial Code, which are governed by the 4-year period in UCC section 2-725; and (3) claims subject to Article 36–B of the General Business Law, which contains various time periods governing the housing merchant implied warranty. *See* General Business Law § 777–a.

CPLR 214–i attempts to prevent extensions of the statute of limitations by providing that "[n]otwithstanding any other provision of law, *when the applicable limitations period expires*, any subsequent payment toward, written or oral affirmation of or other activity on the debt does not revive or extend the limitations period." (emphasis added).

The new statute is discussed in further detail in Siegel & Connors, New York Practice § 35 (January 2023 Supplement).

IX. CPLR 302. Personal jurisdiction by acts of non-domiciliaries.

United States Supreme Court Sustains Jurisdiction Over Ford in Products Liability Actions in States Where It Did Not Design, Manufacture, or Sell the Allegedly Defective Automobile in Question

In *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, _ U.S. _, 141 S.Ct. 1017 (2021), the United States Supreme Court returned to the subject of longarm jurisdiction. The decision involved two state court cases in which Ford contested personal jurisdiction over it in products liability lawsuits arising from accidents involving vehicles it manufactured. In both cases, the accident occurred in the forum state (Montana and Minnesota, respectively), and the victim was a resident of the forum state. Ford conducted substantial business in both states, including advertising, selling, and providing servicing for the particular model that was involved in the action. Nonetheless, Ford argued that jurisdiction was not proper in either of the forum states under the due process clause because the automobiles involved in the crashes were not initially sold in the forum State and were not designed or manufactured there.

The Supreme Court rejected Ford's argument, and that is certainly welcome news to plaintiffs attempting to assert jurisdiction over defendants under

CPLR 302(a)(3), which is likely our longarm statute's busiest thoroughfare. The Court held that "[w]hen a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit." *Ford Motor Co.*, _ U.S. at _, 141 S.Ct. at 1022. The Court held that a forum state can exercise longarm, or "specific," jurisdiction over a defendant corporation if the litigation "arise[s] out of *or relate[s] to* the defendant's contacts within the forum." *Ford Motor Co.*, _ U.S. at _, 141 S.Ct. at 1026 (emphasis in original).

The decision's impact on CPLR 302 is discussed in further detail in Siegel & Connors, New York Practice § 88 (January 2023 Supplement).

X. CPLR 304. Method of commencing action or special proceeding.

Court of Appeals Emphasizes That Under CPLR, Filing Occurs When County Clerk's Office Actually Receives the Relevant Papers

A plaintiff who plans to mail the initiatory papers to the clerk, which is permissible, should remember that commencement doesn't occur until the clerk receives the mail, opens the papers, and files them. Siegel & Connors, New York Practice § 45. In *Matter of Miller v. Annucci*, 37 N.Y.3d 996 (2021), the Court of Appeals demonstrated the point and emphasized that "by its express terms, the CPLR indicates that filing occurs when the clerk's office receives the [relevant papers]. Indeed, 'filing' has long been understood to occur only upon actual receipt by the appropriate court clerk." *See* CPLR 2102(a) ("papers required to be filed shall be filed with the clerk of the court in which the action is triable").

The petitioner in *Matter of Miller*, who was a prison inmate, argued that the Court should follow the "mailbox rule," under which papers would be deemed filed when an inmate presented the document to prison authorities for forwarding to the appropriate court. The Court of Appeals rejected petitioner's argument and essentially concluded that "filing" is not deemed to occur on mere posting of papers. The decision, which is also of significant importance to those litigating beyond prison walls, is discussed in Siegel & Connors, New York Practice §§ 45, 63, 202, 531 (January 2023 Supplement).

Plaintiff Who Served Initiatory Papers, and Then Filed Them, Is Denied a Default Judgment

The first step for commencing an action in a New York State court is for the plaintiff to file the initiatory papers and to then follow the filing with service of those papers. See Siegel & Connors, New York Practice § 63. Yet plaintiffs sometimes reverse the order, and serve the papers before filing, as in *Kegelman v. Town of Otsego*, 202 A.D.3d 82, 161 N.Y.S.3d 436 (3d Dep't 2021). In *Kegelman*, the supreme court denied plaintiff's application for a default judgment because he could not establish proper service of the summons and complaint as required by CPLR 3215(f). *See* Siegel & Connors, New York Practice § 295. The Third Department affirmed, noting that plaintiff had served defendant twice with these papers, but did so before their filing.

Could this defect be cured by an application under CPLR 2001? *See* Siegel & Connors, New York Practice §§ 63, 76B.

XI. Uniform Rule 202.5-bb. Electronic Filing in Supreme Court; Mandatory Program.

There continues to be frequent expansion of e-filing throughout the state. These developments are tracked in Siegel & Connors, New York Practice § 63A, entitled "Commencement of Actions by Electronic Filing ("E-Filing")," a new section added to the Sixth Edition, and in the biannual supplements. Decisions involving procedural issues arising in e-filed actions are also referenced in this section.

In the 61 counties in which some form of e-filing is permitted, *see* Administrative Order, *see* AO/372/21, effective December 22, 2021, the Chief Administrative Judge authorized consensual e-filing of "[a]ll civil matters" that are not subject to mandatory or mandatory in part e-filing.

Unrepresented parties in these actions must file, serve and be served by non-electronic means unless they expressly opt in to participate in NYSCEF. *See* 22 N.Y.C.R.R. § 202.5-b(2) (ii)(discussing exemption for unrepresented litigants in consensual e-filed actions); 22 N.Y.C.R.R. § 202.5-bb(e)(1)

("Exemption of unrepresented litigants" in mandatory e-filed actions); Siegel & Connors, New York Practice § 63A.

In Allegany County, the only county where e-filing is not yet established, represented parties can deliver papers through the newly implemented Electronic Document Delivery System ("EDDS"), or by mail. *See* Siegel & Connors, New York Practice § 77 (January 2023 Supplement). Service of interlocutory papers in these actions must be served "by electronic means or by mail." *See* Siegel & Connors, New York Practice § 202 (discussing service by "electronic means").

AO/372/21, Appendix B, sets out the same rules and conditions for consensual e-filing in matrimonial actions established by the now superseded AO/209A/20.

XII. CPLR 305. Summons; supplemental summons, amendment.

Failure to Sign Summons Does Not Require Dismissal of Action

The requirement that a summons and all other papers served in a New York State court action be signed is contained in Uniform Rule 130-1.1-a. *See* Siegel & Connors, New York Practice §§ 201, 414A. If a paper is not signed, the clerk "shall refuse to accept [it] for filing." 22 N.Y.C.R.R. § 202.5 (d)(1)(iv); *see* Siegel & Connors, New York Practice § 63.

In *Bank of New York Mellon v. Silverberg*, 201 A.D.3d 695, 696, 156 N.Y.S.3d 874, 874 (2d Dep't 2022), the Second Department ruled that supreme court "providently exercised its discretion in denying dismissal of the complaint insofar as asserted against the defendants on the ground that the summons was jurisdictionally defective because it was not signed." The court observed that the summons that was filed complied with the requirements in CPLR 305 and, citing to CPLR 2001, *see* Siegel & Connors, New York Practice § 6, noted that the defendants failed to show any prejudice attributable to the defect, which was promptly cured by the plaintiff.

Court Saves Plaintiff Who Waits Until the Last Day to Commence an Action with a Summons and Notice

The dangers of commencing actions with a summons and CPLR 305(b) notice, especially with the statute of limitations looming, are vividly demonstrated in *Abreu v. Daddona*, 2020 WL 1942344 (Sup. Ct., Nassau County 2020), where the defendant moved to dismiss the action on the ground that plaintiffs' summons with notice did not comply with CPLR 305(b). Defendant argued that the notice was defective because it failed to include the date of the accident, the specific location of the accident, the type of injury sustained, and the amount of the damages sought.

The stakes were high because the summons and notice was e-filed on the last day of the statute of limitations governing several of plaintiffs' claims. As the court acknowledged, the action's survival boiled down to the age-old question: "How much need one include in a 'notice' to be sure it's sufficient?" *Abreu*, 2020 WL 1942344 at * 3. The court ruled that plaintiffs' summons with notice, while "inartful," was adequate and denied the motion to dismiss.

The decision is discussed in further detail in Siegel & Connors, New York Practice § 60 (January 2023 Supplement).

XIII. CPLR 306-b. Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause.

Governor's COVID-19 Disaster Emergency Executive Orders Toll CPLR 306-b's Time Periods

During the COVID-19 Disaster Emergency, the Governor issued Executive Order 202.8, which tolls "any specific time limit for the . . . *service* of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state." (emphasis added); *see* Siegel & Connors, New York Practice § 33 (January 2023 Supplement). Therefore, if the time periods to make service in an action under CPLR 306-b were still running on the date Executive Order 202.8 was issued (March 20, 2020), or at any time during the COVID-19 Toll, they are tolled. *See Chen v. The New York Hotel*

Trades Counsel Health Center, Inc., 2021 WL 2394214 (Sup. Ct., Kings County 2021); *Savianeso v. Aerco Intern., Inc*, 2021 WL 2226412, *2 (Sup. Ct., New York County 2021).

XIV. CPLR 306-d. Additional mailing of notice in an action arising out of a consumer credit transaction

New CPLR 306-d Requires Submission of "Additional Notice Of Lawsuit" To Clerk In Certain Actions Arising Out of a Consumer Credit Transaction

The new CPLR 306-d is one of several 2022 amendments to procedure in actions arising from consumer credit transactions. The statute, which became effective on May 7, 2022, requires that when the plaintiff files proof of service of the summons and complaint in an action arising out of a consumer credit transaction, she must also submit an "Additional Notice of Lawsuit" to the clerk in a stamped, unsealed envelope addressed to the defendant at the address at which defendant was served with process. CPLR 306-d(b).

The contents of this additional notice are included in CPLR 306-d(a) and should be reproduced verbatim by the plaintiff. The additional notice essentially warns the plaintiff about the consequences of the lawsuit, including a default, and provides "[s]ources of information and assistance." CPLR 306-d(a). The face of the envelope must include the clerk's office as its return address. CPLR 306-d(b).

The statute and its additional particulars are discussed in Siegel & Connors, New York Practice §§ 63, 296 (January 2023 Supplement).

XV. CPLR 308. Personal service upon a natural person.

Filing of Proof of Service 3 Days Late under CPLR 308(4) Results in Vacatur of Default Judgment Entered in 2010!

In *First Federal Savings & Loan Association of Charleston v. Tezzi*, 164 A.D.3d 758 (2d Dep't 2018), the Second Department imposed a harsh penalty for what amounted to a three-day delay in filing proof of service

under CPLR 308(4). The plaintiff in *First Federal Savings* obtained a default judgment based on defendant's failure to appear and, more than six years later, the defendant moved to vacate the judgment, arguing that proof of service was not timely filed. The supreme court, sua sponte, deemed the affidavit of service timely filed, nunc pro tunc, and denied the defendant's motion to vacate the default judgment.

On appeal, the Second Department observed that the affidavit of service was not filed within 20 days of the mailing or affixing, as required by CPLR 308(4), and ruled that "service was never completed." Therefore, the court reasoned that defendant could not be in default, reversed supreme court, and granted the motion to vacate the default judgment. The court afforded defendant 30 days to appear, running from service upon her of a copy of its decision and order.

The court acknowledged that the "failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion pursuant to CPLR 2004." While the Second Department agreed with that portion of the supreme court's order deeming the affidavit of service timely filed, sua sponte, it concluded that it was improper to make the relief retroactive to the date plaintiff filed proof of service.

Similarly, in *Miller Greenberg Management Group, LLC v. Couture*, 193 A.D.3d 1273, 147 N.Y.S.3d 218 (3d Dep't 2021), plaintiff's process server completed service by delivery and mail under CPLR 308(2) on November 17, 2017. Plaintiff did not file proof of service until December 11, 2017, more than 20 days after the delivery and mailing. Therefore, the Third Department held that "the filing was untimely and, as such, service of process was never completed." The court ruled that plaintiff's default judgment was a nullity requiring vacatur.

What is the plaintiff to do if proof of service is not timely filed under CPLR 308(2) or (4) and the defendant has not appeared in the action?

These troublesome problems are discussed in further detail in Siegel & Connors, New York Practice §§ 72, 74 (January 2023 Supplement).

XVI. Business Corporation Law § 304. Statutory designation of secretary of state as agent for service of process.

Corporation's Designation of Secretary of State as Agent for Service of Process Does Not Constitute Consent to Personal Jurisdiction in New York

When the defendant is a licensed foreign corporation, it will have designated the secretary of state as its agent for service of process on any claim. Bus. Corp. Law § 304. In Siegel & Connors, New York Practice § 95, we explore the issue of whether such designation constitutes the corporation's consent to personal jurisdiction in New York. The issue has become an important one in light of the Supreme Court's decision in *Daimler*.

In *Aybar v. Aybar*, 37 N.Y.3d 274 (2021), the Court of Appeals affirmed the Second Department's order, ruling that a foreign corporation does not consent to the exercise of general jurisdiction in New York when it registers to do business in New York and thereby designates the secretary of state as its agent for service of process. The Court concluded that a foreign corporation's compliance with the relevant statutory provisions in the Business Corporation Law ("BCL") merely constitutes consent to accept service of process in New York.

In light of the holding in *Aybar*, if personal jurisdiction is challenged by a defendant corporation, the plaintiff will be required to establish some independent jurisdictional basis apart from the method of service, such as general or longarm jurisdiction. The Court noted that the plaintiffs in *Aybar* did not assert longarm jurisdiction under CPLR 302 and abandoned the argument that defendants Ford and Goodyear were "at home" in New York and subject to general jurisdiction under the Supreme Court's decision in Daimler.

The decision and its impact is discussed in Patrick M. Connors, *'Two Feet in New York': Obtaining General Jurisdiction Over the Corporate Defendant*, 266 N.Y.L.J., no. 44, Sept. 1, 2021, at p. 3, col. 1.

Extensive Delays Reported from Secretary of State's Receipt of Process to Its Actual Delivery to Defendants

Service on a corporation through the secretary of state under BCL 306 and 307. *See* Siegel & Connors, New York Practice § 95. CPLR 3012(c) provides that if service of the summons and complaint "is made on the defendant by delivering the summons and complaint to an official of the state authorized to receive service in his behalf …, service of an answer shall be made within thirty days after service is complete." This rule applies most commonly when a domestic or licensed foreign corporation is served through the Secretary of State under BCL 306(b). Service under BCL 306(b) is "complete" when two copies of the initiatory papers and the statutory fee are personally delivered to the Secretary of State, and not when the papers are forwarded to the defendant.

BCL 306(b) states that "[t]he secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such corporation," but we have been informed of some substantial delays. For example, in one action the initiatory papers were served on the Secretary of State on January 28, 2022, but were not sent to the defendant until 75 days later, on April 13, 2022. In another, the initiatory papers were served on the Secretary of State on February 18, 2022, but were not sent to the defendant until 71 days later on April 30, 2022. *See also* Fishman, Letter to the Editor, N.Y.L.J., March 25, 2022 (describing an action against an LLC in which service was made on the secretary of state on December 29, 2021, but papers were not forwarded until 81 days later on March 19, 2022). These deliveries to the corporate defendant can hardly be classified as "prompt[]," and unless the defendant corporation learned about the action in some other way, the time to appear under CPLR 3012(c) would have long expired.

The problem is explored in Siegel & Connors, New York Practice § 95 (January 2023 Supplement).

XVII. CPLR 327. Inconvenient forum

Court of Appeals Rules That Court Can Address a Forum Non Conveniens Issue Prior to Ruling on a Motion to Dismiss Based on Lack of Personal Jurisdiction

A court will normally resolve an objection to personal jurisdiction before deciding a forum non conveniens motion. The resolution of a forum non conveniens issue generally presupposes that the court already has both subject matter and personal jurisdiction. An absence of either would produce a jurisdictional dismissal and render the forum non conveniens question academic. *See Ehrlich–Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 579 (1980)("the doctrine [of forum non conveniens] has no application unless the court has obtained in personam jurisdiction of the parties").

An issue before the Court in *Estate of Kainer v. UBS AG*, 37 N.Y.3d 460 (2021), was whether the courts below erred as a matter of law by granting a motion to dismiss on forum non conveniens grounds while declining to address a motion to dismiss for lack of personal jurisdiction. The lower courts presumed that personal jurisdiction existed over the defendants so that the forum non conveniens motion could be entertained, and then ruled that the action should be dismissed after weighing the relevant forum non conveniens factors. The Court of Appeals examined its prior precedent and declared that it "did not hold in *Ehrlich–Bober* that a court invariably must resolve any outstanding personal jurisdiction issue prior to addressing forum non conveniens." Furthermore, the Court expressly declined to adopt such a rule and concluded that the courts below did not abuse their discretion in ruling on the forum non conveniens issue before addressing the motion to dismiss based on lack of personal jurisdiction. *See also Sinochem Int'l Co. v Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432, 127 S.Ct. 1184, 1192, 167 L.Ed.2d 15, 26 (2007) ("A district court . . . may dispose of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.").

The decision is discussed in further detail in the January 2023 Supplement to Siegel & Connors, New York Practice § 28.

XVIII. CPLR 501. Contractual provisions fixing venue.

CPLR Amended to Render Venue Selection Clauses in Contracts Involving "Consumer Goods" Void

CPLR 501 permits the parties to fix venue by contract and the trend in New York State Courts is to honor these agreements.

The amended CPLR 501 adds a reference to the new CPLR 514, which provides that "[i]n any contract involving the sale, lease or otherwise providing of consumer goods, any portion of the contract or any clause which purports to designate, restrict, or limit the venue in which a claim shall be adjudicated or arbitrated shall be deemed void as against public policy." CPLR 514(2). "Consumer goods" are broadly defined in the statute to "mean goods, wares, paid merchandise or services purchased or paid for by a consumer, the intended use or benefit of which is intended for the personal, family or household purposes of such consumer." CPLR 514(1); *see* Gen. Bus. Law § 399-c(1)(b) (defining "consumer goods" to "mean goods, wares, paid merchandise or services purchased or paid for by a consumer, the intended use or benefit of which is intended for the personal, family or household purposes of such consumer"); Siegel & Connors, New York Practice § 607.

CPLR 514(2) also purports to void any venue selection clause in a contract involving "consumer goods" that requires disputes to be arbitrated. In this regard, if the contract pertains to matters involving "interstate commerce," and many do, it will be governed by the Federal Arbitration Act. *See* Siegel & Connors, New York Practice § 607.

The amended CPLR 501 and the new CPLR 514 became effective on December 3, 2021 and "apply to all actions and arbitration proceedings which have not been commenced prior to such effective date." S.B. 997, 2021-22, Reg. Sess. (2021). If an action on a contract involving "consumer goods" has been commenced prior to the effective date, any venue selection clause in the contract will still govern and, as discussed in the main volume, New York courts tend to give effect to such agreements.

XIX. CPLR 503. Venue based on residence.

Court of Appeals Rules That Venue in the Bronx Is Improper Where "Individually-Owned Business" That Conducted Business There Did Not Have Its "Principal Office" in That County

CPLR 503(d) governs venue in actions in which a party is an "individually-owned business." See Siegel & Connors, New York Practice § 119. The statute states that "an individually-owned business shall be deemed a resident of any county in which it has its principal office, as well as the county in which the partner or individual owner suing or being sued actually resides."

In *Lividini v. Goldstein*, 37 N.Y.3d 1047 (2021), plaintiff commenced a podiatric malpractice action in the Bronx against several defendants arising from treatment she received in Westchester County. Venue was based on the fact that a defendant doctor, who resided in Westchester County, conducted a portion of his "individually-owned business" in the Bronx.

Defendants moved to change venue under CPLR 510(1), *see* Siegel & Connors, New York Practice § 123, arguing that Bronx County was an improper forum under CPLR 503(d) because the doctor's residence and "principal office" were both in Westchester County. In support of the motion, the doctor submitted a "detailed affidavit" describing that he "devoted 3 ½ days each week to patient care in . . . in Westchester County . . . and derived 75% of his income from services provided there."

While he acknowledged that he was also employed at two Bronx locations and provided care for patients there, the Court of Appeals was satisfied that the proof established that he spent substantially less time, and provided care to substantially fewer patients, in the Bronx than in Westchester County. Therefore, the defendant doctor established that his "principal office" was in Westchester County and the Court concluded that the motion to change venue should have been granted.

A key set of documents submitted by the plaintiff, and relied upon by the Appellate Division majority in denying the motion to change venue, were the doctor's medical license registration forms submitted to the New York State Education Department listing a Bronx "business address" for mailing

purposes. The three-judge dissent in *Lividini* placed heavy emphasis on this proof in concluding that the defendants failed to meet their burden of establishing that the defendant doctor's "principal office" under CPLR 503(d) was Westchester County. The majority afforded far less weight to these materials because the defendant was not required to identify any particular county as the location of his "principal office" to licensing authorities.

The courts have avoided factual disputes when interpreting a similar venue provision in CPLR 503(c), which states that a domestic and a licensed foreign corporation "shall be deemed a resident of the county in which its principal office is located." In interpreting the phrase "principal office" in CPLR 503(c), the courts have consistently concluded that the address listed in a domestic corporation's certificate of incorporation filed with the Secretary of State pursuant to BCL § 402(a) controls, "despite its maintenance of an office or facility in another county." *Green v. Duga*, 200 A.D.3d 861, 862, 155 N.Y.S.3d 342, 343 (2d Dep't 2021).

There is a similar judge-made rule that provides that when an authorized foreign corporation is a party, the address listed in its application for authority to do business in New York required under Business Corporation Law ("BCL") § 1304(a)(5) controls. *See Janis v. Janson Supermarkets LLC*, 161 A.D.3d 480, 480, 73 N.Y.S.3d 419, 419 (1st Dep't 2018) (authorized foreign corporation's designation of New York County as its office location in its application for authority to do business "is controlling for venue purposes, even if it does not actually have an office in New York County").

It is interesting to note that neither the application for a certificate of incorporation filed with the Secretary of State by a domestic corporation nor the application for authority to do business in New York filed by an authorized foreign corporation specifically asks for the corporation's "principal office," yet the courts have interpreted it to be such for purposes of determining venue under CPLR 503(c).

In light of the majority's holding in *Lividini*, which stressed that the defendant was not required to identify any particular county as the location of his "principal office" to licensing authorities, the caselaw interpreting CPLR 503(c) to determine the proper venue of a corporation likely needs to be reexamined.

After *Lividini*, a strong argument can be made that the "principal executive office" listed in a BCL § 408 biennial registration statement should be given greater weight in determining the venue of a corporation under CPLR 503(c).

The *Lividini* decision is discussed in further detail in Siegel & Connors, New York Practice § 119 (January 2023 Supplement).

XX. CPLR 1015. Substitution upon death.

Defendant's Death During Mortgage Foreclosure Action Renders Dismissal Under CPLR 3216 Void

The death of a party to an action in effect divests the court of jurisdiction until proper substitution has been made, and that any step taken without the substitution may be deemed void. *See* Siegel & Connors, New York Practice § 184. This rule can sometimes redound to the benefit of an adversary, as it did in *Deutsche Bank National Trust Company v. Smith*, 191 A.D.3d 950 (2d Dep't 2021), a mortgage foreclosure action in which the defendant died after serving an answer. More than four years after the defendant's death, supreme court served the plaintiff with a written demand under CPLR 3216(b)(3) directing it to resume prosecution of the action. *See* Siegel & Connors, New York Practice § 375. The plaintiff failed to comply and the court ordered dismissal of the complaint for neglect to prosecute under CPLR 3216.

On appeal, the plaintiff argued that the defendant's death in effect stayed the action, rendering any orders issued prior to the defendant's substitution under CPLR 1015(a) nullities. The Second Department agreed, ruling that "the defendant's death triggered a stay of all proceedings in the action pending substitution of a legal representative." *Deutsche Bank*, 191 A.D.3d at 951, 143 N.Y.S.3d at 388. Therefore, the appellate court vacated the dismissal order and restored the action to the trial calendar.

XXI. CPLR 2004. Extensions of time generally.

First Department Analyzes Request for Extension to Plead Under CPLR 3012(b), Rather Than CPLR 2004, and Dismisses Action

While CPLR 2004 applies to extensions of all sorts of time periods arising during litigation, CPLR 3012(d) specifically addresses an "[e]xtension of time to appear or plead." In *Fawn Second Avenue LLC v. First American Title Insurance Co.*, 192 A.D.3d 478, 140 N.Y.S.3d 399 (1st Dep't 2021), supreme court denied defendant's motion to dismiss the action under CPLR 3012(b) and granted plaintiffs' motion for an extension of time to serve the complaint under CPLR 2004. The First Department reversed, ruling that "[b]ecause defendant's motion to dismiss the complaint pursuant to CPLR 3012(b) preceded plaintiffs' motion for an extension of time pursuant to CPLR 2004, the case should be analyzed under CPLR 3012(b)." *Fawn*, 192 A.D.3d at 478, 140 N.Y.S.3d at 400. Although the appellate division agreed with supreme court's finding that plaintiffs' delay in serving the complaint was excusable on the basis of law office failure, *see* CPLR 2005; Siegel & Connors, New York Practice §§ 108, 231, it concluded that plaintiffs' motion to extend its answering time, which the court apparently treated under CPLR 3012(d), should have been denied because they failed to establish the merits of their case. The court noted that plaintiffs' motion was only supported by an attorney affirmation and an unverified complaint.

This important issue is discussed in further detail in the January 2023 Supplement to Siegel & Connors, New York Practice § 231.

XXII. CPLR 2101. Form of papers.

Uniform Rules Addressing Bookmarking Requirement and Length and Contents of Motion Papers Amended Effective July 1, 2022

Administrative Order AO/141/22, which became effective on July 1, 2022, slightly amended the bookmarking requirement for each electronically-submitted memorandum of law, affidavit, and affirmation exceeding 4,500 words. The bookmarking requirement in Uniform Rule 202.5(a)(2) now only applies when the paper "was prepared with the use of a computer software program," but that is almost always the case. Furthermore, the rule now

permits the court to relieve the parties of this requirement. Any party that relies on this latter exception should ensure that the court's dispensation from the bookmarking requirement is recorded in writing.

Uniform Rule 202.8-b(a) provides word limitations for various papers such as motions and cross-motions, and also contains limitations on the subject matter of certain documents. "[A]ffidavits, affirmations, briefs and memoranda of law in chief shall be limited to 7.000 words each" and "reply affidavits, affirmations, and memoranda shall be no more than 4,200 words and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief." 22 N.Y.C.R.R. § 202.8-b(a). These requirements are discussed in further detail in Siegel & Connors, New York Practice § 201 (January 2023 Supplement).

See Tremada W. End Ave. LLC v. New York State Div. of Housing & Community, 2021 WL 5180140 (Sup. Ct., New York County 2021)(court refused to consider respondent's answering affirmation because it exceeded word limitations in Uniform Rule 202.8-b(a), and granted the relief sought in the CPLR Article 78 proceeding).

XXIII. CPLR 2104. Stipulations.

First Department Holds That Mere Transmission of Email from Party or Attorney Constitutes a "Subscribed" Writing under CPLR 2104

What happens if a lawyer sends an email containing the terms of a settlement, but her name is not retyped? The First Department, after noting that it had held that to be insufficient under CPLR 2104, has reconsidered its position in *Matter of Philadelphia Insurance Indemnity Company v Kendall*, 197 A.D.3d 75 (1st Dep't 2021), and concluded:

> that this distinction between prepopulated and retyped signatures in emails reflects a needless formality that does not reflect how law is commonly practiced today. It is not the signoff that indicates whether the parties intended to reach a settlement via email, but rather the fact that the email was sent…. We find that if an attorney hits "send" with the intent of relaying a settlement offer or acceptance, and their email

account is identified in some way as their own, then it is unnecessary for them to type their own signature.

In support of its ruling, the court pointed to the broad definition of "electronic signature" in Section 302(a) of New York's Electronic Signatures and Records Act (ESRA). *See* State Technology Law § 302(a); Siegel & Connors, New York Practice § 205 (January 2023 Supplement)(discussing caselaw addressing the validity of electronic signatures). The First Department also addressed concerns about the sometimes casual nature of email communications, observing that emails containing settlement agreements should only be sent after an attorney promptly communicates with the client and explains the settlement to the extent necessary to allow the client to make an informed decision. *See* New York Rules of Professional Conduct, Rules 1.4(a)(iii)(requiring an attorney to "promptly inform the client of…material developments in the matter including settlement …offers"); 1.4(b)(requiring that a lawyer "explain a matter [, such as a settlement offer,] to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). Only after these communications with the client have occurred, and the client has made an informed decision regarding the matter, can a lawyer tender a settlement to an adversary. *See* New York Rules of Professional Conduct, Rule 1.2(a)("A lawyer shall abide by a client's decision whether to settle a matter."). In sum, given an attorney's ethical obligations, settlement communications should never be casual.

Applying these standards to the facts before it, the First Department held that the plaintiff was bound by her attorney's email, which agreed to settle her uninsured motorist's claim for $400,000. The matter was before an arbitrator, who had issued a decision awarding claimant $975,000 and promptly forwarded it to counsel for both parties. Neither received it, however, and they continued to negotiate until the $400,000 settlement was reached 3 days later in an email from claimant's attorney. The attempt to avoid the settlement failed, as the First Department ruled that the email satisfied CPLR 2104.

After *Kendall*, it appears that the First Department does not even require that the name of an attorney or party appear in the body of an email to satisfy CPLR 2104. As long as the party attempting to enforce the settlement can demonstrate that the email containing it was transmitted from an email

account of an attorney or party, that will likely be sufficient even if there is no electronic signature, the name is not retyped, and there is no prepopulated name or address.

The court did acknowledge that issues of authentication may still arise and that email accounts can be hacked. In that scenario, the party resisting the settlement will likely claim the email is a forgery, just as she would do if the settlement was contained in a hard copy document. There may also be arguments about whether an email was inadvertently sent. These issues, which were not present in *Kendall*, are matters for another day.

XXIV. CPLR 2106. Affirmation of truth of statement by attorney, physician, osteopath or dentist.

Courts Rule That CPLR 2106(b) Affirmation Must Comply with Requirements in CPLR 2309(c)

In *U.S. Bank National Ass'n v. Langner*, 168 A.D.3d 1021, 1023, 92 N.Y.S.3d 419, 421 (2d Dep't 2019), the Second Department declared that "an affirmation from a person physically located outside the geographic boundaries of the United States must comply with the additional formalities of CPLR 2309(c), and must, in substance, affirm that the statement is true under the penalties of perjury under the laws of New York (*see* CPLR 2106[b])." As to the affirmation at issue in *Langner*, which was signed by the defendant in Israel, the court noted that "[w]hile the defendant's identity was verified by an authorized official in Israel acting in the capacity of a notary, the affirmation itself failed to indicate that the statements made therein were true under the penalties of perjury." *Langner*, 168 A.D.3d at 1023, 92 N.Y.S.3d at 421. Therefore, the court held, the affirmation lacked probative value and reversed the order granting the defendant's cross-motion that was based on it.

In *Murphy v. Metrikin*, 2021 WL 1753777, at *2 (Sup. Ct., New York County 2021), which involved an affirmation executed in London, the court noted that "CPLR 2106(b) is silent as to whether affirmations authorized by the subdivision nonetheless must be notarized in the same fashion as religious-exception affirmations, as opposed to CPLR 2106(a) affirmations, which have always been accepted without notarization." *See Lazzari v.*

Qualcon Constr., LLC, 162 A.D.3d 440, 441, 78 N.Y.S.3d 126, 128–29 (1st Dep't 2018) ("Contrary to defendants' contention, a certificate of conformity (*see* CPLR 2309[c]) was not required since the physician is licensed to practice in New York and signed the [CPLR 2106(a)] affirmation in New York."). It is worth noting that CPLR 2106(a) is also silent on the point.

Citing the Second Department's pronouncement in *Langner*, however, the *Murphy* court held that "CPLR 2106(b) affirmations must still include the required certificate of conformity, pursuant to which an attorney or public official in the foreign country of signature certifies that the affirmation otherwise conforms to the style of affirmations employed in that country." *Murphy*, 2021 WL 1753777 at *3; *see Eelco Van Den Berg v. Clinton Hall Holdings, LLC*, 2019 WL 2995777, at *4 (Sup. Ct., New York County 2019) (citing to *Langner*, the court held that a CPLR 2106(b) affirmation must also comply with the requirements in CPLR 2309 (c)).

The issue is explored in further detail in Siegel & Connors, New York Practice § 388 (January 2023 Supplement).

XXV. CPLR 2214. Motion papers; service; time.

Significant Amendments to Uniform Rules Affect Several Aspects of Motion Practice

New Provisions in Uniform Rules Addresses Submission of Sur-Reply and Post-Submission Papers and Moving by Order to Show Cause

A new Section 202.8-c, entitled "Sur-Reply and Post-Submission Papers," provides:

> Absent express permission in advance, sur-reply papers, including correspondence, addressing the merits of a motion are not permitted, except that counsel may inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues, but there shall be no additional argument. Materials submitted in violation hereof will not be read or considered. Opposing counsel who receives a copy of materials submitted in violation of this Rule shall not respond in kind.

A new section 202.8-d to the Uniform Rules, entitled "Orders to Show Cause," states that "[m]otions shall be brought on by order to show cause only when there is genuine urgency (e.g. applications for provisional relief), a stay is required or a statute mandates so proceeding. See Section 202.8-e." The reference to section 202.8-e is to another new Uniform Rule provision addressing "Temporary Restraining Orders," which are almost always sought via an order to show cause.

CPLR 2214(d) permits the court to grant an order to show cause "in a proper case." There are three reasons stated in the new 202.8-d for bringing on a motion by order to show cause: (1) genuine urgency, (2) a stay is required, *see, e.g.*, CPLR 2201 ("Stay"), CPLR 5519 ("Stay of enforcement"); Siegel & Connors, New York Practice §§ 255, 535, or (3) a statute mandates that the motion be made by order to show cause. *See, e.g.*, CPLR 5015(a) (motion to vacate a judgment or order); Siegel & Connors, New York Practice §§ 426-33. Traditionally, these have been three major reasons courts have used to determine whether the application presents "a proper case" for the signing of an order to show cause, but there are others. For example, a party might want to ask the court to devise a method of service of the motion papers.

A new Uniform Rule 202.8-f, entitled "Oral Argument," was adopted to address additional aspects for oral argument of a motion.

These new sections are discussed in further detail in Siegel & Connors, New York Practice §§ 246-47 (January 2023 Supplement).

Third Department Rules That Notice of Motion Properly Stated Grounds for Relief Sought in Absence of Prejudice

CPLR 2214(a) requires that the notice of motion specify the relief the movant is seeking and the grounds for the relief. In *Rosenheck v. Schachter*, 194 A.D.3d 1144 (3d Dep't 2021), a divorce action, the wife moved before supreme court for counsel fees related to motions made by the husband before the Court of Appeals. The court granted the wife's motion and, following the husband's failure to pay, the court entered a money judgment representing the total amount awarded to the wife plus sheriff's fees.

The defendant husband argued that the wife's notice of motion was defective because it failed to specify the grounds on which the motion was based and thereby prejudiced him. The Third Department observed that

> there is no requirement that the notice of motion list the statute or regulation that is the basis of the ... motion as long as some grounds are mentioned…[and that] [i]n practice, '[t]he notice of motion specifies the time and place of the hearing as well as the relief requested while the affidavits, affirmations, and memorandum of law state the grounds for the relief" (David D. Siegel & Patrick M. Connors, N.Y. Prac § 246 at 471 [6th ed 2018]).

The Third Department examined the motion papers submitted to supreme court, including its 2018 order finding that the wife was entitled to appellate counsel fees based on a prior agreement between the parties, as well as various correspondence exchanged between the parties' attorneys noting that the wife would be seeking judicial intervention if the counsel fees were not rendered pursuant to the agreement. The court also emphasized that the husband served a timely and detailed reply to the motion with various exhibits, including a copy of the agreement. "Given the clear lack of prejudice or misunderstanding," the Third Department ruled that the court properly awarded the relief sought to the wife despite any alleged defects in the notice of motion.

Second Department Reverses Order Issued Sua Sponte Without a Hearing

The grounds for the motion must also be stated when the court moves on its own initiative by what is often termed the sua sponte motion. In *City of New York v. Quadrozzi*, 189 A.D.3d 1344 (2d Dep't 2020), the supreme court conducted a status conference with the parties in January 2019 and then issued an order, sua sponte, in March of 2019 which directed the defendant to perform certain acts regarding his buildings in Brooklyn. On appeal, the Second Department reversed and ruled that supreme court should not have, sua sponte and without a hearing, imposed an injunction on the defendant and determined issues of fact pertaining to his property. The appellate division noted that "[a] court is generally limited to noticed issues that are the subject of the motion before it," and in *Quadrozzi* there was no motion pending. The court emphasized that plaintiffs did not move for an injunction

or seek a determination on the factual issues that supreme court adjudicated and the court did not hold a hearing on those issues.

Is an appeal appropriate here without motion to vacate? *See* Siegel & Connors, New York Practice § 524.

Appellate Division Decisions Affirm Refusal of Trial Courts to Extend Deadlines for Submission of Opposition Papers on Motions for Summary Judgment

There are many cases in which courts appropriately reject papers on timeliness grounds based on the dilatory party's failure to establish "good cause" under CPLR 2004 and CPLR 2214(c). *See* Siegel & Connors, New York Practice § 246 (January 2023 Supplement). For example, in *Garner v. Rosa Coplon Jewish Home and Infirmary*, 189 A.D.3d 2105, 134 N.Y.S.3d 880 (4th Dep't 2020), a nursing home malpractice action, the plaintiff argued that supreme court improperly granted the defendants' summary judgment motion dismissing the complaint. The court's scheduling order, with which defendants complied in making their motion, expressly required that responding papers were to be served within 30 days of receipt of the moving papers. The defendants' motion papers reiterated that deadline. Plaintiff conceded that the opposition papers were untimely under that time limit, but argued that they were timely under CPLR 2214(b).

In affirming the order dismissing the complaint, the Fourth Department held that the defendants' made a prima facie showing of entitlement to judgment as a matter of law and, additionally, that the plaintiff's untimely submission of opposition papers constituted a failure to raise a triable issue of fact in opposition. The court determined that it was not an abuse of discretion for supreme court to refuse to consider the opposition papers because the plaintiff neither sought leave of court to extend the deadline in the scheduling order nor offered a credible excuse for the delay "other than a vague claim that amounts to law office failure, which the motion court found incredible." *Garner*, 189 A.D.3d at 2105, 134 N.Y.S.3d at 881; *see also Miglionico v. Arbors Homeowners' Association, Inc.*, 184 A.D.3d 818, 124 N.Y.S.3d 235 (2d Dep't 2020). The court similarly rejected the contention that the late response should be considered because it had merit and did not prejudice the adverse party.

The Second Department returned to the subject in *Aneke v. Parks*, 197A.D.3d 601 (2d Dep't 2021), and affirmed supreme court's order granting defendant's motion to strike the plaintiff's opposition papers to their motion for summary judgment dismissing the complaint due to plaintiff's failure to comply with the service requirements in CPLR 2214(b). The appellate division also concluded that supreme court providently exercised its discretion in denying the plaintiff's cross motion pursuant to CPLR 2004 for an extension of time to file the opposition papers because plaintiff failed to show good cause for the delay. *See* Siegel & Connors, New York Practice § 6 (discussing requirements for establishing "good cause" under CPLR 2004). The Second Department went on to note that because the defendants' motion for summary judgment dismissing the complaint was, in effect, unopposed, the appeal from that portion of the order granting summary judgment to defendants "must be dismissed, as no appeal lies from a portion of an order entered on the default of the appealing party." *See* CPLR 5511; Siegel & Connors, New York Practice § 525 (noting that a party who has defaulted is not "aggrieved" within the meaning of CPLR 5511).

In *U.S. Bank National Association v. Sokolof,* 201 A.D.3d 839, 162 N.Y.S.3d 96 (2d Dep't 2022), however, the Second Department ruled that supreme court improvidently exercised its discretion in denying defendant's application for an extension of time to submit opposition papers to a motion. The court noted that "the application was made promptly on the return date of the motion, and was occasioned by the defendant's prior unawareness of the motion, which had been sent to his former counsel, and the need to retain new counsel." In addition, the court concluded that plaintiff was not prejudiced by the short extension.

XXVI. CPLR 2219. Time and form of order.

Second Department Provides Extensive Treatment of CPLR 2219(a)'s Requirements for an Order, In Action Where Judge Repeatedly Refused to Provide One

"A motion is an application for an order," CPLR 2211, and a party can only appeal from an order on a motion, and not from the decision,

opinion, or ruling. *See* Siegel & Connors, New York Practice § 524. Obtaining an appealable order on a motion should be a relatively simple task, but sometimes it can prove exceedingly difficult, as demonstrated in the Second Department's decision in *Charalabidis v. Elnagar*, 188 A.D.3d 44, 132 N.Y.S.3d 129 (2d Dep't 2020), a 3 1/2 year saga in which plaintiffs still do not have an order from which they can take an appeal!

The *Charalabidis* decision, which discusses the requirements of an order under CPLR 2219(a) is discussed in further detail in Siegel & Connors, New York Practice § 250.

XXVII. CPLR 2221. Motion affecting prior order.

Courts Hold That Retention of New Expert Cannot Supply Grounds for a Renewal Motion

In *Bank of America, N.A. v. Mancia-Parone*, 192 A.D.3d 739, 139 N.Y.S.3d 887 (2d Dep't 2021), in support of a renewal motion, defendants relied upon the affidavit of a mortgage fraud and forensic analyst, asserting that it was only after the supreme court's prior order in 2016 that they became aware of the expert's existence. The Second Department reversed the supreme court's order granting defendants renewal motion holding that "[t]he retention of an expert not previously utilized . . . is not a proper basis for renewal." *Mancia-Parone*, 192 A.D.3d at 742, 139 N.Y.S.3d at 888; *see also Feurderer v. Vassar Bros. Med. Ctr.*, 185 A.D.3d 789, 791, 125 N.Y.S.3d 296, 297 (2d Dep't 2020); *Welch Foods, Inc. v. Wilson*, 247 A.D.2d 830, 831, 669 N.Y.S.2d 109, 110 (4th Dep't 1998) ("Nor is the recruitment of a new expert a legitimate basis for renewal.").

Motion Pursuant to CPLR 2221 Is Not Proper Procedural Vehicle to Challenge a Final Judgment

So holds the Third Department in *Cruz v. Cruz*, 186 A.D.3d 1796, 1797, 130 N.Y.S.3d 559, 561 (3d Dep't 2020) ("CPLR 2221 is not an appropriate vehicle to 'challeng[e] a judgment entered after trial.'"). The Second Department reached the same conclusion in *Nationstar Mortgage, LLC v. Coglietta*, 189 A.D.3d 1435, 1437, 134 N.Y.S.3d 749, 749–50 (2d Dep't

2020), ruling that "a motion pursuant to CPLR 2221 was not 'the proper procedural vehicle to address [the] final judgment.'"

XXVIII. CPLR 2304. Motion to quash, fix conditions or modify.

Is a Good Faith Affidavit Prescribed in 22 N.Y.C.R.R. § 202.7(a) Required on a CPLR 2304 Motion to Quash, Condition or Modify a Subpoena?

There is some conflicting caselaw on the above issue. In *Healy v. Carriage House LLC*, 2021 WL 1175108 (Sup. Ct., New York County 2021), the court relied upon the reasoning in *Martin v. Daily News, L.P.*, 2010 WL 1821988 (Sup. Ct., New York County 2010), in concluding that the good faith requirement in 22 N.Y.C.R.R. section 202.7(a), *see* § 353, is inapplicable to a nonparty who moves under CPLR 2304 to quash a subpoena served upon him or her.

In *Capacity Group of NY, LLC v. Duni*, 186 A.D.3d 1482, 1483, 131 N.Y.S.3d 373, 375 (2d Dep't 2020), the defendants moved under CPLR 2304 to quash subpoenas served by the plaintiff on several nonparties. The Second Department assumed that the good faith requirement in 22 N.Y.C.R.R. section 202.7(a) and (c) applied in this context, but held that the failure to comply with the rule did not require denial of the motion. The Second Department noted that "[w]hile the defendants failed to submit an affirmation of good faith from their attorney, the record reveals that the discovery dispute could not be resolved without court intervention, thereby establishing good cause for the defendants' failure to confer with opposing counsel prior to making these motions." *Capacity Group of NY*, 186 A.D.3d at 1483, 131 N.Y.S.3d at 375.

XXIX. CPLR 2309. Oaths and affirmations.

Courts Continue to Take Different Approaches to Resolving CPLR 2309(c) Defects

In *Edwards v. Myers*, 180 A.D.3d 1350, 1352, 118 N.Y.S.3d 889, 892 (4th Dep't 2020), the court held that "the affidavit of plaintiff's expert should not

be deemed inadmissable on the ground that it failed to comply with CPLR 2309(c), inasmuch as 'such a defect is not fatal, and no substantial right of [defendants] was prejudiced.'" *But see also Ivanovic v. Ash*, 2019 WL 6247717 (Sup. Ct., New York County 2019) (denying motion for default judgment against three defendants because, among other things, affidavits of service failed to include certificates of conformity as required under CPLR 2309(c)).

XXX. CPLR 3001. Declaratory judgment.

Real Property Law § 235-h Legislatively Overrules Court of Appeals Decision in *159 MP Corp.*

In *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 356, 104 N.Y.S.3d 1, 3, 128 N.E.3d 128, 130 (2019), the Court of Appeals enforced a clause in a lease whereby a commercial tenant unambiguously agreed to waive the right to commence a declaratory judgment action as to the terms of the lease. This clause, in effect, prevented a commercial tenant from seeking a *Yellowstone* injunction to toll the period of time allowed to cure an alleged default, and to prevent the landlord from terminating the lease.

In response to the Second Department's decision in *159 MP Corp.*, which was affirmed by the Court of Appeals, legislation was introduced to make void, on public policy grounds, the tenant's waiver of the right to commence a declaratory judgment action. Effective December 20, 2019, Real Property Law section 235-h, entitled "Waiver of right to bring a declaratory judgment action," provides:

No commercial lease shall contain any provision waiving or prohibiting the right of any tenant to bring a declaratory judgment action with respect to any provision, term or condition of such commercial lease. The inclusion of any such waiver provision in a commercial lease shall be null and void as against public policy.

The decision in *159 MP Corp.* and the amendment to add Real Property Law section 235-h are discussed in further detail in Siegel & Connors, New York Practice § 436 (January 2023 Supplement).

XXXI. CPLR 3012. Service of pleadings and demand for complaint.

CPLR 3012(a) Amended to Preclude Use of a Summons and Notice in An Action Arising Out of a Consumer Credit Transaction

Effective May 7, 2022, the first sentence in CPLR 3012(a) was amended to eliminate the option of using a summons and notice when commencing an action arising out of a consumer credit transaction. *See* CPLR 105(f)(defining "consumer credit transaction" to mean "a transaction wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes."). This measure is one of several 2022 amendments to the CPLR contained in the Consumer Credit Fairness Act. *See* Siegel & Connors, New York Practice §§ 45, 60 (January 2023 Supplement).

Furthermore, a complaint in such action must now be far more expansive in its description and must attach the contract, as required under the new CPLR 3016(j). *See* Siegel & Connors, New York Practice § 216 (January 2023 Supplement).

Governor's COVID-19 Disaster Emergency Executive Orders Toll Certain Periods for Appearing in an Action

The Executive Orders should not be read, however, to necessarily extend the time to appear in actions. *See* Siegel & Connors, New York Practice § 111 ("How and When to Appear"). Nor should they be interpreted to extend the time to serve answering papers on a motion. Executive Order 202.8 tolls "any specific time limit for the . . . service of any . . . notice [or] motion . . . as prescribed by the procedural laws of the state." That would appear to apply to the service of the notice of appearance, a CPLR 3211(a) pre-answer motion to dismiss, and a CPLR 3024 corrective motion. Yet, Executive Order 202.8 does not, by its express language, apply to toll the defendant's time to serve an answer!

Nonetheless, in *Louis Monteleone Fibres, Ltd. v. Kejriwal Newsprint Mills LLC*, 2020 WL 6801988, *1 (Sup. Ct., New York County 2020), the court "decline[d] to read Executive Order 202.8 (and the subsequent orders

extending its application) to exclude the tolling of a defendant's time to answer." The court was "unable to conceive of [a] rational reading of the governor's order that would toll certain deadlines but somehow continue to require a defendant to answer" because "[t]he purpose of the [Executive Order] was not to protect only plaintiffs, it was to preserve the status quo for all litigants." *See also Callisonrtkl Inc. v. Envirochrome Interiors, Inc.*, 2020 WL 6259555, *3 (Sup. Ct., New York County 2020) (granting plaintiff's motion for a default judgment against a defendant whose time to appear expired in late February, 2020 because the COVID-19 Executive Orders "only permit extensions of time for defendants whose time to answer expired after they went into effect").

Other courts have not been so generous in their interpretation. *See Chevra Gmilas Chesed Stropkover Joseph Chaim v. Washington Cemetery*, 72 Misc.3d 418, 420, 148 N.Y.S.3d 370 (Sup. Ct., Kings County 2021).

Plaintiff's Mere Denial of Receipt of Demand for Complaint Insufficient to Establish Reasonable Excuse for Delay

In *Mazzola v. Village Housing Associates, LLC*, 164 A.D.3d 668, 83 N.Y.S.3d 127 (2d Dep't 2018), the defendant moved under CPLR 3012(b) to dismiss plaintiff's action seeking damages for negligence and wrongful death based on the failure to timely serve the complaint. The supreme court denied the motion, but the Second Department reversed and dismissed the action. Plaintiff argued that he should be excused from timely serving the complaint because his attorney did not receive the demand for the complaint that was served upon him by regular mail, but the Second Department ruled that the proffered excuse was unreasonable under the circumstances.

Plaintiff commenced the action via e-filing and defendant uploaded a notice of appearance and demand for the complaint on the New York State Courts Electronic Filing system (NYSCEF), in addition to serving the documents via regular mail, but that latter step was not required under the e-filing rules. *See* Siegel & Connors, New York Practice §§ 63A, 202. The Second Department noted that the NYSCEF system promptly provided an email notification to plaintiff's attorney that the notice of appearance and demand for the complaint had been uploaded on the NYSCEF site. *See* 22 N.Y.C.R.R. § 202.5-b(f)(2)(ii) ("Service of interlocutory documents in an e-filed action."). Therefore, the court concluded that "plaintiff failed to proffer

any excuse, let alone a reasonable excuse, for his failure to timely serve a complaint in response to this email notification." *Mazzola*, 164 A.D.3d at 669, 83 N.Y.S.3d at 129.

In *Malfetano v. Westchester County*, 2019 WL 7161036 (Sup. Ct., Westchester County 2019), the plaintiff was served with a demand for the complaint via regular mail. When the complaint was not served within 20 days as required by CPLR 3012(b), defendant moved to dismiss the action. To establish a reasonable excuse for the delay in serving the complaint, plaintiff argued that he never received the demand via regular mail and that once he saw it in defendant's moving papers, he served and filed a complaint approximately two weeks later.

The *Malfetano* court contrasted the facts in the Second Department's decision in *Mazzola* because the plaintiff in the action before it had opted out of e-filing and, therefore, never would have received notice of the demand for the complaint via email. Nonetheless, the court relied on a decision from the Fourth Department in holding that plaintiff's excuse of non-receipt of the mailing containing the demand was insufficient to establish a reasonable excuse for the delay in serving the complaint. *See Dunlop v. Saint Leo The Great R.C. Church*, 109 A.D.3d 1120, 1121, 971 N.Y.S.2d 759, 760 (4th Dep't 2013) (holding that a claim of mere nonreceipt of properly served demand for complaint was not a reasonable excuse for delay in serving complaint). The Second Department subsequently reached the same conclusion. *See Mezar v. Defranco*, 190 A.D.3d 849, 850, 136 N.Y.S.3d 782, 782–83 (2d Dep't. 2021) ("[P]laintiffs' mere denial of receipt of the demand for the complaint [served via first class mail] was insufficient to demonstrate a reasonable excuse for their delay in serving the complaint."), *lv. den*, 37 N.Y.3d 916, 178 N.E.3d 946, 157 N.Y.S.3d 280.

The rationale supporting the decisions in *Malfetano*, *Dunlop*, and *Mezar* is contained in the Court of Appeals opinion in *Kihl v. Pfeffer*, 94 N.Y.2d 118, 122, 700 N.Y.S.2d 87, 90, 722 N.E.2d 55, 90 (1999), where it concluded that "service of papers on an attorney is complete upon mailing (CPLR 2103[b][2]) . . . , a properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption." *See* Siegel & Connors, New York Practice §§ 202, 367.

Third Department Holds That Merits of Defense Must Be Considered by Courts on Motions Under CPLR 3012(d) to Extend Time to Answer

The Third Department has beeen of two minds on whether a party seeking an extension of time to answer under CPLR 3012(d) must demonstrate a meritorious defense. *See* Siegel & Connors, New York Practice § 231. In *Kegelman v. Town of Otsego*, 203 A.D.3d 82, 85 (3d Dep't 2021), the court acknowledged the issue and held that on a motion to extend the time to answer under CPLR 3012(d), whether a defendant has demonstrated a meritorious defense is "part of the 'sui generis determination to be made by the court based on all relevant factors.'" The *Kegelman* court noted several additional factors that should be considered on the motion, including the length of the delay, whether the delay was willful, and whether the opposing party suffered prejudice from the delay. Applying these four factors, the Third Department ruled that supreme court properly exercised its discretion in granting the extension.

XXXII. CPLR 3012-a. Certificate of merit in medical, dental and podiatric malpractice actions.

The Second Department Compares the Provisions in CPLR 3012-a and 3012-b

In *Wilmington Savings Fund Society, FSB v. Matamoro*, 200 A.D.3d 79, 84–88, 156 N.Y.S.3d 323, 329–32 (2d Dep't 2021), a residential mortgage foreclosure action, the Second Department compared the requirements for certificates of merit for medical, dental, and podiatric malpractice actions under CPLR 3012-a with those for residential foreclosure actions under CPLR 3012-b. While the opinion primarily addressed the requirements of CPLR 3012-b and that certificate's effect in a residential mortgage foreclosure action, it will be helpful in navigating issues arising under CPLR 3012-a in medical, dental and podiatric malpractice actions. The *Matamoro* decision is discussed in detail in David D. Siegel & Patrick M. Connors, New York Practice § 136 (January 2023 Supplement).

First and Second Departments Discuss Applicability of CPLR 3012-a Certificate of Merit Requirement and Penalty for Noncompliance with Statute

In *Rabinovich v. Maimonides Medical Center*, 179 A.D.3d 88, 89-90 (2d Dep't 2019), the Second Department issued an opinion addressing "the difference between ordinary negligence and medical malpractice, and the effect of that difference upon the obligations of attorneys under CPLR 3012–a." The court also addressed the appropriate remedy where a CPLR 3012-a certificate of merit is not filed in an action sounding in medical malpractice.

The plaintiff in *Rabinovich* donated blood at the defendant's blood donation center and, after leaving the center, allegedly had an adverse reaction causing her to lose consciousness, fall, and sustain injuries.

The defendant moved to dismiss the complaint because it was not accompanied by the required CPLR 3012-a certificate of merit for medical malpractice actions. The Second Department noted that if an action involves ordinary negligence rather than medical, dental, or podiatric malpractice, CPLR 3012–a's requirements are not imposed. Nonetheless, the court concluded that plaintiff's claims sounded in medical malpractice and did require the filing of a CPLR 3012-a certificate.

The *Rabinovich* court acknowledged that the distinction between negligence and medical malpractice "is a subtle one," but concluded that "the critical factor [in distinguishing these claims] is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached." *Rabinovich*, 179 A.D.3d at 93. Citing to several decisions in which appellate courts have struggled with the distinction, the Second Department concluded that "many of the plaintiff's allegations bear a substantial relationship to the rendition of medical treatment to a particular patient." *Id.* at 94.

Although the required CPLR 3012-a certificate was not filed, the Second Department ruled that the complaint need not be dismissed. The court cited to its decision in *Kolb* in noting that CPLR 3012-a "is unlike CPLR 3012(b), which expressly permits the dismissal of an action where a plaintiff fails to serve a complaint that has been duly demanded under that statute."

Rabinovich, 179 A.D.3d at 96; *see* Siegel & Connors, New York Practice § 231 (discussing motions to dismiss under CPLR 3012).

The court ruled that the proper remedy at this stage was to extend the plaintiff's time to serve a CPLR 3012-a certificate upon the defendant within 60 days after service of its order.

In *Fortune v. New York City Health & Hosps. Corps.*, 193 A.D.3d 138, 142 N.Y.S.3d 54 (1st Dep't 2021), the First Department held that the failure to timely file a CPLR 3012-a certificate is not the equivalent of a pleading default under CPLR 3012(b). Therefore, a plaintiff seeking an extension of time to file a CPLR 3012-a certificate is not required to meet the standards applicable on a motion under CPLR 3012(d). The *Fortune* opinion is discussed in further detail in the 2021 Supplementary Practice Commentaries on McKinney's CPLR 3012-a.

XXXIII. CPLR 3012-b. Certificate of merit in certain residential foreclosure actions.

Second Department Rules That Defective CPLR 3012-b Certificate of Merit Cannot, Standing Alone, Require Dismissal for Lack of Standing

As noted in an entry below under CPLR 3018, there is caselaw indicating that in certain situations compliance with CPLR 3012-b may establish plaintiff's standing in a residential mortgage foreclosure action. Looking at the issue from a different angle, what if the defendant establishes that the CPLR 3012-b certificate is defective in some respect? Will that satisfy defendant's burden on a motion to dismiss for lack of standing?

In *Wilmington Savings Fund Society v. Matamoro*, 200 A.D.3d 79, 81, 87, 156 N.Y.S.3d 323, 327, 331 (2d Dep't 2021), the Second Department ruled

> that a defendant moving to dismiss a complaint on the ground of the plaintiff's lack of standing does not meet the affirmative burden of proof by merely relying upon any defects that might exist with the certificate of merit submitted by the plaintiff's attorney under CPLR 3012-b, or otherwise, if the certificate of merit fails to address all potential aspects of standing. . . . [T]he obligation imposed

> by . . . [CPLR] 3012-b is not an evidentiary one as to the ultimate merits of an action …, but is instead . . . an ethical one.

The *Matamoro* court acknowledged that the documents annexed to a CPLR 3012-b certificate of merit can be used in support of a CPLR 3211(a) motion to dismiss, and presumably in support of a CPLR 3212 motion for summary judgment. Nonetheless, a deficiency in a certificate of merit will not, in and of itself, provide a basis for the dismissal of a complaint if the defendant, as the moving party, fails to affirmatively address in its motion papers all relevant legal issues required for a CPLR 3211 dismissal, including any that go beyond the contents of the certificate of merit itself. *Matamoro,* 200 A.D.3d at 89, 156 N.Y.S.3d at 332.

In addition to their standing argument, defendants also sought dismissal of the action on the ground that the certificate of merit was defective because it did not specifically identify the representatives of the plaintiff who were consulted by counsel, and failed to expressly state that the plaintiff was the creditor entitled to enforce its rights under the relevant documents. *See* CPLR 3012-b(a) (requiring, among other things, that the plaintiff's attorney undertake "consultation with representatives of the plaintiff identified in the certificate" and to certify "that the plaintiff is currently the creditor entitled to enforce rights under such documents"). In opposition to defendants' motion, plaintiff's attorney filed an amended certificate of merit which, according to the Second Department, "cured the technical defects that had been raised by the defendants." *Matamoro*, 200 A.D.3d at 93.

The *Matamoro* decision is discussed in further detail in Siegel & Connors, New York Practice § 136 (January 2023 Supplement).

XXXIV. CPLR 3014. Statements.

Writings Attached to Petitions Help Defeat Motions to Dismiss for Insufficient Pleading

The pleader who wishes to make a writing a part of the pleading need merely attach a copy of it and CPLR 3014 provides that it is part of the pleading "for all purposes." This rule has come to the rescue of a few recent petitioners who commenced Election Law proceedings. In these matters, the

pleadings were challenged for lack of sufficiency, but the courts ruled that the writings attached to the petitions were thereby incorporated into the petitions and provided the necessary specificity. *See Morales v. Burgos*, 194 A.D.3d 888, 890, 146 N.Y.S.3d 312, 314 (2d Dep't 2021); *Lynch v. Duffy*, 172 A.D.3d 1370, 1373, 102 N.Y.S.3d 71, 73, (2nd Dep't 2019), *lv. den.*, 33 N.Y.3d 906, 127 N.E.3d 316.

XXXV. CPLR 3015. Particularity as to specific matters.

Improvements Made by Plaintiff to Defendant's Home During Intimate Relationship Subject to Licensing Requirement

An interesting application of CPLR 3015(e) arose in *Cunningham v. Nolte*, 188 A.D.3d 806, 136 N.Y.S.3d 78 (2d Dep't 2020), where plaintiff cohabitated with defendant in her residence in Rockland County and shared an intimate relationship with her for approximately two years. Plaintiff was apparently handy, and during the relationship he performed extensive home improvement contracting work on the home in reliance on the defendant's promise that he would be reimbursed for the work after its impending sale.

The relationship soured and plaintiff commenced an action to foreclose a mechanic's lien he had filed against the residence, to recover damages for breach of contract, to recover in quantum meruit, and to impose a constructive trust over the residence. The defendant moved to dismiss the action under CPLR 3211(a)(7) for failure to state a cause of action alleging, among other things, that the plaintiff was not a licensed home improvement contractor in Rockland County.

The supreme court denied the motion, but the Second Department modified and granted those branches of the defendant's motion to dismiss the causes of action to foreclose a mechanic's lien, to recover damages for breach of contract, and to recover in quantum meruit. The court noted that under "CPLR 3015(e), a complaint that seeks to recover damages for breach of a home improvement contract or to recover in quantum meruit for home improvement services is subject to dismissal under CPLR 3211(a)(7) if it does not allege compliance with the licensing requirement." *Cunningham*, 188 A.D.3d at 807, 136 N.Y.S.3d at 80.

The Second Department rejected plaintiff's contention that CPLR 3015(e) did not apply under the unique facts of the case. Plaintiff alleged that he performed home improvement contracting work and even conceded that the cause of action to foreclose a mechanic's lien could not survive defendant's motion to dismiss because he was not a licensed home improvement contractor in Rockland County at the time he performed the work, as required by the statute. The appellate division did, however, affirm that portion of supreme court's order that denied the motion to dismiss the cause of action to impose a constructive trust over the residence.

XXXVI. CPLR 3016. Particularity in specific actions.

A New CPLR 3016(j) Adds Pleading Requirements for Actions Arising from Consumer Credit Transactions

Effective May 7, 2022, a new subsection (j) was added to CPLR 3016. Specifically, CPLR 3016(j) applies in actions "arising out of a consumer credit transaction where a purchaser, borrower or debtor is a defendant." (Can there be any other defendant in an action arising from a consumer credit transaction?)

The subdivision requires that "the contract or other written instrument on which the action is based . . . be attached to the complaint." CPLR 3016(j). The subdivision notes that "if the account was a revolving credit account, the charge-off statement may be attached to the complaint instead of the contract or other written instrument." CPLR 3016(j).

CPLR 3016(j) also requires that numerous items be included in the complaint, which are set forth in subparagraphs (1) through (8). Some of these items might require significant detail. For example, CPLR 3016(j)(5)(A) requires the complaint to include "an itemization of the amount sought, by (i) principal; (ii) finance charge or charges; (iii) fees imposed by the original creditor; (iv) collection costs; (v) attorney's fees; (vi) interest; and (vii) any other fees and charges."

CPLR 3016(j)(7)(A) requires the plaintiff to state whether the plaintiff is the original creditor and, if not, "the complaint shall also state (i) the date on which the debt was sold or assigned to the plaintiff; (ii) the name of each

previous owner of the account from the original creditor to the plaintiff and the date on which the debt was assigned to that owner by the original creditor or subsequent owner; and (iii) the amount due at the time of the sale or assignment of the debt by the original creditor." CPLR 3016(j)(7)(B). In certain instances, these facts might be difficult to ascertain.

The amendment is discussed in further detail in Siegel & Connors, New York Practice § 216 (January 2023 Supplement).

XXXVII. CPLR 3018. Responsive Pleadings.

Compliance with CPLR 3012-b Will Establish Standing

CPLR 3012-b, which became effective in 2013, requires the filing of a "certificate of merit" in any residential foreclosure action involving a home loan in which the defendant is a resident of the property subject to the foreclosure. *See* Practice Commentaries to McKinney's CPLR 3012-b. The statute requires that if it is not already attached to the complaint, the plaintiff's attorney must attach to the certificate copies of the relevant instruments of indebtedness and any instruments of modification, extension, consolidation and assignment. CPLR 3012-b(a). In sum, CPLR 3012-b creates a procedure requiring the plaintiff's attorney to take certain steps to ascertain and then certify that the plaintiff has standing to maintain the foreclosure action.

In *Onewest Bank, FSB v. Cook*, 2019 WL 7547317 (Sup. Ct., Suffolk County 2019), the court observed that plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit, as is required by CPLR 3012-b(a), "constitute[s] due proof of the plaintiff's possession of the note prior to the commencement of the action and thus its standing to prosecute its claim for foreclosure and sale." The court cited to numerous decisions to support its conclusion. *See also U.S. Bank National Association v. Dayan*, 195 A.D.3d 763, 765, 145 N.Y.S.3d 390, 392 (2d Dep't 2021) ("This Court has long recognized that a plaintiff's filing of a copy of the note as an attachment to a complaint can be prima facie evidence of the plaintiff's standing.").

Second Department Holds That Defendant's Improper DKI Results in Admission of Allegations

If the fact alleged is something the court feels the defendant must know firsthand, one way or the other, a denial "upon information and belief" (DKI) will not be satisfactory and the allegation purportedly denied may be deemed admitted. *See* Siegel & Connors, New York Practice § 221. That is essentially what occurred in *Majerski v. City of New York*, 193 A.D.3d 715, 146 N.Y.S.3d 641 (2d Dep't 2021), a Labor Law action arising from a fall from a ladder at a worksite. The defendants denied "knowledge or information sufficient to form a belief" as to plaintiffs' allegations in the complaint regarding the defendants' status as the owner, operator and/or contractor of the premises. The Second Department held that this form of pleading "was improper as the truth or falsity of the information alleged within those paragraphs of the complaint is wholly within the possession of the defendants." *Majerski*, 193 A.D.3d at 718, 146 N.Y.S.3d at 645. Therefore, the court deemed those allegations regarding defendants' status as the owner, operator and/or contractor of the premises, which is a key component to claims under Labor Law sections 240(1) and 241(6), to be admitted.

The Second Department addressed a somewhat similar pleading irregularity in *U.S. Bank N.A. v Saff*, 191 A.D.3d 733, 735, 141 N.Y.S.3d 472, 475 (2d Dep't 2021), where the defendants' answer specified that several paragraphs of the complaint were "Neither Admitted nor Denied." The court observed that this "is not a recognized pleading response in our civil practice, [and that the allegations] should be deemed as admitted." *Saff*, 191 A.D.3d at 735, 141 N.Y.S.3d at 475.

XXXVIII. CPLR 3025. Amended and supplemental pleadings.

Court of Appeals Rejects Contention That Motion to Amend Should Be Denied Because Plaintiff Failed To Comply with 2012 Amendment to CPLR 3025(b)

Several decisions have addressed the 2012 amendment to CPLR 3025(b) requiring that "[a]ny motion to amend or supplement pleadings . . . be accompanied by the proposed amended or supplemental pleading clearly

showing the changes or additions to be made to the pleading." *See* Siegel & Connors, New York Practice § 236.

We now have a Court of Appeals decision that notes the issue, but it does not shed much light on how to handle the problem. In *Greene v. Esplanade Venture Partnership*, 36 N.Y.3d 513, 144 N.Y.S.3d 654, 168 N.E.3d 827 (2021), defendants argued that plaintiff's proposed amended complaint failed to comply with CPLR 3025(b) because it did not clearly show the proposed changes to the pleading. The Court stated in a footnote that "[t]o the extent defendants contend that the motion should have been denied for the independent reason that plaintiffs failed to comply with the submission requirements of CPLR 3025(b), that contention should be rejected." *Greene*, 36 N.Y.3d at 526 n.3, 144 N.Y.S.3d at 662 n.3, 168 N.E.3d at 662 n.3.

It is difficult to ascertain if the contention was rejected because the plaintiff complied with CPLR 3025(b), or because the failure to comply with CPLR 3025(b)'s relatively new requirement cannot, standing alone, result in the denial of a motion to amend. The debate on this issue will likely continue. *See, e.g.*, *Mendoza v. Enchante Accessories, Inc.*, 185 A.D.3d 675, 679, 126 N.Y.S.3d 187, 191 (2d Dep't 2020) ("[T]he branch of its motion which was, in effect, pursuant to CPLR 3025(b) to amend its answer to assert the affirmative defense of Workers' Compensation exclusivity also was properly denied since [defendant] failed to include any proposed amended answer 'clearly showing the changes or additions to be made to the pleading.'").

Interplay of CPLR 3025(a) and CPLR 3211(f) Provides Defendant with More Than 3 Years to Serve Amended Answer

If the pleading to be amended requires a response and the opposing party, instead of answering, moves to dismiss the pleading under CPLR 3211, the making of the motion automatically extends the opposing party's responding time under CPLR 3211(f) and by so doing extends as well the time in which the pleading can be amended as of right. *See* Siegel & Connors, New York Practice § 236. This rule came to the fore in *Matter of Part 60 RMBS Put-Back Litigation*, 195 A.D.3d 40, 146 N.Y.S.3d 109 (1st Dep't 2021).

More than five years after the *Part 60 RMBS* action was commenced, the defendant served an amended answer with counterclaims without seeking leave of court. The amended answer alleged a broader statute of limitations

defense than that included in the original answer and was the first time defendant referenced CPLR 202, the borrowing statute, in any motion or pleading it interposed. *See* Siegel & Connors, New York Practice § 57 (discussing CPLR 202).

Defendant served its original answer with counterclaims in August of 2015 after the denial of its pre-answer motion to dismiss. *See* CPLR 3211(f); Siegel & Connors, New York Practice § 277 ("Motion Under CPLR 3211 Extends Responding Time"). Rather than serving a reply, plaintiff moved under CPLR 3211(b) to dismiss the answer with counterclaims. That meant that if the motion was denied, plaintiff's reply would not need to be served until 10 days after service of the order denying the motion, with notice of entry. *See* CPLR 3211(f) ("Service of a notice of motion under [CPLR 3211(b)] before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order"). The defendant would then have "twenty days after service of a pleading responding to [the answer]," i.e., the reply, to serve an amended answer. CPLR 3025(a).

In *Part 60 RMBS*, the amended answer with counterclaims, which included the meritorious statute of limitations defense under CPLR 202, was served during the pendency of the CPLR 3211(b) motion to dismiss in September of 2018, well before the court's decision on the motion on July 8, 2019. Therefore, the First Department ruled that the amendment as of right was timely under CPLR 3025(a) and that the CPLR 202 borrowing statute had not been waived. Although the plaintiff argued that it was prejudicial to allow an amendment of the original answer more than three years after it was served, and more than five years after the action was commenced, the First Department concluded that "where an amendment to a pleading is allowed of right [under CPLR 3025(a)], no showing of prejudice or lack thereof is required." *Part 60 RMBS*, 195 A.D.3d at 50, 146 N.Y.S.3d at 118.

The *Part 60 RMBS* decision is discussed in further detail in section 236 of the January 2023 Supplement to Siegel & Connors, New York Practice.

First Department Deems Proposed Amended Complaint Submitted on Plaintiff's CPLR 3025(b) Motion to Be Operative Pleading Because Time to Amend as of Right Under CPLR 3025(a) Had Not Expired

In another decision involving the interplay of CPLR 3025(a) and CPLR 3211(f), *Roam Capital, Inc. v. Asia Alternatives Management LLC*, (1st Dep't 2021), the court observed that a CPLR 3211(a) motion to dismiss extends the defendant's time to answer the complaint "until ten days after service of notice of entry of the order" deciding the motion. CPLR 3211(f); *see* Siegel & Connors, New York Practice § 277. In that supreme court had not yet decided defendant's CPLR 3211(a) motion at the time plaintiff moved to amend its complaint under CPLR 3025(b), the latter motion was unnecessary. Because plaintiff still had time to amend the complaint as of right under CPLR 3025(a) when it, instead, made a motion to amend under CPLR 3025(b), the court deemed plaintiff's proposed amended complaint submitted with its motion to be the operative pleading. Defendant claimed that plaintiff waived its ability to amend as of right under CPLR 3025(a) by making a motion seeking permission to amend under CPLR 3025(b), but the First Department rejected the contention.

These conclusions were important in *Roam Capital* because the supreme court denied plaintiff's motion to amend the complaint under CPLR 3025(b) and granted the defendant's motion to dismiss the original complaint. The First Department ruled on appeal that it need not address that portion of the order dismissing the original complaint because it was academic. Given its holding, the amended complaint superseded the original complaint.

Second Department Affirms Order Granting Motion to Amend Answer Made 5 Months After Filing of Note of Issue

Mere lateness is not a barrier to seeking to amend a pleading by leave of court, but lateness coupled with significant prejudice can lead to the denial of a motion to amend a pleading under CPLR 3025(b). *See* Siegel & Connors, New York Practice § 237. That principle was cited by the Second Department and governed its decision in *Lennon v. 56th and Park (NY) Owner, LLC*, 199 A.D.3d 64 (2d Dep't 2021). In *Lennon*, the plaintiff filed a claim for workers compensation benefits in July of 2014, approximately two weeks after his alleged injury at a construction site. The plaintiff also commenced an action against several defendants in September of 2014 alleging that they were liable for damages for their negligence and for violations of various provisions in the Labor Law.

After a hearing before an administrative law judge (ALJ), the workers' compensation claim was denied on the ground that the ALJ did "not believe that the hoist elevator malfunctioned in any way, much less in the drastic and dramatic way described by [the plaintiff]." The plaintiff sought an administrative review of the determination, but the Workers' Compensation Board affirmed the findings and conclusions of the ALJ.

The defendants interposed an answer to plaintiff's second amended complaint in March of 2016 containing eight affirmative defenses, but it lacked the affirmative defense that the action was barred by collateral estoppel emanating from the determination of the ALJ and Workers' Compensation Board. After disclosure was conducted, the plaintiff filed a note of issue and certificate of readiness in April of 2017. Five months later, in September of 2017, the defendants moved under CPLR 3025(b) to amend their answer to include an affirmative defense that the action was barred by the doctrine of collateral estoppel, and for summary judgment dismissing the complaint based on that defense. *See* Siegel & Connors, New York Practice § 223 ("Affirmative Defenses").

The plaintiff opposed the motion to amend by arguing that it should not be granted at such a late stage in the action, especially because the defendants were aware of the workers' compensation determination almost two years before seeking the amendment. The supreme court rejected the plaintiff's argument, granted the defendants' motion to amend, and then granted the motion for summary judgment dismissing the action based on the defense of collateral estoppel.

The Second Department affirmed, ruling that supreme court did not improvidently exercise its discretion in granting the motion to amend. The court observed that "[t]he closer an amendment is sought in relation to the parties' trial, the more a motion for leave to amend may be properly denied, and particularly when it is sought at the proverbial eve of trial." In *Lennon*, however, the court concluded that there was no discernible prejudice from permitting the amendment because plaintiff knew that his workers' compensation claim had been denied during the pendency of the negligence action, and well before the completion of discovery. Therefore, the Second Department concluded, "the potential collateral estoppel impact of the workers' compensation proceedings could be of no surprise to the plaintiff

prosecuting the personal injury action premised, as it was, upon the same underlying accident and facts."

The *Lennon* decision is discussed in further detail in Siegel & Connors, New York Practice §§ 237, 456 (January 2023 Supplement)

Comparison of Standards Applicable Under CPLR 3025(b) with Those Applicable on a CPLR 3211(a) Motion to Dismiss

A motion to amend a pleading under CPLR 3025(b) should be denied if the proposed amendment is palpably insufficient or patently devoid of merit. *See* Siegel & Connors, New York Practice § 237. Is that standard the same as the standard on a CPLR 3211(a) motion to dismiss? In other words, if the party opposing the motion to amend can demonstrate that the proposed amendment would not survive a motion to dismiss under CPLR 3211(a), does it make sense to permit the amendment at all?

The court discusses the issue in *Olam Corp. v. Thayer*, 2021 WL 408232 (Sup. Ct., New York County 2021), and we have an expanded discussion on what can be a thorny problem in the 2021 Supplementary Practice Commentaries on McKinney's CPLR 3025, C3025:11.

First Department Rules That Supreme Court Lacked Authority to Grant Plaintiff's Motion to Amend Complaint after Appellate Division Ordered Complaint Dismissed

There is generally no stated time limit for the amendment by leave under CPLR 3025(b). *See* Siegel & Connors, New York Practice § 237. There are necessarily some limits to the timing of the motion, however, as demonstrated in *Favourite Limited v Cico*, _ A.D.3d _, 171 N.Y.S.3d 67 (1st Dep't 2022). In *Favourite*, the First Department issued an order in a prior appeal dismissing plaintiffs' complaint because they lacked capacity or standing to sue, and directing the clerk to enter judgment accordingly. The plaintiffs then attempted to remedy the defect, and sought leave to file an amended complaint under CPLR 3025(b). Supreme court granted the motion, but the First Department held that the court below lacked power to entertain the motion after the appellate division order dismissing the action with a direction to enter judgment.

The First Department noted that given its prior order dismissing the complaint, there was no action pending when plaintiffs made their motion to amend their pleading. Therefore, supreme court lacked power to entertain the motion even though defendants did not see to the entry of a final judgment dismissing the action. In reaching this conclusion, the court observed that "[w]here an Appellate Division remits to the trial court below solely for the specified purpose of entering a final order, decree or judgment pursuant to the Appellate Division's direction, the order is held to be final, and the remission in such a case is considered one for purely 'ministerial' action." *Favourite*, _ A.D.3d at _, 171 N.Y.S.3d at 75.

The First Department's order was accompanied by a two-justice dissent, and plaintiffs have appealed to the New York Court of Appeals as of right. APL-2022-00102; *see* Siegel & Connors, New York Practice § 527.

XXXIX. CPLR 3042. Procedure for bill of particulars.

First Department Affirms Order Striking Supplemental Bill of Particulars Alleging New Injuries

A supplemental bill of particulars cannot be used to assert a new injury, *see* Siegel & Connors, New York Practice § 240, as the First Department's decision in *Matias v. West 16th Realty LLC*, 197 A.D.3d 1043, 151 N.Y.S.3d 889 (1st Dep't 2021), demonstrates once again. In *Matias*, the appellate division affirmed supreme court's order

> granting defendants' motions to strike plaintiff's supplemental bills of particulars, served more than three years after the note of issue was filed, since they alleged new injuries and additional economic damages not alleged in the original bill of particulars (CPLR 3043[b]). The supplemental bills "expanded not only on the extent of the continuing disability, but on the very nature of the injuries."

Matias, 197 A.D.3d at 1043, 151 N.Y.S.3d at 889 (citation omitted).

The First Department agreed with supreme court's conclusion that plaintiff's bills of particulars were in essence amended, rather than supplemented, and therefore could not properly be served without leave of court as required by

CPLR 3042(b). Plaintiff argued that the defendants should have been aware of the injuries described in the supplemental bill of particulars because he had testified extensively about them 3 1/2 years earlier, but the court ruled that "it was not sufficient to put defendants on notice of the injuries alleged in the supplemental bills of particulars." *Matias*, 197 A.D.3d at 1043, 151 N.Y.S.3d at 889.

XL. CPLR 3101. Scope of Disclosure.

CPLR 3101(f) Amended to Require Production of Existence and Contents of Insurance Policy

CPLR 3101(f), which addresses disclosure of the contents of insurance agreements. *See* Siegel & Connors, New York Practice § 344. Effective December 31, 2021, as part of the "Comprehensive Insurance Disclosure Act," this subdivision was dramatically amended to affirmatively require "any defendant, third-party defendant, or defendant on a cross-claim or counter-claim" to produce "proof of the existence and contents of any insurance agreement[.]" We assume the new provision also imposes these obligations on the plaintiff against whom a counterclaim is asserted, but that is not clearly stated in the statute.

The mandatory production must occur within 90-days of the answer, *see* CPLR 320; CPLR 3011, the answer to the third-party complaint or cross-claim, *see* CPLR 3011, or the answer of an additional party defendant on a counterclaim, *see* CPLR 3019(d). The new subdivision requires that the production be made to all parties in the action.

CPLR 3101(f)(1) now requires production of

> proof of the existence and contents of any insurance agreement in the form of a copy of the insurance policy in place at the time of the loss or, if agreed to by such plaintiff or party in writing, in the form of a declaration page, under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment.

A key provision in the new subdivision requires any "defendant, third-party defendant, or defendant on a cross-claim or counter-claim" that was obligated to disclose information under CPLR 3101(f)(1) to "make reasonable efforts to ensure that the information remains accurate and complete." CPLR 3101(f)(2). A party's duty to supplement disclosure that it has previously provided already exists under CPLR 3101(h), *see* Siegel & Connors, New York Practice § 352A, but CPLR 3101(f)(2) is far more specific. It requires updating information already provided "[1] at the filing of the note of issue, [2] when entering into any formal settlement negotiations conducted or supervised by the court, [3] at a voluntary mediation, and [4] when the case is called for trial, and [5] for sixty days after any settlement or entry of final judgment in the case inclusive of all appeals." 3101(f)(2).

In conjunction with the amendment to CPLR 3101(f), the Comprehensive Insurance Disclosure Act also added a new CPLR 3122-b, entitled "Certification of insurance disclosure." This statute works in tandem with CPLR 3101(f) and requires that any information produced under the new subdivision be accompanied by a certification from both the party and the party's attorney sworn in the form of an affidavit "stating that the information is accurate and complete, and that reasonable efforts have been undertaken, and in accordance with [CPLR 3101(f)(2)'s supplementation requirements] will be undertaken, to ensure that this information remains accurate and complete." CPLR 3122-b. The statute acknowledges that the certification can be in the form of an "affirmation where appropriate." CPLR 3122-b; *see* CPLR 2106(a); Siegel & Connors, New York Practice § 205 (noting that affirmations are the equivalent of affidavits without the need of a swearing ceremony or a notary's signature).

While the new CPLR 3101(f) and 3122-b certainly strengthen disclosure obligations pertaining to insurance agreements, neither statute prescribes a specific penalty for a violation.

The new CPLR 3101(f) and CPLR 3122-b take effect on December 31, 2021 and apply to all actions commenced on or after that date. Its provisions are discussed in further detail in Siegel & Connors, New York Practice § 344 (January 2023 Supplement).

Second Department Affirms Order Allowing Disclosure of All Relevant Social Media Activity by Plaintiff Up to Three Years Prior to Commencement of Action

In *Gentile v. Ogden*, 208 A.D.3d 855 (2d Dep't 2022), plaintiff commenced an action against defendants seeking to recover damages for personal injuries arising from a motor vehicle accident. The plaintiff alleged a serious injury under the no fault law claiming that "she sustained severe and permanent injuries to her neck, back, and right shoulder, and that her injuries prevented her from performing her usual and customary daily activities for not less than 90 of the first 180 days following the accident." Supreme court granted defendants' motion under CPLR 3124 and CPLR 3126 to compel plaintiff to comply with their disclosure demands for, among other things, all relevant social media activity from all of her social media accounts from three years prior to the accident through the date of the motion.

In affirming the order, the Second Department cited to New York's liberal disclosure rules embodied in CPLR 3101(a) and noted that they "do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information."

In affirming the order, the Second Department examined the plaintiff's claimed injuries and damages and concluded that the "defendants demonstrated that the plaintiff's social media accounts were reasonably likely to yield relevant evidence regarding her alleged injuries and loss of enjoyment of life."

The *Gentile* decision and issues related to disclosure of social media postings are further examined in Siegel & Connors, New York Practice § 344 (January 2022 Supplement).

First Department Holds That Defendants Are Entitled to Authorizations from Plaintiff to Obtain Medical Records in Anticipation of a CPLR 4545 Collateral Source Hearing

There is caselaw permitting pretrial disclosure pertaining to "collateral source" payments so defendants can acquire information and documents that may later be used at a CPLR 4545 collateral source hearing. *See* Siegel &

Connors, New York Practice § 348. In *Winslow v. New York-Presbyterian/Weill-Cornell Medical Center*, 203 A.D.3d 533, 534, 161 N.Y.S.3d 775, 776 (1st Dep't 2022), the First Department reaffirmed the point, holding that defendants were entitled to authorizations from plaintiff to obtain medical records in anticipation of a collateral source hearing.

Relying on Third Department's *Loiselle* Decision, Court Orders Production of Nonparty Doctors' Financial Records for Seven-Year Period

In *Loiselle v. Progressive Casualty Insurance Co.*, 190 A.D.3d 17, 135 N.Y.S.3d 500 (3d Dep't 2020), the Third Department aligned itself with the Fourth Department's position and concluded that financial records of doctors performing CPLR 3121(a) exams are subject to disclosure. In *Beaudette v. Infantino*, 73 Misc. 3d 864, 865, 157 N.Y.S.3d 243, 246 (Sup. Ct., Warren County 2021), two doctors who were hired by defendant to perform CPLR 3121(a) exams on the plaintiff were served with subpoenas seeking, among other things, "[a]ll billing records, invoices, payment records, checks and 1099 statements for independent medical examination (IME) services performed on behalf of insurance companies and defense attorneys for the years 2014 through 2020." The nonparty doctors moved under CPLR 2304 to quash, modify and fix conditions upon plaintiff's subpoena.

The doctors conceded that, based on the authority of *Loiselle*, the documents sought were subject to disclosure, but attempted to limit production to the five-year period from 2016 through 2020, rather than the seven-year period commencing in 2014. The court denied the motion, finding that the doctors had "not set forth an adequate basis to explain why the disclosure of financial records for the additional two-year period would present an undue burden or otherwise be abusive (*see* CPLR 3103 [a]), when producing five years of records is apparently not." *Beaudette*, 73 Misc. 3d at 867, 157 N.Y.S.3d at 247.

Plaintiff's subpoena also sought disclosure of "[a]ll reports, expert disclosures, and written memoranda for each examination or record review for which [the doctors] received payment" for the seven-year period from 2014 through 2020. The *Beaudette* court ruled that the portions of the subpoenas seeking these documents were "directed at minimally relevant information" and should be quashed "'to prevent unreasonable annoyance,

expense, embarrassment, disadvantage, or other prejudice' to the nonparties, their prior examinees and the court." *Beaudette*, 73 Misc. 3d at 871–72, 157 N.Y.S.3d at 250–51 (quoting CPLR 3103(a)).

The *Beaudette* decision is discussed in further detail in Siegel & Connors, New York Practice § 344 (January 2023 Supplement).

XLI. CPLR 3106. Priority of depositions; witnesses; prisoners; designation of deponent.

Revised Uniform Rules for Supreme and County Courts Limit Number and Length of Depositions

The revised Uniform Civil Rules for The Supreme Court & The County Court impose a limit on the number of depositions that can be taken by various parties (10) and a maximum of hours for each deposition (7). *See* 22 N.Y.C.R.R. § 202.20-b. New Uniform Rule 202.20-b, states: "Unless otherwise stipulated to by the parties or ordered by the court: (1) the number of depositions taken by plaintiffs, or by defendants, or by third-party defendants, shall be limited to 10; and (2) depositions shall be limited to 7 hours per deponent." *See Bush v. Alliant Content, LLC*, 171 N.Y.S.3d 347, 350 (Sup. Ct., Westchester County 2022) (denying defendant's motion to enlarge the 7-hour time limit in Uniform Rule 202.20-b(a)(2)). The rule and related provisions addressing depositions are discussed in Siegel & Connors, New York Practice §§ 354, 356 (January 2023 Supplement).

New Uniform Rule Expands on Procedures Under CPLR 3106(d) While Borrowing Heavily from Rule 30(b)(6) of the Federal Rules of Civil Procedure

A party who cannot single out the particular person in the corporation's employ to whom a deposition notice should be properly directed can direct it to the corporation under CPLR 3106(d). *See* Siegel & Connors, New York Practice § 345. The situation aimed at by CPLR 3106(d) is where a corporation or other entity is the "person" from whom a deposition is sought through its agents. The revised Uniform Civil Rules For The Supreme Court & The County Court, which became effective on February 1, 2021, now include detailed provisions for parties seeking to depose entities through

their agents. New Uniform Rule 202.20-d, entitled "Depositions of Entities; Identification of Matters," contains eight subsections with extensive verbiage that is borrowed from Commercial Division Rule 11-f. That rule, in turn, traces its origins to Rule 30(b)(6) of the Federal Rules of Civil Procedure, which governs depositions of corporations in federal court.

The new rule is discussed in detail in the 2022 McKinney's Supplementary Practice Commentaries to CPLR 3106, C3106:7 ("Designation of Deponent").

XLII. CPLR 3113. Conduct of the examination.

Administrative Orders Address Depositions and Strongly Encourage Cooperation and the Use of Remote Technology in Pursuing Discovery

On March 7, 2020, Governor Cuomo issued Executive Order 202 declaring a disaster emergency for the entire State of New York due to the transmission of COVID-19. The Chief Administrative Judge subsequently issued several administrative orders regulating procedure in the New York State courts during the during the COVID-19 Disaster Emergency.

Administrative Order AO/88/20, issued on May 2, 2020, prohibited courts from ordering "the personal attendance of physicians or other medical personnel (including administrative personnel) who perform services at a hospital or other medical facility that is active in the treatment of COVID-19 patients." AO/88/20 had a broad sweep and, for example, apparently covered a secretary who was performing services in a unit of a hospital that was not active in treating COVID-19 patients, as long as one unit of the hospital was doing so. The provisions of AO/88/20 were authorized on a temporary basis and were to "be reviewed and circumscribed promptly at the conclusion of the COVID-19 public health emergency."

Although the COVID-19 public health emergency had not yet concluded, the Chief Administrative Judge issued AO/129/20 on June 22, 2020, which "cancelled" Administrative Order AO/88/20 and provided that it "shall have no further force or effect." AO/129/20 provides that "counsel and litigants are strongly encouraged to pursue discovery in cooperative fashion and to employ remote technology in discovery whenever possible." In this regard,

AO/129/20 is more expansive than AO/88/20 because it applies to all discovery permitted under CPLR Article 31, and not simply depositions of "physicians or other medical personnel." *See also* AO/71/20 (discouraging "[t]he prosecution of pending civil matters (including discovery) in a manner that requires in-person appearances or travel").

AO/129/20 requires that physicians or other medical personnel demonstrate that they are unavailable for discovery "for reasons relating to the treatment of COVID-19 patients," and not simply that the facility where they work "is active in the treatment of COVID-19 patients," as was required under AO/88/20.

In "strongly encourage[ing]" parties to "employ remote technology whenever possible," AO/129/20 is an invitation to parties to invoke the procedures in CPLR 3113(d) and "stipulate that a deposition be taken by telephone or other remote electronic means" and to permit electronic participation, such as through ZOOM or Skype for Business.

Courts Order Parties to Conduct Video Depositions During COVID-19 Disaster Emergency

In *Fineman v. Qureshi*, 2020 WL 5088199 (Sup. Ct., New York County 2020), plaintiff commenced a medical malpractice action in New York, but resides in Florida. Plaintiff's attorney stated:

> that plaintiff would be amendable to being deposed in New York since this lawsuit was filed within the state of New York…[,but] submits that the novel coronavirus ("COVID-19") pandemic has upset the regular course of discovery, creating an "undue hardship" that necessitates, and thereby requires, that plaintiff's deposition be completed virtually.

Fineman, 2020 WL 5088199 at * 1. Therefore, plaintiff made a motion to compel defendants to appear for plaintiff's virtual deposition.

Several defendants opposed the application, arguing that a virtual deposition "would invite numerous technological issues" and, additionally, "that plaintiff's compromised cognitive condition would make a virtual deposition highly impractical." *Id.* These defendants contended "that plaintiff's

deposition should be conducted only after the challenges posed by COVID-19 have abated, and a vaccine has been procured." *Id.*

The court cited its discretionary power under CPLR 3103(a) to regulate the use of "any disclosure device" to "prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice." The court noted, however, that if a plaintiff has commenced an action in New York State court "and wishes to appear for a deposition by means other than an in-person within the state, as required by CPLR 3110 (a), that party must demonstrate that appearing within the state would cause 'undue hardship'." *Id.* (*citing LaRusso v Brookstone, Inc.*, 52 AD3d 576, 577 (2d Dep't 2008)); *see* CPLR 3110, Commentary C3110:6 ("Change of Disclosure Venue").

The *Fineman* court concluded that the COVID-19 Disaster Emergency "has disrupted the process of conducting in-person depositions safely within the state," and cited to several decisions finding that "virtual depositions are an acceptable alternative. (*see Johnson v. Time Warner Cable N.Y. City, LLC*[2020 WL 2769117,] [Kalish, J.][May 28, 2020][N.Y. Cty. Sup. Ct. Index No.: 155531/2017] ["to delay discovery until a vaccine is available or the pandemic has otherwise abated would be unacceptable"]; *Arner v. Derf Cab Corp.* [Silvera, J.][May 14, 2020][N.Y. Cty. Sup. Ct. Index No.: 151731/19] [defendants ordered to appear for virtual depositions]; *Stern as Executrix of Stern v. New York Presbyterian Hospital* [Edwards, J.] [June 1, 2020][Kings Cty. Sup. Ct. Index No.: 510384/2018][virtual depositions ordered in a medical malpractice case])." *Fineman*, 2020 WL 5088199 at * 1; *see also Rubin v. Sabharwal*, 2021 WL 561878 (Sup. Ct., New York County 2021)(granting 77 year old plaintiff's motion for a protective order precluding defendants from taking her in-person deposition, and to compel defendants to conduct her deposition by remote video conference); *Rodriguez v Montefiore Med Ctr.*, 2020 WL 7689633 (Sup. Ct., Bronx County 2020); *Fields v. MTA Bus Co.*, 69 Misc.3d 632, 638 (Sup. Ct., Westchester County 2020)(in granting plaintiffs' motion to compel depositions of all parties by video conference, court cited to several cases granting similar relief and concluded "that in-person depositions would impose undue hardship on the parties at this time due to the COVID-19 pandemic" and that "the parties' interests are sufficiently protected through the use of video depositions").

The *Fineman* court concluded that if it insisted that plaintiff's deposition be conducted in-person in accordance with CPLR 3110, "the inherent health risks associated with the pandemic would cause plaintiff, the appearing attorneys, and the court reporter 'undue hardship'." *Fineman*, 2020 WL 5088199 at * 2. Furthermore, "to place all discovery, including depositions, on hold indefinitely or until a vaccine is discovered, would greatly prejudice plaintiff," especially because of his "perilous medical condition." *Id.* Therefore, the court ordered plaintiff's virtual deposition to be conducted on or before October 2, 2020.

Court Denies Plaintiff's Application for a Remote Deposition, but Requires That Several Safety Procedures Be Put in Place for In-Person Deposition

In *Bush v. Alliant Content, LLC*, 171 N.Y.S.3d 347 (Sup. Ct., Westchester County 2022), an employment discrimination action, plaintiff asserted that she was at high risk for COVID-19 because she was not vaccinated and had recently received treatment for cancer. She submitted a letter from her treating endocrinologist in support of the application, which confirmed plaintiff's contentions. Plaintiff's counsel independently noted that his partner was at high risk for COVID-19 due to his age, and that his law firm's staff had sustained numerous COVID-19 infections over the past two years.

Defendant argued that an in-person deposition was necessary due to the large volume of evidence to be examined, including significant e-discovery. Defendant also emphasized that plaintiff maintained an active and in-person lifestyle and regularly attended her job in-person. Furthermore, defendant submitted that the limited number of necessary attendees at the deposition could obtain a PCR test in advance, social distancing could be imposed, and masks could be required for all non-speaking attendees.

The court recognized that notwithstanding the language in CPLR 3113(d) that only permits the parties to stipulate to a remote deposition, the courts are vested with power under CPLR 3103(a) to order a remote deposition. *See* Siegel & Connors, New York Practice § 356 (January 2023 Supplement). The *Bush* court recognized that during the COVID-19 Disaster Emergency many decisions have held that requiring a party to appear for an in-person deposition can create an undue hardship, *see, e.g., V.M. v. M.M.*, 2022 WL

260508 (Sup. Ct., Kings County 2022), but concluded that the plaintiff had not satisfied this burden.

Nonetheless, the court insisted that the deposition be conducted with several detailed protections in place, including

> a large enough conference room so that each individual is spaced at least three feet apart. The plaintiff must be partitioned with glass or plastic partitions so that she is separated from defense counsel, her own counsel, court reporters and the two parties present. Plaintiff's counsel must also be partitioned off completely from all other individuals present for the deposition, as does any other individual present who desires to be partitioned. All individuals present, except the attorney questioning the witness and the plaintiff, must wear a mask at all times. Should plaintiff and/or plaintiff's counsel wish to have a private conversation with each other, all other individuals shall leave the conference room so that the conversation can be conducted in the conference room where the deposition is taking place. (n.1 It is encouraged that the individuals attending also take a PCR and/or at home Covid test prior to the deposition.)

Id. at 349–50, 350 n.1.

XLIII. CPLR 3120. Discovery and production of documents and things for inspection, testing, copying or photographing.

Discovery Notice That Did Not Contain Any Time Limit on Records to be Produced Deemed "Overly Broad"

Blunderbuss demands for documents using broad and general descriptions, especially when they require the production of massive quantities of papers or other items, are generally not enforced by the courts. *See* Siegel & Connors, New York Practice § 362. For example, in *Ghodbane v. 111 John Realty Corp.*, 2021 WL 504882 (Sup. Ct., New York County 2021), plaintiff served a CPLR 3120(1)(i) notice to produce fifteen items pertaining to records of installation, inspection, maintenance and repair related to the electrical services, water lines, pumps and submeters and sewer lines located in the basement of the building where plaintiff fell on a staircase. Defendants

argued that the requests were overly broad and constituted a fishing expedition. Plaintiff moved under CPLR 3124 to compel defendant to provide detailed responses to the CPLR 3120 notice.

The court acknowledged that the notice sought relevant information, but concluded it was overly broad because it did not contain any time limit on the records to be produced. In addition, plaintiff's motion did not provide the court "with a straightforward way to limit the temporal scope of the . . . [n]otice." *Ghodbane*, 2021 WL 504882, at *2. Therefore, the court vacated the entire demand rather than pruning it.

Revised Uniform Rules Require Parties and Nonparties to Adhere to the Electronically Stored Information ("ESI") Guidelines in Appendix A to the Rules of Practice for the Commercial Division

Rule 11-c of the Rules of Practice for the Commercial Division refers to the Commercial Division's Guidelines for Discovery of Electronically Stored Information ("ESI") (the "ESI Guidelines"), which can be found in Appendix A to the Rules of the Commercial Division. 22 N.Y.C.R.R. § 202.70(g), Appendix A. Effective February 1, 2021, a new Uniform Rule 202.20-j, now entitled "Adherence to the Electronically Stored Information ('ESI') Guidelines Set Forth in Appendix Hereto," was adopted to address disclosure of ESI in supreme and county court actions. The rule was subsequently amended effective July 1, 2022 and now states that "[p]arties and nonparties should adhere to the Electronically Stored Information ('ESI') Guidelines set forth in Appendix A hereto." While Uniform Rule 202.20-j refers to the "Electronically Stored Information ('ESI') Guidelines set forth in Appendix A hereto," the rule appears to be citing to what is currently Appendix A to Uniform Rule 202.70(g), which contains the Rules of Practice for the Commercial Division. Appendix A was substantially amended effective April 11, 2022. *See* AO/72/22.

Significantly, Appendix A provides that, "[a]s a general matter, the producing party should bear the cost of searching for, retrieving, and producing ESI." Appendix A, VIII, A. Uniform Rule 202.20-j and Appendix A are discussed in further detail in the 2022 McKinney's Supplementary Practice Commentaries to CPLR 3120, C3120:2A ("Electronic Disclosure").

Fourth Department Orders Production of Plaintiff's Cell Phone

The discovery of a driver's cell phone records for the period surrounding the occurrence is commonly sought. *See* Siegel & Connors, New York Practice § 362. In *Tousant v. Aragona*, _ A.D.3d _, --- N.Y.S.3d ----, 2022 WL 3097520 (4th Dep't 2022), a negligence action arising from a collision with defendants' school bus, defendants moved to compel production of plaintiff's cell phone and related information to ascertain if he was using the phone at or near the time of the accident. The supreme court denied the motion to the extent it sought production of the cell phone, but required production of cell phone records from plaintiff's service provider.

The cell phone records obtained from the provider established that plaintiff was not talking on his phone at the time of the accident, but we all know that cell phones are now rarely used for talking and have an abundance of other features. The provider's records did not indicate, for example, whether plaintiff opened or sent text messages during the relevant time period or was using any other "applications on his phone, such as Snapchat or Facebook." *Tousant*, _ A.D.3d at _, --- N.Y.S.3d at----, 2022 WL 3097520, at *1.

Defendants made a second motion to compel production of, and access to, plaintiff's cell phone, arguing that an examination of the phone itself was necessary to ascertain if plaintiff was using it at the time of the accident for purposes other than verbal communication. The court denied the motion because defendants failed to put forward a factual basis to suggest that the phone was being used for texting at the time of the accident.

The Fourth Department reversed, citing to New York's liberal disclosure rule in CPLR 3101(a). The court also quoted from the Court of Appeals' 2018 decision in *Forman v. Henkin*, 30 N.Y.3d 656, 664, 70 N.Y.S.3d 157, 164 (2018), which ruled that "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information." In *Forman*, a case in which defendant sought disclosure of relevant materials on plaintiff's social media site, the Court found that defendant "more than met his threshold burden of showing that …the materials from plaintiff's Facebook account that were ordered to be disclosed pursuant to Supreme Court's order were

reasonably calculated to contain evidence 'material and necessary' to the litigation." *Forman*, 30 N.Y.3d at 666, 70 N.Y.S.3d at 166.

Applying this standard, the Fourth Department ruled that defendants were entitled to production of, or access to, plaintiff's cell phone. In support of their second motion to compel, defendants submitted evidence that plaintiff was traveling at close to 80 miles per hour on a residential road near an elementary school just before the accident, and that he did not brake before colliding with the school bus. The court concluded that "[e]vidence concerning whether [plaintiff] was distracted before the collision is relevant to the issues involved in this negligence action, and defendants' request for production of or access to his cellular phone is reasonably calculated to yield relevant information…, especially considering that [plaintiff] is unable, due to his injuries [that left him in a vegetative state], to provide any information regarding his activities in the moments before the accident." *Tousant*, _ A.D.3d at _, --- N.Y.S.3d at ----, 2022 WL 3097520, at *2.

XLIV. CPLR 3121. Physical or mental examination.

Court Rules That CPLR 3121(a) Notice That Does Not "Specify the Time…and the Conditions and Scope of the Examination" Is Defective

CPLR 3121(a) requires that the notice of examination "specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination." It is rare indeed where a party seeking disclosure fails to comply with this provision, but in *Rivera v. Quadrum 38, LLC*, 2021 WL 5407843 (Sup. Ct., New York County 2021), the court granted plaintiff's motion for a CPLR 3103(a) protective order vacating defendants' CPLR 3121(a) demand for a pre-surgery physical examination. The court noted that the notice of examination did not "'specify the time … and the conditions and scope of the examination' as required (CPLR 3121[a]) and is, therefore, procedurally defective." *Rivera*, 2021 WL 5407843, at *1.

The decision and related issues are discussed in Siegel & Connors, New York Practice § 363 (January 2023 Supplement).

First Department Recognizes That Disclosure Demand for Hospital Authorizations Is Authorized by CPLR 3121

While the language of CPLR 3121(a) can lead to the view that a hospital authorization can be secured only by demand in a notice setting up an examination, the examination is not necessary to the demand. In *Winslow v. New York-Presbyterian/Weill-Cornell Medical Center*, 203 A.D.3d 533, 534, 161 N.Y.S.3d 775, 776 (1st Dep't 2022), the First Department addressed the point, concluding that "[p]laintiff's argument that a discovery demand for medical record authorizations is not legally authorized is incorrect." The court affirmed an order denying plaintiff's cross-motion for a protective order precluding disclosure of his medical records, and ordering plaintiff to provide HIPAA-compliant authorizations for specified providers and a specified time range.

First Department Rules That Spoliation Sanctions Cannot Be Imposed on Plaintiff Who Elects Non-Emergency Surgery Prior to CPLR 3121(a) Exam

In *Gilliam v Uni Holdings*, 201 A.D.3d 83, 86, 159 N.Y.S.3d 401, 403–04 (1st Dep't 2021), the First Department held "that the condition of one's body is not the type of evidence that is subject to a spoliation analysis. And, to the extent that these lower court decisions hold that spoliation analysis encompasses the condition of one's body, they should not be followed."

In *Gilliam*, plaintiff alleged that she was struck by a falling portion of the bathroom ceiling in her apartment and sustained injuries to, among other things, her lumbar spine. She failed to appear for a court ordered CPLR 3121(a) exam, and approximately 1 month later underwent surgery to her lumbar spine. After defendant attempted to schedule another CPLR 3121(a) exam, plaintiff served a supplemental bill of particulars in which she disclosed the lumbar spine surgery and attached a HIPAA release form. The supreme court denied the motion to dismiss plaintiff's action, but issued spoliation sanctions against plaintiff by precluding her from offering any evidence regarding an injury or surgery to her lumbar spine and recovering any damages for such injury or surgery.

The First Department reversed and held "that the condition of one's body is not the type of evidence that is subject to a spoliation analysis." *Gilliam*, 201

A.D.3d at 85, 159 N.Y.S.3d at 403. Rather, the failure to appear for a court-ordered CPLR 3121(a) exam, "regardless of whether [it] is preceded by medical treatment for the condition at issue, should be analyzed the same as other failures to comply with court-ordered discovery." *Gilliam*, 201 A.D.3d at 86, 159 N.Y.S.3d at 404.

The *Gilliam* decision is discussed in Siegel & Connors, New York Practice § 363 (January 2023 Supplement).

XLV. CPLR 3122. Objection to disclosure, inspection or examination; compliance.

Where Party Timely Objects to Party's Disclosure Demand, but Fails to Particularize Objections, It Waives Objections Based on Any Ground Other Than Privilege or Palpable Impropriety

In *Khatskevich v Victor*, 184 A.D.3d 504, 124 N.Y.S.3d 178 (1st Dep't 2020), plaintiff timely objected to defendant's disclosure request in writing, but did not specify any particular grounds. Approximately five months later, plaintiff raised a privilege objection. Defendant moved to compel production and, after an in camera review, the court denied the motion. The First Department reversed, holding that plaintiff waived objections based on any ground other than privilege or palpable impropriety, and that plaintiff failed to establish a basis to object on those grounds. *See also Healy v Carriage House LLC*, 2021 WL 1175108 (Sup. Ct., New York County 2021)(where nonparty served with subpoena failed to object with particularity, court held that it did establish "palpable impropriety" of certain materials sought).

XLVI. CPLR 3126. Penalties for Refusal to Comply with Order or to Disclose.

Administrative Order AO/71/20 Encourages Parties to Agree to Extensions of Disclosure Deadlines During COVID-19 Disaster Emergency

In recognition of the standstill in litigation caused by the COVID-19 Disaster Emergency, the Chief Administrative Judge issued Administrative Order AO/71/20 on March 19, 2020. AO/71/20 declared that "[t]he

prosecution of pending civil matters (including discovery) in a manner that requires in-person appearances or travel, or otherwise requires actions inconsistent with prevailing health and safety directives relating to the coronavirus health emergency, is strongly discouraged."

Regarding discovery, AO/71/20 directs:

> Civil Discovery Generally: Where a party, attorney or other person is unable to meet discovery or other litigation schedules (including dispositive motion deadlines) for reasons related to the coronavirus health emergency, the parties shall use best efforts to postpone proceedings by agreement and stipulation for a period not to exceed 90 days. Absent such agreement, the proceedings shall be deferred until such later date when the court can review the matter and issue appropriate directives. In no event will participants in civil litigation be penalized if discovery compliance is delayed for reasons relating to the coronavirus public health emergency.

AO/71/20 applies to a "party, attorney or other person" who cannot "meet [a] discovery or other litigation schedule[]." That would include a party or nonparty witness. The AO is addressed in further detail in Siegel & Connors, New York Practice § 367 (January 2023 Supplement).

XLVII. CPLR 3133. Service of answers or objections to interrogatories.

Where Interrogatories Are Overbroad, the Appropriate Remedy Is to Vacate the Entire Demand

If the court finds in a given case that interrogatories are burdensome, oppressive and improper, it will often vacate them in toto rather than prune them. *See* Siegel & Connors, New York Practice § 361. That was precisely the outcome in *Bennett v. State Farm Fire & Casualty Co.*, 189 A.D.3d 749, 137 N.Y.S.3d 120 (2d Dep't 2020), wherein the Second Department affirmed supreme court's denial of plaintiffs' CPLR 3124 motion to compel the defendants to respond to certain interrogatories and to produce certain documents. Similarly, in *Fox v. Roman Catholic Archdiocese of New York*, 202 A.D.3d 1061 (2d Dep't 2022), the Second Department held that supreme court should have granted the defendant's motion to strike the

plaintiff's CPLR 3120 demand and interrogatories in their entirety, instead of pruning them, where "they were overbroad and burdensome, sought irrelevant or confidential information, or failed to specify with reasonable particularity many of the documents demanded."

XLVIII. CPLR 3211(a)(5). Motion to Dismiss Based on Various Affirmative Defenses.

Second Department Imposes Collateral Estoppel Based on Findings of Workers' Compensation Board, and Dismisses Personal Injury Action

The Court of Appeals has repeatedly recognized that quasi-judicial determinations of administrative agencies, such as determinations of the Workers' Compensation Board, may be entitled to collateral estoppel effect if the requirements of the doctrine are satisfied. *See* Siegel & Connors, New York Practice § 456. While the Court of Appeals held that there was not the required identity of issue in *Auqui v. Seven Thirty One Ltd. Partnership*, 22 N.Y.3d 246 (2013), to impose collateral estoppel on the plaintiff in his personal injury action, in *Lennon v. 56th and Park (NY) Owner, LLC*, 199 A.D.3d 64 (2d Dep't 2021), the Second Department found that the requirements of imposing the doctrine were satisfied and afforded collateral estoppel effect to a Workers Compensation Board determination.

The court cited and discussed several decisions in which the parties disputed whether collateral estoppel could be imposed based on the findings of a Workers Compensation Board determination, with results going in both directions. The *Lennon* court attempted to reconcile "the various cases where collateral estoppel has or has not been applied as a result of workers' compensation findings" and concluded that "the central inquiry, regarding the identity of issue, is whether the board evaluated an issue on its merits which, by its nature and scope, then prevents the plaintiff from establishing one or more elements for a viable personal injury action, whether as to liability or damages."

The Second Department ruled that the defendants met their burden of establishing that collateral estoppel emanating from the Workers' Compensation Board determination barred plaintiff's personal injury action. The findings of the Board

> established as a matter of fact that the accident claimed by the plaintiff did not occur, or did not occur in the described manner as would cause injury. That finding is material and, in fact, pivotal, to the core viability of any personal injury action that the plaintiff could pursue in a court at law regarding the same incident.

In that plaintiff had a full and fair opportunity to litigate that central issue at a "detailed and thorough hearing" before the Workers' Compensation Board, the court ruled that defendant should be awarded summary judgment based on collateral estoppel because he was "barred…from arguing the core of his case in this matter," i.e., that the alleged accident occurred.

XLIX. CPLR 3211(d). Facts unavailable to opposing party.

Third Department Holds That Plaintiff Provided "Sufficient Start" Required to Warrant Further Disclosure to Establish Longarm Jurisdiction

In *Archer-Vail v. LHV Precast Inc.*, 168 A.D.3d 1257, 92 N.Y.S.3d 434 (3d Dep't 2019), the Third Department affirmed supreme court's order denying defendant's motion to dismiss based on lack of personal jurisdiction pending further disclosure on the issue. The court acknowledged that plaintiff bore the burden of proof on establishing personal jurisdiction, but noted that in opposing a motion to dismiss pursuant to CPLR 3211(a)(8), plaintiff did not have the burden of "making a prima facie showing of personal jurisdiction; rather, plaintiff need only demonstrate that it made a 'sufficient start' to warrant further discovery . . . ." *Archer-Vail*, 168 A.D.3d at 1261.

Plaintiff was relying on CPLR 302(a)(3), a provision in New York's longarm statute that requires satisfying several elements to establish jurisdiction. *See* Siegel & Connors, New York Practice § 88 (discussing CPLR 302(a)(3)). Among other things, "[p]laintiff submitted evidence establishing that [defendant] maintained an interactive website, which marketed and made its products available to New York customers, provided for custom designs tailored to the needs of the purchaser and highlighted its prior sales to New York and other interstate customers." *Archer-Vail*, 168 A.D.3d at 1261-62. Plaintiff also relied on affidavits submitted by defendant

to establish that it derived substantial revenue from goods used or consumed in the state, *see* CPLR 302(a)(3)(i), or from interstate commerce, and that it should have reasonably expected its allegedly negligent acts to have consequences in this State. *See* CPLR 302(a)(3)(ii). Based on these submissions, the Third Department ruled that plaintiff made "the 'sufficient start' required to warrant further discovery on the issue of whether personal jurisdiction may be properly exercised over [defendant] under CPLR 302(a)(3)." *Archer-Vail*, 168 A.D.3d at 1262; *see also State v. Vayu, Inc*, 195 A.D.3d 1337 (3d Dep't 2021).

L. CPLR 3211(e). Number, time and waiver of objections; motion to plead over.

CPLR 3211(e) Amended to Eliminate 60-Day Rule in "Any Proceeding to Collect a Debt Arising Out of a Consumer Credit Transaction"

CPLR 3211(e) that requires a defendant who raises the defense of lack of personal jurisdiction based on improper service in an answer to make a motion for summary judgment on the defense within 60 days of serving the answer. See Siegel & Connors, New York Practice §§ 111, 266, 269.

As part of a series of 2022 amendments to the CPLR that pertain to actions arising from consumer credit transactions, known as the Consumer Credit Fairness Act, the 60-day rule is made inapplicable "in any proceeding to collect a debt arising out of a consumer credit transaction where a consumer is a defendant."

The Consumer Credit Fairness Act also amended the last sentence in CPLR 3211(e), which provides that the affirmative defenses of lack of personal jurisdiction or in rem jurisdiction are waived if they are not included in a CPLR 3211(a) pre-answer motion to dismiss or, if no such motion is made, the affirmative defenses are not included in the responsive pleading. The amendment now provides that if no CPLR 3211(a) motion is made, the defendant can raise these affirmative defenses "in the responsive pleading *which, in any action to collect a debt arising out of a consumer credit transaction where a consumer is a defendant, includes any amended responsive pleading*." (emphasis added). This italicized language, which

contains the amendment, is superfluous and applies in all actions in any event.

The amendments to CPLR 3211(e) are discussed in further detail in Siegel & Connors, New York Practice §§ 111, 266, 269, 274 (January 2023 Supplement).

LI. CPLR 3212. Motion for Summary Judgment.

Courts Hold That Governor's COVID-19 Executive Orders Tolled Time to Move for Summary Judgment

CPLR 3212(a) requires that motions for summary judgment be served within 120 days of the filing of the note of issue, unless the court sets its own deadline in a given case. *See* Siegel & Connors, New York Practice § 279. Executive Order 202.8 tolled "any specific time limit for the . . . service of any . . . motion" in the CPLR. *See* Siegel & Connors, New York Practice § 33 (January 2023 Supplement). Therefore, if a CPLR 3212(a) time period to move for summary judgment was running during the COVID-19 Toll, it will receive the benefit of the toll. *See Kocak v. Sabato*, 2021 NY Slip Op 31954(U) (Sup. Ct., Broome County 2021)(interpreting rules for the Sixth Judicial District, requiring that dispositive motions be made within sixty days of the filing of the Note of Issue); *Brown v. Chazbani*, 2021 WL 2388826 (Sup. Ct., Kings County 2021).

First Reported Decisions Applying the Revised Uniform Rules on Statement of Material Facts for Summary Judgment Motions

One of the more significant amendments to the Uniform Rules is contained in a new section 202.8-g, entitled "Motions for Summary Judgment; Statements of Material Facts." This new rule, which largely tracks the language in Commercial Division Rule 19-a and Local Rule 56.1 in the Federal District Courts in the Southern and Eastern Districts of New York, requires the parties to comply with several procedural hurdles on a summary judgment motion in addition to those in CPLR 3212, the primary summary judgment statute. For example, Uniform Rule section 202.8-g(a) states:

> Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, *the court may direct that* there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

In turn, Uniform Rule section 202.8-g(b) provides that:

> the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

Furthermore, every statement of material fact submitted on a motion for summary judgment "must be followed by citation to evidence submitted in support of or in opposition to the motion." 22 N.Y.C.R.R. 202.8-g(d).

The real kicker in Uniform Rule section 202.8-g lies in subdivision (c), which states that "[e]ach numbered paragraph in the statement of material facts required to be served by the moving party *may* be deemed to be admitted *for purposes of the motion* unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party. *The court may allow any such admission to be amended or withdrawn on such terms as may be just.*" Therefore, an opponent's failure to comply with Uniform Rule section 202.8-g(b) can pave the way to a grant of summary judgment, as it did in *Reus v. ETC Housing Corporation*, 72 Misc.3d 479 (Sup. Ct., Clinton County 2021), *aff'd* 203 A.D.3d 1281, 164 N.Y.S.3d 692 (3d Dep't 2022) which may be the first reported decision on the new Uniform Rules. *See also Amos Fin. LLC v Crapanzano*, 2021 WL 3503946 (Sup. Ct., Rockland County 2021)("This Court denies this motion because it violates the Uniform Rules governing summary judgment applications."). Yet in *Leberman as Trustee for Estate of Hathaway v. Instantwhip Foods*, 207 A.D.3d 850 (3d Dep't 2022), the Third Department held that "[w]hile it would have been better for [plaintiff] to submit a paragraph-by-paragraph response to [defendants'] statement, 'blind adherence to the procedure'" set forth in 22 NYCRR 202.8-g is not required

if the proof does not support granting summary judgment or the circumstances otherwise warrant a departure from that procedure".

CPLR 3212 Amended to Add a New Subdivision (j) Requiring an Additional Notice in Summary Judgment Motions Against a Pro Se Defendant in Actions Arising from a Consumer Credit Transaction

Effective May 7, 2022, a new subsection (j) was added to CPLR 3212, which requires an additional notice when moving for summary judgment, in whole or in part, in any action against "a consumer defendant in an action to collect a debt arising out of a consumer credit transaction . . . where the consumer defendant against whom summary judgment is sought is not represented by an attorney." This measure is contained in the Consumer Credit Fairness Act and is one of several 2022 amendments to the CPLR that pertain to actions arising from consumer credit transactions.

The new subdivision may prevent a moving party from entering an order granting summary judgment, in whole or in part, within the time frames otherwise permitted under CPLR 2214(b). The issue is discussed in detail in Siegel & Connors, New York Practice § 278 (January 2023 Supplement).

LII. CPLR 3213. Motion for summary judgment in lieu of complaint.

CPLR 3213 Amended to Mandate Compliance with New CPLR 3212(j), Which Requires an Additional Notice in Summary Judgment Motions Against a Pro Se Defendant in Actions Arising from a Consumer Credit Transaction

Effective May 7, 2022, a new subsection (j) was added to CPLR 3212, which requires an additional notice when moving for summary judgment in any action against "a consumer defendant in an action to collect a debt arising out of a consumer credit transaction . . . where the consumer defendant against whom summary judgment is sought is not represented by an attorney." This measure, noted above, is contained in the Consumer Credit Fairness Act and is one of several 2022 amendments to the CPLR that pertain to actions arising from consumer credit transactions.

CPLR 3213 was also amended to provide that "[t]he additional notice required by subdivision (j) of rule 3212 shall be applicable to a motion made pursuant to this section in any action to collect a debt arising out of a consumer credit transaction where a consumer is a defendant."

As with so many of the provisions contained in the Consumer Credit Fairness Act, the amendment to CPLR 3213 is clunky. The notice required under CPLR 3212(j)(1) will, in effect, need to be submitted to the clerk at the time of service of the CPLR 3213 papers in all instances where the plaintiff commences an "action to collect a debt arising out of a consumer credit transaction where a consumer is a defendant." CPLR 3213; *see* CPLR 3212(j)(1).

In addition, the minimal time periods in CPLR 3212(j)(2) that must be satisfied before an order granting summary judgment can be entered do not conform with the time periods in CPLR 3213. Based on the language in CPLR 3212(j)(2), it would appear that if the additional notice and envelope required by CPLR 3212(j)(1) are provided to the clerk at the time of the filing of the CPLR 3213 summons and summary judgment motion, the award of summary judgment can be entered on the return date.

The issue is discussed in detail in Siegel & Connors, New York Practice § 291 (January 2023 Supplement).

LIII. CPLR 3215. Default judgment.

CPLR 3215(f) Amended to Require Additional Proof in Action Arising Out of Consumer Credit Transaction

Effective May 7, 2022, CPLR 3215(f) was amended to add an additional requirement "[i]n an action arising out of a consumer credit transaction, if the plaintiff is not the original creditor." In such actions, the party applying for a default judgment must include in her papers:

> (1) an affidavit by the original creditor of the facts constituting the debt, the default in payment, the sale or assignment of the debt, and the amount due at the time of sale or assignment; (2) for each subsequent assignment or sale of the debt to another entity, an

> affidavit of sale of the debt by the debt seller, completed by the seller or assignor; and (3) an affidavit of a witness of the plaintiff, which includes a chain of title of the debt, completed by the plaintiff or plaintiff's witness.

The requirement imposed here will be a relatively burdensome one for the plaintiff, especially in situations where the debt may have been assigned well before the amendment took effect.

The amended CPLR 3215(f) states that the chief administrative judge will issue form affidavits to satisfy the requirements of this subdivision for consumer credit transactions.

New CPLR 3215(j) Requires That Application to Clerk for Default Judgment Be Accompanied by an Affidavit from an Attorney or Party Stating That Statute of Limitations Has Not Expired

An amendment to CPLR 3215 adding a new subsection (j) is somewhat startling, so we quote it in full:

> (j) Affidavit. A request for a default judgment entered by the clerk, must be accompanied by an affidavit by the plaintiff or plaintiff's attorney stating that after reasonable inquiry, he or she has reason to believe that the statute of limitations has not expired. The chief administrative judge shall issue form affidavits to satisfy the requirements of this subdivision for consumer credit transactions.

This new subsection, which went into effect on May 7, 2022, comes as a bit of a surprise because the statute of limitations is an affirmative defense on which the defendant has the burden of proof. *See* Siegel & Connors, New York Practice § 223. Therefore, it need not be pleaded by the party asserting the claim. *See* Siegel & Connors, New York Practice § 215. Nonetheless, the new CPLR 3215(j) turns these longstanding principles on their head and requires that a party applying to the clerk for a default judgment include an affidavit by the plaintiff, or the plaintiff's attorney, "stating that after reasonable inquiry, he or she has reason to believe that the statute of limitations has not expired." CPLR 3215(j).

The affidavit required by CPLR 3215(j) will be a somewhat odd document for the actual plaintiff to swear to, as she likely has little or no knowledge of the law governing the expiration of the statute of limitations.

The new statutory requirement in CPLR 3215(j) is somewhat similar to one of the requirements in Uniform Rule 202.27-a, which governs default judgments in consumer credit matters and is discussed at the end of this section in the main volume.

The new CPLR 3215(j) requires the affidavit regarding the statute of limitations in all applications to the clerk for a default judgment, and not simply those pertaining to consumer credit transactions!

The amendment to CPLR 3215(j) is discussed in further detail in Siegel & Connors, New York Practice § 295 (January 2023 Supplement).

Where Action Is Dismissed Under CPLR 3215(c), but Order Does Not Include the Specific Conduct Demonstrating "A General Pattern of Delay," Plaintiff Is Entitled to CPLR 205(a)'s 6-Month Extension

If the complaint is dismissed under CPLR 3215(c) and the statute of limitations has expired, the dismissal may be the end of the line for the plaintiff. The dismissal qualifies as a neglect to prosecute, which is one of the four exceptions to the application of CPLR 205(a). If, however, the order of dismissal does not include any findings of specific conduct demonstrating "a general pattern of delay in proceeding with the litigation," the plaintiff will be entitled to the six-month period for a new action under CPLR 205(a). *See* Siegel & Connors, New York Practice §§ 52, 294. That was the result in *Estrella v. East Tremont Medical Center*, 193 A.D.3d 567, 142 N.Y.S.3d 802 (1st Dep't 2021), a medical malpractice action that had been dismissed under CPLR 3215(c). In that the order of dismissal did not contain any findings of specific conduct demonstrating "a general pattern of delay in proceeding with the litigation," plaintiff was entitled to CPLR 205(a)'s gifts and timely commenced a second action.

LIV. CPLR 3216. Want of prosecution.

Court's Conditional Order of Dismissal under CPLR 3216 Deemed Improper on Several Grounds

Several conditions must be satisfied before an action can be dismissed for neglect to prosecute under CPLR 3216. *See* Siegel & Connors, New York Practice § 375. The first condition is that the dismissal motion cannot be made earlier than a year after the joinder of issue. In *Bank of America, N.A. v. Ali*, 202 A.D.3d 726 (2d Dep't 2022), a mortgage foreclosure action, supreme court issued a conditional order of dismissal for want of prosecution under CPLR 3216 at a status conference. The plaintiff took no further action, and the action was administratively dismissed. More than five years after the conditional order, and more than nine years after the action was commenced, plaintiff moved to vacate the conditional order of dismissal and to restore the action to the active calendar.

Supreme court denied the motion, but the Second Department reversed, holding that the court "was without authority to issue a 90–day notice since issue was not joined in the action." The court also ruled that the conditional order of dismissal, which in effect was the 90–day demand required by CPLR 3216(b)(3), was defective because it did not state that the plaintiff's failure to comply would serve as a basis for supreme court, on its own motion, to dismiss the action. Moreover, a CPLR 3216 motion was never made by the court and there was no entry of an order of dismissal. In sum, a total of three shortcomings under CPLR 3216 led to the restoration of a thirteen-year-old action to the trial calendar.

These issues are discussed in further detail in Siegel & Connors, New York Practice § 375 (January 2023 Supplement).

Failure of Courts to Set Forth "Specific Conduct Constituting the Neglect" in CPLR 3216(b)(3) Demand Results in Reversal of Dismissal for Neglect to Prosecute

If the court fails to include the specific conduct constituting neglect in its 90-day demand, as required by the 2015 amendment to CPLR 3216(b)(3), would that render a subsequent dismissal under CPLR 3216 void? We now have caselaw answering the question in the affirmative. For example, in

Christiano v. Heatherwood House at Holbrook II, LLC, 185 A.D.3d 778, 779, 125 N.Y.S.3d 299, 300 (2d Dep't 2020), the Second Department ruled that supreme court's CPLR 3216 dismissal was improper because, among other things, its compliance conference order that constituted the court's written demand under CPLR 3216(b)(3) "failed to set forth any specific conduct constituting neglect by the plaintiffs in proceeding with the litigation." *See* Siegel & Connors, New York Practice § 375 (January 2023 Supplement).

LV. Uniform Rule 202.26. Settlement and Pretrial Conferences.

Uniform Rule 202.26 Amended in Several Respects

As part of the overhaul of the Uniform Rules in 2021, *see* Siegel & Connors, New York Practice § 3 (January 2023 Supplement), Uniform Rule 202.26 was substantially amended in several respects and is now entitled "Settlement and Pretrial Conferences."

Uniform Rule 202.26(a) addresses the "Settlement Conference," which can occur at any time after the "certification of the matter as ready for trial or at any time after the discovery cut-off date." The scheduling of a settlement conference is optional, but if the judge elects to hold one, both "counsel and the parties" must attend and "are expected to be fully prepared to discuss the settlement of the matter." 22 N.Y.C.R.R. § 202.26(a).

Uniform Rule 202.26(b) separately addresses the "Pretrial Conference," which is still optional. The rule mandates, nonetheless, that "counsel . . . confer in a good faith effort to identify matters not in contention, resolve disputed questions without need for court intervention and further discuss settlement of the case" prior to trial. 22 N.Y.C.R.R. § 202.26(b). The rule states that if the court elects to schedule a pretrial conference, "or otherwise prior to the commencement of opening statements, counsel shall be prepared to discuss all matters as to which there is disagreement between the parties and settlement of the matter, and the court may require the parties to prepare a written stipulation of undisputed facts." 22 N.Y.C.R.R. § 202.26(b).

Under the prior version of Uniform Rule 202.26(e), the court was empowered to direct representatives of an insurer of a party to attend a pretrial conference. That power has now been removed from the rule, along with the power to order parties, representatives of parties, or persons having an interest in any settlement, including those holding liens on any settlement or verdict, to attend the pretrial conference.

The new rule deleted the provisions in the former subdivision (g) of Uniform Rule 202.26 that addressed transfers down under CPLR 325(c) and (d). It would seem that the court still retains the power to transfer down actions to lower courts at the pretrial conference stage, as there is no timeliness restriction in CPLR 325 or Uniform Rule 202.13.

The substantial changes to Uniform Rule 202.26 are discussed in Siegel & Connors, New York Practice §§ 27, 374 (January 2023 Supplement).

LVI. CPLR 5003-a. Prompt payment following settlement.

Court Rules That CPLR 5003-a Applies to Settlements in Federal Actions, But That COVID-19 Toll Does Not Apply to Timing of Payment Obligations Under the Statute

In *D.M. v. New York City Department of Education*, 2021 WL 4441508 (S.D.N.Y. 2021), the parties reached a settlement and stipulated to the dismissal of the action on December 6, 2019. The court concluded that while CPLR 5003-a is a state statute, it applies to settlements in federal actions, even if the underlying claim arises under federal law. *See Elliot v. City of New York*, 2013 WL 3479519, at *2 (S.D.N.Y. 2013). Therefore, the court ruled that plaintiffs were entitled to entry of judgment and interest on the settlement because the municipal defendant failed to pay the settlement amount within 90 days of the tender of the release and stipulation of discontinuance. *See* CPLR 5003-a(b).

Under CPLR 5003-a(b), the defendant was required to pay the settlement amount by October 27, 2020, but failed to make the payment until January 19, 2021. The court rejected the defendant's argument that its payment, while late, rendered plaintiffs' motion moot. The court noted that "the fact that payment was tendered sometime after that 90-day period may change

the interest to which the plaintiff was entitled, but it did not change the underlying issue of whether the plaintiff was entitled to interest based on failure to pay the settlement amount within the statutory period." *D.M.*, 2021 WL 4441508 at *2.

The court rejected defendant's argument that the COVID-19 Toll, *see* Siegel & Connors, New York Practice § 33 (January 2023 Supplement), tolled the time periods in CPLR 5003-a governing the payment of a settlement. The court quoted the language in Executive Order 202.8 that provided for the tolling of "... any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state." The court concluded that this language does not toll a party's time to pay a settlement agreement governed by CPLR 5003-a.

LVII. CPLR 5004. Rate of Interest.

CPLR 5004 Amended to Lower Statutory Interest from 9% to 2% on Claims and Judgments "Arising Out of a Consumer Debt"

Effective April 30, 2022, CPLR 5004 was amended to change the "annual rate of interest to be paid in an action arising out of a consumer debt where a natural person is a defendant." CPLR 5004(a). A new CPLR 5004(b) affords a broad definition of "consumer debt" to encompass

> any obligation or alleged obligation of any natural person to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment, including, but not limited to, a consumer credit transaction, as defined in [CPLR 105(f)].

The interest rate for such obligations, which was previously 9% annually, is now 2%. The amendment is discussed in further detail in Siegel & Connors, New York Practice § 412 (January 2023 Supplement).

LVIII. CPLR 5019. Validity and correction of judgment or order; amendment of docket.

CPLR 5019(c) Amended to Note That Subdivision Is Not Applicable to an Assignment of a Debt Before a Judgment Is Obtained

CPLR 5019(c) states the procedure for recording the fact that someone has succeeded to the interest of the judgment creditor, such as an assignee, a trustee in bankruptcy, a receiver, etc. *See* Siegel & Connors, New York Practice § 423. Effective November 8, 2021, CPLR 5019(c) was amended to provide that the subdivision will "not apply when there is a change to the owner of a debt through a sale, assignment, or other transfer where no judgment exists." Therefore, if a debt is assigned before a judgment is obtained, it need not be recorded in the county clerk's office.

LIX. CPLR 5201. Debt or property subject to enforcement; proper garnishee.

Federal Court Rules Judgment Debtor Cannot Assert Lack of Personal Jurisdiction Over Garnishee Bank

The "separate entity" rule provides that a restraining notice or turnover order served on a bank branch in New York is only effective as to assets held in accounts maintained at that specific branch, but will not have any effect on assets held in other branches. Therefore, personal jurisdiction over the bank where the judgment debtor's account is maintained is necessary for enforcement purposes. *See* Siegel & Connors, New York Practice § 487. In *Levine as trustee of Marvin H. Schein Descendants' Trust v. Brown*, 2020 WL 550653 (S.D.N.Y. 2020), plaintiff moved for a turnover order pursuant to Rule 69 of the Federal Rules of Civil Procedure, *see* Siegel & Connors, New York Practice § 641, and CPLR 5225(b) seeking funds held by Wells Fargo, the garnishee, in an account that had been opened in Texas. The court noted that the procedural requirements in CPLR 5225(b) were satisfied and there was no dispute that there was personal jurisdiction over the defendant. Nonetheless, the defendant attempted to assert lack of personal jurisdiction over Wells Fargo.

The court concluded that "personal jurisdiction is an 'individual right, which is waivable,' and therefore cannot be raised on behalf of others." *Levine*,

2020 WL 550653 at *1. Thus, it held that the defendant lacked standing to raise the defense on behalf of Wells Fargo, who had been served and given the opportunity to object to the proceeding.

The court granted plaintiff's motion and ordered turnover of the proceeds. It ordered plaintiff to serve a copy of the relevant orders on Wells Fargo at the relevant branch or branches in possession of the accounts at issue.

LX. CPLR 5240. Modification or protective order; supervision of enforcement.

Court of Appeals Holds That Proceedings Under CPLR 5239 and 5240 Are a Judgment Debtor's Exclusive Remedy for Alleged Misuse of CPLR Article 52's Enforcement Devices; A Claim in Tort Does Not Lie

In *Plymouth Venture Partners, II, L.P. v GTR Source, LLC*, 37 N.Y.3d 591 (2021), the plaintiff, a receiver acting on behalf of a judgment debtor, asserted tort claims against judgment creditors and a New York City marshal based on alleged violations of CPLR Article 52 committed while trying to enforce judgments. The underlying New York judgments were valid, and the funds recovered by the enforcement officers (a Rockland County sheriff and a New York City marshal) were used to satisfy the judgments. Plaintiff claimed, however, that the judgment creditors improperly issued executions under CPLR 5232(a), *see* Siegel & Connors, New York Practice § 496, directing the enforcement officers to serve a notice and levy on a Michigan bank that was not subject to personal jurisdiction in New York. *See* Siegel & Connors, New York Practice § 491. Nonetheless, the bank complied with the levies and issued checks totaling almost $450,000 that were applied to the creditors' judgments.

The plaintiff commenced two tort actions in federal court alleging, among other things, wrongful restraint and execution against the judgment creditors, wrongful execution against the marshal individually, conversion, and trespass to chattels. Plaintiff sought to recover the amounts taken from the Michigan bank accounts to satisfy the judgments and "consequential" damages. The district court dismissed both actions and an appeal was taken to the Second Circuit, where the cases were consolidated and certified questions were issued to the Court of Appeals.

The Court of Appeals answered the certified questions by "hold[ing] that a judgment debtor's exclusive avenue for relief under these circumstances is to bring an appropriate action pursuant to CPLR article 52." The Court emphasized that CPLR 5239 and 5240 both allow "any interested person," including a judgment debtor, to seek redress for improper use of the broad range of enforcement devices in Article 52.

CPLR 5239 allows the judgment debtor to pursue a special proceeding against the judgment creditor to adjudicate the rights to specific property that is subject to enforcement. The statute allows the court to "vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded." *See* Siegel & Connors, New York Practice § 521. CPLR 5240, the subject of this section in the main volume, allows the court "at any time, on its own initiative or the motion of any interested person, . . . [to] make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure."

The decision is discussed in further detail in Siegel & Connors, New York Practice § 522 (January 2023 Supplement).

LXI. CPLR 5511. Permissible appellant and respondent.

Order That Sua Sponte Dismissed Complaint for Failure to Comply with Court Order Not Appealable as of Right

A court's sua sponte order is the equivalent of an ex parte order and cannot be directly appealed. *See* Siegel & Connors, New York Practice § 524. That doctrine was applied in *Budwilowitz v. Marc Nichols Associates*, 195 A.D.3d 404 (1st Dep't 2021), where the supreme court sua sponte dismissed the complaint for failure to comply with a prior order. The First Department dismissed the appeal from the sua sponte order, noting that it was not appealable as of right. "Plaintiff's remedy was to move to vacate the order, and if that was denied, to appeal the denial of his motion to vacate."

LXII. CPLR 5513. Time to take appeal, cross-appeal or move for permission to appeal.

Governor's COVID-19 Disaster Emergency Executive Orders Toll Time to Appeal or Move to Appeal

The Governor issued a series of Executive Orders beginning in March 20, 2020 that tolled "any specific time limit for the . . . filing, or service of any . . . notice [or] motion . . . as prescribed by the procedural laws of the state." Executive Order 202.8. That language tolls the running of the 30-day period in CPLR 5513(a) to serve and file the notice of appeal. It also tolls the 30-day period to move for permission to appeal contained in CPLR 5513(b). The Governor's Executive Orders and various administrative orders and memoranda issued by the Chief Administrative Judge that affect the time to appeal are addressed in more detail in Siegel & Connors, New York Practice § 33 (January 2023 Supplement).

In *Brash v. Richards*, 195 A.D.3d 582 (2d Dep't 2021), the Second Department confirmed that the Governor's COVID-19 Executive Orders constituted a toll:

> These motions raise the issue of whether a series of executive orders issued by Governor Andrew Cuomo, as a result of the COVID-19 pandemic, constitute a toll or, alternatively, a suspension of filing deadlines applicable to litigation in the New York courts. For the reasons that follow, we conclude that the subject executive orders constitute a toll of such filing deadlines.

In *Brash*, a copy of the order appealed from was served upon the appellant, with written notice of its entry, on October 2, 2020. CPLR 5513 (a) provides that an appeal must be taken within 30 days of service of a copy of the order or judgment appealed from and written notice of its entry. The appellant served and filed a notice of appeal on November 10, 2020.

Respondents argued that the notice of appeal was untimely served and filed because the COVID-19 Executive Orders only suspended filing deadlines in civil litigation in the New York courts until November 3, 2020. The Second Department agreed with appellant that the COVID-19 Executive Orders tolled filing deadlines and, therefore, appellant had 30 days from November

3, 2020, to serve and file the notice of appeal. Therefore, the notice of appeal served and filed on November 10, 2020 was timely.

Court of Appeals Rejects Adoption of "Mailbox Rule" for Pro Se Inmate Who Provides Notice of Appeal to Prison Authorities for Service and Filing within CPLR 5513(a)'s Time Period, but Filing with County Clerk Is Untimely

An appeal is taken by serving and filing a notice of appeal within 30 days of service of the order or judgment to be appealed from, with notice of entry. CPLR 5513(a), 5515(1); *see* Siegel & Connors, New York Practice § 531. In *Matter of Miller v. Annucci*, 37 N.Y.3d 996 (2021), the petitioner was a pro se inmate attempting to appeal to the Third Department from a judgment in an Article 78 proceeding. He delivered the notices of appeal for filing and service to prison authorities within the 30-day period in CPLR 5513(a), but the notice of appeal was not timely filed with the county clerk. In the Court of Appeals, petitioner argued that the Third Department should have applied a "pro se inmate 'mailbox rule'" for filing, under which the notice of appeal would be deemed filed when an inmate presented the document to prison authorities for forwarding to the appropriate court. The Court of Appeals rejected petitioner's argument and concluded that the filing of the notice of appeal was untimely.

The decision in *Matter of Miller*, which is also of significant importance to those litigating beyond prison walls, is discussed in greater detail in Siegel & Connors, New York Practice § 531 (January 2023 Supplement).

LXIII. CPLR 7503. Application to compel or stay arbitration; stay of action; notice of intention to arbitrate.

Governor's COVID-19 Disaster Emergency Executive Orders Toll Time to Commence Special Proceeding to Stay Arbitration

The 20-day period in CPLR 7503(c) has been held to be a statute of limitations, with its expiration causing a complete forfeiture of the right to question arbitrability even if missed by only a day. *See* Siegel & Connors, New York Practice § 593.

Executive Order 202.8, issued by the Governor during the COVID-19 Disaster Emergency, tolls "any specific time limit for the commencement, filing, or service of any legal action [or] notice . . . as prescribed by the procedural laws of the state." That language tolls the running of the 20-day period in CPLR 7503(c) to commence a special proceeding to stay arbitration, which requires the "filing" of a petition and "service" of same with a notice of petition or order to show cause. The issue is explored in further detail in Siegel & Connors, New York Practice § 33 (January 2023 Supplement).

Governor's COVID-19 Disaster Emergency Executive Orders Toll Statute of Limitations

The claim in an arbitration proceeding is deemed interposed for statute of limitations purposes upon the service of "a demand for arbitration or a notice of intention to arbitrate." CPLR 7503(c). *See* Siegel & Connors, New York Practice § 590.

Executive Order 202.8, issued by the Governor during the COVID-19 Disaster Emergency, tolls "any specific time limit for the . . . service of any legal . . . *notice* . . . or other process . . . as prescribed by the procedural laws of the state . . . ." (emphasis added). A strong argument can be made that this language tolls the service of a demand for arbitration under CPLR 7503(c). The issue is explored in further detail in Siegel & Connors, New York Practice § 33 (January 2023 Supplement).

LXIV. CPLR 7510. Confirmation of award.

Governor's COVID-19 Disaster Emergency Executive Orders Toll Time to Commence Special Proceeding to Confirm Arbitration Award

Executive Order 202.8, issued by the Governor during the COVID-19 Disaster Emergency, tolls "any specific time limit for the commencement, filing, or service of any legal action, . . . motion, or other process or proceeding . . . as prescribed by the procedural laws of the state." *See* Siegel & Connors, New York Practice § 33 (January 2023 Supplement). That language tolls the running of the 1-year period in CPLR 7510 to commence a special proceeding to confirm an arbitration award, which requires the

"filing" of a petition and "service" of same with a notice of petition or order to show cause. *See Matter of Lancer Ins. Co. v. Kushetsky*, 2021 NY Slip Op 31950(U) (Sup. Ct., Nassau County 2021)(ruling that cross-petition to confirm arbitration award was timely, as COVID-19 Executive Orders tolled running of statute of limitations in CPLR 7510).

Therefore, if the arbitration award was "delivered" during the COVID-19 Toll, which ran from March 20 until November 3, 2020, the party seeking confirmation of the award under CPLR 7510 could commence a special proceeding to confirm the award up until November 3, 2021.

LXV. CPLR 7515. Mandatory arbitration clauses; prohibited.

New CPLR 7515 Prohibits Mandatory Arbitration Clauses "In Any Contract" to Resolve Allegations of Discrimination, Including Sexual Harassment

CPLR 7501 authorizes arbitration for "any controversy" and does not purport to set any limits. *See* Siegel & Connors, New York Practice § 587. Caselaw has set certain limitations over the years, as have statutes, including the new CPLR 7515, which prohibits mandatory arbitration clauses "in any contract" that are included "to resolve any allegation or claim of discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law [Human Rights Law]." CPLR 7515(a)(2); *see* CPLR 7515(a)(3) (defining "mandatory arbitration clause"). The prohibition applies to contracts entered into on or after July 11, 2018. CPLR 7515(b)(1); *see* Newton v. LVMH Moet Hennessy Louis Vuitton Inc., 192 A D 3d 540, 541 (1st Dept. 2021) ("The provisions of CPLR 7515 relied on by plaintiff are not retroactively applicable to arbitration agreements, like the one at issue that were entered into preceding the enactment of the law in 2018.").

There are some exceptions to the broad prohibitions in CPLR 7515. If the arbitration clause is permitted under federal law, CPLR 7515 will not apply. CPLR 7515(b)(i) (stating that prohibition applies, "[e]xcept where inconsistent with federal law"); *see* Siegel & Connors, New York Practice § 607 (noting that the Federal Arbitration Act, when it applies to the contract at issue, prohibits states from conditioning the enforceability of certain

arbitration agreements). CPLR 7515(b)(ii) permits an employer and employee to agree to a mandatory arbitration provision through collective bargaining. CPLR 7515(c) declares that "[w]here there is a conflict between any collective bargaining agreement and this section, such agreement shall be controlling."

The arbitration of discrimination claims, which includes claims for sexual harassment claims under collective bargaining agreements can nonetheless be challenged on public policy grounds in a special proceeding under CPLR 7511. In *Matter of New York City Transit Authority v. Phillips*, 162 A.D.3d 93, 75 N.Y.S.3d 133 (1st Dep't 2018), for example, the First Department held that "the arbitrator's conclusion that [an employee's] conduct did not rise to the level of sexual harassment, as well as the penalty imposed, a meager 10–day suspension, was fundamentally at odds with the arbitrator's own findings of fact, and contrary to the well-recognized policy of the State in protecting against workplace sexual harassment . . . ." Therefore, the court granted the petition to vacate the arbitration award and remanded the matter to a different arbitrator to enter a finding that respondent employee engaged in "sexual and other discriminatory harassment" and to pass upon the appropriateness of the penalty of termination.

CPLR 7515 was part of a package of amendments that also included the addition of CPLR 5003-b, which restricts the use of nondisclosure agreements in the settlement or discontinuance of any claims "involv[ing] discrimination, in violation of laws prohibiting discrimination , including but not limited to, article fifteen of the executive law [Human Rights Law] . . . unless the condition of confidentiality is the plaintiff's preference." The prohibition applies to any "employer, its officer or employee" and also became effective on July 11, 2018. *See also* Gen. Oblig. Law § 5-336 (1)(a)("Notwithstanding any other law to the contrary, no employer, its officers or employees shall have the authority to include or agree to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law, any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant's preference.").

The amendments are discussed in further detail in Siegel & Connors, New York Practice § 587 (January 2023 Supplement).

Federal Arbitration Act Preempts Several New York Statutes

When the Federal Arbitration Act appears on the scene, it can render any conflicting state law impotent. *See* Siegel & Connors, New York Practice § 607. Another example has arisen with the 2018 enactment of CPLR 7515, which attempts to prohibit mandatory arbitration clauses "in any contract" that are included "to resolve any allegation or claim of discrimination, in violation of laws prohibiting discrimination," including sexual harassment. CPLR 7515(a)(2); *see* Siegel & Connors, New York Practice § 587. Less than a year after the statute was on the books, it was ruled to be displaced by an arbitration agreement covered by the Federal Arbitration Act in *Latif v. Morgan Stanley & Co. LLC*, 2019 WL 2610985 (S.D.N.Y. 2019). In *Latif*, the court granted the defendant's motion to compel arbitration of plaintiff's sexual harassment claims and rejected plaintiff's argument that the arbitration of the claims was prohibited by CPLR 7515. CPLR 7515 and the *Latif* decision are discussed in further detail in Siegel & Connors, New York Practice § 587 (January 2023 Supplement).

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act Renders the FAA Consistent with CPLR 7515, at Least in Some Respects

In the entries above, we discuss the 2018 adoption of CPLR 7515, which prohibits mandatory arbitration clauses "in any contract" that are included "to resolve any allegation or claim of discrimination, in violation of laws prohibiting discrimination," including sexual harassment. CPLR 7515(a)(2). The statute contains a necessary exception in CPLR 7515(b)(i), which states that the prohibition applies, "[e]xcept where inconsistent with federal law," which would include the Federal Arbitration Act ("FAA"). *See also* CPLR 7515(b)(ii).

Since it became effective in 2018, CPLR 7515 has faced a tough battle trying to steer discrimination claims away from arbitration. As in the *Latif* decision discussed above, many courts have concluded that these disputes are governed by the FAA, which preempts CPLR 7515, and have enforced broad arbitration clauses. *See*, *e.g.*, *Rollag v. Cowen Inc.*, 2021 WL 807210,

at *6 (S.D.N.Y. 2021) (“Parties cannot contract their way out of the FAA's displacement of state-law prohibitions on the arbitration of particular types of claims. Simply put, …CPLR § 7515 is displaced by the FAA in any ‘arbitration agreement within the coverage of the Act.’”); *Crawford v. The Goldman Sachs Group, Inc.*, 2021 WL 743913 (Sup. Ct., New York County 2021)(granting motion to compel arbitration because “the [discrimination] claims fall within the scope of the arbitration clause and are not barred by CPLR 7515 as this dispute is governed by the FAA”).

On March 3, 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act was signed into law. The Act, which adds a new chapter 4 to the FAA, provides:

> at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

9 U.S.C. § 402(a).

In sum, the Act exempts sexual assault and sexual harassment claims from pre-dispute arbitration agreements and pre-dispute joint-action waivers at the option of the plaintiff. To that extent, CPLR 7515 is now consistent with the FAA, at least with respect to sexual assault and sexual harassment claims. Yet CPLR 7515 goes further and prohibits mandatory arbitration clauses that purport to cover any claim of unlawful “discrimination.” Therefore, in certain matters, such as claims pertaining to racial discrimination, it may still be preempted by the FAA.

LXVI. CPLR 7516. Confirmation of an award based on a consumer credit transaction.

New CPLR 7516 Adds Additional Requirements When Seeking Confirmation of an Arbitration Award Based on a Consumer Credit Transaction

Effective May 7, 2022, the new CPLR 7516 will impose additional requirements in any proceeding under CPLR 7510 to confirm an arbitration award "based on a consumer credit transaction." This measure is contained in the Consumer Credit Fairness Act and is one of several 2022 amendments to the CPLR that pertain to actions arising from consumer credit transactions.

CPLR 7516 requires the party seeking confirmation of the award to "plead the actual terms and conditions of the agreement to arbitrate" and to attach to the petition "(a) the agreement to arbitrate; (b) the demand for arbitration or notice of intention to arbitrate, with proof of service; and (c) the arbitration award, with proof of service."

Furthermore, if the arbitration award "does not contain a statement of the claims submitted for arbitration, of the claims ruled upon by the arbitrator, and of the calculation of figures used by the arbitrator in arriving at the award, then the petition shall contain such a statement." CPLR 7516. CPLR 7507, which governs the form of the arbitration award, does not require that the arbitrator state reasons for the award, its underlying findings or, if figures are included, the calculations supporting them. *See* Siegel & Connors, New York Practice § 600. Therefore, it may be difficult for the petitioner seeking confirmation of an award under CPLR 7510 to state the matters required under CPLR 7516 with any specificity. Finally, the new statute provides that the court cannot "grant confirmation of an award based on a consumer credit transaction unless the party seeking to confirm the award has complied with this section." CPLR 7516.

It must be noted that if the contract containing the arbitration clause pertains to matters involving "interstate commerce," and many do, it will be governed by the Federal Arbitration Act ("FAA"). When the FAA appears on the scene, it can render any conflicting state law impotent through the

doctrine of preemption. *See* Siegel & Connors, New York Practice §§ 587, 607.

CPLR 7516 is discussed in further detail in Siegel & Connors, New York Practice § 601 (January 2023 Supplement).

LXVII. Small Claims Issues

Small Claims Jurisdiction Within the New York City Civil Court Expanded to $10,000

On December 16, 2019, the Governor signed legislation increasing the monetary limit in the small claims part in the New York City Civil Court from $5,000 to $10,000. The increase applies to actions and proceedings commenced on or after that date.

There has been no change to the $5,000 monetary limit in the small claims parts of the Nassau and Suffolk County District Courts or the small claims parts of the city courts outside of New York City. *See* Siegel & Connors, New York Practice §§ 19, 581 (January 2023 Supplement).

Court of Appeals Rules That Doctrine of Res Judicata Can Bar a Second Action by a Plaintiff Who Has Litigated an Action in a Small Claims Court

Section 1808 in each of the lower courts' small claims articles provide that a judgment obtained in a small claims action "shall not be deemed an adjudication of any fact at issue or found therein in any other action or court; except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount" of the small claims judgment. New York City Civ. Ct. Act, Uniform Dist. Ct. Act, Uniform City Ct. Act, and Uniform Just. Ct. Act § 1808.

While the statutes address small claims judgments, they also can have a dramatic impact in cases involving substantial damages, as demonstrated in *Simmons v. Trans Express Inc.*, 37 N.Y.3d 107 (2021). In *Simmons*, plaintiff commenced an action against her former employer in the small claims part of the New York City Civil Court for nonpayment of wages and asserted

$5,000 in damages, the maximum monetary jurisdiction in that court at the time. *See* Siegel & Connors, New York Practice §§ 19, 581. The matter was referred to a small claims arbitrator and the court ultimately awarded plaintiff $1,000. The defendant promptly satisfied the judgment.

Plaintiff then commenced a second action against the defendant, this time in the federal district court for the Eastern District of New York, seeking additional damages based on defendant's failure to pay her overtime wages in violation of federal and state law. Defendant moved to dismiss the complaint, arguing that the prior small claims judgment barred the federal action under the doctrine of res judicata, commonly known as claim preclusion. *See* Siegel & Connors, New York Practice § 443 ("Members of the Res Judicata Family"). Plaintiff contended that section 1808 of the New York City Civil Court Act rendered claim preclusion inapplicable to small claims judgments unless the subsequent action raised exactly the same claim or theory as the small claims action.

The district court granted the motion to dismiss and plaintiff appealed to the Second Circuit. That court then certified a question to the Court of Appeals requesting that it define the effect of section 1808 on the doctrines of claim preclusion and issue preclusion in the context of a small claims judgment.

In a 3-2 decision, the Court held that judgments governed by section 1808 in the various small claims parts of New York State courts do not have collateral estoppel effect, but "may have the traditional res judicata or claim preclusive effect in a subsequent action involving a claim between the same adversaries arising out of the same transaction or series of transactions at issue in a prior small claims court action." *Simmons*, 37 N.Y.3d at 110.

"With the benefit of the Court of Appeals' decision," the Second Circuit ruled that "under New York's law of claim preclusion, Simmons's suit is barred because of her prior small claims court action." *Simmons v. Trans Express Inc.*, 16 F.4th 357 (2d Cir. 2021).

The decision is discussed at length in Siegel & Connors, New York Practice § 585 (January 2023 Supplement).

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