NEW YORK

A. STATUTE OF LIMITATIONS

The statutes of limitations for business torts vary dramatically from tort to tort. For example, the statute of limitations for trade libel is one year,[1] while the statute of limitations for misappropriation of business opportunity,[2] tortious interference with contract,[3] and conversion[4] is three years. Meanwhile, the statute of limitations for fraud,[5] fraudulent transfers,[6] and breach of contract is six years.[7]

For claims of breach of fiduciary duty[8] and unfair competition,[9] courts have applied both three-year and six-year statute of limitation periods. As a general rule, the six-year statute of limitations applies for breach of fiduciary duty claims (1) based on fraud, or (2) seeking solely equitable relief.[10] Where, however, the claim seeks monetary damages, the three-year statute of limitations applies.[11]

Regardless of the claim, any applicable tolling period begins either when the cause of action accrues,[12]—*i.e.*, when the final act giving rise to the cause of action occurs[13]—or when the cause of action is discovered.[14] Under New York's discovery rule, a plaintiff has two years to bring a cause of action from the time the claim is discovered, or within the remaining time within the statute of limitations, whichever is longer.[15]

B. MISAPPROPRIATION OF TRADE SECRET

1. Common Law Misappropriation of Trade Secrets

Unlike most states, New York has not adopted the Uniform Trade Secrets Act. However, New York's common law does provide for such an action. Thus, to establish a claim for the misappropriation of trade secrets, a plaintiff must show that (1) it possesses a trade secret, and (2) defendant is using that trade secret "in breach of an agreement, a confidential relationship, or duty, or as a result of discovery by improper means."[16]

A trade secret has been defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it,"[17] and may include information that is either scientific (*e.g.*, chemical processes or software codes) or nonscientific (*e.g.*, confidential customer data).[18] Typically, New York courts examine six factors to determine whether information should be considered a protectible trade secret. In particular, courts look at:

> (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard

> the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[19]

In addition, New York courts have held that trade secrets must consist of "a process or device for continuous use in the operation of business." Thus, "marketing concepts," "new product ideas," and "business possibilities or goals" do not qualify for trade secret protection.[20]

To establish a claim for misappropriation of trade secrets, a plaintiff must also show that the defendant misappropriated the protected information. In particular, a plaintiff must show that the defendant used or disclosed the trade secret, which was acquired through a breach of confidence,[21] in fraud or bad faith,[22] or by unfair means.[23]

Plaintiffs alleging misappropriation of a trade secret may seek both equitable relief[24] and monetary damages.[25]

Defendants alleged to have misappropriated trade secrets have a variety of defenses, but may not argue that the secret (1) could have been discovered by diligent research, (2) could have been ascertained through sources which were never actually explored (*e.g.*, testimony in a prior litigation, expired patents, etc.)[26] or (3) was legitimately ascertained by another's diligent efforts.[27]

2. Restrictive Covenants/Covenants Not to Compete

Restrictive covenants are generally disfavored in New York because they "sanction the loss of a man's livelihood."[28] Nevertheless, New York courts will generally enforce such covenants when the restraint "(1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public."[29] Put differently, a restrictive covenant may be enforceable provided it is reasonably limited temporally and geographically to protect against the misappropriation of a trade secret or competition from an employee whose services are unique or extraordinary.[30]

C. CONVERSION

New York courts have defined "conversion" as the unauthorized assumption and exercise of another's ownership rights in property to the exclusion of the proper owner's rights.[31] Acts that may constitute a conversion consist of, *inter alia*, (1) the taking of property without the owner's authorization,[32] (2) the unauthorized use of property by one who has no right or title to it,[33] (3) the improper seizure of goods through the legal process (*e.g.*, foreclosure, attachment),[34] (4) the mingling of special funds with those funds of the tortfeasor,[35] and (5) the delivery of property to the wrong person or a person not entitled to its possession.[36]

Although typically thought of as an intentional tort, a plaintiff alleging a claim for conversion need not establish that the defendant "intended" to

possess another's property.[37] Rather, it is sufficient to show that the defendant acted without authorization in depriving plaintiff of his property.[38]

D. TORTIOUS INTERFERENCE WITH CONTRACTS AND PROSPECTIVE ECONOMIC RELATIONS

New York courts will generally recognize a cause of action for tortious interference with contract when a defendant (1) prevents the making of a contract,[39] (2) procures a party's breach of the contract,[40] or (3) interferes with performance of a contract.[41]

A defendant will be liable for preventing the making of a contract if he acted by wrongful means,[42] such as fraud or deceit,[43] or by means of actual malice not justified by defendant's self-interest,[44] and that "but for" the defendant's conduct, plaintiff would have received the contract.[45] Whatever the wrongful act alleged, it must be more than mere persuasion,[46] the offering of better terms,[47] or the use of derogatory but true statements concerning one of the contracting parties.[48]

The elements required for a cause of action for procuring a breach of contract include (1) the existence of a valid contract,[49] (2) defendant's knowledge of that contract,[50] (3) the defendant's intentional procurement of the breach of that contract,[51] and (4) resulting damages.[52] Under this cause of action, the measure of damages is equivalent to what the plaintiff would be entitled to in a breach of contract claim.[53]

Finally, a defendant will be liable for interference with contract if he intentionally interferes with the performance of the contract without legal or social justification.[54]

E. FRAUD AND MISREPRESENTATION

Broadly speaking, fraud is defined as any cunning, deception, or artifice employed by one person to deceive or gain an unfair advantage to the detriment of another.[55]

In New York, a party pleading fraud must do so with particularity,[56] and must establish that (1) there was a representation of a material fact (whether existing or preexisting fact),[57] (2) the representation was untrue,[58] (3) the party making the representation knew it to be untrue,[59] (or under certain circumstances the statement was recklessly[60] made), (4) the representation was made with the intent to deceive and for the purpose of inducing the recipient to act upon it,[61] (5) the recipient justifiably relied on the representation,[62] and (6) by relying on the untrue statement, the recipient suffered damages.[63]

Generally, there is no cause of action for misrepresentations that are negligently made.[64] In some situations, however, a negligent misrepresentation can be a basis for liability provided, *inter alia*, (1) the defendant was aware that the information provided was to be used for a particular purpose,[65] (2) the relationship of the parties required the defendant to provide the type of information at issue with care,[66] and (3) the plaintiff was justified in relying on the information.[67]

A plaintiff alleging fraud is entitled to the damages sustained as a result of the misrepresentation,[68] *i.e.*, the plaintiff's out-of-pocket damages,[69] as well as other consequential damages proximately caused by reliance on the false information.[70] And when the misrepresentation was willful, wanton, or malicious, or is characterized by some other aggravating circumstance, a plaintiff may be entitled to punitive damages.[71] However, a plaintiff is not entitled to any profits that might have been realized in the absence of the alleged fraud.[72]

F. TRADE LIBEL/PRODUCT DISPARAGEMENT

New York courts define trade libel as the knowing publication of a false matter that is derogatory to the plaintiff's business and is calculated to prevent or interfere with relationships between the plaintiff and others to the plaintiff's detriment.[73] To successfully assert a claim for trade libel, a plaintiff must establish (1) the falsity of the statement,[74] (2) publication to a third person,[75] (3) malice,[76] and (4) special damages.[77]

Notably, a claim for trade libel (which protects the vendibility of the plaintiff's products) is separate and distinct from a claim of defamation (which protects plaintiff's general reputation).[78] Thus, a statement that impugns the basic integrity or creditworthiness of a business may give rise to claim for defamation, where there is a presumption that plaintiff was injured.[79] A statement that is confined to denigrating the quality of the business's goods or services, however, can only support an action for disparagement, and will do so only if malice and special damages are proven.[80]

G. CONSUMER FRAUD STATUTES

Sections 349-350 of New York's General Business Law, referred to as Consumer Protection from Deceptive Acts and Practices, protect consumers from deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in the state.[81] While the Attorney General may bring an action relating to violations of these laws,[82] private actions are also available under the statutes.[83] The statutes are designed to assist consumers, but a business may file a deceptive practices claim if it was injured while acting as a consumer.[84] A prevailing plaintiff is entitled to reasonable attorney's fees.[85]

A plaintiff bringing an action under Sections 349 or 350 must demonstrate that: (1) the alleged practice was misleading in a material respect; and (2) the plaintiff was injured.[86] The plaintiff does not have to show that the defendant's actions were intentional, fraudulent, or even reckless.[87] With respect to claims arising under Section 349, the plaintiff does not have to prove reliance, although the plaintiff must show that the defendant's "material deceptive act" caused the injury.[88]

H. COMMON LAW UNFAIR COMPETITION

At common law, an unfair competition claim requires a plaintiff to show "(1) that the defendant's activities have caused confusion with, or have been mistaken for, the plaintiff's activities in the mind of the public, or are likely to cause such confusion or mistake; or (2) . . . the defendant has acted unfairly in

some manner."[89] Thus, even when there is no fraud on the public, an unfair competition claim may be sustained provided the plaintiff can show that its "property rights" were misappropriated by another for commercial advantage.[90] This broad concept is designed to protect against any "unjustifiable attempt to profit from [the plaintiff's] expenditure of time, labor and talent."[91]

Typically, a claim for unfair competition also requires some element of bad faith,[92] although such a showing is not required where the plaintiff is attempting to establish confusion or a likelihood of confusion between his mark and the mark of the defendant.[93] A plaintiff alleging a claim for unfair competition may seek to enjoin the defendant from further tortious conduct[94] or seek an award of damages.[95]

I. FRAUDULENT TRANSFERS

Fraudulent conveyance actions in New York are governed by the New York Debtor and Creditor Law ("NYDCL").[96] The purpose of the NYDCL is to protect creditors[97] from fraudulent transactions entered into by the debtor in attempt to shelter assets[98] from the estate.[99]

A creditor seeking to set aside a fraudulent conveyance generally has the burden of establishing "fraudulent intent"—*i.e.*, the debtor intended to hinder, delay, or defraud either present or future creditors.[100] Fraudulent intent, however, may be presumed where the conveyance was made without fair consideration by a person who is or will be rendered insolvent,[101] or by a person engaged in a business for which the property remaining in his hands after the conveyance is an unreasonably small capital.[102]

A creditor that establishes that the asset transfer was fraudulent may seek a variety of equitable remedies including (1) avoidance of the transfer,[103] (2) attachment against the transferred asset,[104] (3) a preliminary injunction restraining the defendant from disposing of the asset,[105] or (4) the appointment of a receiver to take charge of the asset.[106] And, in certain situations (such as when a fraudulent transferee conveys real property to another after a fraudulent conveyance), a creditor may seek monetary damages.[107]

J. ECONOMIC LOSS

New York typically does not recognize a cause of action based on strict liability and negligence where the suit seeks recovery of economic loss.[108] A limited exception, however, is permitted for claims of negligent performance of contractual services.[109]

K. BREACH OF FIDUCIARY DUTY

1. Generally

An agent is a fiduciary of the principal.[110] Thus, the agent is bound to exercise the utmost good faith[111] and undivided loyalty[112] toward the principal throughout the duration of the relationship.[113] If an agent breaches the fiduciary duty owed to the principal, the agent can be held liable for damages to the principal.

2. Officers and Directors—Usurpation of Corporate Opportunity

A director or officer is permitted to engage in other business ventures without the corporation's consent, and does not breach his fiduciary duty by engaging in such activities.[114] Nevertheless, it has long been held in New York, that a director or officer will be liable for breach of fiduciary duty when he diverts an opportunity away from the corporation in pursuit of an outside business interest.[115] Thus, liability will be found when the director or officer (1) uses his/her position or power at the corporation to prevent it from seeking business that would compete with his/her outside business interests,[116] (2) cancels the corporation's contracts so that his/her outside business interests can obtain the business,[117] or (3) organizes a new business and solicits and obtains customers from the corporation.[118]

The damages arising out of a claim for usurpation of a corporate opportunity can be measured by either (1) the benefit assumed by the director or officer as a result of the breach,[119] or (2) the profits lost as a consequence of the breach.[120] The choice of remedy belongs to the corporation.[121]

L. OFFICERS' AND DIRECTORS' LIABILITY FOR TORTS OF CORPORATION

As a general rule, a corporate director or officer is not liable for loss or damage to the corporation.[122] But, where a director voted to approve an unauthorized transaction, participated therein, or had knowledge of and ratified an unauthorized transaction he/she may be held liable for the loss.[123] As a corollary to this rule, a plaintiff must show that the officer's or director's conduct resulted in damages to the corporation.[124] Finally, good faith alone is not a defense.[125]

M. SPECIAL COURTS FOR BUSINESS TORTS

The Commercial Division of the Supreme Court of New York was established in 1995 as a "vehicle for resolution of complicated commercial disputes."[126] Parties may seek assignment to the Commercial Division provided they meet certain monetary thresholds (absent punitive damages, interests, costs, disbursements, and counsel fees),[127] and the principal claims asserted include breach of contract, fraud, misrepresentation, unfair competition, or any other business tort claims.[128] Certain actions, however, regardless of their monetary value, cannot be heard by the Commercial Division. These causes of actions include, *inter alia*, (1) collection of professional fees, (2) declaratory judgment, (3) residential real estate disputes, (4) enforcement of a judgment, and (5) attorney malpractice.[129]

The Commercial Division maintains its own set of Court Rules, some of which are distinct from those of the New York Supreme Court. For example, in the Commercial Division, dispositive motions do not automatically stay discovery,[130] motions for summary judgment require a separate statement of facts,[131] and alternative dispute resolution can proceed at any time.[132]

Bar and business associations have responded favorably to the Commercial Division.[133]

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ENDNOTES - NEW YORK

1. N.Y. C.P.L.R. §215; *See also Besicorp Ltd. v. Kahn*, 290 A.D.2d 147, 736 N.Y. S.2d 708 (3d Dep't 2002).

2. N.Y. C.P.L.R §214; *See also Powers Mercantile Corp. v. Feinberg*, 109 A.D.2d 117, 490 N.Y.S.2d 190 (1st Dep't 1985).

3. N.Y. C.P.L.R. §214(4); *See also Besicorp Ltd. v. Kahn*, 290 A.D.2d 147, 736 N.Y. S.2d 708 (3d Dep't 2002); *Niagara Mohawk Power Corp. v. Freed*, 288 A.D.2d 818, 733 N.Y.S.2d 828 (4th Dep't 2001); *Kenneth D. Laub & Co. v. Bear Stearns Cos.*, 262 A.D.2d 36, 692 N.Y.S.2d 30 (1st Dep't 1999).

4. N.Y. C.P.L.R. §214(3); *See also D'Amico v. First Union Nat'l Bank*, 285 A.D.2d 166, 728 N.Y.S.2d 146 (1st Dep't 2001); *Lawyers' Fund for Client Protection of the State of N.Y. v. Gateway State Bank*, 239 A.D.2d 826, 658 N.Y.S.2d 705 (3d Dep't 1997). In conversion cases arising out of the defendant's refusal to return the property, the three-year statute of limitations does not begin to accrue until the plaintiff demands the return of the property and the defendant refuses. *Rahanian v. Ahdout*, 258 A.D.2d 156, 694 N.Y.S.2d 44 (1st Dep't 1999).

5. *See* N.Y. C.P.L.R. §213(8).

6. N.Y. C.P.L.R. §213(8); *See also Island Holding, LLC v. O'Brien*, 6 A.D.3d 498, 775 N.Y.S.2d 72 (2d Dep't 2004); *Roccanova v. Commissioner of Dep't of Social Servs.*, 5 Misc. 3d 909, 787 N.Y.S.2d 631 (N.Y. Sup. Ct. 2004).

7. N.Y. C.P.L.R. §213(2).

8. *Compare Silvester v. Time Warner, Inc.*, 1 Misc. 3d 250, 763 N.Y.S.2d 912 (N.Y. Sup. 2003) (applying three-year statute of limitations) *with Serio v. Rhulen*, 24 A.D.3d 1092, 806 N.Y.S.2d 283 (3d Dep't 2005) (applying six-year statute of limitations).

9. While the New York Court of Appeals has ruled that an unfair competition claim premised on the misappropriation and unauthorized use of a master phonographic recording was subject to a three-year statute of limitations under N.Y. C.P.L.R. §214, *see Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 488, 448 N.E.2d 1324, 1327, 462 N.Y.S.2d 413, 416 (1983), other courts have held that unfair competition claims are subject to the six-year period for fraud claims, *see Charles Atlas, Ltd. v. DC Comics, Inc.*, 112 F. Supp. 2d 330, 334 (S.D.N.Y. 2000) (applying N.Y. C.P.L.R. §213(1)), the six-year period for breach of contract claims, *see Katz v. Bach Realty, Inc.*, 192 A.D.2d 307, 307, 595 N.Y.S.2d 455, 456 (1st Dep't 1993), and the three-year period for actions

to recover damages for injury to property, *see Bausch & Lomb Inc. v. Alcon Labs., Inc.*, 64 F. Supp. 2d 233, 245 (W.D.N.Y. 1999), or to recover upon a liability imposed by statute, *see Byron v. Chevrolet Motor Div. of Gen. Motors Corp.*, No. 93 Civ. 1116, 1995 WL 465130, at *3 (S.D.N.Y. Aug. 7, 1995); De Medici, 101 A.D.2d 719, 719, 475 N.Y.S.2d 392, 392 (1st Dep't 1984). *Mopex, Inc. v. Am. Stock Exch.*, LLC, No. 02 Civ. 1656, 2002 WL 342522, at *11 (S.D.N. Y. Mar. 5, 2002), *amended by* 2002 WL 523417 (S.D.N.Y. Apr. 5, 2002).

10. *Bouley v. Bouley*, 19 A.D.3d 1049, 797 N.Y.S.2d 221 (4th Dep't 2005); *Spitzer v. Schussel*, 7 Misc. 3d 171, 792 N.Y.S.2d 798 (N.Y. Sup. Ct. 2005).

11. *Bouley v. Bouley*, 19 A.D.3d 1049, 797 N.Y.S.2d 221 (4th Dep't 2005).

12. N.Y. C.P.L.R. § 203(a); *Aetna Life Cas. Co. v. Nelson*, 67 N.Y.2d 169, 501 N.Y. S.2d 313 (1986); *Aldous v. Town of Lake Luzerne*, 281 A.D.2d 807, 722 N.Y.S.2d 293 (3d Dep't 2001); *Spitzer v. Schussel*, 7 Misc. 3d 171, 792 N.Y.S.2d 798 (N.Y. Sup. Ct. 2005).

13. *Aetna Life & Cas. Co. v. Nelson*, 67 N.Y.2d 169, 501 N.Y.S.2d 313 (1986).

14. N.Y. C.P.L.R. § 213(8) (stating that the statute of limitations for an action for fraud shall commence "from the time the plaintiff or person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it."); *In re Neidich*, 290 A.D.2d 557, 736 N.Y.S.2d 694 (2d Dep't 2002).

15. N.Y. C.P.L.R. § 203(g); *M & A Oasis, Inc. v. MTM Assocs., L.P.*, 307 A.D.2d 872, 764 N.Y.S.2d 9 (1st Dep't 2003); *In re Neidich*, 290 A.D.2d 557, 736 N.Y. S.2d 694 (2d Dep't 2002).

16. *Hudson Hotels Corp. v. Choice Hotels Int'l*, 995 F.2d 1173, 1176 (2d Cir. 1993) (*abrogated on other grounds*); *Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.*, 920 F.2d 171, 173 (2d Cir. 1990); *Kadant, Inc. v. Seeley Mach., Inc.*, 244 F. Supp. 2d 19, 36 (N.D.N.Y. 2003); *LinkCo, Inc. v. Fujitsu Ltd.*, 230 F. Supp. 2d 492, 497-498 (S.D.N.Y. 2002). Notably, New York state courts seem to cite only the first element of the two-part test and base their decision on whether the information qualifies as a trade secret. *See, e.g., DoubleClick Inc. v. Henderson*, No. 116914/97, 1997 WL 731413 (N.Y. Sup. Ct. Nov. 7, 1997).

17. *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 407, 624 N.E.2d 1007, 1013, 604 N.Y.S.2d 912, 917 (1993) (quoting Restatement (First) of Torts, § 757, cmt. b); *see also Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 124, 672 N.Y.S.2d 8, 15 (1st Dep't 1998); *Delta Filter Corp. v. Morin*, 108 A.D.2d 991, 992, 485 N.Y.S.2d 143, 144 (3d Dep't 1985); *Eagle Comtronics, Inc. v. Pico, Inc.*, 89 A.D.2d 803, 804, 453 N.Y.S.2d 470, 472 (4th Dep't 1982). The Restatement (Third) of Unfair Competition § 39, which has been cited by certain New York courts, defines a trade secret as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret

to afford an actual or potential economic advantage over others." *See, e.g., Wiener*, 241 A.D.2d at 124, 672 N.Y.S.2d at 17.

18. *See, e.g., Leo Silfen, Inc. v. Cream*, 29 N.Y.2d 387, 392, 278 N.E.2d 636, 640, 328 N.Y.S.2d 423, 428 (1972) (noting that customer lists may be trade secrets in cases "where the customers are not known in the trade or are discoverable only by extraordinary efforts").

19. *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.S.2d 395, 407, 624 N.E.2d 1007, 1013, 604 N.Y.S.2d 912, 917 (1993) *quoting* Restatement (First) of Torts, § 757, cmt. b; *see also Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 124, 672 N.Y.S.2d 8, 17 (1st Dep't 1998).

20. *Hudson Hotels Corp. v. Choice Hotels Int'l*, 995 F.2d 1173, 1177 (2d Cir. 1993) *abrogated on other grounds by Nadel v. Play-by-Play Toys & Novelties, Inc.*, 208 F.3d 368 (2d Cir. 2000); *LinkCo, Inc. v. Fujitsu Ltd.*, 230 F. Supp. 2d 492, 500 (S.D.N.Y. 2002).

21. *Burnett Process, Inc. v. Richlar Indus., Inc.*, 55 A.D.2d 812, 813, 390 N.Y.S.2d 282, 282 (4th Dep't 1976); *Alamac Knitting Mills, Inc. v. Fairmoor Coat & Suit Corp.*, 31 Misc. 2d 1023, 220 N.Y.S.2d 528 (N.Y. Sup. Ct. 1961).

22. *Tabor v. Hoffman*, 118 N.Y. 30, 36, 23 N.E. 12, 13 (1889); *Alley v. Positype Corp. of Am.*, 224 A.D. 603, 231 N.Y.S. 461 (1st Dep't 1928), *aff'd*, 251 N.Y. 577, 168 N.E. 433 (1929).

23. *Sealectro Corp. v. Tefco Elec., Inc.*, 32 Misc. 2d 11, 14, 223 N.Y.S.2d 235, 238 (N.Y. Sup. Ct. 1961); *see also generally Hudson Hotels Corp. v. Choice Hotels Int'l*, 995 F.2d 1173, 1176 (2d Cir. 1993) (stating that the plaintiff must prove that the defendant used or disclosed the trade secret in "breach of an agreement, a confidential relationship, or duty, or as a result of discovery by improper means") (*abrogated on other grounds*); *Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.*, 920 F.2d 171, 173 (2d Cir. 1990).

24. *See, e.g., Clark Paper & Mfg. Co. v. Stenacher*, 236 N.Y. 312, 140 N.E. 708 (1923).

25. *See, e.g., Spiselman v. Rabinowitz*, 270 A.D. 548, 61 N.Y.S.2d 138 (1st Dep't 1946).

26. *Sealectro Corp. v. Tefco Elec., Inc.*, 32 Misc. 2d 11, 14, 223 N.Y.S.2d 235, 238 (N.Y. Sup. Ct. 1961); *Minnesota Min. & Mfg. Co. v. Technical Tape Corp.*, 23 Misc. 2d 671, 192 N.Y.S.2d 102 (N.Y. Sup. Ct. 1959), *aff'd*, 15 A.D.2d 960, 226 N.Y.S.2d 1021 (2d Dep't 1962).

27. *Minnesota Min. & Mfg. Co. v. Technical Tape Corp.*, 23 Misc. 2d 671, 192 N.Y. S.2d 102 (N.Y. Sup. Ct. 1959), *aff'd*, 15 A.D.2d 960, 226 N.Y.S.2d 1021 (2d Dep't 1962).

28. *Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499, 369 N.E.2d 4, 6, 398 N.Y.S.2d 1004, 1006 (1977); *Briskin v. All Seasons Servs., Inc.*, 206 A.D.2d 906, 615 N.Y.S.2d 166, 167 (4th Dep't 1994) ("It is well established that restrictive covenants that tend to prevent an employee from pursuing a similar vocation upon termination or retirement from employment are disfavored by the law.").

29. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388, 712 N.E.2d 1220, 1223, 690 N.Y.S.2d 854, 856 (1999) (emphasis in original).

30. *See, e.g., Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499, 369 N.E.2d 4, 6, 398 N.Y.S.2d 1004, 1006 (1977). Thus, for example, courts have enforced restrictive covenants that are 18 months long, *see BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 712 N.E.2d 1220, 690 N.Y.S.2d 854 (1999), and that are five years, *see Albany Med. Coll. v. Lobel*, 296 A.D.2d 701, 702, 745 N.Y.S.2d 250, 251 (3d Dep't 2002). And courts typically enforce covenants that are coextensive with the geographic scope of the employer's business. *See Karpinski v. Ingrasci*, 28 N.Y.2d 45, 49, 268 N.E.2d 751, 754, 320 N.Y.S.2d 1, 5 (1971) (enforcing a covenant not to compete in five rural counties served by the plaintiff's oral surgery practice, which had employed the defendant); *Novendstern v. Mount Kisco Med. Group*, 177 A.D.2d 623, 625, 576 N.Y.S.2d 329, 330 (2d Dep't 1991) (holding reasonable a three-year prohibition on the former partner's engaging in practice of certain medical specialties within a specified area of the county where the plaintiff medical group was located).

31. *See Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso*, 87 N.Y.2d 36, 660 N.E.2d 1121, 637 N.Y.S.2d 342 (1995); *Kranz v. Town of Tusten*, 236 A.D.2d 675, 653 N.Y.S.2d 194 (3d Dep't 1997). Conversion has also been defined as "any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with that person's rights in the property." *See* 23 N.Y. Jur. 2d, Conversion §1 (2001), citing *Meyer v. Price*, 250 N.Y. 370, 165 N.E. 814 (1929).

32. *See, e.g., Pierpont v. Hoyt*, 260 N.Y. 26, 182 N.E. 235 (1932); *Meyer v. Price*, 250 N.Y. 370, 165 N.E. 814 (1929); *AMF Inc. v. Algo Distribs., Ltd.*, 48 A.D.2d 352, 369 N.Y.S.2d 460 (2d Dep't 1975).

33. *In re Petrosemolo Estate*, 152 Misc. 419, 273 N.Y.S. 718 (N.Y. Sur. Ct. 1934).

34. *See, e.g., ERA Realty Co. v. RBS Properties*, 185 A.D.2d 871, 586 N.Y.S.2d 831 (2d Dep't 1992) (holding that improper execution of levy on plaintiff's bank account consisted of conversion); *L.C. Smith & Corona Typewriters v. Royal Indem. Co.*, 155 Misc. 20, 277 N.Y.S. 515 (N.Y. Sup. Ct. 1934).

35. *2300 Concourse Realty Corp. v. Klug*, 201 Misc. 179, 111 N.Y.S.2d 168 (N.Y. City Mun. Ct. 1952).

36. *Griggs v. Day*, 136 N.Y. 152, 32 N.E. 612 (1892) (holding that conversion occurs when property is improperly surrendered to one other than the owner); *Procter & Gamble Dist. Co. v. Lawrence Am. Field Warehousing Corp.*, 22 A.D.2d 420, 255 N.Y.S.2d 788 (1st Dep't), *rev'd on other grounds*, 16 N.Y.2d 344, 213 N.E.2d 873, 266 N.Y.S.2d 785 (1965).

37. *General Elec. Co. v. Am. Export Isbrandtsen Lines, Inc.*, 37 A.D.2d 959, 327 N.Y. S.2d 93 (2d Dep't 1971).

38. *General Elec. Co. v. American Export Isbrandtsen Lines, Inc.*, 37 A.D.2d 959, 327 N.Y.S.2d 93 (2d Dep't 1971).

39. *Union Car Adver. Co. v. Collier*, 263 N.Y. 386, 189 N.E. 463 (1934); *Susskind v. Ipco Hosp. Supply Corp.*, 49 A.D.2d 915, 373 N.Y.S.2d 627 (2d Dep't 1975).

40. *Phillips & Benjamin Co. v. Ratner*, 206 F.2d 372 (2d Cir. 1953); *Lurie v. New Amsterdam Cas. Co.*, 270 N.Y. 379, 1 N.E. 472 (1936); *McRoberts Protective Agency, Inc. v. Lansdell Protective Agency, Inc.*, 61 A.D.2d 652, 403 N.Y.S.2d 511 (1st Dep't 1978).

41. *Spectacolor Inc. v. Banque Nationale de Paris*, 207 A.D.2d 726, 616 N.Y.S.2d 953 (1st Dep't 1994); *S&S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp.*, 108 A.D.2d 351, 489 N.Y.S.2d 478 (1st Dep't 1985).

42. *See Singleton Mgmt., Inc. v. Compere*, 243 A.D.2d 213, 673 N.Y.S.2d 381 (1st Dep't 1998).

43. *See Gurwitz v. Leichter*, 19 Misc. 2d 749, 192 N.Y.S.2d 321 (N.Y. Sup. Ct. 1959).

44. *See, e.g., A.S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 144 N.E.2d 371, 165 N.Y.S.2d 475 (1957).

45. *See Susskind v. Ipco Hosp. Supply Corp.*, 49 A.D.2d 915, 373 N.Y.S.2d 627 (2d Dep't 1975); *Muller v. Star Supermarkets, Inc.*, 49 A.D.2d 696, 370 N.Y.S.2d 768 (4th Dep't 1975); *Williams & Co. v. Collins, Tuttle & Co.*, 6 A.D.2d 302, 176 N.Y.S.2d 99 (1st Dep't 1958). Accordingly, a plaintiff should include in his complaint specific allegations that negotiations would have culminated in a contract but for the alleged interference. *Susskind*, 49 A.D.2d 915, 373 N.Y.S.2d 627.

46. *Daly v. Cornwell*, 34 A.D. 27, 54 N.Y.S. 107 (2d Dep't 1898).

47. *Franklin Enters. Corp. v. King Refrigerator Corp.*, 207 Misc. 956, 141 N.Y.S.2d 734 (N.Y. Sup. Ct. 1955).

48. *Union Car Adver. Co. v. Collier*, 263 N.Y. 386, 189 N.E. 463 (1934).

49. *Simon v. Noma Elec. Corp.*, 293 N.Y. 171, 56 N.E.2d 537 (1944); *Herman & Beinin v. Greenhaus*, 258 A.D.2d 260, 685 N.Y.S.2d 41 (1st Dep't 1999); *Warner Bros. Pictures, Inc. v. Simon*, 21 A.D.2d 863, 251 N.Y.S.2d 70 (1st Dep't 1964); *Bernberg v. Health Mgmt. Sys., Inc.*, 303 A.D.2d 348, 756 N.Y.S.2d 96 (2d Dep't 2003). Thus, there can be no action for inducing breach of contract where the contract has expired, *see Winer v. Glaser*, 3 A.D.2d 656, 158 N.Y.S.2d 1016 (1st Dep't 1957), if the contract has not been fully executed, *see Lance Television Lab. v. Certified Appliance Co.*, 99 N.Y.S.2d 485 (N.Y. Sup. Ct. 1950), where the contract is void, *see Nifty Foods Corp. v. Great Atl. & Pacific Tea Co.*, 614 F.2d 832 (2d Cir. 1980), or if the contract is illegal or against public policy, *see Ely v. Donoho*, 45 F. Supp. 27 (S.D.N.Y. 1942), *Paramount Pad Co. v. Baumrind*, 4 N.Y.2d 393, 151 N.E.2d 609, 175 N.Y.S.2d 809 (1958).

50. *Mautner Glick Corp. v. Edward Lee Cave, Inc.*, 157 A.D.2d 594, 550 N.Y.S.2d 341 (1st Dep't 1990); *State Enters., Inc. v. Southridge Co-op Section 1, Inc.*, 18 A.D.2d 226, 238 N.Y.S.2d 724 (1st Dep't 1963); *Bernberg v. Health Mgmt. Sys., Inc.*, 303 A.D.2d 348, 756 N.Y.S.2d 96 (2d Dep't 2003).

51. *Campbell v. Grate*, 236 N.Y. 457, 141 N.E. 914 (1923); *Bernberg v. Health Mgmt. Sys., Inc.*, 303 A.D.2d 348, 756 N.Y.S.2d 96 (2d Dep't 2003). Thus, the negligent or incidental interference of a contract is not enough. *See Alvord & Swift v. Stewart M. Muller Constr. Co.*, 46 N.Y.2d 276, 385 N.E.2d 1238, 413 N.Y. S.2d 309 (1978); *Murtha v. Yonkers Child Care Ass'n, Inc.*, 59 A.D.2d 925, 399 N.Y.S.2d 260 (2d Dep't 1977).

52. *Dinkin v. Raporte*, 26 Misc. 2d 639, 202 N.Y.S.2d 521 (N.Y. Sup. Ct. 1960); *Bernberg v. Health Mgmt. Sys., Inc.*, 303 A.D.2d 348, 756 N.Y.S.2d 96 (2d Dep't 2003).

53. *Lurie v. New Amsterdam Cas. Co.*, 270 N.Y. 379, 1 N.E.2d 472 (1936).

54. *Spectacolor Inc. v. Bangue Nationale de Paris*, 207 A.D.2d 726, 616 N.Y.S.2d 953 (1st Dep't 1994); *S&S Hotel Ventures Ltd. P'ship v. 777 S.H. Corp.*, 108 A.D.2d 351, 489 N.Y.S.2d 478 (1st Dep't 1985).

55. *See, e.g., Cowles v. Board of Regents of Univ. of State of N.Y.*, 266 A.D. 629, 44 N.Y.S.2d 911 (3d Dep't 1943).

56. *See* N.Y. C.P.L.R. § 3016(b) ("Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail."); *see, e.g., New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 662 N.E.2d 763, 639 N.Y.S.2d 283 (1995).

57. *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 725 N.E.2d 598, 704 N.Y.S.2d 177 (1999); *Eagle Comtronics, Inc. v. Pico Prods., Inc.*, 270 A.D.2d 832, 705 N.Y.S.2d 758 (4th Dep't 2000); *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 683 N.Y.S.2d 179 (1st Dep't 1998). Put differently, the representation

supporting a claim for fraud must have been false when it was made. *See Beltrone v. General Schuyler & Co.*, 223 A.D.2d 938, 636 N.Y.S.2d 917 (3d Dep't 1996); *Lovett v. Allstate Ins. Co.*, 86 A.D.2d 545, 446 N.Y.S.2d 65 (1st Dep't 1982), *aff'd w/o op.*, 64 N.Y.2d 1124, 479 N.E.2d 823, 490 N.Y.S.2d 187 (1985).

58. *Adams v. Gillig*, 199 N.Y. 314, 92 N.E. 670 (1910); *Grammer v. Turits*, 271 A.D.2d 644, 706 N.Y.S.2d 453 (2d Dep't 2000); *Dunlevy v. New Hartford Cent. School Dist.*, 266 A.D.2d 931, 697 N.Y.S.2d 446 (4th Dep't 1999); *Kamhi v. Tay*, 244 A.D.2d 266, 664 N.Y.S.2d 288 (1st Dep't 1997).

59. *Marine Midland Bank v. John E. Russo Produce Co.*, 50 N.Y.2d 31, 405 N.E.2d 205, 427 N.Y.S.2d 961 (1980); *DonDero v. Gardner*, 267 A.D.2d 830, 700 N.Y. S.2d 507 (3d Dep't 1999); *Ronan v. Northup*, 245 A.D.2d 1119, 667 N.Y.S.2d 181 (4th Dep't 1997); *Abrahami v. UPC Constr. Co.*, 224 A.D.2d 231, 638 N.Y. S.2d 11 (1st Dep't 1996); *Adams v. Berkowitz*, 212 A.D.2d 557, 622 N.Y.S.2d 565 (2d Dep't 1995).

60. *See, e.g., Burgundy Basin Inn, Ltd. v. Watkins Glen Grand Prix Corp.*, 51 A.D.2d 140, 379 N.Y.S.2d 873 (4th Dep't 1976); *Skrine v. Staiman*, 30 A.D.2d 707, 292 N.Y.S.2d 275 (2d Dep't 1968), *aff'd w/o op.*, 23 N.Y.2d 946, 246 N.E.2d 529, 298 N.Y.S.2d 727 (1969). Thus, it is fraud to affirm positive knowledge of that which one does not positively know. *Kountze v. Kennedy*, 147 N.Y. 124, 41 N.E. 414 (1895); *Archibald & Lewis Commerce*, 216 A.D. 322, 214 N.Y.S. 366 (1st Dep't 1926).

61. *Seneca Wire & Mfg. Co. v. A.B. Leach & Co.*, 247 N.Y. 1, 159 N.E. 700 (1928); *Baker v. R.T. Vanderbilt Co.*, 260 A.D.2d 750, 688 N.Y.S.2d 726 (3d Dep't 1999); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Robert Christopher Assocs.*, 257 A.D.2d 1, 691 N.Y.S.2d 35 (1st Dep't 1999); *Adams v. Berkowitz*, 212 A.D.2d 557, 622 N.Y.S.2d 565 (2d Dep't 1995); *McClurg v. State*, 204 A.D.2d 999, 613 N.Y.S.2d 71 (4th Dep't 1994); *Navaretta v. Group Health Inc.*, 191 A.D.2d 953, 595 N.Y.S.2d 839 (3d Dep't 1993).

62. *Kimmell v. Schaefer*, 89 N.Y.2d 257, 675 N.E.2d 450, 652 N.Y.S.2d 715 (1996); *Jones v. Title Guarantee & Trust Co.*, 277 N.Y. 415, 14 N.E.2d 459 (1938); *CGJ Assocs. of N.Y. Inc. v. Hanson Indus.*, 274 A.D.2d 892, 711 N.Y.S.2d 232 (3d Dep't 2000); *Giurdanella v. Giurdanella*, 226 A.D.2d 342, 640 N.Y.S.2d 211 (2d Dep't 1996).

63. *Held v. Kaufman*, 91 N.Y.2d 425, 694 N.E.2d 430, 671 N.Y.S.2d 429 (1998); *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 668 N.E.2d 1370, 646 N.Y.S.2d 76 (1996); *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 653 N.E.2d 1179, 629 N.Y.S.2d 1009 (1995).

64. *See Kountze v. Kennedy*, 147 N.Y. 124, 41 N.E. 414 (1895); *Coolite Corp. v. Am. Cyanamid Co.*, 52 A.D.2d 486, 384 N.Y.S.2d 808 (1st Dep't 1976); *Sheridan Drive-In, Inc. v. State*, 16 A.D.2d 400, 228 N.Y.S.2d 576 (4th Dep't 1962); *Lassiter v. Rellstab Assocs.*, 1 A.D.2d 672, 146 N.Y.S.2d 263 (2d Dep't 1955);

Cowles v. Board of Regents of Univ. of State of N.Y., 266 A.D. 629, 44 N.Y.S.2d 911 (3d Dep't 1943).

65. *Kimmell v. Schaefer*, 89 N.Y.2d 257, 675 N.E.2d 450, 652 N.Y.S.2d 715 (1996); *IT Corp. v. Ecology & Envtl. Eng'g, P.C.*, 275 A.D.2d 958, 713 N.Y.S.2d 633 (4th Dep't 2000); *Grammer v. Turits*, 271 A.D.2d 644, 706 N.Y.S.2d 453 (2d Dep't 2000); *Spitzer v. Christie's Appraisals, Inc.*, 235 A.D.2d 26, 652 N.Y.S.2d 38 (1st Dep't 1997).

66. *Kimmell v. Schaefer*, 89 N.Y.2d 257, 675 N.E.2d 450, 652 N.Y.S.2d 715 (1996); *Heard v. City of New York*, 82 N.Y.2d 66, 623 N.E.2d 541, 603 N.Y.S.2d 414 (1993). Notably, New York courts have held that the relationship between the parties must be something more than an arms-length transaction. *See, e.g., Andres v. LeRoy Adventures, Inc.*, 201 A.D.2d 262, 607 N.Y.S.2d 261 (1st Dep't 1994).

67. *Kimmell v. Schaefer*, 89 N.Y.2d 257, 675 N.E.2d 450, 652 N.Y.S.2d 715 (1996); *Salesian Soc'y, Inc. v. Nutmeg Partners Ltd.*, 271 A.D.2d 671, 706 N.Y.S.2d 459 (2d Dep't 2000); *Dunlevy v. New Hartford Cent. School Dist.*, 266 A.D.2d 931, 697 N.Y.S.2d 446 (4th Dep't 1999); *Fab Indus., Inc. v. BNY Fin. Corp.*, 252 A.D.2d 367, 675 N.Y.S.2d 177 (1st Dep't 1998).

68. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 668 N.E.2d 1370, 646 N.Y.S.2d 76 (1996); *Weitzman v. Listman*, 217 A.D.2d 442, 629 N.Y.S.2d 250 (1st Dep't 1995); *Helbig v. City of New York*, 212 A.D.2d 506, 622 N.Y.S.2d 316 (2d Dep't 1995).

69. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 668 N.E.2d 1370, 646 N.Y.S.2d 76 (1996); *Geary v. Hunton & Williams*, 257 A.D.2d 482, 684 N.Y.S.2d 207 (1st Dep't 1999); *Kaddo v. King Serv. Inc.*, 250 A.D.2d 948, 673 N.Y.S.2d 235 (3d Dep't 1998); *Ben-Reuven v. Kidder, Peabody & Co.*, 241 A.D.2d 504, 661 N.Y.S.2d 28 (2d Dep't 1997).

70. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 668 N.E.2d 1370, 646 N.Y.S.2d 76 (1996); *Clearview Concrete Prods. Corp. v. S. Charles Gherardi, Inc.*, 88 A.D.2d 461, 453 N.Y.S.2d 750 (2d Dep't 1982).

71. *Barclays Bank of N.Y., N.A. v. Heady Elec. Co.*, 174 A.D.2d 963, 571 N.Y.S.2d 650 (3d Dep't 1991); 36 N.Y. Jur. 2d, Damages, § 175 (2001).

72. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 668 N.E.2d 1370, 646 N.Y.S.2d 76 (1996); *MTI/The Image Group, Inc. v. Fox Studios East, Inc.*, 262 A.D.2d 20, 690 N.Y.S.2d 576 (1st Dep't 1999); *Zivian v. McNulty*, 136 A.D.2d 547, 523 N.Y.S.2d 168 (2d Dep't 1988).

73. *See Jurlique, Inc. v. Austral Biolab Pty., Ltd.*, 187 A.D.2d 637, 590 N.Y.S.2d 235 (2d Dep't 1992). Some courts refer to trade libel as "injurious falsehood,"

defined as the utterance of an untrue statement about the plaintiff's business or property which induces others to refrain from dealing with him, or otherwise deprives him of prospective economic advantage, *see, e.g., Waste Distillation Tech., Inc. v. Blasland & Bouck Eng'rs, P.C.*, 136 A.D.2d 633, 523 N.Y.S.2d 875 (2d Dep't 1988); *Bivas v. State*, 97 Misc. 2d 524, 411 N.Y.S.2d 854 (N.Y. Ct. Cl. 1978), while other courts refer to trade libel as "product disparagement" which has been described as an action to recover for words or conduct which tend to disparage or negatively reflect upon the condition, value or quality of a product or property,'' *see, e.g., Kirby v. Wildenstein*, 784 F. Supp. 1112 (S.D.N.Y. 1992); *Angio-Med. Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269 (S.D.N.Y. 1989).

74. *Kirby v. Wildenstein*, 784 F. Supp. 1112 (S.D.N.Y. 1992) (applying New York law); *Angio-Med. Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269 (S.D.N.Y. 1989) (same); *Drug Res. Corp. v. Curtis Publ'g Co.*, 7 N.Y.2d 435, 166 N.E.2d 319, 199 N.Y.S.2d 33 (1960).

75. *Kirby v. Wildenstein*, 784 F. Supp. 1112 (S.D.N.Y. 1992) (applying New York law); *Angio-Med. Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269 (S.D.N.Y. 1989) (same).

76. *Kirkland v. American Title Ins. Co.*, 692 F. Supp. 153 (E.D.N.Y. 1988) (applying New York law); *Modulars By Design, Inc. v. DBJ Dev. Corp.*, 174 A.D.2d 885, 571 N.Y.S.2d 168 (3d Dep't 1991).

77. *Kirby v. Wildenstein*, 784 F. Supp. 1112 (S.D.N.Y. 1992) (applying New York law); *Angio-Med. Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269 (S.D.N.Y. 1989) (same).

78. *See, e.g., Bridge C.A.T. Scan Assocs. v. Ohio-Nuclear, Inc.*, 608 F. Supp. 1187 (S.D.N.Y. 1985) (applying New York law).

79. *See, e.g., Angio-Medical Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269 (S.D.N.Y. 1989) (applying New York law).

80. *See, e.g., Ruder & Finn, Inc. v. Seaboard Surety Co.*, 52 N.Y.2d 663, 422 N.E.2d 518, 439 N.Y.S.2d 858 (1981).

81. N.Y. Gen. Bus. Law §§ 349-350 (2004).

82. N.Y. Gen. Bus. Law §§ 349(b), 350-d.

83. N.Y. Gen. Bus. Law §§ 349(h), 350-d.

84. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 24, 647 N.E.2d 741, 744, 623 N.Y.S.2d 529, 532 (1995).

85. N.Y. Gen Bus. Law. §§ 349(h), 350-e.

86. *See Moses v. Citicorp Mortgage, Inc.*, 982 F. Supp. 897, 903 (E.D.N.Y. 1997); *Oxman v. Amoroso*, 172 Misc. 2d 773, 782, 659 N.Y.S.2d 963, 968 (N.Y. City Ct. 1997); *McDonald v. North Shore Yacht Sales, Inc.*, 134 Misc. 2d 910, 914, 513 N.Y.S.2d 590, 593 (N.Y. Sup. Ct. 1987).

87. *Oxman*, 172 Misc. 2d at 782, 659 N.Y.S.2d at 968. If there is proof of scienter, the court can treble damages up to $1,000. *Oswego Laborers*, 85 N.Y.2d at 26, 647 N.E.2d 745, 623 N.Y.S.2d at 532.

88. *Strutman v. Chemical Bank*, 95 N.Y.2d 24, 29, 731 N.E.2d 608, 612, 709 N.Y.S.2d 892, 896 (2000).

89. 104 N.Y. Jur. 2d, Trade Regulation § 196 (2005), citing *Corning Glass Works v. Corning Cut Glass, Co.*, 197 N.Y. 173, 90 N.E. 449 (1910); *McGraw-Hill Book Co. v. Random House, Inc.*, 32 Misc. 2d 704, 225 N.Y.S.2d 646 (N.Y. Sup. Ct. 1962); *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037 (2d Cir. 1980) (applying New York law); *Renofab Process Corp. v. Renotex Corp.*, 158 N.Y.S.2d 70 (N.Y. Sup. Ct. 1956); *Rolls Royce Motor Cars, Inc. v. Schudroff*, 929 F. Supp. 117 (S.D.N.Y. 1996) (finding claim for unfair competition where automobile dealership falsely publicized that it was an authorized dealer of Rolls Royce automobiles).

90. *See* N.Y. Jur. 2d, Trade Regulation, § 242 citing *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

91. *See, e.g., Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.*, 297 F. Supp. 2d 463 (N.D.N.Y. 2003).

92. *See Camelot Assocs. Corp. v. Camelot Design & Dev. LLC*, 298 A.D.2d 799, 750 N.Y.S.2d 155 (3d Dep't 2002); *Capitaland Heating & Cooling, Inc. v. Capitol Refrigeration Co.*, 134 A.D.2d 721, 521 N.Y.S.2d 202 (3d Dep't 1987).

93. *See Camelot Assocs. Corp. v. Camelot Design & Dev. LLC*, 298 A.D.2d 799, 750 N.Y.S.2d 155 (3d Dep't 2002).

94. *See, e.g., Rochester Sav. Bank v. Rochester Savs. & Loan Ass'n*, 170 Misc. 983, 11 N.Y.S.2d 130 (N.Y. Sup. Ct. 1939); *Dynamic Electronics, N.Y. v. Dynamic Television Assocs.*, 101 N.Y.S.2d 263 (N.Y. Sup. Ct. 1950).

95. *See American Electronics, Inc. v. Neptune Meter Co.*, 33 A.D.2d 157, 305 N.Y. S.2d 931 (1st Dep't 1969) (noting that the measure of damages in unfair competition cases is typically the amount the plaintiff would have made but for the wrongful acts of the defendant); *Santa's Workshop, Inc. v. Sterling*,

2 A.D.2d 262, 153 N.Y.S.2d 839 (3d Dep't 1956), *aff'd*, 3 N.Y.2d 757, 143 N.E.2d 529, 163 N.Y.S.2d 986 (1957).

96. *See* N.Y. Debt. & Cred. Law §§ 270-281. Because "[t]he provisions of the New York Debtor and Creditor Law . . . are declaratory of common law principles," 30 N.Y. Jur. 2d Creditors' Rights, § 295 (1997), citing *Palermo v. Patterson*, 219 A.D. 832, 222 N.Y.S. 220 (1927), New York's Debtor and Creditor Law cannot be construed to limit a creditor's potential remedy at common law, *id*. (citing *James v. Powell*, 25 A.D.2d 1, 266 N.Y.S.2d 245 (1st Dep't 1966), *rev'd on other grounds*, 19 N.Y.2d 249, 255 N.E.2d 741, 279 N.Y. S.2d 10 (1967).

97. "Creditor" is defined under the New York Debtor & Creditor Law as a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent. *See* N.Y. Debt. & Cred. Law § 270.

98. "Assets" of a debtor are defined as property not exempt from liability for his debts. *See* N.Y. Debt. & Cred. Law § 270.

99. *Hassett v. Goetzman*, 10 F. Supp. 2d 181, 188 (N.D.N.Y. 1998) (applying New York law).

100. *See* N.Y. Debt. & Cred. Law § 276.

101. *See* N.Y. Debt. & Cred. Law § 273; *see also American Inv. Bank, N.A. v. Marine Midland Bank, N.A.*, 191 A.D.2d 690, 691, 595 N.Y.S.2d 537, 538 (2d Dep't 1993).

102. *See* N.Y. Debt. & Cred. Law § 274; *see also Julien J. Studley, Inc. v. Lefrak*, 66 A.D.2d 208, 412 N.Y.S.2d 901 (2d Dep't 1979).

103. Debt. & Cred. Law § 278(1)(a); *see also Society Milion Athena v. National Bank of Greece*, 281 N.Y. 282, 293, 22 N.E.2d 374, 377 (1939) (noting that creditor may have fraudulent conveyance set aside or annulled only to the extent necessary to satisfy his claim).

104. N.Y. Debt. & Cred. Law § 278(1)(b); *see also Sheils v. Donohue*, 6 Misc. 2d 610, 161 N.Y.S.2d 622 (N.Y. Sup. Ct. 1957).

105. N.Y. Debt. & Cred. Law § 279(a); *see also In re Standard Tile Co.*, 257 A.D.834, 12 N.Y.S.2d 188 (2d Dep't 1939).

106. N.Y. Debt. & Cred. Law § 279(b); *Matthews v. Schusheim*, 36 Misc. 2d 918, 235 N.Y.S.2d 973 (N.Y. Sup. Ct. 1962), *rev'd on other grounds*, 18 A.D.2d 719, 192 N.E.2d 28, 236 N.Y.S.2d 407 (1963).

107. *Fox v. Erbe*, 100 A.D. 343, 91 N.Y.S. 832 (1st Dep't 1905), *aff'd*, 184 N.Y. 542, 76 N.E. 1095 (1906); *Gruenebaum v. Lissauer*, 185 Misc. 718, 57 N.Y.S.2d 137 (N.Y. Sup. Ct. 1945), *aff'd*, 270 A.D. 836, 61 N.Y.S.2d 372 (1st Dep't 1946).

108. *See 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 292, 750 N.E.2d 1097, 1103, 727 N.Y.S.2d 49, 55 (2001).

109. *MCI Telecommunications Corp. v. John Mezzalingua Assocs. Inc.*, 921 F. Supp. 936, 945 (N.D.N.Y. 1996).

110. *See Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc.*, 117 A.D.2d 284, 502 N.Y.S.2d 165 (1st Dep't 1986); *In re Wingate*, 169 Misc. 2d 701, 647 N.Y.S.2d 433 (N.Y. Sup. Ct. 1996).

111. *Semmler v. Naples*, 166 A.D.2d 751, 563 N.Y.S.2d 116 (3d Dep't 1990); *Polley v. Daniels*, 238 A.D. 181, 264 N.Y.S. 194 (3d Dep't 1933).

112. *Semmler v. Naples*, 166 A.D.2d 751, 563 N.Y.S.2d 116 (3d Dep't 1990); *TPL Assocs. v. Helmsley-Spear, Inc.*, 146 A.D.2d 468, 536 N.Y.S.2d 754 (1st Dep't 1989).

113. *Northeast Gen. Corp. v. Wellington Adver., Inc.*, 82 N.Y.2d 158, 624 N.E.2d 129, 604 N.Y.S.2d 1 (1993); *Coldwell Banker Residential Real Estate v. Berner*, 202 A.D.2d 949, 609 N.Y.S.2d 948 (3d Dep't 1994); *Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc.*, 117 A.D.2d 284, 502 N.Y.S.2d 165 (1st Dep't 1986); *In re Wingate*, 169 Misc. 2d 701, 647 N.Y.S.2d 433 (N.Y. Sup. Ct. 1996).

114. *See, e.g., Licensing Dev. Group, Inc. v. Freedman*, 184 A.D.2d 682, 585 N.Y.S.2d 456 (2d Dep't 1992).

115. *See, e.g., New York Auto Co. v. Franklin*, 49 Misc. 8, 97 N.Y.S. 781 (1905). *See also Alexander & Alexander of N.Y. v. Fritzen*, 147 A.D.2d 241, 246, 542 N.Y.S.2d 530, 533 (1st Dep't 1989).

116. *Evangelista v. Queens Structure Corp.*, 27 Misc. 2d 962, 212 N.Y.S.2d 781 (1961); *Pearson v. John R. Boland & Co.*, 156 N.Y.S.2d 435 (N.Y. Sup. Ct. 1956).

117. *Sialkot Importing Corp. v. Berlin*, 295 N.Y. 482, 68 N.E.2d 501 (1946).

118. *Duane Jones Co. v. Burke*, 306 N.Y. 172, 117 N.E.2d 237 (1954).

119. *Western Elec. Co. v. Breiner*, 41 N.Y.2d 291, 360 N.E.2d 1091, 392 N.Y.S.2d 409 (1977).

120. *See, e.g., Harry R. Defler Corp. v. Kleeman*, 19 A.D.2d 396, 403-404, 243 N.Y.S.2d 930, 937 (4th Dep't 1963), *aff'd*, 19 N.Y.2d 694, 226 N.E.2d 569, 278 N.Y.S.2d 883 (1967).

121. *Gomez v. Bicknell*, 302 A.D.2d 107, 756 N.Y.S.2d 209 (2d Dep't 2002) citing *Harry R. Defler Corp. v. Kleeman*, 19 A.D.2d 396, 403-404, 243 N.Y.S.2d 930, 937 (4th Dep't 1963), *aff'd*, 19 N.Y.2d 694, 226 N.E.2d 569, 278 N.Y.S.2d 883 (1967).

122. *Melnick v. Sable*, 11 A.D.2d 1075, 206 N.Y.S.2d 825 (2d Dep't 1960); *Litwin v. Allen*, 25 N.Y.S.2d 667 (N.Y. Sup. Ct. 1940). Put differently, directors are not insurers of the facts of corporate officers. *See, e.g.*, *Kavanaugh v. Gould*, 147 A.D. 281, 131 N.Y.S. 1059 (3d Dep't 1911).

123. *Newfield v. Ettlinger Co.*, 22 Misc. 2d 769, 194 N.Y.S.2d 670 (N.Y. Sup. Ct. 1959); *Litwin v. Allen*, 25 N.Y.S.2d 667 (N.Y. Sup. Ct. 1940).

124. *Imberman v. Alexander*, 16 Misc. 2d 330, 184 N.Y.S.2d 801 (N.Y. Sup. Ct. 1958).

125. *See, e.g., Cowin v. Jonas*, 43 N.Y.S.2d 468 (N.Y. Sup. Ct. 1943), *aff'd*, 267 A.D. 947, 48 N.Y.S.2d 460 (1st Dep't), *aff'd*, 293 N.Y. 838, 59 N.E.2d 436 (1944).

126. *See* http://www.nycourts.gov/comdiv/Brief_History_of_CD.htm.

127. *See* Uniform Rules for N.Y. State Trial Courts, §202.70(a). The monetary thresholds range from $25,000 (for Albany, Erie, and Suffolk Counties) to $100,000 (for New York and Westchester Counties).

128. Uniform Rules for N.Y. State Trial Courts, §202.70(b) (enumerating the types of claims that must be asserted in order for assignment to the Commercial Division to be proper).

129. Uniform Rules for N.Y. State Trial Courts, §202.70(c).

130. N.Y. Supreme Court, Commercial Division, Rule 11(d).

131. N.Y. Supreme Court, Commercial Division, Rule 19-a.

132. N.Y. Supreme Court, Commercial Division, Rule 3.

133. *See* http://www.nycourts.gov/comdiv/Brief_History_of_CD.htm.