PUBLICATION UPDATE

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Weinstein, Korn & Miller CPLR Manual, Third Edition

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HIGHLIGHTS

The following chapters have been updated within Release 77:

- **VOLUME 1: CHAPTERS 1, 2, 3, 4, 5, 6, 7, 8, 10, 13, 14, 15, 16, 19, 20, 21 & 22**
- **VOLUME 2: CHAPTERS 23, 24, 25, 26, 27, 28, 31, 32 & 33**

Issues of interest for the practitioner include the following:

VOLUME 1

Chapter 2, § 2.15[b] CPLR 208(b)—Child Victims Act

§ 2.18[g][8] CPLR 214-g Extension of Statute of Limitations in Actions Involving the Sexual Abuse of Children—Child Victims Act

Chapter 19, § 19.06 Form and content of pleadings—in general

§ 19.16[c] Motion to strike scandalous or prejudicial matter

In *Matter of Pisula v. Roman Catholic Archdiocese of N.Y.*, 201 A.D.3d 88, 159 N.Y.S.3d 458 (2d Dep't 2021), the Second Department had the occasion to "discuss the interplay between CPLR 3024(b), which permits the striking of scandalous or prejudicial matter from pleadings, and the general pleading requirements of CPLR 3013 in the context of sex abuse claims brought under the recently-enacted CPLR 214-g." The issue there focused on which allegations in a Child Victims Act (CVA) complaint should be struck.

The court explained that a two-part

test is applied in a CPLR 3024(b) analysis. The first question is whether the subject allegation is "scandalous or prejudicial." If not, the matter is not to be stricken. If it is scandalous or prejudicial, then the second question is whether the allegation was inserted into the pleading "unnecessarily." In other words, the issue is whether the matter is relevant. In sum, if the allegation is both irrelevant and scandalous or prejudicial, it can be stricken. The court pointed out that "[a]llegations of sexual abuse are, by their nature, definition, and essence, scandalous and prejudicial on some obvious level. At the same time, factual averments about sexual abuse are necessary in any action where those allegations form the predicate for an award of damages, to state a cause of action generally and pursuant to the CVA specifically." (201 A.D.3d at 99, 159 N.Y.S.3d at 468.)

The court noted that "the enactment of CPLR 214-g has revived the remedy for aggrieved plaintiffs" and there may "be a recurrence of issues reflecting the tension between the pleading requirements of CPLR 3013 and 3024(b)." Thus, the court set out to provide "bright lines" to be followed in the future:

> — Factual allegations about a plaintiff's own alleged sexual abuse will not be stricken from the complaint under CPLR 3024(b) as they are central and necessary to giving notice of the transaction or occurrence or series of transactions and occurrences, and the material elements of the cause(s) of action asserted.
>
> — Factual allegations about a defendant's prior sexually-abusive conduct will not be stricken from the complaint under CPLR 3024(b) where one or more causes of action includes, as a necessary element, what acts or propensities an institutional defendant knew or should have known by the time of the plaintiff's own abuse.
>
> — Factual allegations about a defendant's concurrent-in-time sexual abuse of another person will not be stricken from the complaint under CPLR 3024(b) where one or more causes of action includes, as a necessary element, what acts or propensities an institutional defendant knew or should have known by the time of the plaintiff's own abuse.
>
> — Factual allegations about a defendant's subsequent relevant statements or conduct that specifically relate back to the sexual abuse of the plaintiff will not be stricken from the complaint under CPLR 3024(b).
>
> — Factual allegations about a defendant's statements or conduct involving a subsequent sexual abuse survivor, other than the plaintiff, may be stricken from a complaint under CPLR 3024(b) on the ground that they are scandalous or prejudicial and not necessary to the elements of the plaintiff's specific cause(s) of action.

> *Id.* at 110–11, 159 N.Y.S.3d at 476.
>
> Ultimately, trial courts are vested with discretion in determining motions to strike pursuant to CPLR 3024(b), and there may be unique issues raised by pleadings in sexual abuse actions that are not covered by the facts and circumstances of this particular appeal, or which warrant alternate conclusions by the court in the proper exercise of its discretion.

See also David L. Ferstendig, *Second Department Discusses Interplay of CPLR 3024(b) and 3013 in the Context of a Sex-Abuse Case*, 736 N.Y.S.L.D. 3–4 (2022).

2.18[c][2][iv] Consumer Credit Transaction

§ 2.18[g][11] Consumer Credit Transaction

CPLR 214-i was added as part of a new law entitled, the "Consumer Credit Fairness Act," impacting a cause of action arising out of a consumer credit transaction where the defendant is a purchaser, borrower or debtor. The new Act requires the inclusion of certain information in the complaint (new CPLR 3016(j)) and that the complaint be served with the summons (amended CPLR 3012(a)); reduces the Statute of Limitations period for actions on consumer credit transactions from six to three years (new CPLR 214-i); makes the 60-day rule to move on improper service grounds inapplicable (amending CPLR 3211(e)); requires additional notice requirements when filing the complaint (new CPLR 306-d), or in the service of a summary judgment motion (new CPLR 3212(j) and amended CPLR 3213); adds more stringent requirements for an application for a default judgment (amended CPLR 3215(f) and new 3215(j)); provides for similar exacting requirements with respect to the confirmation of a consumer credit arbitration award (new CPLR 7516); amends CPLR 5019(c) to make the subdivision inapplicable "where there is a change to the owner of a debt through a sale, assignment, or other transfer where no judgment exists" and requires the chief administrator to make available no later than 1/1/2022 Spanish translations for the additional notices referenced above and form affidavits for a default judgment motion (Judiciary Law § 212, subdivision (2), new paragraph (aa)).

CPLR 214-i L. 2021, ch 593, signed November 8, 2021, reduces the general six-year statute of limitations applicable to contract to three years in certain actions arising out of consumer credit transactions where the defendant is a purchaser, borrower, or debtor. All relevant sections are effective 180 days after signing or May 7, 2022 except (i) CPLR 214-i (decreasing limitation period to three years), which is effective on April 7, 2022; and (ii) Judiciary Law § 212, and the CPLR 5019 amendment, which were both effective immediately on November 8, 2021. In addition, CPLR 214-i provides that where the applicable limitation period expires "any subsequent payment toward, written or oral affir-

mation of or other activity on the debt does not revive or extend the limitations period."

§ 2.18[g][12] Claims Arising out of Exposure to Toxic Burn Pits

Another section numbered CPLR 214-i was added via a 2021 amendment (L. 2021, ch 729, eff 12/22/21). It provides that a personal injury action alleging contact with or exposure to toxic burn pits arising out of service as a member of the armed forces throughout the Middle East on or after 8/2/90, may be commenced the later of three years from (i) the date of the discovery of the injury or (ii) when through the exercise of reasonable diligence the cause of such injury should have been discovered. CPLR 214-i (i). A personal injury includes, but is not limited to the following diseases:

> asthma that was diagnosed after service in a country or territory listed, cancer of any type, chronic bronchitis, chronic obstructive pulmonary disease, constrictive bronchiolitis or obliterative bronchiolitis, emphysema, granulomatous disease, interstitial lung disease, lymphoma, pleuritis, pulmonary fibrosis, and sarcoidosis.

CPLR 214(5) was also amended to add CPLR 214-i as an exception to that statute (providing for a three-year limitation period with no discovery provision). The sponsor's memorandum provides that:

> After the conflict in Vietnam, it took many years to fully realize the extent of the health damage done to servicemen and women due to exposure to Agent Orange. Unfortunately, a similar pattern has emerged in our veterans who served in the Middle East throughout the conflicts of the past 30 years. The practice of using bur pits to dispose of toxic materials has caused a litany of chronic illnesses for returning veterans. Because of the nature of these illnesses, it often takes time for the condition to emerge, get diagnosed, and determine the most likely cause. This legislation ensures veterans can access New York courts with a cause of action without being barred by the typical period of limitation.

Chapter 3, § 3.10-a Commencing the action—filing and service

A motion to extend the time to effect service cannot be granted where an action was not timely commenced. Similarly, it has been held that where the plaintiff failed to timely serve the defendant, he could not revive the action by moving to extend his time to serve under CPLR 306-b once the statute of limitations had expired. *See Matter of Chen v. New York Hosp. Med. Ctr. Of Queens*, 200 A.D.3d 512, 160 N.Y.S.3d 19 (1st Dep't 2021):

> "In March 2019, plaintiff moved under CPLR 306-b for a 60-day extension of time to serve defendant in the interest of justice and for good cause, and Supreme Court granted the motion in May 2019. Plaintiff then served defendant in June 2019, which was

within the 60-day extension but four months after the statute of limitations for the medical malpractice claim had expired. In July 2019, defendant moved to dismiss the complaint as time-barred under CPLR 3211(a)(5). Although Supreme Court granted plaintiff's motion under CPLR 306-b for a 60-day extension of time to serve the amended complaint, the court providently exercised its discretion in granting defendant's motion to dismiss. As the court stated, plaintiff failed to demonstrate good cause for the delay in service even though he attempted to serve defendant at her last known home address on October 9, 2018, since he did not thereafter take diligent steps to determine why defendant had not answered (citation omitted). Rather, plaintiff waited to contact defendant's insurance carrier until after the applicable statutes of limitations had expired—a fact he failed to mention on his CPLR 306-b motion. As plaintiff failed to timely serve defendant, he could not revive the action by moving to extend his time to serve under CPLR 306-b once the statute of limitations had expired (citation omitted). Supreme Court also providently exercised its discretion in finding that an extension of time to serve defendant was not warranted in the interest of justice. Defendant did not receive actual notice of plaintiff's claims against her until June 2019, after the statutes of limitations for medical malpractice and lack of informed consent had expired, and more than six years after the alleged malpractice occurred (citations omitted). In view of plaintiff's lack of diligence and the long delay in notifying defendant of this action, both of which caused her substantial prejudice, an extension of time to serve was unwarranted and dismissal of the amended complaint against her was appropriate (citation omitted)."

§ 3.16[d] Jurisdiction conferred by appearance

CPLR 3211(e) was amended in 2021, as part of a new law entitled the "Consumer Credit Fairness Act," to provide that the 60-day rule applicable to moving on improper service grounds does not apply to an action to collect a debt arising out of a consumer credit transaction where a defendant is a consumer. The sponsor's memorandum advises that the purpose of this provision is to "permit defendants in consumer credit actions to raise improper service as a defense in their answer and preserve that defense for trial without having to file a separate motion to dismiss within 60 days as under current law." It further discussed the justification for the legislation:

> Debt collection actions are rife with poor service of process as confirmed in numerous studies and by New York governmental institutions. Indeed, questionable

service of process is the reason for the exceedingly high number of default judgments in consumer credit actions. Because consumer defendants rarely have attorneys, improper service is a defense they often unknowingly waive when they finally discover they have been sued, even though service of process is a requirement of due process rights afforded under the United States Constitution. Current law places time limits on a defendant's right to assert improper service as a defense or to seek dismissal of the case on this basis. To protect consumers from unknowingly waiving this legitimate defense, the bill would allow consumer defendants to assert improper service as a defense and seek dismissal of the lawsuit beyond the time limits in current law.

Chapter 5, § 5.05[f] Action to recover a chattel

CPLR 508 provides that venue in such cases "may" be in the county in which any part of the subject property is located. By implication, the plaintiff has the option of relying on the residence provisions of CPLR 503(a). *See Robert Owen Lehman Found., Inc. v. Wien*, 197 A.D.3d 865, 152 N.Y.S.3d 749 (4th Dep't 2021):

> " 'To effect a change of venue pursuant to CPLR 510 (1), a defendant must show both that the plaintiff's choice of venue is improper and that its choice of venue is proper' (citation omitted). Rieger failed to make such a showing inasmuch as plaintiff's choice of venue, i.e., Monroe County, is proper because plaintiff is 'deemed a resident of' that County (see CPLR 503 [c]). Furthermore, contrary to Rieger's contention, CPLR 508 does not require that venue be placed in the county where the chattel is located (citation omitted). Rieger abandoned any reliance on CPLR 510 (3) as a ground for change in venue inasmuch as it failed to raise that contention in defendants' main brief (citation omitted)."

Chapter 6, § 6.01[c] Factors affecting joinder

Where the Appellate Division finds that the trial court erred in not granting consolidation, the Appellate court can choose to grant consolidation in the interest of judicial economy without remitting the matter to the trial court. *See Matter of Disa Realty, Inc. v. Rao*, 198 A.D.3d 869, 156 N.Y.S.3d 300 (2d Dep't 2021):

> "[I]n the instant action, that branch of the defendant's motion which was to consolidate the two actions should not have been denied. In the interest of judicial economy, rather than remit the matter to the Supreme Court for consideration of the motion on the merits, we find that the defendant has established that consolidation is appropriate here, as 'it will avoid unnecessary duplication of trials, save unnecessary

costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts' (citation omitted). Contrary to the plaintiff's contention, it has not demonstrated that consolidation will cause it to suffer any prejudice to a substantial right (citations omitted)."

Chapter 19, § 19.05 Service of pleadings and demand for complaint; sanctions for delay, [a] Service of complaint; demand for complaint

The Consumer Credit Fairness Act—via a 2021 amendment—impacts a cause of action arising out of a consumer credit transaction where the defendant is a purchaser, borrower or debtor. Under CPLR 3012(a), a summons must be accompanied by a complaint in a consumer credit transaction action. Although there is no requirement that the complaint be served with the summons (other than in a Consumer Credit Transaction, see above)

§ 19.09[j] Consumer Credit Transaction Actions

Chapter 21, § 21.09[b][6][iii] Consumer Credit Transaction Action

CPLR 3016(j) was added as part of a new law entitled, the "Consumer Credit Fairness Act," impacting a cause of action arising out of a consumer credit transaction where the defendant is a purchaser, borrower or debtor. CPLR 3016(j) provides that the relevant contract or other written instrument is to be attached to the complaint. In the case of a revolving credit account, the charge off statement can be attached instead. In addition, the complaint must include the following information: the original creditor's name; the last four digits of the account number from the most recent monthly statement, recording a purchase transaction, last payment or balance transfer; the date and amount of the last payment or if none made, a statement to that effect; the date when the final statement of account was given to the defendant where there is an account stated cause of action; an itemization of the amount sought with the information required under 3016(j)(5); the account balance printed on the most recent monthly statement, recording a purchase transaction, late payment or balance transfer; whether the plaintiff is the original creditor; if not, the date on which the debt was sold or assigned to the plaintiff, the name of the prior account owners and the date of assignment, and the amount due at the time of sale or assignment of the debt by the original creditor; and matters required to be stated with particularly under CPLR 3015.

The new Act also requires that the complaint be served with the summons (amended CPLR 3012(a)); reduces the Statute of Limitations period for actions on consumer credit transactions from six to three years (new CPLR 214-i); makes the 60-day rule to move on improper service grounds inapplicable (amending CPLR 3211(e)); imposes additional

notice requirements when filing the complaint (new CPLR 306-d), or in the service of a summary judgment motion (new CPLR 3212(j) and amended CPLR 3213); adds more stringent requirements for an application for a default judgment (amended CPLR 3215(f) and new 3215(j)); provides for similar exacting requirements with respect to the confirmation of a consumer credit arbitration award (new CPLR 7516); amends CPLR 5019(c) to make the subdivision inapplicable "where there is a change to the owner of a debt through a sale, assignment, or other transfer where no judgment exists" and requires the chief administrator to make available no later than 1/1/2022 Spanish translations for the additional notices referenced above and form affidavits for a default judgment motion (Judiciary Law § 212, subdivision (2), new paragraph (aa)).

The sponsor's memorandum advises that

> [c]urrent law allows debt collectors to provide minimal and vague information in the complaint that initiates the case, making it very difficult for consumers to identify the debt or the company collecting it. This bill requires court papers to include more information about the debt sued upon. This would ensure that all New Yorkers will be better able to identify the debt on which they are being sued. There are many debts that result from identity theft or mistaken identity and, in other situations the defendant may not recognize the debt as theirs from the minimal information provided on the initial legal papers and may therefore not respond. This legislation will be particularly important for domestic violence survivors as it will help them identify the debt and assert defenses in cases involving debts they did not voluntarily incur but that were incurred by their abusers in the survivor's name.

§ 19.09-d Additional Notice Requirements in Consumer Credit Transactions

CPLR 306-d was added as part of a new law entitled, the "Consumer Credit Fairness Act," impacting a cause of action arising out of a consumer credit transaction where the defendant is a purchaser, borrower or debtor. The new Act requires the inclusion of certain information in the complaint (new CPLR 3016(j)) and that the complaint be served with the summons (amended CPLR 3012(a)); reduces the Statute of Limitations period for actions on consumer credit transactions from six to three years (new CPLR 214-i); makes the 60-day rule to move on improper service grounds inapplicable (amending CPLR 3211(e)); requires additional notice requirements when filing the complaint (new CPLR 306-d), or in the service of a summary judgment motion (new CPLR 3212(j) and amended CPLR 3213); adds more stringent requirements for an application for a default judgment (amended CPLR 3215(f) and new 3215(j)); provides for similar exact-

ing requirements with respect to the confirmation of a consumer credit arbitration award (new CPLR 7516); amends CPLR 5019(c) to make the subdivision inapplicable "where there is a change to the owner of a debt through a sale, assignment, or other transfer where no judgment exists" and requires the chief administrator to make available no later than 1/1/2022 Spanish translations for the additional notices referenced above and form affidavits for a default judgment motion (Judiciary Law § 212, subdivision (2), new paragraph (aa)).

CPLR 306-d provides for an additional mailing of notice to be provided at the time of the filing of the summons and complaint in a consumer credit transaction (CCT) by the plaintiff to the clerk together with an unsealed envelope addressed to the defendant. The notice is to be "clear type of no less than twelve-point in size, in both English and Spanish."

Chapter 20, § 20.02 [f] Party's statement

Note that CPLR 4549 was added in 2021 to permit the admission of an *opposing party* statement, if it is made by a person authorized by the opposing party to make that statement on the subject or by an agent or employee "on a matter within the scope of that relationship and during the existence of that relationship." The amendment took effect immediately on December 31, 2021 and applies to all actions pending on or after such effective date.

§ 20.02[g] Contents of insurance agreement

Via a 2021 amendment, and revised in a 2022 chapter amendment, CPLR 3101 (f) was replaced and CPLR 3122-b was added as part of the "Comprehensive Insurance Disclosure Act." The amendment applies to actions commenced after 12/31/21. L. 2021, ch 832 § 4, eff 12/31/21 (L. 2022, ch 136 § 3, eff 2/24/2022). The prior version of CPLR 3101 (f) provided that a party could obtain the existence and contents of an insurance agreement, but provided no time limit. The new law requires that the defendant, a third-party defendant, or defendant on a crossclaim or counterclaim ("the defendant") produce within 90 days of service of the answer, "proof of the existence and contents of any insurance agreement in the form of a copy of the insurance policy in place at the time of the loss, or, if agreed to by such plaintiff or party in writing, in the form of a declaration page, under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of a final judgment." A plaintiff or party who agrees to accept a declaration page does not waive the right to receive any other required information, and can revoke the agreement upon notice to the applicable defendant, and receive the full insurance policy.

The section enumerates what must be included in such a production, including all primary, excess and um-

brella policies, contracts or agreements, "insofar as such documents relate to the claim being litigated;" if the policy is provided, there must be production of a complete copy of the policy, "under which any person or entity may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment," including "declarations, insuring agreements, conditions, exclusions, endorsements and similar provisions"; the contact information for the person assigned to adjust the underlying claim; the total limits available under the policy to satisfy a judgment; lawsuits that have reduced or eroded or may reduce or erode any amounts available under the policy; and the amount of attorneys' fees that have eroded or reduced the policy's face value, and the name and address of the attorney who received the payments.

There is a continuing disclosure obligation, requiring that the defendant "make reasonable efforts to ensure that the information remains accurate and complete" and produce the updated information "at the filing of the note of issue, when entering into any formal settlement negotiations conducted or supervised by the court, at a voluntary mediation, and when the case is called for trial." This continuing obligation applies for 60 days after any settlement or entry of final judgment (including appeals). An insurance application is not to be treated as part of an insurance agreement.

The disclosure of the policy limits does not "constitute an admission that an alleged injury or damage is covered by the policy" and production of the insurance information required under this section does not make it admissible in evidence at trial. This section does not apply to actions to recover motor vehicle insurance PIP benefits under Insurance Law Article 51 or 11 NYCRR 68.

As part of the amendment, CPLR § 3122-b was also added, which requires that the information provided under CPLR 3101(f) be certified. Such certification must be "sworn in the form of an affidavit or affirmation where appropriate, stating that the information is accurate and complete, and that reasonable efforts have been undertaken, and in accordance with paragraph two of subdivision (f) of section thirty-one hundred one of this article will be undertaken, to ensure that this information remains accurate and complete."

Chapter 21, § 21.07 Motion for summary judgment, [a] Scope and application

CPLR 3212(j) was added as part of a new law entitled, the "Consumer Credit Fairness Act," impacting a cause of action arising out of a consumer credit transaction where the defendant is a purchaser, borrower or debtor. CPLR 3212(j) requires that in an action to collect a debt arising out a consumer credit transaction where a defendant is a consumer, additional notice is required, where the movant is the plaintiff and the defendant is a consumer proceeding pro se. The no-

tice is to be "in English and Spanish to be printed in clear type no less than twelve-point in size," and is to be submitted to the clerk together with a stamped, unsealed envelope addressed to the defendant. (3212(j)(1)).

Chapter 22, § 22.04 Dismissal of abandoned cases

In 2021, CPLR 3410 was added as part of a larger amendment to extend consumer protections to the process of acquiring a reverse cooperative apartment unit loan. It is titled "Face-to-face meeting for foreclosure of reverse cooperative apartment unit loans" and provides for a "mandatory settlement conference" in actions arising out of a borrower's default under a reverse cooperative apartment unit loan. Specifically, in any action involving a borrower's default under a reverse cooperative apartment unit loan, the lender is to file "a petition in the supreme court of the county in which the cooperative apartment is located stating that the loan is in default and the reason for the default." After service on the borrower, "[w]ithin ten days of the date of service of the notice to the borrower, the petitioner must file a specialized request for judicial intervention with the clerk. Within sixty days of receipt of the notice or on such adjourned date as has been agreed to by the parties, the court shall hold a mandatory settlement conference for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the loan documents, including, but not limited to 1. determining whether the parties can reach a mutually agreeable resolution to help the borrower avoid losing his or her cooperative apartment unit, and evaluating the potential for a resolution or other workout options may be agreed; or 2. whatever other purposes the court deems appropriate."

At any such meeting, the lender and borrower are to appear in person or by counsel, and be fully authorized to dispose of the matter. Where the borrower appears without counsel, the court is to inform the borrower "of the nature of the action and his or her rights and responsibilities." The court can permit the borrower or the borrower's representative to appear at the conference telephonically or by video-conference. When the notice of default is filed with the court, it is to send "either a copy of the notice or the borrower's name, address and telephone number (if available) to a housing counseling agency or agencies on a list designated by the department for the geographic region in which the borrower resides. Such information shall be used by the designated housing counseling agency or agencies exclusively for the purpose of making the borrower aware of housing counseling and foreclosure prevention services and options available to them."

The court must promptly send a notice in a form prescribed by the court to the parties advising them of the time, place and purpose of the

meeting, the documents to bring with them and the requirements of this rule.

Both parties are required to "negotiate in good faith to reach a mutually agreeable resolution, including but not limited to a repayment agreement, or any other loss mitigation, if possible." In evaluating whether a party has negotiated in good faith, the court is to consider the "totality of the circumstances," including, but not limited to, the following factors (reminiscent of CPLR 3408(f), applicable to a mandatory settlement conference in a residential foreclosure action):

> "1. compliance with the requirements of this rule and applicable regulations pertaining to the face-to-face meeting process;
>
> 2. compliance with applicable lending and servicing laws, rules, regulations, investor directives, and loss mitigation standards or options; and
>
> 3. conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the meeting with authority to fully dispose of the matter, avoiding moving forward to take possession while loss mitigation applications and attempts are pending, and providing accurate information to the department and all parties.
>
> Neither of the parties' failure to make the offer or accept the offer made by the other party is sufficient to establish a failure to negotiate in good faith."

Where the court finds that the plaintiff failed to negotiate in good faith, the court must, at a minimum, toll the accumulation and collection of interest, costs, and fees during any undue delay caused by the plaintiff, and where appropriate, the court can also compel production of documents requested during the conference; impose a civil penalty not exceeding $25,000, payable to the state sufficient to deter repetition of the conduct; award actual damages, fees, including attorneys' fees and expenses to the defendant; or award any other relief that the court deems just and proper.

A party to a default action cannot "charge, impose, or otherwise require payment from the other party for any cost, including but not limited to attorneys' fees, for appearance at or participation in the settlement conference process."

This rule will not apply, if:

> "1. the borrower dies and there is no surviving borrower, unless: (i) the last surviving borrower's spouse, if any, is a resident of the property subject to foreclosure; or (ii) the last surviving borrower's successor in interest who by bequest or through intestacy, owns, or has a claim to the ownership of the property subject to foreclosure, and who was a resident of such property at the time of death of such last surviving borrower; or the borrower does not reside in the unit after such non-occupancy by the borrower

> as verified by the lender and the lender has taken action as required by subdivision eight of section six-o of the banking law; or
>
> 2. a repayment plan or other workout consistent with the borrower's circumstances is entered into to bring the borrower's account current or otherwise cure the default thus making a meeting unnecessary."

Note separately 22 NYCRR 202.70 (g), Rule 30(b), requiring that following the filing of the Note of Issue, unless exempted by the rule, "the parties in every case pending in the Commercial Division must participate in a court-ordered mandatory settlement conference."

VOLUME 2

Chapter 23, § 23.02[d] Trial other than at the courthouse

Commercial Division Rule 36, 22 NYCRR § 202.70(g), Rule 36, provides for a virtual evidentiary hearing or non-jury trial in a Commercial Division case. The rule states:

> Rule 36. Virtual Evidentiary Hearing or Non-jury Trial.
>
> (a) If the requirements of paragraph (c) of this Rule are met, the court may, with the consent of the parties, conduct an evidentiary hearing or a non-jury trial utilizing video technology.
>
> (b) If the requirements of paragraph (c) of this Rule are met, the court may, with the consent of the parties, permit a witness or party to participate in an evidentiary hearing or a non-jury trial utilizing video technology.
>
> (c) The video technology used must enable:
>
> i. a party and the party's counsel to communicate confidentially;
>
> ii. documents, photos, and other things that are delivered to the court to be delivered to the remote participants;
>
> iii. interpretation for a person of limited English proficiency;
>
> iv. a verbatim record of the trial; and
>
> v. public access to remote proceedings.
>
> (d) This Rule does not address the issue of when all parties do not consent.

§ 23.03[g] Choosing a jury, [1] In general

In *Matter of Caldwell v. New York City Tr. Auth.*, 203 A.D.3d 6, 161 N.Y.S.3d 179 (2d Dep't 2021), the Second Department tried to reconcile the 2013 amendment to CPLR 4106 permitting the replacement of a regular juror with an alternate after deliberations have begun with the constitutional and statutory requirements for a civil jury verdict. In doing so, it ruled that a trial court permitting, upon adequate inquiry, a substitution of a regular juror with an alternate juror once deliberations have begun, must instruct the jury: (1) that one of its members has been discharged and replaced with an alternate juror as provided by law; (2) that the parties are entitled to a verdict reached only after full participation of the six ju-

rors who will ultimately return the verdict; and (3) in order to assure the parties of that right, the jury must start their deliberations on each issue from the beginning, and must set aside and disregard all past deliberations (citations omitted). Further, where the trial court has provided the jury with a verdict sheet, the court should substitute it with a clean verdict sheet in order to ensure that past deliberations do not infect the new deliberation process.

Chapter 24, § 24.06 Validity of judgment unaffected by non-prejudicial errors

CPLR 5019(c) provides a uniform method by which anyone other than the person who recovered the judgment may enforce it by filing a copy of the instrument upon which "his authority [to enforce] is based." The instrument establishing this authority must be acknowledged in the form necessary to permit a deed to be recorded in the State. If the authority of the new judgment creditor is derived from a court order, a certified copy of the order will suffice.

CPLR 5019(c) was amended in 2021, as part of a new law entitled the "Consumer Credit Fairness Act," to provide that the subdivision does not apply "where there is a change to the owner of a debt through a sale, assignment, or other transfer where no judgment exists." The sponsor's memorandum advised that the amendment clarified that CPLR 5019(c) applies only to judgment creditors.

Chapter 27, § 27.24 Protective orders

In *Plymouth Venture Partners, II, L.P. v. GTR Source*, 37 N.Y.3d 591, 163 N.Y.S.3d 467, 183 N.E.3d 1185 (2021), a majority of the Court of Appeals held that a judgment debtor's sole remedy for an unlawful restraint is under CPLR Article 52 and the debtor cannot assert common law tort claims. The Court referenced CPLR 5239 and 5240, concluding that permitting a judgment debtor to proceed outside of the article 52 avenues of relief "would be inconsistent with the relevant statutory framework" and would eviscerate the purpose of CPLR Article 52. *See also* David L. Ferstendig, *Narrow Majority of Court of Appeals Holds Judgment Debtor's Exclusive Avenue for Relief for Unlawful Restraint Is Through CPLR Article 52*, 734 N.Y.S.L.D. 1-2 (2022).

Chapter 31, § 31.10 Confirmation, [a] Procedure

In 2021, CPLR 7516 was added as part of a new law entitled, the "Consumer Credit Fairness Act," impacting a cause of action arising out of a consumer credit transaction where the defendant is a purchaser, borrower or debtor. CPLR 7516 provides that in a CPLR 7510 proceeding to confirm an arbitration award based on a consumer credit transaction, the party seeking to confirm must plead the actual terms and conditions of the arbitration agreement and attach to the petition,

- the arbitration agreement,
- the demand for arbitration

- or notice of intention to arbitrate with proof of service, and
- the arbitration award, with proof of service

"If the award does not contain a statement of the claims submitted for arbitration, of the claims ruled upon by the arbitrator, and of the calculation of figures used by the arbitrator in arriving at the award, then the petition shall contain a statement." An award cannot be confirmed absent compliance with the above.

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☐	1-1 thru 1-9	1-1 thru 1-10.1
☐	1-43 thru 1-47	1-43 thru 1-47
☐	2-1 thru 2-6.1	2-1 thru 2-6.1
☐	2-15 thru 2-31	2-15 thru 2-32.3
☐	2-55 thru 2-79	2-55 thru 2-80.1
☐	2-92.5 thru 2-92.10(23)	2-92.5 thru 2-92.10(27)
☐	2-92.23 thru 2-92.57	2-92.23 thru 2-92.58(3)
☐	2-97 thru 2-123	2-97 thru 2-124.7
☐	2-153	2-153 thru 2-154.1
☐	2-163 thru 2-169	2-163 thru 2-169
☐	3-38.5	3-38.5
☐	3-47 thru 3-52.1	3-47 thru 3-52.1
☐	3-60.1 thru 3-66.1	3-61 thru 3-66.1
☐	3-68.9 thru 3-68.10(1)	3-68.9 thru 3-68.10(1)
☐	3-86.1 thru 3-100.1	3-87 thru 3-100.1
☐	3-107 thru 3-133	3-107 thru 3-134.3
☐	3-155	3-155 thru 3-156.1
☐	3-167 thru 3-173	3-167 thru 3-174.1
☐	3-195 thru 3-233	3-195 thru 3-237
☐	4-1 thru 4-9	4-1 thru 4-10.1
☐	5-5 thru 5-25	5-5 thru 5-26.5
☐	5-32.1 thru 5-33	5-33 thru 5-34.1
☐	6-1 thru 6-9	6-1 thru 6-11
☐	7-5 thru 7-11	7-5 thru 7-12.1
☐	7-21 thru 7-33	7-21 thru 7-34.7
☐	7-47 thru 7-63	7-47 thru 7-65
☐	8-11	8-11
☐	10-3	10-3 thru 10-4.1
☐	13-1 thru 13-31	13-1 thru 13-32.1
☐	14-3 thru 14-17	14-3 thru 14-17
☐	14-31	14-31 thru 14-32.1
☐	15-17 thru 15-29	15-17 thru 15-30.1
☐	15-39 thru 15-49	15-39 thru 15-50.3
☐	15-73 thru 15-79	15-73 thru 15-80.1
☐	15-88.1 thru 15-89	15-89 thru 15-90.1
☐	16-13 thru 16-29	16-13 thru 16-31

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	19-1 thru 19-2.1.	19-1 thru 19-2.1
☐	19-19 thru 19-29	19-19 thru 19-30.9
☐	19-39.	19-39
☐	19-51 thru 19-54.11	19-51 thru 19-54.17
☐	19-73 thru 19-76.11	19-73 thru 19-76.12(1)
☐	19-76.21 thru 19-76.25	19-76.21 thru 19-76.25
☐	20-21.	20-21 thru 20-22.1
☐	20-55 thru 20-58.3	20-55 thru 20-58.4(3)
☐	20-58.15 thru 20-67	20-59 thru 20-68.5
☐	20-83 thru 20-86.11	20-83 thru 20-86.12(1)
☐	20-86.21 thru 20-91	20-86.21 thru 20-86.35
☐	20-101	20-101 thru 20-102.1
☐	20-121 thru 20-133	20-121 thru 20-134.3
☐	20-163 thru 20-165	20-163 thru 20-165
☐	21-1 thru 21-23	21-1 thru 21-24.3
☐	21-39 thru 21-47	21-39 thru 21-48.1
☐	21-70.1 thru 21-70.13	21-70.1 thru 21-70.14(1)
☐	21-77 thru 21-131	21-77 thru 21-132.13
☐	21-145 thru 21-157	21-145 thru 21-159
☐	22-33 thru 22-47	22-33 thru 22-53

VOLUME 2

Revision

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	Title page thru xiii	Title page thru xv
☐	23-8.1 thru 23-10.1	23-9 thru 23-10.3
☐	23-25 thru 23-26.1	23-25 thru 23-26.3
☐	23-50.1 thru 23-56.1.	23-51 thru 23-56.3
☐	23-71.	23-71 thru 23-72.1
☐	24-21.	24-21 thru 24-22.1
☐	24-33 thru 24-54.19	24-33 thru 24-54.20(3)
☐	25-5 thru 25-9	25-5 thru 25-10.1
☐	25-22.1 thru 25-25	25-23 thru 25-26.11
☐	25-37.	25-37
☐	26-25 thru 26-47	26-25 thru 26-48.7
☐	26-59 thru 26-65	26-59 thru 26-66.1
☐	26-77 thru 26-84.1	26-77 thru 26-84.1
☐	27-29.	27-29 thru 27-30.1
☐	27-43 thru 27-44.1	27-43 thru 27-44.1
☐	27-108.1 thru 27-131	27-109 thru 27-137
☐	28-65 thru 28-85	28-65 thru 28-87
☐	29-1 thru 29-11	29-1 thru 29-11

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	31-7	31-7 thru 31-8.1
☐	31-19 thru 31-21	31-19 thru 31-22.1
☐	31-26.3 thru 31-26.9	31-26.3 thru 31-26.9
☐	31-39	31-39 thru 31-40.1
☐	32-23	32-23 thru 32-24.1
☐	32-32.3 thru 32-33	32-33 thru 32-34.5
☐	33-23 thru 33-26.5	33-23 thru 33-26.5
☐	33-41 thru 33-43	33-41 thru 33-43
☐	TC-1 thru TC-241	TC-1 thru TC-245
☐	TS-1 thru TS-47	TS-1 thru TS-47
☐	I-1 thru I-39	I-1 thru I-39

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