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THE SURVEY OF NEW YORK PRACTICE

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INTRODUCTION*

This edition of *The Survey* examines several recent decisions

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* The following abbreviations will be used uniformly throughout *The Survey*:
New York Civil Practice Law and Rules (McKinney) ..... CPLR
New York Civil Practice Act ..... CPA
New York Criminal Procedure Law (McKinney) ..... CPL
New York Code of Criminal Procedure ..... CCP

affecting New York practice. In *Gager v. White*, the Court of Appeals decided the fate of the many pending *Seider*-based cases by holding that the Supreme Court's ruling in *Rush v. Savchuk* must be applied retroactively unless the defendant has waived the jurisdictional defect. In this regard, the Court held that, in order to preserve his rights, the defendant must have stated his jurisdictional objection with sufficient particularity to apprise the plaintiff of the quasi-in-rem nature of the defect. Also of special importance is *Loomis v. Civetta Corinno Construction Corp.*, wherein the Court of Appeals held that a motion to amend the ad damnum clause of a plaintiff's complaint may be granted after a verdict has been rendered, absent prejudice to the defendant. Notably, this decision rejects the approach of numerous lower courts, which had been to deny such motions routinely, and brings the New York rule closer to alignment with that prevalent in the federal courts. Also discussed in *The Survey* is the Court's decision in *Home Mutual Insurance Co. v. Broadway Bank & Trust Co.*, which held that a mere business relationship between an insurance company and a premium finance agency will not give rise to a duty to speak so as to permit the imposition of liability for negligent misrepresentation.

Included among the appellate division cases analyzed in *The*

Real Property Actions and Proceedings Law (McKinney) ..... RPAPL
Domestic Relations Law (McKinney) ..... DRL
Estates, Powers and Trusts Law (McKinney) ..... EPTL
General Municipal Law (McKinney) ..... GML
General Obligations Law (McKinney) ..... GOL
D. Siegel, New York Practice (1978) ..... SIEGEL
Weinstein, Korn & Miller, New York Civil Practice (1979) ..... WK&M
The Biannual Survey of New York Practice ..... *The Biannual Survey*
The Quarterly Survey of New York Practice ..... *The Quarterly Survey*
The Survey of New York Practice ..... *The Survey*

Extremely valuable in understanding the CPLR are the five reports of the Advisory Committee on Practice and Procedure. They are contained in the following legislative documents and will be cited as follows:

1957 N.Y. Leg. Doc. No. 6(b) ..... FIRST REP.
1958 N.Y. Leg. Doc. No. 13 ..... SECOND REP.
1959 N.Y. Leg. Doc. No. 17 ..... THIRD REP.
1960 N.Y. Leg. Doc. No. 120 ..... FOURTH REP.
1961 Final Report of the Advisory Committee on Practice and Procedure ..... FINAL REP.

Also valuable are the two joint reports of the Senate Finance and Assembly Ways and Means Committee:

1961 N.Y. Leg. Doc. No. 15 ..... FIFTH REP.
1962 N.Y. Leg. Doc. No. 8 ..... SIXTH REP.

Survey is *Connell v. Hayden,* a case in which the second department considered the unity-of-interest principle embodied in CPLR 203(b). The *Connell* court held that because a professional corporation is united in interest with its members, service upon the corporation will relate back to the date of service upon an individual member. Significantly, however, the court expressly declined to resolve the question whether the continuous treatment doctrine can apply in the context of such corporations so as to postpone accrual of a medical malpractice cause of action.

It is hoped that the cases treated in this installment of *The Survey* will keep the bar aware of the important developments in New York law.

CIVIL PRACTICE LAW AND RULES

Article 2—Limitations of Time

CPLR 203(b): Preservation of a medical malpractice cause of action under CPLR 203(b)

In New York, a medical malpractice cause of action is deemed to accrue at the time of an alleged act of malpractice,[1] irrespective of the plaintiff's knowledge of such negligent act.[2] Nevertheless, pursuant to the continuous treatment doctrine, the accrual date for statute of limitations purposes may be postponed until the termination of medical services.[3] Of course, regardless of when the

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[1] *E.g.,* Davis v. City of New York, 38 N.Y.2d 257, 259, 342 N.E.2d 516, 517, 379 N.Y.S.2d 721, 723 (1975); Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 217, 188 N.E.2d 142, 144, 237 N.Y.S.2d 714, 717-18, *modified,* 12 N.Y.2d 1073, 1073, 190 N.E.2d 142, 144, 239 N.Y.S.2d 896, 897, *cert. denied,* 374 U.S. 808 (1963); Brush v. Olivo, 81 App. Div. 2d 852, 853, 438 N.Y.S.2d 857, 859 (2d Dep't 1981); Conklin v. Draper, 229 App. Div. 227, 229, 241 N.Y.S. 529, 532 (1st Dep't), *aff'd,* 254 N.Y. 620, 173 N.E. 892 (1930). *But see* Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 431, 248 N.E.2d 871, 873, 301 N.Y.S.2d 23, 27 (1969); CPLR 214-a (McKinney Supp. 1981-1982) (when a foreign object negligently has been left in a plaintiff-patient's body, the statute of limitations for a medical malpractice action will not commence until the plaintiff has discovered or reasonably should have discovered such object).

[2] Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 217, 188 N.E.2d 142, 144-45, 237 N.Y.S.2d 714, 717-18, *modified,* 12 N.Y.2d 1073, 1073, 190 N.E.2d 253, 253, 239 N.Y.S.2d 896, 897, *cert. denied,* 374 U.S. 808 (1963); Schiffman v. Hospital for Joint Diseases, 36 App. Div. 2d 31, 33, 319 N.Y.S.2d 674, 676 (2d Dep't 1971); SIEGEL § 42, at 44.

[3] *E.g.,* Borgia v. City of New York, 12 N.Y.2d 151, 155-56, 187 N.E.2d 777, 778-79, 237 N.Y.S.2d 319, 321-22 (1962); Muller v. Sturman, 79 App. Div. 2d 482, 484, 437 N.Y.S.2d 205, 207 (4th Dep't 1981); Fonda v. Paulsen, 46 App. Div. 2d 540, 543-44, 363 N.Y.S.2d 841, 845 (3d Dep't 1975); CPLR 214-a (McKinney Supp. 1981-1982) (codification of the continuous treatment doctrine). *Borgia,* the case which promulgated the continuous treatment doctrine,