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LDRC Libel Defense Resource Center

LIBELLETTER

June 1994

DCS Members Make Unique Suggestions

Two Defense Counsel Section member firms have provided us with interesting and somewhat unique litigation practice techniques.

Jim George and Julie Ford, of George, Donaldson & Ford, suggest consideration of contributory or comparative negligence law as a defense in private figure libel cases in which the plaintiff is required to prove that the defendant acted with negligence. While the defense has yet to be tested in any of the cases in which George, Donaldson & Ford lawyers have pled it, it seemed worthy of raising to the LDRC membership for your consideration. Julie Ford has prepared a short note on the subject which is attached to this LibelLetter.

Please let LDRC know what you think of the ideas put forth in Julie's memo and of any cases of which you are aware in which this concept was litigated.

John Lankenau, of Lankenau Kovner & Kurtz, found that a dismissal of a libel claim in one jurisdiction on statute of limitations grounds barred subsequent litigation of the same claim in a different jurisdiction on *res judicata* and Full Faith & Credit grounds. While such a defense requires a number of substantive and procedural steps to fall into proper place, after reviewing some of our other members' litigation, we came to believe that this set of defenses was worth noting. His note on these issues is also attached.

Again, we would ask all of you to let LDRC know if any have cases relevant to the issues raised in John's note. We would also ask that any of you who have litigation issues, tactics or techniques that you believe useful to please pass them on to LDRC.

A New Ride-Along Claim

A new lawsuit in a Colorado federal district court has been filed on behalf of a convicted criminal defendant by an attorney in cooperation with the ACLU against the local media and local law enforcement based upon newsgathering in plaintiff's home at the time of the execution of a search warrant and plaintiff's arrest. The plaintiff is claiming that the defendants violated his civil rights, and committed trespass, invasion of privacy, outrageous conduct and negligent supervision when the press followed law enforcement, photographing the fruits of the search of plaintiff's home and his arrest.

The press, of course, was notified by law enforcement in advance of the search and arrest. Reporters from the local television stations and the *Rocky Mountain News* were present and entered plaintiff's home after the police had effected their search and had cuffed the plaintiff. While plaintiff claims that he asked the press to leave, the press contends that he spoke with them about the charges, but did not ask them to leave the premises.

The plaintiff was sought by law enforcement for having lured underage females to his apartment under pretext, thereafter convincing them to undress for nude photography sessions. In all, nearly 200 such pictures of over 20 young girls were found in his home. The police, as well as the press participants, contend that law enforcement sought coverage of the plaintiff in hopes that plaintiff's victims would come forward. Plaintiff was convicted and is now serving two concurrent 16 year terms.

This case represents one more in what is becoming a disturbing trend of claims based upon "ride-alongs". This case is just in its beginning stages. LDRC will report on its progress.

Tort Reform

In the mid-1980's LDRC actively reviewed and analyzed state efforts at tort reform. Tort reform proposals of particular interest to LDRC included: (1) limits on punitive damages, (2) limits on non-economic damages, and (3) remedies for frivolous prosecution.

Because we believe that there has recently been a resurgence of activity at both the national and state level, LDRC plans to reinvigorate its efforts to monitor this area.

Examples of recent activities on the tort reform front include a bill on products liability pending in the U.S. Senate. While not designed to apply to libel or privacy claims, it is probably worth noting. The Product Liability Fairness Act would create a national system giving guidelines for punitive damages, abolishing joint and several liability for non-economic damages, and encouraging alternative

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Tort Reform Issues Examined

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dispute resolution.

Another example: In Maryland, advocates of tort reform have recently created a committee led by the Maryland Chamber of Commerce. They plan to meet and strategize this summer in anticipation of elections in November. LDRC Members interested in participating can call LDRC for more information.

Few LDRC members need be told that tort reform could present media defendants with enormous savings in time and money if limits could be obtained, for example, on non-economic and punitive damages. Even more importantly, if such limits serve to discourage litigation, the savings could be even greater. The First Amendment values in this suggest that tort reform should be a media issue.

LDRC has a Tort Reform Committee, chaired by Richard Rassel of Butzel Long. If you have any issues that you would like to see LDRC and the committee pursue, please give Sandy Baron or Dick Rassel a call, or send them a note.

Cert Denied in Texas Privacy Claim

Phil Donahue and Multimedia Entertainment, Inc. scored a final victory last week when the United States Supreme Court denied the plaintiffs' petition for writ of certiorari in a privacy lawsuit out of Galveston, Texas. Plaintiff Nancy Anonsen's mother, Miriam Booher, appeared on the Donahue Show and described how rape and incest affected her life and her family. In short, Ms. Booher's story was, "My daughter had my husband's baby." Anonsen sued Donahue and her mother for invasion of privacy.

Ms. Booher, who was born in Israel, had moved to Arkansas to live with her new husband. Her young daughter came with her as well, and was adopted by Mr. Booher. The daughter gave birth to a son when she was 12 years old. The Boohers adopted the boy and raised him as their own child. In fact, unknown to Ms. Booher for many years, her husband was the father of this child.

Anonsen's claim was that Donahue and her mother had given publicity to private embarrassing facts which were not a subject of legitimate public concern. Forced to admit that the crimes of incest and rape were topics of legitimate public concern, Anonsen claimed that her identity was not of public concern.

Anonsen's name was not mentioned on the show. Anonsen argued, however, that people who knew her mother would be able to identify her as the daughter. Ms. Booher should have to disguised herself if she had wanted to tell this story, according to Anonsen.

Donahue and Multimedia Entertainment, represented by Jim George and Julie Ford, now with the firm of George, Donaldson and Ford, L.L.P., won their motion for summary judgment. A Texas Court of Appeals affirmed the judgment, and the Texas Supreme Court declined to consider the appeal. The Texas appellate court opinion states that the First Amendment protects Ms. Booher's right to tell her story undisguised. The opinion is reported at 857 S.W.2d 700.

Although not the basis of the court's opinion, certain facts about this case must have been hard for the court to ignore. The husband, who raped the daughter when she was 11 years old, was an Arkansas State Police Officer. It turned out that this incest was known to several of his fellow officers, who took no action.

When asked why she did not go to the police, Ms. Booher replied, "He *is* the law." Not until Ms. Booher appeared undisguised on television was there any reaction to this crime of a fellow officer. Even then-Governor Bill Clinton was on the phone to the Arkansas police after Ms. Booher's appearance. (At last report, Mr. Booher was working as a prison guard at a prison for the criminally insane in Rusk, Texas, where he described the men he guarded as "the scum of the earth.")

Computers to Arrive at LDRC

LDRC has now ordered a new set of computers. We are moving into the 1990's and Windows. We plan to put the indices for the brief, jury instruction, and expert witness banks into the computer.

With the help of a data base program, it is our intention to be able to search for subjects, states, time frames, etc...the very type of information that we believe will be useful to you in accessing the many, many documents that LDRC has in its reference system.

We hope to have this accomplished before the end of this year.

Our next step will be to arrange for a communications system that allows all of our members to gain access from their own desktop computers into our database indices.

We have some ideas of how to accomplish that and if the revenues of LDRC this year permit us to do so, we will move forward on that front as well.

In the meantime, we want to thank all of the members who have sent LDRC information and briefs recently, and to urge that all of you who have litigation materials — specifically, briefs, jury instructions and expert witness information — to send them to LDRC for inclusion in our reference materials.

Thank you.

JUST THE FAX

LDRC is considering the use of a broadcast fax service for distribution of timely material. It is very important to confirm the fax numbers we have on file for all of our members. We would ask DCS members to confirm their fax number listings in the DCS DIRECTORY (and send in the DCS forms distributed last month if you haven't already done so). LDRC will undertake other means of confirming media member listings.

Foreign Judgments: An Amicus Alert

In the most recent development in a case that spans 10 years, the losing defendant in a British libel decision has brought a civil rights action in federal court to prevent its recognition and enforcement in the United States. The underlying suit arose from a letter to the editor of the London *Daily Telegraph* written in February 1984 by Vladimir Matusevitch, a U.S. citizen who was living in London at the time and working as a journalist for Radio Free Europe/Radio Liberty. His letter accused the plaintiff, Vladimir Telnikoff, of espousing "racialist views" in an op-ed column published in the *Daily Telegraph*, and Mr. Telnikoff responded with a libel suit.

While the defendant won one round of this litigation when the lower courts determined that his statements were "fair comments" as a matter of law, the House of Lords reversed and remanded, holding that whether the letter was comment (opinion) or fact was a jury question. Mr. Telnikoff then won a jury verdict for £240,000 ($416,000 at the then-current exchange rate).

Mr. Matusevitch, who currently resides in Bethesda, Maryland, has brought a §1983 action to bar recognition and enforcement of this judgment. Although comity would normally be accorded the judgment of a British court, Mr. Matusevitch argues that recognition and enforcement of the judgment would not only offend the public policy of the United States but would also violate both the federal and state Constitutions, because protections that are constitutionally mandated under U.S. law are absent under British law. For example, in Great Britain, not only does the defendant bear the burden of proving truth, but faces aggravated damages if the "justification" defense fails. The threat of additional penalties for litigating the issue of truth forced Mr. Matusevitch to rest his defense on fair comment alone. Moreover, in Great Britain, the plaintiff is not required to establish a level of fault by the defendant, as he would in the U.S.

If you are interested, LDRC has available the briefs and related pleadings filed by Mr. Matusevitch's attorney, Arnon Siegel of Davis Polk & Wardell. An *amicus* brief is currently being prepared for several media organizations, including The New York Times, by Laura Handman of Lankenau Kovner & Kurtz. Contact Ms. Handman if you or your media clients are interested in joining the brief. Ms. Handman was counsel of record in *Bachchan v. India Abroad Publications Inc.*, a recent New York case that successfully resisted enforcement of a British libel judgment.

Libel: The Ultimate Chill

A libel suit is being blamed for the demise of a small publication in New York. The publication recently won its appeal from a $2.1 million jury verdict, but the newspaper closed down operations in 1992. The defendants cite the judicial hold on the newspaper's assets as the major cause of its failure. The case is *Kaplansky v. Rockaway Press*.

In 1992, a public figure plaintiff won a jury judgment against *The Rockaway Press*, a New York newspaper with a circulation of approximately 10,000. The jury concluded that the paper had libeled the plaintiff through articles, editorials and cartoons published over several months in 1987.

Immediately after trial, the plaintiff's attorneys sent restraining notices to the newspaper's bank and advertisers advising them of the judgment and inhibiting them from transactions with the defendant.

Though under New York State law the newspaper could have had an automatic stay if it had been able to post bond, the small paper which had no libel insurance, was unable to do so. Attorneys for the newspaper moved for a stay in the enforcement of the judgment pending hearing and determination of the appeal. They argued that a stay is particularly warranted in the case of a small newspaper like this one, where the size and enforcement of judgment would result in its closure, and which is seeking independent apellate review of a public figure libel claim. Counsel also asked for a temporary stay pending determination of that motion. Both were denied, with the Court instead allowing only a release of funds from the bank of $20,000 to be used for operating and litigation expenses. The remainder of the newspaper's assets remained frozen.

Two years after the jury's decision, the Appellate Division of the New York Supreme Court overturned the verdict, saying that the plaintiff had not met his burden of proving either falsity or "actual malice." Because the appeals process took so long, and despite this victory, the process of the libel action effectively closed down this community newspaper.

The paper's current attorney says that the plaintiff has now made a motion for permission to appeal to the Court of Appeals, New York's highest court, and the newspaper is making a cross-motion to impose sanctions for frivolous conduct.

LDRC's membership is generally not at risk of business failure due to a libel or privacy claim. But it is well worth remembering that small publications do face such a risk that the chill so often spoken of in First Amendment litigation and opinions is a very real possibility, in a permanent way.

Libel Suit in Cyberspace:

Solo Publisher Sued for Investigative Efforts

In the last LibelLetter, LDRC published a note by DCS member Steve Lieberman on libel issues raised by computer bulletin boards, a means of communication (if not publication) that a number of LDRC members are engaged in in some manner. LDRC members, or their employees, may also be communicating on the Internet, that global computer information link-up. There is a recently filed libel claim against a small reporter/publisher of material distributed on the Internet. LDRC asked David Marburger of Baker & Hostetler, counsel for the defendant, to summarize that case.

Perhaps the most interesting issue is David's point that Internet users who participate in those areas of the Internet that offer totally open, unedited, equal access to the means of communications afforded by the Internet may be public figures, at least to the extent that the original publication was on the Internet and deals with matters of concern to Internet users.

Inhibition may be coming to the usually uninhibited marketplace of ideas known as the Internet, thanks to a direct-mail marketing business's libel suit against solo publisher Brock Meeks.

For years, the vast network of public and private computer systems called the Internet has been a model for mass communication and debate, where millions of people exchange information, often unedited and with no gatekeepers, through home and business computer systems. Many times, the exchange of information produces disagreement resulting in vitriolic streams of consciousness known as "flaming," which just as often has produced more flaming.

Over the past decade, the culture that has evolved on the Internet has treated rebuttal—often impolite and strident—as the means of redressing statements with which Internet users disagree. One Internet user, however, has resorted to libel litigation.

The Suarez Corporation and its principle owner, Benjamin Suarez, have sued Brock Meeks, a reporter for Warren Publishing Company in Washington, D.C., who, on his own time transmits a publication over the Internet called *Cyberwire Dispatch*. Weeks, in his late 30's, writes *Cyberwire Dispatch* by himself. The suit is over one of Meek's *Dispatch* postings criticizing an offering on the Internet by an outfit calling itself the Electronic Postal Service (EPS). EPS is one of the many enterprises of the Suarez Corporation, a large direct-mail marketing operation in Canton, Ohio.

Through the Internet, EPS promised to supply users with free Internet electronic mailboxes for storing commercial messages, and promised to pay Internet users for receiving the commercials.

Intrigued by the EPS promises, Meeks accepted the EPS invitation to acquire additional information, and provided EPS with his name and address. Eventually, Meeks received a solicitation in the U.S. Mail from the Suarez Corporation urging Weeks to spend more than $150 for a book and a tape recording revealing how to get rich by forming a "net profit generating system."

Suspecting a link between Suarez and EPS, Meeks did some research about Suarez and learned that the attorney general of Washington State had sued Suarez for allegedly violating that state's consumer protection law over statements contained in Suarez's direct-mail offerings to Washington consumers. Meeks also learned about other accusations made against Suarez by other authorities over different Suarez offerings.

In March, 1994, Meeks summarized his findings in a *Cyberwire Dispatch*, which he accompanied with plenty of rhetoric expressing his personal distaste for the activities of Suarez. Suarez promptly sued Meeks for libel in Ohio court in Cleveland. In addition to damages, Suarez sought an injunction barring further publication of the article. Before a hearing on injunctive relief could convene, Meeks moved for summary judgment against injunctive relief. That motion remains pending, and no hearing date is scheduled.

The Internet may be unique because of the unrestricted, unedited ability of users to communicate to wide audiences. Applying that characteristic to the case may open the way for treating all Internet users as though they were public figures, at least where the alleged libel is in response to a communication initiated on the Internet by the plaintiff and addresses a matter of concern to Internet users.

Bruce Sanford and David Marburger of Baker & Hostetler are representing Meeks.

Disparagement: *Again*

This time it is **Florida.**

The Governor has allowed a perishable food disparagement statute to become law without his signature. The statute goes into effect October 1, 1994.

The statute of limitations is 3 years. Treble damages are provided for if the defendant is found to have acted "intentionally...for the purpose of harming [the] producers."

It allows for a claim by any producer of perishable agricultural food products *or* any association representing producers for any "willful or malicious" dissemination of false information that a perishable agricultural product is not safe for human consumption. "False information" is defined as information "which is not based on reliable, scientific facts and reliable, scientific data which the disseminator knows or should have known to be false."

LDRC has a copy of the statute and would be glad to make it available to its members upon request.

Expert Witness Committee Needs Your Help

Please respond, at your earliest convenience, to the request of the Expert Witness Committee, noted in the last LibelLetter, for any information that members may have in respect of the following:

(1) expert witnesses and categories of expert testimony used in defamation lawsuits;

(2) motions *in limine* dealing with expert witness issues and particularly journalism experts; and

(3) resumes and testimony of expert witnesses, including depositions, declarations, treatises, and other information helpful for direct and cross-examination.

Any information should be forwarded to the Committee Chair:

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Your cooperation would not only be greatly appreciated, it is vital.

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To LDRC Members:

In Barry Switzer's book, *Bootlegger's Boy*, Switzer devotes a chapter to a bizarre tale he calls "The Setup." Without retelling the entire story (Switzer would rather have you buy his book), the story begins by describing a Dallas newspaper reporter who had written about Switzer and his Oklahoma football team over the years. Switzer was not especially pleased with this reporter's tactics.

The story then switches to events involving a football player known as "Big Red." Big Red thought his girlfriend had tried to set him up. The girlfriend made suspicious requests and strange telephone calls to Big Red while he was in Miami for the 1988 Orange Bowl. Big Red thought she was trying to get him to bring drugs back from Miami -- and then get him busted.

There was no bust. However, the police had gotten a tip that a player would be bringing drugs back from Miami. Also, the girlfriend had disappeared. Big Red, and then Switzer, learned that the girlfriend had been meeting with a reporter from Dallas while Big Red had been in Miami. They also found a telephone number the girlfriend had left behind. The number was an inside line to a Dallas newspaper -- the same newspaper that employed the above-described reporter.

The reporter sued Switzer and the book publisher for libel and false light. The reporter claimed that the book falsely implied that he had participated in a conspiracy to set up Big Red and embarrass Switzer and the entire O.U. football team.

We had the pleasure of representing Mr. Switzer in that lawsuit. The evidence at trial was that the plaintiff had been assisting a less experienced reporter in working with Big Red's girlfriend on a story about O.U. football players and drugs. "Working with" the girlfriend included giving her a tape recorder (which she used to secretly tape conversations with O.U. players), and helping her move out of Big Red's apartment before he returned from Miami. In addition to providing advice in connection with this story, the plaintiff personally contacted Oklahoma law enforcement officers about drugs and the O.U. team.

In the event that a negligence standard would apply, we pleaded the defense of comparative negligence, something we had not seen in any libel case in Texas. Our argument was: Here was a man who admittedly helped another reporter in activities that, if viewed by a third party, certainly could lead that viewer to believe they both were involved in some kind of set-up. If Switzer was negligent in reporting the facts as he saw them, the plaintiff was negligent in creating the suspicious circumstances in the first place.

Ultimately the plaintiff stipulated that he was a public figure, and our issue of comparative negligence did not go to the jury. To date, we have not had an opportunity to present the issue of comparative negligence to a jury in a libel case. Further, we are not aware of any libel cases in which this defense was ruled upon. However, in those states using a negligence standard for media defendants in private figure libel cases, the defense could apply.

The negligence rule requires a publisher to conform to a certain standard of care to protect the reputations of individuals against unreasonable risks. Similarly, an individual should be required to conform to an objective standard of care to protect his own interests. Free speech principles would seem to demand that a publisher not bear the entire burden of protecting an individual's reputation, and comparative negligence provides one way to ease that burden.

The reasoning behind the U.S. Supreme Court's distinction between public and private plaintiffs is consistent with a defense based on shared fault. In *Gertz v. Robert Welch, Inc.*, the Court stated, "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Gertz*, 94 S.Ct. at 3010. It seems to follow that the media should also be able to operate on the assumption that private individuals will act with reasonable care to protect their reputations. This degree of care would dictate the manner in which they expose themselves to the public and to the media. Individuals who, by their own actions, heighten the risk of false press reports about them should be held accountable for their failure to use reasonable care.

Whether this defense will apply may depend on the wording of the applicable statute, or the development of that state's common law if no statute exists. The law in Texas, where a simple negligence standard applies to private figure libel cases, and where the comparative negligence statute is broad enough to cover libel cases, it seems obvious that this defense is applicable. The concept of comparative or contributory negligence in libel cases may be more elusive in those states that have not enacted comparative negligence statutes, and/or have not clearly articulated a simple negligence standard of fault in the wake of *Gertz*.

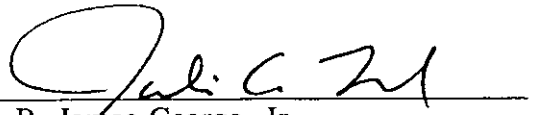
Fact situations that would support a comparative negligence finding seem to crop up in many libel case scenarios. For example, take a man who talked and dressed like a gang member and, upon being told by a journalist that the newspaper wanted to write about gang members, spoke at length about his friends and neighbors. When he is then described in the news story as a gang member, he sues. The jury might find that the publisher was negligent for assuming the man was a gang member. The jury could also find, however, that the man failed to exercise reasonable care to prevent such a misunderstanding.

Another situation, particularly irksome to publishers, which is suitable for comparatory negligence, is where an individual refuses to be interviewed, and then later sues because the publisher got the facts wrong. Although evidence of the plaintiff's conduct could help prove the reasonableness of the publishers' conduct, it may not be enough to cause the jury to find no negligence at all on the part of the publisher. And while the defendant may hope this evidence will factor into the jury's determination of damages, there would be no instruction to that effect.

Although we were not able to test this defense in Switzer's case, we continue to raise this defense in any case where negligence is the standard of fault. We are interested in hearing from other LDRC members who may have raised this defense in a libel case.

Yours sincerely,

GEORGE, DONALDSON & FORD, L.L.P.

By: 
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FORUM SHOPPING CAN BE TURNED TO DEFENDANTS' ADVANTAGE

Forum shopping can, on occasion, work to the decided advantage of a defendant where dismissal is secured in the first jurisdiction on the grounds of the statute of limitations and the law of that jurisdiction is that such dismissal is "on the merits." Under those circumstances, a subsequent suit in another jurisdiction should be barred on res judicata and Full Faith and Credit grounds.

That proved to be the case in a libel suit brought by Itzik Shaari, the Israeli owner of a Jerusalem youth hostel, against St. Martin's Press and Harvard Student Agencies. Shaari based his suit on a statement published in the 1989 edition of Let's Go: Israel and Egypt that three women guests at his hostel had sued him for sexual harrassment.

Mr. Shaari did not live or work in New York but still brought suit in New York, perhaps, in the mistaken belief that New York was a friendly forum to libel plaintiffs. His suit, however, was instituted more than a year after publication and thus was untimely under New York's one year statute.

The defendants moved for summary judgment on statute of limitations grounds. Plaintiff did not seriously contest the defendants' motion and announced in his papers that another suit would be brought in Massachusetts, which has a three year statute of limitations for libel suits that had not run on his claim.

The New York Supreme Court granted the motion for summary judgment and dismissed the action.

As promised, plaintiff then brought suit on the same claim in Massachusetts. At the suggestion of David Kaye, in-house counsel to St. Martin's, defendants then moved to dismiss the Massachusetts suit on the grounds that under New York law the dismissal was res judicata on the merits, and that Massachusetts was bound to honor the effect given the judgment by New York under the Full Faith and Credit Clause of the U.S. Constitution.

The Massachusetts Superior Court agreed, holding first "that in New York a dismissal on statute of limitations grounds is 'on the merits' for the purposes of res judicata. Smith v. Russell Sage College, 54 N.Y.2d 185 (1981)." 19 Media Law Reporter 1700, 1701 (Sup. Ct. Mass. 1991). The Court noted that "[o]ther states, including Massachusetts, have followed this 'clear trend toward giving claim-preclusive effect to dismissals based on statutes of limitations.' Rose v. Town of Harwich, 778 F.2d 77, 80 (1st Cir. 1985)." Id.

Invoking the Full Faith and Credit Clause, the Court went on to hold as follows:

> The Full Faith and Credit Clause of the United States Constitution as codified in 28 U.S.C. § 1738, mandates that judicial proceedings "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such state ... from which they are taken." Therefore Massachusetts courts must accord the judgment of a sister state such as New York "the same credit, validity and effect which it has in the state where it was rendered." Wright Machine Corp. v. Seaman-Andwell Corp., 364 Mass. 683, 689 (1974).

19 Med. L. Rptr. at 1702.

Thus, the Massachusetts Superior Court granted defendants' motion and dismissed the claim.

As a post script, plaintiff then returned to New York and moved on grounds of excusable neglect to vacate the judgment of dismissal, claiming that the prior judgment of dismissal should have been without prejudice. That motion was denied, and on appeal, the denial was affirmed by the First Department. In a last gasp, plaintiffs moved for leave to appeal to the Court of Appeals but his motion was dismissed for lack of jurisdiction.

John C. Lankenau
Lankenau Kovner & Kurtz