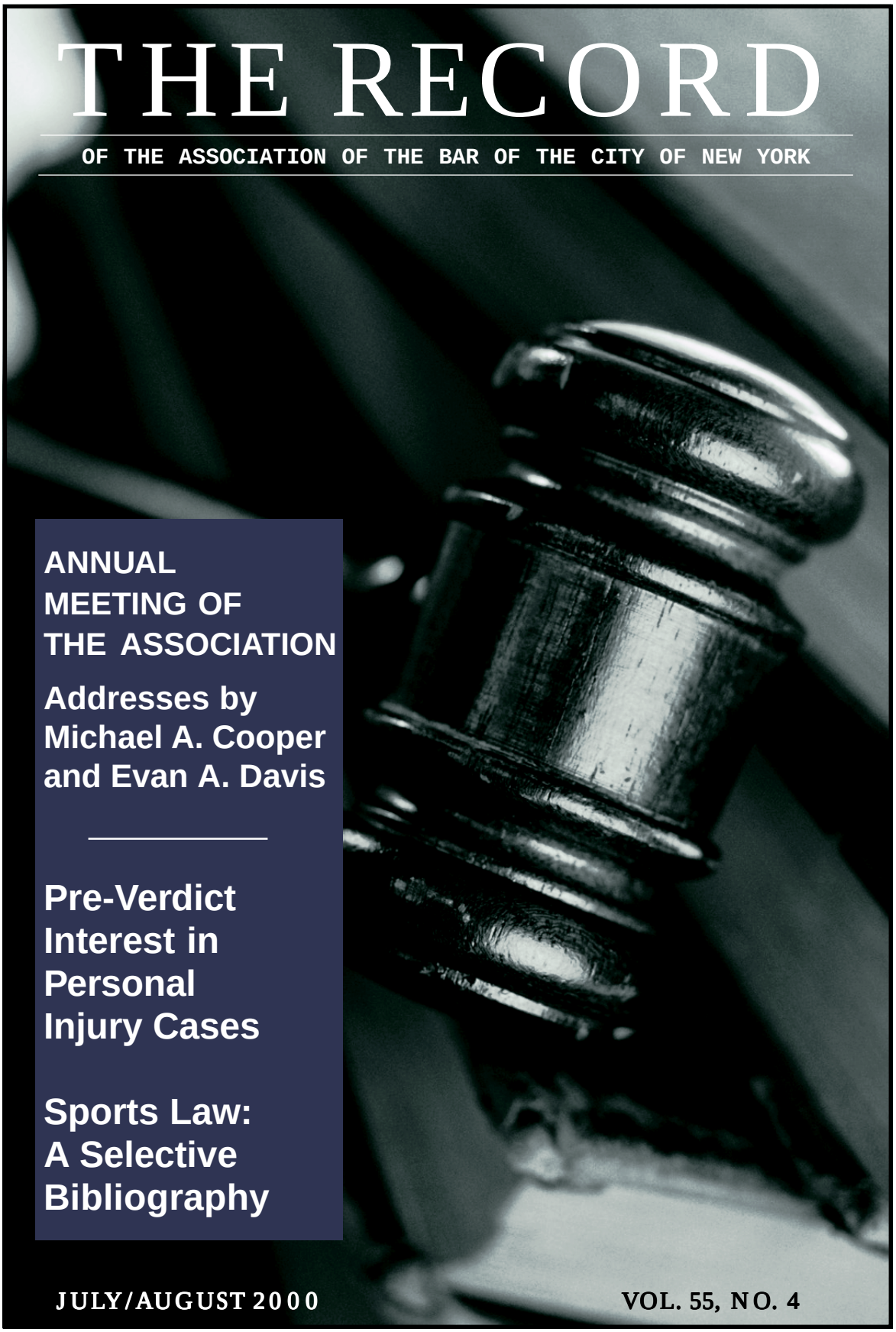
THE RECORD

OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK



ANNUAL MEETING OF THE ASSOCIATION

Addresses by Michael A. Cooper and Evan A. Davis

Pre-Verdict Interest in Personal Injury Cases

Sports Law: A Selective Bibliography

JULY/AUGUST 2000

VOL. 55, NO. 4

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Contents

OF NOTE 459

ANNUAL MEETING OF THE ASSOCIATION
FAREWELL ADDRESS *by Michael A. Cooper* 466

INAUGURAL ADDRESS *by Evan A. Davis* 475

Reports by the Committee on Professional and Judicial Ethics
FORMAL OPINION 2000-1:
PLANS TO SOLICIT BIDS BY LAWYERS TO PERFORM LEGAL SERVICES ON INTERNET WEBSITE 482

FORMAL OPINION 2000-2:
CHARGING INTEREST ON UNPAID LEGAL FEES 489

REPORT IN SUPPORT OF PRE-VERDICT INTEREST IN PERSONAL INJURY CASES
by The Council on Judicial Administration 496

THE FAILURE OF CIVIL DAMAGES CLAIMS TO MODIFY POLICE PRACTICES, AND RECOMMENDATIONS FOR CHANGE
by The Committee on New York City Affairs 533

TAXABILITY OF PAYMENTS MADE ON ACCOUNT OF EMPLOYMENT DISCRIMINATION CLAIMS
by The Committee on Labor and Employment Law 542

STATES' RIGHTS V. INTERNATIONAL TRADE: THE MASSACHUSETTS BURMA LAW
by The Committee on International Trade 553

NEW MEMBERS 572

A SELECTIVE BIBLIOGRAPHY: SPORTS LAW
by Ronald I. Mirvis and Eva S. Wolf 578

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Of Note

THE FOLLOWING CANDIDATES HAVE BEEN ELECTED TO THE VARIOUS Association offices and committees for 2000-2001.

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Mark G. Cunha
Beth L. Kaufman
Timothy G. Rogers

Members of the Committee on Audit
Susan Porter
Donald S. Bernstein
Patricia S. Skigen

❊

THE NOMINATING COMMITTEE FOR 2000-2001 CONSISTS OF: PAUL A. Crotty, Harvey J. Goldschmid, Victor Marrero, Kay Crawford Murray, Eleanor Jackson Piel, Bettina B. Plevan, and David G. Trager. The Executive Committee has elected Kathy Hellenbrand Rocklen Chair and Laurie Berke-Weiss Secretary of the Executive Committee for 2000-2001.

❊

THE ELEVENTH ANNUAL LEGAL SERVICES AWARDS WERE PRESENTED to honor attorneys who provide crucial civil legal assistance to New York's poor. Douglas S. Eakeley, Chairman of the Board of Directors of the Legal Services Corporation, presented the awards at a reception on May 11 at the Association.

This year's recipients are: Liberty Aldrich, Director, Victim Services Domestic Violence Law Project; Valerie Bogart, Staff Attorney, Legal Services for the Elderly; Magda I. Rosa Rios, Staff Attorney, Volunteer Division/Community Law Offices, The Legal Aid Society; Scott Rosenberg, Director of Litigation, Civil Appeals and Law Reform Unit, The Legal Aid Society; and Jonathan Twersky, Director, Housing Unit, Legal Services for New York City, Brooklyn Branch.

The awards, endowed by a generous contribution from the Horace W. Goldsmith Foundation, are administered by the Special Committee on the Legal Services Awards (John Kiernan, Chair).

❊

THE NINTH ANNUAL PRESENTATION OF THE HENRY L. STIMSON MEDAL to outstanding Assistant United States Attorneys in the Southern District and in the Eastern District of New York, was held on May 30 at the Association. Evan A. Davis, the Association's new President, presented the awards to: Sara L. Shudofsky Southern District/Civil Division; Ira M. Feinberg, Southern District/Criminal Division; Richard Weber, Eastern District/Civil Division; and Bernadette Miragliotta, Eastern District/Criminal Division.

The Stimson Medal, made possible by the firm of Winthrop, Stimson, Putnam and Roberts, honors Mr. Stimson, who served as United States Attorney for the Southern District from 1906-1909 during a career of distinguished public service.

The awards are sponsored by the Committee on the Stimson Medal (Stephen A. Weiner, Chair) and the Committee on Federal Courts (Guy M. Struve, Chair).

❊

THREE OUTSTANDING MINORITY STUDENTS AT NEW YORK AREA LAW schools have been awarded Thurgood Marshall Fellowships for the 2000-2001 academic year. These students will have the opportunity to work

with the Association to advance the goals of civil rights and equal justice. Fellowships were awarded to: Baaba K. Halm, Brooklyn Law School; Alice Eddie Backer, New York University School of Law; and Tina Matsuoka, Fordham University School of Law.

The fellowships are funded by the Orison S. Marden Lecture Fund and are open to second and third year minority law students from New York area law schools. Fellows were nominated by their schools and selected by the Association's Committee on the Thurgood Marshall Fellowship Program (Daniel Richman, Chair).

❊

HON. RICHARD T. ANDRIAS, SUPREME COURT APPELLATE DIVISION, First Department, presented the Association's annual Municipal Affairs Awards on June 21. The Awards are given to lawyers from the New York Law Department who have demonstrated outstanding performance. This year's recipients are Susan Choi-Hausman, Appeals Division; Brian Cody, Queens Torts Division; Rachel Goldman, Administrative Law Division; Joan Margiotta, Affirmative Litigation; Mark McIntyre, Environmental Law Division; and Jonathan Michaels, Bronx Torts Division.

The awards are sponsored by the Committee on New York City Affairs (Alan J. Rothstein, Chair).

❊

THE FOLLOWING NEW COMMITTEE CHAIRS AND DELEGATES HAVE RECENTLY BEEN APPOINTED for terms beginning September 1, 2000:

Howard M. Rogatnick (Administrative Law); Robert J. Gruendel (Admiralty Law); Wallace L. Ford II (African Affairs); Hayley J. Gorenberg (AIDS); Elizabeth Snow Stong (Alternative Dispute Resolution); Deborah Masucci (Arbitration); Donald S. Bernstein (Audit); Roger D. Wiegley (Banking Law); David N. Hoffman (Bioethical Issues); James E. Raved (Construction Law); Roy L. Reardon (Continuing Legal Education); Richard Davis (Council on Criminal Justice); Peter M. Kougasian (Delegation to the New York State Bar Association House of Delegates); John Doyle (Drugs and the Law); Sarah Barish-Straus (Energy); Joseph T. McLaughlin (Enhance Diversity in the Profession); Robert David Lippman (Entertainment); Robert C. Harris (Entertainment Law); Frederick Townsend Davis (European Affairs); Monica A. Drinane (Family Court and Family Law); Susan C. Ervin (Futures Regulation); Margaret S. Morton (Government Counsel);

Michael A. Cooper (Honors); Jean T. Schneider (Housing Court Public Service Projects); Cyrus D. Mehta (Immigration and Nationality Law); Richard Winfield (Independent States of the Former Soviet Union); Robert F. Van Lierop (Council on International Affairs); Philip Weinberg (International Environmental Law); Scott Horton (International Human Rights); Jane M. Spinak (Juvenile Justice); Deborah E. Collins (Labor and Employment Law); Fredrick A. Becker (Land Use Planning and Zoning); Joanne Simon (Legal Issues Affecting People with Disabilities); Mariann Sullivan (Legal Issues Pertaining to Animals); John S. Kiernan (Legal Services Awards); Eric C. Rosenbaum and Aubrey Lees (Lesbian and Gay Rights); Antonia Grumbach (Library); Thomas McGanney (Orison S. Marden Memorial Lectures); Jesse S. Waldinger (Medical Malpractice); Keri K. Gould (Mental Health Law); Harvey J. Goldschmid (Nominating); James H. R. Windels (Pro Bono and Legal Services); Charles Merrill Nathan (Securities Regulation); Stephen J. Friedman (Senior Lawyers); Jeremy M. Creelan (State Legislation); Owen D. Kurtin (Telecommunications Law); Daniel C. Richman (Thurgood Marshall Fellowship Program); Bret I. Parker (Trademarks and Unfair Competition); Robert Bergen (Transportation); and Mal L. Barasch (Trusts, Estates and Surrogate's Courts).

Recent Committee Reports

Art Law
Letter re: S. 1696, The Cultural Property Procedural Reform Act

Letter to Governor Pataki re: An Act to Amend the Arts and Cultural Affairs Law in Relation to Subpoenas Duces Tecum for Works of Art (Assembly Bill A. 9075)

Condemnation and Tax Certiorari
Report on Legislation (S. 5457) which Would Restrict the Right to Judicial Review of Real Property Tax Assessments

Commencement of Judicial Proceedings to Review Final Assessed Valuations in the City of New York: The Need to Reform the Process of Purchasing Index Numbers

Cooperative and Condominium Law
Commentary on the Model Form of Alteration Agreement for Residential Cooperatives

Corrections/Criminal Law
Memorandum in Support of Meaningful Drug Law Reform

Council on Judicial Administration
Letter re: Proposed Uniform Rules for New York County Supreme Court Justices

Letter to Senator Lack and Assembly Member Weinstein Re: Assembly Bill 10420—Housing Court Judges' Salaries

Report in Support of Pre-Verdict Interest in Personal Injury Cases

Environmental Law
Legislation to Promote Environmentally Sound "Green Buildings"

Ethics 2000
Comments on Amendments to Model Rules 1.2, 1.4, 1.11, 1.12, 2.x, 2.3,

3.1, 3.4, 3.5, 3.7, 3.8, 3.9, 5.5, 6.3, 6.5, and 8.5, Proposed by the ABA Ethics 2000 Commission

Federal Courts
Letter to US District Court Re: Use of Masters

Futures Regulation
Letter to Commodity Futures Trading Commission re: Proposed Amendments to Rule 4.7

Health Law
Report on A. 1400-A—Accountability of Health Care Organizations

Report on Proposed Insurance Regulation No. 164—Reserve Requirements for Health Care Providers

Immigration and Nationality Law
Letter Re: Religious Services and Language Classes for Asylum Seekers

International Environmental Law
China: An Environmental Snapshot

International Human Rights
Letter to The Supreme Court of the Republic of Angola re: Rafael Marques and Aguiar Dos Santos

Legal Issues Affecting People with Disabilities
Letter re: Opposition to H.R. 3590, the "ADA Notification Act"

Lesbian and Gay Rights
Letter to OCA Re: Hate Letter Distributed in Bronx Criminal Court

Mental Health Law
Letter to the Editor Re: The Andrew Goldstein Case

An Act to Amend the Mental Hygiene Law, in Relation to the Discharge of Patients to the Community from Hospitals Licensed by the Office of Mental Health

Multidisciplinary Practice
Comments on Independence Standards Board Discussion Memorandum (DM 99-4)

Non-Profit Organizations

Comments on the IRS Proposed Rules (REG–209601-92) on the Tax Treatment of Sponsorship Payments Received by Exempt Organizations

President

Amicus Brief in Support of Standing of NYCLA to Challenge 18-b Rates (New York County Lawyers' Association v. Governor George E. Pataki)

Securities Regulation

Letter to the Securities and Exchange Commission Re: File S7-31-99, Proposed Rules 10b5-1 and 10b5-2

Trusts, Estates and Surrogate's Courts

An Act to Amend the Estates, Powers, and Trusts Law, in relation to Granting Fiduciaries a Limited Power to Amend Trusts in Order to Effectuate Qualified Reformations for Specific Tax Purposes (S.3393-A/A.7265-A)

Copies of any of the above reports are available to members by calling (212) 382-6658, or by e-mail, at skumara@abcny.org.

Farewell Address

Annual Meeting of the Association

Michael A. Cooper

The Annual Meeting of the Association was held on May 23, 2000.

When our Association Forebearers established many years ago the custom that the President should presumptively serve two consecutive one-year terms, they acted wisely but cruelly. They were wise because they could foretell that the activities of the Association would become so protean and far-ranging that it would take a President the better part of a year to learn how to bring them under rein. They were cruel because the professional and personal satisfactions of serving as President of this magnificent institution are so great and enduring that it becomes harder with each year to relinquish the office. Indeed, for a fleeting moment recently I considered a sit-in, but being forcibly carried out the door (as Montgomery Ward's Chairman was carried out of his office by soldiers during World War II) would have been an affront to the Association, as well as a personal indignity.

And so I step down after two years, years that have given me great rewards but also posed great challenges. Make no mistake: the legal profession today faces enormous and daunting challenges from both within and without. What are they, and what is the Association doing in response to them?

Let me start with the challenges from within. There is a malaise, a sense of disaffection, in the profession that is so pervasive that lawyers are leaving the practice of law in large numbers. Some, young and old, are leaving enticed by the prospect of accumulating great wealth in the dot.com world. Others are taking early retirement, because the prospect of travel, leisure and spending more time with one's family "sure beats the practice of law," as one of my law school classmates recently wrote in our reunion report. Still others are leaving the law for different careers that will, they hope, bring them satisfactions they have not derived from being a lawyer.

What can the Association do to stem this tide? We obviously cannot increase the monetary rewards of practicing law. Those tangible rewards are, in any event, already more than adequate. We can and do offer the intellectual stimulation of committee service, the collegiality of joining with other lawyers in a common pursuit, and the opportunity to hear splendid speakers and attend informative and interesting programs.

We can and do offer senior lawyers the opportunity to serve on, and to chair, important committees of the Association, as well as the opportunity to share their skills and experience with public interest organizations to which they are introduced by our Public Service Network.

We can and do assist lawyers of all ages and in all professional settings in maintaining their skills, keeping abreast of developments in their respective areas of practice and complying with court-imposed continuing legal education requirements. The Association is offering CLE programs in ever-increasing numbers. As evidence of the Association's commitment to this service to its members, just this month we have opened a new 130-seat CLE Training Center with state-of-the-art equipment enabling instructors to use a variety of media in their presentations and making it possible to produce high quality audio and video tapes for sale to lawyers who prefer to satisfy their CLE requirements in their offices or at home. (At the conclusion of this meeting, you are invited on your way to the reception to view the CLE Training Center; it is located in the Bar Building next door and can be accessed through the doorway right outside this Meeting Hall.)

Three years ago we created a special committee to examine the array

of issues, sometimes referred to collectively as "quality of life," that are troubling so many young and not so young lawyers these days. Those issues include overwork, inequitable work distribution, inadequate training, insufficient feedback and impersonal workplace relationships. A senior partner at a large New York City firm told me recently that he plans to take early retirement at the end of the year because he can no longer abide the discussion at partners' meetings as to how more work can be squeezed out of associates. The legal press has reported that some law firms are conditioning all or part of their associate bonuses on the number of billable hours recorded by the associates. It is antithetical to the very concept of a profession for a law firm to view its associates as assembly-line workers. How foreign that approach is from Roscoe Pound's definition of a "profession" as a group of individuals "pursuing a learned art as a common calling in the spirit of a public service" "no less a public service because they may make a livelihood thereby."

The Quality of Life Task Force has interviewed many law firm associates and will shortly issue a report containing specific recommendations for improving the workplace and lifestyle of lawyers. Additionally, the Committee on Recruitment and Retention of Lawyers, assisted by Arthur Andersen, is midway through a four-year survey of law firm associates and is preparing to issue an interim report summarizing the survey results. Finally, the Association in January convened a well-attended conference on mentoring and has sponsored the publication of a guide to mentoring.

There is another challenge from within the profession, one that we have met during the past two years. The quickening pace and increasing competitive pressures of law practice place lawyers under great stress, which a sadly large number seek to alleviate by resort to alcohol and drugs. Until last year there was no trained counselor connected with the profession in New York City to whom an alcoholic or substance-abusing lawyer could turn. In May of last year we established a Lawyer Assistance Program staffed by a certified alcoholism and substance abuse counselor, Eileen Travis. Although the existence of the program is not yet widely known, Eileen has already received nearly 1,000 calls and 73 referrals, and she is monitoring four lawyers at the request of the Departmental Disciplinary Committee. Please help us spread the word to lawyers, judges and the community at large about the availability and benefits of the Lawyer Assistance Program.

As the law becomes more complex and technology becomes increasingly important to law office management, efficient communication and

research, sole practitioners and lawyers in small firms, who comprise nearly 30% of our membership, are facing obstacles they cannot surmount as easily as their colleagues in larger organizations. To respond to the needs of this cohort of the profession, we have recently opened a Small Law Firm Center, with an experienced, full-time Director, Carol Seelig. The Center is still a work in progress, and I cannot enumerate all of the services it will provide, but they will include information on technology hardware and software, a separate reference library, specially tailored CLE programs and networking opportunities.

The last internal challenge to our profession I wish to discuss is the challenge to promote diversity within our ranks. We must increase the number of minority lawyers and assist them in attaining leadership positions in their firms and in the profession. In the June issue of 44th Street Notes I have described the Association's initiatives in this area. They are many and encompass (i) programs designed to encourage minority youth to consider the law as a career; (ii) programs for minority law students, (iii) a statement of goals for the recruitment, retention and promotion of minority lawyers, and (iv) outreach to, and collaboration with, minority bar associations. This Association is proud to be one of seven participating in a working group called Lawyers for One America, which was created in response to a Call to Action from President Clinton to promote diversity in the profession.

We must also keep in mind that diversity encompasses more than racial pluralism and includes such differentiating characteristics as gender, sexual preference and physical disabilities. And so we must continue our efforts, so far only partially successful, to elevate the corps of women lawyers to the highest ranks of our profession, and to be more supportive of lesbian and gay lawyers and lawyers with disabilities. The Executive Committee reaffirmed the Association's commitment to diversity in this broader sense in a Statement of Policy adopted just last month.

Let me turn now to the external challenges facing the legal profession. In the interest of brevity, I will confine my remarks to the two I view as the most important today: multidisciplinary practice (or "MDP" as it is commonly called) and the unmet legal needs of the poor.

When I took office in May 1998, MDP was a blip on the radar screen in the United States; it is now the single most controversial subject confronting the bar. MDP is troubling for two very different reasons. First, the prospect of organizations that include lawyers and other professionals undeniably poses risks to bedrock values of our profession: independent judgment, confidentiality and loyalty. But MDP is also troubling

because of the tone and tenor of much of the current debate over the subject. There has been, in my view, too much circling of the wagons, too many protestations of professional virtue that happily coincides with the protesters' economic self-interest, and too little dispassionate consideration of the complexities of the subject and the paramount objective of seeking a solution that is in the interests of the client community. This Association has issued a Statement of Position pointing toward such a solution and will, I'm confident, continue on that path.

The other external challenge, as I've said, is meeting the legal needs of the poor. We live in a society that will not yet accord to the poor in civil matters the right to counsel that we acknowledge in the arena of criminal law. We may someday have a "civil Gideon"; we do not today. Government at every level has been penurious and mean-spirited in its support of legal services to the poor. That is understandable, for the poor are not a powerful political constituency, but it is not acceptable in a society that wishes to be thought civilized. The private Bar has been relatively generous both financially and in its contribution of volunteer services, but we must realistically acknowledge that the Bar cannot entirely fill the gap, particularly at a time when the needs of paying clients are so demanding. Again, you may ask: What is the Association doing to address this enormous social problem? The answer is: A great deal.

Under the inspiring leadership of Maria Imperial, the City Bar Fund has been expanding a number of its current programs such as the refugee assistance project and the SHIELD program and embarking on new initiatives, including (i) a Women and Children Self-Sufficiency Project, which advises impoverished women about day care rights, benefits issues and domestic violence, (ii) Project R.I.S.E., an acronym for "Remaining Independent and Self-Sufficient Elders," which helps the elderly with benefits such as medicare, medicaid and social security, and (iii) a Contested Divorce Clinic, staffed by more than 50 experienced matrimonial law practitioners.

The City Bar Fund has this year sponsored two landmark conferences: the very first citywide legal services conference and, more recently, a three-day conference, entitled Partnerships Across Borders: A Global Forum on Access to Justice, which brought together representatives from 20 countries to discuss different models for providing civil legal services and the barriers to access to those services around the globe.

The depth of our commitment to the City Bar Fund programs is reflected in our decision to bring its staff, which had been scattered throughout this building, together in a suite of attractive and efficiently laid out new

offices in the Bar Building adjacent to the CLE Training Center. I invite you to view those offices before or during the reception following this meeting.

All of this is well and good, you may be thinking, but what of the traditional activities of the Association: preparing informative and persuasive committee reports, pursuing legislative initiatives and presenting significant programs and lectures? Has the Association ignored these activities in its zeal to meet the challenges I've mentioned? Not at all.

The committees of the Association have continued to generate cogently reasoned reports on the significant legal and policy issues of the day. To give but a few examples, the Committee on Federal Legislation, while maintaining the Association's historic political neutrality, authored a report on alternatives to removal from office for arguably impeachable conduct; the report was cited during the congressional debate on impeachment last year. The Committee on Securities Regulation issued substantial reports on forward-looking statements in securities filings and on the Securities and Exchange Commission's so-called "aircraft carrier" release. And the Committee on Military Affairs and Justice issued a report on the involvement of children in armed conflict, which we have reason to believe played a role in persuading the Secretary of Defense to reverse existing policy and join the international community in condemning the deployment of 17-year-olds in military combat.

When an issue has arisen that did not neatly fall within the jurisdiction of an existing committee or was of a magnitude that would have unduly taxed a single committee's resources, we have created commissions or task forces the name matters little to explore the issue and publish a report. Two notable examples are (i) the Special Committee on the Future of the City University of New York, which issued in the space of six months two reports on remediation, finances and governance at CUNY, and (ii) the Commission on Campaign Finance Reform, which has issued a soon-to-be-published report containing a detailed set of interrelated recommendations to fix a regulatory scheme that virtually everyone concedes is a failure.

In one area of campaign finance, the Association achieved a significant reform after three years of sustained effort. I refer to the ethically corrosive practice called "pay-to-play," contributions by lawyers to political candidates in order to secure government legal work or to judges in order to secure guardianships or similar judicial appointments. Under Michael Cardozo's leadership this Association put pay-to-play on the American Bar Association's agenda three years ago. This February, the ABA House of

Delegates finally adopted a new Model Rule of Professional Conduct (Rule 7.6) condemning the practice. Closer to home, the Administrative Board issued an order providing that pay-to-play is barred by the New York Code of Professional Responsibility, as interpreted by two recent Ethical Considerations adopted by the State Bar.

Belying its parochial name, the Association has for decades concerned itself with international affairs. During the past two years, the Association issued two significant reports on international human rights issues. We sent a mission to Northern Ireland to explore the human rights issues implicated in the so-called "Good Friday" accord between the warring Roman Catholic and Protestant communities. A separate mission traveled to Hong Kong to consider the consequences for the rule of law of the handover of Hong Kong to the People's Republic of China. January saw a remarkable and historic event at the House of the Association: the United States Senate Foreign Relations Committee convened a hearing here on the United States' relationship with the United Nations.

The past two years have also seen towering figures in the law cross the Association's portals. We conferred honorary membership on Chief Justice William H. Rehnquist and on former Senator George Mitchell, who brokered the Northern Ireland peace accord. Cardozo lectures were given by Justice Ruth Bader Ginsburg (a former member of the Association's Executive Committee) and Anthony Lewis, perhaps the most perceptive non-lawyer commentator of our time on legal issues. And in a lighter vein, Justice Antonin Scalia permitted us to poke gentle fun at him in the Association's biennial Twelfth Night show.

What I have described thus far has been visible. There have also been significant invisible changes in the Association. Most notably, we have installed new software systems for our membership and committee activities and for our accounting and related financial functions. And, while I am touching on technology, thanks to Robin Gorsline's careful planning we navigated the Y2K transition without incident.

Much of what I have described was made possible by a superb staff of approximately 150 capable and committed individuals. I have already thanked them both privately and publicly in my final 44th Street Notes column, but I wish to do so one last time. They are led by Barbara Berger Opotowsky, who embodies a perfect blend of organizational and management skills, inexhaustible energy, judgment, tact and good humor. Alan Rothstein, who bears the title of General Counsel, is that and so much more. I still cannot fathom how he manages to coordinate, stimulate and sometimes restrain our more than 170 committees so effectively. I have also been

blessed by collaboration with a dedicated and capable Executive Committee, ably chaired last year by Richard Cashman and this year by Carol Sherman. Time does not permit me to name the members of the Executive Committee or the staff, but I do ask you to join me in applauding them.

The staff has been wonderfully supportive of me, and I know that they will be equally supportive of your new President, Evan Davis. The Nominating Committee chose wisely in selecting Evan as President, but it cannot have been that difficult a choice, for Evan has served the Association so well over the years (including chairing the Executive Committee) and has devoted himself to public service in so many capacities and with such distinction that he is a "natural" for the position he now assumes.

At this point some of you may be recalling my opening remark about contemplating a sit-in, and you may be thinking that I have traded that strategy for a filibuster. Do not despair; I will end shortly.

It took me eighteen months before I was able to articulate why serving as President of this Association has meant so much to me. This January I was reading some background materials on Anthony Lewis's guest at the Cardozo Lecture, a South African (and more recently English) barrister named Sydney Kentridge. He may be unknown to many of you, but he is truly a giant at the Bar of both those countries. He represented South African dissidents, opponents of apartheid, at a time when doing so took both moral and physical courage. When he moved to England, he represented the Bar in suing the Lord Chancellor over legal aid fees that had not been upgraded for several years. When Sydney Kentridge was honored by the UK Bar Conference last year, Lord Alexander, another preeminent barrister, said that Kentridge had demonstrated, and I quote, a "commitment to Francis Bacon's great but sometimes forgotten axiom that 'every man is a debtor to his profession'."

That axiom resonated with me, for I share the conviction that every man—and four centuries after Bacon we may say every woman—is a debtor to his or her profession. Nor is that our only debt. Looking back near the end of his magnificent life, Whitney North Seymour said: "I've tried to recognize that one owes the community a debt...."

I do not know whether those two debts to the profession and to the community can ever be fully paid off. I doubt it. But they must be paid down. With the unstinting and loving support of my wife, Nan, with the generous encouragement of my colleagues at Sullivan & Cromwell, and with the selfless and committed assistance of innumerable Association committee chairs and members and a dedicated staff, I have been per-

mitted these past two years to make a partial payment of my debts to the profession and the community in the most satisfying and enriching way I could ever imagine. I am deeply, deeply grateful to you for that opportunity.

And now I give you your President, Evan A. Davis.

Inaugural Address

Annual Meeting of the Association

Evan A. Davis

Thank you Michael.

Thank you for being such an outstanding President and for handing the Association over in truly excellent health. Our wonderful Association is even more beloved after your tenure than before, and I credit this to your character and to the skill with which you have executed your office. To you also goes special credit not just for preserving the core mission of the Association—excellence in the service of the public and the profession–but for championing and extending that mission.

Tonight I want to talk about how I plan to build on what you and our predecessors have accomplished.

I recently reread that excellent history of the first hundred years of the Association, *Causes and Conflicts*, by George Martin. I find it a real page-turner. Martin teaches us that the Association was founded with both public service and member service in mind. The Association's initial public service work was a campaign to drive corrupt lawyers out of the profession, corrupt judges off the bench and corrupt politicians out of office. The major goal in the member services category was to found a great law library.

As Martin describes it, founding a library was civilized work but

fighting corruption was dangerous. The founders first met in secret. One of their number was nearly beaten to death because of his involvement in the cause.

The Association has been extraordinarily successful in helping to achieve its initial public and member service goals. The kind of professional, judicial and political corruption that the Association was established to fight has been brought under a good degree of law enforcement control. Today the courts devote substantial attention to enforcing ethics rules and truly corrupt attorneys stand a good chance of being both disbarred and convicted.

The bribe taking judge and the kickback taking politician have also become an endangered species. In New York, federal, state and local law enforcement resources have been deployed in substantial ways to detect and prosecute official corruption. They do their job well. Recently the Chief Judge has responded to evidence of improper linkage in Brooklyn between partisan politics and fiduciary appointments by appointing the commission chaired by Sheila Birnbaum. We need to help the commission and be ready to evaluate its work on completion. The quickness and appropriateness of the Chief Judge's response, however, shows how far we have come since the Association was founded.

As for the great law library, for a long time the Association has had one of the world's greatest. What has changed recently with modern technology is the way in which the books in that library are used, or not used, by our members.

George Martin's book also makes clear that more recently the Association has worked hard to shed one bad aspect of its founding ethos—its exclusiveness. That part of the Association's past is so notorious that on the first of this month the Chief Judge made pointed reference to it in her law day speech. Our founders hoped no doubt that the Association would be a vehicle to identify those members of the profession who lived by high professional standards. In practice, the idea of exclusiveness was a bad idea that only gave vent to the human tendency to find a proclivity for high standards in people like oneself.

Leo Gottlieb, one of the founding partners of my own firm, wrote that he decided early on in a legal career that began in 1920 to devote his major efforts in the bar association field to the New York County Lawyers' Association which he felt had special importance to solo practitioners and members of small firms. He was reflecting a widespread belief that this was a need not being met by the Association. And while Leo Gottlieb was much too tactful to say it, the effort to be exclusive, to be

supposedly superior, leads necessarily to an opening for the corrosive effect of racial, ethnic, gender, religious and other prejudices.

Prejudice remains a harmful force in our society, but I am pleased to be able to say that the Association is now an aggressively inclusive organization and a leader in devising ways to mitigate the effects of prejudice both in the profession and in society. We unreservedly support effective efforts to enhance diversity in the places of power where critical judgments are made. We know from our own experience in the work of the Association that there are many, many people whose qualifications to make those critical judgment are clear, whose inclusion would enhance diversity and whose exclusion is harmful to public confidence in the fairness of our society.

All that being said, when I look back on the Association's successes, I see mostly a major job still to be done. Fortunately, I see at the same time an organization uniquely well-suited to help get that job done. We are uniquely well-suited not only because of the impressive and diverse legal talent we can marshal but also because undertaking that work is the very essence of what we are about.

People often identify the core values of the legal profession as competence, confidentiality, independence of professional judgment and loyalty to clients. These are important principles in so far as client services are concerned. Without them clients will not get reliable legal advice. In my judgment, however, these principles do not address what should be the core value of the profession, and what is in fact the core value of the Association, in so far as the role of lawyers in society is concerned.

What the Association has helped me understand is that there is more to being a lawyer than providing legal services to paying clients. My work in the Association has taught me that lawyers are not cogs in a legal system the soundness and fairness of which they are bound to assume. Rather lawyers are custodians of the rule of law. As lawyers, they have a right to be heard in the public interest on any matter affecting the soundness of the laws or the process by which those laws are made and enforced.

Lawyers have a right to be heard because it is in the public interest that we be heard. We have the expertise, we have the knowledge, we have the experience that are needed to maintain and perfect the rule of law in a just society.

Lawyers also have an obligation to become informed and to speak out about what we have learned. Lawyers are fiduciaries. They owe to their clients the fiduciary duties of diligence, candor and loyalty. But it is also in the public interest that they be fiduciaries of the justice system.

That they are fiduciaries in this sense is what I understand to be implicit in the principle that all lawyers are officers of the court and that all are bound to uphold the rule of law established by our constitution.

In my opinion, one of the essential, and traditional, missions of The Association of the Bar of the City of New York is being a vehicle to help its members fulfill their obligations as fiduciaries of the justice system. We do this in our pro bono work, in our law reform work and in our efforts to improve the administration of justice and ensure the election or appointment of well qualified judges. In the judgment of many, we do it better than any other bar organization in the nation.

Therefore, and as I believe is traditional, as I plan for my term as President of the Association, I have focused first on maintaining and developing the relevance and quality of the traditional activities of our committees and, second, on selecting a few subjects about which the Association should be speaking with special force at this time. I have already mentioned one: the public interest in seeking to compensate for the effects of prejudice by promoting diversity. Let me raise two others that I believe need our institutional attention and legal skills.

The Association has not always had a happy relationship with state government in Albany. When in 1871 the legislature passed a special act to create the Association, it marred the act with a graffiti-like provision related to the Erie railroad litigation. From my time in Abany, I know that many members of the legislature view the Association as a particularly high-handed and elitist "goo goo organization." (Most of you know, I think, that in Albany-speak, "goo goo" is a pejorative phrase meaning good government.)

Despite these handicaps to our effectiveness in Albany, I do not believe that the Association can remain true to its mission and not take a close look at the question whether our governance system in Albany is broken and, if it is broken, then ask the sixty-four million dollar question: What is to be done? I can tell you from experience that that system is highly focused on majority party control in each House and is very vulnerable to breakdowns in the personal relationships between the "three men in a room" who run it.

The process is also awash in campaign contributions. Lobbyists spend their evenings going from hotel room to hotel room delivering their clients' campaign contributions at fundraising receptions. In a "give-to-get" environment, the three men in a room have the kind of power that attracts to them and the campaign committees they control truly massive amounts of money.

Much more law is made by the Albany law-making process than is made by judges perfecting New York common law. An Association committed to the soundness of the law must care about the soundness of the Albany law-making process.

For example, it is highly likely that the poor functioning of the legislative and budgetary process is responsible for the State's failure to increase 18b fees. 18b fees, as most of you know, are the $25 per hour out of court and $40 per hour in court fees the State pays to lawyers representing indigent criminal defendants and indigent victims of domestic violence.

Everyone in Albany agrees that these fees urgently need to be increased. The only difficulty is the decision whether the fee increase should be paid for by the State or by local governments. Because the problem is politically difficult, there is a desire to avoid deciding it. The current process in Albany makes this avoidance easy and attaches no accountability for failing to have made a difficult decision.

The same point can be made about the inability of Albany to achieve the urgently needed court restructuring that will eliminate the need for litigants to shuffle form court to court in a single matter. The merits of the proposal are not difficult; what is difficult is the partisan politics arising from the impact of court reform on political patronage. Again, the current system makes it easy to avoid confronting and resolving these political difficulties and assures that no one, except perhaps the Governor, can be held accountable for the failure to act.

The defenders of the current process in Albany say that while the "three men in a room" system stops good bills, more importantly it also stops bad bills. The merit of this argument is, however, most unclear to me. For example, to my mind the "the system works" argument is seriously undercut by the passage of a bill repealing the New York City commuter tax because the speaker thought it would help the Democrats win a legislative election in Rockland County. Such short-term, highly partisan and speculative political considerations would play a lesser role in a legislative process with more diffused decision making.

I will ask the Association's Executive Committee to approve the creation of a special committee to study the Albany law-making process, and other aspects of State governance, and to make recommendations. If the request is approved, I will make the work of this special committee a top priority for the Association.

The other issue that the Association needs to study is how to ensure that *pro bono* work by lawyers in private firms does not become a victim to the increasing demands being placed on these lawyers for productivity,

billable hours, client development, training of juniors and recruiting.

It has for some time been the position of the Association that the obligation of a lawyer to render *pro bono* service is effectively mandatory under current rules, in the sense of being a duty and not just an aspiration. This is the case even though a lawyer will not be sanctioned for failing to meet that obligation. In this context, it was also our belief that *pro bono* work should be defined broadly. While representation of the indigent is *primus inter pares*, a lawyer is also providing *pro bono* legal services when he or she helps to reform the law, improve the administration of justice, insure well qualified judges, promote the integrity of the profession or provide law related education to our youth and to the general public.

A key function of the Association over the years has been to help our members in the logistics of discharging these *pro bono* obligations. We have founded organizations like New York Lawyers for the Public Interest and Volunteers of Legal Service that act as a clearing houses and training and supervision providers. More recently, the McKay Community Outreach Law Program and the City Bar Fund have been implementing innovative programs to meet the most pressing legal needs of New Yorkers.

Our job now, given the current pressures, is to help our members, and for that matter all lawyers, have a work environment that actually accommodates their obligation to do *pro bono* work. An environment where the work demands leave no room for *pro bono* work is not such an environment. The same is true of a work environment where *pro bono* work is allowed but is perceived as disadvantageous from the point of view of advancement or where the practical choice is between doing *pro bono* work and billing enough hours to secure a bonus. The best environment is obviously one where pro bono work is encouraged and is perceived as contributing to professional development and promotion.

How the Association should go about encouraging a supportive environment for *pro bono* in the different settings in which lawyers work is not yet clear. I have asked our Standing Committee on Pro Bono and Legal Services, whose incoming Chair is Jim Windels, to make recommendations. I promise you that this is something I will pursue vigorously.

As I mentioned at the outset, the Association was founded with both public service and member service in mind. Under Michael's leadership the Association has made a giant leap forward by establishing the Small Law Firm Center. The role of the small law firm is likely to grow in the years ahead. Technology will make it possible for small law firms to do things that before could only be done by large law firms. Large law firms,

on the other hand, find it difficult not to become larger and larger. Those who want something else will help support the growth of small firms.

The Association has approximately twenty-one thousand members. Our resident members constitute about thirty percent of the lawyers whose attorney registration forms show that they practice in New York City. This percentage has remained relatively constant over recent years.

I plan to make it a priority to increase this percentage. Each percentage point is about 700 lawyers. Without letting up on any of our current membership expansion efforts, I have asked our membership Committee chaired by Lisa Sotto to investigate the feasibility of a multi-year membership campaign with a specific goal. In connection with that study we will review our current fee structure with an eye to increasing our membership and maintaining our financial stability. We will also look for ways to make membership more attractive by increasing the opportunity for members actively to participate in the life of the Association.

Technology obviously expands to some extent our ability to do this. There was a time when the Association routinely submitted reports for consideration by the full membership. This practice was abandoned because turnout at membership meetings was too low and the membership too large to clearly ascertain the membership's views. There will come a time when internet access is sufficiently universal to make it reasonable to submit certain reports for a membership discussion over the internet. In the meantime, we need to make the continued development of our website a critical priority to support our members, our work and our effectiveness.

In closing I want to tell you how honored I am to have been chosen to lead this remarkable and truly outstanding organization. As I have said, the Association has done the most to teach me what it means to be a lawyer and the potential that the lawyer has uniquely to make a difference in moving our society to a higher plane of justice. In the short time that I have I will do my best to help the Association make further progress.

It is you, however, who will be the true cause of whatever success the Association may have. Your willingness to give time and effort to committee work, your participation in our programs, your help in advocating the reforms we espouse, your help in recruiting new members, your personal commitment to the idea that being a lawyer involves more than serving paying clients, all these are what will make the difference.

Thank you.

Formal Opinion 2000-1

Plans to Solicit Bids by Lawyers to Perform Legal Services on Internet Website

The Committee on Professional and Judicial Ethics

Topic: Plan to solicit bids by lawyers to perform legal services on internet website; advertising, solicitation, and participation in a referral plan; duties with regard to advertising fees, client confidentiality, unauthorized practice of law, and conflicts of interest.

Digest: Lawyers may respond to an invitation to bid on legal projects through an internet website where client's invitation is not initiated by lawyer, where only the client is charged a fee, no legal fees are shared with the service provider, and responding lawyers are not pre-screened, approved, or otherwise regulated by the plan.

Code: DR 2-101; DR 2-103; EC 2-15; DR 3-101(B); DR 4-101(B); DR 5-105 (E); DR 5-107(B).

QUESTION

May a lawyer ethically respond to an invitation to submit bids for legal projects over the internet sponsored by a profit-making business (the "Provider") that would facilitate the posting by potential clients of legal projects on the company's website? An attorney wishing to provide legal services for a project would submit a profile, including the attorney's experience in the subject matter of the representation, the estimated date of completion and the legal fees to be charged. Under this arrangement, the only fee charged would be imposed on the clients, who would be charged for obtaining access to this information. The participating attorneys would not be assessed a fee, share any legal fees with the Provider, or be prescreened, approved, or otherwise regulated or controlled by the Provider.

OPINION

Introduction

A growing aspect of the "information revolution" is ready access to information about professional services, including lawyers and law firms. The internet has become part of this revolution. As a result, consumers of legal services can now obtain more information to assist them in choosing an attorney without having to rely on a word-of-mouth referral or the yellow pages. Plans like the one that is the subject of this opinion are proliferating on the internet. Accordingly, we take this opportunity to consider the ethics issues raised by an attorney's participation in the proposed enterprise.

The Proposed Plan

A business has created an "international attorney comparison" website that would allow potential clients to post legal projects on the website. Attorneys interested in providing legal representation in connection with a posted project are invited to submit profiles. The attorney profile would include the attorney's qualifications, the date on which the attorney expects to complete the project and the attorney's proposed fee for the project. The potential client could use the attorney profiles received to compare responding attorneys and their respective proposals and assist in deciding whether to retain one of them.

The only fee that would be charged would be imposed solely on the potential client, who would be charged for access to the information. Participating attorneys would not be charged any fee, nor would the Provider and the attorney share any fees. The fee charged to the potential client by the Provider would be for using the website to receive informa-

tion provided by the attorneys, and would be separate from any fee the attorney would charge the client for providing legal services, which would be billed directly to the client.

None of the attorneys submitting profiles would be screened or otherwise approved by the Provider and the Provider would not in any way direct or regulate the attorney's professional representation. However, the Provider proposes to assist responding attorneys in avoiding any potential conflicts by giving them the name of the potential client and the name of any adverse party before any response is submitted.

Advertising and Solicitation

It is well established that a lawyer or law firm may advertise and/or solicit legal business through traditional means, such as newspapers or radio, subject to the rules regulating lawyer advertising and solicitation.[1] We conclude that the use of the internet as the medium by which a lawyer communicates advertising does not alter this basic conclusion.

In any event, where, as here, a request for representation is initiated by the client, not the lawyer, the Committee concludes that the act of responding to a request over the internet for representation does not, standing alone, constitute "advertising" or "solicitation" as these terms are used in the New York Lawyer's Code of Professional Responsibility (the "Code").[2] Although the Provider contemplates that participating lawyers will contact prospective clients directly over the internet, the process at issue here is initiated by, or on behalf of, the clients who, in effect, have "solicited" those attorneys who are interested to submit a bid on the project. As such, it is not functionally different than any other bidding process that has become increasingly common in selecting counsel. Indeed, such procedures often occur following the publication of a Request for Proposals ("RFP") by a government or other organization, or, for that matter, any project that is posted on a (real) bulletin board.[3] Indeed, some courts

1. See Shapero v. Kentucky State Bar Assn., 486 U.S. 466, 473 (1988); In re: Koffler, 51 N.Y.2d 140, 432 N.Y.S.2d 872, 875 (1980) (direct mail solicitation of potential clients by lawyers is constitutionally protected commercial speech). The only caveat, which applies as well to advertising, is that communications to prospective clients must not contain any statements or claims that are false, deceptive or misleading and should otherwise conform to the limitations imposed by DR 2-101(C) concerning references to credentials, other clients, and legal fees. See infra, note 4.

2. See DR 2-101; DR 2-103.

3. We express no view as to whether a more targeted type of plan would involve "solicitation" requiring ethical regulation.

presiding over class actions recently have conducted "auctions," inviting lawyers to submit qualifications and bids. *See, e.g., In re Cendant Corp. Litig.*, 182 F.R.D. 144, 150 (D.N.J. 1998) ("There is an emerging trend in common fund class actions for courts to simulate the free market in the selection of class counsel. The use of an auction to select counsel in a securities class action was pioneered. . . ."); *In re Auction Houses Antitrust Litig.*, Civ. Action No. 00Civ. 0648 (LAK), 2000 WL 460355 (S.D.N.Y. April 20, 2000).

Participation in a Lawyer Referral Plan

We also conclude that a lawyer's involvement in responding to an invitation to bid pursuant to the plan described here, would not violate the provision in DR 2-103(B) proscribing participation in certain for-profit referral plans. Because no fee is paid by the lawyer to the Provider to obtain employment, the plan at issue, therefore, lacks the essential element regulated by DR 2-103(B).[4] In this respect, it resembles other plans considered and approved by both the New York County Lawyers Association and the New York State Bar Association.

In N.Y. County 721 (1997), the New York County Lawyers' Association considered a network of lawyers, law students, and legal workers that sponsored an internet home page through a local internet provider. The provider allowed the organization to include an on-line "Attorney Referral Board" as part of its home page, at no extra charge to the lawyers. When an internet user (*i.e.*, potential client) clicked on the Attorney Referral Board, the screen showed a directory of legal subject areas which was in turn linked to a brief description of each area of law and a listing of attorneys who practice in each area. The County Lawyers determined that this plan is permitted under DR 2-103(B), stating:

> We do not view the listing described by the inquirer as a prohibited for-profit referral service because the user will select the attorneys whom he or she chooses to contact... and no payment is to be made to the internet provider on the basis of matters actually generated by the listings.

4. DR 2-103(B) provides as follows:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2-107.

Similarly, the State Bar Association in N.Y. State 659 (1994) determined that, consistent with DR 2-103(B), a lawyer may allow a car dealer to give car buyers an "information package" which includes the lawyer's advertising materials as long as the lawyer does not pay the auto dealer a fee to distribute the materials, does not discuss the lawyer's advertisement with customers, and the advertising materials comply with DR 2-101.

Like the plans considered above, the plan at issue here involves no payment by the lawyer to the Provider. Under the circumstances, we conclude that the internet plan described to us does not come within the purview of DR 2-103(B).

OTHER ISSUES

Confidentiality, Conflicts of Interest

A number of ethics committees have addressed the problem of an attorney's use of the internet to communicate with clients or prospective clients. The starting point, of course, is DR 4-101(B) which prohibits a lawyer from knowingly revealing client confidences or secrets and requires a lawyer to use reasonable care to protect client confidences and secrets. We do not believe that there is anything inherently improper about using the internet as a means generally to communicate with a client, especially given recent laws precluding unauthorized interception of internet transmissions. *See* The Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq*. Of course, a lawyer may come into possession of certain highly confidential or especially sensitive information that warrants more protection than the internet currently is able to provide and which should be communicated through another more secure means. We agree with the recent decision by the New York State Bar Association which concluded that, based on recent steps taken to criminalize the unauthorized interception of e-mail, "lawyers may in ordinary circumstances utilize unencrypted internet e-mail to transmit confidential information without breaching their duties of confidentiality under Canon 4 to their clients . . ." N.Y. State 709 (1998). In reaching this conclusion, however, the New York State Bar Association cautioned that circumstances may exist in which a particular e-mail transmission is at such heightened risk of interception or is of such an extraordinarily sensitive nature, that a more secure means of communication than unencrypted internet e-mail should be chosen. *Id.; cf.* N.Y. City 1994-11; N.Y. City 1998-2. Although it is possible that the profiles could contain at least some information that might be considered to be a "confidence," such as the anticipated cost of the legal project,

there is nothing that would appear to be especially sensitive warranting extraordinary protection. Accordingly, we believe that use of the internet is appropriate to convey the profiles contemplated by the Provider.

Although well meaning, the Provider's stated intention prospectively to provide interested attorneys with the names of the potential client and any adverse parties does raise a confidentiality concern.[5] To be sure, providing such information to prospective lawyers would facilitate the requisite conflicts checks. *See* DR 5-105(E).[6] However, providing this information to a lawyer prematurely could result in divulging confidences and secrets that could harm the client, such as the identity of a client who contemplates filing a possible lawsuit—information that might impel an adversary to sue preemptively. The Provider, therefore, should establish procedures to avoid prematurely revealing on the internet information about the client's identity in connection with the invitation for bids, unless precautions are taken to assure that the client would not be better off waiting until a tentative selection of counsel is made before the identities of the client and others who may be involved are revealed.

Unauthorized Practice

We also note that a response by a lawyer to a client posting a legal project on the internet who resides outside of New York can raise issues about whether the provision of legal advice or assistance to such a client comports with DR 3-101(B), governing unauthorized practice. DR 3-101(B)

5. We note that the service has pledged not to direct or regulate in any way the attorney's professional judgment. Such a policy, if followed, would obviate any potential issue raised by the proscription against third party interference set forth in DR 5-107(B), which states:

> Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client under DR 4-101(B).

6. In New York, DR 5-105(E) requires that lawyers and law firms maintain an accurate record-keeping system of current and prior engagements, and must check those records before undertaking a new matter to assure that there will be no violation of the conflicts rules because of a current or past representation. See DR 5-105; DR 5-108. In N.Y. State 709 (1998), the State Bar opined that practicing law for clients in conjunction with the internet "does not give rise to any exemption from the fundamental obligation to avoid conflicts and not to undertake a new representation without checking to assure that it does not create an impermissible conflict,"(citing N.Y. State 664 (1994) (requiring conflicts check by lawyer providing specific legal advice to clients by means of "900 " telephone service)).

states that a lawyer "shall not practice law in a jurisdiction where to do so would be in violation of regulations in that jurisdiction." This will depend on whether the particular legal services to be provided would constitute the unauthorized practice of law in the other jurisdiction. Although it is beyond the scope of this Committee's jurisdiction to determine whether lawyers licensed in New York may lawfully provide legal services to clients who reside in other states or countries, we caution lawyers who respond to invitations over the internet to be familiar with the laws of the other jurisdictions governing unauthorized practice.[7]

May 2000

7. In Birbower, Montabano, Condon & Frank v. Superior Court, 70 Cal. Rpt. 2d 304 (Cal. Sup. Ct. 1998), the California Supreme Court held that a New York law firm that represented a California company in an arbitration proceeding engaged in the unauthorized practice of law in violation of a California statute. Another jurisdiction might have taken a different view than that of California regarding the New York law firm's conduct.

Formal Opinion 2000-2

Charging Interest on Unpaid Legal Fees

The Committee on Professional and Judicial Ethics

Topic: Charging interest on unpaid legal fees.

Digest: 1. It is not improper for a lawyer to include in a retainer agreement a provision charging interest on unpaid legal fees when the lawyer (1) fully informs the client of the circumstances where interest may be charged, (2) those circumstances, the fee, and the interest rate are reasonable, and (3) the client consents.

2. It is also not improper to charge interest on unpaid legal fees, although the retainer agreement is silent, when the lawyer (1) notifies the client that the lawyer intends to charge a reasonable interest rate on unpaid legal fees, and (2) provides the client with a reasonable opportunity to pay the outstanding unpaid balance before any interest accrues.

Code: DR 2-101(C)(3); 2-106; EC 2-17; 2-18; 2-19; 2-23.

QUESTION

A lawyer inquires whether she may ethically charge a client interest on unpaid legal fees where (a) the retainer agreement expressly provides that interest will be charged and, alternatively (b) the retainer agreement is silent. Assuming *arguendo* that charging interest is ethical in either of these cases, the lawyer further asks what interest rates ethically may be charged.

A. May a written retainer agreement provide for interest to be charged on unpaid legal fees?

In N.Y. City 1982-6, this Committee previously considered whether a written retainer agreement may ethically provide for an interest charge on unpaid legal fees. In that case, the specific question under consideration was whether an annual interest charge of eighteen percent could be imposed on legal fees not paid within one month of billing. This Committee concluded that it is not improper to assess a reasonable interest charge on unpaid legal bills if (1) "the arrangement is clearly and fully explained to the client in advance and the client understands and consents to the proposed arrangement" and (2) "the arrangement does not result in the charging of an excessive fee." N.Y. City 82-6.[1]

In this same vein, N.Y. State 399 (1975) also concluded that it is not *per se* improper for a lawyer to charge interest on delinquent accounts if "the lawyer . . . advise[s] the client prior to performing services of the fact that interest will be charged on delinquent accounts which are delinquent for more than a stated period of time, the stated period is reasonable under all the circumstances of the matter, the rate of interest is reasonable, the fee is not excessive and the client consents to such interest charge." Similarly, in ABA Formal Opinion 338 (1974), the ABA's Committee on Ethics and Professional Responsibility also approved of a lawyer's charging interest, noting: "It is . . . the Committee's opinion that a lawyer can charge his client interest providing the client is advised that the lawyer intends to charge interest and agrees to the payment of interest on accounts that are delinquent for more than a stated period of time." *See*

1. In reaching this conclusion, this Committee relied upon DR 2-106 and EC 2-17, EC 2-18 and EC 2-19 of the Code of Professional Responsibility (the "Code"). We did not refer to DR 2-101(C)(3), which we believe also supports this conclusion. On its face, DR 2-101(C)(3) provides that attorneys may include information in advertisements about "credit arrangements accepted." Because credit arrangements almost always provide for interest to be charged on outstanding balances, DR 2-101(C)(3) strongly suggests interest can be ethically charged under appropriate circumstances.

also C. Wolfram, *Modern Legal Ethics*, § 9.2.2, at 506-7 (1986) ("Most states now permit lawyers to make credit arrangements for the payment of fees, such as through client use of credit cards. By the same token, a fee contract can provide for a stipulated rate of legal interest on amounts due.").[2]

Based on these decisions, we conclude that when (1) the lawyer fully informs the client of the circumstances where interest may be charged, (2) those circumstances, the fee, and the interest rate are reasonable, and (3) the client consents, it is not improper for a retainer agreement to provide for charging interest on unpaid legal fees.

B. May a lawyer charge interest on unpaid fees where the agreement with the client is silent?

Having concluded that a lawyer may charge interest on unpaid balances where the retainer agreement provides for it, we now turn to the more difficult issue of whether a lawyer may charge interest on unpaid balances where the retainer agreement is silent. Although our research does not reveal any New York authority in point,[3] ethics committees in other states have divided over this issue. Four other committees have allowed it.[4] One com-

2. Also instructive is N.Y. City 1995-1, where we determined that it would not be improper for a lawyer to enter into a relationship with a third party financing the payment of legal fees: "Implicit in any financing plan is the charging of interest. We conclude that if a financing plan . . . otherwise complies with all ethical rules, the fact the client is charged interest is not in and of itself improper so long as full disclosure of that arrangement is made in advance to the client and the client agrees."

3. In N.Y. City 1982-6 (see page 2 above), we determined that a lawyer could not unilaterally make prospective changes to a fee arrangement contained in a retainer agreement by written notice to the client. Unlike the first part of that opinion where the Committee focused on the propriety of providing for charging interest in a retainer agreement, in the second part of the opinion, the Committee cast its net much more broadly because a "fee arrangement"—in addition to the charging of interest—captures such diverse subjects as retainers, contingent fees and staffing issues, each of which may implicate different ethical considerations. In determining whether a lawyer could unilaterally alter terms relating to these subjects, we did not address, much less decide, the issue before the Committee here: a lawyer's ability to charge interest when confronted with a client's breach of the obligation to pay the lawyer in a timely manner.

4. See Massachusetts 83-1 (1983) (attorney "may ethically charge interest on unpaid balances for legal services previously rendered whether or not the attorney and client agreed to such charging of interest prior to the rendering of services, provided that the client has notice and a reasonable opportunity to pay the balance due without interest."); Georgia 45 (1985) (attorney can "comply with EC 2-19 and unilaterally charge interest without a prior specific agreement with a client if notice is given to the client in advance that interest will be charged on fee bills which become delinquent after a stated period of time, but not less than 30 days");

mittee has prohibited the practice.[5] Another has conditioned it on client consent.[6]

We begin by observing that although libraries have been written about the nature and scope of a lawyer's obligations to her client, there is surprisingly little said about the client's corresponding obligations to the lawyer. Nevertheless, it cannot be seriously debated that where a client retains a lawyer on a fee-paying basis, the client is obligated to honor the fee arrangement.[7]

For its part, the Code plainly recognizes that an important obligation of a client to the lawyer is to pay the lawyer's fee in accordance with the fee arrangement. DR 2-110 specifically includes among the grounds of permissible withdrawal the deliberate failure by the client to comply with "an agreement or obligation to the lawyer as to expenses or fees." DR 2-110(C)(1)(f). And, any doubt that the Code's drafters considered the client's payment obligation to be extremely important is dispelled by the potential consequences to the client that the Code allows if a lawyer is forced to collect a fee. Indeed, in this circumstance, the Code creates a limited exception to the lawyer's sacrosanct obligation not to disclose a client's confidences or secrets, which is one of the bedrock duties underpinning the lawyer-client relationship, and authorizes the lawyer "[to] reveal . . . [c]onfidences or secrets necessary to establish or collect the lawyer's fee. . . ." DR 4-101(4). Conversely, it is hardly surprising that there is no provision in the Code precluding a lawyer faced with a client who dishonors a fee arrangement from charging interest.

Rhode Island 98-06 (1998) (lawyers may unilaterally charge interest on unpaid legal fees provided "the client receives advance notice with a reasonable opportunity to pay the balance due without interest "); and North Carolina 98-3 (1998) (lawyer may unilaterally charge interest, but only at the legal rate).

5. West Virginia 93-02 (1993) ("Because the imposition of a finance charge is a new concept which has the potential to confuse the client even further, fairness to the public mandates voluntary, written client consent at the outset of representation. Requesting a client in the middle of representation to consent to such charges would carry with it the implied threat that the attorney might withdraw. Client consent under such circumstances has the potential to be coerced.").

6. Arizona 86-9 (1986) ("Absent a written fee agreement or the client's consent after notice with opportunity to bring the account current, interest may not be charged on delinquent invoices.").

7. See e.g., N.Y. State Bar Association, Statement of Client's Responsibilities ¶ 3 (1998) (as adopted by the Administrative Board of the Courts) ("The client must honor the fee arrangement as agreed to with the lawyer, in accordance with law.").

This Committee yields to no one in refusing to allow the rules of conduct governing our learned profession to become captive to the morals of the marketplace. But this does not mean that in interpreting these rules, we can, or should, ignore commercial reality and the consequences that would attend a rule subordinating the rights of a lawyer to the rights of other creditors seeking payment from a lawyer's client. Certainly, clients can be presumed to act in their own economic self-interest and faced with the choice between paying obligations to other creditors—all carrying interest charges—and a legal bill with no interest, the temptation to unduly delay payment of the lawyer's statement can prove irresistible.

Given this reality, we believe allowing interest to be imposed, and placing lawyers on a more equal footing with other creditors can, at least in some situations, serve the salutary purpose envisioned by EC 2-23 of avoiding fee disputes. Conversely, a rule precluding a lawyer from charging interest could foster litigation because a lawyer prevailing in fee litigation can recover prejudgment interest under CPLR § 5001 "from the earliest ascertainable date the cause of action existed." *See, e.g., Hecht v. Clowes*, 224 A.D.2d 312, 638 N.Y.S.2d 42 (1st Dep't 1996) (under CPLR § 5001, attorney entitled to pre-judgment interest on successful fee claim).

Our conclusion that an interest charge may be imposed is fortified by long-standing New York case law enforcing an "account stated " on behalf of an attorney where a client fails to respond to a bill. In New York, a lawyer may assert a cause of action for account stated against a client "with proof that a bill, even if unitemized, was issued to a client and held by the client without objection for an unreasonable period of time. It is not necessary to establish the reasonableness of the fee since the client's act of holding the statement without objection will be construed as acquiescence as to its correctness." *O'Connell & Aronowitz v. Gullo*, 644 N.Y.S.2d 870, 871 (3d Dep't) (citations omitted), *appeal denied*, 89 N.Y.2d 803 (1996).[8] Significantly, an account stated will be enforced regardless of whether there was an initial retainer agreement between the attorney and client. *See, e.g., Ellenbogen & Goldstein, P.C. v. Brandes*, 641 N.Y.S.2d 28, 29 (1st Dep't 1996), *appeal denied*, 89 N.Y.2d 806 (1997). An account stated may include interest even though there was initially no express agreement to pay interest. *Davison v. Klaess*, 280 N.Y. 252, 256 (1939);

8. See also Ruskin, Moscou, Evans & Faltischeck, P.C. v. FGH Realty Credit Corp., 644 N.Y.S. 2d 206, 207 (1st Dep't 1996) ("Defendant's receipt and retention of the plaintiff law firm's invoices seeking payment for professional services rendered, without objection within a reasonable time, gave rise to an actionable account stated."); Legum v. Ruthen, 621 N.Y.S.2d 649 (2d Dep't 1995).

Emerick Assocs. v. Classic Tool Design Inc., 688 N.Y.S.2d 792, 794 (3d Dep't 1999) (affirming judgment in favor of plaintiff on account stated, finding that "based on plaintiff's express notification that it would begin charging a 1.5% monthly finance charge on all balances past due more than 30 days . . . Supreme Court did not err in its award of interest to plaintiff.").[9]

Accordingly, the Committee concludes that when the lawyer (1) notifies the client that the lawyer intends to charge a reasonable interest rate on unpaid legal fees and (2) provides the client with a reasonable opportunity to pay the outstanding unpaid balance before any interest accrues, it is not improper to charge interest on unpaid legal fees although the retainer agreement is silent.

At the same time, the Committee wishes to underscore its strongly held view that it is far better practice to address all the terms of an engagement, including all payment provisions and any interest to be charged on past due bills, in a written retainer agreement entered into at the inception of the engagement. The Committee echoes the cautionary note sounded by the draft Restatement of the Law Governing Lawyers that "[a] lawyer . . . usually has no justification for failing to reach an agreement at the inception of the relationship or pressing need to modify an existing agreement during it. The lawyer often has both the opportunity and the sophistication to propose appropriate terms before accepting a matter." *Restatement of the Law Governing Lawyers*, Proposed Final Draft No. 1, § 29A(1) at 42 (March 29, 1996). But not every lawyer at the outset of the engagement will contemplate that the client will fail to discharge her payment obligation and where this occurs, we believe that interest may be imposed under the circumstances set forth.

C. The amount of any interest must be reasonable.

In response to the third inquiry—concerning the appropriate interest rates that can be charged—we note that the fee charged a client shall not be "illegal or excessive" and shall be "reasonable," *see* DR 2-106; EC 2-17. Though interest is not part of the fee, but rather compensation for

9. Milstein v. Montefiore Club of Buffalo, Inc., 365 N.Y.S.2d 301, 303 (4th Dep't 1975) (reversing denial of summary judgment to plaintiff on causes of action for account stated and interest; "[h]aving determined that [plaintiffs] are entitled to summary judgment on the first cause of action [for account stated], it follows that summary judgment also should be granted . . . on the second cause of action [for interest on the balance due]. 'The mere presenting of the bill, if there were nothing more, constituted a sufficient demand to start interest running.'") (quoting Davison v. Klaess, 280 N.Y. at 258.)

delay in payment of the fee, the rate of interest should be subject to the same reasonableness requirement. Furthermore, any interest charged must also comply with all applicable laws, including usury laws.

May 2000

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Report in Support of Pre-Verdict Interest in Personal Injury Cases

The Council on Judicial Administration

TABLE OF CONTENTS

I. INTRODUCTION 498
A. The Current System 499
B. Brief Historical Background 500
C. Other Jurisdictions 503

II. RATIONALES FOR PVIPIC 504
A. Fairness Rationale 504
B. Equality Rationale 509
C. Efficiency Rationale 511

III. RATIONALES AGAINST PVIPIC 513
A. Nature of Damages Rationale 513
B. Windfall Rationale 515
C. Time of Accrual Rationale 517
D. Penalty Rationale 518

E. Fault for Delay Rationale 519
F. Economic Rationale 520
G. Economy Rationale 521

IV. RECOMMENDATIONS OF THE COUNCIL 521
Conclusion 524

V. APPENDICES 525
I. Proposal: An Act to Amend the Civil Practice Law and Rules 525
II. Brief Survey of Recent Proposals for Pre-Verdict Interest 526
III. The Association of the Bar's Prior Support for Pre-Verdict Interest 528

Report in Support of Pre-Verdict Interest in Personal Injury Cases[1]

The Council on Judicial Administration

I. INTRODUCTION

In 1956 the Committee on State Legislation of the Association of the Bar of the City of New York issued a report approving a bill that would have provided for pre-verdict interest in actions to recover damages for injuries to persons or property resulting from negligence.[2] Noting the Committee's opposition to such legislation in the three prior years, the Report stated that the twin goals of full indemnity to tort victims and decreased court calendar congestion outweighed any countervailing factors, such as the difficulty of translating personal injury into monetary loss. After almost 45 years of raging debate, a national trend in favor of such legislation, and a decade of efforts by court administrators and state legislators to change the rule in New York, the Association's Council on

1. The issue this report addresses is often phrased as whether there should be "pre-judgment interest in tort cases." However, CPLR 5002 already provides for pre-judgment interest in all cases, and CPLR 5001(a) already provides for pre-verdict interest in some tort cases. Thus, at least in New York, the issue is whether "pre-verdict" interest should accrue in "personal injury" cases.

2. See Appendix Three, "The Association of the Bar of the City of New York's Prior Support for Pre-Verdict Interest in Personal Injury Cases."

Judicial Administration has looked at the issue anew. We conclude that the rationales in favor of such legislation significantly outweigh those against and that the time has come to pass such legislation.

A. The Current System

In our crowded, complex, competitive society, accidents will—and do—happen. People injured due to their own fault must look to their own resources to cope with their ordeals. People injured due to another's fault may look to the legal system for financial redress. Lawsuits culminating in judgments for plaintiffs and collection of the amount awarded provide monetary compensation intended to place the plaintiffs in the same relative position they would have been in had the injury not occurred.[3]

To compensate for the inevitable delay between injury and redress, during which the defendants are using money that they should have paid to the plaintiffs at the moment of injury,[4] the legal system tacks interest[5] onto the amount owed. In New York State, CPLR 5001-5004 govern this process.

CPLR 5001(b), (c) provide for interest "from the earliest ascertainable date the cause of action existed" until verdict, report, or decision. CPLR 5002 provides for interest from verdict until judgment. CPLR 5003 provides for interest from judgment until collection. CPLR 5004 provides for interest "of nine per centum per annum, except where otherwise provided by statute."

The only provision that distinguishes between different causes of action is CPLR 5001(a), which covers what often will be the longest interval between injury and redress: the interval between injury and verdict. CPLR 5001(a) provides that pre-verdict "[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of

3. "In all cases . . . of civil injury . . . the declared object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the . . . tort [had] not [been] committed." 1 T. Sedgwick, Measure of Damages § 30, at 25 (9th ed. 1912); see, e.g., Reid v. Terwilliger, 116 N.Y. 530, 534 (1889) ("Compensatory damages, as indicated by the word employed to characterize them, simply make good or replace the loss caused by the wrong.").

4. Miller v. Robertson, 266 U.S. 243, 257-58, 45 S. Ct. 73, 78, 69 L. Ed. 265, 275 (1924) ("One who has had the use of money owed to another justly may be required to pay interest from the time the payment should have been made.").

5. "Interest is the compensation allowed by law . . . for the use or forbearance of money, or as damages for its detention . . . ." Hiatt v. Brown, 82 U.S. 177, 185, 21 L. Ed. 128, 131 (1873).

an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property . . . ." Thus, pre-verdict interest, which is available in all contract actions, is available in only some tort actions, including actions for conversion of[6] or damage to[7] property, tortious interference with contractual relations and unfair competition,[8] negligent misrepresentation,[9] and wrongful death.[10] In sum, in contract, property, and wrongful death actions, interest accrues from injury and carries forward through verdict, judgment, and collection. In personal injury actions, interest accrues only from verdict and carries forward through judgment and collection.[11]

B. Brief Historical Background

In England, "the stigma of religious and moral taboos, inherited from the dark era of prohibition [against usury], remained to stunt and distort the growth of all branches of the legal rules about compensation for delay in paying money or damages."[12] "In America, where perhaps tradi-

6. Andrews v. Durant, 18 N.Y. 496, 502 (1859) ("Interest on the value at the time of the conversion was . . . as necessary a part of complete indemnity as the value itself.").

7. Wilson v. City of Troy, 135 N.Y. 96, 105, 32 N.E. 44, 46 (1892) ("[W]here the value of property is diminished by an injury wrongfully inflicted the jury may, in their discretion, give interest on the amount by which the value is diminished from the time of the injury.").

8. De Long Corp. v. Morrison-Knudsen Company, Inc., 14 N.Y.2d 346, 348, 200 N.E.2d 557, 558, 251 N.Y.S.2d 657, 659 (1964).

9. Kleartone Transparent Prod. Co. v. Dun & Bradstreet, Inc., 118 A.D.2d 832, 500 N.Y.S.2d 316 (2d Dept. 1986) ("[B]y its grossly negligent conduct [defendant] wrongfully induced the plaintiff to part with goods and services sold on credit to an uncreditworthy customer.").

10. Est. Powers & Trusts L. § 5-4.3(a). However, pre-verdict interest is not recoverable on survival damages. Chase v. New York City Transit Auth., 121 A.D.2d 425, 426, 503 N.Y.S.2d 123, 124 (2d Dept. 1986).

11. In equitable actions, "interest and the rate and date from which it shall be computed shall be in the court's discretion." CPLR 5001(a). This accords with the general English and American rule. Charles T. McCormick, Handbook on the Law of Damages § 59 (1935).

12. McCormick, supra note 11, at § 51, at 209. "The taking of interest originally was usury at common law, and a punishable offense." Coleman v. Reamer's Executor, 237 Ky. 603, 36 S.W.2d 22, 23 (1931). Anthony A. Rothschild, Prejudgment Interest: Survey and Suggestion, 77 Nw. U. L. Rev. 192, 195-96 (1982), contains a broad survey of the historical bias against interest, citing, inter alia, the works of Plato and Aristotle, several passages in the Bible, Blackstone's Commentaries, Holdsworth's History of English Law, Francis Bacon's Essay on Usury, statutes going back to the 1500s, cases going back to the 1700s, and commentators sprinkled throughout the last century. The ancient maxim that "money cannot breed money" is reflected in these words to Shylock:

tional theology was not so dominant and mercantile influence was stronger, the courts have from the first manifested a somewhat less intransigent attitude toward the extension of the limits of the recovery of interest as damages."[13] The following passage, from an opinion by Judge Learned Hand, exemplifies the American view:

> Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.[14]

Thirty-one years later, Judge Hand simply stated, without preamble, that "interest is awarded on the theory that it is indemnity for the delay in paying for the loss."[15]

At common law, courts assessed pre-verdict interest ("PVI") in contract actions only if the damages were "liquidated."[16] Over time, the concept of "liquidated" came to include damages that were reasonably

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> If thou wilt lend this money, lend it not
> As to thy friends, for when did friendship take
> A breed for barren metal of his friend?
> But lend it rather to thine enemy,
> Who if he break, thou mayst with better face
> Exact the penalty.

William Shakespeare, *Merchant of Venice*, act 1, sc. 3.

13. McCormick, supra note 11, at § 51, at 210.

14. Proctor & Gamble Distrib. Co. v. Sherman, 2 F.2d 165, 166 (S.D.N.Y. 1924).

15. Newburgh Land & Dock Co. v. The Texas Co., 227 F.2d 732, 734 (2d Cir. 1955).

16. McCormick, supra note 11, at § 54, at 216 ("[W]here the amount sued for may be arrived at by a process of measurement or computation from the data given by the proof, without any reliance upon opinion or discretion after the concrete facts have been determined, the amount is liquidated and will bear interest."); compare Faber v. City of New York, 222 N.Y. 255, 262-63, 118 N.E. 609, 610-11 (1918) (finding that no market value or other recognized standard could be used to compute damages for having to remove extra bedrock to construct foundation of East River bridge tower) with Van Rensselaer v. Jewett, 2 N.Y. 135 (1849) (finding that value of "eighteen bushels of wheat, four fat hens, and one day's service with carriage and horses" could be ascertained). Faber was abrogated by the 1927 amendment to Civil Practice Act § 480 that provided for pre-verdict interest in all contract cases.

ascertainable.[17] The current trend is to award PVI in all contract actions.[18]

Historically, PVI was available in actions based on deprivation of[19] or injury to[20] property, because damages were ascertainable by reference to a market value.[21] PVI was unavailable in personal injury actions[22] because damages could not be ascertained with accuracy prior to trial and because juries might award arbitrary amounts.[23] In New York, the borderline between "contract" and "personal injury" actions was occupied by actions for breach of warranty that resulted in bodily injury[24] and actions for

17. McCormick, supra note 11, at § 56, at 222; see generally Eazor Express Inc. v. International Bhd. of Teamsters, 520 F.2d 951, 973 (3d Cir. 1975), cert. denied, 424 U.S. 953, 96 S. Ct. 1149, 47 L. Ed. 2d 342 (1976).

18. Funkhouser v. J. B. Preston Co., 290 U.S. 163, 168, 54 S. Ct. 134, 136, 78 L. Ed. 243, 246 (1933) (holding PVI proper in contract actions, even if damages are unliquidated, to "secur[e] a more adequate compensation by adding an amount commonly viewed as a reasonable measure of the loss sustained through delay in payment").

19. Flamm v. Noble, 296 N.Y. 262, 72 N.E.2d 886 (1947) (reversing denial of award of pre-verdict interest to plaintiff deprived of corporate stock by defendant's misstatements and threats).

20. Purcell v. Long Island Daily Publishing Co., Inc., 9 N.Y.2d 255, 257-59, 173 N.E.2d 865, 865-67, 213 N.Y.S.2d 425, 426-28 (1961) (reversing trial court's grant of pre-verdict interest on judgment for property damage negligently caused by fire because power to award such interest was solely within jury's discretion).

21. McCormick, supra note 11, at § 55.

22. Gillespie v. Great Atl. & Pac. Tea Co., 44 Misc. 2d 670, 671, 255 N.Y.S.2d 10, 11 (Sup. Ct., Westchester County 1964) ("It has long been the established rule that in all personal injury actions, whether resulting from tort or not, the plaintiff has not been entitled in any circumstances to recover interest on the damages assessed."), aff'd, 26 A.D.2d 953, 953, 276 N.Y.S.2d 372, 372 (2d Dept. 1966) ("[P]reverdict interest is not allowable on a verdict for personal injuries, even though the complaint was couched in the form of an action for damages for breach of an implied warranty of fitness for use . . . ."), modified on other grounds, 21 N.Y.2d 823, 235 N.E.2d 911, 288 N.Y.S.2d 907 (1968); Cf. Restatement (Second) of Torts § 913(2), at 488-89 (1965) ("Interest is not allowed upon an amount found due for bodily harm, for emotional distress or for injury to reputation, but the time that has elapsed between the harm and the trial can be considered in determining the amount of damages.").

23. McCormick, supra note 11, at § 57; Restatement, supra note 22, at § 913, cmt. c.

24. Compare Hyatt v. Pepsi-Cola Albany Bottling Co., 32 A.D.2d 574, 574-75, 298 N.Y.S.2d 1005, 1006-07 (3d Dept. 1969) (per curiam) (reversing grant of pre-verdict interest on breach of warranty claim based on "whole dead mouse" in bottle of Pepsi-Cola), and Raman v. Carborundum Co., 31 A.D.2d 552, 553, 295 N.Y.S.2d 534, 536 (2d Dept. 1968) (affirming denial of pre-verdict interest on breach of warranty claim based on injury caused by defective

unlawful termination of employment that sought damages for pain and suffering.[25] Decisions were not always easy to predict or harmonize.[26]

C. Other Jurisdictions

The last several decades have seen a marked trend toward abrogating the common-law rule against pre-verdict interest in personal-injury cases ("PVIPIC").[27] In 1965 a mere five states provided for some form of PVIPIC.[28]

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grinding wheel), with Brown v. Godefroy Mfg. Co., 278 App. Div. 242, 243, 104 N.Y.S.2d 444, 445 (1st Dept. 1951) (affirming grant of pre-verdict interest on breach of warranty claim based on poisonous dye), and Gellman v. Hotel Corp. of Am., 46 Misc. 2d 521, 260 N.Y.S.2d 154 (Civ. Ct., Bronx County 1965) (allowing pre-verdict interest for breach of warranty damages based on tuna fish salad containing particles of glass). Gillespie, denying PVI in "warranty" actions, is today considered the controlling precedent. E.g., Schwimmer v. Allstate Insurance Co., 176 F.3d 648, 650 (2d Cir. 1999) ("Parties cannot attempt to circumvent this bar on preverdict interest in personal injury actions by couching their complaints in the form of contract actions.").

25. Compare McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 176 Misc. 2d 325, 334, 672 N.Y.S.2d 230, 235-36 (Sup. Ct., N.Y. County 1997) (holding that pre-verdict interest was not available for damages for "gender discrimination and unlawful retaliation" because the claim was "clearly one to recover damages for emotional pain and suffering") with O'Quinn v. New York Univ. Med. Ctr., 933 F. Supp. 341, 344-45 (awarding pre-judgment interest on compensatory damages for pain and suffering caused by violation of federal anti-discrimination statute).

26. "The law in this State as to the allowance of interest in common law actions is in a very unsatisfactory condition. The decisions upon the subject are so contradictory and irreconcilable that no certain rule for guidance in all cases can be deduced from them." White v. Miller, 78 N.Y. 393, 394 (1879). New York is not alone: "Texas prejudgment interest law has long been 'misleading,' 'illogical,' and even 'bewildering.'" Robert H. Pemberton, A Guide to Recent Changes and New Challenges in Texas Prejudgment Interest Law, 30 Tex. Tech. L. Rev. 71, 73 (1999) (citations omitted).

27. "The modern trend is clearly towards allowing prejudgment interest as a matter of right on wholly unliquidated tort claims, such as personal injury . . . claims, with most jurisdictions establishing this right through legislative enactments instead of judicial decisions." H. Dean Wong, Prejudgment Interest: Too Little, Too Much, or Both, 10 U.C.L.A.-Ala. L. Rev. 219, 224-25 (1981); accord, Joel A. Williams, Prejudgment Interest: An Element of Damages Not to be Overlooked, 8 Cumb. L. Rev. 521, 535 (1977).

28. Patrick J. McDivitt, Pre-judgment Interest As An Element of Damages: Proposed Solutions for a Colorado Problem, 49 U. Colo. L. Rev. 335, 335 (1978) (listing Colo., La., Mass., Me., and N.H.). James D. Wilson et al., 30 Trial Law. Guide 105, 114 (1986), states that prior to 1965, "five states had prejudgment interest statutes," omitting Me. and adding R.I. to the foregoing list. Of course, whether or not a state should be counted as a "prejudgment interest" jurisdiction depends on what types of actions are considered. New York is often listed as a "pre-judgment interest" state because of PVI in wrongful death and property deprivation or

As of January 2000, 27 states did.[29] Several states have decreased PVIPIC by lowering the rate or delaying the accrual, but no state has ever repealed PVIPIC.

There is no general federal PVI statute.[30] Federal common law allows PVI in breach-of-contract cases.[31] In other types of cases, federal law relies on discretion and fairness.[32] One recent case lists the following factors a court should consider in determining whether to award PVI in non-contract cases: "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court."[33] In diversity cases, federal courts apply state pre-judgment interest rules.[34] Thus, any change in New York State law will reverberate in federal court.

II. RATIONALES FOR PVIPIC

A. Fairness Rationale

The most basic rationale for PVIPIC is innate fairness. During the

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injury cases. An up-to-date survey of the law governing PVIPIC in all 50 states is beyond the scope of this report. However, the above-cited article, which contains perhaps the most detailed, if not the most recent, survey on the subject, indicates the following rough breakdown:

PVIPIC available: Alaska, Cal., Colo., Conn., Ga., Haw., Iowa, La., Me., Md. (vehicular accidents), Mass., Mich., Minn., Mont., Nev., N.H., N.J., N.M., N.C., N.D., Ohio, Okla., Pa., R.I., Tenn., Tex., Utah, Va., W. Va., Wis.

PVIPIC not available: Ala., Ariz., Ark., Del., Fla., Idaho, Ill., Ind., Kan., Ky., Md. (non-vehicular accidents), Miss., Mo., Neb., N.Y., Or., S.C., S.D., Vt., Wash., Wyo.

29. 1999 Report of the Advisory Committee on Civil Practice, at 5 (*see infra*).

30. Wilson, *supra* note 28, at 126.

31. Young v. Godbe, 82 U.S. (15 Wall.) 562, 565, 21 L. Ed. 250, 251 (1872) ("If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment.").

32. Bd. of County Comm'rs. of the County of Jackson v. United States, 308 U.S. 343, 352, 60 S. Ct. 285, 289, 84 L. Ed. 313, 318 (1939) ("The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.").

33. Wickham Contracting Co., Inc., v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 955 F.2d 831, 834 (2d Cir.), cert. denied, 506 U.S. 946, 113 S. Ct. 394, 121 L. Ed. 2d 302 (1992).

34. Schwimmer v. Allstate Insurance Co., 176 F.3d 648, 650 (2d Cir. 1999); In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F.2d 1279, 1333 (7th Cir. 1992).

months or, more commonly, years that elapse between the time a tortfeasor injures a victim and the time a jury renders a verdict,[35] the defendant's tortious conduct has deprived the plaintiff of health and enjoyment of life.[36] A verdict is simply an ex post facto determination by the legal system—in effect, by society—that the defendant should have paid the plaintiff that amount of money at the time of the injury. "It is almost an axiom in American jurisprudence that he who has the use of another's money, or money he ought to pay, should pay interest on it."[37] Metaphorically speaking, "once admit that interest is the natural fruit of money, it would seem that whenever a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date."[38] The Third Circuit neatly explicated this basic concept:

> In economic terms, the plaintiff, once injured, is deprived of his former health, and this deprivation can be converted to monetary value. The defendant, in injuring the plaintiff, has "taken" his former health. In a perfect system, the plaintiff would be immediately compensated by the defendant, without delay. Unfortunately, our system is not perfect, and a defendant therefore benefits from the monetary value of his "taking" throughout the judicial process, until the case is concluded. Since money loses value over time, delay damages [*i.e.*, PVI] merely insure that a defendant is paying an accurate price for what he "took" from the plaintiff. It is not a question of fault, but instead a question of economics and the fluctuating value of money.[39]

The goal of our legal system, in both contract and tort actions, is to

35. Solely for simplicity, this report will assume that trials are before juries.

36. This report only addresses situations in which a finder of fact has determined that a defendant has wronged a plaintiff. Without that, there is, obviously, no recovery and no interest. See Black's Law Dictionary 1496 (7th ed. 1999) ("tort").

37. Katz v. Nichols, 48 N.Y.S.2d 640, 641 (Sup. Ct., Bronx County 1944) (quoting 1 Sutherland on Damages § 324 (4th ed.)).

38. Rothschild, supra note 12, at 199 (quoting T. Sedgwick, A Treatise on the Measure of Damages § 300). "As to the assessment of damages: it is a rational, and a legal principle, that the compensation should be equivalent to the injury." Bussy v. Donaldson, 4 U.S. (4 Dall.) 206, 207, 1 L. Ed. 802, 803 (1800).

39. Knight v. Tape, 935 F.2d 617, 628-29, n. 11 (3d Cir. 1991). Of course, if plaintiffs are to receive PVI, they should pay interest on liens held on their awards by social service providers, health insurers, medical professionals, etc.

make the victim whole.[40] PVIPIC is necessary to make plaintiffs whole[41] because without it plaintiffs are not fully compensated for their damage; although they may be awarded the equivalent of what they lost, they are awarded nothing for the time they did without. Thus, "prejudgment interest is an essential item of substantive damages in personal injury . . . cases."[42]

On the opposite side of the unjustly deprived plaintiff coin is the unjustly enriched defendant.[43] The absence of PVIPIC results in interest-free loans from tort victims to tortfeasors. As stated by the New York State Court of Appeals, in ruling that interest always runs from the liability verdict in bifurcated cases:

> [T]he defendant, who has actually had the use of the money, has presumably used the money to its benefit and, consequently, has realized some profit, tangible or otherwise, from having it in hand during the pendency of the litigation. There is thus nothing unfair about requiring the defendant to pay over this "profit" in the form of interest to the plaintiff, the party who was entitled to the funds from the date the defendant's liability was fixed. Indeed, inasmuch as the defendant was not entitled to the use of the money from the moment that liability was established, a rule that would permit the defendant to re-

40. See General Motors Corp. v. Devex Corp., 461 U.S. 648, 655-56, 103 S. Ct. 2058, 2059, 76 L. Ed. 2d 211, 217-218 (1983) ("An award of [pre-judgment] interest from the time that the royalty payments would have been received [from a patent infringer] merely serves to make the patent owner whole, since his damages consist not only of the value of the royalty payments but also of the forgone use of the money between the time of infringement and the date of the judgment."); Prager v. New Jersey Fidelity and Plate Glass Ins. Co., 245 N.Y. 1, 5-6 (1927) ("While the dispute as to value was going on, the defendant had the benefit of the money, and the plaintiff was without it. Interest must be added if we are to make the plaintiff whole . . . ."); 1 Stein on Personal Injury Damages 3d § 1:1, at 4 (1997) ("[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his or her position prior to the tort.").

41. "Prejudgment interest is normally designed to make the plaintiff whole . . . ." Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 335, 108 S. Ct. 1837, 1842, 100 L. Ed. 2d 349, 358 (1988).

42. Therese Keelaghan-Silvestre, The Availability of Prejudgment Interest in Personal Injury and Wrongful Death Cases, 16 U.S.F. L. Rev. 325, 326 (1982).

43. John W. Pharris, Note, Pain and Suffering Damages: A Move Toward More Precision and Accuracy, 56 Neb. L. Rev. 910, 931-32 (1977) (advocating "pre-judgment interest for nonpecuniary loss like pain and suffering" to prevent "unjust enrichment").

> tain the cost of using the money (i.e., interest) would provide the defendant with a windfall.[44]

Thus PVIPIC is proper from defendant's perspective as well as plaintiff's.

PVIPIC is also necessary to balance the discounting to present value of awards for future losses.[45] One historic justification against PVIPIC was that "the great majority of jurisdictions that have considered this issue have concluded that damages for future non-economic losses should not be discounted to reflect their present value."[46] Courts reasoned that such damages were unascertainable.[47] However, the trend is to discount these awards,[48] as New York now does. The converse of a payment prior to actual damage, which should be discounted, is a payment after actual damage, which should be augmented.[49]

> Because reduction to present value is merely the obverse of prejudgment interest, a failure to grant prejudgment interest to the plaintiff for past pecuniary losses means that the parties are not being treated equally. In effect the defendant is "paid" interest for his early payment, but is not charged interest for his

44. Love v. State, 78 N.Y.2d 540, 545, 583 N.E.2d 1296, 1298-99, 577 N.Y.S.2d 359, 361 (1991). Although uninsured defendants may not "invest" the money of which they had use prior to trial, insurance companies, the real party in interest in many personal injury cases, surely do. Busik v. Levine, 63 N.J. 351, 359, 307 A.2d 571, 575-76 ("[T]he carrier receives income from a portion of the premiums on hand set aside as a reserve for pending claims."), appeal dismissed, 414 U.S. 1106, 94 S. Ct. 831, 38 L. Ed. 2d 733 (1973).

45. See CPLR Article 50-B, Periodic Payment of Judgments in Personal Injury, Injury to Property, and Wrongful Death Actions; Restatement (Second) of Torts § 913A, cmt. a, at 491 (1979) ("Just as interest is granted to the plaintiff for a loss between the time of the harm and the time of the trial, so is interest granted to the defendant for prepaying the loss that is yet to occur."). Thus, "where future payments are to be anticipated and capitalized in a verdict the plaintiff is entitled to no more than their present worth." Chesapeake & Ohio Ry. Co. v. Kelley, 241 U.S. 485, 493, 36 S. Ct. 630, 633, 60 L. Ed. 1117, 1123 (1916).

46. Friedman v. C. & S. Car Serv., 108 N.J. 72, 75, 527 A.2d 871, 873 (1987); see generally Dan B. Dobbs, Law of Remedies § 8.5(3), at 468-69 (2d ed. 1993).

47. Chicago & N. W. Ry. Co. v. Candler, 283 F. 881, 884 (8th Cir. 1922) ("In the matter of pain, suffering or inconvenience, no books are kept, no inventories made, no balances struck.").

48. E.g., Abbot v. Northwestern Bell Telephone Co., 197 Neb. 11, 16, 246 N.W.2d 647, 650 (1976).

49. "If it be only fair to discount sums paid now on account of future loss which would not be due until some years in the future, it is, by the same token, inequitable not to make appropriate compensation for delay in discharging the obligation." Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583, 594 (2d Cir. 1961) (citations omitted), cert. denied, 368 U.S. 989, 82 S. Ct. 606, 7 L. Ed. 2d 626 (1962); accord, McCormick, supra note 11, at § 56, at 225.

> late payment. So the denial of prejudgment interest is not only a failure of compensation, it is also a failure of fairness.[50]

The New York Court of Appeals recently held that in wrongful death cases, interest is allowed from the date of loss on pre-verdict losses and that interest is not allowed on post-verdict losses.[51] A federal court noted that "[a]ugmenting the amount of income flow lost between death and trial is part of 'fair and just compensation' just as discounting the income flow after trial is part of 'fair and just compensation.'"[52]

Furthermore, future losses are discounted even though future inflation is speculative,[53] whereas past inflation is certain.

> [W]hat is sauce for the goose is sauce for the gander. If the defendant, for the purpose of avoiding overpaying the plaintiff, can reduce the plaintiff's future losses to their present worth, even by reference to a speculative rate of interest, then the court, to avoid underpaying the plaintiff, should likewise permit the plaintiff to recover the loss of the use of the money in the past, by reference to a rate of interest which is not speculative.[54]

PVIPIC would also help offset the fact that pre-judgment interest and post-judgment interest are simple,[55] whereas the return on investments is compound.[56]

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50. Dobbs, supra note 46, at § 3.6(3), at 351.

51. Milbrandt v. A.P. Green Refractories Co., 79 N.Y.2d 26, 588 N.E.2d 45, 580 N.Y.S.2d 7 (1992).

52. In re Air Crash Disaster Near Chicago, Illinois, 644 F.2d 594, 646 (7th Cir. 1981).

53. Sleeman v. Chesapeake and Ohio Ry. Co., 414 F.2d 305, 308 (6th Cir. 1969) ("the inflation versus deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified in the daily gyrations of the stock markets").

54. Francis H. Hare, Jr., & Richard A. Meelheim, Prejudgment Interest in Personal Injury Litigation: A Policy of Fairness, 1981 Am. J. Trial Advoc. 81, 89 (1981).

55. E.g., Kaufman v. Le Curt Constr. Corp., 196 A.D.2d 577, 579, 601 N.Y.S.2d 186 (2d Dept. 1983); David D. Siegel, New York Practice § 411, at 668 (3d ed. 1999); Dobbs, supra note 46, at § 3.6(4), at 353 ("The traditional rule is that . . . prejudgment interest . . . is not . . . compounded."); but cf. Michael S. Knoll, A Primer on Prejudgment Interest, 75 Tex. L. Rev. 293, 299 n. 35, 308 (1996) ("The most common incorrect computational method . . . is to grant simple interest.") (noting that had prejudgment interest in In re Oil Spill by the Amoco Cadiz off the Coast of France on Mar. 16, 1978, 954 F.2d 1279 (7th Cir. 1992), not been compounded, the award would have been $66 million less).

56. "Courts should uniformly give compound interest for the prejudgment period [without which] a defendant would be unjustly enriched . . . ." Rothschild, supra note 12, at 218.

Additionally, PVIPIC is necessary to prevent defendants from coercing plaintiffs into accepting unreasonably low settlements. This was compellingly demonstrated by one federal court as follows:

> Plaintiffs intimate in their brief that the defendants are dragging, or may drag, their feet, blaming each other or otherwise attempting to complicate the issue of liability in order to earn interest on the amounts which they ultimately may have to pay as damages. The amount of damages in these cases has been estimated at between 115 and 500 million dollars. The interest that the defendants or their insurers may earn, and plaintiffs may lose . . . is between 11.5 and 50 million dollars per year or between $31,800 and $137,200 per day. *There is, therefore, a real incentive for the defendants to delay payment as well as to urge plaintiffs to accept lesser amounts in settlement than they might secure after a trial.*[57]

B. Equality Rationale

PVIPIC is also necessary for tort victims to be treated as fairly as contract victims. The general principle is that "[c]ompensation is a fundamental principle of damages, whether the action is in contract or in tort."[58] Contract claims arise out of a plaintiff's volitional acts. Tort claims arise out of a defendant's invasive acts.[59] Contract claimants can recover what they would have gained, *i.e.*, lost profits.[60] Tort claimants can only be

57. In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979, 480 F. Supp. 1280, 1285 (N.D. Ill. 1979) (emphasis added) (citation omitted), aff'd on other grounds, 644 F.2d 633, 646 (7th Cir. 1981) (rejecting pre-judgment interest theory but reaching same result by awarding "present value at trial of both past and future losses").

58. Miller v. Robertson, 266 U.S. 243, 257, 45 S. Ct. 73, 78, 69 L. Ed. 265, 275 (1924). As the New York Court of Appeals found in Baker v. Drake, 53 N.Y. 211, 220 (1873):

> the rule of damages should not depend upon the form of the action. In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort; . . . the inquiry must always be, what is an adequate indemnity to the party injured, and the answer to that inquiry cannot be affected by the form of the action in which he seeks his remedy.

59. At common law, pre-verdict interest was not allowed even for intentional personal torts. See Rupert v. Sellers, 50 N.Y.2d 881, 883, 408 N.E.2d 671, 671, 430 N.Y.S.2d 263, 264 (1980) ("[P]reverdict interest is not obtainable as of right in a libel action . . . ."); Keilson v. City of New York, 126 N.Y.S.2d 606, 607 (Mun. Ct., City of N.Y. 1953) (stating that PVI is not available for "assault, battery, slander, libel, etc.") (dicta).

60. Sager v. Friedman, 270 N.Y. 472, 481, 1 N.E.2d 971, 974 (1936) ("The injured party is entitled to the benefit of his bargain as written and is entitled to damages for the loss caused

made whole.[61] In an equitable society, justice for people living in dilapidated housing, walking along crumbling sidewalks, and being treated at overcrowded public hospitals should be as complete as justice for people buying and selling manufactured goods or Internet stocks.[62] PVIPIC would bridge the gap between those deprived of health and those deprived of money. An astute commentator noted that "[P]ecuniary and non-pecuniary injuries have the same ultimate effect of diminishing human happiness, the former by destroying the means to obtain it and the latter by destroying the capacity for happiness itself."[63]

Similarly, PVIPIC is necessary for personal injury victims to be treated as fairly as other tort victims.[64] The history of PVI is replete with courts abolishing artificial distinctions. One treatise author noted that this trend is beginning to reach its logical conclusion.

> Based on the fact that the measure of recovery for damages for personal injury is no more uncertain or unliquidated than that in many other tort actions where prejudgment interest has been allowed, courts have started to recognize that the distinction between personal injury and other actions is illogical and that a prevailing plaintiff in a personal injury action should be able to recover prejudgment interest on damages that have accrued by the time of the judgment.[65]

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by failure to perform the stipulated bargain. That loss may include the profits which he would have derived from performance of the contract."); Lieberman v. Templar Motor Co., 236 N.Y. 139, 149, 140 N.E. 222, 225 (1923) ("Damages, if recoverable, include gains prevented.").

61. See, e.g., Reno v. Bull, 226 N.Y. 546, 553, 124 N.E. 144, 146 (1919) ("The purpose of an action for deceit is to indemnify the party injured. All elements of profit are excluded. The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong."). Personal injury plaintiffs labor under other infirmities not faced by contract plaintiffs, including more difficulty in proving a case, higher payment of attorney's fees as a proportion of recovery, and negligible chances of recovering attorney's fees.

62. Cf. 3 Stein, supra note 40, at § 17:58, at 78 ("Since the plaintiff was deprived of compensation for his or her injury [between injury and judgment] to the same extent in tort cases as in actions for breach of contract, the more favored rule is that where interest is awarded in tort cases, it is awarded as a matter of right.").

63. Recent Developments—Prejudgment Interest as Damages: New Application of an Old Theory, 15 Stan. L. Rev. 107, 110 (1962).

64. "Prejudgment interest has long been awarded as an essential part of the compensation for the loss of a bull, mule, cattle, horse, colt, dog, sheep, goat, pig and cow, but not for the loss of a human life." James D. Wilson, supra note 28, at 106 (citations omitted).

65. 3 Stein, supra note 40, at § 17:60, at 80; accord, Cavnar v. Quality Control Parking, Inc.,

One state court demonstrated that PVIPIC is also necessary to insure that all personal injury victims are treated equally:

> Suppose A inflicts precisely the same amount of damage of any type on B and C at the same moment, evaluated by juries as $1,000 each. If C wins his judgment a year later than B and does not get prejudgment interest for the year, C recovers less than B for the same injury; C has been deprived of the use value of $1,000 for one year while B has enjoyed the use value. Interest is the market, or in the case of the legal rate the legislative, evaluation of the use value of money. B obviously has not gotten too much for he had a right to be made whole immediately upon being injured, and B and C should get the same amount for the same injury, so C must have gotten too little. Only by awarding prejudgment interest from the time the cause of action accrues, when a plaintiff is entitled to be made whole, can the sort of injustice that happened to C in the hypothetical case be avoided.[66]

Thus, PVIPIC is necessary for equality between various types of plaintiffs.

C. Efficiency Rationale

PVIPIC increases judicial efficiency, thus saving taxpayer money spent on courthouses and salaries. "[T]ort litigation is a major demand upon the judicial system. Delay in the disposition of those cases has an impact upon other litigants who wait for their turn, and upon the taxpayers who support the system."[67] Likewise, PVIPIC saves litigants' time and money (for attorney's fees and litigation costs) because it eliminates or reduces

696 S.W.2d 549, 553 (Tex. 1985) (holding that personal injury victims, not merely contract and property victims, should receive PVI). The Texas legislature codified Cavnar's institution of prejudgment interest, in slightly different form, in Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 § 6, which was "the exclusive means of seeking prejudgment interest in a personal injury case" in Texas. Zamarripa v. Sifuentes, 929 S.W.2d 655, 657-58, n. 1 (Tex. App. 1996). The law was recodified in art. 5069-1E.101 to -1E.108 (Vernon Supp. 1998).

66. State v. Phillips, 470 P.2d 266, 274 (Alaska 1970); cf. Dana v. Fiedler, 12 N.Y. 40, 50 (1854) ("If [a breach of contract plaintiff] is not entitled to interest from [the] time [of breach] as a matter of law, this contradictory result follows, that while an indemnity is professedly given, . . . the longer a party is delayed in obtaining it, the greater shall its inadequacy become.").

67. Busik v. Levine, 63 N.J. 351, 359, 307 A.2d 571, 575, appeal dismissed, 414 U.S. 1106, 94 S. Ct. 831, 38 L. Ed. 2d 733 (1973).

defendants' incentives to prolong litigation.[68] Litigants and litigators will resolve cases faster if defendants have no incentive to foot-drag.[69] "A potential award of pre-judgment interest advances the objective of encouraging speedy compensation to victims, and ensures that the aim of obtaining a high recovery for victims and their survivors is not defeated by a defendant's simple strategy of delaying payment or judgment until the award is diminished in actual value."[70] The common practice of settling cases on the courthouse steps, particularly irksome to court officials responsible for providing juries,[71] will be significantly reduced. PVIPIC at a market rate will eliminate or reduce any built-in incentive either to rush or to prolong litigation.[72] Another efficiency of a uniform rule for contract, property, and tort actions would be the elimination of litigation to determine the "nature" of particular claims.

PVIPIC also encourages adequate safety measures by persons engaged in potentially dangerous activities (*e.g.*, landowning, manufacturing, transporting) because these persons will have to provide full compensation to their tort victims. Without PVIPIC, potential tortfeasors are under-deterred from hazardous activity and will take inadequate safety precautions. Conversely, without PVIPIC potential plaintiffs, such as prospective employees or travelers, are over-deterred and will take excessive precautions, thus

68. "As ancient as the injured's plaint of 'the law's delay,' [see William Shakespeare, The Tragedy of Hamlet, Prince of Denmark, act III, sc. 1] is the use of that delay as a means by which a defendant may obtain a more favorable settlement." Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583, 594 (2d Cir. 1961), cert. denied, 368 U.S. 989, 82 S. Ct. 606, 7 L. Ed. 2d 526 (1962).

69. "What would any profit seeking insurance company do from file to trial with the reserve for large[,] honest and perfectly legitimate claims? Pay it out early, or pay it late?" S. Mary Therese Wolf & John V. Evans, A Case for Allowance of Prejudgment Interest in Reference to Wrongful Death Cases, 17 Trial Law. Guide No. 3, at 302, 304 (1973). The authors state that the increasing use of in-house counsel increases insurers' financial incentives to delay. Id. at 305. The use of "per diem" attorneys instead of outside counsel retained on an hourly basis may also increase the incentive to delay.

70. Domangue v. Eastern Air Lines, Inc., 722 F.2d 256, 264 (5th Cir. 1984).

71. See The Jury Project, Report to the Chief Judge of the State of New York, March 31, 1994, at 80.

72. Somewhat comparable judicial efficiency could, arguably, be achieved by adoption of the English Rule for the payment of attorney's fees. See Edward F. Sherman, From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice, 76 Tex. L. Rev. 1863 (1998). Whether in its pure form or, as has recently been advocated, in various "offer of judgment" forms, this country is not likely to adopt "loser pays," which arguably goes against the American grain of open access to courthouses, anytime soon.

stifling economic initiative and distorting the effect of capitalism's "invisible hand."[73]

III. RATIONALES AGAINST PVIPIC

A. Nature of Damages Rationale

One rationale against PVIPIC is that evaluating general damages is arbitrary, subject to juror whim and caprice. What, after all, is the worth of a life or a limb? "The rationale behind the [current] rule is that compensatory damages are unliquidated, not easily quantified and not easily divided into specific time periods."[74] As eloquently expressed by Professor McCormick,

> when we consider the remedy of money damages for injuries which have nothing to do with a man's "estate," but concern his "mind" or "body," we are in a different world. It is true that courts award money damages for pain, mental suffering, humiliation, and disgrace, but the process of measurement is in a sense an arbitrary one, in which the court or jury assessing damages exercise [*sic*] a latitude and freedom different in kind from the discretion allowed in the measurement of injuries of a pecuniary sort. Where a jury considers, without any standards except a general standard of reasonableness and restraint, the amount of money to be awarded a plaintiff for the disgrace of being falsely accused of murder, it would serve little purpose to give them specifically a further discretion to add interest, where the figure to be arrived at is almost wholly discretionary or "at large."[75]

California's highest court recently used this same line of reasoning to deny pre-judgment interest in a nuisance case awarding damages for airport noise:

> [D]amages for the intangible, noneconomic aspects of mental and emotional injury are of a different nature from [damages for loss of money or property]. They are inherently nonpecuniary, unliquidated and not readily subject to precise calculation. The amount of such damages is necessarily left to the subjective

73. See generally Knoll, supra note 55, at 296 ("Thus, prejudgment interest helps ensure that prospective parties undertake the efficient levels of precautions.").

74. McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 176 Misc. 2d 325, 334, 672 N.Y.S.2d 230, 235 (Sup. Ct., N.Y. County 1997) (citations omitted).

75. McCormick, supra note 11, at § 57, at 226.

> discretion of the trier of fact. Retroactive interest on such damages adds uncertain conjecture to speculation.[76]

Although personal injury awards are arbitrary in a philosophical sense, judges, practitioners, and claims adjusters become able to predict what a jury will normally award for a particular type of injury.[77] Arguably, "the measure of recovery for damages in a personal injury action is no more uncertain and unliquidated than that in many other tort and contractual disputes where prejudgment interest has been allowed."[78] Furthermore, a runaway award is always subject to decrease by the trial court,[79] Appellate Division,[80] or both,[81] albeit not by the Court of Ap-

76. Greater Westchester Homeowners Association v. City of Los Angeles, 26 Cal. 3d 86, 103, 603 P.2d 1329, 1338, 160 Cal. Rptr. 733, 741 (1979), cert. denied, 449 U.S. 820, 101 S. Ct. 77, 66 L. Ed. 2d 22 (1980).

77. "Courts and legislatures ignored the fact that each day, attorneys and judges evaluated claims and came to reasonable values for both settlements and verdicts, and at the outset of all claims, insurance carriers reviewed the injuries and liability to establish amounts to set aside their reserves." James D. Wilson, supra note 28, at 108 (citation omitted).

78. Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 553 (Tex. 1985).

79. See CPLR 4404(a); Loadholt v. Funway Tours of N.J., N.Y.L.J., Apr. 18, 1994, p. 28, col. 5 (Sup. Ct., N.Y. County) ("Pursuant to CPLR 4404(a) the [trial] court in its discretion may set aside a verdict and order a new trial in the interest of justice. The applicable standard of review is whether the award . . . deviates materially from what would be reasonable compensation.")

80. See CPLR 5501(c):

> In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter [which includes personal injury actions, CPLR 4111(f)], in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

See generally Byrd v. New York City Transit Auth., 172 A.D.2d 579, 581, 568 N.Y.S.2d 628, 630 (2d Dept. 1991) (granting new trial unless plaintiff, who was awarded $950,000 compensatory damages for false imprisonment, malicious prosecution, and assault and battery, agreed to reduction to $250,000), lv. denied, 80 N.Y.2d 751, 599 N.E.2d 691, 587 N.Y.S.2d 287 (1992).

81. Saltzberg v. Kiamesha Concord, Inc., 24 A.D.2d 876, 877, 264 N.Y.S.2d 428, 429 (2d Dept. 1965) (directing new trial unless plaintiff-administrator agreed to reduction of damages for infant's death to $25,000 after plaintiff had already agreed to $43,300 to avoid new trial after original jury had awarded $100,000), aff'd without opinion on other grounds, 17 N.Y.2d 847, 218 N.E.2d 323, 271 N.Y.S.2d 283 (1966); Loeb v. Tietelbaum, 112 Misc. 2d 1039, 1040, 448 N.Y.S.2d 391, 392 (Civ. Ct., Kings County 1982) (false arrest damages effectively went from $350,000 [trial] to $75,000 [post-trial] to $17,000 [appeal] to $40,000 [retrial]).

peals.[82] Moreover, there is no way to know, much less to prove, whether the wide discretion granted to juries[83] works in favor of plaintiffs, who may generate more sympathy than defendants, or in favor of insurers and municipalities (common defendant parties-in-interest), who, respectively, set rates (or provide data to state regulators who set rates) and collect taxes. In any event, interest is simply an adjunct of damages.[84] The arguable arbitrariness of damage awards may be a political football in the "tort reform" arena but does not justify denial of interest.

B. Windfall Rationale

Other opposition to PVIPIC is based on the notion that juries already inflate their awards to reflect the delay between injury and judgment.[85] Under the Restatement view, that delay "can be considered" in making awards.[86] One court opined that any balancing between delay and the size of the award should be done on the table, rather than under it:

> No one would be so naive as to suppose that juries do not throw into the scales [of justice] the years that a plaintiff may have had to wait before his case can be heard by a jury. The practical reason why the courts in jury cases have refused to grant moratory interest [*i.e.*, interest as damages] may therefore be found in the judicial recognition that a jury usually makes some allowance for loss because of the law's delay. Likewise judges doubtless

82. Tate v. Colabello, 58 N.Y.2d 84, 86 n., 445 N.E.2d 1101, 1102, n., 459 N.Y.S.2d 422, 423 n. (1983).

83. E.g., Shapp v. Simmons, 31 A.D.2d 666, 666, 295 N.Y.S.2d 554, 555 (3d Dept. 1968) ("The fixation of damages in personal injury actions is peculiarly the function of the jury . . . .").

84. Busik v. Levine, 63 N.J. 351, 369, 307 A.2d 571, 580 ("Prejudgment interest may be deemed to be part of the damages occasioned by the initial wrong, although one might say that such interest is a remedy for a second wrong, i.e., the delay in payment."), appeal dismissed, 414 U.S. 1106, 94 S. Ct. 831, 38 L. Ed. 2d 733 (1973).

85. Professor McCormick believed that juries "doubtless oftentimes" inflate awards because of delay. McCormick, supra note 11, at § 57, at 227. Jury inflation was viewed as a matter of course in Lindwall v. Talent Cab Corp., 51 Misc. 2d 381, 382, 273 N.Y.S.2d 261, 263 (Sup. Ct., N.Y. County 1966) ("The jury, in fixing the amount of [a personal injury] award, will automatically take the interest into consideration in arriving at their estimate of plaintiff's monetary loss."). On the other hand, the Court of Appeals rejected as "conjectural" an argument that juries "routinely increase awards based on the kind of delay present in . . . bifurcated trial/interlocutory appeal situations." Gunnarson v. State, 70 N.Y.2d 923, 925, 519 N.E.2d 307, 308, 524 N.Y.S.2d 396, 397-98 (1987).

86. Restatement (Second) of Torts § 913(2), at 489 (1979).

> make some allowance for loss because of the law's delay. It would seem to be better to recognize this and have the computation made on a basis which is known and understood.[87]

PVIPIC should be consistent, not arbitrary.

There is no definitive way of knowing whether juries augment awards to account for delay. A 1983 study by the Rand Institute purports to show that between 1960 and 1979, in the federal, state, and municipal courts of Cook County, Illinois, in the 1349 trials arising out of automobile accidents, even controlling for the general type and specific severity of the injury, juries increased awards by an average of 3.7% per year over and above inflation (as measured by the Consumer Price Index) between injury and trial.[88] In 1986 three Illinois practitioners criticized the study on the grounds that, *inter alia*, accurately factoring out the severity of injury is impossible: "One fractured tibia is not equitable with another fractured tibia."[89] The study attempted to compare apples to apples by assessing, for each injury, a plaintiff's lost income, medical expenses, disability *vel non*, and basic level of injury. Nevertheless, it is easy to imagine that even after all was said and done, injuries that the study considered to be comparable except for the length of time of their adjudication were actually somewhat different, with the more serious ones being litigated more fiercely, and thus at greater length, by one or both parties. As two Columbia University scholars note, "[T]he stark fact is that the more serious a plaintiff's injuries and hence the greater his need for prompt payment, the longer his wait is likely to be. [B]ig-recovery cases—those in which the plaintiff was seriously injured—close at a much slower pace than relatively trivial cases."[90]

In Professor Dobbs's view, the Institute for Civil Justice's "study is limited and the ability to compare cases limited, but the idea [of juror inflation] does not defy common sense."[91] Because Illinois did not allow PVIPIC during the years in question,[92] it is quite possible that jurors were

87. Moore-McCormack Lines Inc. v. Richardson, 295 F.2d 583, 594 (2d Cir. 1961), cert. denied, 368 U.S. 989, 82 S. Ct. 606, 7 L. Ed. 2d 526 (1962).

88. Stephen J. Carroll, Jury Awards and Prejudgment Interest In Tort Cases 2 (The Institute for Civil Justice 1983).

89. James D. Wilson, supra note 28, at 112.

90. Maurice Rosenberg & Michael I. Sovern, Delay and the Dynamics of Personal Injury Litigation, 59 Colum. L. Rev. 1115, 1122 (1959).

91. Dobbs, supra note 46, at § 3.6(5), at 360.

92. See Wilson, supra note 28, at 152.

indeed inflating awards. However, if PVIPIC is enacted, judges should instruct jurors to evaluate damages as of the time of loss; the law will then award interest at a rate that the legislature has determined to be fair. As explained by the Supreme Court of New Jersey, "an instruction to the jury can obviate the risk [of duplication of interest]."[93] Juror inflation, motivated by a sense of fairness, may point the way to a more precise resolution of the problem caused by litigation's inherent delay.[94]

C. Time of Accrual Rationale

Another argument against PVIPIC is that in personal injury actions, "the damages are continuing and may even reach beyond the time of trial."[95] Clearly, interest from injury should not be allowed on compensation for damage suffered after injury.

The date a jury renders a verdict is completely arbitrary vis-à-vis the date or dates on which a plaintiff suffers damage.[96] Indeed, even the date of the injury is often arbitrary vis-à-vis the date or dates on which the plaintiff suffers damage, except that the latter cannot precede the former. Pain and suffering, lost wages, and medical expenses can all be incurred for years or decades after injury, and years or decades before and after verdict. What matters, though, is the date or timespan[97] as of which a jury is assessing particular damage. Once this is known, the correct interest can easily be added to pre-verdict damages. Simply put, if a jury is assessing pre-verdict damages as of the date of injury, the court should award pre-verdict interest pursuant to the first sentence of CPLR 5001(b)

93. Busik v. Levine, 63 N.J. 351, 360, 307 A.2d 571, 576, appeal dismissed, 414 U.S. 1106, 94 S. Ct. 831, 38 L. Ed. 2d 733 (1973).

94. "[T]he court should specifically instruct the jury not to consider the passage of time in their assessment of damages. Then, with respect to all damages that arose prior to trial, the judge or jury would apply a predetermined interest rate to adjust the past damages to a present value." Rothschild, supra note 12, at 216.

95. Gillespie v. Great Atl. & Pac. Tea Co., 44 Misc. 2d 670, 671, 255 N.Y.S.2d 10, 11 (Sup. Ct., Westchester County 1964) (quoting Law Revision Commission Report of 1950, at 108), aff'd, 26 A.D.2d 953, 276 N.Y.S.2d 372 (2d Dept. 1966), modified on other grounds, 21 N.Y.2d 823, 235 N.E.2d 911, 288 N.Y.S.2d 907 (1968).

96. Cf. Anthony A. Rothschild, Prejudgment Interest: Survey and Suggestion, 77 Nw. U. L. Rev. 192, 219 (1982) ("[T]he date on which [the plaintiff] files his complaint bears no relationship to the time at which he became entitled to compensation—the date of the injury—or the amount of compensation necessary to make him whole again.").

97. Time spans are measured by their ending date, a procedure that, to plaintiffs' detriment, sacrifices accuracy for simplicity.

("earliest ascertainable date") as of that date. Conversely, if the jury is assessing pre-verdict damages as of a date or time span after injury, the court should award pre-verdict interest as of that date or, pursuant to the second sentence of CPLR 5001(b),[98] as of that time span.

D. Penalty Rationale

Another argument against PVIPIC is that it "penalizes" defendants. The Court of Appeals squarely rejected this view in *Love v. State*,[99] perhaps the court's most important disquisition on the PVIPIC issue. *Love* was a personal injury action against the State, with a trial bifurcated between liability and damages. Damages were determined considerably after liability, neither side being responsible for the delay. Interpreting CPLR 5002's provision that interest "be recovered . . . from the date the verdict was rendered or the report or decision was made" to require that interest run from the date that liability was determined, regardless of fault for delay, the Court stated as follows:

> [I]nterest is not a penalty. Rather, it is simply the cost of having the use of another person's money for a specified period. It is intended to indemnify successful plaintiffs "for the nonpayment of what is due them," and is not meant to punish defendants for delaying the final resolution of the litigation.[100]

The court explained why PVI should run from the determination of liability rather than the determination of damages as follows:

> At that point [*i.e.*, the determination of liability], the defendant's

98. "Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date."

99. 78 N.Y.2d 540, 583 N.E.2d 1296, 577 N.Y.S.2d 359 (1991).

100. 78 N.Y.2d at 544, 583 N.E.2d at 1298, 577 N.Y.S.2d at 361 (citations omitted); accord, Lodges 743 and 1746, Int'l Ass'n of Machinists v. United Aircraft Corp., 534 F.2d 422, 447 (2d Cir. 1975) ("[A]wards of prejudgment interest are essentially compensatory . . . and wrongdoing by a defendant is not a prerequisite to an award."); McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 176 Misc. 2d 325, 336, 672 N.Y.S.2d 230, 236 (Sup. Ct., N.Y. County 1998) (awarding pre-verdict interest on claim for back pay in discrimination case as "simply the cost to the defendant of having had the use of plaintiff's wages for the period of time it wrongfully withheld them"). Of course, any requirement to pay money can be viewed, or at least phrased, as a "penalty." A person who borrows money, buys groceries, or attends a Broadway show must pay for the privilege, but that payment is not normally considered a "penalty."

> obligation to pay the plaintiff is established, and the only remaining question is the precise amount that is due. The fact that damages are not yet liquidated is of no moment. As we explained in *Gunnarson v State of New York* (70 NY2d 923, 924), plaintiffs are entitled "to be compensated with interest for the delay in the payment of the principal award certainly due them [even though] . . . the amount remains uncertain." And, there is no logical objection to permitting the plaintiff to recover interest "retroactive[ly]" (*id.*, at 924) after damages are computed.[101]

If defendants should pay interest for the time between the liability determination and the damage determination, even though the amount of interest cannot be determined until the latter, then they should also pay interest for the time between damage and the liability determination, even though liability cannot be determined until the latter.[102]

E. Fault for Delay Rationale

Opponents of PVIPIC argue that a defendant who has not delayed litigation should not be required to pay such interest. The debate over who delays litigation may be the longest running show on the courthouse stage.[103] One New Jersey jurist, in a vigorous dissent against affirming the adoption of N.J. Rule 4:42-11(b), providing for prejudgment interest in "tort actions," to run from the later of commencement of the action or six months after accrual, tried to spread the blame:

> It is difficult to resist the impression that the impelling motivation for adoption of the rule was clearance of trial dockets in automobile and kindred insured-tort situations by imposing coercive pressure on insurance companies to settle cases early. But beyond the observation above that others than insurers may be penalized by the rule, it does not seem fair to assume, as does the rule, that only defendants or their insurers are respon-

101. Love, 78 N.Y.2d at 544, 583 N.E.2d at 1298, 577 N.Y.S.2d at 361.

102. To the extent defendant has had the free use of the income-producing ability of plaintiff's money without having to pay for it, he has been unjustly enriched. To divest defendant of this unjustified benefit is not to penalize him, for it has been determined by the trial that it was never rightfully his.

Recent Developments, supra note 63, at 109.

103. "[F]ailure to award prejudgment interest creates a substantial financial incentive for defendants to litigate even where liability is so clear and the jury award so predictable that they should settle." State v. Phillips, 470 P.2d 266, 274 (Alaska 1970).

> sible for unreasonable failures of litigants to arrive at pre-trial settlements. The rule may well operate to encourage unreasonable recalcitrance on the part of some plaintiffs. It is a blunderbuss which strikes its objects indiscriminately and without necessary regard to the justice of its effect in particular cases.[104]

Defendants note (1) that delay is not always in their best interest, because it increases their litigation costs; (2) that the proper defense of a serious personal injury or medical malpractice[105] case takes painstaking, time-consuming preparation; and (3) that plaintiffs sometimes delay matters by resisting disclosure.[106] However, despite the validity of these points, defendants still retain the money at issue before and during litigation. *Love*, *supra*, demonstrates that fault for delay does not militate in favor of denying or delaying PVIPIC.[107] In any event, most courts and commentators agree that intentional delay is a one-sided problem.[108]

F. Economic Rationale

Yet another argument against PVIPIC is that it would force insurers to raise premiums, and force self-insured municipalities to raise taxes, to

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104. Busik v. Levine, 63 N.J. 351, 384-85, 307 A.2d 571, 589 (Conford, J., dissenting), appeal dismissed, 414 U.S. 1106, 94 S. Ct. 831, 38 L. Ed. 2d 733 (1973).

105. CPLR 5001 does not allow pre-verdict interest in medical malpractice cases. Glassman v. Brunswick Home, Inc., 51 Misc. 2d 392, 273 N.Y.S.2d 335 (Sup. Ct., Suffolk County 1966).

106. See generally Comment, Judgments: Interest on Judgments—Limitation on Recovery of Prejudgment Interest, 56 Minn. L. Rev. 739, 746 (1972) (advocating that in property damage actions, judges be given discretion to reduce or eliminate prejudgment interest "in cases where the plaintiff is responsible for unnecessary delay").

107. See Walter Motorcars Ltd. v. Mazda Motor of Am., Inc., 169 Misc. 2d 737, 738-40, 647 N.Y.S.2d 683, 684-85 (Sup. Ct., Nassau County 1996) (holding that pre-verdict interest cannot be reduced due to plaintiff's unreasonable delay); Krause v. City of New York, 149 Misc. 2d 962, 965, 567 N.Y.S.2d 1004, 1005-06 (Sup. Ct., Bronx County 1991) ("[A] fault analysis does not relate to the reason for the award of interest—to compensate a plaintiff for the defendant's use of the plaintiff's funds.").

108. Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 554 (Tex. 1985) ("[PVIPIC] will remove the current incentives for defendants to delay as long as possible without creating incentives for plaintiffs to delay."); Rothschild, supra note 12, at 210 ("Prejudgment interest removes the defendant's incentive to prolong litigation . . . . [T]he plaintiff is not likely to engage in dilatory tactics to generate prejudgment interest because he receives nothing until he obtains his judgment. . . . Moreover, prejudgment interest does not make a plaintiff better off for having waited."). Rothschild notes that plaintiffs who delay in filing are subject to Statute of Limitations or laches dismissals. See id. at 213. Plaintiffs in New York who delay in prosecution are also subject to CPLR 3216 ("Want of Prosecution") dismissal.

cover increased payouts. However, the purpose of insurance is to spread the risk of loss,[109] and the purpose of taxes is to pay the costs of government.[110] The marketplace is the proper venue for competing economic forces to determine where loss caused by dangerous activities ultimately should come to rest. Victims should not bear this loss.

G. Economy Rationale

A decade ago, opponents of PVIPIC argued against instituting it "during an era of economic malaise and budget cuts."[111] The current era is one of economic health and tax cuts. New York City argued that PVIPIC would subject municipalities "to even greater financial burdens during a time of tremendous fiscal uncertainty."[112] For fiscal year 2000, the City Comptroller is projecting a budget surplus in excess of $2,000,000,000.00.[113] Thus, the argument that "now is not the time" has become the counter-argument that "there has never been a better time."

IV. RECOMMENDATIONS OF THE COUNCIL ON JUDICIAL ADMINISTRATION

The Council on Judicial Administration recommends that CPLR 5001(a), (b) be amended to provide for PVIPIC, interest to run from the date of commencement of the action.[114]

The highest courts of two nearby sibling jurisdictions, New Jersey and Pennsylvania, have adopted court rules providing for PVIPIC "in the exercise of their power to govern practice and procedure within their jurisdictions. In both instances, the same courts affirmed the constitution-

109. Holmes's Appleman on Insurance, 2d § 1.2, at 4 (1996) ("[I]nsurance is generally understood as risk sharing through consensual arrangements which transfer and distribute risks among the consenting parties.").

110. City of Rochester v. Bloss, 185 N.Y. 42, 47-48, 77 N.E. 794, 795-96 (1906) ("Taxes do not rest upon contract, express or implied. They are obligations imposed on citizens to pay the expenses of government.").

111. Tom Precious, Intense Lobbying Kills Lawsuit-Interest Bill, Albany Times-Union, July 4, 1991.

112. Gary Spencer, In Albany, Interests Clash on Bill to Allow Prejudgment Interest, N.Y. L.J., June 27, 1991, p. 1, col. 2.

113. <http://www.comptroller.nyc.ny.us.>

114. See Appendix One, "Proposal: An Act to Amend the Civil Practice Law and Rules to Provide for Pre-Verdict Interest in Personal Injury Cases."

ality of these rules."[115] The highest court in Texas instituted PVIPIC by modifying the common law.[116] However, generally speaking, "prejudgment interest is a creature of statute."[117] In New York, the Legislature has heretofore pre-empted PVI issues.[118] Thus, any change must come from that body.

The campaign for legislatively-mandated PVIPIC in New York can easily be traced back half a century.[119] The state court system itself proposed PVIPIC in its 1999 Report ("Advisory Report") of the Advisory Committee on Civil Practice ("Advisory Committee"), submitted to the state's Chief Administrative Judge.[120] The Advisory Report recommends amending CPLR 5001(a), (b) to provide that interest be recoverable "in an action based on personal injury," to run from one year after the commencement of the action to the verdict, exclusively on special and general damages.[121] Settle-

115. Wilson, supra note 28, at 114-16 (citing N.J. Rule 4:42-11(b); Busik v. Levine, 63 N.J. 351, 307 A.2d 571, appeal dismissed, 414 U.S. 1106, 94 S. Ct. 831, 38 L. Ed. 2d 733 (1973); Pa. R. Civ. P. 238; Laudenberger v. Port Auth. of Allegheny County, 496 Pa. 52, 436 A.2d 147 (1981) (upholding PVIPIC rule adopted to clear court congestion because rule did not "abridge, enlarge, [or] modify the substantive rights of any litigant"), appeal dismissed sub nom. Bucheit v. Laudenberger, 456 U.S. 940, 102 S. Ct. 2002, 72 L. Ed. 2d 462 (1982). The continuing saga of Rule 238 and of Laudenberger's sequellae is recounted in Knight v. Tape, 935 F.2d 617, 620-30 (3d Cir. 1991) (upholding revised version of rule).

116. Supra note 65.

117. Rothschild, supra note 12, at 193.

118. In Purcell v. Long Island Daily Publishing Co., Inc., 9 N.Y.2d 255, 258-59, 173 N.E.2d 865, 866-67, 213- N.Y.S.2d 425, 427-28 (1961), the Court of Appeals held that only the legislature could change the rule that pre-verdict interest in an action for negligent, rather than intentional, injury to property was discretionary rather than mandatory. Dissenting, Judge Fuld wrote that "[s]ince the rule was court-created and court-developed, no obstacle exists to prevent the court from modifying it and announcing the doctrine which, following the modern trend, accords with principles of reason and justice." 9 N.Y.2d at 260, 173 N.E.2d at 867-68, 213 N.Y.S.2d at 428 (Fuld, J. dissenting) (citations omitted).

119. 1966 N.Y. L. Rev. Comm. Rep., p. 409 et seq., noted in Zegman v. State, 99 Misc. 2d 473, 477, 416 N.Y.S.2d 505, 507 (N.Y. Ct. Cl. 1979); see Appendix Two, "Brief Survey of Recent Proposals for Pre-Verdict Interest in Personal Injury Cases in New York"; Appendix Three, "The Association of the Bar of the City of New York's Prior Support for Pre-Verdict Interest in Personal Injury Cases."

120. The Advisory Committee is one of the standing advisory committees established by the Chief Administrative Judge pursuant to Judiciary Law § 212(1)(g), (q). The Committee's Chair is listed as George F. Carpinello, Esq., c/o Office of Court Administration, Counsel's Office, 25 Beaver Street, New York, NY 10004. Advisory Report at 4.

121. Id. at 7-8. The Advisory Report, at 5, also recommends amending CPLR 3221, in tandem with the CPLR 5001, to provide that in all actions, if a plaintiff rejects an offer to compromise and fails to obtain a more favorable judgment, interest, in addition to costs, would be limited

ments would not be covered, because they "are concluded with interest in mind," and punitive and future damages also would not be covered.[122] According to the Advisory Committee, these recommendations are "based on considerations of equity and effective case disposition" and "reflec[t] a growing national trend."[123]

In the majority of jurisdictions "where [prejudgment] interest is allowed [in personal injury cases], it is computed from the date of the tort. Thus, in an action for negligence, interest runs from the date of the injury."[124] However, the date of injury is not always easy to ascertain, especially in toxic tort cases. Lengthy, expensive proceedings to determine the "date of injury" could result. Furthermore, many defendants, particularly corporate defendants, will not even know that a claim exists prior to commencement. Finally, as noted above, in many cases damage does not occur until some time after injury.

On the other hand, the Advisory Committee's proposal that interest start running one year from commencement reflects the overly optimistic hope that personal injury cases will be resolved within that period of time, barring deliberate delay. However, as noted above, PVI is not a penalty; rather, it is payment for the deprivation to plaintiffs and the benefit to defendants caused by the latter's use of money that equitably belonged to the former. A one-year-from-commencement rule may encourage defendants to stall a case until then before seriously attempting to resolve it. Also, such a rule fails to provide full indemnity. Finally, the one-year delay is unnecessary in light of the rule in CPLR 5001(b) that interest runs from the date damage is incurred if that date is after the date that from which interest otherwise would be computed.

The Council believes that PVIPIC should begin at the commencement of the action or the date damages are incurred, whichever is later. Commencement is easily ascertainable. It is often the earliest date that a

to the period preceding the offer. The Advisory Committee believes that this will encourage plaintiffs to settle or to proceed expeditiously to trial. The Council on Judicial Administration takes no position on the Advisory Committee's recommendation to amend CPLR 3221.

122. *Id.* at 6.

123. *Id.* at 5.

124. 3 Stein, *supra* note 40, at § 17:64, at 84. "[T]he recognition that prejudgment interest compensates for the defendant's possession of money that rightfully belongs to the plaintiff implies that a better rule would be to start accruing interest as soon as the claim arose." Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 Tex. L. Rev. 293, 354 (1996).

defendant can begin to assess liability and estimate damages.[125] Furthermore, given the difficulty inherent in precisely determining when damage occurs, commencement will usually be a reasonable intermediate date between injury and a date approaching trial.[126]

CONCLUSION

As the Association has long recognized, providing for pre-verdict interest in personal injury cases is fair as a matter of substance and will significantly alleviate court congestion as a matter of procedure. This will benefit all litigants and the Unified Court System itself. Accrual upon commencement (or when damage is incurred, if later) fairly addresses the competing theoretical concepts and policy considerations.

The Council on Judicial Administration of the Association of the Bar of the City of New York recommends that CPLR 5001(a), (b) be amended to provide for pre-verdict interest in personal injury cases, interest to run from the date of commencement of the action. New York should join the trend towards a more enlightened, harmonious resolution of this ancient, vexing issue.

April 2000

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125. See Don Wade Cloud, Jr., Note, Cavnar v. Quality Control Parking, Inc.: Prejudgment Interest Is Now Recoverable in Personal Injury, Wrongful Death and Survival Action Cases, 38 Baylor L. Rev. 385, 408-410 (1986) (advocating that interest commence upon the earlier of the filing of a "reasonable" notice of claim or the commencement of the action, to "avoid the inequity of having prejudgment interest run on damages prior to the defendant being informed of his opportunity to settle").

126. Admittedly, the "commencement rule" has critics. It may be self-defeating:

> The rule restricting interest to the postfiling period . . . may induce plaintiffs to file their complaints in greater haste to trigger the running of prejudgment interest. Yet an appreciation of the full extent of the damages, which often does not develop for a considerable period of time after the injury occurs, is a prerequisite for meaningful settlement negotiations and discovery procedures. To encourage plaintiffs to file suit before obtaining that appreciation serves no useful purpose; it also may result in a sacrifice of the quality of the legal craftsmanship and theproliferation of premature pleadings. To achieve full compensation and encourage complete knowledge of the extent of damages prior to filing suit, prejudgment interest should begin to run at the time the cause of action accrues.

Rothschild, supra note 12, at 219; accord, Wilson, supra note 28, at 116 (arguing that a one-year-after-commencement rule "results in fomenting litigation. In those cases where a formal complaint is required, claimants are compelled to file suit as quickly as possible after an injury").

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Appendix One

Proposal: An Act to Amend the Civil Practice Law and Rules to Provide for Pre-Verdict Interest in Personal Injury Cases

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 5001(a), (b) of the Civil Practice Law and Rules is amended to read as follows:

> (a) **Actions in which recoverable.** Interest to verdict, report or decision shall be recovered ~~upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property~~ in actions based upon breach of contract, personal injury, or deprivation of or interference with property rights, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.
>
> (b) **Date from which computed.** Interest shall be computed from the earliest ascertainable date the cause of action existed, except that in actions based upon personal injury interest shall be computed from the commencement of the action. ~~i~~Interest upon damages incurred ~~thereafter~~ after the date specified in the preceding sentence shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred~~ or~~, except that in an action based upon personal injury, interest shall be computed upon each item from the date it was incurred or from the commencement of the action, whichever is later. Interest may be computed upon all of the damages from a single reasonable intermediate date, in which case, in a personal injury action, determination of the single reasonable intermediate date shall presume that all pre-commencement damages occurred at commencement.

Appendix Two

Brief Survey of Recent Proposals for Pre-Verdict Interest in Personal Injury Cases in NewYork

In 1989 the New York State Office of Court Administration proposed a bill pursuant to which interest would have run from the filing of the note of issue "in hopes of reducing civil caseloads by encouraging earlier settlements."[127]

In 1990 Chief Judge Sol Wachtler promoted the passage of PVIPIC legislation in his State of the Judiciary message.[128] That year, the Chief Administrative Judge's Advisory Committee on Civil Practice recommended amending CPLR 5001 to provide for PVIPIC from the filing of the Note of Issue and recommended amending CPLR 3221 to provide that if a plaintiff refused an offer and did not obtain a more favorable judgment, interest and costs would be limited to the period preceding the offer.[129]

In 1991, State Senate Judiciary Chair Christopher Mega proposed legislation pursuant to which interest in personal injury cases would have run from the later of the commencement of the action or six months after the cause of action arose.[130] Interest would have been disallowed if the plaintiff rejected an offer and did not obtain a more favorable judgment.[131] That June, Senator Mega's proposal passed the Assembly, where it was sponsored by Stephen Kaufman,[132] and was sent to the Senate Rules Committee. There, as Senate Bill 3027-A, it was "killed . . . in a closed-door meeting. It was not even being allowed out onto the floor for a debate."[133] Senate Majority Leader Ralph J. Marino apparently kept the bill bottled up in Committee.[134] The bill's opponents, described as "insurance organizations, municipalities [particularly New York City] and medical groups concerned about malpractice insurance premiums"[135] said that

127. Spencer, supra note 112, at p.1, col. 2.

128. Abraham Fuchsberg, Perspective, Pre-Judgment Interest: A True Bill, N.Y.L.J., Jan. 29, 1991, p.2, col. 3-4.

129. Id.

130. Spencer, supra note 112, at p. 1, col. 1.

131. Spencer, supra note 112, at p. 2, col. 2.

132. Tom Precious, Bill Would Tack On Back Interest In Successful Personal-Injury Lawsuits, The Times Union (of Albany), circa July 1991.

133. Id.

134. Id.

135. Spencer, supra note 112, at p. 1, col. 2. "The fight over the bill has clearly drawn lines: trial lawyers on one side, and nearly every other group on the other. Among the opponents are

the bill "would have driven up insurance premium rates on consumers and taxes on residents in communities that are self-insured against personal injury suits."[136]

In mid-decade The Jury Project Report noted as follows:

> Awarding prejudgment interest is widely perceived as another effective means of encouraging early settlements, since the longer a settlement is delayed the greater the potential exposure to the defendant. Indeed, we are advised that most of the settlements that occur after jury selection but before trial [a bête noire of the Report] come in tort cases, where prejudgment interest is not currently awarded.[137]

The Report noted the defense bar's "strenuous" opposition to PVIPIC, but suggested that, as a compromise, interest could run only from the pretrial conference.[138]

In or about 1997 Assembly Member Kaufman introduced A.610, providing for interest only if plaintiff recovered an amount greater than that offered, and only from one year following the date the cause of action arose or the action was commenced, whichever was later.[139] Interest would have accrued only on general and special damages to the date of verdict.[140]

On March 23, 1998, Chief Judge Judith Kaye proposed PVIPIC on settlements and judgments, to accrue beginning one year after commencement.[141] "Right now, it pays to drag a personal injury case slowly through the courts."[142]

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organizations representing counties, cities and towns, insurance companies, doctors, hospitals, large and small businesses, the Metropolitan Transportation Authority and the American Automobile Association." Precious, supra note 132. As stated in Interest on Damages Awarded in Negligence Cases Is Discretionary with Jury, 11 Buff. L. Rev. 272, 273 (1961), "[i]t is a well-known fact that the legislature is subject to pressure groups and has a propensity to delay. The effect of this may in some instances be injustice or delay resulting in injustice."

136. Precious, supra note 111.

137. The Jury Project, Report to the Chief Judge of the State of New York, March 31, 1994, at 78.

138. Id.

139. Pre Judgment Interest: Myths and Facts, The New York State Trial Lawyers Association, at 2 (May 27, 1997).

140. Id.

141. Richard Perez-Pena, More Interest Payments on Awards Are Urged to Speed Up Court Cases, New York Times, Mar. 25, 1998.

142. Id. (quoting Chief Judge Judith S. Kaye).

Appendix Three

The Association of the Bar of the City of New York's Prior Support for Pre-Verdict Interest In Personal Injury Cases

In 1956 the Association's Committee on State Legislation issued the following report[143] recommending passage of legislation providing for pre-verdict interest, computed from commencement of the action, on judgments in suits to recover damages for injuries to person or property caused by negligence:

The Association of the Bar of the City of New York
Committee on State Legislation.
No. 91

A. Pr. 548, Int. 546 Mr. Samansky.

AN ACT to amend the civil practice act, in relation to interest in actions to recover damages for injuries to person or property resulting from negligence.

The bill is approved

The bill, to take effect September 1, 1956, would amend Section 480 of the Civil Practice Act and add a new section 480-b to the act. The proposed changes would require interest, computed from the date of the commencement of the action, or the filing of the counterclaim, as the case might be, to be included in any judgment rendered in a suit to recover damages for injuries to person or property resulting from negligence.

We approve this bill because, despite some shortcomings, it would to a large extent clarify existing decisional law, and would serve to assure an injured party of the full indemnity, by way of interest, to which he would seem to be entitled, and because it would also serve as an incentive to early settlements in negligence actions and thereby operate as an effective measure for meeting the grave problem of calendar congestion.

The entire subject of the recoverability of interest upon litigated claims has long been involved in uncertainty and confusion. Legislation has

143. The Association of the Bar of the City of New York, The Committee on State Legislation, Bulletin No. 6, Memo No. 91, at 299-304 (1956).

provided a measure of certainty on this subject in certain limited areas, notably those involving contract actions and wrongful death actions, in which interest is by statute now allowable as of right from the date of the accrual of the cause of action. (Civil Practice Act §480; Decedent Estate Law §132.) In tort actions other than those brought for wrongful death, the rules relating to interest have been left to be developed by judicial decision.

It would seem that in actions brought to recover damages for personal injuries resulting from negligence, interest for any period to the date of the verdict, decision or report, is not allowable (*Helman v. Markoff*, 255 App. Div. 991 (2d Dept. 1938)). In actions for trespass, conversion or fraud, on the other hand, interest is held to be recoverable as a matter of right from the date of the accrual of the cause of action (see *Flamm v. Noble*, 296 N.Y. 262, 268 (1947)).

Until the decision in *Flamm v Noble, supra,* the law in this State was regarded as settled that in an action to recover damages for injuries to property resulting from negligence, the allowance of interest for the period preceding the rendition of the verdict, decision or report was left to the discretion of the trier of the facts (see *Wilson v. City Troy*, 135 N.Y. 96, 105 (1892); *Flamm v. Noble, supra,* 296 N.Y. at 268). The distinction drawn in the decisions between such cases and trespass and conversion actions was declared by the Court of Appeals in *Flamm v. Noble* to be "manifestly unsound because interest is essential to complete indemnity in both classes of cases" (296 N.Y. at 268). The comments made by the Court on this score, however, were dictum, since the *Flamm* case involved, not a negligence action, but one to recover damages for a money loss caused by fraud. But, on the basis of that dictum, there have been several recent decisions in the Appellate Division and at Trial Term of the Supreme Court, in which interest from the date of the accrual of the cause of action has been allowed by the court as a matter of law following jury verdicts in actions for injury to property through negligence (*Harmon & Regalia, Inc. v. City of New York*, 286 App. Div. 825 (1st Dept. 1955); *A. L. Russell, Inc. v. City of New York*, 138 N.Y.S. 2d 455 (Supr. Ct. 1954)), although it has been suggested that in certain situations it may be appropriate to award only from the date of the commencement of the action (see *A. L. Russell, Inc. v. City of New York, supra,* 138 N.Y.S.2d at 457). It is not clear, however, whether this change in the decisional law will be upheld by the Court of Appeals, in the absence of legislation on the subject.

There is undoubtedly a need for clear and definite legislation to regulate the entire subject of interest in tort actions. Although we would pre-

fer to see a carefully drawn bill, providing just and uniform rules applicable to all tort actions, instead of a bill addressed to one limited class of such cases, we do not regard that as reason for disapproving this bill, provided its approach and rationale are sound.

Insofar as the bill applies to actions for property damage resulting from negligence, it will serve the salutary purpose of prescribing a definite rule in place of the existing uncertain decisional law on the subject.

That portion of the bill which deals with personal injuries resulting from negligence has been the subject of great controversy. It has been strongly urged that the allowance of interest in personal injury actions would serve as an effective means for meeting the serious problem of calendar congestion in negligence actions by encouraging early settlements by insurance companies. It has thus been noted that if insurance companies were confronted with the prospect of having to pay interest for the period of years which usually elapses before a negligence action is reached for trial on the jury calendar in New York City, they would be more fully disposed to seek or acquiesce in early settlements of the claims. It has been contended, on the other hand, that many plaintiffs would not forego the advantages of delay if they were assured of receiving interest on the ultimate recovery for so long asthe delay continued. We do not, however, see any real danger on that score.

We have in prior years disapproved similar proposals to allow interest in personal injury actions (Memo. No. 5, p. 15, 1953; Memo. No. 32, p. 103, 1954; Memo. No. 7, p. 21, 1955). We felt that such proposals invited a variety of complex problems which are presently avoided by denying interest in personal injury actions for any period preceding the rendition of the verdict, decision or report. We thus noted that many of the elements of damage in personal injury actions involve matters as to which no standard of pecuniary measurement is available, such as those of pain, suffering and humiliation; that a jury assessment of such damages is largely a matter of discretion in the first instance; and that it is in many cases difficult to determine from what date interest on such damages should be awarded. We recognized that there were certain pecuniary losses, such as medical expenses, that are easily ascertainable, but that unless the questionable practice were adopted of requiring the jury in every personal injury action to submit a detailed special verdict, it would be impossible to determine to what extent the plaintiff had been awarded a recovery for particular alleged items of such expenses.

Because, however, of the continued seriousness of the problem of calendar congestion in negligence actions, and because we feel that it is

the special duty of the Bar to leave no stone unturned in an effort to meet that problem, we have reconsidered our prior position. After careful deliberation, we have reached the conclusion that the allowance of interest in such actions may well serve as an incentive to early settlements, and thereby operate as an effective measure for meeting the grave problem of calendar congestion. Viewed in the context of this consideration, we no longer feel that the objections which we have previously noted to proposals of this kind outweigh the policy considerations, expressed in *Flamm v. Noble, supra,* 296 N.Y. at 268, in favor of affording complete indemnity, by way of interest, in all tort actions, wherever practicable. The fact that the damages in personal injury actions are largely unliquidated, can no longer be deemed a bar to the allowance of interest, (Cf. *Flamm v. Noble, supra,* 296 N.Y. at 266-267). Losses sustained by reason of personal injuries are as real, and often much more serious than, injuries to property for which the decisional law now sanctions recovery of interest.

For the reasons stated, the bill is approved.

The Failure of Civil Damages Claims to Modify Police Practices, and Recommendations for Change

The Committee on New York City Affairs

There is constant debate in this City, both in its political institutions and in the press, about police accountability to the public for violations of civil rights. The Civilian Complaint Review Board, an independent body to investigate civilian complaints against the police, has been criticized as insufficiently vigorous in pursuing and substantiating complaints against police; and in the cases in which citizens' complaints are substantiated, the Police Commissioner has been criticized for failing to act to discipline the officers involved.

It is not our purpose to enter into the merits of the ongoing controversy concerning the adequacy of administrative measures of discipline, but instead to call attention to an additional, generally neglected source of police accountability to the public, and to propose changes that will serve to make the legal process as a whole more effective both in reducing the amount of damages paid out of public funds and in controlling police abuses. That source of accountability is the tort system—the damages paid by the city for the injuries allegedly inflicted by police officers.

Under the terms of New York State's General Municipal Law, the City is obligated to supply counsel and pay the damages for civil claims against its employees, including police officers, when the employee "was acting

within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency;"[1] the Corporation Counsel interprets this provision in such a way as to supply counsel and indemnify police officers in the overwhelming majority of civil claims. Furthermore, as a self-insurer, the City pays such claims directly out of its fiscal resources. Thus the municipality pays nearly all the damages arising out of claims of abuse by police officers.

The City paid a total of $140 million in damages for alleged police abuses, through settlements as well as litigated judgments, between the 1994-95 and 1998-99 fiscal years.[2] By contrast, in the five years 1988-92, the City paid out $45.5 million for similar cases. Despite the substantial sums involved, there is no showing that either the police department or the City administration has made systematic use of the facts or results in such cases either in connection with the discipline of individual police officers or in the shaping of police department policy. Thus the tort system is failing in one of its principal purposes, to shape the actions of those officials on whose behalf damages are paid.

The Office of the Comptroller, the City's fiscal officer, has for nearly a decade been urging the police to make use of data from civil tort claims for purposes of discipline and policy. In February 1992, the office of then Comptroller Elizabeth Holtzman made a study of cases in which damages had been paid for police abuses; she recommended that the NYPD:

- monitor claims and lawsuits involving charges of police misconduct in addition to complaints filed with the Civilian Complaint Review Board and correlate the data from all three sources;

- use the data from claims and lawsuits, as well as from civilian complaints, to identify and correct problems in training or other procedures and policies; and identify individual police officers and take appropriate follow-up action, including additional training or other assistance;

- use the information from police misconduct cases to improve the function of the NYPD, reduce claims and save the City money.

1. NYS Gen. Mun. Law sec. 50-k.

2. K. Flynn, "Record Payout in Settlements against Police," New York Times Oct. 1, 1999. This figure reflects recent increased efforts by the Office of the Corporation Counsel to settle cases.

Talks were held between the police and the Comptroller in the effort to implement these recommendations, but so far as this Committee has been able to determine, the recommendations were not followed.

In 1999, Comptroller Alan Hevesi, in a memo of April 12 to Police Commissioner Safir, recommended that the NYPD "review settled claims data" in the following terms:

> In FY 98, we paid out $28.3 million for police action claims. Although most of these claims are settled by the Comptroller's Office and Corporation Counsel without a direct admission of guilt on the part of the police officers(s) involved, there is enough evidence collected to convince the City that the plaintiff has a serious case. The police department should analyze these settled claims, and take steps to review the officers' performance and propensity to commit acts of excessive force

Mr. Hevesi has remarked that "there is a total disconnect" between the settlements of civil claims and police department action; such matters are ordinarily not even noted in an officer's personnel file.[3] As a result, the NYPD does not learn of potential problem officers, fails to take curative action, and not infrequently fosters a situation in which an officer will engage in another act of violation, resulting in harm to another person and further damages from the City. More important, study of a large number of cases might well reveal patterns of misconduct against which the NYPD could and should take systematic management action. The City's Commission to Combat Police Corruption recently recommended that "...in cases where Law Department attorneys intend to settle claims or there are adverse judgments involving police officers because of liability for excessive force or other misconduct, such reporting can lead the [police] Department to take training or disciplinary measures to address the problem."[4] Most important, the present policy, in place for years, has resulted in a situation in which the City consistently misses opportunities to increase the protection of the rights of persons in the city and to reduce injuries that poison the relations between police and citizen and in doing so saving millions of dollars.

The Law Department, which usually represents the defendants, in-

3. Ibid.

4. NYC Commission to Combat Police Corruption, "The New York City Police Department's Disciplinary System: A Review of the Department's December 1996 False Statement Policy" August 1999 p.35.

cluding the City itself and/or its employees, has suggested that, because the vast majority of police abuse claims are settled, it might be a mistake to try to draw conclusions concerning liability or policy from the results.[5] The defendants usually do not admit liability in a settlement, and cases may be settled merely upon an estimate of the risks involved in the litigation, rather than because of the intrinsic merits of the claim. Nevertheless, it appears to be the case that the City and its Police Department (NYPD) can make judgments about the behavior of individual officers based on their investigations of cases, and that more general conclusions could be drawn from a range of cases. A memo of the facts is made as a basis for a recommendation of settlement in a tort case, and as a result, the City usually does have an informed opinion concerning the actual liability of the officers and the City from its own investigation of the case. Narrative accounts of cases, based upon sometimes undisputed facts, both by the Comptroller and in news accounts, indicate that some very serious abuses have passed through the tort system without any action by the NYPD. For example, in 1995, the city paid $16.6 million in a case where a man was left a quadriplegic after police allegedly slammed his head into a door with such force that it crushed his spine. The police officers involved were apparently never disciplined.

We understand that the Law Department now regularly provides a data printout of case filings to the NYPD. In addition, the Law Department submits a detailed lawyer-client memorandum to the NYPD on cases which, in the Law Department's view, might result in a payment of damages of $250,000 or more. While clearly a highly useful procedure, the cases on which memoranda are prepared represent only one or two percent of the cases filed, too small a number, in our view, to provide sufficient information on patterns of conduct by officer, by precinct or by the NYPD in general.

We recognize that the preparation of additional memoranda will entail a significant degree of effort, and perhaps additional expenditures by the law department. However, we believe that the extra effort and cost is more than justified:

- whatever can be learned about the practices of one, some or many police officers that can be used by the NYPD to better train, manage and discipline wrongful conduct will result should result in enough savings—given the magnitude of the sums paid

5. Ibid.

in damages—to more than offset the increased resources devoted to reporting;

• beyond the cost saving, any changes that will reduce the friction between the NYPD and much of the City's population, or improve public confidence in the behavior and judgment of police officers, would provide far more than monetary benefits. This, of course, depends on whether the NYPD effectively utilizes the information provided.

We are not suggesting that there be a specific dollar value of a case above which a report should be provided to the NYPD. We are persuaded that dollar value can be a misleading indicator of which cases would be most instructive to the NYPD, inasmuch as the age, status and condition of the victim is a major determinant of this value, often regardless of the culpability of the offending officer's conduct. However, there are factors that can be used to separate cases which may be frivolous or of relatively little merit:

• level of culpability of the officer
• some evidence of a pattern of conduct of an officer or group of officers, or a precinct
• some corroborative evidence of misconduct
• severity of harm to the victim.

In response to this approach, the argument may be made that, since so many cases are settled and many, in the judgment of the Law Department, may have questionable value, the tort system essentially should not serve as the warning device in police cases that it so pervasively serves. We cannot accept that argument. At any one time, there may be 7,000 cases of police misconduct pending against the City. That is simply too large a number to ignore, particularly since the tort system is the only means available for people who seek monetary compensation for injuries resulting from police misconduct. The fact that one case is settled for a small amount may not be significant, but the fact that several cases are brought against the same officer, or many cases may involve officers of the same precinct, or a substantial number are brought with regard to a particular practice, may be of great significance, even if all the resulting judgments are relatively small. Moreover, the public needs assurances that any patterns of misconduct or instances of egregious misconduct, how-

ever brought to the City's attention, are dealt with seriously and effectively by the agencies involved, and this is perhaps most true in the case of the NYPD, with the enormous authority it wields over the population.

Recent changes in the way that civil claims for police abuses in Los Angeles, California, in both the city and the county, are being handled suggest that a reform in the relations between the tort system and the management of the police in New York City is overdue and will result in substantial benefits to the city. Following the notorious beating of Rodney King in 1991, the Christopher Commission examined all civil cases alleging the use of excessive force by the Los Angeles Police Department (the city police) in which there was a payment in excess of $15,000. The Commission found disturbing patterns of abuse and failure to discipline officers for such abuses. The Commission recommended:[6]

> LAPD management must recognize that the problem of litigation is a reflection of the more fundamental problem of excessive force, not in all cases to be sure, but in far too many of them. Prompt investigation and discipline, if appropriate, should be pursued. Information about officers' conduct that becomes available in the litigation should be used in evaluating those officers. Conduct that results in large settlements or judgments, including punitive damages awarded on the basis of egregious or intentional misconduct, should be carefully studied to determine what went wrong and why. In addition, the Department, in conjunction with the City Attorney's office and other interested bodies of City government, might consider arbitration or mediation of claims that are not routinely denied and often lead to more expensive litigation.

According to later reports, these recommendations are being implemented.

The experience in Los Angeles County, outside the confines of the city, with the LA Sheriff's Department, is still more revealing. The Special Counsel to the County and its Board of Supervisors examined the records of civil cases alleging brutality by deputy sheriffs during a period of five years, and found that there were certain repetitive fact situations that gave rise to litigation and to a serious risk of loss on behalf of the county. As a result, measures were taken both in policy and in training to reduce the risk of such cases recurring. At present, the county has a system for tracking new litigations, to determine the officer's record and to intro-

6. Report of the Independent Commission on the LA Police Department p. 63 (1991).

duce information concerning the case into the department's records. Whenever there is a substantial settlement, the Sheriff's Department is required to submit a report setting forth what the department is doing to minimize the risk of repetition, through changes in procedure and/or training. Furthermore, the corrective action report and the county counsel's recommendation for a settlement are public records. As a result, the number of such cases filed dropped dramatically, and the Special Counsel has estimated that the county saved $30 million between 1992 and 1996.

We note that the actions taken in Los Angeles go beyond those recommended from time to time by the Office of the Comptroller here in New York. The Comptroller has recommended only that the NYPD track civil cases involving alleged police abuses and make more systematic use of the results. It would appear that continued recommendations that the NYPD, acting alone, take action to integrate the information offered by civil claims are inadequate; the onus to make use of the results of legal claims that have been litigated by the City's lawyers and settled with the consent of the Comptroller should not be placed on the police department alone. The systematic use of such information would be a change in policy by the City that should be carried out by the Corporation Counsel, the Comptroller and the NYPD acting jointly.

Based upon the repeated recommendations of the Office of the Comptroller of the City of New York, on the continued rise in damage payments for alleged police abuses in our city, and upon the experience in Los Angeles, our Committee recommends the following:

1. The Comptroller and Law Department should study police misconduct cases over the last five years to identify patterns and general issues, and make recommendations for the NYPD to consider.

2. The above two agencies and the NYPD should form a liaison team, and the NYPD should appoint a specially-designated liaison officer to carry out NYPD's responsibilities under this proposal.

3. The Law Department should report the filing of a case to the NYPD liaison officer, who should maintain a databank on these cases, assess the claim and report back to the Law Department. Officers with three or more claims against them should have the cases noted in their personnel files.

4. The three agencies, working together, should develop criteria

for determining when a case should be reported in detail by the Law Department to the NYPD. The criteria should include: level of culpability of the officer; some evidence of a pattern of conduct; some corroboration of the misconduct; and degree of harm to the victim. When a police misconduct case is identified that meets these criteria, a report on the matter should be prepared by the Law Department and sent to the NYPD and the Comptroller. The NYPD liaison officer should prepare a response to the report indicating whether there have been other settlements or judgments with regard to the officer in question, and what action was taken with regard to the officer or what change in policy or procedure has resulted, or is to be implemented. The amount of damages paid in a matter should be entered on the officer's record.

5. The liaison team should review reports every six months and analyze trends or other data from these actions to identify appropriate changes in policy or procedure. The team should also follow up with NYPD concerning actions taken with regard to the officers involved and with regard to training or other systemic improvements that had been recommended previously. The team should issue a report with recommendations, and a redacted version of this report, with identification of individual officers removed, should be made public.

6. The Comptroller should issue an annual report, by March 31 of the year following, with data on police conduct cases brought and settled, judgments rendered, and amount paid out. This report should be made public.

In the view of this Committee, the recommendations set forth above are essential. At present, it appears that the NYPD is failing to take curative measures and to implement changes in training and practices that would be revealed as necessary by a systematic study of past and present claims for damages. Thus the tort system is failing in one of its basic purposes, to modify the conduct of persons and organizations found liable. Most important, a change in the present policy, through which the NYPD and other parts of the City administration would make a systematic study of police abuses revealed through the litigation of civil claims in the Law Department and inform the public of resulting steps taken, would reduce the number of claims, increase the protections of the rights of persons in

New York City, improve police-community relations and save the City and ultimately the taxpayers many millions of dollars.

May 2000

The Committee on New York City Affairs

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Patrick E. Cox, *Secretary*

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Taxability of Payments Made on Account of Employment Discrimination Claims

The Committee on Labor and Employment Law

Prior to 1996, Section 104 of the Internal Revenue Code exempted from income taxation "any damages received . . . on account of personal injuries or sickness." The courts had construed this provision to exclude from taxable income payments made in connection with claims of employment discrimination in which the employee claimed to have suffered emotional distress, physical and/or psychological injury or pain and suffering. Section 104 did not, however, exclude from taxable income amounts received as "backpay." In settling claims of employment discrimination, the parties were able to allocate between taxable and non-taxable portions of the settlement payment.

On August 20, 1996, President Clinton signed into law the Small Business Job Protection Act that amended Section 104 so that the Code no longer excluded from taxable income all damages received on account of "personal injuries." Rather the provision was narrowed to allow an exclusion from income only for amounts received "on account of *personal* injuries or *physical* sickness." In addition, the new law specified that "[e]motional distress shall not be treated as a physical injury or physical sickness." This limitation of Section 104's exclusion only to personal injuries that were

"physical" in nature, had the effect of making taxable most payments made by employers to employees on account of employment discrimination claims.

The Committee on Labor and Employment Law of the Association of the Bar of the City of New York (the "Committee") endorses the legislation introduced by Representative Deborah Pryce of Ohio to reverse the 1996 amendment to Section 104 and to restore the tax law regarding damages received on account of "personal injuries" as it existed prior to 1996. Specifically, the exclusion from taxable income contained in Section 104 of the Internal Revenue Code should not be limited to personal injuries that are "physical" in nature, the law should also allow as exclusions from income payments made on account of emotional harm due to alleged acts of discrimination.

The Committee believes that Representative Pryce's proposed legislation is supported by the public policy of encouraging settlement of employment discrimination claims out of Court, rather than through costly, time-consuming litigation. In addition, this legislation treats those who claim to have been injured by employment discrimination in a manner no different from those who claim to have physical injuries due to other types of tort claims. Such treatment is appropriate because there is no principled difference for this purpose between physical and non-physical personal injuries and such a distinction should not be embodied in the tax laws.

Representative Pryce's bill also will allow Congress to correct an ill-advised change in the law that appears to have resulted from Congress' hasty enactment of the 1996 law without the benefit of full debate in Congress or by the public. The legislative history of the 1996 law contains no indication as to the reasons why Congress amended Section 104. The focal points of the 1996 law that consumed most of the legislative history were the increase in the minimum wage from $4.25 per hour to $5.15 per hour, the passage of a tax credit for parents of adopted children, and the allowance of a simplified 401(k) pension benefit plan for small employers. There was virtually no debate regarding the amendment to Section 104 on the floor of Congress or consideration of it by the House Committee on Ways and Means, which reported the bill to the House for passage.

When he signed the bill into law, President Clinton specifically singled out the amendment to Section 104 as being objectionable. He reasoned that the type of damages that were now being made taxable by the amended Section 104 "are paid to compensate for injury, whether physical or not,

and are designed to make victims whole, not to enrich them."[1] The President nevertheless signed the bill in an apparent compromise to attain the positive objectives he sought in the law, particularly the increase in the minimum wage.

The Committee also believes that Congress should enact legislation directing the Internal Revenue Service ("IRS") to promulgate rules and regulations specifying the manner in which employers and employees allocate payments made in settlement of discrimination cases between taxable and nontaxable portions. Congress also should direct the IRS to specify the manner in which the parties are to report such payments on account of discrimination claims to the IRS. Although there can be no precise formula for allocating between taxable and nontaxable portions of such payments, the Committee believes that the facts and circumstances of particular cases will allow the parties to make reasonable distinctions no different from those distinctions made by individuals with respect to damages received on account of physical injuries. The Committee also believes that the IRS should enact a default rule that parties to a discrimination case may apply in resolving ambiguous cases. One possible default rule would make presumptively valid an allocation of 50/50 between taxable and nontaxable portions of payments made to settle discrimination claims. Such a default rule will avoid the practical difficulty experienced by the IRS as well as employment lawyers in applying the pre-1996 law.

BACKGROUND AND HISTORY

The amendment to Section 104 of the Internal Revenue Code pursuant to the Small Business Job Protection Act of 1996 reflects a rejection of over 80 years of precedent that had allowed the exclusion from income of settlements that compensated employees for damages for emotional harm. The exclusion from income in Section 104 prior to its 1996 amendment was initially enacted in 1918. That provision excluded from income "[a]mounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness."[2]

Few early decisions construed this provision, inasmuch as the Bureau

1. President's Statement on Minimum Wage Bill dated August 20, 1996 (available by searching on Internet at http://www.pub.whitehouse.gov).

2. Pub. L. No. 65-254, §213(b)(6), 40 Stat. 1057, 1066 (1918).

of Internal Revenue (the predecessor of the IRS) generally viewed compensation for non-physical injuries to be outside the definition of "income." For example, in 1922, the Bureau ruled that compensation for a nonphysical tort or personal right, such as alienation of affections or defamation, constituted a replacement, and not a gain, of human capital, and thus was not within the definition of income. Solic. Int. Rev. Op. 132, I-1 C.B. 92 (1922). Subsequently, in *Hawkins v. Commissioner*, 6 B.T.A. 1023 (1927), the Board of Tax Appeals held that damages received for libel and slander were not gross income, because damages to compensate nonphysical injuries did not fall within the definition of income.

In 1955, the Supreme Court decided *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), in which it expanded the definition of income to include any "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." Accordingly, the previously dormant exclusion for damages received on account of personal injuries became more important in judicial and administrative analysis of the issue.

Prior to its 1996 amendment, Section 104(a) of the Code provided that "gross income does not include . . . the amount of any damages received . . . on account of personal injuries or sickness." In 1970, the IRS promulgated Section 1.104.1(c) to explain that "damages received" in Section 104(a) meant amounts received through an action or settlement based upon "tort or tort-type rights."

In the twenty-five years that followed the 1970 regulation, Courts have been called upon repeatedly to analyze the meaning of "damages received on account of personal injuries." As reflected below, the Courts had developed the law in this area in a manner that provided significant guidance to practitioners in the area—albeit guidance that did not create a bright line rule and was not always easily applied.

For example, in *Roemer v. Commissioner*, 79 T.C. 398 (1982), *rev'd*, 716 F.2d 693 (9th Cir. 1983), the Tax Court addressed the tax consequences of a defamation award. Roemer had reported as income only a portion of the award he had received in a libel suit. *Roemer*, 716 F.2d at 695. The Commissioner determined that the entire award was subject to taxation as gross income. *Id.* at 695. The Tax Court upheld the Commissioner's determination, on the basis that Roemer had not established that either the compensatory or punitive damages had been received for injury to his personal reputation. *Id.* at 695-96.

However, the Court of Appeals reversed and held that both the compensatory and punitive damages were excludable from gross income be-

cause defamation is a personal injury under §104(a)(2) of the Internal Revenue Code. *Id.* at 696. The court noted that the IRS had long held that all damages received for nonphysical personal injuries were excludable from gross income. *Id.* at 697. The court explained that the lower court had confused a personal injury with its consequences and "illogically" distinguished physical from nonphysical personal injuries. *Id.* at 697. Instead, the court suggested that the "relevant distinction" is between personal and nonpersonal injuries, not physical and nonphysical injuries. *Id.* at 697.

The court also noted that the rationale behind exclusions for lump-sum awards, enabling taxpayers to exclude the entire amount, is a certain sympathy and compassion for victims of injury. Under this rationale, the injured party, who has suffered enough, should not be further burdened with the practical difficulty of sorting out the taxable and nontaxable components. *Id.* at 696.

In *Bent v. Commissioner*, 87 T.C. 236 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987), the Tax Court decided that damages received under 42 U.S.C. §1983, for employment discrimination related to the First Amendment and free speech, are excludable from gross income. The court held that these and similar violations constituted personal injuries. *Bent*, 87 T.C. at 243. Moreover, the court declared that §104(a)(2) permits exclusions for damages that arise from suits over legal rights more analogous to tort type rights than to property or contract rights. *Id.* at 248.

Later, in *Metzger v. Commissioner*, 88 T.C. 834 (1987), *affd*, 845 F.2d 1013 (3d Cir. 1988), the Tax Court further expanded "personal injury" to include violations of Title VII of the Civil Rights Act of 1991 and 42 U.S.C. §§1981, 1985 and 1986. *Metzger*, 88 T.C. at 834, 850-59. The court stated that the relevant test for determining whether a personal injury exists is whether the violations were invasions of personal rights. *Id.* at 847.

In *Threlkeld v. Commissioner*, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988), the Tax Court heard a case involving a contested tax deficiency. Threlkeld had settled a malicious prosecution claim and excluded most of the settlement from gross income. *Threlkeld*, 848 F.2d at 82. The Commissioner found a deficiency, but the Tax Court declared that the settlement constituted damages received on account of personal injuries. *Id.* at 82.

The Court of Appeals affirmed, finding that injury to one's personal or professional reputation are excludable because both arise from a personal injury. *Id.* at 83-84. The court echoed *Roemer* by reasoning that "the personal nature of an injury should not be defined by its effect." *Id.* at

84. As in *Threlkeld, Roemer* stressed that the nature of the claim, the personal injury, and not the economic consequences of it, should determine whether exclusions may apply.

In recent years, the United States Supreme Court has confirmed and further clarified the Tax Court's development of the exclusion provided in Section 104. In *United States v. Burke*, 504 U.S. 229 (1992), employees of the Tennessee Valley Authority ("TVA") filed a sex discrimination suit alleging claims under Title VII of the Civil Rights Act of 1964 and eventually entered into a settlement agreement with the defendant. *Burke*, 504 U.S. at 231. However, when TVA withheld federal income taxes from the amounts paid to employees, the employees filed claims with the IRS, requesting refunds. *Id.* at 231-32. The IRS disallowed the claims and respondents filed suit. *Id.* at 232. The District Court held that back pay could not be excluded from gross income, but the Court of Appeals reversed, and found that exclusions exist for damages from injuries that are "personal and tort-like in nature." *Id.* at 232.

The Supreme Court reversed the decision of the Court of Appeals and held that back pay awards in settlement of Title VII claims were not damages received on account of personal injuries and, therefore, were not excludable. *Id.* at 229, 241-42. The Court's reasoning derived from its reading of §104(a)(2), which it interpreted as requiring redress of a tort-like personal injury in order to qualify for exclusion. *Id.* at 237-38. Because it failed to compensate victims for any of the "traditional harms associated with personal injury," including pain and suffering, emotional distress and harm to reputation, the Court found that Title VII did not address tort-like personal injuries and that damages under it were not excludable. *Id.* at 238-39. The Court stressed that whether a suit was based on tort or tort-type rights was dependent upon the kind of remedies awarded. *Id.* at 234-37.

The *Burke* Court noted that it was addressing Title VII as it existed before the expansion of remedies afforded under the Civil Rights Act of 1991. *Id.* at 241 n.12. Thus, because the 1991 amendments to Title VII added provisions for compensatory damages, punitive damages and jury trials under Title VII, the Court left open the possibility that settlements and damage awards may be excludable from income.

Justice O'Connor, joined by Justice Thomas, dissented, insisting that the remedies available "do not fix the character of the right they seek to enforce." *Id.* at 249. That is, since the "purposes and operation of Title VII are closely analogous to those of tort law, . . . that similarity should determine excludability of recoveries for personal injury." *Id.* at 249. In short,

Justice O'Connor stated, "I see no inequity in treating Title VII litigants like other plaintiffs who suffer personal injury." *Id.* at 252-53.

Following the Court's decision in *Burke*, the IRS issued Rev. Rul. 93-88, which construed *Burke* as requiring exclusion from income for compensatory damage awards resulting from suits under federal anti-discrimination statutes, including racial and gender discrimination under Title VII of the Civil Rights Act of 1964, as amended in 1991, and disability discrimination under the Americans with Disabilities Act.

The Supreme Court further analyzed the Section 104 exclusions in *Commissioner v. Schleier*, 115 S. Ct. 2159 (1995). There, the Court addressed a settlement under the Age Discrimination in Employment Act ("ADEA"). Schleier had included as gross income the back pay portion of the settlement, but not the portion of the settlement which represented liquidated damages. *Schleier*, 515 U.S. at 323. The Commissioner instituted a deficiency notice, maintaining that the liquidated damages should have been included in gross income. *Id.* at 323. Schleier not only contested the Commissioner's findings on liquidated damages, but also sought a refund for having included his back pay in gross income. *Id.* at 323.

Both the Tax Court and the Court of Appeals found for Schleier and held that "the entire settlement constituted 'damages received . . . on account of personal injuries or sickness' within the meaning of §104(a)(2) of the Internal Revenue Code and was therefore excludable from gross income." *Id.* at 327.

However, the Supreme Court reversed, reasoning that the Code's definition of "gross income" had a "sweeping scope" and that exclusions from income must therefore be narrowly construed. *Id.* at 327-28. As such, the Court created a two-part test for excluding recoveries under §104(a)(2). The first prong required that the underlying cause of action be based upon "tort or tort-type rights." *Id.* at 333-34. The second prong required that damages be received on account of personal injuries or sickness. *Id.* at 330.

The Court addressed the first prong by noting that the remedies available under the ADEA, namely back pay and liquidated damages, are of an economic character and do not provide compensation for any of the traditional harms associated with personal injury. *Id.* at 335-36. As such, recovery under the ADEA is not based on tort or tort-type rights. *Id.* at 336.

As to the second prong, the Court found that recovery for back pay under the ADEA is not "on account of" any personal injury and no personal injury affected the amount of back pay recovered. Therefore, as no part of Schleier's recovery of back pay could be attributed to a personal

injury or sickness, it could not be excluded. *Id*. at 330-31. Likewise, the liquidated damages were not received on account of personal injuries or sickness, but were considered punitive in nature, not compensatory, and thus were also includable. *Id*. at 330-32.

However, Justice O'Connor, joined by Justice Thomas and, in part, by Justice Souter, dissented and criticized the majority's denial of exclusions for ADEA damage awards. Justice O'Connor suggested that the majority's limited view of exclusions assumed an interpretation of §104(a)(2) in which only damages received by tangible injuries would be excludable. *Id*. at 337. Instead, Justice O'Connor recommended that exclusions be permitted for damages arising from varied violations of individual rights, be they physical, psychological or economic. *Id*. at 339. Justice O'Connor explained that, "the injuries from discrimination that the ADEA redresses . . . may not always manifest themselves in physical symptoms, but they are no less worthy of excludability under §104(a)(2)." *Id*. at 341.

The Supreme Court last addressed the topic of Section 104's exclusions in *O'Gilvie v. United States*, 117 S.Ct. 452 (1996), in which it held that, in addition to the classification of punitive damages as taxable income in nonphysical injury cases, punitive damages must also be considered taxable income in personal injury cases as well. Following the Court's decisions, the IRS suspended Rev. Rul. 93-88. Rev. Rul. 96-65, 1996-53 I.R.B. 5. The IRS did not issue a replacement ruling, but instead awaited further guidance from Congress.

The IRS received this guidance in the form of the 1996 amendments to §104(a)(2) of the Internal Revenue Code by the Small Business Job Protection Act. As already noted above, this statutory change provided that damages paid as a consequence of non-physical personal injury claims, those not on account of personal physical injuries or physical sickness, would no longer be excludable from income. The Act also specifically provides that emotional distress shall not be treated as a physical injury or physical sickness.

PROPOSED LEGISLATION TO RESTORE THE PRE-1996 SECTION 104

Following the 1996 amendment to Section 104, a number of bills have been introduced in Congress to reverse the amendment.[3] As indi-

3. On October 31, 1997, Representative Gerald Solomon introduced the Employment Discrimination Award Tax Relief Act which was referred to the House Committee on Ways and Means. The bill sought to amend the Internal Revenue Code by eliminating taxes on compensation for emotional distress and other noneconomic damages resulting from a nonphysical

cated above, in the current Congress, Representative Deborah Pryce has introduced the Civil Rights Tax Fairness Act which was referred to the House Committee on Ways and Means on May 27, 1999. This bill provides that "[g]ross income does not include damages received (whether by suit or agreement and whether as lump sums or periodic payments) on account of a claim of unlawful discrimination." The bill defines "unlawful discrimination" to include "an act" that is unlawful under sixteen specified statutes as well as other federal, state or local laws prohibiting "the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted under Federal law."[4]

Although the Pryce bill accomplishes the goal of reversing the 1996 amendment to Section 104 of the Internal Revenue Code, the Committee believes the bill should be clarified and extended in two important respects. First the bill should restore prior law by specifying that only "tort type" damages arising from "personal injury" may be excluded from income. While the Pryce bill excludes backpay, front pay and punitive damages from the definition of damages received on account of a claim of unlawful discrimination, this exclusion does not account for the fact that backpay and front pay may under certain circumstances be considered "damages" under certain statutes. For example, the Family and Medical Leave Act of 1993 provides a "damages" remedy that is measured by the amount of lost backpay and interest. 29 U.S.C. §2617(a)(1)(A).

Second, many of the sixteen statutes that do not provide remedies for "tort type" damages should be deleted from the list of statutes contained in the bill. For example, although the Family and Medical Leave Act provides for a "damages" remedy, this remedy is not a "tort type" remedy, but rather more like a traditional backpay remedy that has historically been considered equitable relief and the type of relief which should always be taxable income. Similarly, the Worker Adjustment and Retraining Notification Act provides no damages remedy, but a remedy only for

injury, and by clarifying the deductibility of attorneys fees and income averaging for taxable back pay. However, the bill stalled in Committee and died. H.R. 2792, 105th Cong. (1997). Subsequently, on November 4, 1997, Representative Barney Frank introduced a bill that also was referred to the House Committee on Ways and Means. Representative Frank's bill would have amended the Internal Revenue Code to restore the exclusion from gross income for damages awards for emotional distress. That bill also failed to pass. H.R. 2802,105th Cong. (1997).

4. The bill also contains a section regarding income averaging that goes beyond reversing the effect of the 1996 amendment to Section 104 of the Internal Revenue Code as to which the Committee has not taken a position.

backpay and possible civil penalties. 29 U.S.C. 2104(a). Again, such relief should always be taxable.

Finally, the bill should be amended to address the question of how parties may allocate between a taxable backpay component of a settlement and a nontaxable damages component of a settlement. The Committee believes that a presumption that settlements are equally divided between backpay and damages components is a fair method for addressing the allocation issue. The bill should require the Internal Revenue Service to promulgate rules and regulations that create objective rules that will guide parties in this regard and avoid the ambiguities that existed in the prior law. Such rulemaking should also guide employers and employees as to the proper reporting of such settlements to the Internal Revenue Service.

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The Committee on Labor and Employment Law*

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States' Rights v. International Trade: The Massachusetts Burma Law

The Committee on International Trade

I. INTRODUCTION

On October 13, 1999, the Association's Committee on International Trade co-sponsored, with the Center for International Trade of New York Law School and the Customs and International Trade Bar Association, a symposium entitled "States' Rights v. International Trade: The Massachusetts Burma Law." The subject of the symposium was the litigation brought by the National Foreign Trade Council (NFTC) to challenge a statute adopted by the Commonwealth of Massachusetts that restricts state agencies from purchasing goods or services from any person or company "doing business" with Myanmar (formerly known as Burma).[1] The speakers at the symposium were Thomas A. Barnico, Assistant Attorney General of Massachusetts, Professor Peter J. Spiro, Hofstra University Law School, Professor Joel P. Trachtman, Fletcher School of Law and Diplomacy and Professor Paul R. Dubinsky, New York Law School. The panel was moderated by Professor Sydney M. Cone of New York Law School. This report presents a summary of the litigation and the presentations at the symposium.

1. General Laws of Massachusetts, Chapter 7, Sections 22G-M.

In the Massachusetts Burma Law, the restriction on procurement takes the form of a ten-percent price handicap or "negative preference" for a bid or offer by bidders doing business in Burma.[2] The dispute also has broad significance beyond the specifics of the Massachusetts statute. A bill almost identical to the Massachusetts Burma Law has been introduced in the New York State legislature, and a similar law already exists in New York City. Legislation relating to Myanmar and, in some cases other countries, has been enacted or is pending in other state legislatures and city councils.

On November 24, 1998, the federal District Court in Boston issued an order declaring the Massachusetts Burma Law to be unconstitutional and enjoining its enforcement. In reaching its decision, the court relied entirely on its analysis that the Massachusetts Burma Law "is an unconstitutional infringement on the federal government's exclusive foreign affairs power." On June 22, 1999, the Court of Appeals for the First Circuit upheld the District Court's decision. However, the First Circuit substantially expanded the basis for its holding that the statute was unconstitutional. On September 17, 1999, Massachusetts submitted a petition for certiorari to the United States Supreme Court seeking review of the First Circuit's decision. The National Foreign Trade Council filed a rather curious brief formally opposing the State's petition, but closing by urging the Court to accept the case if it had reason to believe that the authority of a state to legislate in this area is unclear. The Supreme Court agreed to hear the case on November 29, 1999. Under the Court's Rules, Massachusetts's brief is due 45 days following the acceptance of certiorari, and the respondents' brief is due 40 days after Massachusetts's brief. Oral arguments would then be held either in March or April 2000. The Supreme Court's decision would probably come before the end of its term in late-June 2000.

II. SUMMARY OF THE FIRST CIRCUIT'S DECISION

The decision of the Court of Appeals for the First Circuit in *National*

2. The statute provides in pertinent part that "the awarding authority may award the contract to a person who is on or who meets the criteria of the restricted purchase list [i.e., a person who is doing business in Burma] only if there is no comparable low bid or offer by a person who is not on the restricted purchase list." Id. § 22H(d). The law defines a "comparable low bid or offer" as "a responsive and responsible bid or offer which is no more than ten percent greater than the lowest bid or offer submitted for goods or a service." Id. § 22G. The restriction on procurement from companies doing business in Burma does not apply if "the procurement is essential" or if it "would eliminate the only bid or offer, or would result in inadequate competition." Id. § 22H(b).

Foreign Trade Council v. Natsios[3] (1) affirmed the district court's determination that the Massachusetts Burma Law interfered with the foreign affairs power of the federal government and is thus unconstitutional; (2) held that the market participant exception to the domestic Commerce Clause does not extend to the Foreign Commerce Clause and that the Massachusetts Burma Law does, indeed, violate the Foreign Commerce Clause; and (3) further held that Congress did not implicitly permit the Massachusetts Burma Law and that the law was preempted by federal sanctions against Burma. The First Circuit's reasoning is summarized below.

A. Interference with the Foreign Affairs Power of the Federal Government

In order to determine whether or not the Burma Law interfered with the foreign affairs power of the federal government, the court turned to *Zschernig v. Miller*,[4] which it described as having "most directly considered the boundaries of permissible state activity in the foreign affairs context."[5] The *Zschernig* decision struck down an Oregon statute that barred nonresident aliens from taking property by will or succession unless U.S. citizens had a reciprocal right to take property on the same terms in the alien's country. In its decision, the Supreme Court wrote that the Oregon statute would lead probate courts "into minute inquiries concerning the actual administration of foreign law" and that such inquiries would "affect international relations in a persistent and subtle way" and "may well adversely affect the power of the central government to deal with . . . problems [of international relations]."[6]

Massachusetts argued that the *Zschernig* decision recognized the need to "balance state interests against possible harm resulting from state intrusion in foreign affairs"[7] and that the Burma Law did not constitute an impermissible intrusion into the federal government's foreign affairs power. The court rejected this argument. It ruled that the *Zschernig* decision did not call for a balance between state and national interests in foreign policy but, instead, stood for "the principle that there is a threshold level of involvement in and impact on foreign affairs which states may not exceed."[8]

3. 181 F.3d 38 (1st Cir. 1999).

4. 389 U.S. 429 (1968).

5. National Foreign Trade Council, 181 F.3d at 51.

6. Zschernig, 389 U.S. at 435, 440, & 441.

7. National Foreign Trade Council, 181 F.3d at 52.

8. Id.

The court concluded that the mechanism by which Massachusetts carried out the Burma Law crossed this threshold level of involvement: "The Massachusetts law creates a mechanism for an ongoing investigation into whether companies are doing business with Burma . . . . By investigating whether certain companies are doing business with Burma, Massachusetts is evaluating developments abroad in a manner akin to the Oregon probate courts in *Zschernig*."[9] The court also identified the following factors to show that the Burma Law had more than an "incidental or indirect effect" on the nation's foreign relations: (1) the intent of the Burma Law is to affect the affairs of a foreign country; (2) Massachusetts, with its $2 billion in annual purchasing power, has the wherewithal to implement the intent of the Burma Law; (3) the effects of the Burma Law would be greatly magnified if other states and governments followed suit, as they already have; (4) other countries such as those belonging to the Association of South East Asian Nations and the European Union have lodged protests against the Burma Law; and (5) the Burma Law diverges from federal law in dealing with the current government in Burma. Because the Burma Law goes far beyond the limits of permissible state activity in foreign affairs under *Zschernig* and has more than an incidental or indirect effect in foreign countries, the court ruled that the law intruded on the foreign affairs power of the federal government and is, thus, unconstitutional.

Massachusetts also argued that *Barclays Bank PLC v. Franchise Tax Board*[10] allowed only Congress, not the courts, to determine whether a state law interferes with the foreign affairs power of the federal government. In *Barclays*, the Supreme Court upheld the worldwide combined reporting requirement in California's corporate tax system against Commerce Clause and due process challenges. Barclays had argued that the system burdened foreign-based multinationals. Barclays also argued that the law impeded the federal government's ability to speak with one voice when regulating commercial relations with foreign governments. The First Circuit rebuffed the state's reliance on *Barclays*, finding that unlike the present Burma Law case: (1) *Barclays* did not involve a state law that targeted any foreign nation, and (2) there was no claim in *Barclays* that California was engaging in foreign policy via its tax system. In contrast, the present case involves a law affecting a foreign nation, and also involves a claim that the Burma Law violates the foreign affairs power of the federal government.

9. *Id.* at 53.

10. 512 U.S. 298 (1994).

B. Nonapplicability of the "Market Participant Exception" under the Foreign Commerce Clause and Violation of the Foreign Commerce Clause

Massachusetts argued that the Burma Law did not violate and was, in fact, exempt from the Commerce Clause because the state acted as a market participant. The Commerce Clause gives Congress the power to regulate commerce with foreign nations, and among the States. Massachusetts cited *South-Central Timber Dev., Inc. v. Wunnicke*,[11] where the Supreme Court established that "if a State is acting as a market participant, rather than a market regulator, the dormant Commerce Clause places no limitation on its activities." Massachusetts then argued that the market participant exception should also extend to the Foreign Commerce Clause (which forbids state laws from discriminating against or burdening foreign commerce) and that even if the exception did not apply, the Burma Law still did not violate the Foreign Commerce Clause.

The First Circuit found that Massachusetts was not a market participant when it enacted the Burma Law. When the state created a selective purchasing list as required under the law, it also created a mechanism to monitor the ongoing activities of private actors. Furthermore, the state attempted to regulate unrelated activities of its contractors once a contract was signed but before its performance was completed. Thus, in enacting the Burma Law, Massachusetts had "crossed over the line from market participant to market regulator"[12] and was, therefore, subject to Foreign Commerce Clause scrutiny.

The court ruled, further, that even if Massachusetts had acted as a market participant, it did not necessarily mean that the market participant exception applied at all to the Foreign Commerce Clause. Noting that the Supreme Court had never resolved the issue of whether the market participant exception applied to the Foreign Commerce Clause, the court decided to leave its "resolution to another day and another case," but left a cautionary note that "the risks inherent in state regulation of foreign commerce . . . weigh against extending the market participation exception to the Foreign Commerce Clause."[13]

Having decided that the Burma Law is subject to Commerce Clause scrutiny, the court then turned to whether it actually violated the Foreign Commerce Clause. Massachusetts argued that its law did not discriminate

11. 467 U.S. 82, 93 (1984).

12. National Foreign Trade Council, 181 F.3d at 63.

13. Id. at 66.

against foreign commerce because it made no distinction between foreign and domestic companies. But the court concluded that the Burma Law violated the Foreign Commerce Clause because it facially discriminated against foreign commerce. The court stated that "[w]hen the Constitution speaks of foreign commerce, it is not referring only to attempts to regulate the commerce of foreign companies; it is *also* referring to attempts to restrict the actions of American companies overseas."[14] The court also ruled that the Burma Law violated the Foreign Commerce Clause because it impeded the federal government's ability to speak with one voice in foreign affairs and also attempted to regulate conduct outside of Massachusetts and outside the country's borders.

C. Lack Of Implicit Congressional Authorization and Federal Preemption

Massachusetts argued that the Burma Law did not violate the Supremacy Clause because Congress was fully aware of the law when it enacted federal sanctions against Burma and failed to preempt the Burma Law explicitly. The state again relied on *Barclays*, arguing that Congress's failure to preempt a law explicitly shields the law from constitutional scrutiny. The First Circuit rejected Massachusetts's claim and held that the Burma Law violated the Supremacy Clause. It ruled that "the discussion of preemption in *Barclays* came as part of a Commerce Clause inquiry" and therefore *Barclays* "did not discuss how courts should address Supremacy Clause challenges to state laws that impact foreign affairs such as the Massachusetts Burma Law."[15]

The state also argued that federal sanctions did not preempt the Burma Law because "state procurement is a traditional area of state power reserved to the states by the Tenth Amendment" of the US Constitution. It cited *Will v. Michigan Dep't of State Police*,[16] which held that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute" which, according to Massachusetts, it did not. The court rejected the state's argument and cited *Hines v. Davidowitz*,[17] where the Supreme Court found that Pennsylvania's Alien Registration Act was preempted by the federal Alien Registration Act. Ac-

14. Id. at 68 (italics in original).

15. Id. at 72.

16. 491 U.S. 58, 65 (1989).

17. 312 U.S. 52 (1941).

cording to the court, *Hines* and other subsequent decisions established that "when Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern."[18] Using this decision, the court found that federal sanctions against Burma preempted the Burma Law. In its analysis, the court said that Congress constructed a reasonably comprehensive statute enacting sanctions against Burma and also attempted to balance various goals and interests by choosing a set of carefully calibrated tools to carry out the sanctions. In contrast, the court argued, the Massachusetts Law had "chosen a blunt instrument to further only a single goal, making judgments different from and contrary to the judgments made by Congress and the President."[19] In citing another example, the court said that Congress chose to limit only new investments in the development of resources while the Burma Law applied to virtually all investment in Burma.

III. SUMMARY OF THE SYMPOSIUM PRESENTATIONS

A. Thomas A. Barnico, Assistant Attorney General Of Massachusetts

The first speaker was Thomas A. Barnico, Assistant Attorney General of Massachusetts, who represented the state in the District Court and Court of Appeals, and who filed the petition for certiorari with the Supreme Court. Mr. Barnico explained the claims and defenses maintained by the state in the case decided by the First Circuit Court of Appeals. He followed with an outline of the issues he hoped to present to the U.S. Supreme Court and the hopes which he and the State of Massachusetts share for what the Supreme Court will say in its opinion. He closed with some general comments on international trade agreements and the issues they present for state governments.

The constitutional issues fall into three categories: (1) a claim that the 1996 federal sanctions law against Burma preempts Massachusetts from enacting laws in this area; (2) a claim under the Foreign Commerce Clause of the U.S. Constitution that the Massachusetts Burma Law and other similar state and local laws hinder the ability of the United States to speak with one voice on foreign matters and, also, discriminated against foreign commerce; and (3) a claim under the Foreign Affairs Clause that the Massachusetts Burma Law interferes with the ability of the federal government to conduct foreign affairs.

18. National Foreign Trade Council, 181 F.3d at 76.

19. Id.

Mr. Barnico noted that the federal sanctions law does not expressly preempt Massachusetts from taking any action in this area. Citing the *Barclays* case, he argued that Congress had implicitly permitted state action in this area. Mr. Barnico further argued that, by implicitly permitting Massachusetts to take action by enacting a selective purchasing law against Burma, Congress had also insulated the law against claims under the Foreign Commerce Clause.

Further addressing the Foreign Commerce Clause, he noted that the law does not apply to purchases by private parties, but is solely directed at state procurement. Thus, the law does not restrict the right of any private citizen or corporation to do business or trade with Burma as they may see fit. Under the domestic Commerce Clause, state laws have been held to be insulated from Commerce Clause review, where the state laws are intended to govern the state's activities as a participant in the market, rather than intended to regulate the conduct of private parties in the market. The question here is, first, whether Massachusetts is acting as a market participant or a market regulator, and second, whether the market participant doctrine applies to the Foreign Commerce Clause, an issue which has not yet been determined by the Supreme Court.

Addressing the final constitutional argument, that selective purchasing laws of this type interfere with the ability of the United States to conduct its foreign policy with respect to Burma, Mr. Barnico pointed out that the Foreign Affairs power had been asserted in only one case decided by the United States Supreme Court to invalidate a state law: the *Zschernig* decision. In addition to asserting that *Zschernig* raised very different issues from those raised by the Massachusetts Burma Law, Mr. Barnico also argued that the Court should extend the market participation exception to the Foreign Affairs issue as well.

Mr. Barnico then turned to the issue of certiorari to the U.S. Supreme Court and why he believed this case merits the attention of the Justices.[20] First, he points out, this law is not all that different from the issues raised by the various state and local laws in the 1980's regarding purchases from companies doing business in South Africa and state and local laws regarding divestment of securities from state and local pension funds. Those laws were hotly debated at the time, but the Supreme Court never determined the validity of those laws. More generally, he believes that it is inevitable, in light of the enormous growth of international trade and the increase in international trade agreements, that foreign firms are likely

20. As noted above, the Court has now granted certiorari.

to cite conflicts with foreign commerce or international treaties whenever they believe they have been disadvantaged by state or local regulations. And, he asks, should these complaints form the basis of a ruling that these state and local laws are unconstitutional?

He believes that this case presents a good opportunity for the Supreme Court to clarify the law in several areas:

> (1) Is the *Zschernig* case still good law? That is, will state laws of this type continue to be seen as in conflict with the Foreign Affairs power?
>
> (2) What about *Barclays Bank*? Does this case truly stand for the proposition that failure to preempt constitutes implicit permission by Congress to the states to enact legislation of this type?
>
> (3) Is the market participation exception applicable to this type of case? Is it applicable at all to cases involving the Foreign Commerce Clause?

Mr. Barnico closed his presentation with a summary of the policy issues that concern state and local lawmakers as the state's petition for certiorari was being considered by the Supreme Court:

> This is a threat to traditional state law making. We're talking about laws that generally speaking satisfy things like our commerce clause. I'm not talking just about Burma here. I'm talking about other state laws that may be subject in the future to complaints under the GATT and so forth. The threat is they will come under increasingly common review by international agencies or bodies, and further, that they'll become under additional Constitutional attack, such as this case, in which those claiming that state law is unconstitutional cite the fact of the trade complaints as evidence that we're roiling the foreign waters.

B. Professor Peter J. Spiro, Hofstra Law School

Professor Spiro discussed the Massachusetts Burma Law within the context of a new understanding of states' role in foreign relations. In Professor Spiro's view, the world is beginning to hold political subdivisions (e.g., states) directly accountable for violations of international obligations. In the course of his presentation, Professor Spiro outlined how this trend represents a retreat from the traditional rule of federal

exclusivity over foreign affairs. According to Professor Spiro, the traditional rule, well founded in the Constitution and in the context in which it evolved, may be less important today than it was prior to the end of the Cold War or creation of the World Trade Organization (WTO). International diplomatic dynamics and international trade are more stable than they were in the past. Moreover, in today's world, international actors are capable of ascribing actions to political subdivisions, and targeting a response at those subdivisions. Recent cases suggest that the international community is leaning towards targeted retaliation. Thus, the traditional rule of federal exclusivity should no longer prevent Massachusetts from promulgating its own international-related legislation, but Massachusetts will have to face targeted retaliation if it does so.

The traditional rule of federal exclusivity requires that the federal government conduct the nation's foreign affairs. This rule can be traced to Article I, Section 10 of the United States Constitution, which prohibits states from entering into treaties, engaging in warfare, granting letters of marque and reprisal, and imposing import or export taxes. The requirement that the nation "speak with one voice" avoids inefficiencies which may arise when individual decision makers do not bear the burden of their decision. Further support stems from the democratic notion that decision making is legitimate only when those affected by a decision have some say in it. Finally, the traditional rule made sense within the context in which it evolved. Most particularly, during the Cold War, the balance and tensions between superpowers warranted a strict prohibition on the ability of political subdivisions to act in any way which might cause an international conflict. Thus, in *Zschernig*, the Supreme Court blocked an Oregon escheat law which barred inheritance by aliens of East Bloc nations. Given the changed circumstances since *Zschernig*, a retreat from the traditional rule may be in order.

Professor Spiro explained that the international community now differentiates between the international legal personality and subdivisions of that personality such that it can, and does, target retaliation. Moreover, Professor Spiro sees the current climate as far less sensitive than the preceding climates in which the doctrine evolved. In terms of security, the Cold War is over and the likelihood that a political subdivision will create an international incident which might lead to nuclear war has diminished. In terms of trade, the WTO has replaced the General Agreement on Tariffs and Trade (GATT). The WTO's dispute resolution mechanism provides greater trade stability than that of the GATT. Professor Spiro admits that although the political and global context has changed, one could

still argue that in the Burma case, it may or may not be Massachusetts that would bear the retaliation of a nation for its decision making. To the extent that New York bore the burden of a retaliation by another country for the Massachusetts Burma Law, the policies underlying the traditional rule would still be present.

Nevertheless, cases of actual targeted retaliation have already occurred. The controversy surrounding *Barclays* involves such an example. California passed a corporate tax which offended the United Kingdom, as well as other countries, and the United Kingdom targeted its response at California.[21] Likewise, the international community has begun to challenge individual states in their application of the death penalty, recognizing that the death penalty issue stems from state law.

Professor Spiro posited that the international community knows that it is Massachusetts which passed the Burma law. If the international state actors target Massachusetts and Massachusetts bears the burden of its law, there should be no reason why the rest of the nation should care. Professor Spiro sees international society as moving in a direction where subnational actors are recognized as having some limited form of international legal personality. In such a situation, Massachusetts will not be able to avoid the retaliation which might come through the WTO if that case goes forward and if the EU or Japan fashions, and the WTO authorizes, a remedy which targets Massachusetts.

C. Professor Joel P. Trachtman, The Fletcher School of Law and Diplomacy

Citing "creative ambiguity" in the system as it stands now, Professor Trachtman spoke of confessed ambivalence over, and apprehension of, the ultimate efficacy of a U.S. Supreme Court determination in the Massachusetts Burma Law matter. His presentation contrasted the national desire to speak with one voice in the international trade arena with our desire to have a federal system, and the impact of the WTO on those values.

Initially, he remarked that there is actually a certain congruity between federal values and state values: that is, in the "New Federalism," our federal value in speaking with one voice is balanced by our federal value in having "live" states. As such, the *Zschernig* case, the *Barclays* case, the Burma Law case and others are instances in which the underlying conflicts between these competing interests are being worked out. The

21. It could be argued that the action taken by the United Kingdom was more in the nature of reciprocity than retaliation (Ed. Note).

question, he contends, is whether one of these two values should prevail automatically.

Professor Trachtman suggested that it is deficient to presume that a "foreign affairs, one voice" value should automatically prevail, especially given the multiple issues going on in foreign affairs. He warned that if we allow "foreign affairs, one voice" values to dominate, "we'll soon find ourselves with states that don't mean very much."

Turning to the market participant doctrine, he stated that it has thus far largely been confined to the domestic commerce clause circumstance, addressing the rights of states to speak as independent voices in domestic commerce. In the context of the Burma Law conflict, the question arises as to whether this market participant doctrine should be extended to allow states to speak as persons in international relations. According to Professor Trachtman, this begs an understanding of the position in which the WTO, the government procurement agreement and international law are located within the federal system. He commented that "[t]he quick answer to this topic is that it really is not located within the federal system in a very powerful way."

Professor Trachtman explained that the WTO and the Uruguay Round Agreements were accepted by the United States through the Fast Track process. Moreover, there was no formal state role in the Uruguay Round Agreements process.[22] What brings a WTO issue into this case is the Government Procurement Agreement, the agreement under which the Burma Law has been challenged by the European Union and by Japan. When the Government Procurement Agreement was being negotiated, the federal government polled the states, asking whether they wanted to be covered by the agreement, and Massachusetts answered yes. However, Professor Trachtman commented that while there was consultation, there was no direct state role. In the international relations context, the states have access, but not control over the operation of these laws. This, he reasoned, is a direct contrast to the rights of member states in the European Union, our "interlocutor in international trade," which do have a direct role in making international agreements. Noting that Professor Lawrence Tribe of Harvard Law School voiced concern in the 1994 Uruguay Round Agreements about what would happen in a dispute settlement proceeding about a state law like the Burma Law, Professor Trachtman challenged,

22. Section 102(b)(1)(B) of the Uruguay Round Agreements Act provides that USTR has to consult with the states as to implementation of U.S. obligations. Trachtman noted that although Massachusetts representatives are consulted, "there's still a sense that in Geneva, things are happening which are outside the control of states."

"How is it that the European Union can manage to allow Italy and France and the other member states to have some voice and the United States can't?"

The Supremacy Clause, the Commerce Clause, and the Foreign Affairs power allocate much power to the federal government, especially to make federal law. While there is a very strong argument that these agreements have a direct effect within the federal system, that effect is self-limited by the fact that only one plaintiff is permitted in this context: the U.S. government.[23] Significantly, the U.S. government has been reluctant to attack Massachusetts in this case. The U.S. government has not brought its own case here, and therefore questions exist as to supremacy and preemption, as well as the standing of the NFTC to assert WTO-related arguments. Supremacy is the right of the federal government to act to deny Massachusetts the right to have this law. That right has not been exercised. Secondly, there are questions of preemption regarding whether Massachusetts has the right to engage in this activity, despite the fact that there is no clear federal legislation stopping them.

Turning to the "ambiguous" nature of international law and the WTO Government Procurement Agreement, Professor Trachtman proceeded to examine the attack on the Burma Law initiated by the European Union (EU) and Japan in their request for a WTO dispute resolution panel. That action within the WTO preceded the initiation of the Burma Law suit by the NFTC. The EU and Japan set forth three main arguments, each of which is problematic: (1) Massachusetts violated Article VIII(b) of the Government Procurement Agreement, which provides constraints on the ability to disqualify bidders in the context of government procurement[24]; (2) Massachusetts violated Article XIII(4)(b) of the Agreement, which holds that the bid has to be awarded to the person who comes up with the best price and the best compliance with non-price factors, because political and non-economic factors should not be considered[25]; and (3) Massachu-

23. Under Section 102(b)(2)(A) of the Uruguay Round Agreements Act, no state law may be declared invalid by reason of being inconsistent with a WTO Agreement, except in a lawsuit commenced by the United States. Notably, WTO decisions are accorded no deference in the litigation.

24. Article VIII(b) provides in relevant part that "any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capacity to fulfil the contract in question."

25. Article XIII(4)(b) provides in pertinent part that "the [procuring] entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender . . . is either the lowest tender or the tender which in terms of the

setts violated the requirement in Article III of the Agreement for nondiscrimination in government procurement.[26] The EU further argued that the Burma Law nullifies or impairs the concessions made by the United States in the Agreement.

Regarding the Article VIII(b) issue, Professor Trachtman stated that it does not apply to the Burma Law because it applies to establishing a selective tender when pre-qualifying bids, and the Burma Law does not disqualify a bidder; rather, it provides for a 10 percent negative preference. Moreover, Article VIII(b) speaks of conditions to qualify for participation, which, he opines, is different from the Burma Law, which speaks to determining the best bid. Professor Trachtman also questioned the EU interpretation of Article XIII(4)(b), which requires that the business be given to the best bid. He pointed to Article XII(h), which specifically contemplates non-price factors that are separate from price-affecting cost factors.

The most difficult issue posed by the EU relates to national treatment and the most favored nation nondiscrimination obligation articulated in Article III of the Agreement. The question ultimately is what parameters are to be looked at in determining discrimination. Massachusetts takes the position that they are not discriminating at all because they are treating local firms the same as they are treating the EU or Japanese firms—if they do business with Burma, they are subject to the 10 percent negative preference. In other words, if products are treated like suppliers, and the Burma Law is interpreted as discriminating among suppliers from different states rather than between foreign states and the United States, it should not violate the discrimination language of Article III.[27]

Regarding whether the Burma Law amounts to nullification of U.S. concessions under the agreement, Professor Trachtman referred to the recently decided Kodak/Fuji WTO dispute resolution case. In that decision,

specific evaluation criteria . . . is determined to be the most advantageous." The United States also has procurement laws that do consider non-economic factors known as "green procurements"(e.g., Iran).

26. Article III(1) provides that "[w]ith respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than: (a) that accorded to domestic products, services and suppliers; and (b) that accorded to products, services and suppliers of any other Party."

27. Articles VIII(b), X and XII specifically do permit this distinction among suppliers based upon the identity of the supplier.

the WTO panel took a very limited view of what legitimate expectations of the complaining state were being frustrated.

In view of the pending litigation in the U.S. courts, the case before the WTO Dispute Resolution panel was suspended in February 1999. The EU and Japan took the position that their interests would be best served by following along with the litigation brought by the NFTC. Professor Trachtman commented:

> In many contexts, the WTO panel and the appellate body are fairly positivist.. They look for clear treaty obligations. They also try to promote liberal trade, and so they've got a difficult conundrum because the positive law does seem to favor Massachusetts, but they will have some concerns about these types of preferences, reducing the value of the Government Procurement Agreement.

Noting that although we do not know how the WTO dispute resolution panel will solve that problem, Professor Trachtman concluded "we can expect that the international litigation will be restarted if the domestic litigation doesn't get our trading partners what they want."

D. Professor Paul Dubinsky—New York Law School

Paul Dubinsky, Associate Professor at New York Law School, was charged with responding to the remarks of the first three speakers. He opened his remarks by predicting, or at least hoping, that the Supreme Court would deny certiorari.[28] Professor Dubinsky's first reason for this "hope" is his belief that the current state of affairs regarding selective purchasing laws is actually useful in negotiating trade agreements. In essence, Professor Dubinsky believes that if the Massachusetts law is allowed to remain in effect, then a trade negotiator can take the position that his options are unduly limited by the Massachusetts law, even if the negotiator actually opposes some form of selective purchasing.

The other reason that Professor Dubinsky was hopeful that the Supreme Court would deny certiorari concerned the existing status of international customary law. Professor Dubinsky argued that there are many questions concerning international customary law, most notably whether

28. While events have overtaken Professor Dubinsky's "hopes" in this regard, the Supreme Court has been known, at times, to deliver opinions that do not resolve all of the outstanding issues, so Professor Dubinsky's "hopes" may yet be fulfilled by a Delphic utterance from the Supreme Court (Ed. Note).

or not customary law has the same status as U.S. federal common law. Professor Dubinsky, echoing Professor Trachtman's comments, is concerned that if the Supreme Court agrees to hear the case, the ramifications of any decision rendered may be far-reaching and unclear. If the Supreme Court does render a decision on Massachusetts Burma Law, then Professor Dubinsky's best case scenario would be a decision that draws a distinction between areas that are considered "traditional" provinces of state law, such as state procedural law and enforcement of judgments, and areas which are generally left to the federal government such as the promulgation of laws and regulations regarding trade and treaties. Even if this type of distinction were drawn by the Supreme Court, Professor Dubinsky argues that "from an intellectual perspective," the end result would be an "unsatisfactory distinction" that would "leave us adrift." In summarizing his view of what should happen next in the ongoing chronology of this case, Professor Dubinsky remarked that "whatever the Supreme Court said on it would be the beginning of a sort of difficult road of litigation to figure out where the lines of federalism currently are."

With respect to Professor Dubinsky's responses to the other speakers, most of his comments were made in response to the remarks of Professor Spiro, particularly Professor Spiro's discussion of "targeted retaliation." One of Professor Spiro's main points is that various countries are increasingly capable of targeting retaliatory actions to a specific political or geographic entity; in the instant case, Professor Spiro would argue that it would be possible for foreign countries to respond to a state's selective purchasing laws in such a manner that only the state promulgating such a law would be targeted in response. Professor Dubinsky clearly believes that targeted retaliation is unrealistic.

He argued that targeted retaliation does not work, nor will it ever work, because "we have a very interdependent economy that cuts across state lines." Furthermore, he commented that it is "impossible for any state to suffer economic consequences in a world arena without there being a trickle over effect to anyone else. Not only its neighboring states but all over the country . . . ." As an example, Professor Dubinsky posited that if a targeted retaliation against Massachusetts results in a loss of jobs in Massachusetts, then the citizens of Massachusetts will have less money to spend on something that may be imported from another state. He argued broadly that with respect to foreign affairs and interstate commerce, the framers of the Constitution believed that "we're in this together, and anything that separates how we are doing [and] how we live together, is divisive and bad."

Professor Dubinsky then made a related point regarding the perception of Americans by foreigners. Professor Dubinsky believes that any law passed by a particular state that discriminates against a specific country or targets international commerce generally will be perceived (rightly or wrongly) as an "American" law and that all Americans will suffer because of that perception. Professor Dubinsky also makes a "privileges and immunities" argument, in which he claims that if Massachusetts passes a law which invites targeted retaliation, then citizens of other states may either choose not to move to Massachusetts or may be unduly affected by the ramifications of such a law if and when they move to Massachusetts. Professor Dubinsky argued that a citizen could be adversely affected by a state law which was created without that individual having any input into the process of enacting such a law.

Finally, Professor Dubinsky discussed the area of preemption, arguing that "a standard preemption analysis just doesn't work in this area." Under such a standard analysis, one would argue that if Congress had intended to preempt a state's right to enact a selective purchasing law, then Congress would have taken some affirmative action to do so, or at least Congress would have enacted legislation in this area preventing states from enacting their own legislation. Professor Dubinsky argued that it is incorrect to merely examine what Congress may or may not have done to date. Under a standard preemption analysis, one could argue that Congress implicitly "let [the Burma Law] go forward." However, Professor Dubinsky posited that one of the "key powers" with respect to "diplomacy and negotiating in the foreign arena is the ability to be silent, the ability to say nothing, not to have your hand forced in negotiations, and to take that away from the administration is to take away a lot of what it can do." In essence, Professor Dubinsky advocated that the federal government, in dealing with countries such as Burma, Syria and Iran, among others, needs to have as many negotiating weapons as possible in its arsenal and that one of those weapons is the ability to refrain from taking legislative action. Accordingly, he noted, it would be wrong to assume that the failure to take legislative action is an implicit approval of the Massachusetts Burma Law.

IV. CONCLUSION

When the Supreme Court hears and decides the Massachusetts Burma Law case, it will be deciding whether Massachusetts and other states can pass laws which facially appear to be in conflict with trade agreements

entered into by the federal government. It may also be signaling to what extent the states may be bound by the rules and the decisions of the WTO and the trade agreements administered by that international body. But, perhaps, most importantly, it will be further defining the boundaries of the "New Federalism" that has been so much discussed as a result of other decisions of the U.S. Supreme Court.[29] Will it expand the scope of the states' authority into the international arena? Or will it stop the states' authority at the water's edge?

February 2000

29. See. e.g., The New Federalism, The Record, Vol. 54, No. 6 (1999) (report by the Committee on Federal Legislation).

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Sports Law

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