St. John's Law Review

Volume 55
Number 2 *Volume 55, Winter 1981, Number 2*

Article 11

Writ of Prohibition Will Not Issue Against a Public Prosecutor Acting in an Investigatory Rather Than a Quasi-Judicial Capacity

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confidence to his attorney, may be privileged even if disclosure tends to implicate the client in the commission of a crime. *Hennessy* therefore may undermine the purpose of the attorney-client privilege by coercing a breach of professional ethics[99] and thereby discourage free and candid consultation with legal advisors.[100] It is hoped, therefore, that the courts will be more solicitous of attorney-client confidentiality by considering carefully the likelihood that an attorney-client relationship in fact exists.

Peter C. Roth

ARTICLE 78—PROCEEDING AGAINST BODY OR OFFICER

Writ of prohibition will not issue against a public prosecutor acting in an investigatory rather than a quasi-judicial capacity

Article 78 of the CPLR authorizes a proceeding in the nature of prohibition[101] to prevent a judicial or quasi-judicial officer from

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[99] *See In re* Michaelson, 511 F.2d 882, 894 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975) (Merrill, J., dissenting). Voluntary disclosure of a client's "secret" is a breach of the American Bar Association's Code of Professional Responsibility, even if that "secret" is not technically protected by the attorney-client privilege. N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(B)(1) in N.Y. JUD. LAW app., at 433 (McKinney 1975). While the disciplinary rule allows an attorney to reveal confidences or secrets when required by court order, *id.*, DR 4-101(C)(2), at 433, the policy behind attorney-client confidentiality seems disserved by excessive use of the subpoena power to compel such disclosure.

[100] *See In re* Michaelson, 511 F.2d 882, 894 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975) (Merrill, J., dissenting); note 94 *supra*.

[101] CPLR 7801 abolishes the procedural forms of the prerogative writs of certiorari, mandamus, and prohibition which existed at common law and provides for the maintenance of a single all-encompassing article 78 proceeding. *See generally* SEIGEL § 557. However, the substantive distinctions between the remedies survive. *See* CPLR 7801, commentary at 17 (1963). Thus, CPLR 7803 permits a party to raise any one of four separate questions in an article 78 proceeding, each of which corresponds to the issues triable under the common-law writs. Notably, CPLR 7803(2) embodies the common-law writ of prohibition by authorizing a proceeding to determine whether a body or officer is acting "without or in excess of jurisdiction." CPLR 7803(2) (1963).

The birth of the writ of prohibition can be traced to the conflict between the ecclesiastical court system and the common-law court system in medieval England. The writ was developed by the common-law courts as a means of restricting the exercise of jurisdiction by the ecclesiastical courts in matters which were thought to be purely temporal in nature. *See* Note, *The Writ of Prohibition in New York—Attempt to Circumscribe an Elusive Concept*, 50 ST. JOHN'S L. REV. 76, 77-79 (1975) [hereinafter cited as *The Writ of Prohibition in New York*]. Evolving from this common-law heritage, prohibition is now seen as an essential protection of the individual in his relations with the state. Dondi v. Jones, 40 N.Y.2d 8, 12, 351 N.E.2d 650, 654, 386 N.Y.S.2d 4, 7-8 (1976). Prohibition continues to be regarded, however,

acting without or in excess of his jurisdiction.[102] Although the Court of Appeals has held that a public prosecutor is a quasi-judicial officer subject to prohibition under proper circumstances,[103]

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as an "extraordinary remedy." *See* Vaga v. Bell, 47 N.Y.2d 543, 546-47, 393 N.E.2d 450, 452, 419 N.Y.S.2d 454, 456-57 (1979); State v. King, 36 N.Y.2d 59, 62, 324 N.E.2d 351, 353, 364 N.Y.S.2d 879, 882 (1975); Lee v. County Court, 27 N.Y.2d 432, 438, 267 N.E.2d 452, 455, 318 N.Y.S.2d 705, 709, *cert. denied*, 404 U.S. 823 (1971). Therefore, issuance of the writ remains in the discretion of the court based on a showing of a clear legal right. Dondi v. Jones, 40 N.Y.2d at 13, 351 N.E.2d at 654, 386 N.Y.S.2d at 8; *see* La Rocca v. Lane, 37 N.Y.2d 575, 579, 338 N.E.2d 606, 610, 376 N.Y.S.2d 93, 97 (1975), *cert. denied*, 424 U.S. 968 (1976). In exercising this discretion, courts generally will consider the gravity of the harm caused by the alleged abuse of power, and whether an adequate alternative remedy is available. La Rocca v. Lane, 37 N.Y.2d at 579-80, 338 N.E.2d at 609-11, 376 N.Y.S.2d at 97-98; *see The Writ of Prohibition in New York*, *supra*, at 98. If, however, the court determines that prohibition will "furnish a more complete and efficacious remedy," the proceeding will be allowed "even though other methods of redress are technically available." Dondi v. Jones, 40 N.Y.2d at 14, 351 N.E.2d at 655, 386 N.Y.S.2d at 9; La Rocca v. Lane, 37 N.Y.2d at 579-80, 338 N.E.2d at 609-10, 376 N.Y.S.2d at 98; *cf.* Nolan v. Court of Cen. Seas., 15 App. Div. 2d 78, 80, 222 N.Y.S.2d 635, 637 (1st Dep't 1961), *aff'd*, 11 N.Y.2d 114, 181 N.E.2d 751, 227 N.Y.S.2d 1 (1962) (prohibition viewed as traditional remedy where petitioner claims double jeopardy). Moreover, the articulation of a substantial claim that a body or officer has exceeded its jurisdiction generally will permit a petitioner to seek redress through prohibition without regard to whether the claim will succeed on the merits. Nicholson v. State Comm'n on Judicial Conduct, 50 N.Y.2d 597, 606, 409 N.E.2d 818, 821-22, 431 N.Y.S.2d 340, 344 (1980) (per curiam); *see* La Rocca v. Lane, 37 N.Y.2d at 581, 338 N.E.2d at 606, 376 N.Y.S.2d at 99.

[102] Nicholson v. State Comm'n on Judicial Conduct, 50 N.Y.2d 597, 605-06, 409 N.E.2d 818, 821, 431 N.Y.S.2d 340, 343 (1980) (per curiam); Forte v. Supreme Court, 48 N.Y.2d 179, 183, 397 N.E.2d 717, 719, 422 N.Y.S.2d 26, 28 (1979); Vega v. Bell, 47 N.Y.2d 543, 546-47, 393 N.E.2d 450, 452, 419 N.Y.S.2d 454, 456 (1979); B.T. Prods., Inc. v. Barr, 44 N.Y.2d 226, 231-32, 376 N.E.2d 171, 173, 405 N.Y.S.2d 9, 11 (1978); Dondi v. Jones, 40 N.Y.2d 8, 13, 351 N.E.2d 650, 654, 386 N.Y.S.2d 4, 8 (1976). Prohibition will issue only to control the actions of a body or officer possessing judicial or quasi-judicial authority, as distinguished from merely legislative, executive, or ministerial authority. B.T. Prods., Inc. v. Barr, 44 N.Y.2d at 231-32, 376 N.E.2d at 173, 405 N.Y.S.2d at 11; Dondi v. Jones, 40 N.Y.2d at 13, 351 N.E.2d at 654, 386 N.Y.S.2d at 8. Although no case has been found which defines quasi-judicial authority in this context, analysis of the decisions on this issue indicates that quasi-judicial authority is deemed to be the authority to exercise discretion and to take remedial action. *Accord*, BLACK'S LAW DICTIONARY 1411 (4th ed. 1968). Consequently, the writ is most often directed to judicial tribunals. *See, e.g.*, Proskin v. County Court, 30 N.Y.2d 15, 18, 280 N.E.2d 875, 876, 330 N.Y.S.2d 44, 45-46 (1972); Lee v. County Court, 27 N.Y.2d 432, 436-37, 267 N.E.2d 452, 455, 318 N.Y.S.2d 705, 708-09, *cert. denied*, 404 U.S. 823 (1971). Other official bodies that have been deemed quasi-judicial and also subject to prohibition, however, include a state liquor authority, *see* Winejournal Inc. v. State Liquor Auth., 82 Misc. 2d 304, 368 N.Y.S.2d 366 (Sup. Ct. N.Y. County 1974), *aff'd mem.*, 48 App. Div. 2d 773, 371 N.Y.S.2d 1002 (1st Dep't 1975), a city council, *see* Roche v. Lamb, 61 Misc. 2d 633, 306 N.Y.S.2d 515 (Sup. Ct. Monroe County 1969), *appeal dismissed*, 33 App. Div. 2d 1102, 308 N.Y.S.2d 583 (4th Dep't), *aff'd*, 26 N.Y.2d 544, 260 N.E.2d 537, 311 N.Y.S.2d 903 (1970), and a zoning board of appeals, *see* Van Deusen v. Jackson, 35 App. Div. 2d 58, 312 N.Y.S.2d 853 (2d Dep't 1970), *aff'd*, 28 N.Y.2d 608, 268 N.E.2d 650, 319 N.Y.S.2d 855 (1971).

[103] B.T. Prods., Inc. v. Barr, 44 N.Y.2d 226, 232, 376 N.E.2d 171, 173, 405 N.Y.S.2d 9,

the Court, until recently, had not considered what specific activities would justify the issuance of a writ of prohibition against a public prosecutor.[104] In *McGinley v. Hynes*,[105] however, the Court of Appeals held that the prohibition remedy was not available to forestall the "purely investigative" acts of a public prosecutor and, therefore, a writ would not issue to prevent him from convening a second grand jury after an earlier grand jury had failed to return an indictment.[106]

Pursuant to an executive order,[107] the special prosecutor in *McGinley* convened a Suffolk County grand jury to investigate possible medicaid fraud and corruption in the nursing home and health care industry.[108] Several motions to quash the grand jury's subpoenas, combined with the failure of various witnesses to appear as scheduled, resulted in delays and forced the special prose-

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11 (1978); Dondi v. Jones, 40 N.Y.2d 8, 13, 351 N.E.2d 650, 654, 386 N.Y.S.2d 4, 8 (1976). Although the concept of a public prosecutor as a quasi-judicial officer antedates the 20th century, *see* People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497, 498 (1899), vigorous arguments have been made that this status should not subject him to a writ of prohibition. For example, in *Dondi*, Chief Judge Breitel stated his belief that a prosecutor serves a purely executive function. Dondi v. Jones, 40 N.Y.2d at 22-23, 351 N.E.2d at 661, 386 N.Y.S.2d at 14 (Breitel, C.J., dissenting). In his view, the sole reason for characterizing a prosecutor as a quasi-judicial officer was to set him apart from other attorneys because of his responsibility to investigate and prosecute individuals with total objectivity. *Id.*

[104] The Court's reluctance to adopt any strict framework regarding issuance of the writ is exhibited by the following language:

> [T]he extraordinary remedy of prohibition has not developed as a linguistic exercise but as a response in language and concept to the recognized needs and accommodations in a society governed by the rule of law. . . . To eliminate or minimize the concept of an excess of power, on presumed verbalistic grounds, would undermine a common-law principle of ancient standing and the continuous statutory statement of that principle . . . .

B.T. Prods., Inc. v. Barr, 44 N.Y.2d 226, 232-33, 376 N.E.2d 171, 174, 405 N.Y.S.2d 9, 12 (1978) (quoting La Rocca v. Lane, 37 N.Y.2d 575, 581, 338 N.E.2d 606, 611, 376 N.Y.S.2d 93, 99 (1975), *cert. denied*, 424 U.S. 968 (1976)).

[105] 51 N.Y.2d 116, 412 N.E.2d 376, 432 N.Y.S.2d 689 (1980), *rev'g*, 75 App. Div. 2d 897, 428 N.Y.S.2d 57 (2d Dep't 1980).

[106] 51 N.Y.2d at 124, 412 N.E.2d at 380, 432 N.Y.S.2d at 693-94.

[107] The investigation by the special prosecutor in *McGinley* stemmed from Exec. Order No. 4, [1979] 9 N.Y.C.R.R. § 3.4, which authorized the Attorney General and his appointed deputies to make a general investigation into the nursing home and health care industry in New York State with a view toward uncovering possible criminal violations. The special prosecutor appointed by the Attorney General was given broad investigatory powers under the authority of N.Y. EXEC. LAW § 63(8) (McKinney Supp. 1980).

[108] 51 N.Y.2d at 119, 412 N.E.2d at 377, 432 N.Y.S.2d at 691. The inquiry by the grand jury focused upon certain financial transactions of a particular nursing home, and subpoenas were issued to compel the institution and several of its suppliers to produce their business records for grand jury inspection. *Id.* at 119-20, 412 N.E.2d at 377-78, 432 N.Y.S.2d at 691.

cutor to seek extensions of the grand jury term.[109] The growing impatience of the grand jurors culminated in their decision to disband without having taken any action with respect to the investigation.[110] When the special prosecutor reinstituted the investigation before a new grand jury, a hospital employee whose bank records had been subpoenaed brought an article 78 proceeding in the nature of prohibition, claiming that court approval was necessary before the investigation could be renewed.[111] Special term dismissed the petition,[112] but the appellate division reversed, concluding that prohibition was available to prevent the prosecutor from acting without an order authorizing resubmission.[113]

Finding that the prosecutor was acting in an executive rather than a judicial or quasi-judicial capacity, the Court of Appeals reversed.[114] Initially, Judge Gabrielli, writing for a unanimous Court, noted that a public prosecutor assumes "two fundamentally distinct and separate" roles in the criminal justice system.[115] When representing the state in a criminal prosecution, a public prosecutor performs a quasi-judicial, accusatory function which may properly serve as the basis for an article 78 proceeding.[116] However, when involved in the purely investigatory work of ferreting out the commission of crime, the public prosecutor's acts are executive in nature.[117] While the Court declined to define precisely those activi-

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[109] *Id.* at 120-21, 412 N.E.2d at 378, 432 N.Y.S.2d at 691-92. Initially, motions to quash were made by the nursing home's suppliers. Upon denial of these motions, the home, itself, brought a similar motion which delayed production of the records for almost 4 months. In addition, several witnesses, allegedly on advice of counsel, failed to make appearances and refused to answer pertinent questions when they eventually did appear. *Id.*

[110] *Id.* at 121, 412 N.E.2d at 378, 432 N.Y.S.2d at 692.

[111] *Id.* at 121-22, 412 N.E.2d at 379, 432 N.Y.S.2d at 692. Petitioner's claim was based on CPL § 190.75(3), which provides that once a charge has been dismissed by a grand jury, it may not be resubmitted except upon the direction of a court. *Id.* The petitioner argued that the grand jury's inaction was equivalent to a dismissal of charges, and, therefore, the special prosecutor was powerless to act without a court order. 51 N.Y.2d at 122, 412 N.E.2d at 379, 432 N.Y.S.2d at 692.

[112] 51 N.Y.2d at 122, 412 N.E.2d at 379, 432 N.Y.S.2d at 692.

[113] 75 App. Div. 2d at 897, 428 N.Y.S.2d at 57-58. Additionally, the appellate division determined that the petitioner had standing to bring the article 78 proceeding because she was a "potential target" of the investigation, and that the special prosecutor had violated CPL § 190.75(3), *see* note 111 *supra*, by resubmitting the charges to a second grand jury without court approval. 75 App. Div. 2d at 897-98, 428 N.Y.S.2d at 58.

[114] 51 N.Y.2d at 126, 412 N.E.2d at 381-82, 432 N.Y.S.2d at 695.

[115] *Id.* at 123, 412 N.E.2d at 380, 432 N.Y.S.2d at 693.

[116] *Id.*

[117] *Id.* at 124, 412 N.E.2d at 380, 432 N.Y.S.2d at 693-94. The Court indicated that the same test should be applied when prohibition is sought against a grand jury, since that body

ties which are investigatory rather than accusatory in nature,[118] it determined that the acts of the special prosecutor in *McGinley* were "clearly and unambiguously" investigative since no individuals had yet been accused of any wrongdoing.[119] Thus, while the petitioner could seek the traditional remedy of a motion to quash, the Court concluded that an article 78 proceeding in the nature of prohibition was unavailable.[120]

It is submitted that the Court of Appeals decision in *McGinley* narrows the scope of the prohibition remedy against a public prosecutor to include, in the great majority of cases, only those acts by a prosecutor which succeed the filing of an accusatory instrument.[121] It is urged, however, that the commencement of a criminal action should not be applied inflexibly as the line of demarcation separating quasi-judicial from executive acts. Where the pre-accusatory actions of a prosecutor, taken unilaterally or in conjunction with a member of the judiciary, directly impinge upon a substantial and identifiable right of a specific individual, and where no other adequate remedy is available, a proceeding in the

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also performs both investigatory and accusatory functions. *Id.* at 125, 412 N.E.2d at 381, 432 N.Y.S.2d at 694.

[118] The Court noted that "there can be no bright, clear line separating the investigative activities of a public prosecutor from his 'quasi-judicial' activities." *Id.* at 124, 412 N.E.2d at 380, 432 N.Y.S.2d at 694. Instead, the Court reasoned that a case-by-case approach would avoid subjecting the prohibition remedy to unduly strict guidelines. *Id.*

[119] *Id.* at 124-25, 412 N.E.2d at 381, 432 N.Y.S.2d at 694.

[120] *Id.* at 126, 412 N.E.2d at 382, 432 N.Y.S.2d at 695. Because it determined that this was not a proper case for prohibition, the Court did not reach the merits of the petitioner's claim or the question of whether the petitioner had standing to contest the prosecutor's action. *Id.* at 122 & n.1, 412 N.E.2d at 379 & n.1, 432 N.Y.S.2d at 693 & n.1.

[121] The distinction between investigatory and accusatory activities is compatible with several recent Court of Appeals decisions upholding the use of prohibition against a public prosecutor. *See, e.g.*, Forte v. Supreme Court, 48 N.Y.2d 179, 397 N.E.2d 717, 422 N.Y.S.2d 26 (1979); Dondi v. Jones, 40 N.Y.2d 8, 351 N.E.2d 650, 386 N.Y.S.2d 4 (1976). In *Forte*, a successful pretrial motion to suppress had rendered the prosecution's evidence so weak that the indictment was dismissed. 48 N.Y.2d at 182-83, 397 N.E.2d at 718, 422 N.Y.S.2d at 27-28. When the district attorney informed the court that a superseding indictment had been obtained charging the petitioner with the same crime as the original indictment, a successful prohibition proceeding was instituted to challenge the prosecutor's authority to obtain the superseding indictment. *Id.* at 184, 397 N.E.2d at 719, 422 N.Y.S.2d at 28-29. Similarly, in *Dondi*, a special prosecutor had obtained an indictment against the petitioner for allegedly bribing a police officer to alter his testimony in a civil action. 40 N.Y.2d at 11, 351 N.E.2d at 653, 386 N.Y.S.2d at 6-7. Since the special prosecutor's authority as defined by executive order was limited to the investigation and prosecution of corruption within the criminal justice system, the prohibition remedy was held proper. *Id.* at 19, 351 N.E.2d at 658-59, 386 N.Y.S.2d at 12. Clearly, in both of these cases, the challenged prosecutorial acts were performed after the proceeding had entered the accusatory stage.

nature of prohibition should be authorized.[122]

The practitioner should be mindful, nonetheless, that *McGinley* evidences the Court's hostility toward attempts to use the article 78 proceeding merely to delay pre-accusatory investigations. By preserving prohibition as a truly extraordinary remedy, it appears that the Court hopes to assure the vitality of the writ, while at the same time reducing the perceived availability of a collateral proceeding as a simply evasive measure.[123] It seems advisable, therefore, to rely on more traditional remedies, such as a motion to

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[122] *See* Nicholson v. State Comm'n on Judicial Conduct, 50 N.Y.2d 597, 606, 409 N.E.2d 818, 821-22, 431 N.Y.S.2d 340, 344 (1980) (per curiam); B.T. Prods., Inc. v. Barr, 44 N.Y.2d 226, 233, 376 N.E.2d 171, 174, 405 N.Y.S.2d 9, 12 (1978). In *Nicholson,* the Commission on Judicial Conduct, vested with authority to investigate corruption in the judiciary, began an inquiry into the campaign activities of a particular judge. 50 N.Y.2d at 603, 409 N.E.2d at 820, 431 N.Y.S.2d at 342. Together with a former campaign manager who had been subpoenaed by the commission, the judge sought a writ of prohibition alleging that the commission's investigation had infringed upon their first amendment rights. *Id.* at 605-07, 409 N.E.2d at 821-22, 431 N.Y.S.2d at 343-44. Although the petition was denied on the merits, the Court of Appeals held that the prohibition proceeding was properly entertained. *Id.* at 606-07, 409 N.E.2d at 822, 431 N.Y.S.2d at 344. The claim of an improper chilling effect, if proved, would have shown an excess of authority sufficient to invoke the remedy. *Id.* at 606-07, 409 N.E.2d at 822, 431 N.Y.S.2d at 344. Similarly, in *B.T. Prods., Inc.,* the Organized Crime Task Force applied for and obtained a search warrant from a county court judge pursuant to which they seized the petitioner's business records and retained them for nearly two years. 44 N.Y.2d at 230-31, 376 N.E.2d at 172, 405 N.Y.S.2d at 11. During this period no attempt was made to obtain an indictment against the petitioner, and no explanation was ever offered to justify the seizure. *Id.* at 231, 376 N.E.2d at 172, 405 N.Y.S.2d at 11. The Court of Appeals concluded that the task force's statutory authority did not include the power to apply for a search warrant, *id.* at 236, 376 N.E.2d at 176, 405 N.Y.S.2d at 14, and, since no other remedy was available, issuance of a writ of prohibition was proper. *Id.* at 233, 376 N.E.2d at 174, 405 N.Y.S.2d at 12. It is suggested that prohibition was justified in these cases, even though the challenged acts were undeniably pre-accusatory, because the petitioners' claims, if proven, would be sufficient to establish a usurpation of judicial authority under the guise of an investigation.

[123] In the four years prior to the *McGinley* decision, the Court of Appeals rendered three decisions reviewing the activities of similar investigatory entities within the context of a prohibition proceeding. *See* Nicholson v. State Comm'n on Judicial Conduct, 50 N.Y.2d 597, 409 N.E.2d 818, 431 N.Y.S.2d 340 (1980) (per curiam); B.T. Prods., Inc. v. Barr, 44 N.Y.2d 226, 376 N.E.2d 171, 405 N.Y.S.2d 9 (1978); Dondi v. Jones, 40 N.Y.2d 8, 351 N.E.2d 650, 386 N.Y.S.2d 4 (1976); notes 121-22 *supra.* Unlike the Court in the previous decisions, however, the *McGinley* Court was unanimous. It would seem, therefore, that *McGinley* reflects a consensus within the Court to forego the analytical conflicts which characterized the earlier opinions, *see* B.T. Prods., Inc. v. Barr, 44 N.Y.2d at 238-40, 376 N.E.2d at 177-79, 405 N.Y.S.2d at 15-17 (Jasen, J., dissenting); Dondi v. Jones, 40 N.Y.2d at 20-29, 351 N.E.2d at 659-65, 386 N.Y.S.2d at 13-19 (Breitel, C.J., dissenting), in favor of a practical approach which will serve to reduce the frivolous use of the writ of prohibition as a means of impeding the legitimate work of the broad investigatory entities.

quash, in all but unusual cases.

Carl Lawrence

BUSINESS CORPORATION LAW

BCL § 626: Corporate dissolution and distribution of assets held not to preclude subsequent derivative action

Section 626 of the Business Corporation Law (BCL) authorizes shareholders to derivatively prosecute an action in the right of a corporation.[124] To be entitled to commence such an action, the plaintiff-stockholder must be a "holder at the time of bringing the action,"[125] as well as at the time of the alleged wrong.[126] While the

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[124] Section 626 of the Business Corporation Law (BCL) provides in pertinent part:

> (a) An action may be brought in the right of a . . . corporation to procure a judgment in its favor, by a holder of shares . . . of the corporation or of a beneficial interest in such shares . . . .

N.Y. BUS. CORP. LAW § 626 (McKinney 1963).

At common law, those entrusted with the management and direction of a corporation could with impunity breach fiduciary duties owed to the corporation since shareholders were not permitted to bring actions at law against corporate directors to account for their actions or transgressions. Ross v. Bernhard, 396 U.S. 531, 534 (1970). Hence, the shareholders' derivative action developed as an equitable remedy to protect shareholders against such abuses on the part of management. Halpern v. Pennsylvania R.R., 189 F. Supp. 494, 498 (E.D.N.Y. 1960); Burnham v. Brush, 176 Misc. 39, 41, 26 N.Y.S.2d 397, 398 (Sup. Ct. N.Y. County 1941); *see* H. HENN, CORPORATIONS §§ 358-360 (2d ed. 1970); Prunty, *The Shareholders' Derivative Suit: Notes On Its Derivation*, 32 N.Y.U.L. REV. 980, 987-89 (1957). The scope of this remedy was subsequently expanded to permit actions against third parties who had injured the corporation, and against whom the corporation, through its directors' inaction, did not seek redress. Dodge v. Woolsey, 59 U.S. (18 How.) 331, 345 (1856).

The derivative action, as embodied in section 626, is the shareholder's sole remedy for a breach of a fiduciary duty owed to a corporation by a corporate director or officer. Shielcrawt v. Moffett, 49 N.Y.S.2d 64, 71 (Sup. Ct. N.Y. County 1944). It is distinguishable from both a representative action—an action in which the stockholder alleges that a duty owed to a class of which he is a member has been breached by the corporation acting through its directors (for example, the denial of voting rights), *see* Siegal v. Engelmann, 1 Misc. 2d 447, 143 N.Y.S.2d 193 (Sup. Ct. Queens County 1955); Lazar v. Knolls Co-op. Section No. 2, 205 Misc. 748, 130 N.Y.S.2d 407 (Sup. Ct. Bronx County 1954), and a personal action—an action in which the shareholder alleges that a duty owed to him individually has been breached by the corporation through its directors, *see* Diamond v. Davis, 60 N.Y.S.2d 375 (Sup. Ct. N.Y. County 1945). *See generally* Note, *Distinguishing Between Direct and Derivative Shareholder Suits*, 110 U. PA. L. REV. 1147 (1962).

[125] Hanna v. Lyon, 179 N.Y. 107, 110, 71 N.E. 778, 779 (1904); N.Y. BUS. CORP. LAW § 626(b) (McKinney 1963). The rationale underlying the requirement that the plaintiff be a stockholder at the time of commencement is that the plaintiff, being under no fiduciary duty to vindicate a wrong to a corporation, institutes the suit to have the corporation made