Westchester Bar Journal

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The editors encourage the submission of manuscripts for publication in the *Westchester Bar Journal*. All submissions should be forwarded to the WCBA electronically in Microsoft Word format as attachments to: editor@wcbany.org. Please indicate in the subject line of the email that an article for the Westchester Bar Journal is attached. Please feel free to call the Bar office at 914-761-3707, ext. 20, with any questions.

Articles should be between 1200-4000 words in length, and all citations should be written in accordance with a Uniform System of Citation published by The Harvard Law Review Association (popularly known as the "Blue Book"), and accuracy thereof verified by the author. Articles should be free from electronic formatting such as page numbering, headers or footers, and should be tabbed rather than manually spaced. "All caps" text formatting should NOT be used. A digital headshot of the author(s) must be provided as a high resolution JPEG.

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All articles should be accompanied by a brief biography and headshot of the author(s). Three complimentary copies of the issue in which an author's article is published will be distributed to the author or divided among the authors, if there are more than one. The editors reserve the right to accept or reject all manuscripts and to request changes if necessary.

Westchester Bar Journal

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From the Editor-in-Chief

BY CAROL L. VAN SCOYOC, ESQ.

Welcome to the 2014 Winter/Spring edition of the *Bar Journal*. As we slowly thaw out from the effects of a winter marked by unusually bitter cold temperatures and yes, endless snow — the new phenomenon known as the "polar vortex"— we now look forward to the proverbial "light at the end of the tunnel"— the hope of days filled with warm, golden sunshine, the smell of flowers in the air, and the start of spring training! This installment of the *Bar Journal* promises to chase away those "winter blues" by offering you a vast array of scholarly articles exploring an eclectic mix of legal topics as well as a poignant piece paying homage to the memory of giants among us who left us last year.

In this issue of the *Bar Journal,* Westchester County Bar Association Past President Gary E. Bashian, Esq. and Andrew Frisenda, Esq., contribute another article in the continuing series of the ever timely and informative "Estate Litigation Tidbits." The Hon. Nelson E. Canter, Esq., founder of the Canter Law Firm P.C. and part-time Harrison Town Justice, provides some helpful advice concerning the legal implications for failure to screen for colorectal cancer. Matthew D. Donovan, Esq., senior associate in the law firm of Farrell Fritz, P.C., presents some valuable insight concerning the Westchester County Supreme Court Commercial Division, common law dissolution, and the resolution of family-owned business disputes.

The Honorable Thomas A. Dickerson, an Associate Justice of the Appellate Division, Second Department, the Hon. Daniel D. Angiolillo, former Associate Justice of the Appellate Division, Second Department, and John Mechmann, Esq., Principal Law Clerk to the Hon. David S. Zuckerman, Westchester County Court, give a comprehensive and superb review and analysis of recent case law occurring in tax certiorari, eminent domain and real property tax exemptions. Anthony J. Enea, Esq., Past Westchester County Bar Association President, and managing member of the law firm of Enea, Scalan & Sirignano, LLP, offers an excellent primer on discovery pursuant to Section 2013 of the Surrogate's Court Procedure Act.

In this edition, we are pleased to feature the remarks made by David M. Schraver, President of the New York State Bar Association, at the Westchester County Bar Association's Annual Banquet and Induction of Officers in May 2013. We are also very proud to publish the heart felt tribute made at the 2013 Westchester County Bar Association Memorial Service in September 2013, led by Westchester County Bar Association Past President Ralph R. Nobile, Chair of the Memorial Ceremonial Functions Committee, in honor of three prominent members of the Westchester County community, judiciary and of this Bar Association: the Hon. Angelo Ingrassia, the Hon. Andrew P. O'Rourke, and the Hon. Alvin R. Ruskin.

As always, I wish to express my sincere appreciation and congratulations to Luis Rivera, Esq., Director of CLE and Legal Publications and Managing Editor of the *Bar Journal*, Mary Ellen McCourt, the Design & Production Manager of the *Bar Journal*, Donna Drumm, Esq., Executive Director, and the staff of the Westchester County Bar Association, for their hard work and dedication in playing such an integral role in elevating the *Bar Journal's* prestige as a respected legal publication. I also wish to express my gratitude to the advertisers for their support in defraying the costs associated with this publication. Most emphatically, I encourage individuals interested in contributing articles for the *Bar Journal* to submit them to the attention of the Bar Association's *Bar Journal* Committee.

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From the President

BY JODY FAY, ESQ.

Welcome to the 2014 Winter/Spring edition of the Bar Journal. As I write this, I am nearing the sunset of my term as President of The Westchester County Bar Association. We have accomplished so many things this year; I cannot even mention them all. I began my term with three initiatives: Membership, assisting Veterans and outreach to the business community. I am happy to report that we achieved them all.

The Westchester County Bar Association is now 2,000 members strong and we continue to grow. Our CLE programs are a constant calendar event, with several being held each week in order to serve our members. This year, we also partnered with Legal Services of the Hudson Valley with special CLE programs geared at assisting our veterans. We also partnered for a premier networking event with the Business Council of Westchester. These are just many "firsts" that I am excited to share with all of you.

Our *Newsletter* continues to look better and better and is full of terrific articles and information. It is available online as well as via mail. I encourage you to write an article or to simply share a piece of good news with us each month. We expect the *Newsletter* to continue to grow and improve along with our website.

We have also renewed a committee for the WCBA Legal Referral Services, that is now chaired by Past President Ralph Nobile and Sylvia Fabriani. The purpose of the committee is to examine our Legal Referral Services and find ways to improve it and market the service. The Legal Referral Service is an important service to our community. Please look to see more information this upcoming year on our committee efforts.

Lastly, we continue to provide our members with the annual edition of the *Westchester Bar Journal*. Under the skill and scrutiny of Past President, Carol L. Van Scoyoc, the *Journal* is an exceptional publication filled with interesting articles from some of our most well read members. I hope you enjoy this edition and find the time to savor the many articles and insights contained in the edition.

Thank you and God Bless,

Jody

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Estate Litigation Tidbits

BY
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Appellate Division Affirms Westchester County Surrogate Re: Adopted Beneficiary's Rights

In re Svenningsen,[1] the Appellate Division, Second Department affirmed a Decision of the Hon. Anthony A. Scarpino wherein he held a decedent's adoptive child, who was later surrendered by decedent's widow by way of a second adoption, maintained her rights and interests in her first adopted father's *inter vivos* trusts and estate.

Needless to say, *Svenningsen* presented both the Surrogate and the appellate court with a number of difficult legal issues. *Sevenningsen* involved the adoption of an infant Chinese national by an American couple. Unfortunately, during the finalization of the adoption proceedings, the adoptive father was receiving treatment for cancer, and his spouse was forced to travel to China without him to take custody. Importantly, the adoption agreement required that the infant would not be "transferred" or "re-adopted," and that the baby would be deemed the biological child of the adoptive parents. Once returned to the U.S., the adoptive parents acknowledged the adoption, and properly re-adopted the child in the New York family court system so as to obtain a U.S. passport and birth certificate.

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During his life, decedent had created a number of *inter vivos* Trusts, one of which was to distribute income to his then living children, in equal shares, when the oldest child reached 30, at the Trustee's discretion. The trust itself defined "children" as decedent's then living children, and those born or adopted after the Trust's creation. A second Trust designated each of decedent's children as beneficiaries of sub trusts by name, including one such Trust established for decedent's newly adopted daughter. decedent's Will also created a credit shelter Trust to "any child of mine" subject to certain contingencies, and a marital Trust for his spouse. The Will included adoptive children in its definition of "issue."

Thereafter, seven years since the adoption, and six since decedent's passing, the adoptive child was enrolled in a boarding school for children with special needs. It was at that time an administrator approached decedent's widow, and proposed adoption of the child, which eventually was consummated. The child's status as a beneficiary of the aforementioned instruments was not known to the newly adoptive parents at that time. They only discovered the extent of the child's beneficiary status when examining the probate records of decedent's estate — and after counsel for decedent's widow wrote to them suggesting that they consent to the child separating her interests from the estate and the biological children through the creation of a "Spray Trust."

Subsequently, the newly adoptive parents sought to compel an accounting of the trusts and estate on behalf of their adoptive daughter. As a defense, Decedant's biological family argued that the newly adoptive parents (as guardians of the child) did not have standing, as their adoption of the child had been complete. Predictably, both parties moved for summary judgment.

Surrogate Scarpino ruled in favor of the adopted child, and denied the motions made by decedent's widow and his children who had joined in the motion. Relying on the clear terms of the instruments, Surrogate Scarpino found that it was decedent's full intent that his adoptive daughter be included as a full member of his family, and that her rights under his estate plan were fully vested. Thus the adoptive daughter had standing, and was a full beneficiary of his estate and the trusts related thereto.

On appeal, decedent's biological family maintained that the adoptive child's rights had been terminated, pursuant to Domestic Relations Law § 117, as a result of the second adoption.

The Appellate Division, following the guidance of the legislature and the insight of Surrogate Scarpino, held that, even in a situation such as that presented, absent the express exclusion of the adoptive child, the adoptive children stand on equal ground with biological issue. Moreover, that the rights and interests of such adopted children in inheritance are preserved, so long as the testator/settlor intention is clear that the child is an intended beneficiary within the four corners of the instrument at issue.

In the matter before the court, it was clear that the adopted child was to be included in Decedant's testamentary plan. Furthermore, the child's subsequent surrender to new parents was not a foreseeable circumstance at the time of decedent's drafting of his instruments. As such, the second adoption was not intended to, and did not, terminate the children's interest in the Marital Trust — not only because the adoptive child

was specifically named, and intended to be, a beneficiary thereof, but because she was not surrendered to her new parents until many years after decedent's passing. Similarly, the adoptive child's rights regarding the other Trusts had been fully vested, as, although inchoate (the eldest biological child had not yet reached 30), she was named in the instrument, and, though the conditions precedent had not yet been met, "uncertainty is not enough to deny standing" to those who seek to protect Trust property. The beneficiaries' vesting of interest had occurred as they had survived decedent.

As such, Surrogate Scarpino was found to have properly granted summary judgment in favor of the adoptive daughter, and denied that of the decedent's biological family.

Surrogate Sovereignty

Typically in civil litigation, the party who wins a motion or receives a favorable decision will typically file and serve a notice of entry.

However, as discussed by the Hon. Surrogate Robert J. Gigante in *Will of D'Ambrosio*,[2] and in a decision that might be rather surprising to Supreme Court practitioners, no notice of entry is required in the surrogate's court.

The court itself "is self containing and self sufficient," having its own Clerk independent of the County, and having no need for its Orders to be entered therewith, *D'Ambrosio* NYLJ 1202598464039, at 6 (Surr. Ct. Richmond Cnty., Apr. 29, 2013). Furthermore, [t]here is simply no need for a Note of Entry because the Order itself is self-entering…," *Id*.

In *D'Ambrosio*, this little known procedural rule led to the undoing of Objectant's defense in a contempt proceeding, the Objectant's argued that they had no obligation to comply with the Surrogate's Order that they pay Petitioner $2,000, as the order itself had never been entered. Unfortunately for Objectant, this argument was wholly unavailing. With no statutory requirement that an order be entered and served by opposition, no argument could be made that the order was not properly filed with the Surrogate's clerk.

For Your Eyes Only: Sealing v. Public Policy

For any number of reasons, clients might request that counsel move the court to seal the record regarding their matter. However, as the preliminary executors in the *Will of Fay Wason Patrick*[3] quickly learned, relief pursuant to 22 NYCRR 216.1(a) is rarely granted by the surrogate's court.

Indeed, there are a number of factors the court must consider when an application to seal a record is made, foremost of which is if good cause to do so has been established. Furthermore, a record can only be sealed where the movant demonstrates compelling circumstances warranting restriction of access to their file. "Conclusory claims of the need for confidentiality are insufficient to find good cause" as "confidentiality is clearly the exception, not the rule," *Fay Wason Patrick*, NYLJ 1202597358920 at 3 (Surr. Ct. Dutchess Cnty., April 17, 2013).

Additionally, as part of its analysis when considering the sealing of a record, the

court must balance the interests of the public and the parties. Unsurprisingly, the balancing of these interests is weighed in favor of the public's interest as there is a broad presumption that the public should have access to judicial records. Consequently, the court must review every application to seal records on a case by case basis in their effort to determine if good cause actually exists, consider the application within the context of the type of action pending, and state the grounds for any finding of good cause in writing before ordering a seal.

Lastly, and perhaps just as important to this analysis is the fact that sealing a record is not warranted "where the information sought to be sealed is already a matter of public record." *Id* at 2.

As these grounds could not be met, no seal was granted to these fiduciaries.

Out of State Commissions Not Freely Given

It is not at all uncommon that the testimony of a non-party witness who no longer lives in New York State is needed, and a pre-drafted statement or deposition upon written questions are either impractical or inadequate.

With great luck, this non-party might be willing to return to New York's Jurisdiction, or have plans in the future to return, and will agree to be deposed. However, it is a rare exception that arrangements such as these can be made, and the need for counsel to obtain a commission pursuant to CPLR §3108 to conduct a deposition through a surrogate attorney out of state is often the only solution.

Where the party seeking the commission can make a showing to the court that: 1) the testimony sought is material and necessary to the prosecution/defense of the case; 2) that the non-party possesses the information sought, or that their examination is reasonably calculated to produce information relevant to the matter; and 3) that the witness' testimony is unobtainable by other means, a commission may issue.

However, absent a showing of any of these elements, as the Hon. Surrogate Edward W. McCarty indicated in *In re Estate of Levine*, if an application for a commission is "devoid of information concerning efforts…to obtain the cooperation and voluntary appearance of the non party witnesses," even where all of the other elements are clearly met, the commission will not issue. *In re Estate of Levine*,[4] NYLJ 1202596544370 at 4 (Surr. Ct. Nassau Cnty. Mar. 29, 2013).

Accordingly, strict attention to these procedural requirements must be followed or that out of state witness will remain beyond your reach.

Cy Press Saves the Day

No matter how meticulous an estate plan might be crafted, there are always risks that one's testamentary intent cannot be met. Beneficiaries predecease; assets are gifted or sold, and adeem; and unexpected expenses during life might result in a reduced residuary whose proportional shares are far less than expected.

Thankfully, there a number of mechanisms at law which can preserve, to one degree or another, the testamentary intentions of a decedent — the Cy Pres Doctrine (EPTL §8-1.1(c)) being foremost among them.

For the uninitiated, the Cy Pres Doctrine can be utilized where a charitable institution is named as a beneficiary, but that charity cannot accept the bequest as it no longer exists. By virtue of Cy Pres, this bequest will not adeem should a similar charitable institution be found that can accept the bequest.

Such was the case in *In re Wheaton Galentine Trust*,[5] where St. Vincent's Hospital Center was a designated trust beneficiary, but had since been shuttered and could not receive trust income. Accordingly, the Hon. Surrogate Nora S. Anderson authorized the trustees to distribute trust assets to Mt. Sinai Hospital and The Village Center for Care, as "[b]oth institutions provided services to the settlers," were "located in the neighborhood where the settlors lived," and "[s]uch limitation [was] in accordance with the settlor's expressed intent to support geriatric concerns," *In re Wheaton Galentine Trust*, NYLJ 1202595491464 at 2 (Surr. Ct. N.Y. Cnty. Apr. 8, 2013).

Thus, not only was the grantor's intent preserved, but the community which he made his home received the benefits of his bequest, even where the specific beneficiary he sought to benefit was no longer in existence.

Trustee's Discretion Broad, But Not Unbounded

During the administration of long term trusts, it is not uncommon for beneficiaries and trustees to have disagreements about the size and frequency of discretionary distributions that are made. Depending on the reasonableness of the trustee, or as is more often the case, the unreasonableness of the beneficiary, a fiduciary might find himself at the respondent's end of a removal proceeding where the fiduciary refuses to make distributions that he believes are unnecessary, improper, and/or inappropriate – despite the repeated pleas of the beneficiary who seeks them.

Hammerschlag v. Schleisinger,[6] is one such example. The trustee in *Hammerschlag* was granted broad powers to distribute trust income at his "sole and absolute discretion." *Hammerschlag*, NYLJ 1202597358371, at 2 (Surr. Ct. N.Y. Cnty. Apr. 17, 2013). Upon the refusal to distribute funds to a beneficiary who claimed that she was destitute and immediately needed monies to obtain an apartment, meet expenses, and pay off debts (including attorney's fees), the beneficiary alleged that the failure to release income constituted a breach of fiduciary duty warranting his removal as fiduciary.

Unsurprisingly, the trustee moved for summary judgment to dismiss the beneficiary's claims against him, arguing that he had acted in good faith and that the requested expenditures were rejected as the beneficiary had offered no proof in support of her claims of destitution, provided no budget reflecting her expenses, and provided no information about the funds she was receiving from other parties regarding the support of her child. Indeed, the beneficiary had defrauded and stolen from her parents in the past, had criminal charges brought against her regarding these thefts, and was alleged to have a history of "unsavory" behavior.

Nevertheless, noting that the trustee's powers were not "unbounded," the court denied summary judgment as to the trustee as there was an "open question of fact as to whether the trustee failed to exercise his independent judgment or adequately

evaluate the beneficiary's needs before refusing to make any distribution…." *Id* at 5. Accordingly, a hearing was scheduled to determine these issues of fact, and determine if the trustee had breached his duty, or was simply a victim of his own good judgment.

Reformation Confirms the Best Intentions

It is well established that one of the guiding principles governing any surrogate's court matter is that the intent of the decedent must be preserved. Unfortunately, a decedent is not in the position to offer much help when the court is let to determine what that intent was where there is ambiguity on an instrument, or worse still, a provision in an instrument that appears to contradict the underlying logic and purpose of the testamentary plan itself.

Thankfully, neither the court nor petitioners are left without recourse in these situations as interested parties who confront such ambiguity and/or surprising inconsistencies within an estate plan, as they may take advantage of reformation and construction proceedings as authorized by the Surrogate's court Procedure Act (SCPA).

Such was the case in *Trust of Ronald D. Brigati*[7], where the decedent's Irrevocable Life Insurance Trust directed that the proceeds of a life insurance policy were to be paid to his Executor so as to satisfy the estate's tax liabilities — but as a consequence became part of the decedent's gross taxable estate.

Knowing full well that it was not the intention of the decedent to have these life insurance proceeds included as part of the gross taxable estate, the co-trustees sought to reform the trust's provision that controlled this asset.

In support of reformation, the co-trustees not only wisely offered the court an Affidavit of the draftsman that indicated the decedent's known intent was to avoid tax liability when he created the trust, but also highlighted the fact that the fact that the Trust agreement stated that its "Overriding Tax Purpose" was to exclude the assets of the Trust from decedent's gross estate.

Based on the clear language of the trust, and the further evidence offered in support of the decedent's intent, the decedent's intent could clearly be established, Surrogate John M. Czygier granted petitioner's reformation, and saved the estate a sizeable, and clearly unintended, tax burden.

Surrogate Anderson was also confronted with a similar issue in *In re Estate of Bowman*,[8] where an in artfully drafted instrument led to some confusion over the disposition of the family home and its contents.

In *Bowman*, the will appeared to grant the executrix a life estate in the subject property, with the caveat that should the property be sold, that the proceeds should be distributed to children and grandchildren in defined percentages. However, the executrix believed that the language of the Will allowed her to devise this property through her own will upon death, with nothing passing to the other family members thereafter.

Disagreeing, the Hon. Surrogate Anderson held that "[a] sympathetic reading of the provision at issue discloses not merely a primary testamentary objective (*i.e.*, that

the daughter have the use of the property as long as she wished), but also, a secondary objective: that the property's economic value be received by designated individuals (of whom the daughter was one) when the property was no longer being put to the daughter's use." *Bowman*, NYLJ 1202603156509 at 3 (Surr. Ct. N.Y. Cnty. May 22, 2013).

Accordingly, the executrix was determined to only hold title as a fiduciary for others, and would be obligated to eventually share the value of the home with her family one way or the other.

To My Appointee...

Powers of Appointment, and their interaction with the directives of other instruments, remain tricky terrain for the courts, draftsmen, and advocates alike, so much so that even institutional trustees, such as JP Morgan Chase, will seek court intervention to determine if they have been validly exercised in order to properly administer distribution of both trust and estate assets, and not risk a violation of their fiduciary duties to either.

As illustrated in *In re JP Morgan Chase, Trustee*,[9] questions about the validity of the exercise of a Power of Appointment can arise when it appears that the Power seeks to distribute assets to individuals who may not have been authorized beneficiaries under the terms of the trust instrument itself.

As the Hon. Surogate Rita Mella indicated in his decision, "an exercise of a power of appointment is not void if its exercise is more extensive than was authorized but is valid to the extent authorized by the by the instrument creating the power (EPTL §10-6.6[a][1])." *In re JP Morgan Chase, Trustee* NYLJ 1202594798135 at 2-3 (Surr. Ct. N.Y. Cnty. Apr. 2, 2013).

In other words, as the court favors exercising the power of appointment over invalidating it, the portions of a Power of Appointment that are properly authorized will remain valid, and only those portions that attempt to dispose of assets without underlying authority will be deemed void.

Luckily for the appointees in *JP Morgan*, none of them were found to be non-permissible appointees, as the trust from which they would ultimately receive a distribution had ample assets to satisfy its distributions, and no funds from a secondary trust, which could only be distributed to a spouse and/or family, would be implicated in the exercise of the power.

Accordingly, the exercise was determined to be effective, and no proportional invalidation was necessary, as the appointees were never non-permissible appointees in the first place.

Endnotes

1 *In re Svenningsen*, 105 A.D.3d 164, 959 N.Y.S. 2d 237 (2d Dep't 2013.)

2 *Will of D'Ambrosio*, NYLJ 1202598464039 (Surr. Ct. Richmond Cnty. Apr. 29, 2013.)

3 *Will of Fay Wason Patrick*, NYLJ 1202597358920 (Surr. Ct. Dutchess Cnty. April 17, 2013.)

4 *In re Estate of Levine*, NYLJ 1202596544370 (Surr. Ct. Nassau Cnty. Mar. 29, 2013).

5 *In re Wheaton Galentine Trust*, NYLJ 1202595491464 (Surr. Ct. N.Y. Cnty. Apr. 8, 2013).

6 *Hammerschlag v. Schleisinger*, NYLJ 1202597358371 (Surr. Ct. N.Y. Cnty. Apr. 17, 2013).

7 *Trust of Ronald D. Brigati*, NYLJ 1202593000540 (Surr. Ct. Suffolk Cnty. Feb. 27, 2013).

8 *In re Estate of Bowman*, NYLJ 1202603156509 (Surr. Ct. N.Y. Cnty. May 22, 2013).

9 *In re JP Morgan Chase*, *Trustee* NYLJ 1202594798135 (Surr. Ct. N.Y. Cnty. Apr. 2, 2013).

Legal Implications for Failure to Screen for Colorectal Cancer

BY HON. NELSON E. CANTER*

A massive epidemic is occurring in this country everyday. It is an epidemic of ignorance and failure to utilize noninvasive, inexpensive, commonly used screening devices to detect colorectal cancer ("CRC") early when CRC is most treatable. Such screening and detection would save thousands of lives, billions of dollars and grief and agony of patients and families coping with late stage CRC.

The following will outline: (i) the indisputable and staggering statistics for deaths related to CRC in the United States; (ii) efficacy in early detection of CRC; (iii) organized screening programs; (iv) the history of screening tools; (v) legal implications for failure to screen; (vi) the enormous costs incurred by Medicare, Medicaid, and major health care insurers for failure of the medical community to utilize screening to detect CRC; (vii) the Standard of Care for CRC detection and the impending tsunami of medical malpractice actions for the deviation of the standard of care by thousands of doctors, clinics, and hospitals; (viii) potential subrogation claims by insurance carriers to recover the costs for late detection and treatment of CRC; and (ix) *Daubert/Frye* standards.

Implementation of a screening program is crucial to raise the level of awareness of CRC detection before it affects you, your family members, friends and millions of lives across America.

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I. CRC Deaths in the United States

CRC is "the second leading cause of cancer death in the United States and the third leading cause of cancer death among both men and women."[1] An estimated 142,570 people will be diagnosed with CRC in the United States in 2010, and 51,370 people will die from it.[2] The incidence rate of CRC varies from race to race. For instance, in white males, the incidence of CRC is 54.4 people per 100,000 and white females is 40.2 women per 100,000.[3] In stark contrast, the incidence rate of CRC is 67.7 for African American males per 100,000, and 51.2 for African American women per 100,000 people.[4]

The death rate for Caucasian males is 20.6 per 100,000; and 14.4 Caucasian women per 100,000.[5] In even more stark contrast, is the death rate for African Americans from CRC. The death rate for African-American males is 30.5 per 100,000, and 21.0 for African-American women per 100,000.[6] Therefore the death rate is 50% higher for African Americans than the Caucasian population. The death rates in the United States from CRC is reflected in the Age Adjusted Death Rates Map for the United States 2008, which includes all races, both genders and all ages.[7] Due to improved screening for CRC, the death rates have decreased over the last several years.[8]

II. Early Detection of CRC Saves Lives

CRC is most often preceded by a growth or "adenoma" which is a pre-malignant condition that exists for a prolonged period of time (*i.e.* years) which makes CRC an ideal target for early detection and treatment through screening.[9] Indeed, increased screening results in decreased CRC incidence and mortality.[10] This decrease in CRC mortality rates by state are strongly associated with increased screening.[11] However, many doctors and medical providers are either oblivious to the screening tools available for early detection, or consciously disregard such screening tools for economic reasons.[12] Physicians will often make recommendations which are not consistent with the United States Preventative Service Task Force ("USPTF") practice guidelines which are authoritative practice guidelines to be followed in the medical field.

The USPTF recommends four different screening options as follows:

1. High Sensitive FOBT (i.e."FIT");
2. Colonoscopy;
3. Sigmoidoscopy;
4. Combination of FOBT and Sigmoidoscopy.[13]

According to the Center for Decease Control ("CDC"), "when colorectal cancer is found early and treated, the 5-year relative survival rate is 90%."[14] However, "because screening rates are low, less than 40% of CRC is found early. One U.S. clinical trial reported a 33% reduction in CRC deaths and a 20% reduction in CRC incidence among people offered an annual fecal occult blood test (FOBT)."[15] Additionally, "…

among people who can comply with frequent testing, highly sensitive and inexpensive non-invasive testing may be comparable to much less frequent screening with colonoscopy."[16]

III. Organized Screening Programs

CRC lends itself to early detection due to its long development time, which can be detected and therefore prevented through organized screening programs.[17] A study from Norway indicated that screening for CRC can reduce mortality by as much as 80%.[18]

Recognizing the importance of organized screening programs, Kaiser Permanente Northern California ("KPNC") began CRC screening in the 1960s, initially using flexible sigmoidoscopy.[19] Sigmoidoscopies and colonoscopies vary in cost throughout the United States.[20] Sigmoidoscopies can be performed by family practioners and/or internal medicine physicians who view the rectum through sigmoid portion of the colon.[21] Colonoscopies are performed by a gastroenterologist and are performed in endoscopy suites and view the rectum through the entire colon.[22] The average total cost for a sigmoidoscopy ranges from $300 to $700.[23] The average total for a colonoscopy performed in an endoscopy suite runs between $3,000-7,000.[24]

KPNC utilized FIT tests and increased CRC screening rates between 2005 and 2010 from 41% to 78% in the commercial and Medicare populations. "Organized FIT test screening has been associated with an increase in annually detected CRCs, almost entirely because of increased detection of localized-stage cancers."[25]

IV. History of iFOBT and Noninvasive Screening Tests

Noninvasive screening tests for CRC are the guaiac Fecal Occult Blood Test ("guaiac" or "gFOBT") and the Fecal Immunochemical Test ("FIT" or "iFOBT"). Fecal occult blood testing is the most recognized form of CRC noninvasive screening worldwide. FIT, first developed in 1986,[26] is a more sensitive test for the detection of CRC than the guaiac method. FIT has higher patient acceptance and compliance, and is now the most widely used noninvasive method to screen and detect human hemoglobin from the lower gastrointestinal tract which is then used to detect early CRC or pre-cancerous conditions in the colon.[27]

iFOBT/FIT was a significant improvement for the detection of human hemoglobin from the lower GI in stool samples from gFOBT, which was widely used in the U.S. market in the late seventies through the 1980's and 1990's. The major impediments of gFOBT are that it requires three separate daily stool samples from patients, requires the patient to restrict certain medicines and food products three days prior to screening and to maintain those dietary and medicinal restrictions during the three-day screening. Even when a patient complied with these restrictions, the gFOBT lacked both sensitivity and specificity for human blood.

Key advantages of FIT over guaiac are: (i) improved patient acceptance and improved specificity; (ii) FIT is specific for human hemoglobin; (iii) FIT is not affected by diet and medications; (iv) FIT generally requires fewer samples than guaiac

tests with better sensitivity; (v) since hemoglobin is frequently degraded as it passes through the gastrointestinal ("GI") tract, FIT is more specific for lower GI bleeding. Consequently, FIT specificity is not affected by anticoagulant or nonsteroidal medications because such medications induce upper GI bleeding.[28] More importantly, FIT is utilized more frequently because "patients invited to screen with FIT are more likely to use it, compared with the guaiac test, in part because of improved collection devices, fewer required samples, and no dietary restrictions."[29]

FIT screening methodology is an immunochemical reaction to human hemoglobin due to a very specific and sensitive set of antibodies and is ten times more sensitive to the presence of human hemoglobin in the stool than its predecessor the gFOBT. Also FIT screening does not require patients to have any dietary or medicinal restrictions prior to usage. FIT testing, because it demonstrated in studies to be more sensitive and specific for human hemoglobin, with no medicinal or dietary restrictions, was adopted in the Japanese market in the early nineties.[30] It also became the test of choice in Western Europe and in some South American countries in the mid nineties.[31] Studies in these countries have proved that annual FIT testing of patients over the age of 50 was able to reduce colorectal cancer deaths by 30-50%.[32]

V. Legal Implications for Failure to Screen for CRC

Since CRC "is one of the most commonly diagnosed cancers in the United States, and is one of the most preventable forms of cancer, as the second leading cause of cancer death in the United States in both women and men,"[33] there is likely to be an avalanche of medical malpractice litigation for failure to screen, or for failure to screen properly.

In the context of medical malpractice, failure to diagnose has been a dominant malpractice allegation particularly where patients presented with symptoms of CRC. The most frequent allegation now is "failure to screen" and "failure to properly screen." Patients who are at increased risk should be recommended to undergo a colonoscopy. While in many colorectal cancer malpractice cases, plaintiffs were awarded for failure to properly diagnose CRC, there is a growing emphasis on failure to properly screen which would have led to a proper, early diagnosis and therefore early treatment to asymptomatic patients.

Nevertheless, various medical institutions and practitioners have still not recommended or adopted annualized FIT screening for CRC for their patients. Such FIT screening and its ability to shift late stage cancer to pre-cancerous or early stage cancers has simply been ignored. Perhaps the failure to utilize FIT is due to the doctor's lack of education on its efficacy, or to the economic interests associated with treatment. When large health care organizations such as Kaiser Permanente and the American VA aggressively screen their patients with FIT as the SOC on an annual basis, those patients who are diagnosed with CRC should simply inquire if they were ever advised to be screened for CRC.

Worldwide studies and now major studies in the U.S. prove that FIT is inexpensive and noninvasive and could shift as many as 50% of all late stage cancers to early

stage. The CDC found "[a]s many as 60% of deaths from colorectal cancer could be prevented if everyone age 50 and older were screened regularly."[34] According to the *American Journal of Managed Care*, "Fecal occult blood testing every year and sigmoidoscopy every 5 years are the most strongly supported by evidence of effectiveness, are the most widely practiced, and are favored by a recent cost effectiveness model."[35]

Current Status of CRC Screening Coverage Laws

"The 2009 Colorectal Cancer Legislation Report Card, presented by a dozen leading health professional and patient advocacy organizations, provides a snapshot of each state's legislated coverage for CRC screening. Twenty-one states, plus the District of Columbia, received an "A," but 19 states received an "F," revealing that coverage for CRC screening is highly inconsistent across the United States."[36]

2009 Colorectal Cancer Legislation Report Card: State Grades

A 21: Alaska, Arkansas, Colorado, Connecticut, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Virginia, Washington, Washington D.C. States receiving an A reference accepted screening guidelines,[37] allowing the legislation to include coverage of future advances in screening methods.[38]

B 4: Delaware, Pennsylvania, Texas, West Virginia States receiving a B meet current screening guidelines,[39] but no guidelines are specifically referenced. Therefore the legislation may potentially fall short of providing coverage for future advances in screening methods.[40]

C 3: California, Minnesota, Wyoming States receiving a C have passed legislation that covers preventative cancer screenings, but the legislation is vague and does not specifically mention which types of colorectal cancer screenings are covered.[41]

D 3: Alabama, Oklahoma, Tennessee States receiving a D have passed legislation that recommends insurance providers *offer* coverage, but does not *require* coverage.[42]

F 19: Arizona, Florida, Hawaii, Idaho, Iowa, Kansas, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, New York, North Dakota, Ohio, South Carolina, South Dakota, Utah, Vermont, Wisconsin States receiving an F do not currently have any legislation that requires insurance providers to cover preventative colorectal cancer screenings.[43]

FIT is therefore the standard of care for noninvasive, asymptomatic screening for CRC. Therefore, late stage CRC could and should be detected earlier and therefore deaths from CRC should and could be reduced by over 30,000 every year.

Additionally, treatment costs of approximately $500,000/patient should be reduced annually by billions of dollars.

VI. The Cost of Late Stage Detection of CRC

Who stands to benefit from late stage CRC detection? Pharmaceutical companies directly benefit from late stage CRC detection. For instance, chemotherapy drugs such as "Fluoropyrimidines irinotecan, and oxaliplatin are the standard cytotoxic drugs used in treating metastatic colorectal cancer."[44]

As reported in the *New England Journal of Medicine* ("Journal"), when CRC is detected late, the cost of chemotherapy is staggering. In the United States only, the chemotherapy regimen "costs approximately $30,790 for an eight-week course. Assuming that an average patient continues to receive treatment until the mediantime to progression, 8 months of front-line therapy followed by 4.1 months of irinotecan–cetuximabtherapy would cost $161,000."[45]

The *Journal* also reported that "[i]n 2004, 32,000 people in the United States will receive a diagnosis of stage IV colorectal cancer, and recurrent metastatic disease will develop in an additional 24,000. The drug costs for an eight-week course of initial treatment for these 56,000 patients will be approximately $666 million — or $1.2 billion with the addition of monoclonal-antibody therapy."[46] The *Journal's* cost estimates are exclusively for chemotherapy drugs and "do not include the costs of preparation, administration and supervision, or supportive medications."[47]

Most importantly, the *Journal* reported in 2004, that while "such costly treatment will not provide a cure, one can only speculate about the relative effect of directing these resources toward screening and prevention.[48]

Certainly, therefore, "as the costs of care for advanced CRC increase because of use of novel but costly biological therapies, screening with reasonably effective and inexpensive methods such as FOBT and FIT can be not only cost-effective, but also potentially cost-saving."[49]

VII. The Standard of Care

Screening for CRC is the standard of care. While colonoscopies are an effective tool in the screening process, patient acceptance and compliance is highest utilizing FIT as the noninvasive screening method for CRC detection.[50] FIT testing therefore appears to be increasing to become the most widely recognized noninvasive tool for CRC screening throughout the world.[51] As such, FIT testing is becoming the standard of care ("SOC") in noninvasive screening for CRC. FIT is simple, inexpensive, noninvasive and widely accepted within the above-referenced patient communities with patient compliance rates of 60-80%.

Routine, annual FIT screening on age appropriate patients identified those patients with human hemoglobin in their stool. Such screening has led to patients having colonoscopies which identified problems or disease in the colon which ranged from small polyps, larger polyps, adenomas, Crohns, diverticulitis, early stage cancer and late stage cancer. Dr. Jim Allison, a leading gastroenterologist associated with the

University of San Francisco and KPNC, advised that "when all patients eligible for screening are screened with colonoscopy, the fraction with no colorectal neoplasia (new growth) is consistent, ranging from 75% to 83%; thus most patients screened with colonoscopy will have neither adenomas nor cancers."[52] However, those screened with FIT who test positive, will necessarily require colonoscopy follow-up.

Conversely, another study in Japan provided that "in 1998 the government organized a nationwide mass screening which involved 3.3 million people throughout Japan using FIT. 6.7% of those patients were positive.[53] The study demonstrated that through its screening process with FIT, it was determined that approximately 66% of all cancers found (4,548) were at the early stage." Such cancers were therefore treatable. The American Cancer Society found that 37-39% of CRCs in the United States are detected at the early stage as well. Accordingly, the lives saved by screening and specifically FIT testing is indisputable.

KPNC generated even more compelling data corroborating the efficacy of FIT testing. In a retrospective look from 2005 to 2009 of 640,000 patients, KPNC's conclusions were as follows:

- A 50% increase in screening rates (49% in 2005; 73% in 2009)
- 30% increase in Stage 0/I colorectal cancers
- 30% decrease Stage IV colorectal cancers
- Of 5,100 cancers detected approximately 1,530 shifted from late stage IV, with an 8% five-year survivability rate to early stage 0/I with a 92% five-year survivability rate[54]

A recent four-year study in the United States, performed by KPNC which serves over 3 million patients was conducted with astounding results.[55] FIT testing in patients age 50 to 80 years in age, generated the following key observations:

a. The screening test of choice was FIT performed annually; with follow up of positive tests with colonoscopy, and adherence with screening policies tracked by regional electronic data;

b. Between 2004 and 2010, there were vastly improved screening rates: commercial population screening rates (non Medicare) doubled from 34% to 69% and the Medicare rate increased from 46% to 78% over the same time period;

c. From 2007 to 2009, an average of nearly 200 more localized cancers were detected annually in KPNC population compared with the baseline in place from 2006 and before.

Therefore, healthcare providers "will be expected not only to offer screening programs but also to perform them well."[56]

VIII. Failure to Screen for CRC and Medical Malpractice

As demonstrated above, FIT is the standard of care for noninvasive, asymptomatic screening for CRC. If internists, gastoenterologists and other professionals in healthcare continue to fail to utilize FIT, they are exposed to liability for medical malpractice. As reflected in the *American Journal of Managed Care*, "[a]s the evidence for colorectal cancer screening builds, and becomes more widely codified in nationally respected guidelines, cancers developing in people who have not been screened will become an ever-growing embarrassment to managed care organizations."[57]

The trend to codification as referenced above are revealed in the following Bills introduced to the 111th Congress:

- ***HR 1189: Colorectal Cancer Prevention, Early Detection, and Treatment Act of 2009***

  The bill would amend the Public Health Service Act to establish a national screening program at the Centers for Disease Control and Prevention and to amend title XIX of the Social Security Act to provide states the option to provide medical assistance for men and women screened and found to have colorectal cancer or colorectal polyps. The bill would authorize $50 million in funding for grants to the states.

- ***HR 1330: Colorectal Cancer Screening and Detection Coverage Act of 2009***

  The bill would amend the Public Health Service Act, the Employee Retirement Income Security Act of 1974, the Internal Revenue Code of 1986, and Title 5, and if the United States Code, to require that group and individual health insurance coverage and group health plans and Federal employees' health benefit plans provide coverage of colorectal cancer screening.

- ***HR 2291: Medicare Early Detection of Cancer Promotion Act of 2009***

  The bill would amend title XVIII of the Social Security Act to eliminate the 20 percent coinsurance for screening mammography and colorectal cancer screening tests in order to promote the early detection of cancer.

- ***HR 3591/S 1511: Colorectal Examination and Education Now (SCREEN) Act of 2009***

  The bill amend titles XVIII and XIX of the Social Security Act to improve awareness and access to colorectal cancer screening tests under the Medicare and Medicaid programs, and for other purposes. Among other provisions, it authorizes the Secretary of Health and Human Services (HHS) to make grants to states and Indian tribes for colorectal health programs.

- ***S717: 21st Century Cancer ALERT (Access to Life-Saving Early Detection, Research and Treatment) Act***

  The bill would modernize cancer research, increase access to preventative cancer services, provide cancer treatment and survivorship initiatives, and for other purposes. It would expand coverage of colorectal screenings, including through providing grants and allowing states to provide coverage for such screenings under Medicaid.[58]

Establishing malpractice and deviations from the SOC will become more common, until screening becomes mandated and physicians and healthcare providers comply.

In order to establish the liability of a physician for medical malpractice, a plaintiff must prove:

i. the physician owed a duty to the plaintiff;

ii. the physician deviated or departed from accepted community standards of practice;

iii. that such departure was a proximate cause of the plaintiff's injuries and;

iv. that the Plaintiff suffered injuries.[59]

IX. *Daubert/Frye* Standards

The *Daubert* standard is a rule of evidence regarding the admissibility of expert *testimony* to preclude unqualified *evidence* or "junk science" to the *jury*.[60] The *Frye* standard, or "general acceptance" provides that expert opinions based on a scientific technique is admissible only where the technique is "generally accepted" as reliable in the relevant scientific community.[61] In *Daubert*, the Supreme Court held that the *Federal Rules of Evidence* superseded *Frye* as the standard for admissibility of expert evidence in federal courts. Many states, however, still adhere to the *Frye* standard.[62]

Daubert/Frye motions to preclude experts from testifying will, however, be met with indisputable evidence clearly demonstrating the following:

1. FIT has been tested in actual field conditions and has a documented rate of success, including false positive and false negative analysis;

2. FIT has been subject to peer review and publication;[63]

3. The known or potential rate of error has been established in FIT testing;[64]

4. Standards exist for the control of FIT testing;[65]

5. FIT is generally accepted within the relevant scientific community as the preferred screening method to detect blood in the stool and therefore the presence of CRC.[66]

Conclusion

In spite of the all of the obvious benefits to early detection of CRC, the billions of dollars that would be saved if screening were more widely used and most importantly the lives that would be saved, CRC screening "still remains underutilized, despite the availability of effective, non-invasive, inexpensive screening tests."[67] Screening for colorectal cancer lags far behind screening for breast and cervical cancers.[68] About half of the U.S. population aged 50 and older has not been screened for CRC. In fact, according to 2005 data from the National Health Interview Survey (NHIS), only 46.8 percent have had a FIT test in the past year, a sigmoidoscopy in the past five years or a colonoscopy in the last 10 years.[69]

"Screening for CRC was also particularly low among those respondents who lacked health insurance, those with poor access to healthcare services, and those who reported no doctor's visits within the preceding year."[70] "By contrast, in 2005, 67.9 percent of all U.S. women age 40–64 had a mammogram in the past two years."[71]

Currently, "ninety-five percent of physicians routinely recommend colonoscopy screening to asymptomatic, average-risk patients; 80% recommend fecal occult blood testing (FOBT). Only a minority recommend sigmoidoscopy, double-contrast barium enema, computed tomographic colonography, or fecal DNA testing. Fifty-six percent recommend two screening modalities; 17% recommend one."[72]

While colonoscopy is now the most frequently recommended test, only 50% of patients will comply. "[M]ost physicians do not recommend the full menu of test options prescribed in the national Guidelines and inform patients to alternatives to colonoscopy. Few perform sigmoidoscopy... [and] office systems to support CRC screening are lacking in many physicians' practices."[73] In fact, "[w]ith excellent annual adherence, sensitive and inexpensive stool-based testing such as FIT may be comparable to screening colonoscopy."[74]

If failing to screen for CRC continues, medical malpractice actions will (i) illuminate the necessity of CRC detection and treatment and force it to the forefront of the governement's priority in passing the legislation referenced above; (ii) compel medical providers to organize and institute formal screening programs, similar to KPNC's voluntary program, with significant results in detection of CRC and reduction of CRC related deaths; and (iii) seek redress for those who have needlessly suffered or died from CRC because they were simply not properly screened, regardless of whether such individuals have health insurance.

Therefore, CRC screening must be implemented immediately across the nation so that hundreds of thousands of lives will be saved, billions of dollars redirected to screening, early prevention and treatment and millions of families across the nation will be spared the unnecessary agony of late stage detection of CRC.

Endnotes

1 Rebecca Siegel, Deepa Naishadham & Ahmedin Jemal, *Cancer Statistics, 2010*, 60 CA Cancer J. Clinicians 277, 277–300 (2010).

2 *See Id.*

3 *See* SEER Stat Fact Sheets: Colon and Rectum, http://seer.cancer.gov/statfacts/html/colorect.html (last visited Jan. 27, 2012).

4 *See Id.*

5 *See Id.*

6 *See Id*.

7 *See Age Adjusted Death Rates for United States, 2008 Colon & Rectum* http://statecancerprofiles.cancer.gov/map/map.noimage.php (choose area: US By State; choose data group: Cancer Rates; choose cancer: Colon & Rectum; choose data type: Mortality; choose race/ethnicity: All Races (incl. Hisp); choose sex: Both Sexes; choose age group: All Ages; choose year range: Latest single year (US by state); then Generate Map) (last visited Jan. 27, 2012).

8 *See* Historical Trends (1975 to 2008), http://statecancerprofiles.cancer.gov/historicaltrendjoinpoint.noimage.html (choose area: United States; choose cancer: Colon & Rectum; chose data type: Mortality; choose race/ethnicity: All Races (incl. Hispanic); choose sex: Both Sexes; choose age group: All Ages; then Generate Graph) (last visited Jan. 27, 2012).

9 Bernard Levin, et al., *Screening and Surveillance for the Early Detection of Colorectal Cancer and Adenomatous Polyps, 2008: a Joint Guideline from the American Cancer Society, the US Multi-Society Task Force on Colorectal Cancer, and the American College of Radiology*, 58 CA: Cancer J. Clinicians 130, 130–160 (2008).

10 Lisa C. Richardson, et. al., *Vital Signs: Colorectal Cancer Screening, Incidence, and Mortality — United States, 2002–2010*, 60 Morbity Mortality Wkly Rep. 884, 884–89 (2011).

11 Deepa Naishadham, et al. *State Disparities In Colorectal Cancer Mortality Patterns In the United States*, 20 Cancer Epidemiology Biomarkers Preservation 1296, 1296–302 (2011).

12 Such economic reasons are discussed below and have been examined in Debroah Schrag, *The price tag on progress – chemotherapy for colorectal cancer*, 351 New Eng. J. Med. 317, 317–19 (2004); Miriam Koopman et. al, *Sequential Versus Combination Chemotherapy with Capecitabine, Irinotecan, and Oxaliplatin in Advanced Colorectal Cancer (CAIRO): A Phase III Randomised Controlled Trial,* 370 Lancet 135, 135-142 (2007); Matthew T. Seymour et al., *Different Strategies of Sequential and Combination Chemotherapy for Patients with Poor Prognosis Advanced Colorectal Cancer (MRC FOCUS): a randomised controlled trial* (pts 1 & erratum), 370 Lancet 143, 143–152, 566, 566 (2007).

13 See U.S. Preventive Services Task Force, *Screening for Colorectal Cancer: U.S. Preventive Services Task Force Recommendation Statement*, 149 Annals Internal Med. 627, 627–637 (2008).

14 CDC-Colorectal Cancer Screening Rates, http://www.cdc.gov/cancer/colorectal/statisticsscreening_rates.htm (last visited January 27, 2012).

15 *See Id*.

16 *See* Murtaza Parekh, A. Mark Fendrick, & Uri Ladabaum, *As tests evolve and costs of cancer care rise: reappraising stool-based screening for colorectal neoplasia*, 27 Aliment Pharmacol & Therapeutics 697, 709 (2008).

17 Theodore R. Levin et. al., *Organized Colorectal Cancer Screening in Integrated Health Care Ststrems*, 33 Epidemiological Rev. 101, 101–110 (2011).

18 E. Thiis-Evensen et. al., *Population Based Surveillance by Colonoscopy: Effect on the Incidence of Colorectal Cancer: Telemark Polyp Study I,* 34 Scandinavian J. Gastroenterology 414, 414-20 (1999).

19 *See Id*.

20 *See Id*.

21 *See Id*.

22 *See Id*.

23 *See Id*.

24 *See Id*.

25 *See* Levin, *supra* note 17.

26 *See* Toshitaka Takeshita, *Immunological FOBT Used for Mass Screening in Japan*, 1 Nagase Med. Update 1, 1–4 (2001) available at http://www.nagase.com/newsletters/medical/default.asp; *publication of summary of FIT testing since 2003*.

27 For worldwide results, *see* Victoria S. Benson et al., *Colorectal Cancer Screening: a Comparison of 35 Initiatives in 17 Countries*, 122 Int'l J. Cancer 1357, 357–1367 (2008). For the United States, *see* Levin, *supra* note 17.

28 Zohar Levi et al., *Sensitivity, but not Specificity, of a Quantitative Immunochemical Fecal Occult Blood Test for Neoplasia is Slightly Increased by the Use of Low-Dose Aspirin, NSAIDs, and Anticoagulants*, 104 Am. J. Gastroenterology 933, 933–938 (2009).

29 *See* Levin, *supra* note 17; s*ee also* James E. Allison et al., *A Comparison Of Fecal Occult-Blood Tests For Colorectal-Cancer Screening*, 334 New Eng. J. Med. 155, 155–59 (1996); James E. Allison et al., *Screening for Colorectal Neoplasms with New Fecal Occult Blood Tests: Update on Performance Characteristics* 99 J. Nat'l Cancer Inst. 1462, 1462–70 (2007).

30 *See Id*.

31 *See Id*.

32 *See* Takeshita, *supra* note 20; Eduardo Fenocchi et. al., *Screening for Colorectal Cancer in Uruguay with an Immunochemical Faecal Occult Blood Test*, 15 European J. Cancer Prevention 384, 384–90 (2006); S. Crotta, *Feasibility Study of Colorectal Cancer Screening by Immunochemical Faecal Occult Blood Testing: Results in a Northern Italian Community*, 16 European J. Gastroenterology Hepatology 33, 33–37 (2004).

33 *See The State of Colorectal Cancer Screening and Prevention Whitepaper: National Perspectives and Federal Policies*, (January 28, 2010). http://www.olympusamerica.com/corporate/docs/CRCScreening_Prevention_Whitepaper.pdf

34 *See* Colorectal (Colon) Cancer, http://www.cdc.gov/cancer/Colorectal/(last visited January 25, 2012).

35 Robert H. Fletcher et. al., *Screening for Colorectal Cancer: The Business Case*, 8 Am. J. Managed Care 531, 534 (2002).

36 *See State of Colorectal Cancer Screening and Prevention Whitepaper National Perspectives and Federal Policies*, *supra* note 32.

37 *See Id*. (noting Screening Guidelines of the American Cancer Society, American Gastroenterological Association).

38 *See Id*.

39 *See Id*. (noting Screening guidelines of the American Cancer Society, American Gastroenterological Association).

40 *See Id*.

41 *See Id.*

42 *See Id*. (Noting "this report card grades legislation only. Some states with F grades are working with insurance providers to implement voluntary programs that will ensure widespread coverage for colorectal cancer screening.")

43 *See Id*. (Noting "this report card grades legislation only. Some states with F grades are working with insurance providers to implement voluntary programs that will ensure widespread coverage for colorectal cancer screening.")

44 *See* Jolien Tol et al., *Chemotherapy, Bevacizumab, and Cetuximab in Metastatic Colorectal Cancer*, 360 New Eng. J. Med. 563, 563-572 (2009); *See also*, Schrag, *supra* note 12; Koopman, *supra* note 12.

45 *See* Schrag, *supra* note 12.

46 *See Id*.

47 *See Id*.

48 *See Id*.

49 See Parekh, *supra* note 16.

50 *See* Benson, *supra* note 21.

51 *See* Benson, *supra* note 21.

52 James E. Allison, *The Best Screening Test for Colorectal Cancer Is the One That Gets Done Well*, 71 Gastrointestinal Endoscopy 342, 342–45 (2010).

53 *See* Takeshita, *supra* note 20.

54 Study results for Kaiser Permanente Southern California should appear in publication in GUT in the second half of 2011 or early 2012. *See also WSVN, 7News Miami/Ft. Lauderdale* (Sunbeam Television Corp. broadcast Mar. 29, 2010), available at http://www.youtube.com/watch?v=4RpUeao3NOo (Interviewing gastroenterologist Dr. David Weiss of Gastroenterology Consultants).

55 The study was authored primarily by Dr. T.R. Levin, *see* Levin, *supra* note 17.

56 *See* Levin, *supra* note 17.

57 Fletcher, *supra* note 34, at 535.

58 *See, The State of Colorectal Cancer Screening and Prevention Whitepaper National Perspectives and Federal Policies*, *supra* note 32.

59 *See Gross v. Friedman,* 73 NY2d 721, 722-723 (1988); *Heller v. Weinberg,* 77 AD3d 622 (2d Dep't 2010); *Myers v. Ferrara,* 56 AD3d 78, 83 (2d Dep't 2008); *Musiaro v. Clarkstown Med. Assoc.,* 2 AD3d 698 (2d Dep't 2003); *Dolan v. Halpern,* 73 AD3d 1117 (2d Dep't 2010); *Anonymous v. Wyckoff Hgts. Med. Ctr.,* 73 AD3d 1104 (2d Dep't 2010); *Dunn v. Khan,* 62 AD3d 828, 829 (2d Dep't 2009); *Rosen v. John J. Foley Skilled Nursing Facility,* 45 AD3d 558, 559 (2d Dep't 2007).

60 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

61 *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (addressing the issue of whether a polygraph test should be admitted as evidence).

62 The States following the *Frye* standard include Alabama, Arizona, California, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and Washington.

63 There are over forty studies which clearly illustrate that that FIT testing has been subject to peer review and publication.

64 *See* Levin, *supra*, note 17, at 101 and 103. (Noting that "organized fecal immunochemical test screening has been associated with an increase in annually detected CRC's, almost entirely because of increased detection of localized stage cancer" and providing charts outlining the performance of the FIT test in predicting lesions in the lower gastrointestinal tract).

65 *See* Medical Device Databases, http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/Databases/default.htm (last accessed January 26, 2012) ("Medical device manufacturers are required to submit a premarket notification or 510(k) if they intend to introduce a device into commercial distribution for the first time or reintroduce a device that will be significantly changed or modified to the extent that its safety or effectiveness could be affected.")

66 There are over 40 studies which support that FIT testing is generally accepted within the relevant

scientific community as the preferred screening method to detect blood in the stool.

67 *See The State of Colorectal Cancer Screening and Prevention Whitepaper National Perspectives and Federal Policies*, *supra*, note 32.

68 *See* CDC – Colorectal Cancer Trends, http://www.cdc.gov/cancer/Colorectal/statistics/trends.htm (last visited January 26, 2012).

69 *American Cancer Society, Colorectal Cancer Facts & Figures* 2008-2010 15 (2008), *available at* http://www.cancer.org/acs/groups/content/@nho/documents/document/f861708finalforwebpdf.pdf (providing in Table 7 the statistics for colorectal cancer screening among adults aged 50 and older based on National Health Interview Survey Public Use Data File 2005, National Center for Health Statistics, Centers for Disease Control and Prevention, 2006).

70 The *State of Colorectal Cancer Screening and Prevention Whitepaper National Perspectives and Federal Policies*, *supra*, note 32.

71 *Id*.

72 Carrie N. Klabunde et. al., *Colorectal Cancer Screening by Primary Care Physicians: Recommendations and Practices, 2006-2007*, 37 Am. J. Preventative Med. 8, 8 (2009).

73 *See Id*.

74 *See* Parekh, *supra* note 16, at 709.

The Westchester County Commercial Division, Common-Law Dissolution, and the Resolution of Family-Owned Business Disputes

BY MATTHEW D. DONOVAN, ESQ.*

Family-owned business breakups are no strangers to the Commercial Division of the Supreme Court of the State of New York. As the Hon. Timothy S. Driscoll of the Nassau County Commercial Division remarked at a recent CLE sponsored by the Commercial Litigation Committee of the Nassau County Bar Association: "Dissolution of family-owned, closely-held businesses are our bread and butter here in the Commercial Division."

The same can be said of the Westchester County Commercial Division, where in 2012 the Hon. Alan D. Scheinkman, Adminstrative Judge, Ninth Judicial District, presided over at least two notable dissolution proceedings involving sizable family-owned businesses. Both cases involved bitter allegations of intra-family oppression by the controlling majority to "squeeze out" the minority shareholders. Both sought relief *via* the less-traveled route of common law as opposed to statutory dissolution.

Family-owned Business Disputes Distinguished

As explained in a recent enlightening article on the subject,[1] family-owned businesses, which comprise over 80% of U.S. companies and account for over 50% of its workforce, engender unique disputes because they embody inherently conflicting

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values. On the one hand, the family business owner is compelled to attend to the owner's obligations as a member of a family. The owner must look out for the good of the family, a good in and of itself, not to be achieved through some instrumental calculus designed to garner maximum personal benefit from the business. But on the other hand, the family business owner is motivated, and properly so, to do just that – maximize individual and shareholder investment.

Such an owner wears two hats, at once managing employees and making structural decisions about personnel and the overall trajectory of the business, while at the same time recognizing that it is the owner's siblings, children, nieces or nephews that are the subject of such management decisions. In other words, the family business owner, who doubles as a parent or brother or uncle, must simultaneously play two distinct roles and decide on a day-to-day basis which role takes precedence and when.

The presence of this value conflict has real business consequences. Family-owned businesses tend to dispense with corporate formalities. They may find formal agreements and meetings unnecessary and even be offended at the suggestion of entering into a shareholder agreement or attending a board meeting. Written contracts and tallied decision-making are for lawyers and strangers, not blood relatives where one's word is still one's honor.

But a failure to properly document business ownership and leadership; a failure to properly hold and record board and shareholder meetings; and a failure to bargain at arm's length for the protection of one's own interests in the business make up the ingredients of many a recipe for future litigation. Such litigation often erupts in the context of allegations of minority oppression, in which family members holding a minority interest in the business allege that the owners in control are excluding them from key business decisions, withholding important company information, denying dividends, and ultimately forcing them to throw in the towel and sell their shares for something considerably less than fair value.

In the family-owned business context, business owners cannot necessarily be predicted to make decisions they believe will maximize their own benefit. "It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest," quipped Adam Smith. Not necessarily so with the family-owned business, where concern for one's own often trumps self-interest. In short, attorneys and judges involved in family-owned business disputes must approach such disputes with a broader perspective than they would other commercial disputes.

Statutory and Common-Law Dissolution

When owners of a closely held company are pitted against each other in the context of an impending business divorce, there often exists a natural seller and a natural buyer. This is particularly so when one of the warring owners holds a passive minority interest in the company and is ineligible to receive the same salary, bonus, and other benefits enjoyed by the active majority owners. Generally speaking, however, there is no public market for a minority interest in a privately-held company. Add to that

the efforts on the part of the majority owner to squeeze the minority owner out, and receiving a fair price for one's interest becomes a very difficult challenge.

So, in the context of a family-owned business dispute, in which the family members may well have neglected to provide for fair exit mechanisms for withdrawing owners in the foundational documents and agreements, how can an oppressed minority owner compel a liquidation event ensuring a fair return on his investment? One way is to file for dissolution of the company under statutory or common law.

Section 1104-a of the New York Business Corporation Law ("BCL") permits a shareholder holding 20% or more of a company's voting shares to petition for dissolution when, among other events, "those in control of the corporation have been guilty of . . . oppressive actions toward the complaining shareholders" (BCL § 1104-a [1]).[2] Control owners are said to be guilty of oppressive actions when they substantially defeat the minority owner's "reasonable expectations" in being an owner, which were critical to his decision to join the business in the first place (*Matter of Kemp & Beatley*, 64 NY2d 63, 72-73 [1984]). Examples of such expectations include "a job, a share of corporate earnings, a place in corporate management, or some other form of security" *Id*. Such examples are by no means exhaustive, as courts determine whether oppression exists on a case-by-case basis *Id*.

But what if the minority owner holds less than 20% of the company's voting shares or the entirety of the minority owner's interest is non-voting in nature? Enter the doctrine of common law dissolution.

Statutory dissolution was preceded by the remedy of common-law dissolution, which was recognized nearly a half-century ago by the New York Court of Appeals in *Leibert v. Clapp*, 13 NY2d 313 (1963). Common-law dissolution was supplemented — not supplanted — by statutory dissolution, and it remains a legitimate and viable claim to this day (*Ferolito v. Vultaggio*, 99 AD3d 19, 28 [1st Dep't 2012]).

While often based on similar allegations of shareholder "oppression" by the controlling majority, common-law dissolution is separate and distinct from the remedy afforded under BCL § 1104-a and specifically affords similar relief to squeezed-out minority shareholders who have no recourse to the statute because they do not hold the requisite 20% voting interest in the company they are seeking to dissolve. As the Third Department explained in *Lewis v. Jones*, 107 AD2d 931, 933 (3d Dep't 1985), "were we to hold . . . that plaintiff is proscribed from presenting a common-law dissolution action, his lack of standing to commence an action for that remedy pursuant to Section 1104-a of the Business Corporation Law would leave him without an adequate remedy, a circumstance abhorrent to the common law."

To establish a claim for common-law dissolution, the minority owner must show that the majority owners are in breach of their fiduciary duties and "are continuing the existence of the corporation solely for their own benefit at the expense of the minority shareholders, to force such shareholders to sell their holdings to them at a sacrifice and to freeze them out of the corporation" (*Leibert*, 13 NY2d at 316). The majority owners' fiduciary breaches must be based on "egregious conduct" (*Matter of Kemp & Beatley*, 64 NY2d at 69).

Dissolution actions can, and often do, result in a buy-out of the minority owners' interest on terms considerably more favorable than what they may have been offered as they were being squeezed out the door by the control owners. Section 1118 of the BCL, the buy-out companion to BCL § 1104-a, expressly provides that upon filing of a petition for dissolution, "any other shareholder or shareholders or the corporation may...elect to purchase the shares owned by petitioners at their fair value and upon such terms and conditions as may be approved by the court" (BCL § 1118 [a]). Even in the absence of a statutory election on the part of the control owners to purchase petitioner's minority interest, courts have at their disposal the discretion to compel a buy-out as an alternative to the "drastic remedy" of dissolution[3] (*see Matter of Wiedy's Furniture Clearance Ctr.*, 108 AD2d 81 (3d Dep't 1985) (holding that court may "direct) respondents to compensate petitioner for the value of his interest in the (company) as determined by an independent appraiser, in lieu of a corporate dissolution"); *see also Matter of Clever Innovations, Inc.*, 94 AD3d 1174 (3d Dep't 2012) [holding that "a court has broad latitude in fashioning alternative relief . . . in directing a buy-out of the (petitioner's) interest in the company."])

Despite the legitimacy and viability of the claim, court decisions addressing common-law dissolution have been relatively limited in number and analysis — that is, until last year. Justice Alan D. Scheinkman's exhaustive treatment of the doctrine in the "eerily" similar cases of *White v. Fee* and *Armentano v. Armentano* is sure to become go-to precedent for future litigants asserting claims for common-law dissolution.

White v. Fee

White v. Fee, 35 Misc 3d 1243[A], 2012 NY Slip Op 51133[U] [Sup Ct, Westchester County 2012]), involved a fire sprinkler manufacturing company, controlled by the parties' father until his death in 1976. Upon graduation from college, the sister-plaintiffs received a number of non-voting shares in the company from their father and had received dividends from the company annually since 1967.

The plaintiffs alleged that, beginning in 1990, after their defendant-brothers had taken over the business from their father, they promptly abolished the company's annual dividend policy and began to divert millions of dollars in company resources to themselves and other family members. The plaintiffs further alleged that, in 1999, the defendants violated certain transfer provisions in the company's charter by purchasing a number of shares of non-voting stock from their father's trust without first offering the shares for purchase by the company.

Because they held non-voting stock in the company, the plaintiffs sued for common-law dissolution. In support of the claim, they alleged that there was no market for their non-voting shares; that any redemption of such shares under the company's 2004 stock redemption agreement was unreasonable because of the defendants' downward manipulation of the company's book value; that when the plaintiffs acquired their shares, they reasonably expected to receive annual dividends on an ongoing basis and to be eligible for employment and other benefits from the company; and that the defendants breached their fiduciary duties by, among other things, cutting off

the payment of dividends and overcompensating themselves through excessive salary, bonuses, and other perks. The defendants moved to dismiss the complaint.

Justice Scheinkman denied the defendants' motion, noting that the issue of "[w]hether Plaintiffs will be able to substantiate the[ir] allegations is not the issue to be addressed in the context of a motion to dismiss where this Court must deem these allegations to be true." Specifically, Justice Scheinkman found that the plaintiffs' allegations went beyond mere corporate waste to include the "perpetuat[ion] of [the corporation's] existence for [the defendants'] sole benefit and at the expense of the minority shareholders in an effort to freeze them out and require that they sell their shares at less than a fair market value price."

Justice Scheinkman did, however, dismiss the plaintiffs' allegations regarding the 1999 stock sale and the 2004 stock redemption agreement as time-barred under the six-year, residual statute of limitations period under section 213(1) of the New York Civil Practice Law and Rules. Because these allegations fell outside the applicable statute of limitations governing the plaintiffs' 2011 claim, Justice Scheinkman found that they were unavailing to the plaintiffs in support of the claim. The parties settled the matter shortly after Justice Scheinkman issued his decision on the defendants' motion to dismiss.

Armentano v. Armentano[4]

Armentano v. Armentano,[5] which, according to Justice Scheinkman, bore "an eerie resemblance" to *White v. Fee*, involved a propane distribution company founded by the parties' father as a welding supply business in the late 1960s. The plaintiff had been an officer and director of the company in the 1980s and played a substantial role in growing the propane side of the business into a major propane distributer. The plaintiff left the company in the early 1990s over disagreements regarding management and the direction of the business with his father and older brother but retained his non-voting shares in the company.

The plaintiff alleged that, in 2004, after his father began to withdraw from active management, his defendant brothers engaged in a scheme to squeeze him out by manipulating their father into executing a new will that bequeathed virtually all his shares in the company to the defendants, and by diluting the plaintiff's ownership interest through the acquisition of additional shares for themselves via backdated stock bonus plans, bogus stock exchanges, and undervalued stock redemptions unduly imposed upon other minority shareholders, including the parties' other brother.

As in *White v. Fee*, the plaintiff held non-voting stock in the company, compelling him to sue for common-law dissolution. The plaintiff supported his claim with other allegations of shareholder oppression by the defendants, including non-payment of dividends; refusal of access to the company's books and records; unreasonable rejection of legitimate offers from third parties to acquire the company's assets at a premium; excessive officer compensation and perks; and use of company money to pay for a variety of non-company related activities. The defendants moved to dismiss the complaint.

Following his own lead in *White v. Fee* from two months earlier, Justice Scheinkman

denied the defendants' motion primarily because the plaintiff's "ab[ility] to substantiate his allegations is not the issue to be addressed in the context of a motion to dismiss," and because the plaintiff had alleged that "the corporation's capital was being wasted or looted by the other shareholders for their own enrichment or that the corporation was being continued merely for the benefit of the majority at the expense of the [plaintiff]." Justice Scheinkman likewise also dismissed certain of the plaintiff's allegations as time-barred under the applicable statute of limitations, particularly those related to the defendants' influence in the creation of their father's new will and a stock exchange agreement entered into with their father – both of which allegedly occurred in 2005, more than six years before the plaintiff filed his complaint in 2012.

After Justice Scheinkman issued his decision on the defendants' motion to dismiss, the parties completed discovery, and the defendants moved for summary judgment. Justice Scheinkman denied the bulk of defendants' motion, and the parties proceeded to trial. At trial, with the assistance of Justice Scheinkman, the parties reached a settlement.

Settlement of Family Business Disputes and a Unique Judicial Perspective

It was suggested at the outset that it was fitting for Justice Scheinkman, given his extensive background in family and commercial law, to preside over these cases. Two days into the trial of the *Armentano* matter, after the parties' sidebar settlement negotiations began to deteriorate, in part, due to longstanding grudges and heated emotions between the brothers, Justice Scheinkman offered to put on his mediator hat and spend a day with the parties and the lawyers trying to close the deal. It worked, and after the parties had reached an agreement in principle, Justice Scheinkman offered on the record some words of wisdom concerning the settlement of family business disputes:

> The courts of law are always difficult forums for the resolution of family disputes. We are, in many cases, constrained to treat a family dispute just the same and apply the same legal considerations as applied to legal disputes between people who are strangers to each other except they happen to be in business together, and when you have a history of disagreement that is as long as this one, the disputes become even harder.
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> * * * *
>
> [P]eople who have a family or romantic relationship may go into business together and then they sometimes end up here and that adds an emotional component to a business dispute. That is somewhat different than other types of business disputes. In part what that means is that, when you reach a settlement of a business dispute, either the parties will find a way to go on and continue to do business with each other as sometimes happens or they find a way in which they can separate and never see each other again. That's a little harder to do with families.

* * * *

> [T]here is always the family component [in these disputes], and sometimes finding a way, if you can, to put aside long-standing family grievances in and of itself has its own values, and even if you can't see that today, it may be that as time passes and wounds heal, that you may find a way for the family to have a more productive, closer relationship than you have now and that is probably something that couldn't happen with a Court decision because with Court decisions, there are people who perceive that they have won and people who perceive that they have lost and it only puts more salt into wounds.

Justice Scheinkman's remarks bring home the truism in actions involving family business disputes that real finality is a virtual impossibility and that settlement of such actions before judgment is rendered may offer the closest approximation of finality. This is so, as he points out, because settlement precludes court decisions, which, as a general rule, must come down in favor of one party and against the other. That necessarily results in the perception that someone has won and someone has lost, which only breeds further discord.

Again, lawyers handling matters involving family business disputes should attempt to do so with a broader perspective. Whether devising litigation strategies or negotiating settlement terms, representation of clients in such matters calls for care and creativity on the part of the lawyers to appreciate the emotions and psychology underlying the dispute and to proceed accordingly. As Justice Scheinkman said in his closing remarks, the lawyers involved "[shouldn't] lose sight of the fact that a lawyer's job is not only to advocate for their client but to counsel their client."

Endnotes

1 Means, *Nonmarket Values in Family Businesses*, 54 William & Mary L Rev. 1185 (2013).

2 Statutory dissolution also is available to minority members of a limited liability company (*see* LLCL § 702; *Matter of 1545 Ocean Avenue, LLC*, 72 AD3d 121 (2d Dep't 2010)).

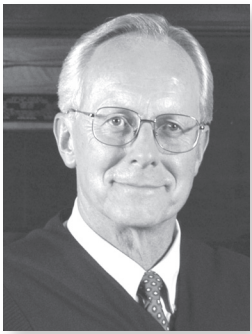
3 The discretionary buy-out remedy also is available to minority members of a limited liability company (*Lyons v. Salamone*, 32 AD3d 757, 758 [1st Dep't 2006]).

4 Disclosure, the author's firm represented the plaintiff in this action.

5 *Armentano v. Armentano*, Sup Ct, Westchester Cnty., Aug. 2, 2012, Scheinkman, J., Index No. 50761/12.

2012 Survey of Tax Certiorari, Tax Exemptions and Eminent Domain

BY HON. THOMAS A. DICKERSON, HON. DANIEL D. ANGIOLILLO AND JOHN MECHMANN, ESQ.*



2012 was a particularly important year in the local fiscal arena of real property tax assessments and exemptions. Since its enactment on June 30, 2011 General Municipal Law §3-c, the "2% real property tax levy cap," as predicted by Governor Cuomo, appears to have lead to greater "discipline, a rigor and a scrutiny to the process...it challenges the local governments to find savings. It informs the citizens and it's working."[1] The response of the state's local taxing authorities has generally been supportive. For example, "a vast majority of school districts—642 of 678, or about 95%—stayed within the tax cap in 2012."[2]

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Reactions To Tax Cap Levy

While most tax authorities have been compliant there have been reactions and criticisms.[3] First, the New York State United Teachers union filed a lawsuit on February 20, 2013 challenging the constitutionality of the tax cap levy asserting "that the tax cap interferes with local control of school and that a requirement that 60% of voters support any override of the limit dilutes the voting power of those who favor exceeding the cap."[4] The union also asserts that the tax cap levy violates "the guarantee of equal protection under the law" since it "has a disproportionate effect on school districts in low-income areas."[5]

Interest In Reassessment

Second, there has been a renewed interest by local taxing authorities to cyclically reassess all properties.[6] In fact, the state actively encourages and provides aid to municipalities seeking to reassess at 100% of market rate.[7] ("To encourage compliance with state law, New York State provides state aid to municipalities that reassess at 100% of market value on a cyclical basis...Aside from state aid, the benefits... include assessment equity for taxpayers, improved bond ratings, few court challenges to assessments, increased state land assessments and transparency.")[8]

Home Inspections Sought

Third, there has been increased pressure on local tax assessors to find new sources of revenue. This has manifested itself in (1) demanding interior inspections of residential property, (2) selective reassessment and (3) challenging existing real property tax exemptions. All of these techniques have been examined and rejected by the courts.

For example, assessors would like to inspect the interior of the premises to search for improvements that would support a reassessment. In *Matter of Aylward v. City of Buffalo*,[9] petitioners commenced RPTL Article 7 proceedings seeking review of their residential real property tax assessments. At trial, the assessor sought to inspect the premises in order to justify the assessments. The trial court erred, however, in shifting the burden to taxpayers to seek preclusion of such an inspection. In reversing, the Fourth Department found that the trial court should not have placed the burden on petitioner to move to preclude inspection, rather than requiring the assessor to justify the inspection. In addition, the court noted that where an assessor seeks an inspection of a premises, for which a tax challenge has been brought, the court must conduct a Fourth Amendment analysis which balances the assessor's need for an interior inspection against the invasion of petitioner's privacy interest that such an inspection would entail.

This finding comports with an earlier Second Department decision in *Matter of Yee v. Town of Orangetown*,[10] wherein three homeowners challenged their real property tax assessment in a SCAR proceeding. At the pretrial conference the town requested that its representatives be permitted to inspect the homes of petitioners. After petitioners refused to permit the inspections, the JHO dismissed the SCAR petitions, with

prejudice, holding that, when a homeowner files a SCAR petition, that homeowner makes a limited and revocable waiver of a right to privacy and consents to inspection and, upon a demand for an inspection by the town, must comply to avoid dismissal of the proceeding. The Second Department reversed holding, *inter alia,* that the JHO's determination to require an inspection without the homeowners' permission violated Fourth Amendment principles and petitioners' rights against unreasonable search and seizure, noting that "Except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant."

Selective Reassessment

The selective reassessment[11] of real property is expressly prohibited in the Second Department.[12] The general rule is that in the absence of a municipality-wide re-assessment an assessor is required to provide an explanation of both the change in assessment on a particular piece of property and the assessment methodology.[13] Based upon observations of work being done on a house from outside the assessor changed the assessment from $32,900 in 2002 to $103,700 in 2003.[14] The trial court found selective reassessment, in that while explaining her reasoning "namely that there were improvements, she wholly failed to justify those changes, as required (and) do not appear...to have been based on objective data...she appears to have consulted no manuals, tables or any other authorities on costing."[15]

Challenging Tax Exemptions

Some assessors in their search for increased assessments have put pressure on tax exempt properties to annually justify their tax exempt status. In *Matter of 471 Columbian Club of Port Jervis, N.Y. Inc.,*[16] petitioner was granted a tax exemption in 2010 as a charitable organization pursuant to Real Property Tax Law § 420. Thereafter, the assessor requested that petitioner submit an application for the same exemption in 2011. After petitioner refused to make application, the assessor removed the tax exemption for 2011 which was affirmed by the trial court. In reversing the trial court, the Second Department noted that "'When a municipality withdraws a tax exemption which has been granted pursuant to RPTL § 420-a(1), it bears the burden of demonstrating that the property is no longer entitled to the exemption'" and held that "A corporation is not required to complete or file any prescribed application forms to be entitled to an exemption pursuant to RPTL § 420-a."

Cooperative or Homeowners Association

In *Matter of W.O.R.C. Realty Corp. v. Board of Assessors,*[17] petitioner, a not-for-profit corporation, held title to the subject property, some 239 acres of land with 283 seasonal cottages along with other improvements (including a marina) on behalf of the West Oak Recreation Club and the club's 283 members, for the purpose of providing recreational facilities for its members. The club members each own one of the 283 cottages on the property, but retain only a leasehold interest in the land upon which

each cottage is situated. The cottages are purchased and sold only to club members, or to those who successfully apply for club membership. The club collects dues from the members for providing staff, common maintenance, and amenities on the premises, and fees for the use of the boat slips at the marina, and petitioner pays the real property taxes from collected membership dues. At trial, the court found that petitioner's ownership of the property was more like cooperative ownership than a homeowners' association, and that it must be valued like other cooperatives as a rental apartment complex according to RPTL § 581. On appeal, the Second Department agreed that the operation of the property was more similar to that of a cooperative than a homeowners association and found that the property was over-assessed.

Condemnation: Value of Railroad Corridor

In *New York Central Lines, LLC v. State of New York*,[18] a case of first impression,[19] claimant, a railroad line, filed a claim relating to a part permanent fee, part permanent easement, taking by the State of New York to expand the Brooklyn-Queens Expressway. At trial, claimant's expert, supported by several scholarly articles on rail corridor valuation, sought to value the taking by utilizing comparable sales to arrive at a corridor value for the property which not only valued the "across-the-fence" value of the parcel but also the value of the corridor itself. The trial court accepted the use of a market analysis but rejected the proposed corridor valuation, and awarded $12,104,106 in damages. The Second Department held, *inter alia*, that the trial court's rejection of the corridor valuation concept was not supported by the evidence or adequately explained and remitted for, *inter alia*, a determination of the proper corridor valuation.

Condemnation: Bad Faith

In *Matter of Zutt v. State*,[20] the Second Department considered the circumstances under which a finding of bad faith on the part of a comdemnor would be appropriate. For more than a decade the homeowners, the Zutts, litigated with the state to prevent the use of their property for the draining of stormwater. The Zutts won every time collecting damages for trespass and obtaining injunctive relief. In 2010, the state invoked its powers of eminent domain and sought to condemn a portion of the Zutts' property for a drainage easement the Second Department concluded that the State acted in bad faith by "violating the spirit and letter of the EDPL in making an unfounded determination of a *de minimus* taking, thereby avoiding the required public hearing, where the Zutts would have had the opportunity to present evidence of bad faith in a public forum" and by failing to conduct any SEQRA review, rather the state "hastily prepared a superficial environmental checklist only after faced with new litigation... and proffered a baseless interpretation of its regulations."[21]

Procedural Issues

In *Matter of Board of Mgrs. of Century Condominium v. Board of Assessors*,[22] petitioner, a condominium manager, commenced RPTL Article 7 challenges to the as-

sessment for its condominium complex for several tax years. However, several of the petitions failed to identify all of the condominium units in the complex; petitioner sought leave to amend the defective petitions, which motion was granted, and respondent appealed. The court held that amendment was proper, where petitioner had, previously, correctly challenged assessment of all of the condominium units before board of assessment review, and in tax petitions for the same property for other tax years, but had inadvertently failed to challenge all of the same units in its RPTL Article 7 petitions for two of the tax years. Respondents would not be prejudiced by the amendment; in fact, their appraisal had appraised the property in its entirety.

In *Matter of Ontario Square Realty Corp. v. Assessor, Town of Farmington*,[23] petitioner filed an RPTL Article 7 petition to challenge the real property tax assessment of the parcel at issue, but failed to timely serve the petition upon respondents. Respondents moved to dismiss, and petitioner responded by seeking additional time to serve. The trial court granted the motion and the Fourth Department affirmed, finding that dismissal for failure of petitioner to timely serve under CPLR § 306-b was appropriate. While RPTL §§ 704 and 708 set forth the general requirements for service and filing of a petition, they fail to specify the time for service of the petition upon respondent, requiring reference to CPLR § 306-b. The latter section requires service within 15 days after the expiration of the applicable statute of limitations, in any special proceeding wherein the statute of limitations is less than four months. Here, pursuant to RPTL § 702, petitioner was required to commence the action by filing his petition within 30 days after the filing and completion of the assessment roll. Pursuant to CPLR § 306-b then, he had 15 days thereafter to serve the petition upon respondent. The trial court also properly held that the proper remedy for failure to timely serve was to move (or in this case, to cross-move), for an extension of time to serve.

Evidentiary Issues

In *Matter of Joy Builders, Inc. v. Conklin*,[24] petitioner brought an RPTL Article 7 petition to challenge the tax assessment on a parcel. Upon petitioner's motion to dismiss, the trial court denied the motion and, after searching the record, granted summary judgment to respondent. The appellate court agreed, summary judgment was properly denied on petitioner's motion for summary judgment, due to the failure of petitioner to meet its initial burden of demonstrating that the assessment was improper. Further, the trial court properly searched the record to grant summary judgment to respondent, where respondent's moving papers showed conclusively that petitioner was unable to establish that the subject property, based on its use on the tax status date, was overvalued.

In *Matter of Rite Aid Corp. v. Otis*,[25] petitioner is the lessee retail pharmacy. Previously, a developer had built the nearly 14,000 square foot building on the property, and had sold the property in 2005 to an investor for approximately $3.6 million. Petitioner subsequently brought RPTL Article 7 petitions to challenge the $3.95 million assessment for tax years 2008, 2009 and 2010. At trial, the parties stipulated that they would limit their proof to the 2008 proceeding and that the determined valuation

would govern the 2009 and 2010 tax year proceedings. The supreme court credited petitioner's expert appraisal proof, rather than the 2005 sale, and granted the petitions. Respondents appealed. The court held that the trial determination of value was against the weight of the evidence, where it credited petitioner's appraisal over an arm's length sale of recent vintage of the subject, such sales being the best evidence of value.

In *Matter of Thomas v. Davis,*[26] petitioners commenced RPTL Article 7 proceedings to challenge the assessments of their mobile home park for several tax years. At trial, the court found that, although petitioners did demonstrate the existence of a valid and credible dispute regarding valuation of the multi-parcel property at issue, they nonetheless failed to meet their burden at trial. Petitioner appealed, and the Fourth Department affirmed. Petitioners' appraiser, it found, had employed both a market and an income approach, and arrived at reconciled values separate from those disclosed in the two methods, but he was unable to explain at trial how his reconciled values were arrived at. The trial court thus found that petitioners' appraiser violated Rule of Court 202.59(g)(2). The Fourth Department also found that petitioners' appraiser had improperly rejected several recent parcel sales as best evidence of the value of those parcels. However, the Fourth Department also found that the trial court did err in failing to evaluate the entire record, namely respondents' appraisals which constituted admissions against interest as to the values contained therein. The Fourth Department modified, reducing the assessments to the extent demonstrated at trial.

Exemptions: Procedural Issues

In *Matter of Foundation for Chapel of Sacred Mirrors, Ltd. v. Harkins*,[27] petitioner, a not-for-profit entity, following purchase of the subject property, timely applied for a real property tax exemption for tax year 2009. Upon denial of the application, and a denial of the challenge to the assessment, petitioner sought relief under CPLR Article 78, and also pursuant to RPTL Article 7 alleged the assessment was excessive. Respondent moved to dismiss the Article 78 action. The trial court transferred, pursuant to CPLR § 7804 (g), the matter to the Appellate Division, which held that "unlawful" assessments subject to challenge pursuant to RPTL § 706 (1), include, as here, an entry on the taxable portion of the assessment roll of the assessed valuation of real property, where the property is wholly exempt from taxation. While a taxpayer may only challenge an overassessment pursuant to RPTL Article 7, for the failure to grant an application for an exemption pursuant to RPTL § 420-a, an owner may seek judicial review pursuant to either RPTL Article 7 or CPLR Article 78.

In *Matter of Circulo Housing Development Fund Corp. v. Assessor of City of Long Beach*,[28] petitioner, a not-for-profit corporation, filed applications for real property tax exemptions for two subject parcels, which applications were denied. Petitioner then brought an Article 7 petition to challenge the denials, which petition was dismissed on motion of respondent, the trial court finding that the entity was not the owner of the parcels and thus lacked standing to bring the Article 7 petition. On appeal, the Second Department noted that, while any person aggrieved by an assessment may file an Article 7 petition challenging said assessment, pursuant to RPTL Article 5 only

the owner of the property may file a complaint or grievance to gain an administrative review of the assessment. The taxpayer had demonstrated ownership of one of the parcels, and therefore that petition was improperly dismissed by the trial court. While the taxpayer had failed to show, in its pre-RPTL Article 7 administrative complaint, that it was the actual owner of the other property at issue, the trial court did err in dismissing that Article 7 petition as well, since the entity did demonstrate that it was an aggrieved party and thus had standing. Nevertheless, that petition must be dismissed, due to the taxpayer's failure to demonstrate that the owner duly pursued a timely administrative challenge to the assessment, said challenge being a precondition to an Article 7 proceeding.

In *Matter of Long Island Community Fellowship v. Assessor of Town of Islip*,[29] petitioner timely filed an application with the local assessor seeking an exemption pursuant to RPTL § 420-a. Upon denial of that application, and the passage of the taxable status date, petitioner filed an administrative challenge, asserting that it had actually intended to apply for an exemption pursuant to RPTL § 462 (the "parsonage" exemption), and included with its challenge an application for a parsonage exemption pursuant to RPTL § 462. The challenge was denied, and petitioner brought CPLR Article 78 and RPTL Article 7 petitions seeking relief. The trial court granted the Article 78 petition, finding that the municipality had violated the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). On appeal, the trial court was found to have erred in finding a RLUIPA violation, since the taxpayer had been held to the same standard (a timely filed application) as other, non-religious taxpayers. Further, pursuant to RPTL § 462, an exemption from real property taxation may be granted only upon a timely application (namely, before the taxable status date) by the owner of the property on a form prescribed or approved by the Commissioner of Taxation and Finance. Petitioner had failed in both respects.

In *Matter of Zen Ctr. of Syracuse, Inc. v. Gamage*,[30] petitioner, the not-for-profit owner of a residential and dining facility for students of Zen Buddhism and visiting clergy, brought an Article 78 action seeking a declaratory judgment that it was entitled to an exemption pursuant to RPTL § 420-a for said facility, which judgment was granted. Respondent appealed, asserting that petitioner had failed to duly apply for said exemption, and that petitioner had failed to bring an RPTL Article 7 action to challenge the assessment. The Fourth Department held that there is no requirement that an application be filed to obtain an RPTL § 420-a exemption; a property owner seeking an exemption pursuant to that section may challenge the assessment pursuant to CPLR Article 78. In addition, a property owner also may challenge the denial of a mandatory exemption, pursuant to RPTL § 420-a, by either an RPTL Article 7 action, or a CPLR Article 78 action. Here, petitioner had met its burden of establishing that the subject property was used exclusively in furtherance of its religious purpose.

Exemptions: Substantive Issues

In *Matter of Vassar Bros. Hosp. v. City of Poughkeepsie*,[31] petitioner not-for-profit hospital was the owner of a parcel containing an office building and a 699-car parking

garage. Petitioner leased the building and the parking garage to a private entity, with the entity in turn sub-leasing the building to private physicians, and operating the parking garage. There were 250 parking spaces in the garage allocated for use by the tenants, sub-tenants, and their visitors, with the remaining (449) spaces allocated for hospital employees and patients; however, of the 250 spaces, only 40 were reserved exclusively for tenant and subtenant use, the remainder being available on a first-come, first-served basis. Subsequently the single building and garage parcel was divided by the municipality into two separate tax lots; while the building was fully assessed, the parking garage was accorded a full exemption. Petitioner challenged the assessment, and the valuation of the garage parcel, and moved for summary judgment; respondent cross-moved for summary judgment, seeking a determination that the garage was only partly exempt. The trial court granted the hospital's motion and denied the cross-motion. The court, on appeal, held that property which is used principally or primarily for an exempt purpose is entitled to a full exemption, including those portions of the property that are put to uses which are reasonably incidental to, or in furtherance, of the tax exempt purpose. However, where portions of the property are not put to uses reasonably incidental to, or in furtherance of, the exempt purpose, only those portions of the property are taxable, and thus the property as a whole is only entitled to a partial exemption. Respondent, here seeking to revoke an exemption, had the burden to prove that the property is subject to taxation, which it met by showing that a portion of the parking garage parcel had been used by the private physician subtenants of the medical office building, which use of the garage is not reasonably incidental to, or in furtherance of, the exempt purpose of the hospital. Thus, the garage was found only entitled to a partial exemption.[32]

In *Matter of Health Insurance Plan of Greater N.Y. v. Board of Assessors*,[33] in a previous proceeding, petitioner, a not-for-profit operating as an Health Maintenance Organization (HMO), had been determined to be eligible for a real property tax exemption for a prior tax year. Petitioners applied for the exemption on identical grounds, which application was denied by respondents. Petitioner's motion for summary judgment was granted on the subsequent tax years, and respondent appealed. The court examined RPTL § 486-a, which provides for exemptions for HMOs, and determining that "exclusive" use as required therein is the same as the "exclusive" use required under RPTL § 420-a, namely principal or primary use. Petitioner, on the motion, had made a *prima facie* demonstration of entitlement to judgment as a matter of law, and appellants failed to raise a triable issue of fact.

In *Matter of Ahavas Chaverim Gemilas Chesed, Inc. v. Town of Mamakating*,[34] the taxpayer, a religious congregation seeking to operate a camp on several improved parcels which it owned, sought a real property tax exemption pursuant to RPTL § 420-a for those properties for several tax years, and brought CPLR Article 78 and RPTL Article 7 actions challenging the denials. The supreme court granted summary judgment to respondents, and petitioner appealed. The appellate court held that a taxpayer seeking a review pursuant to RPTL Article 7 and CPLR Article 78, of the denial of an exemption application, bears the burden of proof as to whether it is entitled to the

claimed exemption. Since petitioner's applications failed to establish that the property would primarily be for a religious use, it was thus rational for respondent to have denied petitioner's applications for tax exemptions for the parcels for the 2009 tax year. The court also noted the failure of petitioner, or the party hired to operate the prospective camp, to have obtained a special permit for the contemplated (camp) use. While the owner's failure to apply for a use permit cannot be made a prerequisite to a RPTL § 420-a tax exemption, where the applicant is taking good faith steps to renovate a property for an intended exempt use, the actual use of a property in contravention of local laws can be a valid basis for denying an application for a tax exemption.

Regarding the 2010 tax year, petitioner's application had the same deficiency of proof on the matter of primary religious use of the property. While property not ready for an intended religious use may also be exempt prior to the use, to demonstrate that improvements (towards the use) are in "good faith contemplated," within the meaning of RPTL § 420-a, an applicant seeking an exemption must have concrete and definite plans for utilizing and adopting the property for exempt purposes within the reasonably foreseeable future. Here, there was a definite failure of proof of such plans. In addition, a contemplated secondary use of property for non-religious purposes will not defeat an application for a tax exemption, but only if such non-religious use is reasonably incident to petitioner's charitable aims. Here, petitioner failed to demonstrate how the proposed hotel use was related to its religious purposes. Thus denial of petitioner's 2010 application was also proper.[35]

In *Matter of Hudson Prop. Owners' Coalition, Inc. v. Slocum*,[36] petitioner's, a not-for-profit association of homeowners and individual homeowners, brought CPLR Article 78 action against respondent assessor, alleging that the tax roll was illegal since it was not assessed at a uniform percentage of value. The petition was dismissed by the trial court for failure to state a cause of action. The Third Department affirmed, finding that, where the petition merely asserted that the Assessor had performed a revaluation (or reassessment) that changed the assessments of approximately 90% of all real property located in the municipality from those in the prior tax year's tax roll, without substantial evidence of overvaluation as related to individual properties, such as a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser, petitioner was defective.

In *Matter of Paws Unlimited Foundation, Inc. v. Maloney,*[37] petitioner, a not-for-profit animal welfare organization which ran a shelter on the subject premises, sought an exemption pursuant to RPTL § 420-a for the shelter and a fee based kennel which would also be operated on the property. Upon denial of the application, petitioner brought a challenge pursuant to CPLR Article 78, and moved for summary judgment, which motion was granted. The court affirmed, finding that entities may receive an RPTL § 420-a(1)(a) tax exemption where the entity is organized exclusively for the purposes enumerated in that section; the property is used primarily for the furtherance of such purposes; no pecuniary profit, apart from reasonable compensation, inures to the benefit of any officer, member, or employee of the entity, and the use is not a guise for profit-making operations. The mere charging of a fee for use of a premises,

it held, will not defeat such a tax exemption, if the fee is "reasonably incident to" the entity's charitable aims (the operation of an animal shelter).[38]

ENDNOTES

1. "*Cuomo Defends 'Rigor' of tax-levy cap; few towns plan to override it"* at www.lohud.com (Nov. 7, 2011).
2. *Kaplan, Teachers' Union Sues Over State's Tax Cap*, www.nytimes.com (2/20/2013)("Today we fund education at more than a billion dollars less than we did in 2008.")
3. *See* Wilkes, *Calculating New York's Two-Percent Tax Cap*, http://www.nypropertytaxmonitor.com/2012/06/29/new-yorks-tax-cap-a-real-brain-teaser/

   ("The greatest source of confusion among most New York State taxpayers is the suggestion that with the tax cap one year's tax bill should never be more than two-percent higher than the year before. This is hardly true. Rather, the cap limit refers to the total tax levy (or budget) for the municipality or school, after application of a complex formula.")
4. *Kaplan, Teachers' Union Sues Over State's Tax Cap*, www.nytimes.com (2/20/2013) "People have a right to go to court." Mr. Cuomo added, "God bless America. God bless our system. I think the property-tax cap has been one of the best things we've done for the State of New York."
5. *See Id*.
6. *See* Dickerson, *The Selective Reassessment of Real Property in New York State: Is Annual Reassessment The Solution?*, IAO Journal, Vol. 48, No. 1, January 2006, p. 4.
7. *See Aid for Cyclical Reassessments*, Office Of Real Property Tax Assessments, Publication 1028 (October 2012) at www.tax.ny.gov.
8. *See Id*.
9. *Matter of Aylward v. City of Buffalo,* 101 A.D.3d 1743 (4th Dep't 2012).
10. *Matter of Yee v. Town of Orangetown*, 76 A.D.3d 104 (2d Dep't 2010).
11. Dickerson, *Real Property Selective Reassessment: Annual Method Best?*, New York Law Journal, January 5, 2006, p. 4, available at http://www.nycourts.gov/courts/9jd/TacCert_pdfs/SELECTIVEREASSESSMENT.pdf
12. *See e.g., Leone v. Town of Cornwall*, 24 Misc. 3d 1218(A)(N.Y. Sup. Ct., Orange Cnty. 2009), *aff'd*, 81 A.D. 3d 649 (2d Dep't 2011); *Bock v. Town/Village of Scarsdale*, 11 Misc. 3d 1052(A)(N.Y. Sup. Ct., Westchester Cnty. 2007); *Young v. Assessor of the Town of Bedford*, 9 Misc. 3d 1107(A) (N.Y. Sup. Ct., Westchester Cnty. 2005), *aff'd*, 37 A.D. 3d 729 (2d Dep't 2007), *Matter of Markim v. Assessor of the Town of Orangetown*, 9 Misc. 3d 1115(A)(N.Y. Sup. Ct., Rockland Cnty. 2005), *adhered to on rearg*., 11 Misc. 3d 1063 (A) (N.Y. Sup. Ct., Rockland Cnty. 2006).
13. *See e.g., Leone v. Town of Cornwall*, 24 Misc. 3d 1218(A)(N.Y. Sup. Ct., Orange Cnty. 2009); *Bock v. Town/Village of Scarsdale*, 11 Misc. 3d 1052(A)(N.Y. Sup. Ct., Westchester Cnty. 2007); Y*oung v. Assessor of the Town of Bedford*, 9 Misc. 3d 1107(A) (N.Y. Sup. Ct., Westchester Cnty. 2005), *aff'd* 37 A.D. 3d 729 (2d Dep't 2007), *Matter of Markim v. Assessor of the Town of Orangetown*, 9 Misc. 3d 1115(A)(N.Y. Sup. Ct., Rockland Cnty., 2005).
14. *See Id*.
15. *See Id*.
16. *Matter of 471 Columbian Club of Port Jervis, N.Y., Inc. v. Duryea*, 104 A.D. 3d 944 (2d Dep't 2013).
17. *W.O.R.C. Realty Corp. v. Board of Assessors*, 100 A.D.3d 75 (2d Dep't 2012), *lv to appeal denied*, 20 N.Y. 3d 862 (2013).
18. *New York Central Lines, LLC v. State of New York*, 101 A.D. 3d 966 (2d Dep't 2012).

19. *See* Goldstein & Rikon, "Corridor Valuation in Railroad Land Condemnation," New York Law Journal, February 26, 2013 p. 4 ("you cannot find a reported case in New York on how just compensation is determined where railroad lands had been condemned. That is until the recent case of N.Y. *Central Lines v. State of N.Y.*").
20. *Matter of Zutt v. State*, 99 A.D. 3d 85 (2d Dep't 2012).
21. *See Id*. at 105-6.
22. *Matter of Board of Mgrs. of Century Condominium v. Board of Assessors*, 96 A.D.3d 739 (2d Dep't 2012).
23. *Matter of Ontario Square Realty Corp. v. Assessor, Town of Farmington*, 100 A.D. 3d 1469 (4th Dep't 2012).
24. *Matter of Joy Builders, Inc. v. Conklin*, 96 A.D.3d 939 (2d Dep't 2012).
25. *Matter of Rite Aid Corp. v. Otis*, 102 A.D.3d 124 (3d Dep't 2012), *lv. to appeal denied*, 21 N.Y. 3d 855 (2013).
26. *Matter of Thomas v. Davis*, 96 A.D.3d 1412 (4th Dep't 2012), *lv. to appeal denied*, 21 N.Y. 3d 860 (2013).
27. *Matter of Foundation for Chapel of Sacred Mirrors, Ltd. v. Harkins*, 98 A.D.3d 1044 (2d Dep't 2012).
28. *Matter of Circulo Housing Development Fund Corp. v. Assessor of City of Long Beach*, 96 A.D.3d 1053 (2d Dep't 2012).
29. *Matter of Long Island Community Fellowship v. Assessor of Town of Islip*, 95 A.D.3d 1128 (2d Dep't 2012).
30. *Matter of Zen Ctr. of Syracuse, Inc. v. Gamage*, 94 A.D.3d 1490 (4th Dep't 2012).
31. *Matter of Vassar Bros. Hosp. v. City of Poughkeepsie*, 97 A.D.3d 756 (2d Dep't 2012).
32. *See Id*.
33. *Matter of Health Ins. Plan of Greater N.Y. v. Board of Assessors*, 93 A.D.3d 795 (2d Dep't 2012).
34. *Matter of Ahavas Chaverim Gemilas Chesed, Inc. v. Town of Mamakating*, 99 A.D.3d 1156 (3d Dep't 2012).
35. *See Id*.
36. *Matter of Hudson Property Owners' Coalition, Inc. v. Slocum*, 92 A.D.3d 1198 (3d Dep't 2012).
37. *Matter of Paws Unlimited Foundation, Inc. v. Maloney*, 91 A.D.3d 1173 (3d Dep't 2012).
38. *See Id*.

Not the Kind of Discovery You Were Thinking of: A Primer on Discovery Pursuant to Section 2103 of the Surrogate's Court Procedure Act

BY ANTHONY J. ENEA, ESQ.

An estate's fiduciary is charged with the obligation of marshaling the decedent's assets. This duty may require the fiduciary to engage in some sleuthing in order to uncover information concerning estate assets and liabilities which may be in the possession of others. This often occurs when during the period of time in close proximity to the decedent's death assets are transferred to third parties or there is an issue as to whether or not assets titled in the name of the decedent and others are truly joint assets passing by operation of law or are property held jointly for convenience purposes only. Additionally, there may arise the occasion where the fiduciary is (1) uncertain as to whether he has possession of all of the estate property; or (2) believes that estate property, or information relevant to that property, is being purposefully withheld from the estate.

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To remedy this situation, § 2103 of the Surrogate's Court Procedure Act (SCPA) allows an estate's legal representative to commence a discovery proceeding. Said proceeding differs from the disclosure vehicles available pursuant to Article 31 of the Civil Practice Law and Rules (CPLR), which will not be discussed in this article.

Initiating a Discovery Procedure

Pursuant to Article VI, § 12 of the New York State Constitution, the surrogate's court has jurisdiction over "all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto." However, a petitioner's right to initiate a discovery proceeding in the surrogate's court is not absolute. Provided that the court has personal and subject matter jurisdiction, and the necessary parties have standing to bring such action, it is within the court's discretion to grant discovery. As such, pursuant to § 2102(b) of the SCPA, the surrogate may entertain or reject a request for discovery, or reserve the matter for later determination in an accounting or other proceeding. Unless rejected in a writing within fifteen days of submission, a discovery proceeding is deemed to have been entertained by the court. A court may reject a request for discovery pursuant to § 2103 of the SCPA for a variety of reasons, including lack of personal or subject matter jurisdiction.

Discovery is an important vehicle for the fiduciary to either obtain information relevant to potential estate assets or discover withheld property. Pursuant to § 2103(1) of the SCPA, a fiduciary is permitted to initiate a discovery proceeding against an individual who has possession or control, or information or knowledge of, any personal property or real property in which the decedent had an interest. This action is similar to that of a conversion or replevin and, absent fraud, is subject to a three year statute of limitations. However, a breach of fiduciary duty action is subject to a six year statute of limitations.

As discussed above, a discovery proceeding may be brought by a legal representative of the estate, including a temporary administrator or preliminary executor. However, there may be the case where the fiduciary (in his or her personal capacity) has control of the property at issue and is unwilling to turn it over to estate? If the fiduciary is unwilling or unable to initiate a §2103 action due to a conflict of interest, then a distributee, beneficiary or financial institution acting as a stakeholder may apply for restricted or limited letters of administration pursuant to SCPA §702 or SCPA §902 for purposes of commencing a discovery proceeding against the fiduciary.

Discovery's Two Stages: Inquisitorial and Turnover

Discovery may have two stages, inquisitorial and turnover. If it is unclear whether a third party has control or possession of the estate property in question, or if a fiduciary believes that a respondent has information relevant to estate property, then petitioner may make an inquiry. The scope of the inquisitorial stage is quite broad to allow the fiduciary to discover pertinent facts relevant to the estate's assets and debts.

At the inquisitorial stage of discovery petitioner alleges upon information and

belief, that a third-party respondent such as an estate beneficiary has possession of (or information concerning) a decedent's assets and such assets should be delivered to or paid to the fiduciary. The proceeding is commenced by the filing of a petition along with an order to attend and be examined. The petition must identify the following: (1) the decedent; (2) the property in question; (3) the date the fiduciary was appointed as such; (4) facts supporting the proponent's claim that the respondent has possession, control or knowledge of the property or money at issue; and (5) the relief sought.

Inquisitorial Stage

At the inquisitorial stage, the proponent is not required to allege facts demonstrating that the estate is the owner of the money or property. However, the proponent's allegations must be sufficient to justify the inquiry. The petition must set forth the relief requested, including, but not limited to an inquiry, examination or injunctive relief. In the Order to Attend, petitioner should consider seeking a temporary restraining order against the respondent to obviate the risk that the property at issue may be disposed of pending the outcome of the proceeding. Additionally, the proponent may submit an affidavit in support of the allegations presented in the petition.

In response to such a petition, the court will use its subpoena power to direct the respondent to appear for examination via the order to attend. Pursuant to § 2103(5) of the SCPA and § 8001 of the CPLR, a certified copy of the order must be served on the respondent along with the witness subpoena fee. The Surrogate's subpoena power is limited to New York State and, as such, personal jurisdiction is limited to witnesses within the state's boundaries. In addition, proper service is paramount because failure to meet the statutory requirements set forth above may result in a dismissal of the proceeding. Conversely, the court may issue a supplemental order allowing the proponent to correct the jurisdictional defect by properly serving the order.

There is no requirement that the respondent file an answer during the inquisitorial stage. As such, a respondent may:

1. Appear on the return date of the citation without filing an answer;
2. Answer the petition generally;
3. Answer the petition and assert title to the property in question;
4. Answer the petition and admit possession, not title, of the property in question; or
5. File an answer and turnover the property in question to the estate.

At the conclusion of the inquisitorial phase, petitioner must demand that the respondent file an answer and turnover the property at issue. A respondent who asserts possession of and title to such property is required to file a verified answer to the petition.

A turnover request may be made simultaneously with an inquiry. An inquiry may also be converted to a turnover proceeding. However, if it is clear that the respondent has possession of the property at issue, a petitioner may avoid the inquisitorial stage

altogether and request that the respondent deliver such property to the estate. If a petitioner did not ask for an examination or inquiry, then he must make factual allegations supporting his position and demand the turnover to the estate of the assets in question.

Turnover proceeding

In a turnover proceeding, the court issues a citation to the respondent alleged to have control or possession over the property at issue to show cause why he should not deliver the property, its value or proceeds. On the return date of the citation, the court conducts a hearing to determine whether the respondent has possession or control of such property and, if so, whether the estate is entitled to the property. If the respondent defaults on the return date, and the allegations set forth in the turnover petition were made solely upon information and belief, then the court will schedule an inquest. During the inquest, the onus is on petitioner to present evidence to the court concerning the property's value and that such property was owned by the decedent when he died and is currently in the respondent's possession. The respondent must be given notice of the inquest as directed by the Surrogate.

The court may grant summary relief to petitioner based upon uncontested allegations of title set forth in the petition Furthermore, both petitioner and respondent may demand a jury trial. However, injunctive relief must be pursued by a separate order. Pursuant to the CPLR, disclosure is only available after the issue is joined, which occurs when the respondent files a verified answer in the proceeding. Discovery would then be governed by the rules as set forth in Article 31 of the CPLR governing discovery and disclosure.

Clearly, whether one is engaged in either the inquisitorial or turnover phase of an SCPA §2103 discovery proceeding it is imperative that one be armed with the factual and legal arguments to be able to establish that the property in issue truly belongs to the decedent's estate. Reliance on speculation and conjecture as to the true ownership of property will not be sufficient.

Remarks by David M. Schraver at the Westchester County Bar Association's Annual Banquet and Induction of Officers, May 9, 2013

BY DAVID M. SCHRAVER, ESQ.*

Good evening and thank you John [Marwell] for that kind introduction. John and I have been good friends for many years. I know he has been a great asset to the Westchester County Bar Association and I can tell you that he is a great asset to the New York State Bar Association (NYSBA).

I belong to a small group of lawyers in Rochester and the standard for admission is whether you would like to spend three or four hours in a fishing boat with the person.

I have spent several afternoons in a fishing boat with John following state bar executive committee meetings in Cooperstown. He passes the test.

My son-in-law loves to fish. Occasionally he doesn't catch anything. He says "That's why they call it fishing, not catching." Based on my experience with John, I think he subscribes to that same philosophy.

It's a great honor to join you tonight for your annual banquet. On behalf of the New York State Bar Association, I extend our congratulations to Jerold Ruderman on a successful year, and wish your incoming president Jody Fay, and the rest of the incoming officers and directors, all the best during their terms. Congratulations also to the recipients of the 50 Years of Service Awards.

The Westchester County Bar Association is fortunate to benefit from the extensive knowledge and experience of those seasoned attorneys. It is thanks to their contributions, and the efforts of so many others, that this association is an invaluable resource for the legal community in Westchester County and the community at large.

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* David M. Schraver, Esq., is President of the New York State Bar Association.

In our increasingly fast-paced world, with so many challenges facing our profession — particularly young attorneys — involvement with the organized bar is more important than ever.

At the same time, with so many professional obligations and pressures competing for our time and attention with family and personal activities, bar participation can begin to suffer.

It is critical that we, as leaders and active members of the bar, remain mindful of the needs of all of the members of our legal community – from those who have achieved 50 years of service, to the most recently admitted generation of lawyers, too many of whom are struggling to begin their legal careers.

Events like this banquet provide a wonderful opportunity to gather in one room to meet new colleagues and catch up with old friends. It's important that we welcome young attorneys to events like this one, and that we take advantage of new technologies that allow us to reach out and provide value to attorneys who may feel too pressed to participate frequently in traditional face-to-face events.

We also see new organizations cropping up that are suited to the needs and interests of younger professionals — these broad professional associations serve as an excellent networking tool.

However, in order to guarantee our profession's continued integrity and high standards of excellence, we must share our core values with the next generation of attorneys — and there is no better way to do that than through the organized Bar.

This bar association, with its large and active membership, is clearly taking these priorities very seriously, and I commend you on all of your excellent work.

In preparing for my term as president of the New York State Bar Association, I have reflected on the importance of bar associations — whether state, local, ethnic or specialty bars —— and their importance to the profession and to our society.

Consider the mission of the state bar, as set forth in our enabling act over 136 years ago: our association was "formed to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy in the legal profession," and to cherish the spirit of camaraderie among attorneys.

In 1877, the first president of the state bar, John K. Porter, characterized the establishment of our association as an undertaking 'designed to be of practical benefit to the profession and to the community at large'. The practice of law is very different than it was in 1877, but these goals and purposes have stood the test of time.

Our bar associations strive to be of 'practical benefit' to our members, helping them to be successful in their practices, to have the tools to serve their clients competently, and to conduct themselves professionally as lawyers. We work to improve the practice of law and use technology effectively to share information with the legal community. We also continue to serve the public interest, to ensure that our work is of 'practical benefit' to the community at large.

Every year, through our legislative advocacy, we work to support the integrity of our justice system at the state and federal level. The leadership of the state bar has

advocated for adequate court funding in Albany and in Washington.

This year, we spoke out in favor of the chief judge's judiciary budget request, which would provide much-needed funding for civil legal services and for the maintenance of basic court operations. The judiciary budget also includes 8.2 million dollars to continue the implementation of long-overdue judicial pay raises.

During these difficult financial times, the judiciary proposed a budget that is essentially flat. The court system will absorb added costs with a proposed operating budget that is slightly smaller than its current budget.

We are aware that Superstorm Sandy has further aggravated the state's budget problems and the court system has responded by making difficult decisions about its spending. We know that the judiciary will continue to protect access to justice for all New Yorkers, and we are pleased that the judiciary budget was recently passed without any reductions.

We remain concerned, however, about the potential impact that reductions in funding would have on the ability of our courts to carry out their essential duties; and we will continue to monitor court funding.

At the federal level, we have been very vocal since early last fall about the potential negative impact of sequestration on the federal courts and the Legal Services Corporation. We have called on congress to fund these institutions at levels that are adequate to permit them to function effectively.

State bar leaders have been collaborating with local bar presidents and New York's business community to carry our message regarding the impacts of sequestration to many audiences. We have issued joint letters and press statements and brought leaders together for lobbying in Washington.

On behalf of the state bar, I thank the Westchester County Bar Association for joining us in these efforts by signing on to our letter to our congressional delegation.

The Budget Control Act of 2011 required automatic federal budget cuts on January 2, 2013 if congress failed to take action to meet deficit-reduction goals. On January 1, congress enacted the American Taxpayer Relief Act of 2012, which delayed sequestration until March 1, 2013.

Facing this calendar, the New York State Bar Association proposed a resolution at the ABA meeting in February 2013, calling on the ABA to urge federal elected officials to protect the federal courts and the Legal Services Corporation. We were pleased that our resolution passed unanimously.

Unfortunately, sequestration was implemented on March 1, 2013. But the debate on funding continues in congress. New deadlines remain, as do the threats of reductions in funding. We will continue to advocate on behalf of the judiciary and funding for legal services.

We are also working to advance a number of other important measures to improve the law and the administration of justice.

We have lobbied at the state level for reforms in the criminal justice and juvenile justice systems to avoid wrongful convictions and ensure that children are treated fairly.

We have lobbied to amend the Not-for-Profit Corporation Law as recommended by our Business Law Section, and to provide access to justice for indigent defendants and indigent parties to civil actions involving the necessities of life.

We have formed task forces on Human Trafficking and Criminal Discovery and special committees on Prisoner Re-entry, Voter Participation and Gun Violence.

In addition, we have been studying the issues facing veterans, and the ways in which lawyers can help address the unmet legal needs of veterans and their families.

In 2011, then-president Vince Doyle named a Special Committee on Veterans, and I served as one of the original members of that committee.

I have had the honor of participating in various groups that serve veterans, and working with our Veterans Court in Rochester. In 2012, the Special Committee released our report and recommendations, which were adopted by the State Bar's House of Delegates. The report addressed issues including training for attorneys who want to get involved in providing pro bono legal services to veterans, strategies to enhance legal services for veterans and improve access to special courts for veterans who become involved in the criminal justice system.

The Committee also developed a continuing legal education program specifically tailored for attorneys who want to provide assistance to veterans.

I would like to commend the Westchester County Bar Association for undertaking similar efforts, and I encourage all of you to take advantage of these terrific opportunities to get involved in assisting veterans in need of legal help. That type of work is incredibly rewarding, and makes a world of difference to the individuals who are served.

This year, the Special Committee on Veterans was transformed into a standing committee, and will continue to study these important issues and develop recommendations to better serve veterans in need of legal help.

In the coming year, we will continue to work on all of these priorities, in addition to the excellent ongoing work of our sections and committees. We'll also place a renewed emphasis on legal education, admission to the Bar and the future of the profession. We'll draw from the expertise of deans, professors and practitioners to offer a balanced examination of legal education.

Our many sections, committees and task forces do excellent work in their respective practice areas to improve the justice system and the practice of law.

The New York State Bar Association exists because New York lawyers in the 1870s decided that they could do more together to advance the legal profession and the interests of lawyers, and to serve the public interest, than they could accomplish separately. That remains true today for all bar associations. Together we truly can make a difference. When I assume my responsibilities as president, I look forward to new opportunities to partner with the Westchester County Bar Association to advance our many shared goals.

Thank you again for inviting me, and for all that you do to serve the community here in Westchester and to enhance the practice of law.

Remarks from the 2013 Westchester County Bar Association Memorial Service to Honor:

Hon. Angelo John Ingrassia
Hon. Andrew O'Rourke
Hon. Alvin R. Ruskin

Supreme Court of the State of New York, County of Westchester
Westchester County Courthouse
111 Dr. Martin Luther King, Jr. Blvd.
White Plains, New York 10601
September 12, 2013

BEFORE: HONORABLE ALAN D. SCHEINKMAN
Justice of the Supreme Court

APPEARANCES:

HON. ROBERT DIBELLA
Justice of the Supreme Court

HON. TIMOTHY IDONI
Westchester County Clerk

HON. JOAN LEFKOWITZ
Justice of the Supreme Court

RALPH R. NOBILE, Past President, WCBA
Chair of Memorial Ceremonial Functions Committee

DAWN KIRBY, President-elect
Westchester County Bar Association

Also Present: Supreme Court Justices and attendees
(*Court opened by Proclamation*)

HON. ALAN D. SCHEINKMAN: We are here today to mark the passing of three distinguished judges who in their own individual ways were loved and respected by us all, but before we proceed with the program, I think it would be fitting for us to take a moment to remember the life of a lawyer that was tragically cut short a few days ago: John Mangialardi. I think many of you know him and his wife and two children. He was a very fine lawyer, an aspiring judge whose life was, unfortunately, ended way too soon. And I would just ask, before we begin this program, to take a moment of silence in respect of his memory. (*Silence*)

HON. ALAN D. SCHEINKMAN: Thank you very much. You may be seated.

We have assembled today to mark three remarkable lives. I think those of us who are here who are judges or have been judges have an obligation to keep alive the memories of our colleagues who have left us so that they will always remain with us. I appreciate very much the efforts that my colleagues in the Ninth Judicial District have made to come here today.

In particular, I would like to thank the Honorable Mark Dillon of the Appellate Division, Second Department for taking time out of his schedule to be here today, and his colleague, Justice Angiolillo, who's not able to make it. He had a prearranged commitment for a very important meeting in Manhattan that he could not rearrange, but he did ask me to give all of you his regards and express his regrets. And from the Appellate Division, First Department, Justice John Sweeney has joined us. Thank you very much for coming.

I also want to thank the New York State Court Pipes and Drums, as well as our court officers for their dedication, their service and all of their efforts in making this program possible, as well as the cooperation of the Westchester County Bar Association and its Executive Director Donna Drumm, who is sittng in the back.

With that, I would call upon Dawn Kirby, the President-elect of the Westchester County Bar Association.

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Ralph R. Nobile's Eulogy Commentary

MS. KIRBY: Good morning, everyone. On behalf of the Westchester County Bar Association, I'd like to introduce Ralph Nobile, who will speak about each of the people we are here to remember today.

MR. NOBILE: May it please the Court, Ralph Nobile on behalf of the Westchester County Bar Association.

Three illustrious members of the Bench left us in a short period of time. All of them contributed so much, but I must tell you they were very different people. I have tried, in my analysis and my presentation to you this morning, to make it interesting, because I've covered, hopefully, some of the items about which you are familiar and perhaps some of the items that you may not have ever heard.

Salute to the Judge From New Rochelle

So, we begin by turning the page to the City of New Rochelle. Some of the lives of our judges have interesting side stories. Well, this one is a side story that deals with the City of New Rochelle and Alvin Ruskin.

Alvin Ruskin, then the mayor, had faced new challenges with respect to the City of New Rochelle. There was a little matter of the city having purchased 78 acres known as David's Island. It was a time when the famous department store Macy's had built a mall that operated downtown with great success. It was a time when there was an economic boom to the City of New Rochelle, and we have an interesting history of Alvin Ruskin as the mayor, and of course, a well respected mayor.

And then Mayor Alvin Ruskin was appointed to the Supreme Court of Westchester County. And of course, at that point the big City of New Rochelle was swelling with pride because Alvin Ruskin was in one of the top spots in Westchester County. He worked, and he accomplished his mission in "a very fine manner." That's a quote from his good friend Rabbi Amiel Wohl. When he took time to look back at his life, he looked back and said, yes, Judge Ruskin, I've been a member of the New Rochelle City Council and I was elected mayor, and it was at the time when the City of New Rochelle was enjoying fame because of the televison program, with Rob and Laura Petrie. It was the *Dick Van Dyke Show*. And the city was New Rochelle where the entire story developed.

New Rochelle had respected his successful political career as Mayor, and then somebody in Albany, Governor Nelson Rockefeller said, you know what? I noted him too, so we're going to make him an appointed judge to the family court. He maintained that position and eventually was elected state supreme court justice. The people of Westchester County acknowledged the quality and the strength of Alvin Ruskin as mayor and as a judge. Vincent Rippa, a well-respected Democrat, who was also seated and served as the New Rochelle Mayor in the late 1970s, had said that Al Ruskin was a man who had a very strong following in the entire city. He was fair. He was approachable. That was the kind of reputation that Alvin Ruskin had.

William O'Shaughnessy, the owner of the WVOX radio station in New Rochelle, was a great fan of Mayor Ruskin. And when the Judge was leaving the Mayor's Office to become a judge, he wrote an editorial entitled, *Alvin R. Ruskin: We'll Never See Another Like Him*, calling him, as mayor, "One of the most sincere, decent and endearing politicians I've ever encountered in public life." That praise was well deserved.

Temple Israel President Rabbi Amiel Wohl had praised Judge Ruskin many times. He often remarked it was such a wonderful experience to know that our good friend Alvin Ruskin had accomplished a mission. He was the first Jewish mayor of the City of New Rochelle who did a wonderful job for the city.

So, we think today of his family who survived him, his son William Ruskin, his daughter Nancy Ruskin, and we say that's a short history of the life of Alvin Ruskin, mayor, family court judge, supreme court judge, a man respected and beloved by all who knew him.

Salute to the Judge From Brooklyn

In the trio of these judges, we take you to Brooklyn, New York. It was March 23, 1923. That was his beginning. His birthday. And a young couple were blessed with their first male child. The male child would go on to great heights, starting out in Brooklyn. Of course, you know that there was a movement immediately in their minds to make available the trees and the green grass, and they then went to a new place, Middletown, New York. Their first son attended St. Joseph's School where he was an active participant in sports. At the Middletown High School, where in 1939 he made the varsity team, he became a life-long "middie," as they called themselves, from Middletown High School. Too soon it was time to engage in the collegiate game of

obtaining a degree, and he did that. He became a candidate and acquired a Bachelors of Science Degree in metallurgical engineering from V.P.I., yes, Virginia Polytechnic Institute.

So, the little guy from Brooklyn, who became a "middie," completed his education, and then something happened called WWII. World War II broke out, and he found himself in the United States Army. He served and reached the rank of first lieutenant. Having reached the rank of first lieutenant, you can imagine that he was immediately assigned to a fighting unit, and in fact, that's what happened. He was assigned to a tank unit and became the commander, leading a platoon with the 8th Armored Division in the European theater of operations.

His division actively participated in the major campaigns, including central Europe, the attack on Germany and the Rhineland, and the battle of the Ardennes. Liberation was something that was going to make a mark in his life. Liberation of the people in the various cities was not only an excitement, but when this young lieutenant participated in the liberation of the slave labor camps established under the Nazi regime, he realized he had fully reached a pinnacle of military success.

With that background, he was recruited, once the war ended with the unconditional surrender of Germany in May of 1945, and was then made a part of a group called the Office of Military Government for Bavaria, and it was in that capacity that he finally completed his United States Army obligations and tour in 1946.

Well, it was time to come home, the war was over, and the veteran soldier did just that. He did return home. He entered the Albany Law School at Union University and was graduated with an LLB Degree in '49, became active with a Middletown law firm, and in 1952, was appointed an assistant district attorney in Orange County where he rose to the rank of chief assistant district attorney and held that position until 1966.

By this time, your curiosity has been peaked, I hope. By this time you're saying, "When is Ralph Nobile going to tell us who this is?" And of course you know it was Judge Angelo Ingrassia. All of us who have participated as practicing attorneys had the experience of knowing when he said, "I'm the boss," he meant, "I'm the boss." He was the boss. We all worked under his guidance and strength. It seemed that there was always a great deal of praiseworthy recognition for what he did.

Let's go back. He became District Attorney of Orange County, and in addition, served as president of the New York State District Attorneys' Association. Judge Ingrassia had a theory. It was simple. It was to the point. "Follow your dreams," he said. "Follow your dreams." It came true because Governor Nelson Rockefeller appointed the judge to the county court, served a full tenure term in Orange County, and then he was elected to the supreme court. As justice he served the Ninth Judicial District, which included Orange, Rockland, Dutchess, Putnam and Westchester.

There was no doubt that Judge Ingrassia had administrative ability, and he was appointed Chief Administrative Judge of the Ninth Judicial District, which he held, and he did his daily work covering the supreme court, family court and city court. His term in the supreme court finally ended, and he retired in December of 1999; not due to the fact that he didn't want to continue, but because he had reached the mandatory

retirement age. So, in 2000, he went back to work as a lawyer with Larkin, Axelrod, Ingrassia & Tetenbaum, and he served as Of Counsel. He enjoyed working with his son, John Ingrassia.

His judicial ability was again recognized as he was appointed Special Master of the United States district court, southern district. Judge Ingrassia had engagements in county court, supreme court, appellate term, and finally, in the federal court. One would say very quickly Judge Ingrassia lived a full and active life, and he shared many of his gifts and talents with the good people of Orange County. All of the attorneys who practiced in the Ninth Judicial District never forgot appearing before him. He was well respected at the Elks Club Lodge. He was an Exalted Ruler, American Legion Post, an active man forever. But he had one terrible habit. He liked to play golf. And if you were in the middle of a conference that didn't settle, and he had a golf game, he would remind you there was a tee time at 2:00. You would always find him enjoying a good round at the Orange Country Club.

The entire legal world and the judicial world recognizes at this celebration of his life that Judge Angelo John Ingrassia was truly a legend in his own time. He accomplished so much, but really his greatest asset, of course, was his family life. He had married the love of his life, the former Judith Mary Bellows, who presented him with a loving daughter Maria, wonderful sons Frank, Anthony and John Ingrassia. They all affectionately called him, "our judge." All of the grandchildren felt a great comfort when the judge gathered with the family and, of course, recounted some of the wonderful experiences he had had on the bench.

When you look back and you think of that young family of Italian immigrants, who became dirt farmers, who settled in Middletown, New York, and who raised a wonderful family, which included Judge Angelo John Ingrassia, you have to say to yourself, all of us in this country have an opportunity. All of us can do great things. It's always been a mystery to his friends that he never used the metallurgical engineering degree and the educational background that went with that in his lifetime. Well, maybe yes, he did, maybe no, he didn't, but between the military duties of World War II and the district attorney obligations and the responsibilities of sitting on the bench, maybe he never had time to use that engineering degree from Virginia Polytech Institute.

This morning we celebrate the life of Angelo John Ingrassia. We extend to the family our deepest respect and condolence in recognizing that he served you and I, and all of us well, and with affection.

Salute to the Judge From Yonkers

My next presentation deals with the Westchester County pragmatic Republican who enjoyed the position of being chief executive of Westchester County for 14 years, and a long-shot nominee to challenge the re-election bid of New York's popular incumbent governor, Mario Cuomo. This is a little vignette in the life story of the Honorable Andrew O'Rourke.

Andrew O'Rourke was saluted in the wonderful news article published by the

Westchester County Bar Association in its *Newsletter*, by then president Donald Sandford. And that article was the basis for so much of the research and the investigation which I was able to conduct. Reading that *Newsletter* and then being required to paraphrase some of the interesting turns and twists in the life of Judge Andrew O'Rourke, I must tell you, I had to return many times to the article.

The judge was described as a ruddy-faced, silver-haired, bantering attorney and judge. And of course, you can appreciate that is what he was. And when it came time to engage in a face-to-face debate, the famous O'Rourke-Governor Cuomo debate -- by the way, it never went on, because the Governor refused to engage in debating. So, what did he do? Only a character like Andrew O'Rourke can do this. He had a cardboard cut-out of the Governor, and when he campaigned, he would debate the cardboard cut-out. Governor Cuomo and Judge O'Rourke. What an interesting tactic.

Let me take you back to his tenure as Westchester County Executive. You might recall that there was a man named Edward G. Michaelian who had the longest term, but O'Rourke was close. And while once in office he promoted many projects, he was proud of the construction of the new county jail, a recycling plant, and a new airport terminal. Executive O'Rourke reopened the famous Rye Playland as a county amusement park.

He had concern for the homeless and was successful in urging and building a permanent shelter, which was accomplished while he was in office here in White Plains.

During his tenure, however, he was criticized by many politicians who believed that his method of saving the bond rating described as a Triple A rating was done with some budgetary tricks. "Not so," he said. He laughed at the comment.

Where did he begin? He began in Yonkers, and he didn't have any concern except to march forward, and he did that and accomplished a great deal. And in doing so, he was known to be someone who didn't pay attention to what was described as the finer points of government ethics.

"Why?" Aha, "What happened," you say? "What happened in that department?" Well, in 1993, responding to some revelations that had been published in Westchester newspapers, he acknowledged he had sought a job for a member of his family and sort of stepped in for an admission on behalf of another person in the county law department and also recommended someone for a particular other position; all considered by some politicians to be violations of government ethics. But when you spoke to Andy O'Rourke about it, he said, "Well, these are, as far as I can see, and as far as I'm concerned, the everyday courtesies that are done in life." And that was Andy O'Rourke.

And while the ethics question was an interesting exchange during the years 1993 to 1997, it finally resolved in his favor when he was cleared entirely and totally and ultimately of any conflicts of interest, and then, of course, he won the election in 1993.

His childhood was interesting because his family moved to Hell's Kitchen. The family was poor. His father was a doctor. He had died early, and left a widowed mother. Andy O'Rourke delivered fish and worked as an usher at the Paramount Theater in Times Square. For a time, he was even a child actor, appearing briefly on Broadway.

And of course, he was a regular guest on a coast-to-coast radio show called *The Children's Quiz Show*. Interesting guy, Andy O'Rourke.

Andrew O'Rourke had a good education. He was graduated from Fordham University, trained in the Air Force as a bombardier and navigator, received his law degree from Fordham University Law, and then went on to practice law in the City of Yonkers. The political issue was always out there. He always wanted to be in that political arena. And the city council was one of his accomplishments, and then finally, the county board of legislators. And his further involvement in the life and love of the political world continued all through his career.

He extended himself beyond the political world and the legal world, and he took the time out to become an author. Yes, an author of an adventure fiction novel entitled *The Red Banner Mutiny*, which, of course, was quite an interesting tale about a Soviet ship. Later, he added a second book called *The Hawkwood*.

He enjoyed his position as state supreme court justice for Putnam, and of course, was absolutely in love with the idea of being assigned to Westchester County, where he knew everyone.

Family. A large and wonderful family surrounded Judge O'Rourke's life. That family included his wife, Ms. Lowe, his children Alice, Aileen and Andrew Jr., and, by the way, six grandchildren.

Judge O'Rourke had the ability to make funny comments that were very appropriate, and at the same time continued to work endless hours in the preparation of his historical novel, and that would have been his third. It was called, *A City in Flames*, which, believe it or not, dealt with the fall of Constantinople and covered the early relations between the Islam world and the western world.

An interesting man. "You like to write," they said? "Yes," he said. "It's cheaper than therapy."

And so today we celebrate the life and remember the former Navy officer and pilot. We also note that he took time in his busy days to build model ships and planes for the six grandchildren. To his survivors and to the family and friends, this is my contribution to the celebration of the life of Andrew O'Rourke. He became a judge, he enjoyed it, and he measured the same kind of life that he always had and knew from the days when he was in Yonkers. We salute Judge Andrew O'Rourke.

* * *

Your Honor, that concludes my commentary on behalf of the Westchester County Bar Association for the three distinguished members of our Bench: Judge Ruskin, Judge Ingrassia and Judge O'Rourke.

HON. ALAN D. SCHEINKMAN: Thank you very much, Mr. Nobile.

Honorable Angelo J. Ingrassia Remembered by Honorable Robert DiBella

MS. KIRBY: I'd like to introduce you to the Honorable Robert DiBella, who will speak to us concerning Judge Angelo Ingrassia.

JUSTICE DiBELLA: Justice Scheinkman, my colleagues on the Bench and at Bar, distinguished family members, friends and guests. Please bear with me today. I'm very unaccustomed, thankfully, to speaking at events like this, but if you bear with me, I'll try to be brief and hold it together.

It was my pleasure and privilege to know Angelo Ingrassia as a colleague and a friend. He lived in a remarkable time, and he was a remarkable man. Born in the Roaring 20's, reared in the time of The Great Depression, reaching adulthood on the battlefields of Europe during World War II, and growing old in an age of unprecedented technological change. His life is a testament to the service and the sacrifice and the ultimate triumph of what has been referred to as the greatest generation our country has ever produced.

He was born poor with little more than his family and his name, and throughout his life of considerable achievement and accomplishment, he would never value anything higher than his family and his name. He learned early on, the value of education, hard work, determination and commitment.

During his life he had many titles. He was a First Lieutenant in the Army, Assistant District Attorney, a Chief Assistant District Attorney, and the District Attorney of Orange County. He was the Director of the National District Attorneys' Association from 1968 to 1970. In the judicial ranks he served as County Court Judge, a Supreme Court Justice, an Associate Justice of the Appellate Term in the Ninth and Tenth Judicial Districts, and from 1990 to 1999 he was our Administrative Judge right here in the Ninth Judicial District.

But titles and status meant very little to Judge Ingrassia. He cared more about a person's character and integrity and treated everyone equally and with respect.

They say that you can learn a lot about a person by playing a round of golf with him, and if this is true, and I believe it is, then Angelo gave many of us ample opportunity to get to know him. He was an avid golfer, and his quick wit, quick mind and uncanny putting stroke made him a delight to be with, even when he was winning. He was much smarter than he let on, and his perceptions were laser sharp. For me, he made complicated and difficult things more clear, and I will always miss his wit and his wisdom. Thank you.

Honorable Alvin R. Ruskin Remembered by Honorable Timothy Idoni

MS. KIRBY: Thank you, your Honor. I would now like to introduce the Honorable Timothy Idoni, County Clerk, who will speak to us concerning Judge Alvin Ruskin.

HON. IDONI: I'd like to thank Dawn Kirby, Justice Scheinkman, members of the Judiciary, friends in the gallery, thank you very much for this brief opportunity.

My friend here has summed up a lot of Alvin Ruskin's life, so I'll be blessedly brief.

I was nine years old when Alvin Ruskin was elected mayor, but I did know the

family. His daughter, Nancy and I were schoolmates for a number of years in the New Rochelle public school system. And then Mayor Ruskin was actually a councilman from 1956, and he was, as previously mentioned, the first Jewish mayor elected after 275 years in the City of New Rochelle; a liberal community, if you will.

A brief story about how difficult it was to be elected a Jewish mayor in New Rochelle at the time. The local country club had a membership for probably close to 100 years where the mayor got an honorary membership. In 1963, when Judge Ruskin was elected mayor, that honor was stripped, and he was not allowed to join the club. As a matter of fact, the locker that the mayor would get in the country club was right at the front of the men's locker room so that when members came in, the first person they would see would be the mayor, and of course, it was quite a political stop for the mayor. He would greet his fellow members. Judge Ruskin had the last laugh on it, of course, because he didn't play golf, and he didn't want to be a member of their club anyway. Very, very true story.

Judge Ruskin was one of a dying breed in the sense that he was a liberal Republican in the vein of Nelson Rockefeller and Jacob Javits and was an incredibly fair person. The word that I hear more often than anything from anybody about Judge Ruskin was "approachable." He was a very decent human being who anybody could walk up and talk to at any point in time. Very, very different from his predecessor Stanley Churchill, who was mayor for 20 years, and was actually an actor and never failed to pass a mirror that he didn't fall in love with, or Frank Garito, who was a member of the County Board of Supervisors and a man of the blue collar fans, and Vincent Rippa, as you know, a fellow jurist of yours who was a fiscal conservative, a social liberal, and he was Vincent. I sum it up that way.

Judge Ruskin was very, very humble. He was extremely humble. You almost wouldn't have noticed him, except for he had a presence that he was the mayor for the seven years that he was mayor before Governor Rockefeller made him a judge. He was known as a model of civic leadership. He had a strength of character that was just incredible. And very, very brief, the two things that he did do, he had a vision, before most, of what downtowns of urban suburban communities like New Rochelle should look like. He was the person that did bring the New Rochelle mall in, which is now gone, of course, but if you think about it, it was there ten years before the Galleria in White Plains. He understood people were driving to shop, as opposed to walking to shop in downtown Westchester County. And he tried to stay ahead of the curve, and he did drive that very successful mall for a number of years.

The David's Island story is legendary. When the federal government wanted to get rid of the army base of Fort Slocum, a terrible hit to the New Rochelle economy, having an army fort closed, the federal government wanted to get rid of it, and they sold it to New Rochelle for $475,000.00. In a very controversial move, he sold it to Con Edison for $3 million for a nuclear power plant. The nuclear power plant was, of course, blessedly never built, and in one of the great financial moves of all time, Mayor Ruskin bought it back for a dollar, clearing $2.5 million in 1970. Quite a sum of money. A brilliant, brilliant businessman.

He was named in the family court by Governor Rockefeller in 1970. In his own humble way, we saw him every day in New Rochelle. He lived in New Rochelle until the 1990's. But you never heard about what was going on in his courts. He was very, very private. He respected what he did. He respected the people he dealt with, and he certainly respected all the residents of New Rochelle, and we did too.

So, thank you very much for this opportunity. We will miss Judge Ruskin. He was quite a hero to all of us. Thank you.

Honorable Andrew O'Rourke Remembered by Honorable Joan Lefkowitz

MS. KIRBY: Thank you very much. Finally, I'd like to introduce you to the Honorable Joan Lefkowitz, who will speak to us regarding Andrew O'Rourke.

HON. LEFKOWITZ: I'm not going to talk about Andy the judge, I'm not going to talk about Andy the politician. I'm going to talk about Andy the person. And you'd say, "Well, how does Joan Lefkowitz know Andy?"

Andy and I met at somebody's home for dinner when I was a family court judge. It was 1987. He was recently appointed by the governor. And the first thing he asked me as we're sitting at dinner was, "Well, how's it going in family court?" He's the county executive. What do you need there? I said, "We need a nursery." He said, "Nursery?" I said, "Yeah, we need a nursery, because what happens is, when you're sitting as a judge in the family court, the people that come before the family court have young children with them, and they're listening to the testimony of what's going on in their families; it's not a good thing." He said, "Well, did you approach the Administrative judge at the time?" I said, "Of course I did. They said there's a liability issue. Nothing could be done." He said, "Who says so? Joan, you want a nursery?" And he tells me, "Call this one, call that one." Within a year, we had a nursery, and we still have one in the family court, in all the districts, and that's really Andy's fault. That's Judge O'Rourke who did that, because he was kind, and he cared.

Then I wanted to run for supreme court. Don't ask me why I did that, but it's been a long career, it's been a wonderful career, and I'm happy I did, but at the time there were no Democrats on the bench, and there were no women. Judge Miller just ended up going up to the Appellate Division. So, it was Andy who said it's a good idea, you should go for it. He said, "But Democrats don't win, of course, but you could go for it." So I said, "Fine, I'm going to go for it." He said, "I don't really like Democrats, but he says, "You're a nice Democrat." He was funny.

So, one day I went to Women's Equality Day, sitting there like everybody else, a family court judge, and I look up and there's Andy, and he says, "Oh, Judge Lefkowitz is in the audience. I don't think she should be a supreme court judge, she should be a U.S. Supreme Court judge." I looked at him, and he came up to me afterwards, and said, "well, there it is, Joan." I said, "What does that mean? He said, "There it is, that's my endorsement, use it all over your literature. There's no candidate for the supreme court for the Republicans. You can use it until they get a candidate." I said, "What? Wow, thanks."

He literally started my entire career. And then after that, there were numerous, numerous dinners in my home for Shabbat, and Andy always had his yarmulke, put on his yarmulke. I said, "Andy, you don't need a yarmulke, you're not Jewish." He says, "I am, I'm Jewish here, I'm Jewish." He always put on his yarmulke.

And then I found out something else about my friend Andy. When Israel was attacked, and the SCUD missiles were going over Tel Aviv, he took a trip to Israel and brought his gas mask, and who was he with, of all people, my rabbi, Rabbi Rubenstein at the time, may he rest in peace now. And where were they? They were in Tel Aviv as the missiles were hitting all over, buildings were falling, and I said to Andy, "My God, Andy, what were you doing?" He said, "Joan, what do you think the rabbi and I were doing?" I said, "I don't know." He said, "We were having a drink." And just to confirm, I asked my rabbi. He said, "That's true, next time you have Andy to dinner, please, do me a favor, Joan, invite me. I'll walk the mile and a half, I'll be fine," and he did. And we all had dinner, and we were all laughing over the experience. We would be at a dinner party, and we'd just be sitting around, and it would be us, and we'd be talking, and somebody at the party had lost their job, something happened, a law firm fired them, he'd say to that person, call my office in the morning. And that person would be interviewed for something in the county, just like that. He cared. He really cared about people. He loved people. He was somebody that was absolutely exceptional about who he was. He knew who he was, and he really cared about everybody else that he encountered. He was kind, he was funny, he was such a special part of my life and a very dear friend of mine, and in the end, when he was in the hospital, it was a very hard thing for me to do. I didn't really — I wanted to see him, but I was very conflicted. But I went, and there was a sign on the door. I don't know if anybody here remembers it. It said, "No Visitors." And I remember his daughter came out and she said, "Come in. He really can't say anything to you, but just please come in." And I reached out, and he held my hand, and he gave me this big smile, and I said these words, and I'll say it again: "Andy, I love you."

Thank you for letting me speak.

Final Remarks

HON. ALAN D. SCHEINKMAN: Thank you very much. I want to recognize some of the people who have joined us today whom I see in the audience. Some people we haven't actually seen in awhile, but it's really good you came.

I see Retired Supreme Court Judge Louis Barone. Judge Barone, would you please stand up and let everybody say hello to you? So good to see you.

And of course, no ceremony would be complete without Colonel Marty Rochelle. Marty, good to see you here. And I want to thank Anthony Pirrotti, Jr., the president of the Westchester affiliate of the New York State Trial Lawyers Association. I saw Anthony here. Thank you very much for coming.

As I said at the beginning, I think it is very important that we take time to remember those who preceded us, who taught us, who had so much to offer, and we've tried to make an effort to do that.

You may remember that when we had the renovations in this building, the old portraits were taken down and put away for storage, and we managed over the last few years to get them back up. And we, I think, have been able to identify most of the people. Unfortunately, in the relocation, some of the names got separated from the plaques, and so unless you go back a really long way, it's not always the easiest thing to try to figure out who's who, but Nancy Barry and the bar association, Donna Drumm have been working on that. That's a very important part of what we're trying to do. Obviously, we're in the Gagliardi Courtroom, and we have the portrait of Judge Gagliardi over my shoulder.

But remembering and trying to recall all of these folks, these very distinguished things people taught us is not about simply looking at a picture, because that really doesn't give you a sense of the humanity of the person. It doesn't give you a sense of what they were about, the experiences that they lived through, their trials, tribulations, their time of life. For example, with these three very unique individuals who we recall here today, all incredible contributors to the life of the people in this area. Mayor of one of our largest cities, someone who I had the privilege of meeting when I was about nine years old. Judge O'Rourke, county executive, political leader, visionary, but a remarkable person. What I will always take with me is, as you may know, coming from somewhat different political point of view, he and I didn't always see alike, but we had some really remarkable sessions over a bourbon, which were always, those memories will always stay with me, and there's nothing about those sessions that I can tell you.

And Judge Ingrassia, who also was an incredibly remarkable person. He was remembered the other day in Orange County, and a number of the Judges all told stories about him, and we all had different memories of what he taught us. I will share this. When I first became a Judge, he stopped in to see me, and he saw that I was working on a decision, and he chastised me. He said, "Don't you know that you're a judge? You're not supposed to be working so hard." And I said, "But I'm trying to get this decision right. I'm trying to do the best I can." So he said to me, "Alan, do you think that you could ever get 100 percent assurance that you're going to get affirmed by the Appellate Division?" I thought about that for a second, and I said, "No, nobody's perfect, nobody can be absolutely sure that you're getting it right." He said, "Well, think about it in these terms. This is going to help you. If you flip a coin, you have a 50/50 chance of being right. So, you start off at 50/50. You've been to law school, right?" I think he was questioning that.

I said, "Yes." He said, "You seem like a reasonably intelligent person. Just by having gone to law school and applying some amount of reasonable intelligence, you're going to get to 60/40. But since you're never going to get to 100, the difference between 60/40 and 100 to zero, you're getting to the point of diminishing returns, my friend. I would just sign that decision and be done with it." And there was a certain practicality to that, because he also knew that there are a lot of other matters that required attention and deliberation, and there are times when you have to just reconcile

that you've done the best you can and move on to something else.

As is our custom, we have a court reporter here who's been transcribing these remarks, and it's been customary for the remarks in the transcript to be prepared and copies given to the families of those whom we recall, and we're going to do that, but we're also going to start something different and new as well, which is, it occurs to me that these transcripts are really oral histories of our times that have gone. Remember Tim was talking about the New Rochelle Mall? Remember the New Rochelle Mall? Somebody else was mentioning the issues that Judge Ruskin, that Judge O'Rourke had to deal with, and I was listening to them, and it occurred to me, some of the same issues that are contemporary issues to us. Playland was one. Affordable housing, that same site has issues, right? And that we could learn so much from these experiences and not just let these people pass by as images and a photograph or pictures on a wall.

So we are going to have the transcripts prepared, and find a way of publishing them, perhaps, on the history page on our website, and try to make them available to all the lawyers and all of the judges and all who pass through, just to remember the remarkable people that we've had. Their accomplishments and what they can continue to teach us. And that's why it's so important to do programs like this. That's why I thank you so very much for coming and for contributing your time and your presence.

And with that, and with thanks to Mr. Nobile, to the bar association, and all of you this program is concluded. Thank you.

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