The ***Commercial Division***

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COMMERCIAL DIVISION

LAW REPORT

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

HON. STEPHEN G. CRANE
ADMINISTRATIVE JUDGE

JUSTICES OF THE COMMERCIAL DIVISION
JUSTICE HERMAN CAHN , JUSTICE BARRY A. COZIER , JUSTICE IRA GAMMERMAN , JUSTICE CHARLES E. RAMOS, JUSTICE BEATRICE SHAINSWIT, JUSTICE THOMAS A. STANDER
SUPREME COURT, CIVIL BRANCH, NEW YORK COUNTY

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To the Commercial Bar:

The Commercial Division is pleased to present to the Bar the Commercial Division Law Report. Assuming that there is interest on the part of the Bar, the Division will publish the Report five times a year. The Report will summarize significant decisions issued by Division Justices statewide in the preceding two months or so. The Report and the complete text of all decisions discussed in it will be available on the Unified Court System's Internet home page at http:// ucs.ljx.com, and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at http://www.nysba.org/ sections/comfed/. Members of the Commercial and Federal Litigation Section may sign up at the Section's home page by May 15, 1998 to receive copies of the Report by e-mail automatically. The Commercial Division expresses its thanks to the Bar Association and the Commercial and Federal Litigation Section (Bernice Leber, Esq. Chair) for their assistance in the distribution of the Report.

Our next issue will be published on the two home pages on May 26, 1998 covering decisions from March and April.

We dedicate this inaugural issue to the memory of our colleague and friend, the Honorable Lewis R. Friedman. By his intelligence, learning, diligence, fairness and deep love for the law, Justice Friedman added luster to the Commercial Division and to the entire court. He helped us to set high ideals. We shall strive always to meet that standard.

Stephen G. Crane, Administrative Judge, Supreme Court, Civil Branch, New York County

Banking law. Liquidation of investment company. Banking Law § 620-a. Absence of adequate documentation. PIC Banking Corp. was chartered under the Banking Law as an investment company dealing in foreign exchange transactions. The Superintendent took over PIC and rejected over $ 29 million in claims. Rejected claimants filed 19 complaints for a review of claims amounting to over $ 8 million. Claimants, who had accounts with entities related to PIC, argued that a course of representations made by members of the controlling family established enough to warrant piercing the corporate veils. The Court rejected certain claims since the claimants had not filed timely proofs of claim and PIC records failed to reflect the existence of accounts. Further, pursuant to Banking Law § 620-a, oral representations or a course of conduct will not suffice to provide a basis for a valid claim, the Court held, and this undermined other claims. Some claimants provided no documentation or inadequate documentation. As to certain claims based upon checks, triable issues of fact were found as to whether PIC was the maker or merely a drawee bank because of uncertainty on the face of the checks. In re Liquidation of PIC Banking Corp., Index No. 118307/95, 1/27/98 (Gammerman, J.).

BCL 630; definition of wages. Federal Worker Adjustment and Retraining Act. Plaintiff union official sued seeking to hold the defendants personally liable for an arbitration award against a bankrupt company in which defendants had been shareholders. BCL § 630. Plaintiff's claim was based upon a contractual provision that the company would give its employees 30 days notice of the cessation of business. Defendants argued that Section 630 applies only to unpaid wages and that the claim did not concern that, whereas plaintiff contended that the award was a form of severance pay and thus "wages," relying upon cases under the Federal Worker Adjustment and Retraining Act. The Court noted that the plaintiff had not sued under the Act and that the award had not been obtained thereunder. Further, the defendants as individual shareholders were not "employers" under the Act. Nor is "back pay" under the Act equivalent to wages, but simply a label to describe the damages due under the Act. BCL 630 is to be construed narrowly, the Court stated; it was not intended to make covered shareholders liable for all corporate debt, but only for wages for services that have been completed. The damages awarded were not wages in this sense, the Court held, nor were they severance pay since that was provided for under the agreement only if the company transferred operations outside of New York City. Motion to dismiss granted. Lee v. Levy, Index No. 606238/96, 2/ 9/98 (Cahn, J.).

Class actions. Certification denied to purported class of computer purchasers due to absence of commonality, typicality, fair representativeness, superiority of class action. Summary judgment. Breach of warranty and GBL § 349 and absence of reliance or damages. Plaintiffs sought certification of a class of purchasers of certain computer products in an action alleging breach of warranty, fraud and other wrongs. The Court held that common questions did not predominate in view of a variety of warranties, the laws of various states, which differ widely in the relevant areas (e.g., on scienter, reliance), and the unique circumstances of each customer's experience and alleged damages; that there was an absence of typicality due to the divergent circumstances surrounding each customer's purchase, including reliance and warranty terms, treatment of the equipment and course of dealings with defendants in regard to it; and that there was neither adequacy of representation nor superiority of the class action device. The Court granted defendant GE's motion for summary judgment as to two plaintiffs because they had warranties from companies other than GE. As to the remaining plaintiff, the warranty claim failed since the claimed breach occurred outside the warranty period; proof of reliance is required for a breach of warranty claim and one under GBL § 349 and plaintiff had failed to offer proof thereof; and plaintiff had failed to offer any proof of damages from any alleged breach or statutory violation. Brummel v. Leading Edge Products, Inc., Index No. 102081/96, 1/29/98 (Gammerman, J.).

Class actions. Failure adequately to allege injury, breach of contract and reliance. GBL §§ 349, 350. In this purported class action against Ford Motor Co. brought on behalf of a class of purchasers/lessors of a certain Ford Explorer, Ford was alleged to have misrepresented in ads that the vehicle was equipped with a ride control feature. When Ford became aware that there had been an error in several hundred window stickers, it sent a letter to customers, including plaintiff, explaining the problem, along with a check for $ 650. On a motion to dismiss, the Court ruled that the plaintiff had failed to allege facts demonstrating that it had suffered an injury; had failed to allege breach of a specific contract provision; or that it had relied upon statements about the ride control. Claims under GBL § § 349 and 350 were similarly found wanting. Motion to dismiss granted. Faden Bayes Corp. v. Ford Motor Co., Index No. 601076/97, 1/16/98 (Ramos, J.).

Class actions. Motion to certify class. Lack of commonality; difficulty of class action; adequacy of individual action; relationship of plaintiff to counsel. Statewide class alternative. Plaintiffs moved to certify a nationwideclass. Plaintiffs claimed that two model years of a car were marked by many defects. Plaintiffs relied upon a questionnaire sent to 5000 persons, of whom 1500 responded. Defendant Ford argued that the answers were not representative. The Court stated that the questions sought to know if respondents had had "problems" with parts of cars up to seven years old and that it would have been remarkable had there been none. Even so, the Court found, the problems reported were diverse and difficult to litigate on a class basis and warranty issues were almost as diverse. That a representative plaintiff was closely related to counsel created a problem on the representativeness portion of the test. Nor, the Court found, would class treatment be superior since each class member would have a substantial individual claim. The Court likewise found unpersuasive the alternative argument of plaintiffs for a New York class. Motion denied. Gordon v. Ford Motor Co., Index No. 104635/94, 2/3/98 (Friedman, J.).

Contracts. Absent written agreement, no breach when the parties intended to enter into a formal agreement. Duty to negotiate in good faith. Promissory estoppel. Unjust enrichment. Planned investment by plaintiff in a corporate defendant. Plaintiff sued on theories of breach of contract, breach of a duty to negotiate in good faith, promissory estoppel and unjust enrichment. Plaintiff claimed that the parties had reached agreement on all material terms even though they contemplated a written memorialization, never signed. If parties do not intend to be bound until a writing is signed, the Court said, there is no binding contract until that occurs and that, the Court found, was the situation here. Nor was there a basis for a claim for breach of a duty to negotiate in good faith since when parties agree to negotiate to reach a final agreement but no binding agreement is arrived at, no duty to negotiate can be enforced. Without a binding and enforceable contract, said the Court, there can be no promise upon which a plaintiff can rely to found a claim for promissory estoppel. Nor did defendants induce plaintiff to rely since plaintiff had known it first had to perform due diligence and other activities. In order to establish unjust enrichment, plaintiff had to show that it had had a reasonable expectation of being compensated, which it could not have had as to its own preliminary activities. Further, unjust enrichment is not an appropriate remedy for recovery of expenses of failed negotiations. Summary judgment granted. Chatterjee Fund Management, L.P. v. Dimensional Media Associates, Index No. 603784/96, 2/9/98 (Cahn, J.).

Contracts. Intent to enter into written agreement. Proof established that parties intended a writing in order to be bound. Labor Law § 193. Written employment agreement expired. The CEO of the corporation ("ACM") sent a letter extending the same terms until the signing of a new agreement. Negotiations ensued. Plaintiff executed a document and sent it to counsel for ACM. Plaintiff was terminated before ACM could sign the writing. Correspondence, the Court found, manifested an intent that a new agreement had to be signed by ACM. The earlier agreement required changes to be in writing and signed. Thus ACM would have had to sign the new agreement in order for its terms to supersede those of the earlier, extended agreement. The Court held that plaintiff, as Senior VP of Sales and Marketing, was an executive and not entitled to the protections of Labor Law § 193 as to deductions from severance pay. Cohen v. ACM Medical Laboratory, Inc., Index No. 07186/97, 1/8/98 (Stander, J.).

Contracts. Not-for Profit Corporation Law. Extrinsic evidence; subsequent conduct. Plaintiffs sought a preliminary injunction enjoining defendant ("NRA") from printing in official communications a designation of a candidate for election to the NRA's Board of Directors as Board-nominated or nominated by NRA members. Plaintiffs claimed that any such designation would violate NRA bylaws and prevent a fair election. Plaintiffs' action sought judicial oversight pursuant to Not-for-Profit Corporation Law § 618 and alleged breach of fiduciary duty. NRA cross-moved to dismiss. Plaintiffs relied on a bylaw provision stating that "no persons nominated by [members'] petition nor by the Nominating Committee shall be so designated." NRA argued that this provision only forbade use of a numerical designation system, that election history showed that the method of nomination had been disclosed, and that a report of the Nominating Committee had been published in official journals for years. The Court upheld both causes of action. The Court noted that a clear, complete agreement should normally be enforced according to its terms and that extrinsic evidence as to what was intended though unstated or misstated is generally inadmissible to add to or vary the writing. Similarly, the conduct of the parties is relevant to intent only if the contract is ambiguous or there is a waiver. The Court concluded that the bylaws clearly provided that the designation was forbidden and was not numerical only and that extrinsic evidence was therefore inadmissible. Cross-motion denied, motion granted. Fezell v. National Rifle Association, Index No. 600211/98, 2/5/98 (Shainswit, J.).

Contracts. Personal service; inability to perform. Extrinsic evidence. Showing for leave to replead. Pleading fraudulent inducement. Fraudulent concealment; standards; pleading with particularity. Negligent misrepresentation; fiduciary duty requirement. Defendant Cavett was to host a radio program. Plaintiff canceled the program because of concern over Cavett's health. Plaintiff asserted claims of breach of contract, fraudulent inducement, negligent and fraudulent misrepresentation, and for an injunction. Defendants moved to dismiss (CPLR 3211(a)(7)). In personal service contracts, the inability to perform of the particular person required under the contract is a complete defense. Plaintiff alleged that Cavett was ill but asserted on the motion that it pled in the alternative and that as to the contract cause of action, Cavett's illness may have been a subterfuge. The Court found that the contract claim was not pleaded alternatively, but incorporated the facts as to the illness, and that nothing suggested that plaintiff had ever intended to rely upon the subterfuge theory. Once extrinsic evidence is offered attacking a complaint, the truth of the pleadings is no longer assumed and the question becomes whether the plaintiff has a claim. Plaintiff failed to show any basis for its theory. The allegation that Cavett had failed to promote the show stated a claim since the failure might have occurred before the illness. Plaintiff sought leave to replead (CPLR 3211(e)), but failed to present evidence in admissible form that Cavett had not been ill when he ceased appearing for work. The Court ruled that the breach claim could be repled only insofar as it concerned the failure to promote the show. The Court rejected the claim for an injunction since Cavett's exclusive services had been required only while the contract was in effect and it had been canceled. As to fraud, the Court noted that plaintiff had alleged that affirmative representations had been made, not merely that defendants had breached the contract. But, the Court held, the complaint failed to allege fraud inasmuch as misrepresentations about Cavett's prior radio experience were not alleged to have damaged plaintiff. As to affirmative statements about Cavett's health, plaintiff pointed to none. However, the Court found, plaintiff could plead a claim for fraudulent concealment if there had been a fiduciary duty or superior knowledge of essential facts. Because of the arm's length nature of the transaction, the former was held inapplicable. As to the latter, the complaint failed to set forth allegations with particularity (CPLR 3016(b)), but enough was present to allow plaintiff to replead this aspect. Negligent misrepresentation claims failed, the Court held, because of the absence of a fiduciary duty. The Court upheld a fraud claim premised upon misrepresentations that Cavett would return to the show. Motion granted in part, with partial leave to replead. Jim and Joyce Music, Inc. v. Cavett, Index No. 601191/97, 2/25/98 (Cahn, J.).

Contracts. Provision for more formal agreement. Contractual interpretation; standard on summary judgment. Plaintiff songwriter granted defendant exclusive rights to publish songs and undertook to deliver ten new songs during each contract period. The agreement provided that the parties would negotiate a more formal contract including "such other terms as are customarily found" in an agreement of this sort. Until then, however, or if none was ever entered into, the writing would constitute a binding agreement. Plaintiff sought a declaration that the agreement had expired by its own terms at the end of a second, optional one-year period. Defendant argued that plaintiff had failed to produce the new songs and that the agreement remained in force until that was done. Defendant offered an expert affidavit to the effect that such a provision is customary. The Court stated that if contractual intent is clearly and unambiguously expressed, intent must be found therein. Absent ambiguity, the question of what the parties intended is one of law for the court. The Court concluded that the agreement unambiguously contained the terms of the parties' agreement and bound them until a more formal agreement was entered into. There was nothing in the agreement, the Court ruled, to indicate that it was to continue until plaintiff completed delivery of the songs. Plaintiff was therefore entitled to the declaratory judgment sought, although the Court noted that defendant might have a claim for breach of contract. Greene v. MCA Publishing, Index No, 604422/96, 1/30/98 (Cahn, J.).

Corporations. Piercing corporate veil. Plaintiff sued to pierce the corporate veil. In order to do so, a plaintiff must present evidence that the parent exercised complete domination and use thereof to commit fraud or a wrong against the plaintiff, proximately causing it damages. Here plaintiff presented a conclusory showing of misconduct. Plaintiff attacked the integrity of books and records, but the evidence failed to show, the Court held, that they had been improperly kept. Plaintiff alleged that assets had been stripped, but failed to present proof. Merely charging that the company should have made a profit based upon the performance of a new tenant was not enough; that profit might have been the result of many factors, the Court stated. Nor was proof presented of alleged domination, save as to a single incident that fell short as it had been properly recorded on the books. Summary judgment for defendants. Ansonia Associates Limited Partnership v. Quik Park Ansonia Garage Corp., Index No. 601693/97, 2/2/98 (Ramos, J.).

Corporations. Rights of terminated shareholder/employee pending payment for shares. Terminated shareholder/

employee was required to sell his shares to the corporation, which was obliged to purchase them. Defendants claimed that plaintiff's shareholder rights ended as of the date of termination, although the parties had failed to agree on an appraiser for the shares, which had still not been transferred. Defendants urged that plaintiff's position was analogous to that of a dissenting shareholder whose shares are acquired pursuant to BCL § 623. However, the Court found no statute or contract term that so provided. Rather, the Court concluded, the situation was closer to an election pursuant to BCL § 1118, wherein a shareholder retains that status. The Court held that plaintiff retained shareholder rights until payment of the fair market value of his shares. Smith v. Wolffpack, Inc., Index No. 0067/97, 11/25/97 (Stander, J.).

Default judgment. Letters of credit. Alternate service upon state bank of Iraq. Plaintiff paid out $ 4 million under a letter of credit and, as provided therein, sought reimbursement from funds held for defendant Central Bank of Iraq at the Bank of New York. The latter refused to pay because of two intervening Executive Orders issued by the President of the United States freezing all assets of the Iraqi government in the US and the Central Bank declined to reimburse plaintiff directly. In view of the Persian Gulf war, the lack of relations between the US and Iraq, and Iraq's having opted out of the Hague Convention, the Court issued an order authorizing alternate service on the Central Bank. The Court found that service had been effectuated in a variety of ways and that the Central Bank had failed to respond. The Court therefore granted plaintiff's motion for a default judgment in the amount of $ 4 million, plus interest. Bank of China v. Central Bank of Iraq, Index No. 603857/96, 1/9/98 (Cahn, J.).

Disclosure. Production of documents of subsidiaries located abroad. Hague Convention. Plaintiff demanded pursuant to the CPLR that one defendant produce documents from its wholly-owned foreign subsidiaries. The defendant maintained that the documents were discoverable only pursuant to the Hague Convention. The Court distinguished In re Augusta, 171 A.D.2d 595 (1st Dept. 1991) and Intercontinental Credit Corp. v. Roth, 154 Misc.2d 639 (Sup. Ct. 1991), in which the Hague Convention was held to be the exclusive discovery device available, on the ground that both cases had involved discovery from an unaffiliated non-party. The Court cited Federal cases stating the proposition that Convention procedures are not compulsory if the discovery occurs in the US and is in no way offensive to principles of international comity. The Court held that if a party subject to the court's personal jurisdiction controls a foreign corporate entity, the party, by virtue of that control, should be required to produce all responsive documents under its aegis, including under the control of the subsidiary, wherever the subsidiary may be located. The Bank of Tokyo-Mitsubishi, Ltd., New York Branch v. Kvaerner a.s., Index No. 600199/97, 1/15/98 (Friedman, J.).

Disclosure. Sealing order; standards applicable. Tobacco litigation. Class actions. In a class action in the tobacco litigation, plaintiffs moved for an order unsealing the temporarily sealed portion of a deposition given by an official of a corporate defendant. Motion granted. Pursuant to Uniform Rule 216.1(a), the Court noted, courts are obligated to exercise independent judgment when acting on a request to seal, rather than merely to defer to the wishes of the parties. A balancing of those wishes against the public interest is required. A finding of good cause is necessary in order for arecord to be sealed. The Court stated that the witness had invoked his Fifth Amendment privilege against self-incrimination, so that the only injury that would flow from unsealing the transcript would be the embarrassment produced by that invocation. The Court noted great and genuine public interest in the litigation, in which the rights of many New Yorkers may be affected, that outweighed embarrassment to the defendant employer. The Court rejected defendants' argument that Section 216.1(a) is inapplicable because the testimony obtained through discovery is not a "court record" (Section 216.1(b)), the transcript having been submitted to the Court. Hoberman v. Brown & Williamson Tobacco Corp., Index No. 110953/96, 1/27/98 (Ramos, J.).

Fiduciary duty claim in currency swap transaction rejected. Fraud (rescission) claim based on lack of authority of treasurer failed given actual and apparent authority and ratification. Plaintiff sued to recover some $ 30 million it had lost as a participant with the first-named defendant ("SBIL") in currency swap transactions. In 1997, the Court dismissed certain claims; SBIL now moved for summary judgment. As to a breach of fiduciary duty claim, the Court observed that that duty has generally not been found in cases between sophisticated parties in the financial services industry. In an Ohio federal case under New York law, it was held that parties to an interest rate swap transaction were in a business, not a fiduciary, relationship even though the bank had had superior knowledge about the swap. The Court here held that plaintiff's showing was no more extraordinary than that alleged in the Ohio case.

Plaintiff is sophisticated and was aware of the risks. There had not been an investment advisory relationship, even though there had been aggressive promoting by SBIL. Plaintiff had negotiated the terms of trades and exercised its own judgment. Superior knowledge about swaps did not create a fiduciary duty, the Court held. Plaintiff also alleged fraud in that SBIL had gone ahead even though it had allegedly known that the treasurer of plaintiff could not enter into transactions without prior approval of superiors. This claim was really one for rescission of contract based on lack of authority. In any case, the Court found, the evidence demonstrated that the treasurer had had actual or apparent authority, and that plaintiff had ratified the swaps. Summary judgment granted.Societe Nationale D'Exploitation v. Salomon Brothers International Ltd., Index No. 113154/96, 2/9/98 (Ramos, J.).

Insurance. Collateral document as part of policy. Misrepresentation; standing; reliance; omission and fiduciary duty. Plaintiffs brought this purported class action based upon the sale of "vanishing premium" life insurance policies by means of alleged misrepresentations. At issue on a motion for summary judgment by defendants were claims of breach of contract and negligent misrepresentation. A key question concerned whether an illustration allegedly relied upon by plaintiff was effectively incorporated into the contract by virtue of a reference on the application. The Court stated that there must be some expression in the incorporating document of an intention to be bound by a collateral document, absent here, or some other evidence in the application reflecting an intent to be bound. The Court found that all that was present was a reference to a collateral document and that this was insufficient to make the illustration part of the policy. Further, the illustration was not physically attached to or otherwise made part of the policy as required by the applicable Insurance Law (Florida). As to the tort claim, a trustee plaintiff lacked standing, the Court held, since the misrepresentations had not allegedly been made to him. As the other plaintiffs had paid and were paying premiums on the policy, although it was now held in trust, they had standing. The Court held that the plaintiffs' reliance was not reasonable since it was in disregard of the fact that interest rates rise and fall. In good part, the Court stated, the claim was really one based upon alleged omissions, but there was no fiduciary duty or other circumstance that could sustain such a theory. Summary judgment granted; motion to certify a class denied.Cole v. Equitable Life Assurance Society, Index No. 108611/95, 2/17/98 (Shainswit, J.).

Insurance. Failure to disclose criminal activity by one member of law firm voids malpractice coverage for the entire firm. Insurer sued to rescind three policies because the firm had failed to disclose in its application that a firm member was engaged in criminal activity as an attorney. The firm claimed that it had learned of the activity after the policy had been issued and severed its relationship with the attorney promptly. The application had asked whether any firm member was aware of any incident that might give rise to a claim. The wrongdoer clearly had had such knowledge so that the negative answer to the question was a material misrepresentation. The application and the policy advised firm members that a material misrepresentation by any protected person would void the policy. Therefore, the lack of knowledge of other firm members did not absolve them. An attorney who completes an application must inquire about issues raised of all attorneys to be covered. Insurer's motion for summary judgment granted.St. Paul Fire & Marine Ins. Co. v. Horowitz & Pollack, PC, Index No. 406500/96, 2/4/98 (Cahn, J.).

Insurance. Interpretation of warranty. Standard on extrinsic evidence. Binder as clarification of policy. Reformation. Plaintiff was involved in promoting three boxing matches between Mike Tyson and adversaries and defendant issued an insurance policy for those events. The second fight did not take place because of Tyson's illness, for which plaintiff sought recovery under the policy. Defendant contended that Tyson had failed to present himself for a physical exam prior to the second fight, though he was examined prior to the first. A warranty in the policy required plaintiff to have all Insured Persons examined and the policy defined them as Tyson and each opponent, listed by name and event date. The Court ruled that Tyson had to be examined only once. If the parties had wished to have him examined three times, the Court said, they would have expressly so agreed. Defendant is a sophisticated party. The agreement contained specific provisions governing other aspects. It did not provide for cancellation in the event of a fighter's illness. As the policy was clear and contained an integration clause, the Court rejected the defendant's attempt to resort to extrinsic evidence (the binders) and noted that there were negotiations and substantive changes after the execution of the binders. The Court also rejected defendant's argument for reformation grounded on mutual mistake since the evidence was clear that the parties had not operated under any mistake. Summary judgment for plaintiff on liability.Viacom Inc. v. Lexington Insurance Co., Index No. 603130/97, 2/3/98 (Friedman, J.).

Insurance. Start date of coverage; incontestability and suicide clauses. At issue was the start date of life insurance coverage. If coverage began from the date of a Receipt and Temporary Insurance Agreement rather than from the start

date of the formal policy, plaintiff would be entitled to proceeds because of the incontestability clause and a suicide clause that precluded the carrier from refusing to pay after two years. The Court held that the Temporary Agreement by its terms indicated that coverage began from the date thereof, having been supplanted by the subsequent formal policy. The most that could be said from the insurer's perspective was that the documents were ambiguous and would have to be construed against their drafter, the insurer. Summary judgment for plaintiff. Springer v. Allstate Life Ins. Co., Index No. 10934/95, 12/29/97 (Stander, J.).

Other action pending; forum non conveniens. Multi-state environmental insurance coverage litigation. Motion by the insured to dismiss or stay (CPLR 3211(a)(4), 327) in favor of a New Jersey action. There was substantial identity of parties and claims. This case was begun first, by about 30 days, which generally is a prevailing consideration. Both cases were equally comprehensive, the Court found, and movant was free to add other claims here. At issue was CGL policy interpretation and these policies had been issued and administered through New York brokers. An asset purchase agreement governed by New York law might also play a role. Residence did not favor New Jersey, the Court said. The various sites were in several states. 8-15 were in New York, although more of the sites were in New Jersey than elsewhere and the greatest potential liability at present would arise from a New Jersey site. Although movant's broker was located in New Jersey, the insurers' were in New York. If site-specific proof became necessary, documents and witnesses would be gathered from all the states where sites are located. Nor, the Court found, would movant, its broker and any New Jersey witnesses be inconvenienced by a New York forum. Motion denied.United States Fidelity & Guaranty Co. v. Schottenstein Stores Corp., Index No. 602332/97, 2/13/98 (Cahn, J.).

Prior action pending; standard of identity of parties and claims. Forum non conveniens; contacts with New York. Stay of this action denied. Defendant insurer moved to dismiss plaintiffs' action to enforce a claimed right to establish a pro ice hockey team in the NHL. CPLR 3211(a)(4). Defendant NHL cross-moved to dismiss on the ground of the absence of necessary parties and forum non conveniens or for a stay. Defendants McConnell, Wolfe and Pizzuti were principals in plaintiff Columbus Hockey, which had sought to obtain an NHL franchise for Columbus, Ohio. These defendants took steps to compete with Columbus Hockey and were awarded the franchise. An action seeking approval of these events was filed by these defendants in Ohio. The Ohio court enjoined plaintiffs here from prosecuting claims against McConnell and Wolfe except in that court and granted partial summary judgment to the Ohio plaintiffs that the defendants here were permitted to obtain the NHL franchise. The insurer argued here that the Ohio action was a prior action pending. The Court pointed out that an identity of parties and claims is required, which was absent since the insurer and NHL were not parties to the Ohio case and unique claims are made here. The Court found that the NHL had failed to meet its burden of establishing interests that would require dismissal under CPLR 327 since relevant NHL conduct occurred here, the NHL is headquartered here and key witnesses and documents are here. As to whether this action should be stayed because the prosecution of claims against McConnell and Wolfe has been limited by the Ohio court, these defendants are nominal ones only here and prosecution of this case would not violate the Ohio order, which also would permit the insurer and the NHL to assert claims against them. The insurer's and NHL's motions to dismisswere denied, a stay was denied, and the parties were enjoined from seeking an order in Ohio limiting the insurer and the NHL from prosecuting or defending any claims here. Expedited discovery ordered. Columbus Hockey Ltd. v. National Hockey League, Index No. 603437/97, 2/10/98 (Cahn, J.).

Restrictive covenant in TV industry. Preliminary injunction after evidentiary hearing. Plaintiff TV network moved for a preliminary injunction enjoining the individual defendant, a key executive and "public face" for plaintiff's networks, from working for any competitor for a period. Evidentiary hearing held. The executive's contract ran through June 30, 1998 and contained a restrictive covenant. Plaintiff had warned the executive not to enter into any employment agreements with a competitor until the expiration of the contract with plaintiff. The executive signed a contract to become President and CEO of a competitor's networks effective July 1, 1998. Plaintiff then terminated his employment for cause. Plaintiff sued for breach of fiduciary duty and other wrongs. The Court underscored the fact that plaintiff was seeking to hold the executive only to the original term of the agreement. Plaintiff argued that the defendant had been properly terminated, thereby permitting it to enforce a non-compete provision. The Court held that the executive was a unique employee in possession of confidential information and thus subject to an enforceable covenant. The Court found that the executive had become entwined in a situation of divided loyalties once he signed the agreement with the competitor. The Court rejected the executive's argument that the plaintiff had failed to give him proper written notice prior to termination and found that the termination for cause was proper. The Court therefore granted the motion for a preliminary injunction through June 30, 1998. MTV Networks v. Fox Kids Worldwide, Inc.,

Index No. 605580/97, 2/4/98 (Cahn, J.).

Statue of limitations. Equitable estoppel. Carriage of Goods Act. Plaintiff sued for damage to goods shipped to New York from Israel. Plaintiff did so more than one year after the damage had occurred, in violation of the federal Carriage of Goods Act, which, pursuant to the bill of lading, governed. Plaintiff argued that defendants should be equitably estopped because they had misled plaintiff to rely on settlement negotiations. Mere mention of possible settlement early on was not enough, the Court held, to have lulled plaintiff into inaction. There was no effort to secure an extension of time, which was defendants' policy in similar cases. Motion for summary judgment of dismissal granted. Galil Importing Corp. v. Azov Shipping Co., Index No. 603291/97, 2/10/98 (Friedman, J.).

Uniform Commercial Code § 3-419. Unauthorized or forged endorsement. Commercial reasonableness. Holder in due course. **Open-end investment company**. Plaintiff allegedly had had a long relationship with a broker, who had induced her to endorse third-party checks to the order of "Dreyfus Family of Funds." The broker, according to plaintiff, then added his own account number to the endorsements and submitted them to defendant for deposit in his personal account. The complaint alleged that although defendant had stated in its prospectus that third-party checks should not be used for investments, it negotiated the checks. Plaintiff claimed that defendant had not acted in good faith and in accordance with reasonable commercial standards. UCC § 3-419(3). As checking privileges and wire and phone transfers were involved, the Court found, defendant open-end investment company arguably acted as a depositary bank. Generally, the drawer of a check paid by such a bank over a forged endorsement does not have a cause of action against the depositary. The allegations of the complaint, the Court ruled, failed to bring the case within the exception to this rule. Defendant had not paid in disregard of a restrictive or over an inadequate endorsement, the Court held. The statement in the prospectus did not aid plaintiff since she did not allege that she had had an account with defendant and since the statement amounted to advice, not a prohibition. The Court rejected plaintiff's implicit argument that the negotiation of a third-party check is per se unreasonable. Plaintiff did not allege that defendant had had any knowledge of the broker's misdeeds and thus the Court concluded that defendant was a holder in due course. UCC § 3-302(2). Motion to dismiss granted. Zaro v. Dreyfus Connecticut Municipal Money Market Fund, Inc., Index No. 603431/97, 1/14/98 (Shainswit, J.).

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THE NEXT ISSUE WILL BE POSTED ON THE UNIFIED COURT SYSTEM AND THE STATE BAR ASSOCIATION HOME PAGES ON **MAY 26, 1998**, COVERING DECISIONS ISSUED IN MARCH & APRIL
