The Commercial Division

of The State of New York

Law Report - January 2000

COMMERCIAL DIVISION

LAW REPORT

A report on leading decisions recently issued by the Justices of the Commercial Division, Supreme Court of the State of New York

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JANUARY 2000 (COVERING DECISIONS ISSUED OCTOBER-DECEMBER 1999)

The Report is pleased to include in this issue statements of the Chief Judge of the State of New York, Honorable Judith S. Kaye, and other distinguished guests on the occasion of the celebration of the fourth anniversary of the establishment of the Commercial Division on November 9, 1999.

The* Report *and the complete text of all decisions discussed in it are available on the Unified Court System's Internet home page at http://www.courts.state.ny.us and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org/sections/comfed. The reader should note that the address of the Court System's home page is new. The previously available cumulative subject matter index of all cases in the* Report *will be inoperative temporarily. However, a new search mechanism will be in place shortly. Members of the Commercial and Federal Litigation Section may sign up at the Section's home page to receive copies of the* Report *by e-mail automatically. The* Report *is issued by the Commercial Division, not the State Reporter. The decisions as they appear on the home pages have not been edited and may differ from the final text published in the official reports.

STATEMENTS OF PARTICIPANTS

on the Occasion of the

FOURTH ANNIVERSARY CELEBRATION

of the Establishment of the

COMMERCIAL DIVISION

November 9, 1999

Rotunda of New York County Courthouse, 60 Centre Street

PROGRAM PARTICIPANTS

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Administrative Judge, Supreme Court, Civil Branch, New York County

Hon. Jonathan Lippman

Chief Administrative Judge of the State of New York

Hon. Judith S. Kaye

Chief Judge of the State of New York

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President, Corporate Bar Association of Westchester and Fairfield

Hon. Stephen G. Crane

Administrative Judge, Supreme Court, Civil Branch, New York County

I bid you a warm welcome as we celebrate this fourth anniversary of the Commercial Division of the Supreme Court of the State of New York. It is appropriate to celebrate, and more appropriate to celebrate in this very location where, on November 13, 1995, our esteemed Chief Judge, Judith S. Kaye, introduced the Commercial Division, an experiment at the time, an outgrowth of the Commercial Parts that preceded it.

There were only six of us then, five in New York County and one in Monroe. Because of the support from the commercial and non-commercial bar and from business clients worldwide, these six have grown to ten judges, six in New York and one each in Monroe, Nassau, Erie and Westchester Counties, with additional venues in the wings.

The Commercial Division is being studied from coast to coast with a view to emulation. Next month Bob Haig and I are speaking in Boston and Washington, D.C. We've spoken previously to the American Corporate Counsel Association and participated in a panel discussion sponsored by the Business Law Section of the American Bar Association in San Francisco.

Why all this attention to our Commercial Division? Because it is a remarkable advancement in the administration of civil justice that accords business litigants a status that they eminently deserve by isolating cases that would otherwise be spread throughout the system and assigning them to speciality judges whose background and expertise can be applied to bring these disputes to conclusion more expeditiously and less expensively. Far from elitism, this innovative approach to business litigation has unclogged the rest of the court, permitting all other cases to be managed more efficiently and handled with higher quality. Everyone wins.

And everyone knows how beneficial the Commercial Division as a laboratory has been to the rest of the court system. To

name just a few developments

- Enlightened case management
- Uniform Part Rules
- Court-annexed ADR programs
- Case management software
- Courtroom 2000

On behalf of the part of the Division located in New York County, I want to credit publicly the dedicated support staff, each of whom I privately thank on a daily basis.

We come now to the principal address. It is my great pleasure to introduce the person who put us into viable competition with the Federal judiciary and brought New York State's judicial system into new-found public esteem and admiration. A fearless leader, brilliant jurist and dear friend, the Chief Judge of the State of New York and the of the Court of Appeals, the Honorable Judith S. Kaye.

Hon. Judith S. Kaye

Chief Judge of the State of New York

I begin with profound thanks both to the speakers, and to the nonspeaker on the program -- our fabulous Chief Administrative Judge, Jonathan Lippman, for his tireless efforts on behalf of the Unified Court System.

In a court system as huge as ours, with so many daily crises, you never want to miss an opportunity for a happy celebration. And the fourth anniversary of our splendid Commercial Division is, by any standard, an occasion for celebration. My trusty Hallmark calendar tells me that there are two ways to go on fourth anniversary gifts -- traditional and modern. The *traditional* gift is fruit and flowers -- and I offer those in abundance. I'm still working on Hallmark's suggested *modern* gift: appliances.

There is surely a lot to celebrate after four years: a first-rate business court commensurate with New York's first-rate business and legal communities. I adopt and affirm every word of praise for Administrative Judge Crane, for the phenomenal Commercial Division Judges and Staff, for our volunteer mediators, and for the business and legal community that inspired this wonderful idea and continues to work with us to assure its vitality.

I could go on with the statistics that make us feel so good and abundantly prove that we're on the right track here: like quicker case resolution, reduced backlogs. But instead I will limit myself to three special causes for celebration this fourth anniversary year.

First, there are the offspring -- a sure sign of success. In four years the Commercial Division family has grown significantly. I refer, of course, not only to the most welcome addition of Justice Helen Freedman in Manhattan, to serve alongside Justices Cahn, Cozier, Gammerman, Ramos and Shainswit. I refer also to our newest Commercial Division branches, in Erie County (Justice Patrick NeMoyer presiding), Nassau County (Justice Daniel Martin presiding) and Westchester County (Justice John DiBlasi presiding).

Each new branch has magnificently survived its infancy, and is now in full flower, with established rules and policies, burgeoning dockets and growing excitement about putting into action one of the fundamental precepts of the Commercial Division: resolving business disputes in a business-like fashion.

I had occasion yesterday to pick up the phone and chat with Judge DiBlasi in Westchester. And what a treat it was for me -- a former commercial litigator -- to listen to him. I was delighted to hear how much of a joint enterprise this has been, how helpful the bar and other Commercial Division Judges have been in getting this newest court off the ground.

He particularly singled out -- as I do -- the ubiquitous, redoubtable, eloquent Bob Haig, and the Monroe County Commercial Division Presiding Judge, Tom Stander, who regrettably could not be here today. As Judge DiBlasi explained, it was Judge Stander who really underscored for him the importance in this Division of a hands-on approach, of a positive attitude in trying to work things out with the parties and the lawyers, of simply staying securely on top of every single case. I loved hearing from him his frank acknowledgment that at first he thought this assignment would be boring, but he has found that this is the most fun he's had in his ten years as a judge. He is enjoying every single day on the bench.

Now that's music to the ears of the Chief Judge. A client community filled with praise. A satisfied bar. And a happy judge. It just doesn't get any better than that.

So the first special cause for celebration this fourth anniversary year is the growth of this fabulous family.

The second is the growth of the law. Here I refer with pride to the *Commercial Division Law Report*, a newsletter that is tangible proof beyond a reasonable doubt that a substantial body of commercial law once again is being generated by the New York State courts. It would warm the heart of Chancellor James Kent -- definitely deserving of a chapter or two, maybe even its own volume, in Kent's *Commentaries*.

While the *Commercial Division Law Report* is not exactly pool side reading, I heartily recommend that you all take a good look at it. It reflects the development of what is in fact being built here in New York State every single day -- a comprehensive, accessible body of relevant commercial law precedents. The *Report* is already available in hard copy and through the court system's website. And if you go through the website, you can electronically retrieve the actual decision as well.

Which brings me to the third special cause for celebration, right up there with growth of the family and growth of the law: we will soon begin electronic filing in the Commercial Division. That may not seem like banner headline news in the year 1999, but we've been waiting for it a long time. For us this is a giant leap into the next century.

And that brings me to yet another treasured aspect of the promise of the Commercial Division: electronic filing is not only a tremendous advance for the Commercial Division, but it also promises to be a boon for the entire court system. In so many ways the Commercial Division serves as a laboratory for the entire court system. When I spoke the other day with Judge Crane, he rattled off many reasons to celebrate today, not the least of them reflected in a trial going on right now upstairs in Courtroom 2000. We can actually see and feel how the wonders of modern technology will facilitate the trial of major cases. Judge Crane and I readily agreed that the biggest bonus of all is what this marvelous experiment called the Commercial Division can mean for the whole court system.

Several years ago, a prominent CEO told me he had succeeded in settling a complex commercial case by stipulating that his British adversary would never have to return to the State Supreme Court. That was a knife in the heart of the Chief Judge, a challenge for change. In just four years' time, the Commercial Division has transformed the image -- and the reality -- of the New York State court system's ability to handle complex commercial matters. On this fourth anniversary of the Division's operations, we celebrate marked progress. And we thank the judges, staff and concerned members of the bar for their contributions to this successful experiment in the delivery of justice.

The five-year anniversary gift, by the way, is wood and silverware. I'm already working on the gifts.

Robert L. Haig, Esq.

Co-Chair, Commercial Courts Task Force

First, on behalf of the Commercial Courts Task Force, I'd like to thank Chief Judge Kaye for her enlightened leadership in creating the Commercial Division. She has acted promptly, thoughtfully and unbureaucratically. Although many people have contributed, Judge Kaye is the only person who was truly indispensable. The bar and the business community in this

State owe her a substantial debt.

Second, to help put the fourth anniversary of the Commercial Division in perspective, I note that New York is the acknowledged leader of an emerging national trend toward creation of business courts. New York is a leader in many areas, but it has not always been a leader in judicial administration and courts. More than 15 states are currently considering business courts. Many of those states are considering following the Commercial Division's model.

I now have the privilege of introducing five distinguished leaders of the business and legal communities. I am particularly happy that they were able to join us because each of the organizations which they are representing here today has played a role in the development of the Commercial Division.

Peter I. Bijur, Esq.

Chairman, Business Council of New York State

I am pleased to be here today representing our 4000 members who are businesses, not-for-profits, trade associations and industries from all over the State. Pleased because it is a chance to put the spotlight on an important New York State business asset -- an efficient and functional court system.

We have now gone in four years' time from a court system that often evoked frustration among businesses, to a business court that is the envy of other states. In so doing, New York has taken its place as a leader, providing a model for others.

The Business Council members employ 1.2 million workers in New York State and it is our goal to help businesses operate more profitably and efficiently. Sometimes that involves a close partnership with government to design and implement proposals that will help members surmount the costs and complexities of doing business in our State.

For a number of years, the Business Council had been concerned that the New York State Judiciary was too complex and confusing for all parties. Our members felt they spent more time and money than appropriate on court cases. So we supported New York's adoption of procedures to expeditiously handle business cases and to develop a court with a higher degree of expertise in the peculiarities of business law.

We were, therefore, pleased when Chief Judge Kaye appointed a Commercial Courts Task Force in February 1995 and named our President, Dan Walsh, as a member. What we did not anticipate was the speed with which the Commercial Division would be up and running and, more importantly, the impressive quality of the results. The time frames are reasonable. The decisions are reasoned.

The Commercial Division is an asset to the business community in New York State. It shows what can be done when business works with practitioners and judges to accomplish something that benefits everyone.

We at Texaco are particularly pleased that the Commercial Division was expanded this year to Westchester County. This new venue is now available for commercial litigation in the county that is home to many New York- based companies. Thank you.

Frederick J. Krebs, Esq.

President, American Corporate Counsel Association

I am honored to be here on behalf of the American Corporate Counsel Association, commonly known as ACCA. ACCA is an international association of more than 11,000 in-house attorneys with members employed by companies throughout the world. We have 40 local chapters in the United States and one in Europe. One of our most active chapters is the metropolitan area. Overall ACCA has more than 1,200 members in New York State.

ACCA supports specialized business courts for many reasons; but to paraphrase Mr. Bijur's remarks: "the clients like it; the clients need it; the clients want it."

Several years ago, at the request of our New York Chapter, ACCA's Board of Directors unanimously endorsed the concept of business courts. Little did we realize what a positive step this would be.

ACCA's policy statement specifically singles out the Commercial Division and concludes that "New York has demonstrated that broad-based commercial courts are feasible and beneficial and that the support of the business community is valuable in creating them."

I am told that at this event a few years ago, one of your speakers referred to this initiative as a "poster child" for specialized business courts. I reaffirm that today -- for that is how we at ACCA see it. Indeed, we cite the New York experience as a model for all to follow.

The ACCA Board of Directors recently reaffirmed our support for the business court concept and encouraged our local chapters to take up the fight for specialized business courts. We hope that other states will follow New York's exemplary lead, although I wonder if they will replicate your speed and efficiency.

I do note that the Philadelphia Common Pleas Court just adopted a specialized court for business disputes -- no doubt they learned from the New York experience. Also, I am pleased to say that a new effort has begun in Florida, which we will assist. So the fight continues.

To Chief Judge Kaye, I congratulate you on your leadership. To the Commercial Division of the New York State Supreme Court, I congratulate you on your success. This is the fourth year that we have been privileged to participate in this ceremony -- truly an honor for us.

ACCA is grateful to the Judiciary in New York for creating and expanding the Commercial Division. I am proud of the role ACCA has played in supporting the Commercial Division and very pleased with the results. Thus, on behalf of ACCA, I enthusiastically salute the Commercial Division on its fourth anniversary. Thank you.

Michael E. Flowers, Esq.

Chair, Business Law Section, American Bar Association

Business courts are a subject of significant interest to our Section, which has more than 50,000 members throughout the United States. Today, I will share with you the key components of a resolution our Section adopted in an effort to strengthen the ability of state courts to handle business litigation. As a business lawyer, I will also give my perspective on how the Commercial Division is successfully responding to the criticism that has come from those who have attempted to conduct business litigation in state courts.

Three years ago, the governing Council of our Section adopted a resolution recommending that courts which hear a substantial number of corporate and commercial disputes establish specialized court divisions to provide the expertise needed to improve substantially the quality of decision making and the efficiency of the courts.

Recognizing that established business courts have proven to be highly successful, our Section concluded that the movement toward specialized business courts in the United States, although then in its inception, was, nonetheless,

gaining strength. Certainly, today's gathering illustrates the success business courts are enjoying in New York.

Some business people believe state courts are not the forum in which to conduct business litigation. It will come as no surprise to you that many businesses are seriously concerned about the expense of litigation. They are also concerned that many state courts are inefficient, unpredictable and slow vehicles for the resolution of business disputes. Some business people believe that many state courts lack the expertise to conduct business litigation appropriately. In addition, many state courts are faulted for failing to use the innovations that are now available to handle business litigation more efficiently, including advanced case management techniques, ADR and technology.

As a result of their dissatisfaction with our judicial systems, businesses have increasingly turned to other forums to resolve their disputes. Businesses that have a choice often prefer to litigate in private dispute resolution forums provided by such entities as the American Arbitration Association. Nevertheless, I and many other business lawyers feel that public courts can and should process business disputes better than they do. One solution to these problems is specialized court divisions dedicated to business litigation.

I think it is fair to say that five years ago, few large companies would have voluntarily chosen to litigate in the New York State courts. Now, the Commercial Division presents an entirely viable and cost-effective alternative which is increasingly the forum of choice.

The impact of the Commercial Division is being felt beyond the borders of New York. The Bar Association of my own state of Ohio has adopted a resolution calling for the adoption of business courts on an initial pilot basis. In the report adopting this resolution, the Ohio State Bar Association specifically noted the particularly successful commercial and business court in operation here in New York.

So today I salute New York. Your Commercial Division is truly a magnificent accomplishment and one that will continue to serve as a national model. Thank you.

Thomas O. Rice, Esq.

President, New York State Bar Association

I am honored on behalf of the 67,000 members of the New York State Bar Association to participate in the observance of the Fourth Anniversary Celebration of the founding of the Commercial Division of the Supreme Court.

I am also pleased to acknowledge Chief Judge Kaye and all those whose efforts have contributed to the success of the Division. I am particularly pleased to have the opportunity to thank Bob Haig for his extraordinary efforts on behalf of not only this project but all that he has done on behalf of the organized bar.

This year and over the past four years, the New York State Bar Association has had the opportunity to be involved in the development of the Commercial Court and to sing its praises. The New York State Bar Association is privileged that its members are ambassadors, spreading the word and describing what is now regarded as *the* model for innovation in judicial administration and partnership among the bench, the bar and the business community.

Five years ago our Commercial and Federal Litigation Section expressed concern about "the flight of commercial litigants from New York's courts which once played a leadership role in adjudicating major commercial disputes." In a report on the problem, the Section proposed creation of a dedicated part or division to handle the unique needs in these types of cases.

Within a year, working hand in hand with enthusiastic court officials, that idea became reality. Practitioners and our Association have been applauding the result and have canceled their "flights" from New York, opting instead to use New York's new venue. Not surprisingly, then, a survey of Section members and practitioners reported overwhelming praise and support.

We are proud proponents of the court and its use of case management and cutting-edge technology. We have urged the expansion of the concept to other areas of the State where warranted by the volume of commercial matters.

The positive results of the project are due in large part to the collective and cooperative energies of bench, bar and business in forging procedures that respond to the needs of each other.

It is a pleasure to point to the Commercial Division as an innovation "made in New York." We look forward to a continued collaboration and to furthering this success story. Thank you.

William D. Cotter, Esq.

President, Corporate Bar Association of Westchester and Fairfield

On behalf of the Corporate Bar Association of Westchester and Fairfield, I am pleased to support the Commercial Division and its work in Westchester County.

Our Association has over 500 lawyers. Most are employed by corporations located in Westchester, New York. On two previous occasions, we expressed our support for the expansion of the Commercial Division to Westchester. Now we are here to say how pleased we are that the expansion was implemented promptly and that the system is up and running.

Westchester County's large and growing business community requires a court which is able to resolve complex commercial disputes efficiently. Expansion of the Commercial Division to Westchester has already fostered efficient case management, while easing the caseload of the other courts.

Expert and efficient resolution of commercial disputes assists in retaining Westchester County's sizable and impressive list of corporate citizens, while also attracting more business to the area. We are fortunate that the expansion of the Commercial Division to Westchester has not required a new courthouse nor significant expenditures of public funds.

Accordingly, the Corporate Bar Association of Westchester and Fairfield strongly supports the Commercial Division and its expansion to Westchester County. Thank you.

SUMMARY OF RECENT LEADING DECISIONS

Account stated; protest; showing to avoid summary judgment. Contract by which plaintiff was to develop software and provide technology services for defendant. After termination, plaintiff sued, alleging account stated. Standards reviewed. An e-mail had been sent by defendant’s CFO setting out a payment schedule for invoices. Defendant argued that

its representatives had complained about the bills and that the CFO was unaware of this, being responsible only for making payments. The court found that plaintiff had made out a prima facie case by the e-mail. To defeat a motion for summary judgment, defendant must supply more than conclusory allegations of protest. The court ruled that the defendant had presented only conclusory allegations. No specific communications at particular times with identified persons were described. Summary judgment for plaintiff. Questra Corporation v. Colorbus, Inc., Index No. 7133/1999, 12/99 (Stander, J.).

Arbitration; commitment to arbitrate. Procedure; statute of limitations. Action for accounting of affairs of limited partnership. Defendants moved to compel arbitration of non-barred claims and for a permanent stay of arbitration or litigation of time-barred claims. The court concluded that the arbitration provision in question was broad and would embrace the matters raised in the case. The court found that defendants had met their burden of establishing that a valid agreement to arbitrate had been made. Not all limited partners had to have signed the agreement. One plaintiff conceded having signed an assignment agreement acknowledging acceptance of all terms and conditions under the partnership agreement. There was evidence the other had signed too. Plus, plaintiffs had commenced the instant action for an accounting under the partnership agreement. Arbitration compelled. However, defendant bank did not have to arbitrate as its mortgage did not contain an arbitration clause and it was not party to any agreement with a party containing such a clause. Dissolution of the partnership, it was held, had occurred in 1996, thereby giving rise to the right to an accounting. The demand for an accounting was governed by a six-year statute and was timely. Claims for fraud, breach of fiduciary duty, etc. were premature as the accounting had not yet taken place. Duncan v. Newburgh Associates Index No. 605826/98, 10/26/99 (Cozier, J.)

Arbitration, waiver. The agreement at issue lacked an agreement to arbitrate, the court ruled. Defendant had not participated in arbitration so as to prevent him from seeking to stay it (CPLR 7503(6)). Consent to arbitration in later agreements did not justify a different approach. Further, the court held that plaintiff had waived any right to compel arbitration in certain contracts by pursuing the instant action on the merits. Arbitration stayed. TMP Worldwide Inc. v. Franzino, Index No. 602933/99, 10/6/99 (Ramos, J.).

Assignment. Law of the case. Judicial estoppel. Real property; amended report of referee to compute. Assignment. Assignee of mortgage and note stood in the shoes of the assignor. Law of the case applied to the assignor's motion for judgment of foreclosure and sale on the original report of the referee to compute, even though that was on default. Judicial estoppel would also apply, as the party estopped had procured a judgment on the basis of the inconsistent position. A referee to compute has no power beyond the order of reference. The assignee moved to confirm an amended referee's report. The court held that the referee had had no power to render that report, the original having already been confirmed. As the assignee had not moved for renewal or reconsideration, or complied with the standards therefor, its motion was blocked by law of the case and estoppel. In argument, the court found that the new calculations of the assignee were deficient. Fourth Federal Savings Bank v. Nationwide Associates Inc., Index No. 103571/98, 9/2/99 (Crane, J.).

Attorney and client; misrepresentation; punitive damages. Judiciary Law 487. Action alleging legal malpractice in connection with a bankruptcy proceeding. Defendant firm moved to dismiss fraud and treble damage claims (Jud. Law 487) and a claim for punitive damages. The court ruled that the fraud claim was deficient in that if an alleged fraud by an attorney does not cause plaintiff to suffer damages beyond those caused by the malpractice itself, a claim is not stated. Simcuski v. Saeli, 44 NY2d 442, was distinguishable. Absent fraud, the punitive damages claim failed. Such damages are ordinarily not available in a legal malpractice case. There was no allegation of a pattern of conduct directed at the public generally. As the alleged malpractice had occurred in a case pending in Colorado, Jud. Law 487did not apply. This claim was also found deficient in view of the holding as to fraud. South Street Corporate Recovery Fund I v. Milbank, Tweed, Hadley & McCloy, Index No. 122690/97, 11/12/99 (Cahn,. J.)

Contracts; employment; restrictive covenant; disloyalty; fiduciary duty. Tortious interference. Unfair competition. Action against former employees. One defendant allegedly had been a key employee, a board member and the principal client contact, and had signed a covenant not to compete. The other two defendants had not been directors or signed a covenant. The court found that plaintiff had failed to show that the covenant was necessary to protect plaintiff's business. The court found that plaintiff had failed to produce evidence to refute the availability of names and addresses of prospective customers. The court ruled that the defendant might have been important to plaintiff's business but was not unique and irreplaceable. Another defendant had had access to the information this defendant had and this defendant was quickly replaced. The court ruled that the defendant had been only a nominal director and had not been burdened by any special duty of loyalty. The court found no proof of disloyalty by this defendant. The court found only conclusory assertions of breach of duties by the defendants. Since the restrictive covenant was unenforceable, a claim

for tortious interference failed. As to unfair competition, the customer list was publicly available and there was no other proof of unfair competition. A prima facie tort claim failed for lack of a showing of intentional infliction of harm. Summary judgment granted. Certified Grinding & Machine, Inc. v. Malovic Index No. 3196/1998, 12/99 (Stander, J.)

Contracts; implied covenant of good faith. Quantum meruit. Unjust enrichment. Labor Law 193. GOL 15-301. Action for breach of contract by terminated former President and CEO of a mutual fund. Claims for breach of the covenant of good faith and fair dealing and quantum meruit were dismissed as duplicative of a contract cause of action. A claim for breach of an implied-in-fact contract with regard to an additional bonus above any governed by a written contract was dismissed as barred by that contract, which required all modifications to be in writing. The court held that an employer's refusal to pay monies to an employee does not constitute a deduction from wages (Labor Law 193). The claim also involved an alleged oral agreement and thus was barred by GOL 15-301(1). Claims for severance pay based on ERISA and an oral, implied-in-fact contract were held to be unsustainable, not having been included in the contract originally or by way of a written modification. Other parties dismissed altogether. Weiss v. Hyperion Capital Management, Inc., Index No. 107644/99, 10/28/99 (Shainswit, J.)

Contracts; interpretation; agreement to agree; compensation term; duty of good faith; statute of frauds. Action for breach of agreement to provide Goldman Sachs Asia with information on business opportunities. Defendants moved to dismiss on the ground that the agreement was only an agreement to agree and that there was no basis for damages. Plaintiffs also alleged an oral agreement whereby Goldman Sachs Asia would enter into five transactions within the contract period. The court held that the supposed oral agreement was barred by the statute of frauds. GOL 5-701(a)(10). The written agreement lacked any specification of a fee except that "typically fees have ranged between 50 bps and 150 bps," which the court found insufficient. This was merely an agreement to agree, the court held. No transactions were alleged to have been consummated. Even with an implied duty of good faith, there was no obligation to accept any proposals. Case dismissed. Interquest Corp. v. Goldman, Sachs & Co., Index No. 604217/98, 11/9/99 (Cozier, J.).

Contracts; interpretation; intent to contract; agreement on payment terms; UCC **2-204.** Additional compensation sought under contract to provide telephone intercom systems. The contract required written notice of claim for extra work. Such notice was not presented on time. Plaintiff relied on a letter, but the court held that it did not constitute a notice of claim because it expressed no intention either to assert a claim for additional payment or to perform the disputed work. Thus, by the terms of the contract, plaintiff had waived any right to extra compensation. In fact, the court ruled, the work was not extra work, but was required by the original contract. Summary judgment for defendant. Target Sound Co. v. New York City Housing Authority, Index No. 604385/98, 12/15/99 (Cozier, J.).

Contracts; interpretation; intent to contract; agreement on payment terms; UCC 2-204. Alleged contract by which defendant was to supply jackets for plaintiff. Defendant claimed that no contract had been arrived at because there had been no agreement as to how payment would be made. Defendant had wanted an irrevocable letter of creditbut plaintiff had provided a revocable one. Under UCC 2-201(2), plaintiff argued, between merchants, as here, there could have been a contract because defendant had never sent written notice of objection. Defendant, however, contended that there never was a prior oral understanding. Plaintiff argued that it would have provided an irrevocable letter but never did because it had never been advised that that was a condition. Under UCC 2-204(3), the court noted, a contract could be found even if some terms were not definite if there had been contractual intent. The court held that contradictory proof of intent to contract had been presented. Therefore, a trial was required. Summary judgment denied. Visions Marketing, Inc. v. Strato Trading Group, Inc., Index No. 602632/97, 12/3/99 (Cozier, J.)

Contracts; interpretation. Misrepresentation; disclosure of facts allegedly misrepresented. Procedure; forum selection clause. Sale of credit card accounts. Plaintiff demanded further documentation regarding the accounts from the selling institution. However, the court held that under the account purchase agreement, the plaintiff assumed the obligations of the seller as to the conditions for obtaining that documentation from the original bank. The seller defendant was not liable for breach of this duty. Nor was there a breach due to failure to pay over amounts received from debtors. A alleged misrepresentation claim failed since the agreement had disclosed that the accounts had been subject to other collection efforts and were no collectible. The court ruled that the case should be dismissed as to the other defendants since there was a clause selecting a Maryland forum and plaintiff failed to show that enforcement would be unreasonable or unjust or the clause invalid because of fraud or overreaching. Case dismissed. TCM Capital Corp. v. Daiwa Consumer Capital Services, LLC, Index No. 102852/99, 11/17/99 (Cozier, J.).

Contracts; joint venture; agreement required. Procedure; summary judgment. Alleged joint venture agreement. The court found that papers submitted on a motion for summary judgment and cross-motion for leave to amend failed to show a legally enforceable agreement or raise a triable issue thereon. Allegations that an agreement was formed orally prior to

a certain letter agreement were conclusory, the court held. The letter, though providing for a sharing of profits, made no mention of a sharing of losses and was subject to approval by a bank, never obtained. Further, the court noted that plaintiff had never contributed any capital and its documents showed that the parties had not intended to be bound absent formal written agreements. The court found no basis to postpone summary judgment pending further discovery. Leave to amend was not appropriate where summary judgment has been granted on the merits. S.L.S.M.C. Inc. v. Bruce S. Brickman & Associates, Index No. 604496/98, 10/21/99 (Ramos, J.).

Contracts; liquidation distribution rights of preferred shareholders; implied covenant of good faith. Banking Law 604, 605. Breach of fiduciary duty. Preferred shareholders of bank did not receive a liquidation distribution to which they allegedly were entitled, but stock in a company that held certain real estate assets. Plaintiffs asserted that an improper step in this process was issuance of stock in alleged violation of a governing certificate requiring full payment of dividends to preferred holders. The court ruled that a motion to dismiss (CPLR 3211(a)(7)) failed as to a breach of contract claim. There is an implied covenant of good faith and the court held that defendants might be liable if they had unreasonably frustrated payment by transferring assets. The court stated that it would not resolve the questions of the parties' intent as to the meaning of clauses in the certificate. The court also ruled that Banking Law 604 and 605 violations were sufficiently alleged. The Banking Department approval did not resolve the rights of preferred stockholders and would not excuse a violation of law. The court dismissed a breach of fiduciary duty claim because it did not arise out of facts separate from a breach of contract or related claim, nor did it allege distinct damages. Claims for ultra vires acts, breach of a duty to disclose and fraudulent conveyance were similarly dismissed. Strome Global Income Fund v. River Bank America, Index No. 605226/98, 12/ 2/99 (Cahn, J.).

Contracts; pleading; prevention of performance of condition precedent; repudiation and right to terminate; implied duty of good faith and fair dealing. Tortious interference with contractual relations. Alleged breach of agreement granting defendant rights relating to two software video games. Motion to dismiss (CPLR 3211(a)(7)). Standards for pleading breach of contract. The court upheld a breach claim. The court rejected an argument that plaintiff had failed to comply with a condition precedent because defendant had allegedly prevented the performance of the condition. The court dismissed a claim for repudiation of the entire agreement since under it defendant had had an unconditional right to terminate, which it did, and thus could be liable only through that date, there being no provision for acceleration of future payments. The court ruled that a fair reading of the contract indicated thatdefendant had an implied duty of good faith to assist, or not interfere with, plaintiff's entering into bundling arrangements with computer manufacturers. A third claim was thus upheld. The court found that plaintiff had set forth only conclusory allegations regarding interference with prospective contractual relations and thus dismissed that claim. Fenris Wolf Ltd. v. GT Interactive Software Corp., Index No. 601206/99, 10/15/99 (Cozier, J.).

Contracts; termination; implied covenant of good faith. General Business Law; deceptive practices. Promissory estoppel. Misrepresentation and contract claims. Purported class action challenging alleged practice of terminating agents in order to misappropriate income and commissions. The court ruled that claims for breach of a guarantee and breach of the agent's contract failed. The court found that the agreements permitted termination on 30-day's notice, which had occurred here. The court rejected an argument that a guarantee in another contract signed after the agent's contract modified the termination clause of the latter, noting that performance standards could be used (citing appellate authority). The court upheld a claim for breach of the duty of good faith and fair dealing, stating that alleged clandestine production quotas would violate that duty although the contracts did not expressly forbid the conduct. The court ruled that alleged deceptive practices in advertising and recruitment of prospective agents were consumer-oriented conduct (GBL Art. 22-A). The court rejected aspects of a promissory estoppel claim insofar as it related to conclusory promises and contradicted the at-will nature of the parties' relationship. The court rejected a defense argument that claims for fraud and negligent misrepresentation involving the alleged clandestine practice as to production quotas duplicated claims for breach of contract. However, dismissal of those claims was required insofar as they were premised on promises that were conclusory or contradicted the at-will relationship. Sheth v. New York Life Ins. Co., Index No. 606106/98, 10/6/99 (Shainswit, J.).

Corporations; liability of shareholders and officers for contract payments where the corporation was dissolved for non-payment of taxes. Telecommunications; filed rate doctrine. Plaintiff sued to recover unpaid charges for telecommunications services. The court ruled that plaintiff had established that an entity controlled by defendants that had contracted for the services had breached the contract. That entity had been dissolved for non-payment of taxes at the time the contract was entered into. The court stated that New York shareholders and officers are responsible for contracts entered into after a dissolution for non-payment, even if, as here, the entity was later reinstated. This is the common law rule and the dominant rule in other jurisdictions, although there is only one case directly on point in New York. The court held that various counterclaims regarding better rates the corporation might have obtained were barred by

the filed rate doctrine. Worldcom, Inc. v. Sandoval, Index No. 603630/97, 11/23/99 (Cahn, J.).

Corporations; piercing corporate veil; stock purchase; prior debts. Procedure; motion to dismiss. Motion to dismiss (CPLR 3211(a)(7)). Plaintiff was owed money by another entity and a repayment plan was entered into. Thereafter, defendant purchased all of the entity's stock and it became a subsidiary of defendant. Defendant moved to dismiss. Standards discussed. The court found that plaintiff's claims against defendant failed. During negotiations on repayment, the entity and defendant were not in a parent-subsidiary relationship. Thus, there was no basis to pierce the corporate veil. Defendant did not assume the entity's debts. Plaintiff failed to show what could be produced in discovery that could aid its effort to hold defendant liable. Motion granted. The Sutherland Group, Ltd. v. IBS International Corp., Index No. 7298/1999, 10/28/99 (Stander, J.)

Corporations; respondeat superior; negligent hiring and retention. Action alleging theft and misuse of plaintiffs' on-line computer account information by employee of corporate defendant. The employee allegedly stole the information while servicing new computer system sold by defendant at plaintiffs' home. The court ruled that various claims premised on respondeat superior were deficient since the employee's actions were not at the direction of the corporation or in furtherance of its business and fell outside the ambit of Riviello v. Waldron, 47 NY2d 297. The issue could be determined as a matter of law. The court ruled that claims premised on negligent hiring and retention failed since there was no suggestion that the employer knew about the employee's actions, that improper behavior was reported to it or that the employee had a criminal record. Mere conclusory allegations fail to withstand a motion to dismiss. Plaintiffs had not alleged what facts they hoped to obtain in discovery. Motion to dismiss by corporate defendant granted. Schacter v. Compusa Inc., Index No. 103983/99, 9/28/99 (Shainswit, J.).

Corporations; shareholder derivative action; demand; pleading. Contracts. Misrepresentation; disclosures in private offering memorandum. Individual and derivative action. Investors in a private offering claimed that the proceeds had not been used as intended, as pre-operating expenses, but rather as exorbitant insurance and salaries for the officers and directors, and that, as an IPO had not gone forward as planned, plaintiffs' investments should have been returned. Plaintiffs challenged the corporation's plan for dissolution. Under Delaware law, allegations of a demand or an excuse therefor are required. The court noted that, under Delaware law, when it is alleged that a Board refused a demand, the only issues for examination are the good faith of the members and the reasonableness of its investigation. Plaintiffs argued that the demand for rescission and return of the proceeds was not really a shareholder demand refused, that, although the complaint did not so allege, a demand would have been futile and was excused because of director interest. The court held that the complaint should be dismissed. It did not allege particularized facts raising a reasonable doubt whether the Board was disinterested and independent or the Board's decision was otherwise invalid. Although there were allegations that two of the five directors were employed and compensated by the corporation and thus would gain by its continuation, three had no such interest. Coverage by D & O insurance is not the type of personal benefit that gives rise to self-dealing; the court reasoned, since such insurance protects the assets of the corporation and benefits it as well. The decision to dissolve and distribute assets among all shareholders was more troubling, the court stated; as there were pleading defects, the pleading would be dismissed with leave to replead. Plaintiffs had not alleged particularized facts showing lack of independence. Election at the behest of those controlling an election does not suffice. Plaintiffs' individual claims, the court ruled, should be dismissed. The private offering memorandum informed investors that proceeds would be used for pre-operating expenses, including compensation, but that use might vary substantially from estimates and might even be made for other purposes. Thus, a breach of contract claim failed. As for rescission, plaintiffs did not allege mutual mistake and fraudulent inducement could not have occurred in view of the disclosure provisions. Complaint dismissed, with partial leave to replead. Porpoise Investors I, L.P. v. Cobb, Index No. 601620/98, 12/22/99 (Cahn, J.).

Corporations; standing of shareholder to sue directly; derivative action as to dissolved corporation; BCL 626; demand; business judgment rule. In an action challenging merger of Bankers Trust and Deutsche Bank, plaintiff moved for a preliminary injunction against the merger and for expedited discovery. Defendants moved to dismiss. Plaintiff asserted that the terms of the transaction involved excessive bonus and retention payments to key managers and severance packages for senior management and other breaches of fiduciary duty by defendant directors. Plaintiff sued on behalf of herself and others similarly situated. The court ruled that plaintiff lacked standing to assert a direct claim against the board. Plaintiff claimed that she had suffered a direct harm but the court found that the alleged wrong had been done to Bankers Trust. Where wrongs suffered by shareholders result from a breach of fiduciary duty by directors, a derivative action is required. The diminution in the value of plaintiff's stock was allegedly a consequence of waste by the directors. The court rejected plaintiff's argument that she would be left without a remedy since a derivative action can be prosecuted even after a corporate dissolution and distribution of assets, even though a derivative plaintiff is required to have stock ownership at the commencement of the action (BCL 626(b)). The court also ruled that merger and dissolution did not prevent plaintiff from complying with BCL 626(c); either a demand could have been made prior to dissolution or upon

the new board or facts can be alleged showing the futility of such a demand. Plaintiff had failed to allege that a majority of the board was interested in the transaction. Conclusory allegations of interestedness or control by a self-interested director are insufficient. In any event, the court held, the complaint failed to allege facts to overcome the business judgment rule, failing to assert facts that a majority had been personally interested in the merger or had acted in bad faith in approving it. Of the 15-member board, the 13 outside directors were not alleged to have received any personal benefit, nor was it claimed that the inside directors had exerted control. Allegations were conclusory and there were no factual allegations that would support a claim of abuse of board discretion. Case dismissed with prejudice. Fischbein v. Beitzel, Index No. 101553/99, 10/27/99 (Ramos, J.).

Discovery. Attorney and client; privilege; work product. Material prepared in anticipation of litigation. Objection to production of audiotapes on attorney-client privilege grounds denied because the court found they did not contain communications with counsel. Recordings between a corporate officer and third parties were not a product that could be created only by counsel and is unique to that function. Nor, the court held, were the tapes protected as material prepared in anticipation of litigation; audiotapes amounting to self-surveillance fall within CPLR 310l(i) andmust be produced. Kenneth D. Laub & Co. v. Bear Stearns Companies, Index No. 602179/97, 10/22/99 (Ramos, J.).

Donnelly Act (GBL 340); bid rigging; distributorship; territorial restrictions. Motions for summary judgment on Donnelly Act claims (GBL 340) based on alleged bid rigging. The court found as to one defendant that plaintiff had failed to present any proof of a concerted effort to restrain competition or fix prices by this defendant and another defendant. Rather, the actions of the movant were in accordance with a distributorship agreement. The motion of that defendant was granted. The court denied plaintiff's motion as to another defendant. At issue was a distributorship agreement with exclusive territorial restrictions. Whether such an arrangement violates the antitrust laws, the court said, is determined by whether there is an unreasonable restraint of trade under the circumstances of the case. The court ruled that another defendant was entitled to summary judgment. The court found that there was no bid rigging scheme at work. The defendant had acted within the scope of its contractual provisions to reject any order from plaintiff for delivery outside its territory. George C. Miller Brick Co. v. Stark Ceramics, Inc., Index No. 1001/1995, 11/99 (Stander, J.).

Donnelly Act (GBL 340); class action status; alleging antitrust injury. Purported class action alleging price fixing in violation of Donnelly Act (GBL 340). The court held that case law and statutory analysis led to the conclusion that the class action procedure is unavailable under the Act since the procedure cannot be used to recover a penalty (CPLR 901(b)) and the Act provides for one in the form of treble damages and does not itself authorize a class action. The court rejected the contention that a new section 6 of the Act, added December 1998, was intended to authorize class actions, stating that its purpose was to give a remedy to indirect purchasers. Although plaintiff argued that she could waive treble damages and pursue actual damages only, she had not done so. Nor can a pleading be amended by a brief. Further, the court stated, GBL 340(5) speaks of treble damages as mandatory and not waivable. Even if these damages are waivable, a class action would still not be appropriate since the plaintiff would not be an adequate class representative. The court found that plaintiff had failed to allege an actual adverse effect on competition as a whole in the relevant market. Thus, the complaint had to be dismissed. Motion to dismiss granted. Rubin v. Nine West Group, Index No. 763/99, 10/29/99 (DiBlasi, J.).

Fiduciary duty; relationship. Accounting. Procedure; statute of limitations; estoppel; continuing breach. Misrepresentation; silence. Purported class action by owner of whole life insurance policy alleging manipulation of income and assets purchased with premiums to improve performance of other insurance lines. The court ruled that there was no fiduciary relationship here. Thus, claims for breach of fiduciary duty and for an accounting had to be dismissed. Further, the court ruled, plaintiff could not argue that defendant was estopped from pleading the statute of limitations due to failure to inform policyholders of its acts. Conclusory allegations attempting to assert affirmative misstatements in annual responses to insurance regulators failed since the alleged fraud was one of omission only. A claim under GBL 349 was held time-barred. The court ruled that the business judgment rule, the New York Insurance Law or authority regarding the discretion of the board of a mutual insurance company did not require a finding, on a motion to dismiss, that the defendant's alleged re-distribution of assets and surplus was prima facie equitable. However, the court held that this claim was partly timed-barred. There was no continuing contractual breach. Rabouin v. Metropolitan Life Ins. Co., Index No. 111355/98, 11/9/99 (Cahn, J.)

Fiduciary duty; relationship; financing transaction. Contracts; pleading breach. Unjust enrichment. Implied duty of good faith and fair dealing. Fraudulent concealment. Negligence. Piercing corporate veil; pleading. Plaintiffs entered into agreement whereby defendants would consider participation in financing a large real estate transaction. Plaintiffs alleged that defendants breached a fiduciary duty by providing funding to another entity and proceeding with the transaction with it. The court held that the relationship was only one of borrower and lender, not a fiduciary one. This doomed the fiduciary duty claim and that seeking imposition of a constructive trust. The court upheld a breach of

contract claim since defendants allegedly failed to keep information provided to them confidential as required. The unjust enrichment claim was dismissed since a valid and enforceable contract existed. The court upheld a claim for breach of a duty of good faith and fair dealing. A fraud claim premised on failure to disclose was found to be merely a restatement of the contract claim and doomed in any case by the absence of a fiduciary relationship. A negligence claim was rejected in the absence of pleading of a breach of legal duty independent of thecontract. The court found that a piercing claim had been set forth in conclusory fashion. Leave to replead was sought in a brief footnote. Leave was denied for lack of any indication of what the pleading would be. Motion to dismiss granted. Frydman & Co. v. Credit Suisse First Boston Corp., Index No. 605549/98, 11/23/99 (Cozier, J.).

Indemnification; contractual; exception; common law; fraudulent transfer claims. Contribution; joint tortfeasors; exception. Motion to dismiss cross-claims. Plaintiff sued for unpaid fees for use of a TV production facility. Claims against the individual defendants were for fraudulent transfers. Moving defendant urged that a contractual indemnification provision in an agreement of sale barred these claims. However, the court held that the provision did not apply to claims involving willful misconduct, which would embrace fraudulent transfer claims. Common law indemnification would not apply. A contribution claim could exist though. Although contribution is generally not allowed between joint tortfeasors, there is an exception for alleged breaches of an independent legal duty, apart from a contractual obligation. This exception, the court ruled, would apply. Motion granted as to a cross-claim, for indemnification only. Home Box Office v. Silverkat Television & Video Productions, LLC, Index No. 606043/98, 10/1/99 (Shainswit, J.).

Insurance; anti-subrogation rule. Action by insurer seeking a declaration against two excess insurers that they owed a duty to indemnify in connection with an accident for which plaintiff had paid in excess of "step down" coverage. The court noted that an insurer has a right of subrogation, but no such right exists against the insured for a claim arising from the risk covered (anti-subrogation rule). This is so even where the insured agreed to indemnify the party from whom the insurer's rights are derived and has procured separate insurance covering the same risk. The court granted summary judgment to defendant insurers on this basis. Liberty Mutual Ins. Co. v. Prudential Ins. Co., Index No. 4287/1996, 12/8/99 (Stander, J.)

Joint venture agreement; interpretation. The court held that the complaint failed to allege facts sufficient to manifest requisite intent. Documents relied on by plaintiff showed nothing more than preliminary negotiations to enter into a project to promote artists. Key terms were lacking, such as sharing of profits and losses, management, and contribution of capital. An alleged oral agreement to share in all revenues, profits and losses went to the essence of a joint venture agreement and would ordinarily be included in a written agreement. Absent such agreement, related causes of action failed. Unjust enrichment claim dismissed because plaintiff could not establish improper enrichment. A claim for promissory estoppel failed since plaintiff had failed to show any injury in reliance on a clear promise. Brandt v. Newmark, Posner & Mitchell, Inc., Index No. 106851/99, 11/18/99 (Cozier, J.).

Misrepresentation; pleading; merger clause; relationship close to privity; contract. Negligent misrepresentation; relationship giving rise to duty. Derivative claims; pleading; share ownership; demand; futility. Settlement. Action by investors alleging fraud in connection with plan to market new golf club design. The court held that a fraud claim against an investment bank and an investment advisor was set forth with adequate detail (CPLR 3016(b)). The court was required to draw all reasonable inferences from the allegations pled. So read, the pleading alleged fraud in reasonable detail. The court rejected an argument that language of the subscription agreement barred the fraud claim. The language was too general. A contention that plaintiffs could not have relied on the alleged misrepresentations because they were sophisticated investors was improperly raised for the first time in a reply and, being fact-based, was not resolvable in a pleading motion. A negligent misrepresentation claim was dismissed as the investment bankers had not had a confidential relationship. Nor could such relationship arise from the transaction complained of. Plaintiffs failed to set forth allegations consonant with a theory based on superior access to relevant information. The court held that a fraud claim against a well-known professional golfer failed since he had not made any misstatements to plaintiffs directly, so that the claim was dependent on the existence of a relationship approaching privity, also the basis of an alleged negligent misrepresentation claim. The court ruled that there was no such relationship under Prudential Insurance, 80 N.Y.2d 377. The court found no direct communications evidencing the necessary understanding nor was there comparable reason for anticipating reliance by particular investors. Claims against corporate officers for falsely promising that any settlement agreement with the golfer could be entered into only with shareholder consent alleged harm to the corporation and would only be brought derivatively. Absent these claims, aiding and abetting and conspiracy claims against the golfer failed. For the derivative claims,the share ownership requirement was met by affidavits, which cured any pleading defects. As to the demand requirement under California law, the court found that plaintiffs supplemented an otherwise deficient pleading by a documentary submission. On the facts,

the court ruled, it would have been a hollow gesture to inform the board of the ultimate facts of each cause of action, as required by California law. Under New York and California law, futility of a demand can be shown by interest of a board majority in a transaction. The court found that the allegations were conclusory as to most directors and that it was not alleged that the interested directors controlled the non-interested ones. Thus, the allegations were insufficient. The court held that allegations of fraud with respect to a settlement agreement with the golfer were conclusory and devoid of allegations of scienter. Ratification was valid. An allegation that the golfer had never intended to follow through on his endorsement commitment and thus committed fraud failed to state a claim. Motions to dismiss granted in part. Darling v. Price, Index No. 602913/98, 10/28/99 (Cahn, J.).

Misrepresentation; reasonable reliance. Fiduciary duty. Conflicts with terms of governing agreement. Plaintiff alleged fraudulent inducement and breach of fiduciary duty in connection with a consignment by him of rare coins for auction. Plaintiff claimed that defendant had represented that a certain individual would not be involved in the auction. However, the court held that under the written consignment agreement, defendant was free to use anyone in its discretion as an expert and the agreement was not to be waived except by a written agreement. The court held that a claim of oral inducement in conflict with the writing was untenable and that no reasonable reliance could have been placed on the alleged representation. Plaintiff also allegedly breached its fiduciary duty and duty of good faith to maximize the sales prices by using a harsh evaluator of coins. Given that the agreement permitted use of any expert and that defendant would not undercut its own interests since it commission depended on the auction returns, and since defendant could not be held liable for any errors or omissions regarding the value of the property, this claim failed also. Claims dismissed. Reale v. Sotheby's, Inc., Index No. 604890/98, 11/8/99 (Cozier, J.).

Partnerships; standing to sue directly. Breach of fiduciary duty claims due to alleged misappropriation of a partnership opportunity. New Jersey law. The alleged wrong, the court found, had been committed against all limited partners. Derivative action required. The extent of the impact (on 50 persons) made this an inappropriate case for a direct action by analogy to the close corporation context. TI & T Realty Investments, Inc. v. Taylor Simpson Group, Index No. 601882/99, 11/22/99 (Cozier, J.).

Preemption. Primary jurisdiction. Mislabeling and false advertizing (GBL 349, 350). Res judicata. GBL treble damages and class actions; waiver. Procedure; statute of limitations. Purported class action alleging that seller of health bar misrepresented fat content and other aspects. The court ruled that the mislabeling claim was not preempted since the defendant could use as a defense compliance with federal law (GBL 349(d)) and the claim was that defendant failed to comply with federal standards. As the plaintiffs did not allege that any FDA regulation is unreasonable, and since no special FDA competence was required here, a primary jurisdiction argument would not assist defendant, the court ruled. The court held that a claim of mislabeling can be premised on GBL 350 and that plaintiffs had sufficiently alleged reliance. A prior class action litigation regarding persons who purchased the bars in California would not preclude on res judicata grounds this case involving an alleged class who purchased in New York. Although no treble damages could be recovered in a class action, the named plaintiff, the court ruled, could waive that relief and bring an action for actual damages only. The court ruled that this issue should be deferred until the certification motion. Damages might be tried separately from a class action on liability only. The court held that the statute of limitations barred claims going back more than three years (CPLR 214). Motion to dismiss granted in part. Morelli v. Weider Nutrition Group, Index No. 601428/99, 11/17/99 (Cozier, J.).

Procedure; attachment; in rem and quasi in rem jurisdiction. Fraudulent transfer. Plaintiffs alleged fraud and other wrongs, all premised upon the contention that Venezuelan courts had corruptly awarded control of corporate defendants to other defendants. All the parties here were Venezuelan and the events at issue had occurred there. Plaintiffs sought jurisdiction by attachment of accounts and other property of some defendants here. The court rejected the argument that the presence of corporate accounts here supported in rem jurisdiction over individual defendants because they and plaintiffs both claimed the accounts. The accounts, the court found, were corporate accounts andthe complaint did not set forth a piercing theory. Further, the court noted, these accounts were not the property that was the subject of the Venezuelan litigation. There were no allegations in the complaint of improper transfer by the corporate defendants, or indeed any causes of action directed against them. Therefore, in rem jurisdiction did not exist as to the corporate or other defendants. As to quasi in rem jurisdiction, the court found that the presence of the accounts here bore little relationship, if any, to the Venezuelan litigation. Here were claims against foreign defendants over ownership of foreign stock, where New York's interests were not implicated. Plaintiffs failed to cite authority for finding such jurisdiction here. Plaintiffs argued that such jurisdiction should be upheld since no alternative forum existed, but the court rejected this. It was not that there was no forum, but rather that it allegedly was inadequate. But no authority was cited to support jurisdiction on that basis. Motion to attach denied. The same result obtained for law firm defendants where the connection to the Venezuelan litigation was even more remote. The transfer of assets out of New York by these foreign attorneys after

the First Department had vacated a TRO provided no basis for a claim for fraudulent transfer. With the TRO vacated, the transfer was permissible. Leave to amend denied. Cannizzaro de Capriles v. Lopez Lugo, Index No. 604059/99, 11/23/99 (Shainswit, J.).

Procedure; declaratory judgment. Misrepresentation; fiduciary relationship; insurer/insured; superior knowledge; reliance. Unjust enrichment. A claim for declaratory judgment is inappropriate when the plaintiff has an adequate, alternative remedy in another form of action. The court held that a claim for breach of contract would resolve current disputes over indemnification agreements and it would be premature to seek declaratory relief regarding future obligations. Thus, the declaratory judgment claim was dismissed. The court held that an insured was not in a confidential relationship with the insurer and the mere failure to disclose would not give rise to a claim for fraud or fraudulent concealment. Nor could a superior knowledge theory succeed since plaintiff had had an opportunity to seek the undisclosed information but did not do so. The agreements revealed, the court said, why the insured wished to obtain retroactive insurance coverage. The plaintiff knew there was a dispute between defendants and the lessor of commercial property rented by them; the claim that plaintiff did not know that litigation had ensued was held to be unavailing since that misunderstanding was not alleged to have been due to misstatements of defendants and plaintiff could have discovered the facts through ordinary diligence. The fact that the individual defendant had allegedly misstated the facts in a deposition in the lawsuit with the lessor did not give rise to a claim by plaintiff as the statements were not alleged to have been made to plaintiff nor was it asserted that it had relied thereon to its detriment. Since the agreements were enforceable and valid, the court rejected an unjust enrichment claim. Motion granted. National Union Fire Ins. Co. v. Red Apple Group, Index No. 601073/99, 10/25/99 (Cozier, J.).

Procedure; foreign judgment, enforcement; public policy concerns; due process rights; forum selection and choice of law clauses in investment agreements for the Lloyd's market. Action for summary judgment in lieu of complaint to enforce a final judgment of the English High Court against defendants, "Names" in the Lloyd's insurance underwriting market. Documents signed by Names committed them to litigating all claims in England under English law. Large losses were suffered by Lloyd's for some years prior to 1993. The forum selection and choice of law clauses were litigated in many actions in the US challenging them on public policy grounds involving the protections of US securities laws. These clauses were upheld in seven Federal circuits. Defendants here unsuccessfully sued in the Southern District. A reorganization plan for Lloyd's was created in 1996 to end a raft of litigation and permit the market to function. Defendants rejected this plan. Lloyd's appointed substitute agents to accept the Plan on behalf of non-consenting Names. This clause and others were challenged unsuccessfully in the English courts. A judgment was entered against defendants in England. Ordinarily, a party who appeared in a foreign court cannot attack the judgment here, the court noted. Defendants argued that their due process rights were violated because they were denied a hearing on fraud claims, and denied a chance to challenge the amounts claimed to be due by operation of a "conclusive evidence" clause of the Plan. The court took note of a case raising similar issues litigated in Illinois Federal court. The court there had held that the denial of a hearing in advance did not violate due process if there was provision for an effective remedy thereafter and good cause for putting off the hearing. Here, the Names had to pay the full sum claimed to be due first, but were allowed to sue later and raise issues of fraud or inaccuracy in the amount due. The Federal District Court held that the exigencies of the Plan and its importance to the obtaining of reinsurance required to resolve outstanding losses in the Lloyd's market were a good cause for postponement. This court reached the same result - - that defendants had not been deprived of process rights. Defendants had agreed to be bound byEnglish law and the rulings of English courts and these clauses have been repeatedly upheld in the US. Lloyd's had a valid reason for the procedures used, the need to restructure and preserve the Lloyd's market. Names still have remedies in English courts. The court ruled that the fact that litigating a set-off would be preferable did not mean that a different method constituted a violation of public policy. Should defendants prove their fraud claims, English law, the court stated, would provide adequate remedies. The use of a substitute agent is valid under English law, but would not preclude defendants from litigating their claims later. Summary judgment granted. Society of Lloyd's v. Grace, Index No. 604065/98, 11/12/99 (Cahn, J.).

Procedure; forum non conveniens. Breach of contract action arising out of put option agreements entered into in connection with a merger. Forum non conveniens motion by defendant denied in view of numerous connections with New York. Leading plaintiff was a New York resident, some negotiations occurred here, defendant had merged with a New York corporation and plaintiffs were former principals thereof. Defendant did a substantial business in New York, its executives traveled here often and it would not be inconvenienced by defending here, whereas the leading plaintiff was ill and might not be able to travel to Washington State. Witnesses referred to by movant, the court noted, were mostly its own employees or had not been shown to be unwilling to travel here and documents could be produced here. That Washington State law governed was not an obstacle to retention here. Price v. The Coffee Station, Inc., Index No. 601941/99, 9/29/99 (Shainswit, J.).

Procedure; forum non conveniens. Motion to dismiss on forum non conveniens grounds and because another action was pending. The court found that the action should be retained here. Plaintiff was a New York resident and much of the consulting work at issue had been done here. Defendant is a large company doing business in New York. Documents could be sent here, the court said. Defendant's former CEO, a witness, did not reside in defendant's choice of site, Mississippi, and its employees were not shown to be unwilling to come to New York. Application of Mississippi law would be possible and not complicated. The Mississippi court had stayed the action there in favor of this case, which argued for retention. Motion denied. Stern Stewart & Co. v. KLLM Transport Services, Inc., Index No. 602370/99, 12/9/99 (Cahn, J.).

Procedure; forum non conveniens; dispute arising out of international business transaction. Forum non conveniens motion in an action alleging breach of contract and misrepresentation in connection with an agreement by which defendants hired plaintiff to find a purchaser for a stake in a group of international modeling agencies. The court determined that a weighing of the various relevant factors required dismissal. At the heart of the case, the court noted, was a mandat, an agreement in French stating that it was made in Switzerland. Three of the four parties/signatories were Europeans and had signed the mandat in Geneva. Two of the defendants might not be subject to jurisdiction here. The performance of the agreement largely took place in Europe. The prospective purchaser who, plaintiff claimed, had been wrongly rejected was a European. Swiss accountants were involved in a restructuring incident to the transaction and their testimony could be needed as to the accuracy of financial data provided. Swiss law would likely apply, the parties were French-speakers and key documents would be in foreign languages. New York's connections, by contrast, were, the court found, inconsequential. One defendant was a resident and the business had substantial operations here, but these contacts were not related to the dispute. A fair alternative forum existed in Switzerland, where an action was already pending. That court had a greater interest in the dispute and all parties had submitted to its jurisdiction. The court determined that that court had before it the question of the interpretation of the parties' rights under the mandat and would likely hear a defamation claim since its alleged effects on plaintiff's business reputation would have been felt in Switzerland. A Swiss judgment could be enforced against assets here. Buri v. Casablancas, Index No. 600954/99, 11/22/99 (Shainswit, J.).

Procedure; leave to amend; after note of issue; prejudice; summary judgment; timeliness. Fiduciary duty; self-dealing; interest. Amendment to add party allowed where facts at issue were the same even though a note of issue had been filed in March 1998 as defendants had failed to establish prejudice. Discovery would be expedited, the court ruled. The court held that a motion for partial summary judgment could be made though it was otherwise untimely in view of appellate activity that served as basis for it. The motion was granted as the First Department had already ruled that an individual defendant was liable for legal fees and he had admitted the amount. Interest would be properwhere a fiduciary had engaged in self-dealing (CRR 5001(a)), but the rate and date would be set at trial. Donovan v. Rothman, Index No. 105335/96, 9/29/99 (Shainswit, J.).

Procedure; motion to renew; new facts; service on law firm receptionist; conversion of documents; pleading; statute of limitations. Preliminary injunction. Agreement whereby defendant had served as legal consultant to plaintiff. Defendant was required to return documents made or kept by him during that work and copies thereof. Motion to renew based on executed copy of the agreement. The court found that plaintiff had used due diligence to find it prior to the original motion but had not, and the motion had been denied for lack of it. Now the court would entertain the motion to renew. Plaintiff showed a likelihood of success since the agreement barred use and defendant had made use of copies in another litigation. Irreparableness of harm and a balancing of the equities favored plaintiff. The court granted a preliminary injunction against defendant. Request for sanctions deferred to trial given disputes of fact over defendant's intent. The court held that it had acquired jurisdiction via service on the receptionist of defendant law firm. On defendants' cross-motion to dismiss, the court upheld a conversion claim based on removal of the documents. The court estopped defendants from asserting the statute of limitations as a defense since the lawyer's affirmative wrongdoing had caused the delay. The court upheld a breach of contract claim, and declaratory judgment and specific performance claims. Metropolitan Life Ins. Co. v. Nimkoff, Index No. 603192/99, 12/20/99 (Cozier, J.)

Procedure; motion to resettle. Discovery; motion to preclude based on interrogatory answers. The court previously decided summary judgment motions. Defendant moved to resettle an order issued as to those motions, contending that the motions had left open an issue and that the decision had not addressed it. The court noted that the notice of motion sought summary judgment dismissing all claims and defenses asserted by defendant relating to certain alleged work. Thus, the issue had been covered. Also, defendant had set forth the parameters of the motion by answers to interrogatories. The court concluded that both the decision and the order thereon had considered the issue. Motion to resettle denied. As to plaintiff's motion to preclude evidence at trial concerning items not set out in defendant's interrogatory answers, the court stated that no such motion lies under the CPLR, in contrast with a motion as to a bill of particulars. Interrogatory answers may be contradicted or explained away at trial. Motion denied. However, the court

said, plaintiff could move to bar proof not previously specified at the trial on grounds of surprise or violation of court orders. Chemical Bank v. Stahl, Index No. 103367/94, 10/18/99 (Ramos, J.)

Procedure; personal jurisdiction; maintenance of accounts; res judicata; prior action pending; statute of limitations; toll by death; equitable estoppel. Claim by joint owner of bank accounts against estate of other owner, who allegedly had converted the funds. The court held that there was personal jurisdiction based on maintenance of joint accounts here. Litigation in federal court was not res judicata since the executor was not a party there and it was not clear that the court's refusal to allow an amendment to add him was on the merits. There was no prior action pending (CPLR 3211(a) (4)) since the prior action was not against the executor. The court stated that the longest limitations period possibly available was six years. The time started to run when the accounts were closed and the funds transferred, which was more than six years before commencement of this action. As the limitations period had run when the decedent died, no toll under CPLR 210(b) was available. The court rejected an equitable estoppel argument since no misrepresentations by decedent were alleged and plaintiff alleged no action to determine the status of the funds for 14 years. Franceskin v. Meischenguiser, Index No. 603476/98, 10/13/99 (Cahn, J.).

Procedure; personal jurisdiction; visit to and communications with New York; forum non conveniens. Motion to dismiss or stay action arising out of aborted oil development deal. As to personal jurisdiction over a Texas company, plaintiff relied on a visit to New York by movant's CFO. The CFO asserted that he had come to New York for a social visit and only paid a brief social call on plaintiffs in response to a phone call by them. A factual dispute would require a hearing ordinarily. Here, though, the court ruled, even if the visit was interpreted as claimed by movant, some business was discussed. This, together with many phone and fax communications related to this matter sent by defendant to New York, warranted exercise of jurisdiction. This was purposeful activity. CPLR 302(a)(l). The court rejected movant's request for dismissal on forum non conveniens grounds as plaintiffs and many relevant facts were linked to New York. Motion denied. Solow v. Destefano, Index No. 605447/97, 11/15/99 (Cozier, J.)

Procedure; preliminary injunction; motion to vacate; renewal and reargument. Motions to vacate a preliminary injunction and to renew and reargue. The court found that respondent had failed to show that petitioner had not met its burden of proof to obtain injunctive relief or to establish that ineffective assistance of counsel constitutes a basis for vacatur of an injunction. The court held that reargument was untimely and that, in any event, the alleged new facts were not relevant and the court had not misapprehended any law or fact. The court had not misunderstood respondent's business plan. Nor was the injunction improper. Had it been, respondent would have succeeded in its efforts in the Appellate Division. Vacatur denied; the facts were in dispute and the injunction was needed until the truth could be established. The court enlarged its prior injunction in view of a press release regarding a reverse merger after the court had enjoined spinoffs, etc. Thomas Kernaghan & Co. v. Lifeone, Inc., Index No. 105748/98, 10/5/99 (Ramos, J.).

Procedure; preliminary injunction; papers in support. Shareholders derivative action alleging misuse of funds. On a motion for a preliminary injunction, the court found that plaintiff had failed to make a showing that he was a shareholder (BCL 626(b)). There was no affidavit by anyone with first-hand knowledge and the complaint was not verified. Even if verified, the bare allegations of the complaint fell short of showing a likelihood of success. Motion denied. Garcia v. Wolf, Index No. 114884/99, 10/18/99 (Ramos, J.).

Procedure; preliminary injunction; standards; non-profit organizations. Preliminary injunction application by non-profit organization against another such organization, a former affiliate, to prevent it from using service marks, membership and donor lists, etc. The court held that the papers before it did not permit it to weigh the merits of plaintiff's assertion of damage from defendant's acts. Defendant had retained its former internet domain name, which troubled the court, but it later surrendered the name. Also, plaintiff had admitted in reply that it had started a new local chapter and repaired its ability to provide local services. It was thus also more unclear whether plaintiff would succeed with its claims. The court found an absence of a showing of irreparable harm. The court also concluded that the balance of equities did not tip in plaintiff's favor since freezing defendant's funds, as requested, would hamper its ability to provide services, harming the public interest. Motion denied. Resolve, Inc. v. American Infertility Ass'n, Index No. 604617/99, 11/21/99 (Freedman, J.).

Procedure; reference; personal jurisdiction; authority to receive service (CPLR 311); statute of limitations; error or fraud in bank account statement; CPLR 306-b extension. Reference on service. A special referee's report will be confirmed whenever the findings are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility. The court found that the referee had properly accepted the process server's affidavit into evidence where due diligence was shown. The affidavit was, the court said, effectively rebutted by the defendant's president. The burden was on plaintiffs to establish jurisdiction, but the record showed they failed, the court

ruled. The proof showed that the recipient of the process was not authorized to receive it (CPLR 311(1)), nor had she had apparent authority. The referee's report was thus confirmed. The court ruled that the action was time barred prior to its commencement since plaintiff should have discovered the error in its account statement (UCC 4-406(4); CPLR 203(f), 213(8)). CPLR 306-b will not permit extension of the statute where it had expired prior to commencement. American Federal Group, Ltd. v. Union Chelsea National Bank, Index No. 122804/94, 11/29/99 (Shainswit, J.)

Procedure; reference; personal jurisdiction; occasional meetings; loan agreements; private placements; solicitation of business. Reference on personal jurisdiction. The court upheld the referee's report. The court agreed that, in this derivative action for waste and mismanagement, there were inadequate contacts (CPLR 302(a)(1)). Some meetings held in New York were unrelated to the claims in the case; loan agreements were also unrelated; and so was a private placement that had closed here. Nor, the court held, was there a basis for finding that the company was doing business in New York (CPLR 301). Solicitation of business does not suffice. Participation in six meetings here over four and one-half years was also inadequate. Designation of the Secretary of State pursuant to the Martin Act did not confer jurisdiction since that appointment was limited to Martin Act proceedings brought by the Attorney General. Report confirmed; case dismissed. Tusiani v. Motive Engineering Co., Index No. 602052/98, 11/29/99 (Shainswit, J.).

Procedure; reference; statute of limitations; estoppel. Interpleader action concerning rights in a collection of papers of a deceased theatrical figure. A special referee, to whom the matter had been referred on consent, reported that most of the papers were theater-related and thus belonged to the New York Public Library under the deceased's will and that the executor had misrepresented years before that the theater-related papers had been destroyed in a fire, leaving nothing for the Library to receive. The court noted that the findings of a referee should be confirmed where clearly supported by the record. The court found that the record contained factual support for the conclusions. The court held that the executor should be estopped from asserting the statute of limitations against the Library since the executor had misled it. Report confirmed; summary judgment for the Library. Gotham Book Mart & Gallery, Inc. v. New York Public Library, Index No. 606325/97, 12/15/99 (Cahn, J.).

Procedure; right to jury trial; waiver. Motion by plaintiff to strike jury demand. Plaintiff argued that defendant had waived a jury trial on plaintiff's claims by interposing an equitable counterclaim arising from the same transaction alleged by plaintiff. Plaintiff pointed to a counterclaim for rescission on grounds of fraud. The court noted conflicting Appellate Division authority on point. The court considered the most relevant First Department case, Hudson View, 222 A.D. 2d 163. The court said that that case rejected waiver where equitable defenses or legal counterclaims were involved but apparently held that assertion of an equitable counterclaim could result in waiver. As an equitable counterclaim had been asserted here, the court ruled, on the basis of that case, that defendants had waived their right. Alas International Ltd. v. Ramiz, Index No. 601817/97, 10/18/99 (Ramos, J.).

Procedure; statute of limitations; borrowing statute (CPLR 202); aiding and abetting breach of fiduciary duty and fraud and conversion, Defendants moved for summary judgment dismissing on statute of limitations grounds (CPLR 202; California law). The place of injury in a case of economic loss is where the plaintiff resides. Actions for fraud or breach of fiduciary duty accrue where the loss is suffered. Residence for a partnership is not determined by the residence of the partners, but the principal place of business of the partnership. That place in the relevant year was California, the court held. That the key partner resided in France was not pertinent. Any economic loss was felt in California, the court said, where the investment was paid for, where meetings concerning it had occurred, etc. The court rejected an argument that the subscription agreement for the limited partnership investment required application of New York law since the defendants, non-parties, were not bound thereby and the clause concerned the agreement itself, not tort claims. Summary judgment of dismissal granted. Proforma Partners, LP v. Skadden, Arps, Slate, Meagher & Flom LLP, Index No. 606048/97, 10/13 /99 (Cahn, J.); Proforma Partners, LP v. First Trust, NA, Index No. 113787/97, 10/13/99 (Cahn, J.).

Procedure; statute of limitations; construction work; discovery toll; continuous treatment; equitable estopped. Action for damages for costs of repair and replacement of roofs in townhome complex in 1989. Some units were covered by a common law housing merchant implied warranty, the court ruled, and not having been commenced within six years, were time barred. Units sold later were governed by a statutory warranty, GBL Art. 36-B. Under the statute, written notice was required to be served. Plaintiff failed to present proof that this has been done and the time to do so had expired. This would bar the action. A discovery toll (CPLR 203(g)) would not assist plaintiff. The court rejected a continuous treatment argument premised upon a relationship with a contractor. The court found no such continuing professional relationship. The fact that the president of the contractor was on the board did not create a relationship. The court stated that the president, as sponsor and board member, had had a very high fiduciary duty. However, he was off the board as of 1992, when the board had knowledge of the roof problems and a new contractor was hired to do repairs. For three years thereafter, plaintiff failed to take legal action. Thus, the court held, there was no equitable estoppel. The

court rejected an effort by plaintiff to allege fraud and misrepresentation so as to extend the statute. A negligence claim against an architect was held to be time barred. Complaint dismissed. Edgewood Estates Homeowners Assn. Mark IV Construction Co., Index No. 4420/1995, 12/15/99 (Stander, J.).

Real property; recording of mortgage assignments (RPL 291); secondary market; priority of rights. Agency; authority. Secondary mortgage. Plaintiff was assignee of a mortgage, which had already been assigned to others, who had been paid off at a refinancing. Plaintiff sought recovery of those proceeds. The defendants, the other assignees, urged that recording of their assignments prior to the purported assignment gave them priority. RPL 291. Plaintiffargued that its receipt of the original note effected a conveyance of an interest superior to that of the assignees and that, as a matter of public policy, as a secondary mortgage market purchaser, it should not have to conduct a title search on every mortgage. The court held that physical delivery of the original note is not mandatory so retention alone did not assist plaintiff. The court noted that this case, unlike one relied on by plaintiff, did not involve an assignment as collateral. Thus, the RPL, not UCC Art. 9, applied. The court rejected the policy argument as a matter for legislative action. Plaintiff also argued that the entity from which it had purchased the mortgage had been defendants' agent for collection of the monthly payments of the mortgagor so that plaintiff's payment had satisfied defendants' rights to receive payments. The full extent of the agent's authority was unclear. Summary judgment denied. Parmann Mortgage Associates v. Patterson, Index No. 18880/98, 11/8/99 (DiBlasi, J.).

Suretyship; indemnification by principals; overpayment by owner. The court held that sureties were entitled to summary judgment for indemnification against two principals of a defunct contractor. A surety makes out a prima facie case against an indemnitor by proof of the agreement and of payments pursuant thereto, here presented. The court found that the sureties were also entitled to attorney's fees, costs and disbursements as the agreement so provided, with the amount to be determined at a hearing. The defenses were conclusory and uncorroborated. In a second action the sureties sued the owner for overpaying the contractor and moved for summary judgment. A surety may avoid obligations under a bond to the extent it has been prejudiced by prepayment or overpayment by the owner. But this must have been done knowingly, collusively or in bad faith; assent to the modification bars the surety. The court found issues of fact. Indemnity Insurance Co. v. Alter Steel Window Corp., 113427/94, 10/27/99 (Cahn, J.).

Unjust enrichment; work preparatory to performance. Claim for restitution for improvements, services, etc. Plaintiff relied on Farash, 59 N.Y. 2d 500, which permitted recovery of fair and reasonable value of performance rendered in a case of part performance at a promisor's request. The court found this case to be different from Farash. The parties agreed that there had been no contract whereby defendant would be responsible for expenses. Unlike Farash, the court found, there had been no definitive representation by defendant that it would enter into the lease and improvements had not been made specifically and uniquely for defendant. There had been no loss of business opportunities or diversion of resources by plaintiff. The court held that the work was merely preparatory to performance. Summary judgment for defendant. Birnbaum v. Airborne Freight Corp., Index No. 5556/1998, 10/5/99 (Stander, J.)
