

# Judicial and Legislative Pronouncements on Citizen-Taxpayer Standing

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of harassment of judgment debtors and multiplicity of suits, are in no way frustrated by permitting a tenant to counterclaim in an action commenced by the landlord.

A possible explanation for the court's action is suggested by the fact that the holding is limited to judgments which are "equal to or less than the amount of rent due."<sup>228</sup> It is submitted that the court wished to provide a tenant with a remedy which would serve only as a defense in a nonpayment proceeding, rather than grant a counterclaim which would result in affirmative relief in situations wherein the prior judgment exceeds the landlord's rent claim.<sup>229</sup> Under either theory, the result in *Myack* would have been the same since the judgment involved did not exceed the rent due. Nevertheless, the court's endorsement of the latter approach would have been more consistent with the current trend towards greater tenant rights.<sup>230</sup> Although the *Myack* court clearly recognized the need for affording tenants greater rights and flexibility in enforcing judgments against their landlords, the court did not go far enough. The practitioner who represents a tenant in a situation similar to *Myack* should certainly attempt to use a prior judgment as a defense of payment. Where the judgment is greater than the amount of rent owing, however, the practitioner would be well advised to request the court to exercise its discretion and allow the tenant's counterclaim on the previously obtained judgment.

#### DEVELOPMENTS IN NEW YORK PRACTICE

##### *Judicial and legislative pronouncements on citizen-taxpayer standing.*

The adjudication of legal interests is governed in part by the shifting contours of constitutional and institutional standing requirements. Directed at the party seeking access to the judicial process, the standing doctrine reflects the judiciary's insistence on an adversary presentation and its interpretation of the proper

<sup>228</sup> 174 N.Y.L.J. 105, at 9, col. 4 (emphasis in original).

<sup>229</sup> The basic difference between a defense and a counterclaim is that a defense "look[s] only to defeating the plaintiff's claim," 7B MCKINNEY'S CPLR 3018, commentary at 152 (1974), whereas a counterclaim is proper "whether it will merely diminish or defeat the relief sought by the plaintiff or it seeks to recover an amount in excess of the plaintiff's claim." 3 WK&M ¶ 3019.02, at 30-427.

In *Molea v. Eppler*, 97 N.Y.S.2d 222 (New Rochelle City Ct. 1950), a defendant tenant asserted a counterclaim on a prior federal judgment which exceeded the landlord's claim, and the court simply offset the rent due against the prior judgment and granted the tenant a judgment for the excess. The *Myack* court noted that but for the fact that *Molea* involved a prior federal judgment not subject to the restrictions of CPLR 5014, see note 216 *supra*, it would have been persuasive precedent. 174 N.Y.L.J. 105, at 9, col. 4.

<sup>230</sup> See note 212 and accompanying text *supra*.

allocation of governmental functions.<sup>231</sup> In the past, the New York Court of Appeals utilized a restrictive approach in granting potential plaintiffs standing to challenge state legislation and actions of state officers.<sup>232</sup> Recent decisions, however, evidence a departure from the harsh standing requirements that limited access to the courts.<sup>233</sup> Effecting a complete reversal of its earlier policy with respect to the standing of citizen taxpayers to challenge the constitutionality of state fiscal legislation, the decision of the Court in *Boryszewski v. Brydges*<sup>234</sup> is in line with this trend.

The *Boryszewski* plaintiffs challenged on constitutional grounds both the state legislative and executive retirement plan<sup>235</sup> as well as the State's budgeting for lump sum "lulus," *i.e.* lump sum payments in lieu of reimbursement for actual expenses incurred by members of the State Legislature. Treating the action as one for a declaratory judgment,<sup>236</sup> the Court upheld the constitutionality of the retirement plan on the merits,<sup>237</sup> but dismissed that portion of the

<sup>231</sup> See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>232</sup> See, e.g., *Hidley v. Rockefeller*, 28 N.Y.2d 439, 271 N.E.2d 530, 322 N.Y.S.2d 687 (1971) (mem.); *Bull v. Stichman*, 298 N.Y. 516, 80 N.E.2d 661, *aff'g mem.* 273 App. Div. 311, 78 N.Y.S.2d 279 (3d Dep't 1948); *Schieffelin v. Komfort*, 212 N.Y. 520, 106 N.E. 675 (1914); *Doolittle v. Supervisors of Broome County*, 18 N.Y. 155 (1858); *Jaffe, Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1277-79 (1961).

<sup>233</sup> See, e.g., *Dairylea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6, 339 N.E.2d 865, 377 N.Y.S.2d 451 (1975); *Douglaston Civic Ass'n v. Galvin*, 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974), *discussed in The Survey*, 50 ST. JOHN'S L. REV. 179, 202 (1975); *Burke v. Sugarman*, 35 N.Y.2d 39, 315 N.E.2d 772, 358 N.Y.S.2d 715 (1974), *discussed in The Survey*, 49 ST. JOHN'S L. REV. 792, 836 (1975); *National Org. for Women v. State Div. of Human Rights*, 34 N.Y.2d 416, 314 N.E.2d 867, 358 N.Y.S.2d 124 (1974); *Bloom v. City of New York*, 28 N.Y.2d 952, 271 N.E.2d 919, 323 N.Y.S.2d 436 (1971), *aff'g mem.* 35 App. Div. 2d 92, 312 N.Y.S.2d 912 (2d Dep't 1970); *State Div. of Human Rights v. Adam, Meldrum & Anderson Co.*, 84 Misc. 2d 52, 375 N.Y.S.2d 502 (Sup. Ct. N.Y. County 1975).

<sup>234</sup> 37 N.Y.2d 361, 334 N.E.2d 579, 372 N.Y.S.2d 623 (1975), *rev'g* 45 App. Div. 2d 789, 357 N.Y.S.2d 149 (3d Dep't 1974) (mem.).

<sup>235</sup> The New York State legislative and executive retirement plan is governed by N.Y. RETIREMENT & SOC. SEC. LAW § 80-a (McKinney Supp. 1975), *amending* (McKinney 1971).

<sup>236</sup> Originally, the papers instituting suit were drafted as an article 78 petition. 37 N.Y.2d at 365, 334 N.E.2d at 581-82, 372 N.Y.S.2d at 626-27. An article 78 proceeding, however, is appropriate only when the application of a statute by a state officer is challenged as unconstitutional. When a blanket challenge to the constitutionality of a statute is desired, the proper vehicle is an action for a declaratory judgment. 7B MCKINNEY'S CPLR 7801, commentary at 12 (Supp. 1975). The Court ignored the procedural defects in plaintiffs' complaint, however, and, pursuant to CPLR 103(c), treated the action as one for a declaratory judgment, 37 N.Y.2d at 365, 334 N.E.2d at 581-82, 372 N.Y.S.2d at 626-27, CPLR 103(c) permits a court to utilize its discretion and treat an action as properly brought to avoid dismissal of that which was brought in an improper form. See, e.g., *Jerry v. Board of Educ.*, 35 N.Y.2d 534, 544-45, 324 N.E.2d 106, 111-12, 364 N.Y.S.2d 440, 447 (1974); *Overhill Bldg. Co. v. Delany*, 28 N.Y.2d 449, 457-58, 271 N.E.2d 537, 542, 322 N.Y.S.2d 696, 703 (1971); *Lakeland Water Dist. v. Onondaga County Water Auth.*, 24 N.Y.2d 400, 408, 248 N.E.2d 855, 859, 301 N.Y.S.2d 1, 7 (1969); *Ammex Warehouse Co. v. Procaccino*, 378 N.Y.S.2d 848, 852 (Sup. Ct. N.Y. County 1975); 1 WK&M ¶ 103.08; 3 *id.* ¶ 3001.06g.

<sup>237</sup> 37 N.Y.2d at 366-68, 334 N.E.2d at 582-84, 372 N.Y.S.2d at 627-29.

complaint dealing with the lump sum "lulus" for failure to state a cause of action.<sup>238</sup> Judge Jones observed that the instant decision granting standing to citizen taxpayers brings New York into conformity with the practice of the majority of states<sup>239</sup> as well as that in New York at the local level.<sup>240</sup> The *Boryszewski* Court expressly overruled *St. Clair v. Yonkers Raceway, Inc.*,<sup>241</sup> and its progeny,<sup>242</sup> explaining its change of attitude as consonant with developing public policy.<sup>243</sup> In departing from such previous denials of standing to plaintiffs not personally aggrieved but simply similarly situated with others adversely affected by state legislative action, the Court has approved the assertion of a public interest as sufficient to confer standing upon citizen taxpayers.<sup>244</sup>

Noting the unlikelihood that public officials would challenge the constitutionality of their own acts, especially when personally

<sup>238</sup> *Id.* at 368, 334 N.E.2d at 584, 372 N.Y.S.2d at 630. In dismissing that portion of the complaint dealing with the lump sum "lulus," the Court noted that the complaint was imprecisely drawn and that plaintiffs had failed to utilize CPLR 3211(c) to enable themselves to plead again if the motion to dismiss was granted. *Id.*

<sup>239</sup> *Id.* at 364, 334 N.E.2d at 581, 372 N.Y.S.2d at 626. In Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1278 (1961), New York and New Mexico were cited as the only two states that expressly prohibited taxpayer suits. A recent New Mexico case, however, indicates that the standing doctrine in that jurisdiction is being reevaluated. See *De Vargas Sav. & Loan Ass'n v. Campbell*, 87 N.M. 469, 535 P.2d 1320 (1975).

<sup>240</sup> 37 N.Y.2d at 364, 334 N.E.2d at 581, 372 N.Y.S.2d at 626. Pursuant to N.Y. GEN. MUNIC. LAW § 51 (McKinney Supp. 1975), a person or corporation liable to pay taxes on a minimum \$1000 assessment has standing to challenge allegedly illegal acts of persons acting on behalf of a municipality. An action may also be maintained to prevent waste or injury to the funds or property of the municipality. Section 51, however, does not authorize actions to challenge legislative policy or administrative discretion on the local level. See *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 133-34, 204 N.E.2d 627, 634, 256 N.Y.S.2d 584, 594 (1965); *Kaskel v. Impellitteri*, 306 N.Y. 73, 79, 115 N.E.2d 659, 661 (1953); *Kelly v. Merry*, 262 N.Y. 151, 160, 186 N.E. 425, 428 (1933). On the state level, citizen-taxpayer standing has been governed by decisional law, but limited exceptions may be found. See, e.g., N.Y. CONST. art. XIV, § 5 (citizen suit to protect forest preserves, reservoirs, wildlife, and environment); N.Y. CIV. SERV. LAW § 102 (McKinney 1973) (citizen-taxpayer suit to restrain or recover payment of compensation in violation of law).

<sup>241</sup> 13 N.Y.2d 72, 192 N.E.2d 15, 242 N.Y.S.2d 43 (1963), *cert. denied*, 375 U.S. 970 (1964) (citizen taxpayers denied standing to challenge statutory reduction of pari-mutuel tax). For a discussion of *St. Clair* and citizen-taxpayer suits in New York see Quirk, *Standing to Sue in New York*, 47 ST. JOHN'S L. REV. 429 (1973).

<sup>242</sup> See, e.g., *Taylor v. Sise*, 33 N.Y.2d 357, 308 N.E.2d 442, 352 N.Y.S.2d 924 (1974); *Hidley v. Rockefeller*, 28 N.Y.2d 439, 271 N.E.2d 530, 322 N.Y.S.2d 687 (1971) (mem.); *Posner v. Rockefeller*, 26 N.Y.2d 970, 259 N.E.2d 484, 311 N.Y.S.2d 15 (1970) (mem.); *Bell v. Levitt*, 44 App. Div. 2d 742, 354 N.Y.S.2d 465 (3d Dep't) (mem.), *leave to appeal denied*, 34 N.Y.2d 518, 316 N.E.2d 883, 359 N.Y.S.2d 1025 (1974); State Ass'n of Chiefs of Police v. Municipal Police Training Council, 82 Misc. 2d 289, 368 N.Y.S.2d 438 (Sup. Ct. Albany County 1975). The Court has put aside this line of cases denying citizen taxpayers standing, however, when presented with a constitutional issue which if left undecided would have troublesome consequences. See, e.g., *Spillane v. Katz*, 25 N.Y.2d 34, 250 N.E.2d 44, 302 N.Y.S.2d 546 (1969) (per curiam).

<sup>243</sup> 37 N.Y.2d at 363, 334 N.E.2d at 580, 372 N.Y.S.2d at 625.

<sup>244</sup> *Id.* See generally Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 305 (1961).

benefited thereby, as well as the general responsibility of state officials to uphold and support action taken by the various branches of state government,<sup>245</sup> the Court reasoned that continued exclusion of the citizen taxpayer from access to the courts would necessarily diminish the possibility of judicial review of state legislative and executive action.<sup>246</sup> Accordingly, Judge Jones observed that the denial of standing in cases like *Boryszewski* would "erect an impenetrable barrier to any judicial scrutiny of legislative action."<sup>247</sup>

The Court's opinion must be read carefully to ascertain its intended scope. Although Judge Jones initially stated the Court's holding as granting "a taxpayer . . . standing to challenge [the constitutionality of] enactments of our State Legislature,"<sup>248</sup> it is clear from the Court's later references to the plaintiffs that they were granted standing not by reason of their status as taxpayers, but as citizen taxpayers.<sup>249</sup> It further appears that "enactments" should be construed narrowly in keeping with the context of the action before the Court. As Judge Gabrielli pointed out in his concurring opinion, the *Boryszewski* Court was not confronted with the issue of standing in a "friendly" suit or a suit challenging administrative action, but with the issue of standing in a constitutional challenge brought by citizen taxpayers questioning fiscal enactments.<sup>250</sup> Implicit in the majority opinion is the reemergence of a more favorable attitude towards grants of standing in citizen mandamus proceedings.<sup>251</sup> Yet, the *Boryszewski* decision must be viewed as being

<sup>245</sup> 37 N.Y.2d at 364, 334 N.E.2d at 581, 372 N.Y.S.2d at 626. N.Y. EXEC. LAW §§ 63(1), 71 (McKinney 1972), which obligates the attorney general to defend the State, illustrates the general responsibility of state officials to support the action taken by the various branches of the State's government. Indeed, in *Boryszewski* the attorney general represented defendant Brydges, who was sued in his capacity as majority leader and temporary president of the State Senate. 37 N.Y.2d at 362, 334 N.E.2d at 580, 372 N.Y.S.2d at 624.

<sup>246</sup> 37 N.Y.2d at 364, 334 N.E.2d at 581, 372 N.Y.S.2d at 626. *Accord*, *St. Clair v. Yonkers Raceway, Inc.*, 13 N.Y.2d 72, 79, 192 N.E.2d 15, 18, 242 N.Y.S.2d 43, 47 (1963) (Fuld, J., dissenting). Support for the Court's reasoning may be found in 175 N.Y.L.J. 98, Nov. 20, 1975, at 2, col. 5, where it is reported that the attorney general denied requests to investigate a public interest group's allegations concerning "no-show" jobs in the State Legislature, thereby forcing that group to take action on its own.

<sup>247</sup> 37 N.Y.2d at 364, 334 N.E.2d at 581, 372 N.Y.S.2d at 626.

<sup>248</sup> *Id.* at 362, 334 N.E.2d at 580, 372 N.Y.S.2d at 624 (emphasis added).

<sup>249</sup> *See id.* at 363-64, 334 N.E.2d at 580-81, 372 N.Y.S.2d at 625-26.

<sup>250</sup> 37 N.Y.2d 368, 369, 334 N.E.2d 584, 585, 372 N.Y.S.2d 630, 631 (Gabrielli, J., concurring in result only).

<sup>251</sup> The petitioner in a citizen mandamus proceeding operates as a mere instrument of the public interest to compel performance of a public duty, whereas the plaintiff in a taxpayer action represents his pecuniary, albeit nominal, interest as a taxpayer. *See* L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 468, 468-75, 531-36 (1965).

In the past, citizen mandamus proceedings were frequently entertained by the Court of Appeals. *See, e.g.*, *Chironna v. Watson*, 304 N.Y. 255, 259, 107 N.E.2d 289, 290 (1952) (per curiam); *Cash v. Bates*, 301 N.Y. 258, 261, 93 N.E.2d 835, 836 (1950); *Kuhn v. Curran*, 294

limited to the issue before the Court. For this reason, the Court's references to challenges of state executive action<sup>252</sup> must also be viewed as dictum.

Interestingly, the *Boryszewski* decision immediately preceded the legislature's enactment of article 7-A of the State Finance Law.<sup>253</sup> Designed to reverse over a century of judicial prohibition of citizen-taxpayer suits, the new article permits such suits for the purpose of challenging illegal or unconstitutional disbursements of state funds by state officers and employees.<sup>254</sup> Simultaneous liberalization by the judiciary and the legislature, however, has left the doctrine of citizen-taxpayer standing in a seemingly nebulous position.<sup>255</sup> Apparently, while *Boryszewski* will control unconstitutional fiscal acts of the State Legislature, article 7-A of the State Finance Law will be applicable to illegal or unconstitutional disbursements of funds by state officers or employees. Conceptually, such a distinction may be valid, but there are situations in which there would be little practical difference.<sup>256</sup> Thus, although article

N.Y. 207, 213, 61 N.E.2d 513, 515 (1945); *Andresen v. Rice*, 277 N.Y. 271, 281, 14 N.E.2d 65, 69 (1938); *McCabe v. Voorhis*, 243 N.Y. 401, 410-11, 153 N.E. 849, 851 (1926); *People ex rel. Pumpysky v. Keating*, 168 N.Y. 390, 393, 61 N.E. 637 (1901); *People ex rel. Stephens v. Halsey*, 37 N.Y. 344, 347-48 (1867); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.10 (1958); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1276-78 (1961). In *Donohue v. Cornelius*, 17 N.Y.2d 390, 218 N.E.2d 285, 271 N.Y.S.2d 231 (1966), however, a citizen was denied standing to challenge the validity of an act of a state official because he was not personally aggrieved. As one notable authority has pointed out, this decision created much confusion with respect to citizen mandamus proceedings in New York. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.10 (Supp. 1970). The *Boryszewski* Court considered the *Donohue* decision "very much tempered" by *Burke v. Sugarman*, 35 N.Y.2d 39, 315 N.E.2d 772, 358 N.Y.S.2d 715 (1974), wherein the inconsistency of *Donohue* was noted, but held not to be controlling on the facts presented. 37 N.Y.2d at 363, 334 N.E.2d at 580, 372 N.Y.S.2d at 625. Such a statement, however, does not appear warranted upon a reading of that decision. See *The Survey*, 49 ST. JOHN'S L. REV. 792, 838-39 (1975).

<sup>252</sup> See 37 N.Y.2d at 364, 334 N.E.2d at 581, 372 N.Y.S.2d at 626 (dictum). The issue of standing with respect to challenges of state executive action may be altogether academic, however, since the legislature enacted N.Y. STATE FIN. LAW art. 7-A (McKinney Supp. 1975).

<sup>253</sup> N.Y. STATE FIN. LAW §§ 123 to 123-j (McKinney Supp. 1975) became effective September 1, 1975. Ch. 827, § 2, [1975] N.Y. Laws 1310 (McKinney).

<sup>254</sup> See N.Y. STATE FIN. LAW § 123 (McKinney Supp. 1975).

<sup>255</sup> Evidence of the nebulous position occupied by the doctrine of citizen-taxpayer standing may be ascertained by reading the comments and recommendations made to the Governor prior to his approval of article 7-A. This information may be found in the contents of the bill jacket to ch. 827, §§ 1-2, [1975] N.Y. Laws 1307 (McKinney). Some organizations and agencies felt that article 7-A could supersede the judicial grant of standing in *Boryszewski*. See, e.g., Letter from Department of Audit and Control to Judah Gribetz, Counsel to Governor Carey, Aug. 6, 1975, on file in the St. John's Law Review Office; Letter from Division of the Budget to Governor Carey, July 29, 1975, on file in the St. John's Law Review Office; Letter from Office of Court Administration to Judah Gribetz, Counsel to Governor Carey, July 25, 1975, on file in the St. John's Law Review Office; Letter from New York Public Interest Research Group to Judah Gribetz, Counsel to Governor Carey, July 24, 1975, on file in the St. John's Law Review Office. Additionally, it was noted that the inconsistent legislative and judicial approaches could cause confusion as to their respective applicability. See, e.g., Letter from Association of the Bar of the City of New York to Judah Gribetz, Counsel to Governor Carey, Aug. 8, 1975, on file in the St. John's Law Review Office.

<sup>256</sup> For example, if a citizen taxpayer were to seek to challenge the constitutionality of a

7-A was intended to legislate a new standing doctrine, it may, in effect, be superimposing new rules upon a developing judicial doctrine.<sup>257</sup> Additionally, many provisions of article 7-A itself are in need of clarification or explanation.

The definitions of a number of the terms employed in this new legislation cause some preliminary problems of construction. Undefined, and therefore a possible source of litigation, is the term "state officer or employee."<sup>258</sup> Although a state legislator is elsewhere included within the definition of a "state officer,"<sup>259</sup> his decisionmaking duties do not appear to be within the ambit of article 7-A.<sup>260</sup> If this is indeed the case, there can be no apprehension that article 7-A has superseded *Boryszewski*.

Section 123-a<sup>261</sup> defines "taxpayer" as "any citizen who has fiscal enactment, his decision to proceed against the statute itself or against the state officer charged with its administration would determine the procedural aspects of his action. If the statute itself were not unconstitutional there would, of course, be no overlap.

One area that may cause difficult problems concerns the issuance of bonds. If a citizen taxpayer were to seek to challenge the issuance of "Big Mac" bonds as illegal or unconstitutional pursuant to article 7-A of the State Finance Law, for example, his action would be dismissed since it has been specifically precluded by the article. N.Y. STATE FIN. LAW § 123-b (McKinney Supp. 1975). See text accompanying note 268 *infra*. If, however, the same citizen taxpayer were to challenge the constitutionality of the legislative authorization to issue "Big Mac" bonds, his action presumably would be maintainable under *Boryszewski*.

<sup>257</sup> The new rules of standing could be developed by the courts or through legislative codification of *Boryszewski*. Although legislative participation in the formulation of standing requirements could lead to a more consistent approach, the propriety of legislative reform of a judicially developed doctrine may be questioned.

<sup>258</sup> See, e.g., *Corcoran v. State*, 24 N.Y.2d 922, 249 N.E.2d 764, 301 N.Y.S.2d 985 (1969), *aff'g mem.* 30 App. Div. 2d 991, 294 N.Y.S.2d 171 (3d Dep't 1968) (district attorney and county judge not state officers within meaning of Court of Claims Act); *Fisher v. State*, 10 N.Y.2d 60, 176 N.E.2d 72, 217 N.Y.S.2d 52 (1961) (assistant district attorney not state officer within meaning of Public Officers Law); *Benvenga v. La Guardia*, 294 N.Y. 526, 63 N.E.2d 88 (1945) (supreme court justices are state officers within meaning of Public Officers Law); *New York City Employees' Retirement Sys. v. Eliot*, 267 N.Y. 193, 196 N.E. 23 (1935) (members of state licensing board are state officers within meaning of Public Officers Law); *McArdle v. Temporary State Comm'n of Investigation*, 41 App. Div. 2d 401, 343 N.Y.S.2d 1001 (3d Dep't 1973) (*per curiam*) (members of temporary state commission are state officials for purposes of denying *ex parte* stay against them); *Isereau v. State*, 207 Misc. 665, 139 N.Y.S.2d 739 (Ct. Cl. 1954), *aff'd mem. sub nom. Farley v. State*, 3 App. Div. 2d 813, 160 N.Y.S.2d 839 (4th Dep't 1957) and *Walker v. State*, 3 App. Div. 2d 812, 160 N.Y.S.2d 840 (4th Dep't 1957) (county sheriff and his agents not state officials within meaning of Court of Claims Act and Public Officers Law).

<sup>259</sup> N.Y. PUB. OFFICERS LAW § 2 (McKinney 1952) (state officer defined).

<sup>260</sup> See N.Y. STATE FIN. LAW § 123 (McKinney Supp. 1975) (legislative purpose). State legislatures typically are allowed wide discretion and flexibility in their control of the fiscal systems of the State. See, e.g., *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159-60 (1930); *Gautier v. Ditmar*, 204 N.Y. 20, 97 N.E. 464 (1912). It should be noted, however, that some may use article 7-A to challenge state fiscal legislation since it is arguable that an unconstitutional motive on the part of the legislators would bring their actions within the purview of the statute. See generally *Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). Moreover, there may be situations in which members of the executive, legislative, or judiciary branches of our state government are responsible for actually administering public funds and will therefore be open to a challenge through an article 7-A action.

<sup>261</sup> N.Y. STATE FIN. LAW § 123-a (McKinney Supp. 1975).

paid or is paying state income or state sales taxes"; "citizen" as "any person who is a resident of the state"; and "person" as any individual, the attorney general, any political subdivision, corporation, "or any other legal entity whatsoever." In contrast, *Boryszewski* defined neither citizen nor taxpayer.<sup>262</sup> Reference<sup>263</sup> was made, however, to section 51 of the General Municipal Law, which authorizes taxpayer actions to restrain illegal official acts on the local level and includes within its grant of standing any person or corporation who is liable for the payment of local real estate taxes.<sup>264</sup> In addition to article 7-A, therefore, courts may look to section 51 for guidance in resolving the procedural issues attendant to plaintiff's standing to maintain an action under *Boryszewski*.

Section 123-b of the State Finance Law grants citizen taxpayers standing to challenge, in an action for equitable or declaratory relief, "wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property"<sup>265</sup> and thereby authorizes litigation in a wide area of fiscal operations. Concern has been voiced over the possible obstruction and delay this section could cause needed public works projects<sup>266</sup> as well as over the extraordinary damages the State and its political subdivisions could be exposed to should such an action be entertained with respect to an ongoing operation.<sup>267</sup> The section

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<sup>262</sup> In different contexts, the terms "citizen" and "taxpayer" may be subject to varying interpretations. For example, a corporation is not always considered a citizen. *See, e.g., Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868) (not a citizen for purposes of privileges and immunities clause of U.S. CONST. art. IV, § 2); *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N.Y. 506, 62 N.E. 587 (1902), *aff'd*, 191 U.S. 376 (1903) (not a citizen of the state in the constitutional sense); *J.D.L. Corp. v. Bruckman*, 171 Misc. 3, 11 N.Y.S.2d 741 (Sup. Ct. Albany County 1939) (corporation not vested with all rights of citizenship inherent in natural person).

<sup>263</sup> 37 N.Y.2d at 364, 334 N.E.2d at 581, 372 N.Y.S.2d at 626.

<sup>264</sup> N.Y. GEN. MUNIC. LAW § 51 (McKinney Supp. 1975).

<sup>265</sup> N.Y. STATE FIN. LAW § 123-b (McKinney Supp. 1975).

<sup>266</sup> Letter from Associated General Contractors of America, New York State Chapter, to Judah Gribetz, Counsel to Governor Carey, July 15, 1975, on file in the St. John's Law Review Office.

<sup>267</sup> Letter from Executive Department Office of General Services to Judah Gribetz, Counsel to Governor Carey, July 31, 1975, on file in the St. John's Law Review Office. The Mayor of the City of New York objected to § 123-b because it permits a plaintiff to join as a party defendant the recipient of the funds being challenged and would therefore subject the city to additional litigation expenses. Letter from the Office of the Mayor of the City of New York to Governor Carey, July 29, 1975, on file in the St. John's Law Review Office.

The applicable statute of limitations is also a cause of great concern to potential defendants in an article 7-A action. Such an action would generally appear to be governed by the 6-year residual statute of limitations found in CPLR 213(1). If, however, the action is brought by the State and based on spoliation or misappropriation of public property, the applicable period would be either 6 years or 2 years from actual or imputed discovery, whichever is longer. CPLR 213(5), 203(f). Both these periods are substantially longer than the statute of limitations generally applied to an article 78 proceeding. *See* CPLR 217 (4-month statute of limitations for article 78 proceeding unless shorter period provided),

specifically exempts from its coverage, however, the issuance of bonds, thereby saving "Big Mac" and other public debt security issuers the necessity of defending challenges brought pursuant to article 7-A. Bond authorizations were given no such protection in *Boryszewski*.<sup>268</sup>

Venue for an article 7-A action lies in the supreme court of any county where the disbursement has occurred or where the state officer has his principal office.<sup>269</sup> No reference is made, however, to CPLR 506(b), which places venue in Albany County for proceedings against bodies or officers connected with certain specified agencies. While this lack of collation has been viewed by some as a source of potential difficulty,<sup>270</sup> it is suggested that these sections may be reconciled since one refers to an action and the other to a special proceeding.<sup>271</sup>

In an article 7-A action the court, in its discretion, is authorized to demand that the plaintiff post up to \$2500 as security for costs and taxable disbursements.<sup>272</sup> Presumably, this provision was designed to discourage the institution of frivolous suits that would unnecessarily disrupt agency action. Similar considerations would seem pertinent to constitutional challenges of legislative enactments. Therefore, although the issue of security did not arise in *Boryszewski*, it would be helpful if the courts had the power to require such a posting in future applications of that decision.<sup>273</sup>

Section 123-e of the State Finance Law authorizes the court to grant preliminary injunctions or temporary restraining orders as

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*discussed in 7B MCKINNEY'S CPLR 217, commentary at 506 (1972); 1 WK&M ¶ 217.01; and 8 id. ¶ 7801.01.*

In contrast, an action under *Boryszewski* in which a citizen taxpayer is seeking a declaratory judgment as to the constitutionality of a statute is one for which there may be no applicable statute of limitations. *See* 1 WK&M ¶ 213.02; 3 *id.* ¶ 3001.19.

<sup>268</sup> *See* note 256 *supra*.

<sup>269</sup> N.Y. STATE FIN. LAW § 123-c (McKinney Supp. 1975).

<sup>270</sup> *See, e.g.*, Letter from the Commissioner of Agriculture and Markets to Judah Gribetz, Counsel to Governor Carey, Aug. 8, 1975, on file in the St. John's Law Review Office.

<sup>271</sup> The implied repeal of an earlier statute by a subsequently enacted statute is not favored and will only be resorted to if there is irreconcilable conflict between the two provisions. *See* *People v. Mann*, 31 N.Y.2d 253, 257-59, 288 N.E.2d 595, 597-98, 336 N.Y.S.2d 633, 636-37 (1972); *O'Brien v. McGinnis*, 63 Misc. 2d 170, 172-74, 311 N.Y.S.2d 553, 556-58 (Sup. Ct. Albany County 1970); *People v. Heath*, 77 Misc. 2d 215, 218-19, 352 N.Y.S.2d 863, 867-68 (Schuyler County Ct. 1974); N.Y. STATS. §§ 391, 392, 398 (McKinney 1971); 1A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 23.10 (4th ed. C. Sands 1972). The distinction between the two different types of civil judicial proceedings, an action and a special proceeding, has been greatly diminished by CPLR 103(b), which provides that unless otherwise authorized by law the procedural requirements of an action shall apply to a special proceeding.

<sup>272</sup> N.Y. STATE FIN. LAW § 123-d (McKinney Supp. 1975).

<sup>273</sup> It is interesting to note that N.Y. GEN. MUNIC. LAW § 51 (McKinney Supp. 1975) requires the plaintiff to furnish a bond of not less than \$250.

well as declaratory relief and other forms of equitable relief.<sup>274</sup> It carves out an exception to the general provisions of CPLR 6313(a), which prohibit the issuance of a temporary restraining order against a public officer. No exception having been made with respect to CPLR 6312(b), a plaintiff seeking a preliminary injunction would presumably have to comply with that provision's requirement of an undertaking.<sup>275</sup> The court also has authority, under section 123-g of the State Finance Law, to award a successful plaintiff reimbursement for costs, expenses, and attorneys' fees.<sup>276</sup> Reimbursement is to be made through a special "citizen and taxpayer suit fund," which will be financed by monies recovered under the article.<sup>277</sup> Although the *Boryszewski* Court was not in a position to consider this issue, a disposition in favor of awarding attorneys' fees to a successful plaintiff in similar actions might be anticipated.<sup>278</sup>

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<sup>274</sup> N.Y. STATE FIN. LAW § 123-e (McKinney Supp. 1975). In addition to authorizing the grant of preliminary injunctions and temporary restraining orders, this section authorizes the court to grant restitution to the State. If the funds have already been expended the state officer or employee responsible for the disbursement would be required to make such restitution himself. *Id.* Notably, however, this requirement conflicts with N.Y. PUB. OFFICERS LAW § 17 (McKinney Supp. 1975), which provides for indemnification of state officers and employees so long as the illegal act they committed was neither willful nor the result of gross negligence.

An additional conflict arises where the attorney general himself is prosecuting the action. Where indemnification of the state officer or employee is authorized, he must notify the attorney general who may then assume control of his defense. *Id.* Thus, the attorney general may find himself both prosecuting and defending the same action. Even if such a predicament were to exist, the action could not be compromised, discontinued, or dismissed without court approval. N.Y. STATE FIN. LAW § 123-f (McKinney Supp. 1975).

<sup>275</sup> See N.Y. STATE FIN. LAW § 123-i (McKinney Supp. 1975) (existing rights of actions or remedies preserved).

<sup>276</sup> *Id.* § 123-g. This provision, however, would not allow a successful intervenor to recover attorneys' fees unless he were found to be a necessary party. *Id.* Although this provision of the State Finance Law was probably enacted to ensure that the fund established for this purpose will remain solvent, barring recovery of attorneys' fees by an intervenor might encourage the institution of separate and independent suits, as opposed to a single action wherein multiple approaches to the issue could be litigated together.

<sup>277</sup> *Id.* § 123-h. Under this provision, only amounts in excess of \$100,000 will be returned to the general fund of the State. Additionally, the first suit maintained under this article may leave the plaintiff without reimbursement for his expenses since no money was appropriated to initiate the fund.

<sup>278</sup> Successful plaintiffs who bring an action under *Boryszewski* should direct the court's attention to *id.* § 123-g and *Nance v. Town of Oyster Bay*, 54 Misc. 2d 274, 282 N.Y.S.2d 324 (Sup. Ct. Nassau County 1967), *aff'd mem.*, 30 App. Div. 2d 918, 293 N.Y.S.2d 704 (2d Dep't 1968), wherein successful plaintiffs were awarded attorneys' fees based on equitable principles in their action brought pursuant to N.Y. GEN. MUNIC. LAW § 51 (McKinney Supp. 1975).

It may be argued that societal interests will be best served through public interest litigation if a successful plaintiff is awarded his attorneys' fees, for although standing is granted it may be economically infeasible for the plaintiff to maintain the suit. See Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301 (1973). Since the suit is not maintained to recover damages and attorneys' fees are only awarded to a successful litigant, there would seem to be little danger that the award of attorneys' fees in such actions would encourage frivolous suits. *Id.* at 333.

These long overdue recognitions of standing afford the public greater participation in the governmental process. Although article 7-A of the State Finance Law provides for guidelines absent in *Boryszewski*, further legislative and judicial clarification and explanation of both the article and the case law is needed.<sup>279</sup> This articulation must not be delayed, for uncertainty as to threshold requirements such as standing overly encumber the decision to initiate an otherwise meritorious action. The practitioner should be aware of the inconsistencies between article 7-A and *Boryszewski* as well as the issues posed by a close examination of article 7-A itself and frame his standing argument accordingly.

*Legislature's attempt to meet medical malpractice crisis.*

The rising cost of medical malpractice insurance<sup>280</sup> has caused consternation within the medical profession. Pressured by the doubling of premium costs and the possibility that many insurance companies might curtail or abolish protection, doctors across the country have protested by staging or threatening strikes.<sup>281</sup> In New York, the threat of a walkout by the medical profession induced the legislature<sup>282</sup> to extensively revise the law of medical malpractice.<sup>283</sup> The major changes became effective July 1, 1975 and apply to acts of malpractice occurring on or after that date.<sup>284</sup>

One of the enactments provided for the creation of a medical malpractice insurance association.<sup>285</sup> Composed of "all insurers au-

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<sup>279</sup> Clarification should be based on an evaluation of the various public policy considerations underlying the different treatment accorded actions under the State Finance Law, the General Municipal Law, and *Boryszewski*. It is submitted that a consistent overall approach to citizen-taxpayer actions would be preferable.

<sup>280</sup> Insurance costs have risen astronomically. As of 1975, the rates averaged 16 times those charged in 1966, with further increases predicted in the near future. *N.Y. Times*, June 1, 1975, § 1 (News), at 47, col. 5.

It is interesting to note that as of 1975 more than 7000 of the 12,000 physicians practicing in New York City and Nassau County were paying premiums of \$2067 or less. *Id.*, June 1, 1975, § 1 (News), at 46, col. 3. When compared to other insurance expenses, such as automobile coverage, this amount does not seem excessive. While it is true that some physicians in high-risk specialties pay top premiums of up to \$14,329, *id.*, these physicians usually charge higher fees for their services.

<sup>281</sup> *E.g.*, *id.*, May 2, 1975, at 1, col. 1; *id.* May 21, 1975, at 30, col. 6 (doctors' strike on West Coast).

<sup>282</sup> *Id.*, May 16, 1975, at 1, col. 3.

<sup>283</sup> Ch. 109, §§ 1-37, [1975] N.Y. Laws 134 (McKinney) (codified in scattered sections of N.Y. BUS. CORP. LAW; CPLR; N.Y. EDUC. LAW; N.Y. INS. LAW; N.Y. JUDICIARY LAW; N.Y. PUB. HEALTH LAW; N.Y. WORKMEN'S COMP. LAW). While there is no general definition of medical malpractice applicable to the whole package of malpractice legislation, the term is defined in the enactment's amendment to the Insurance Law to include liability for death or injury caused by a "licensed physician or hospital." N.Y. INS. LAW § 681(2) (McKinney Supp. 1975). Perhaps that definition will be held to apply to other statutes in the new legislation as well. See 7B MCKINNEY'S CPLR 3403, commentary at 13 (Supp. 1975).

<sup>284</sup> Ch. 109, § 37, [1975] N.Y. Laws 157 (McKinney).

<sup>285</sup> N.Y. INS. LAW §§ 681-95 (McKinney Supp. 1975).