

## Message From The Co-Chairs



Mark S. Mulholland



Douglas J. Good

Welcome to the Spring edition of the *RMF Litigator*, which is published by the Litigation Department at Ruskin Moscou Faltischek, P.C. as a service to our fellow members of the Bar. In this edition, you will read about the Attorney-Client Privilege Act of 2007, amendments to the Court of Claims Act, recent CPLR amendments as well as reports on the activities of our Litigation Department members. We welcome your feedback on our publication as well as your ideas for future issues.

The RMF Litigation Department is the largest commercial litigation practice on Long Island. Ruskin Moscou litigators regularly team with area practitioners, out-of-state lawyers and in-house counsel alike, covering all manner of business disputes. For forty years, we have represented clients in federal and state courts throughout New York and the country and before all forums and tribunals, state and federal, international and domestic. Contact us if we can be of assistance.

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## ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT OF 2007

By Kimberly Malerba



Kimberly Malerba

On November 13, 2007, the U.S. House of Representatives approved the Attorney-Client Privilege Protection Act of 2007 (S.186 / H.R. 3013). As the name aptly communicates, the Act is designed to provide protection to attorney-client privileged communications and attorney work product. As counsel is keenly aware, the attorney-client privilege is essential to ensure that clients, both individual and corporate, can openly and honestly communicate with their chosen counsel. If enacted, the Act would likely foster a greater degree of confidence by clients in their counsel, knowing that their communications with counsel would be protected from compelled disclosure.

The adoption of the Act was in many ways in response to the ever-increasing demands for waiver of these privileges by the Department of Justice as well as various other agencies, prosecutors, regulators and others who could offer organizations the potential for avoiding an indictment and other sanctions. As a result of these tactics, the stated purpose of the Act is to “place on each agency the clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization.”

This Act itself amends the federal criminal code to prohibit any agent or attorney of the United States, in any federal investigation or criminal or civil enforcement matter, from demanding, requesting or conditioning treatment on the disclosure by an organization (or a person affiliated with such an organization) of any communication protected by the attorney-client privilege or any attorney work product. The Act also prohibits the conditioning of a civil or criminal charging decision on, or use as a factor in determining, whether or not an organization or affiliated person is cooperating with the government based upon the following factors:

- (A) any valid assertion of attorney-client or work product privilege;
- (B) the provision of counsel to, or contribution to the legal defense fees or expenses of, an employee of the organization;
- (C) entry into a joint-defense, information-sharing or common-interest agreement with an employee of that organization;
- (D) the sharing of information relevant to the investigation or enforcement matter with an employee of that organization; or
- (E) a failure to terminate the employment or otherwise sanction any employee of that organization because of the decision by that employee to exercise the constitutional rights or other legal protections of that employee in response to a government request.

Finally, the Act also prohibits a U.S. agent or attorney from demanding or requesting that an organization or an affiliated person not take any such action described above. Hearings have recently been held before the Committee on the Judiciary.

Kimberly Malerba is an associate in the Litigation Department at Ruskin Moscou Faltischek. She can be reached at 516-663-6679 or [kmalerba@rmfpc.com](mailto:kmalerba@rmfpc.com).

## AMENDMENT TO THE COURT OF CLAIMS ACT

### *No Longer At Odds With The CPLR*

By Jessica Zimmerman



Jessica Zimmerman

Recently, the Court of Claims Act (“CCA”) § 11(b) was amended to conform with changes made to the CPLR over four years ago. The amendment concerns the pleading requirements and specification of damages in personal injury, wrongful death and medical, dental and podiatric malpractice lawsuits.

Prior to the amendment, CCA § 11(b) stated that a claim must include the total sum claimed. However, in

Supreme Court practice, pursuant to the current CPLR § 3017, all that is required is that the complaint contain a request for “general relief” rather than a specific amount of damages. When the amendment was made to CPLR § 3017, the legislature failed to amend CCA § 11(b) at the same time. This created confusion among attorneys regarding which courts required a total sum to be stated in the pleadings.

A recent Court of Appeals case, *Kolnacki v. State of New York*, 8 NY3d 277 (2007), brought attention to this conundrum. As a result, an amendment was made to the CCA in 2007, removing the “total sum claimed” requirement from a claim for damages arising out of personal injury, wrongful death, and medical, dental and podiatric malpractice claims.

#### What Every Lawyer Should Know About the Amendment

- The legislation provides for retroactive application to November 27, 2003. However, the Senate passed legislation that will prohibit the reopening of closed cases.
- The state is permitted to request the “total sum claimed” sought by the claimant. Upon request, this must be provided within fifteen days.
- While the amendment changes the pleading requirements for specifying damages, it does not change the other necessary elements that must be plead in a claim against the state.
- The amendment applies only to actions involving personal injury, wrongful death, and medical, dental and podiatric malpractice. The total sum claimed must still be plead in Court of Claims actions based on other legal theories of liability.

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## RMF IN MAJOR PRO BONO WIN

### *Client Receives \$3.5 Million Judgment Against Mortgage Scammers*

By Jennifer Hillman



Jennifer Hillman

As reported in Newsday, partner Douglas J. Good and associate Jennifer Hillman successfully represented a local woman, pro bono, who was awarded a judgment of approximately \$3.5 million against individuals who perpetrated a mortgage scam. The client, who at the time was behind in her mortgage payments, was approached by an individual who said he could help her by securing a creditworthy person to be a guarantor in a refinance, which would permit her to draw out equity. Instead, the woman later learned that she had in fact transferred title to her house to someone else for a few thousand dollars.

RMF entered the case when foreclosure proceedings had begun, and impleaded all of the individuals involved in the scam, alleging various fraud theories. The principal scammers predictably defaulted and a default judgment was entered against them. Later, our client presented her proofs at an inquest where Hon. John Michael Galasso awarded punitive damages of five times the value of the home, later determined at approximately \$3.5 million.

Jennifer Hillman is an associate in the Litigation Department at Ruskin Moscou Faltischek. She can be reached at 516-663-6672 or [jhillman@rmfpc.com](mailto:jhillman@rmfpc.com).

## Upcoming CLE Seminars

- **“The Accidental Franchisor”** - Thursday, May 15, 2008, 8 - 10 am at the offices of Ruskin Moscou Faltischek. Presenters include RMF attorneys Harold L. Kestenbaum, John A. DeMaro and Adam P. Silvers. 1.5 CLE credits, Professional Practice and 1.5 CPE credits, Specialized Knowledge, will be offered.
- **“Getting Your Complex Retail Zoning Projects Approved: A Primer”** - Wednesday, June 18, 2008, 8 - 10 am at the offices of Ruskin Moscou Faltischek. Presenters include RMF attorneys Eric C. Rubenstein and David P. Leno. Special guest speaker to be announced. 1.5 CLE credits, Professional Practice, will be offered.

For additional information or to register, email [info@rmfpc.com](mailto:info@rmfpc.com) or call 516-663-5353.

# CPLR AMENDMENTS AFFORD ADDITIONAL TIME ON MOTION PAPERS

By Matthew Didora



Matthew Didora

Several important amendments to the CPLR applicable to motions and cross-motions went into effect on July 3, 2007. The amendments were designed to afford parties additional time to respond to motions and cross-motions prior to the return date.

The relevant sections, as amended, now read as follows:

## NY CPLR § 2214(b)

Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits *and any notice of cross-motion, with supporting papers, if any*, shall be served at least seven days before such time if a notice of motion served at least *sixteen* days before such time so demands; whereupon any reply or responding affidavits shall be served at least one day before such time.

## NY CPLR § 2215. Relief demanded by other than moving party.

At least three days prior to the time at which the motion is noticed to be heard, *or seven days prior to such time if demand is properly made pursuant to subdivision (b) of rule 2214*, a party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers; *provided, however, that:*

- (a) *if such notice and any supporting papers are served by mailing, as provided in paragraph two of subdivision (b) of rule 2103, they shall be served three days earlier than as prescribed in this rule; and*
- (b) *if served by overnight delivery, as provided in paragraph six of subdivision (b) of rule 2103, they shall be served one day earlier than as prescribed in this rule. Relief in the alternative or of several different types may be demanded; relief need not be responsive to that demanded by the moving party.*

Under the previous CPLR § 2214(b), a party was required to serve its motion papers at least eight days before the return date of the motion. If the motion was served by regular mail, CPLR § 2103 required that the movant tack on five days to the date of service, requiring that the papers be deposited in the mail thirteen days

## Recent Litigation Presentations

**Litigation Partner Christine McInerney** was one of the presenters at a well-attended seminar on November 29, 2007 entitled, “A Conversation With The Nassau Commercial Division Justices; Commercial Division Update” at the Nassau Bar Association. Ms. McInerney spoke on Restrictive Covenants, discussing both substantive and practical issues, with commentary for a Panel of Justices: Honorable Leonard B. Austin; Honorable Stephen A. Bucaria and Honorable Ira B. Warshawsky. Other topics at the seminar included Business Divorces; Legal Issues involved in Dissolution Cases for both Corporations and Limited Liability Companies; and Trial Practice In the Commercial Division—A Judicial Panel Discussion with Questions And Answers.

**Department Co-Chair Douglas Good** lectured on “Motion Practice” at the Nassau Academy of Law’s January 27, 2008 Bridge-the-Gap Program. Good was part of a panel of commercial litigators who handled the “civil litigation” portion of this two-day CLE event. The Bridge-the-Gap program is designed especially for recently admitted lawyers, who have an expanded CLE requirement during their first two years of practice. The program, presented at the Nassau County Bar Association annually, is always well attended, usually with 150 or more attorney in attendance. For Good this was a reprise, as he has previously lectured at the Bridge-the-Gap program, as well as other educational programs presented by the Nassau Academy of Law.

before the return date. If the motion papers were served by overnight delivery, one day, rather than five, is added to the service time. The responding party was required to serve its opposition papers two days before the return date. The amendments did not change this timing.

There are two primary drawbacks to this method of noticing motions. First, because the opposing party must only place its papers in the mail two days before the return date, the movant typically will not receive them until after the motion has been submitted to the court. If oral argument is necessary, the moving party will not have an opportunity to prepare a response to the opposition. Second, this method does not permit the movant to serve reply papers.

The CPLR recognizes these deficiencies and provides an alternative means of noticing motions. A moving party may include in the notice of motion a demand that opposition papers be served seven days before the return date, allowing the moving party to serve a reply one day before the return date. Under the prior rule, the movant was entitled to make this demand if the motion papers were served twelve days before the return date (or seventeen if service was by mail and thirteen if by overnight delivery). It is this method of noticing motions that drew the attention of the legislature.

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## About the Firm

Founded in 1968, Ruskin Moscou Faltischek P.C. has emerged as Long Island's preeminent law firm. As specialized as we are diverse, we have built cornerstone groups in all of the major practice areas of law, and service a diverse and sophisticated clientele. With more than 60 legal professionals, superior knowledge of the law, polished business acumen and proven credentials, Ruskin Moscou Faltischek has earned a reputation for excellence and success. It is this ongoing achievement that makes us an acknowledged leader among our peers and the preferred choice among business leaders.

The strength of Ruskin Moscou Faltischek's resources greatly enhances what we can accomplish for our clients – to not only solve problems, but to create opportunities. We take pride in going beyond what is expected from most law firms. The invaluable contacts and relationships we have nurtured in the business community and our multidisciplinary approach heighten our value-added services.

*Continued from page 3*

Now, the amendments to CPLR § 2214(b) extend the twelve-day requirement to sixteen days (or twenty-one days if served by regular mail and seventeen days if service is by overnight delivery) and also *require* the opposing party to serve any cross-motions, as well as opposition papers, seven days before the return date.

If a cross-motion is served, CPLR § 2215 provides additional time to respond. Cross-motions must now be served three days before the return date of the original motion if the original motion was served eight days before the return date or seven days before the return date if the original notice demanded pursuant to CPLR § 2214(b). If the cross-movant serves by regular mail, an additional three days must be added to the service requirement, and one day is added if the cross-movant serves by overnight mail.

While these amendments are a good first start to providing a more workable timetable for briefing motions, they are by no means ideal. Even with the amendments, a party responding to a motion will be hard pressed to draft opposition papers, obtain comments from the client and gather the necessary documentation within the statutory timetable. The best approach, therefore, is for counsel to work out a comfortable briefing schedule with each other and submit it to the court for approval.

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