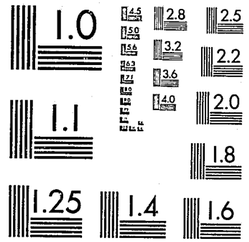

1978 ANNUAL REPORT

STATE OF NEW YORK DEPARTMENT OF LAW

LOUIS J. LEFKOWITZ
Attorney General

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FABIAN BACHRACH

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STATE OF NEW YORK

DEPARTMENT OF LAW

TO THE GOVERNOR AND THE LEGISLATURE

Pursuant to law, I have the honor to present to your honorable body the report of the activities of the Department of Law for the year 1978.

This is the twenty-second Annual Report that I have had the honor to present to you.

This constitutes my final report as Attorney General of the State of New York, commencing in January 1957 – during which the functions, powers and duties of this office were vastly increased and broadened and the staff of the department substantially expanded.

Respectfully submitted,

Louis J. Lefkowitz

LOUIS J. LEFKOWITZ

Attorney General

INTRODUCTION

One of the primary functions of the office continues to be the representation of the State, its departments and officers in the courts of this State and in the federal courts. But I have found that the volume of such litigation and the complexity has increased to such an extent as to tax the resources of the department despite substantial increase in staff. More often the cases brought in the federal courts ingenuously question the vital operations of the State and local governments and must receive the personal attention of the Attorney General and be monitored right to the United States Supreme Court. Because of unified court legislation, the Attorney General must now be available to respond to such demands for representation in litigation brought against the personnel of the entire court system of the State, as well as the staffs of the respective District Attorneys. The State officials and employees and these court employees in such litigation may be made personally liable defendants and charged with substantial claims in the Federal and State courts for damages as well as injunction and additionally, for attorney fees in large amounts. In 1978 well in excess of 15,000 cases were being handled by this office in the courts with men and women attorneys representing the office with distinction and selected solely on the basis of merit, which policy and without distinction of race, color or sex I hope in the best interests of the State will be continued.

Illustrative is the litigation involving the statutory provisions for school financing which have been the subject of challenge. This office appeared in defense of such statutes involving a long and arduous trial lasting over nine months, with voluminous records and briefs and resulting in a lower court ruling declaring that the present system of school financing is constitutionally unsound. When the judgment of the court is entered steps with respect to appellate resolution must be taken. In the federal courts the office appeared in defense of the labor law statutory provisions authorizing unemployment benefits to be paid to persons involved in strikes after a period of weeks. That case too involved a long and difficult trial, and a successful appeal to the U.S. Court of Appeals. The case is now before the U.S. Supreme Court awaiting decision after argument. Awaiting disposition too in that court is an appeal involving the system of suspensions at the licensed race tracks which, too, has been argued. Several other cases also have been briefed in that Court awaiting argument or disposition of certiorari applications or appeal.

While as the Attorney General my office is not involved in the day to day criminal law enforcement process (due to statutory provisions), the office does exercise such functions materially. Criminal violations of tax, labor, securities, antimonopolies, real property, and real estate financing laws are prosecuted by the Attorney General. Indeed, at the present date, there are grand jury presentations by the staff of the Attorney General for violations of such laws now being conducted in various counties. Moreover, many state departments and agencies refer to my office for criminal prosecutions violations of their laws or for indictable offenses under the expanded provisions of the Executive Law (which now authorize all such departments and agencies to refer such matters to the Attorney General) and there is always the latent criminal enforcement power which can be called into being whenever needed.

Supplementing this participation in criminal law enforcement is the representation of the Attorney General in writs of habeas corpus issued out of the state or federal courts at instance of a prisoner. The office appears in numerous writs and also upon the appeals from dispositions of such writs . . . many taken to the U.S. Supreme Court. In that respect as the Attorney General I and my staff have been required to keep abreast of the application of recent decisions of the U.S. Supreme Court, the State Court of Appeals and the U.S. Court of Appeals. The impact of these appellate rulings upon the criminal justice and parole system of this State has been tremendous and has been the subject of the substantial litigation involving these writes of habeas corpus which have crowded the courts.

Additionally, my office renders advice to State departments in the form of formal opinions of the Attorney General and informal opinions to legal counsel to municipalities. In many instances, courses of action on public issues are determined by those opinions, and the proper direction of government action can avoid costly litigation. They are given great weight by the Courts. Moreover, approximately 450 opinions, as to the legality and constitutionality of bills which have passed both houses of the Legislature, are given each year to the Governor at the request of his counsel.

The rendering of opinions is the traditional work of my office but with the increase in the State's financial problems in the last three years the office has developed new activity in the public finance field. In order for certain public authorities to market their securities additional assurances of validity have been required by purchasers, among which have been opinions of the Attorney General. Thus, in addition to the duties of the Attorney General as bond counsel for the State, there is the obligation to review offering statements of these public bodies in order to give the assurances required through the rendition of legal opinions. As Attorney General I have also been called upon to render opinions in connection with various sales of the obligations of the Dormitory Authority, the Housing Finance Agency, the Municipal Assistant Cor-

poration [MAC] and other public authorities, and relative to each of the seasonal borrowings by the City of New York from the Federal Government.

There are a number of lawsuits against the State and State officials, previous uncommon in the area of Public Finance commenced against the State and State officials during this period.

The combination of both public finance opinion work and this specialized litigation has thus developed into a new and increasingly important phase of the Department's work. This new and additional function has filled my time as the Attorney General not only during office hours but long nights and weekends.

The office also through the Claims and Litigation Bureau centered in Albany but operating with many district offices throughout the State which together with other duties appears in the claims against the State in the Court of Claims.

Beyond these functions, the Attorney General has many others which touch the people of the State directly. Reference has already been made to the jurisdiction of the office to enforce the securities and real estate financing laws. In addition to criminal prosecution jurisdiction, there is co-ordinate civil jurisdiction and there have been a number of leading cases decided by the highest courts of this State upholding such litigation, as well as cases involving similar enforcement of laws against restraint of trade by the Anti-Monopolies Bureau of my office. That Bureau, in recognition of its stature, has indirectly received the approbation of the United States Department of Justice by being awarded an appropriation for increased anti-trust activity. The Environmental and Water and Air Resources Bureau, initiated by me, are vigorously engaged in the protection of the environment and have participated in most important environmental decisions having national impact. Assistance in the enforcement of the State's anti-discrimination laws is a recognized signal activity of the Civil Rights Bureau and the Charitable Foundations Bureau monitors the financial performance of charitable organizations and trusts, while the Charity Frauds Bureau proceeds against fraudulent solicitations of charitable funds and also defends in the courts the welfare decisions of the department of Social Services.

Associated is the Estates and Trusts Bureau which in line with its duties has appeared aggressively in the Surrogate's Courts to protect the beneficiaries of charitable bequests. Notable is the recent *Matter of Rothko* landmark case which was affirmed by the New York Court of Appeals. These Bureaus also represent the State Comptroller in claims under the Abandoned Property Law and among other recoveries obtained approximately $7,900,000 from the New York Stock Exchange alone and $6,100,000 from the American Express Company following successful litigation in the U.S. Supreme Court in *Pennsylvania* v. *New York*. The Bureau, in conjunction with the State Comptroller, has been attempting to secure the payment to the State under the Abandoned Property Law of unclaimed income tax refunds from the U.S. Department of the Treasury and in the face of the unexpected recalcitrance of the Federal Government is preparing litigation.

Of the greatest significance also is the work of my office in the protection of the consumer, which is statutorily authorized. This activity was the subject of study by the State Bar Association Committee with recommendations which resulted in the enactment of the Deceptive Practices Act (Gen. Bus. Law, Art. 22-A). The consumer fraud bureau is the first established in any State Attorney General's office and during the past year collected about $3,000,000 in restitution.

Alongside this bureau is the Miscellaneous Frauds Bureau which concentrates on building complaints. It was by way of this Bureau that my office engaged in a long drawn-out effort to protect the tenants' rent security deposits. First, the Attorney General over several years had to persuade the Legislature to mandate that such deposits be placed in interest bearing accounts. Then, because of the holdings of the courts, he had to obtain special legislation authorizing the Attorney General to enforce the statutory provisions for the protection of such deposits. Finally, after three cases had reached the Court of Appeals, the principle was finally upheld in *Matter of Parker* (38 NY 2d 743) and tenants held entitled to such interest on the rent security deposits going back to the original statutory provision. The Bureau is pursuing landlords who fail to comply with this law and has recently emphasized in successful litigation in the Appellate Division in *Matter of Booke*, that these security laws also include advance rent payments.

Finally, the Organized Crime Task Force is a branch of the office engaged in vital work in the interests of criminal justice, and there is always the statutory authority to the Governor to call on the Attorney General to supersede a local District Attorney or to appoint special prosecutors for particular inquiries such as the inquiry into the nursing home industry. That power has been exercised frequently during the past few years and there are several such special prosecutions in operation at present.

I have outlined generally the expanded activities of my office. Following are fuller statements by the Bureaus and District Offices and the financial summary of the Department. It has become patent that further increase of the professional staff is required to meet the burgeoning demands of litigation occasioned in part by new legislation.

I again wish to express my thanks to your honorable bodies, the Governor and his staff and to the department heads for the cooperation and consideration extended to me and to the personnel of my office over these years. I also take this opportunity to record my deep appreciation for the dedication of my staff and the highly professional quality of the services rendered by them to the people which made the accomplishments of the office so possible.

There were very few quiet hours which I, as the occupant of the office of Attorney General had, but I nevertheless enjoyed the opportunity to be of such service to the State and its people over the long span of years.

LOUIS J. LEFKOWITZ

Attorney General

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PROTECTION OF CONSUMERS AND INVESTORS

ANTI-MONOPOLIES BUREAU

JOHN M. DESIDERIO
Assistant Attorney General In Charge

The Anti-Monopolies Bureau is the antitrust enforcement arm of the Department of Law. As such, the Bureau is responsible for enforcing the antitrust laws against restraints of trade and for promoting competition and free enterprise within New York State. The Bureau has two main functions. It is responsible for both the civil and criminal enforcement of the New York Antitrust Law, the Donnelly Act (General Business Law, §§ 340 et seq.), and it is responsible for handling all of the civil treble damage antitrust actions that the State may bring in the federal courts under the Clayton Act (15 U.S.C. §§ 15 et seq.).

In 1978, the Bureau continued to maintain and expand its traditionally vigorous program of antitrust enforcement activities. The Bureau was the recipient of a special grant from the federal government which was made for the express purpose of supporting and encouraging state antitrust enforcement. The grant awarded to the Bureau for federal Fiscal Year 1978 amounted to $412,000.

With the aid of the grant, the size of the Anti-Monopolies Bureau has been substantially increased. In the past year, the number of attorneys on the staff has doubled, and the clerical staff of the Bureau has been augmented accordingly. Additional economic, investigative, and other support personnel were also provided for under the grant and are being recruited. Staff members were afforded the opportunity to participate in several antitrust-oriented continuing legal education programs. They attended seminars given by the Department of Justice, Columbia University, the ALI-ABA Committee on Continuing Legal Education, the New York State Bar Association, and the Practicing Law Institute. In addition, the Bureau has substantially augmented its library of antitrust, economic, and procedural materials for use in research and litigation.

During the past year, the Anti-Monopolies Bureau also became associated with the Civil Clinical Program of St. John's University Law School. Two law students enrolled in the program were assigned to the Bureau as legal interns. The students worked twelve hours a week during the school term assisting the attorneys in the Bureau in legal research and the preparation of pleadings and other matters. Under the Clinical Program the students will receive academic credit for the work they perform for the Bureau.

In addition, as a consequence of the expanded enforcement activities undertaken in 1978, and at the request of the Attorney General two officers of the New York State Police have been assigned for special duty with the Bureau to assist in ongoing investigations.

State Enforcement Activities

The Bureau's enforcement effort was very active in 1978. It was directed over a broad range of investigatory, prosecutorial, and compliance matters.

Pending Investigations:

The Bureau is conducting several major investigations over a broad range of industries and practices. Important investigations involving possible price-fixing, bid rigging, customer and market allocation, boycotts, and unlawful tie-in sales are pending. The inquiries are focusing on the following general areas: public contracts, real estate sales, franchising, the furnishing of services by professionals and local tradesmen, and the distribution systems for perishables, dairy products, and other commodities.

Stamp Dealers Prosecution:

The criminal prosecution of the Stamp Operators Association of Greater New York, which was commenced in May 1977 (*People* v. *Haberstrumpf, et al.,* Indictment No. 907-77, Queens County), was concluded in 1978 with the entry of a guilty plea by the Association to the antitrust felony count of the indictment and the payment of a $15,000 criminal fine. This is the first antitrust felony conviction obtained by the State since the 1975 revision of the Donnelly Act in which the penalties for a violation were increased and the offense was upgraded from a misdemeanor to a felony. In the companion civil action (*State of New York* v. *Stamp Operators Association of Greater New York, et al.*) (Index No. 7451/77, Queens County), the seven principal members and officers of the Association entered into civil consent judgments under which they agreed to pay an additional $38,000 in penalties to the Attorney General. The decree further enjoined the defendants from committing any of the acts which led to their indictment and also required that the defendant Association be dissolved. The members of the Association were barred from forming or joining any similar group of stamp vendors in the Metropolitan Area for a period of five years.

The seven individual defendants were in addition barred from holding office in any trade association for five years. The defendants agreed to this disposition of the case prior to trial and after the trial judge had issued an opinion upholding the validity of the indictment and denying motions to dismiss the charges.

The indictment had charged the defendants with engaging in a price-fixing and customer allocation scheme in the sale of U.S. Postage Stamps to the public from over 4000 stamp vending machines located throughout New York City, Nassau, Suffolk, Rockland and Westchester Counties. In upholding the indictment, Judge Rose L. Rubin of Queens Supreme Court held that an agreement to restrain trade is an element of the substantive crime charged and that under the Donnelly Act an antitrust violation requires no overt act for its commission. The Court also held that charging the defendants with the commission of a felony by a continuing course of conduct from December 1, 1969 to May 1977 did not violate the constitutional prohibition against *ex post facto* laws. "A statute increasing the penalty for conspiracy to commit a crime is not an *ex post facto* law as to a conspiracy which was commenced before the effective date of the statute but was continued by overt acts after its effective date." The court further held that the Attorney General was authorized to commence a civil action against the same defendants to obtain injunctive relief. "The State is clearly empowered to enforce the [Donnelly Act] by both a criminal action and an action for an injunction."

New Actions:

The Bureau commenced the following new enforcement actions in 1978:

(1) *State of New York* v. *Empire City Pharmaceutical Society, et al.* This is a civil action in which the Attorney General has charged the Empire City Pharmaceutical Society and seven of its principal officers and employees with engaging in and fostering a boycott of the State Medicaid Program by pharmacists who practice principally in New York City. Specifically, the defendants are charged with entering into an agreement "to boycott by refusing to and refraining from dispensing drugs reimbursable by Medicaid" and "to persuade, induce and coerce other persons to refuse to and refrain from dispensing drugs reimbursable by Medicaid." The action was commenced by Order to Show Cause with the entry of a temporary restraining order on April 14, 1978 enjoining the defendants from continuing the boycott they had commenced on April 1st as a protest against allegedly inadequate Medicaid reimbursement rates. The action seeks civil penalties from the defendants and a permanent injunction against any future boycott activity.

(2) *State of New York* v. *Ambulance and Medical Transportation Association of New York, et al.* This civil action was commenced on July 18, 1978 by Order to Show Cause, and with the entry of a temporary restraining order against the Association and 37 Ambulette medical transportation companies, to prevent the defendants from engaging in a boycott of medicaid patients which had been threatened to begin on July 31st. The Association has previously announced that its members would halt service on that date to medicaid patients as a protest against what the companies considered to be inadequate medicaid reimbursement rates. As a result of the quick action taken by the Bureau in this matter, medical transportation service to medicaid patients was continued past the deadline without any interruption. The lawsuit against the defendants seeks civil penalties and a permanent injunction.

(3) *State of New York* v. *Levi Strauss, & Co. et al.* In this civil action, defendant Levi Strauss, two of its retail dealers in New York State, and other unnamed co-conspirators, were charged with entering into an arrangement "whereby competition and the free exercise of the business, trade and commerce of the manufacture, distribution and sale of pants and wearing apparel has been, is, or may be restrained" in violation of the Donnelly Act. Specifically, the defendants were charged with engaging in an unlawful agreement to: "arbitrarily, artificially, unlawfully and unreasonably fix or control the prices at which [Levi's] products are resold. . . .advertised, promoted or offered for sale at retail" and "unlawfully restrict or limit the customers or classes of customers to whom [Levi's] dealers may resell its products." The agreement was alleged to have been in effect for some period of time between 1970 and 1976. The action seeks a permanent injunction and statutory penalties.

(4) *State of New York* v. *The Long Island Sewer Contractors Ass'n., et al.* This civil action charges that the Long Island Sewer Contractors Association, its officers, and members fixed and maintained minimum prices for connecting private residential sewer lines to the public sewage system in Nassau and Suffolk Counties. The conspiracy is alleged to have commenced on or about January 12, 1976 and to have continued thereafter up to the date of the complaint, September 28, 1978. Simultaneously with the commencement of the action, 20 of the 24 named defendants agreed to enter into a consent judgment in settlement of the action. The judgment to which the Association, two of its officers. and seventeen members agreed, without admitting a violation of law, required the Association to pay costs of $1,500 to the Attorney General. The officers and members were required to dissolve the Association and

they were further enjoined from discussing or agreeing to fix uniform or similar prices for sewer connecting. The action was severed as to the remaining four non-consenting defendants and the action is being continued against them.

Consent Judgments:

In addition to the consent judgments obtained by the Bureau in connection with the actions against the Stamp Operators Association and the Long Island Sewer Contractors Association already noted above, consent judgments were also obtained in settlement of the following matters:

(1) *State of New York* v. *A.B.C. Process Serving Bureau Inc., et al.* Four firms that serve legal process and other documents in the metropolitan New York City area were charged with agreeing to coerce and restrain their independent-contractor process servers from performing services and otherwise working for certain competitors of the defendants. Without admitting a violation, the firms entered into a consent judgment wherein they were enjoined from conspiring to coerce, direct, persuade, influence, or otherwise cause any process server to cease performing work for any other serving agency. Each defendant also paid $500.00 costs to the Attorney General.

(2) *State of New York* v. *Mid-Island Electrical Sales Corp.* In a non-antitrust matter, the Bureau obtained a consent judgment against a Long Island Corporation which had been accused of fraudulently misrepresenting itself as the winner of a government contract for the sale of incandescent, fluorescent, and other types of lamps to the State and its municipalities. Under the terms of the judgment, to which defendant Mid-Island consented without admitting a violation of law, the firm was enjoined from in any way representing itself as a *bona fide* State contract vendor if such is not the case. The firm was further enjoined from making any reference to a State contract in its price lists or circulars unless it has in fact been awarded a State contract or, if it hasn't, unless that fact is clearly indicated. Mid-Island was also required to pay $3,000 in penalties to the Attorney General.

Other Litigation:

In addition to the affirmative State enforcement litigation activities outlined above, the Bureau has also been involved in a number of other legal proceedings during the past year.

The investigatory powers of the Attorney General, as exercised by the Bureau under G.B.L. § 343, were challenged on several fronts in 1978. This resulted in a sharp increase in the number of cases where potential witnesses and parties under investigation have made motions to quash subpoenas issued by the Bureau during the course of an official inquiry. Nevertheless, the Attorney General's long-standing power to investigate possible antitrust violations was upheld in nearly every instance and has thereby been substantially reaffirmed and strengthened.

The courts upheld the right of the Attorney General to subpoena the testimony and the books and records of individual physicians in connection with an investigation of a medical boycott of patients covered by Workers' Compensation and No-Fault insurance. *Matter of Hirschhorn,* 93 Misc. 2d 275, 402 N.Y.S. 2d 520 (Sup. Ct. N.Y. Co., Sp. Term, Part I), *aff'd.* A.D.2d (1st Dept. May 2, 1978), *app. denied,* 45 N.Y. 2d 705 (1979); *Matter of Green,* 1978-1 Trade Cases ¶ 61, 906 (Sup. Ct. Nassau Co., Sp. Term, Part I, February 23, 1978).

In *Matter of Hirschhorn,* the Court held that "the Attorney General may issue a subpoena calling for information whenever he believes that an inquiry is warranted;" that "the Attorney General is not required to disclose the probable cause and scope of his investigation to justify the issuance of a subpoena;" and that a "subpoena issued in the course of an ongoing investigation is *prima facie* adequate without further amplification or justification." The Court further held that "First Amendment rights do not extend to agreements in restraint of trade, or group boycotts, or the concerted withholding of life-sustaining services from the public." In *Matter of Green,* the Court held that the right of every person to contract with or refuse to render services with whom he chooses is "subject to the limitation that his conduct must not be part of an illegal conspiracy 'aimed at restraining or destroying competition or [have] as its purpose a restraint of the free availability of medical or hospital services in the market.' "

In *Matter of Amos Post, Inc.,* 1978-1 Trade Cases ¶ 62, 125 (Sup. Ct. Albany Co. June 21, 1978), involving an investigation of possibly unlawful tie-in or exclusive supply arrangements between a gasoline distributor and its dealers, the Court denied a motion to quash a *subpoena duces tecum* addressed to the distributor. "Considering the confidentiality mandated by Section 343, the Courts have required only a most limited showing of the factual basis for the issuance of the Attorney General's subpoena. . . .[T]he only requirement is that there be a statement that an investigation is in progress." The Court held that the Attorney General had a sufficient factual basis to investigate upon the sworn statement of an Assistant Attorney General that certain documents indicating the possibility of a violation were in the Attorney General's possession.

An investigation by the Bureau into the operations of the multi-state Carvel franchised retail ice-cream chain re-

sulted in three separate lawsuits by Carvel Corporation and two of its ice-cream suppliers challenging subpoenas served upon them by the Attorney General. The Bureau's investigation focused on complaints that the Carvel franchise system involves the use of unlawful tying or exclusive dealing arrangements, unlawful price-fixing, and unfair competition between the Corporation and its franchised dealers. The companies charged that the Attorney General's subpoenas were burdensome and harrassing, lacked a factual basis, and called for the production of privileged "trade secrets." The Bureau asserted that the Attorney General's subpoenas were proper in every respect, had a proper factual basis, and that "trade secrets" enjoy no special privilege and are discoverable in a proper investigation.

In *Rockland County Multiple Listing System Inc.* v. *State of New York, et al.*, Index No. 7700/1977 (Sup. Ct. Rockland Co. May 9, 1978), the plaintiff sought a declaratory judgment to determine its "rights, duties, and obligations" with respect to a particular proposed by-law to which the Secretary of State had "no objection" but which was opposed by the Attorney General on the grounds that it would violate both State and Federal antitrust law. The by-law in question would have fixed the rate of commission splits between selling and listing brokers on sales made through the Multiple Listing System. After finding that there was no genuine conflict between the two State Officials, since the Secretary of State has no authority to enforce the Donnelly Act insofar as it may apply to the by-law and since the Secretary of State intended no challenge to the Attorney General's right to enforce the Act, the Court held that a declaratory judgment could not issue. The Court stated that the plaintiff's action "appears to be directed towards obtaining a judicial determination as to the applicability of the Donnelly Act provisions to the by-law. The remedy of declaratory judgment, however, is not available to restrain enforcement of a criminal prosecution, absent some challenge to the validity of the statute in question."

Finally, in *Charles Labs, Inc.* v. *Leo Banner, et al.*, 74 Civ. 4395 (S.D.N.Y.) (May 12, 1978), the Bureau successfully defended five members of the State Board of Pharmacy in a private treble damage lawsuit in which it had been charged that they had conspired with the State Pharmaceutical Society to put the plaintiff out of business. The Bureau's motion to dismiss the complaint by reason of plaintiff's failure to prosecute and to comply with discovery demands was granted. The plaintiff was also required to pay $250 in attorneys' fees to the Attorney General.

Miscellaneous:

The Bureau continued to review the certificates of all new trade associations organized under § 404(a) of the Not-For-Profit Corporation Law. In 1978, as of December 1st, approximately 203 certificates were submitted for review.

As of December 1, 1978, the Bureau had also received official notice, pursuant to G.B.L. § 340(5), of the filing of 27 private civil lawsuits which alleged a Donnelly Act cause of action.

Federal Litigation Activities

In 1978, the Bureau maintained its program of Clayton Act enforcement through continued active participation in protracted and complex multiparty antitrust lawsuits pending in various federal district courts across the nation, including the *Ampicillin* litigation in Washington, D.C.; the *Chickens* litigation in Atlanta, Georgia; the *Master Key* litigation in *Hartford,* Connecticut; the *Anthracite Coal* litigation in Williamsport, Pennsylvania; and the *Eastern Sugar* litigation in Philadelphia, Pennsylvania.

In the *Master Key* litigation, two of four defendants, who had previously agreed to pay $12.6 million as part of a total $20.1 million court approved nationwide settlement with all plaintiffs, moved for relief from judgment and sought to vacate the order requiring them to pay their share of the settlement. Their time to appeal from the 1977 final judgment approving the settlement had already expired. The two defendants nevertheless claimed that a change in the law under which they had agreed to settle had occurred as a result of an intervening Supreme Court decision and that the settlement should accordingly be set aside. The District Court's ruling that the defendants' motion had no merit in law of equity was summarily affirmed by the Second Circuit Court of Appeals. Thereafter, the Bureau submitted for court approval the Attorney General's Plan for intra-state allocation and distribution of the New York State portion of the nationwide governmental settlement fund. It is expected that distribution of the Master Key settlement funds will be made in 1979. New York State governmental entities are expected to share approximately $1.6 million. Of this amount, the Attorney General has proposed that approximately $1.2 million be allocated on a pro rata basis to all participating governmental class members represented by the State in this matter. The balance is proposed to be paid to New York City which was not a member of the class but represented itself throughout the proceedings.

In the *Ampicillin* litigation, defendant Beecham offered to settle with all state governmental plaintiffs on a nationwide basis by paying $2.07 million. Beecham also agreed to cooperate with plaintiffs with respect to discovery in the case which is being continued against defendant Bristol-Myers. The Beecham settlement is subject to court approval.

In the *Chickens* litigation, the parties took action to prepare the $30 million nationwide settlement agreement entered into in 1977 for submission to the Court for its approval. It is expected that the Court will hold hearings on the matter in 1979. The state governmental plaintiffs agreed to a population-based interstate allocation of the governmental settlement funds. New York State entities are expected to share approximately $300,000 of this settlement.

In the *Eastern Sugar* litigation, pretrial proceedings were continued. Tentative settlements totalling $5,325,000 with 3 of the defendants were agreed to by all plaintiffs.

Pretrial proceedings were also continued in the *Coal* litigation.

In addition, the Bureau represented the interests of the State which was a member of a nationwide class of governmental entities in the *Refrigerant Gas* litigation in Cleveland, Ohio. The Bureau collected $3,089.06 for the State's claim from the settlement in that case.

Conclusion

1978 was a year of growth and expansion for the Anti-Monopolies Bureau. This provided the basis for a broad overall enforcement effort. It is expected that the Bureau will continue to increase its enforcement activities in 1979.

BUILDING, HOME IMPROVEMENT AND MISCELLANEOUS FRAUDS BUREAU

MEYER S. HOROWITZ
Assistant Attorney General In Charge

This bureau, generally referred to as the Miscellaneous Frauds Bureau, investigates and processes a wide variety of complaints involving fraudulent business practices. The basic categories of these complaints are indicated on the following statistical table for 1978:

	On Hand 12/31/77	Opened	Closed	On Hand 12/31/78	Restitution
Home Construction	37	42	71	8	105,710.00
Home Improvements	39	418	383	74	44,405.64
Swimming Pools	9	32	34	7	1,393.63
Contests	29	37	64	2	1,410.00
Rent Security					
Deposits	2	0	1	1	293.10
Interest	10	1	10	1	2,774.06
Business and Other related frauds	256	1,680	1,693	293	139,986.05
Formal Proceedings (Litigated Matters)	25	15	29	11	
Total	407	2,225	2,285	397	295,972.48

Costs — Ass. of Discontinuance		$2,000.00
Injunctions		1,500.00
	Total	$3,500.00

The bureau also handled 7,196 mail inquiries, 17,162 telephone inquiries, and 1,075 personal inquiries in 1978.

In addition to actions and proceedings generated by investigations, it also handled cases referred by State agencies including Secretary of State, Department of Health, Department of Drug Abuse, Department of Transportation, State University of New York, Office of General Services, Department of Labor, and State Division of Lottery.

Following is a reference to the categories of complaints indicated in the title of this bureau.

Building (New Construction)

Investigations in these areas of public concern revealed that for the most part, builders go broke because of insufficient capitalization or because of difficulty in complying with the requirements of local Building Department and Environmental Protection Agencies.

Complaints primarily relate to new construction of one and two-family homes, either under contract or after title. The moneys paid by would-be home buyers who had given

contract deposits and by those who had taken title often represents their life's savings only to find either that the builder cannot deliver title, or if delivered, that the home is uninhabitable.

This bureau has been successful in resolving a large number of these complaints through the effective use of our investigatory powers, thereby bringing about delivery of title, restitution of contract deposits, and the correction of construction defects.

Conferences with local building departments and with banks have frequently resulted in the satisfactory resolution of these complaints.

Home Improvements and Swimming Pools

Here, too, our investigations reveal that most complaints are against contractors who operate with very limited capital. In 1978, the bureau obtained restitution of $45,799.27 in these categories.

Miscellaneous Frauds

Complaints charging usury, excessive finance charges, false advertising, illegal or fraudulent contests, wrong billings, improper collection practices, fraudulent sales practices, and a wide variety of other business complaints were received. In 1978, the bureau disposed of 1,434 complaints in this category and obtained restitution of $127,298.19.

General

Many of the investigations conducted by this bureau have established facts showing jurisdiction by other government agencies, including the Federal Trade Commission, the Federal Bureau of Investigation, District Attorneys, State Agencies, and Local Agencies. The results of these investigations were forwarded to the agencies having jurisdiction and we have otherwise cooperated with them.

The total restitution obtained for complainants in 1978 amounted to $295,972.48.

CHARITY FRAUDS BUREAU

HERBERT J. WALLENSTEIN
Assistant Attorney General In Charge

The Charity Frauds Bureau, as its name implies, is concerned with the enforcement of the charities solicitation law (Executive Law, Article 7-A). New Yorkers are most generous in responding to pleas from "charities". Experience reveals that, more often than not, the entrepreneurs who solicit these funds are the beneficiaries and not the purported charities. Unscrupulous professional fund raisers, using the names of various police organizations, have retained between 50 and 90 percent of contributions received. The use of high pressure telephone salesmen coupled with the offering of placques, membership cards and, where that fails, with veiled threats of police recrimination, all of which followed by immediate pickup of checks from business enterprises resulted in large sums of money being removed from the legitimate charity market. The failure to advise the public that only a small portion of the charity dollar was being used for the purpose for which it was intended was deemed sufficient for the Supreme Court to grant a temporary injunction against *International Conference of Police Associations,* its officers and the corporations hired to solicit advertisements in a journal in its name. Notwithstanding the court order, the solicitation for such advertisements continued. Representatives of the Bureau took jobs with the fund raiser and obtained evidence sufficient to hold ICPA in contempt of court. The main thrust of the complaint will be brought on for trial early next year.

The Bureau obtained the removal and the barring against future charity activities of local Bronx politicians who had used their positions in the Hispanic community to operate purported "cultural activities" whereby large sums of money were culled from local business people and others interested in advancing the cause of Puerto Rican culture. The officers and directors of *Puerto Rican Day Parade, Inc.* failed to keep proper books and records thereby preventing a thorough and complete audit, made personal loans to each other, filed incomplete annual reports to which their own independent accountants could not give the required unqualified certification. This failure to comply with the standards regarding proper use of charity funds and the reporting thereof resulted in a temporary injunction barring individuals from continuing to act as officers of the charity and from having any authority to collect or disburse funds on its behalf. The order further required the filing of proper and correct quarter-annual financial statements with the Charity Frauds Bureau pending trial and the amending of its certificate of incorporation to limit future activities to the sponsorship of an annual cultural parade.

Having obtained a temporary injunction in 1977 against a professional fund raiser soliciting advertisements for a monthly magazine published on behalf of *National Police Conference on P.A.L. and Youth Activities,* a New Jersey based charity, by reason of excessive fund raising costs and failure of the fund raiser to register as such as required by Executive Law, Article 7-A, this year we sought and obtained a permanent injunction against the fund raisers. The charity in the meantime had cancelled its contract and consented to a judgment directing it to cease using any unregistered professional fund raiser.

The Bureau settled its action against *Richard A. Viguerie Company, Inc.,* a Virginia based professional fund raiser which had been soliciting charity funds in New York on behalf of various clients without having been registered as a fund raiser and who had retained up to 75 percent of monies raised. This fund raiser, which has a nation-wide clientele, agreed to register and remain registered as a professional fund raiser and to limit its future charges for professional fund raising services on behalf of charities to 35 percent of gross monies raised, thereby assuring that 65 percent of such money would be received by the charities. A judgment to that effect was entered and the Viguerie Company paid $2500 costs.

In May 1978, *Toyota Motor Sales USA, Inc.,* commenced an intensive television, newspaper and magazine campaign to raise one million dollars for the U.S. Olympic Committee. The plan called for a donation to be made to the Committee "every time a new Toyota car or truck is sold through June 30, 1978." Investigation revealed that Toyota was not registered as a commercial co-venturer as required by Executive Law, Section 173 and that the advertisements violated Section 174(c) of that statute in that it failed to indicate the amount from each sale to be paid over to the Olympic Committee. After conference with representatives of Toyota, it registered and agreed, insofar as New York is concerned, to display notices in all dealerships that $8 of each sale ($4 from the dealer and $4 from Toyota) would be paid over to the U.S. Olympic Committee. The fund solicitation ended on June 30, 1978 with dealers throughout the United States generating $399,956

and Toyota paying the balance of $600,044, for a total of $1,000,000.

When the various licensees of *McDonald Corporation* determined to raise money to assist Children's Oncology Society of New York, Inc., open a "Ronald McDonald House" in New York by donating 25 cents for each banana float sold, we advised both the entrepreneur and the charity of the requirements of the law respecting registration of commercial co-venturers. As the year ended, a trade association, composed of the various franchisees of McDonald's, was in the process of completing registration as a commercial co-venturer. It is anticipated that approximately $100,000 will be raised by this group in each of the next five years.

We uncovered another violation of the commercial co-venturer section of the charities solicitation act as a result of an investigation into complaints pertaining to the activities of an organization selling cloth goods using the names of Epilepsy associations in Buffalo, Syracuse, Albany and Utica. We found that *Pre-Snap Products Inc.*, a commercial enterprise, was improperly using the names of the various Epilepsy associations indicating that the sale of the cloth goods would benefit epileptics. We discovered that the agreement between Pre-Snap and these various groups was such that less than 10 percent of the sale would be paid over to the charity, without advising prospective purchasers of this fact. We further ascertained that more than $143,000 had been spent by the public for merchandise and the charities received less than $11,000. We prepared the pleadings and forwarded the file to the Buffalo and Syracuse offices for action. As the year ended, a stipulation and consent judgment was being worked out with the attorneys for the fund raisers, limiting their activities and form of solicitation. The Syracuse charity also consented to a limitation of its use of professional fund raisers.

By reason of a series of complaints filed with the Bureau pertaining to the alleged harrassment tactics of *Congress of Racial Equality (C.O.R.E.)* with respect to the solicitation of funds for various publications of the organization, the Bureau commenced an investigation. The investigation was greatly enlarged when an examination of books and records indicated that there was a probable unauthorized use of funds solicited for charitable purposes by key officers and directors of the organization. The investigation indicated that these key officers were using the monies for junkets and trips to various parts of the Carribean as well as Europe; trips to various heavy-weight boxing matches as well as to California and other parts of the Midwest. As the year drew to a close, an action for an accounting and removal of the various officers of C.O.R.E. was commenced.

The Bureau Chief has, for the past twelve years, been the designee of the Attorney General to the New York State Cemetery Board, a supervisory administrative agency in the Department of State. The Cemetery Board passes upon rate applications of approximately 2,000 non-profit cemeteries registered with the Division of Cemeteries. Applications are reviewed at the monthly meetings of the Board.

The Bureau also handles all litigation pertaining to cemeteries and has affirmatively brought actions to remove officers and directors found to be delinquent and derelict in their duties as fiduciaries or where there has been actual defalcation of funds belonging to the cemetery or trust funds managed by the cemetery. In 1978, there were three such actions commenced and monies recovered.

The Bureau works closely with the New York State Insurance Department, Liquidation Bureau, to protect the interests of members of various benevolent burial societies which seek to dissolve and distribute assets, including cemetery plots to members. We have been instrumental in making arrangements for the equitable distribution of all such assets and to see to it that provisions are made for the care of cemetery plots formerly belonging to these societies.

During the course of the past year, this Bureau has conducted investigations into the state of affairs of more than 60 ethnic fraternal organizations which offer sick and/or death benefits to its membership. These investigations were instituted at the behest of anxious members who variously reported that membership meetings and general elections were infrequently or in some cases never held, benefits arbitrarily delayed or denied and financial accountings never rendered.

Examination of officers and organizational records disclosed that membership had severely declined and little or no communication existed between officers and members. Although substantial assets consisting of sizable bank accounts, bonds and considerable excess graves remained in control of its officers, benefits were reduced and difficulties were encountered in obtaining grave assignments. Some organizations were illegally selling graves to persons other than members. In two cases, officers had diverted funds for their own use. Remedial action by this Bureau has resulted in the dissolution by the Superintendent of Insurance of many of these organizations, where warranted, with a distribution of all assets among its membership.

The Charity Frauds Bureau has, under Attorney General Lefkowitz, had a varied and checkered career. It started out as a Bureau handling both charity and miscellaneous frauds. The miscellaneous frauds aspect dealt primarily with rent security, home improvements, swimming pools, puzzle contests, giveaways and games of chance. We successfully sponsored legislation requiring the registration of all games of chance used in conjunction with the promotion of the sale of merchandise (General Business Law, 369-e). In addition in 1973 we successfully sponsored an amendment to General Business Law 396-f concerning blind-made products and the percentage of blind personnel involved in the manufacture or packaging of such products to the end that persons legally blind were in effect the true manufacturers of such products. We also assisted the swimming pool industry in setting up a code of ethics for advertisements of home installed swimming pools.

The miscellaneous frauds aspect of the Bureau was spun off into its own Bureau in 1970 and the Bureau continued its activities in the charity fraud field. However, in 1974, there was added to the activities of the Bureau the defense of Article 78 proceedings brought against the State Commissioner of Social Services. In the first year, the Bureau handled 444 Article 78 proceedings; in the year 1975, it handled 498 proceedings; in 1976 we handled 375 and in 1977, 398 cases and in this year of 1978, we have handled approximately 350 new Article 78 proceedings. On hand at the end of the year were more than 575 cases, many of which are appeals which will be argued in 1979. Many of the Article 78s have been landmark cases concerning the rights and obligations not only of persons receiving public assistance but also of the State Commissioner.

In 1978, in addition to the large volume of Article 78 proceedings, the Bureau received and actively moved on 52 new charity fraud matters and had an inventory of active cases of 137 in various stages of either settlement or being readied for court action.

This year we recovered $5250 in costs and saw to it that approximately $1000 was returned to members of the public.

CONSUMER FRAUDS AND PROTECTION BUREAU

STEPHEN MINDELL
Assistant Attorney General In Charge

Under the day-to-day leadership of Assistant Attorney General Stephen Mindell, the bureau has aggressively pursued numerous avenues, heretofore unknown, in the area of consumer protection. Given the duties and responsibilities of enforcing the state's consumer protection statutes, our bureau has compiled a proud record of achievements. For the 11 month period ending November 30, 1978, the bureau handled approximately 17,000 complaints, and recovered just under $3,000,000 in restitution of monies and services and collected nearly $90,000 in costs and penalties.

What follows is a summary of a smattering of the legal matters handled by our bureau in 1978.

A substantial part of the Bureau's activity in 1978 centered around the travel industry.

In one case, consumers who booked future passage towards cruises that were subsequently cancelled aboard the ill-fated cruise ship "SS AMERICA" received full refunds through our good offices. Under the terms of an agreement reached between the cruise line that operated the ship and the Attorney General's Office, approximately $575,000 was turned over by the line to the Attorney General for distribution to thousands of consumers. Shortly after embarking on its first voyage to "nowhere," the ship was forced to return to New York waters to let off hundreds of irate consumers in the middle of the night. The consumers were not given accommodations due to the line's overbooking and the unsanitary conditions aboard ship involving the plumbing and other facilities. Its second cruise fared no better, provoking hundreds of complaints to the line and to the Attorney General. As a result, all future cruises were then cancelled. The speedy agreement reached with the Attorney General following intensive negotiations, further provided that the cruise line and its principals would not resume the "America's" cruise program until such time as all serious and substantial deficiencies reported by the U.S. Health Service and all necessary plumbing and other repairs were made. In addition, the Attorney General, after several on-site visits by his staff, urged the cruise line to compensate those passengers who went on the first two cruises and who complained regarding malfunctioning plumbing, dirty cabins, and the lack of adequate and advertised facilities.

In response to public inquiries as to how to obtain information on sanitary inspection ratings of cruise ships, the Attorney General requested and received from a number of cruise ship operators their agreement to adopt a policy of furnishing the latest score of the sanitary inspection of their ships to inquiring passengers. Prior to our interceding in this area, the scores given by the U.S. Public Health Service were generally not available directly from the cruise ship operator. One would have had to take the time, effort and interest to contact the Quarantine Division of the Health Service to obtain such information, and usually it took several weeks.

A consent judgment was entered into by a tour packager which advertised guaranteed Super Bowl tickets as part of its special Super Bowl XII charter package to New Orleans. The tour packager did not have the tickets at the time it advertised the tour nor was it able to secure a sufficient number of tickets to satisfy its customers prior to game time. As a result of this office's intervention, over $22,000 was turned over to the Attorney General by the tour operator to effectuate refunds to consumers. The corporation was enjoined from advertising the availability of tickets to any special sports or other event unless it physically had possession of an adequate number of tickets to meet a reasonable demand.

As an offshoot of this experience, and at the direct urging of the New York Attorney General, the Civil Aeronautics Board promulgated a rule requiring all tour packagers who file a Super Bowl program to furnish proof in advance that the tickets are, in fact, in hand before the charters are offered for sale. Without this verification, the prospectus will be rejected by the CAB. Also, at the insistence of the Attorney General, the National Football League modified its procedures and allotments for the distribution of future super bowl tickets.

Approximately 100 consumers who stayed on line at the various ticket offices for many hours, some overnight, to be the first to obtain roundtrip tickets to California for $99, as advertised by a major airline, were incensed when the ticket offices opened and they were advised that all the $99 tickets were already sold. The Attorney General was contacted and promptly elicited an agreement from the airline whereby those passengers who had legitimately attempted to avail themselves of the $99 offer would be accommodated and given a preference towards obtaining the $99 fare, as seats are available, for the duration of the special promotion. As a result, most of those would-be passengers were actually accommodated for the dates they desired.

The airline also agreed to disclose in its future advertising any restrictions or limitations effecting such offer and to indicate the extent of the availability of the reduced-priced tickets.

An agreement was reached between the Attorney General and an association of auto dealers relating to the practice followed by many dealers of adding an item to the new car buyer's bill described as "preparation charges", "predelivery service", "dealer preparation", or "handling and delivery" and usually ranging from $25 to $200. The Attorney General took the position that since most American auto manufacturers reimburse dealers for specified predelivery services, it is deceptive to charge the consumer for such items, which, in effect, means collecting the charge twice. In addition, the Attorney General felt that the preprinting of such charge – as many dealers do – cause car buyers to mistakenly believe such charges are mandatory when in fact they are optional. The association agreed to advise its members that they are to cease: 1) charging buyers for services for which they are reimbursed by the manufacturer, 2) pre-printing an item for preparation charges on new car orders and invoices, 3) failing to itemize on invoices the price and nature of the actual services rendered but not reimbursed by the manufacturer, where opted for by the buyer, and 4) pre-printing optional specified services unless all other available options are also preprinted. The association agreed to submit to the Attorney General any evidence it may have of dealer non-compliance for appropriate action. We feel this agreement, the first to our knowledge in the nation, will have an effect throughout the industry and, hopefully, benefit the public.

A major domestic car manufacturer agreed to sell as used cars any car which receives more than $300 damage during shipment to dealers. Previously, cars with damage in excess of $300 were repaired to original condition and sold as new without the disclosure to the buyer of the shipping damage. The company entered into an assurance of discontinuance whereby it also agreed to urge its dealers to notify the customer in writing, and prior to sale, of any car which has had repair of in-transit damage of less than $300 except where the damage was insignificant. The amounts exclude replacement of stolen or damaged components with identical ones such as wheels, tires, radios and windshields. The $300 figure will remain fixed at least until November, 1979 after which it may be adjusted to reflect increases in costs of parts and labor. If a repair should have to be repeated during the initial new car warranty period, the new repair will be covered by the warranty for an additional 12 months from the date of the repeat repair. The company has agreed to notify some 120 New York buyers of 1978 cars which suffered in-transit damage in excess of $300. The Attorney General was advised that this agreement will be carried out on a nationwide basis.

In another automobile related matter, a major domestic car manufacturer entered into an assurance of discontinuance whereby it agreed to a program to correct water leaks in the roofs of certain 1975-1978 autos equipped with a lift-off glass roof. The Attorney General received numerous complaints from consumers whose cars, despite numerous good faith attempts on the part of the dealers and manufacturer to correct the situation, continued to leak. In a number of cases, interior upholstery and rugs were damaged. Our office contended that the manufacturer had the duty to disclose these facts to the customers prior to sale or cease accepting orders for the leaky roofs. Pursuant to the agreement, the company will send letters to all those affected to determine whether the customer was encountering a water leakage problem or if he has disposed of his car within the last 12 months because of it. Consumers who indicate an existing problem will be advised of the remedial program to be implemented which will include an inspection by a team of specially trained technicians and, where necessary, the installation of specially designed new parts. The car owners will receive an additional one-year warranty on the roof from the time the repairs are completed. In the event the car was disposed of, the company will pay an amount to the owner equivalent to the difference between the diminished value of the car as a result of the leakage problem and the market value of a car without such problem.

A new car dealer entered into an assurance of discontinuance with our office whereby it agreed to discontinue use of conditional sales agreements or purchase order forms that contain a provision which reserves to the seller the right to change the list price of new vehicles, optional equipment or accessories following the execution of such agreement between buyer and seller. In fact the legislature this past session enacted a law giving price protection not only to the retail buyer but also to the seller (dealer) vis-a-vis the manufacturer.

Judgments were obtained against two firms, which accepted more than $30,000 and $58,000, respectively, in deposits from prospective car buyers by allegedly misrepresenting that they could secure credit or solve credit problems. Consumers, most of whom were poor credit risks, paid to the firms from $100 to $2,300 as deposits on cars, but in many cases did not receive the additional credit resources they sought and were refused their money back. Consumers were also charged a "non-refundable fee" of $75. The firms were also enjoined from collecting illegally excessive loan-broker fees.

A major TV manufacturer has agreed with the New York Attorney General to disclose the existence of an excessive failure rate with its 4-lead capacitor in certain of its color model TV receivers. Over 1 million such units were produced. In about 30% of the cases of failure of this capacitor further expensive secondary failure occurred. The manufacturer advised that since 1974 approximately 242,000 malfunctions had occurred nationally as a result of the capacitor failure. In addition the manufacturer's dealers, under its own replacement program, had replaced an additional 274,000 capacitors nationally. Pursuant to the terms of the agreement, the manufacturer consented hereafter to give adequate notice where the existence of a defect or reliability problem is discovered and to adopt a preventive maintenance procedure and adjustment policy as well as a labor costs reimbursement program for those consumers who had paid for labor in replacing the faulty capacitor. The company adopted a special maintenance program for 38,000 New York sets with the troubled capacitor involving the replacement of the defective part without charge.

The Bureau obtained a consent judgment from four of seven respondents in a suit commenced by the Attorney General for violations of the false advertising and mail-order statutes. Certain individuals doing business under various names and through numerous different corporate entities, advertised their own cosmetic products and jewelry in various national publications and made various claims regarding the quality, price, value and familiarity of the offered merchandise. A judgment was entered upon consent of four of the respondents enjoining those respondents in regard to their advertising, from, among other things, 1) representing that the consumer is receiving substantially greater value than he is being charged unless it is substantiated; 2) representing that advertised items are guaranteed to have a manufacturer's suggested retail price unless it is substantiated; 3) representing that the cosmetic products advertised are "famous" or "famous name brand" products unless the products are in fact widely known and recognized in the area in which the ads appear; 4) depicting specific brand names or illustrations of specified items unless such items are actually furnished or disclosure is made that comparable items may be furnished and are in fact sent; 5) representing that the respondents are manufacturers' representatives unless they, in fact, are so authorized; and 6) failing to clearly state their full legal name and current street address in their advertising. The consenting respondents further agreed to create a $10,000 fund from which the Attorney General can process restitution claims. The case is still pending in the Supreme Court with regard to the remaining respondents who thus far have chosen to litigate.

In an action involving the distribution of assets of an insolvent auto rental firm, the issue was whether security deposits put up by consumer renters should be returned to consumers, or whether such consumers were ordinary general creditors. Since tax liens were large, the general creditors would not receive anything after payment of priority creditors. The state agreed that, under General Obligations Law § 7-101(1), a trust was imposed on the security deposits and the funds paid to the insolvent rental agency remained the funds of the consumer. The Appellate Division upheld the state's contention and overrode the contention of the Internal Revenue Service that the state was seeking a preference for consumers prohibited by federal statute. The court held the question was not one of priorities of creditors. The court indicated that since the security deposits were not the rental agency's funds, no question arose concerning the various priorites of the agency's creditors.

Our office is currently awaiting a court decision on a subpoena case, which presents questions beyond the mere issuance of a subpoena. A particular auto rental agency, as well as many others, provide a customer with an option of either being liable for the first $250 of damage resulting from a collision or "waiving" his liability for the first $250 of damage by paying a $2.50 daily fee (CDW) for the duration of the rental. The Attorney General believes that this $2.50 daily charge may be unconscionable if it bears no reasonable relationship to the actual cost experience of the agency. Our office, through its initial inquiry, has a basis to suspect that the agency may be collecting approximately 10 – 15 times the amount it costs them to assume the additional liability. In order to ascertain the actual facts in this particular situation, we issued the subpoena which the agency is vigorously judicially contesting. The issue presently before the court is whether excessive price alone may be deemed unconscionable and thus the subject for injunctive proceedings by the Attorney General.

Following the issuance of a subpoena in 1977 and successfully defending same, an action was brought this year to enforce New York Education Law § 213-b which prohibits the sale of term papers and other forms of assistance to students. The court granted the preliminary injunction prohibiting the defendant from soliciting customers on any school or campus and from selling or offering such research assistance to any enrolled student. The court held that the statute was not unconstitutionally vague or overbroad.

A major retail outlet chain entered into an assurance of discontinuance agreeing to discontinue making certain representations in attempting to collect from consumers whose checks were returned unpaid. The company will no

longer misrepresent 1) that a consumer committed a crime; 2) that non payment within a stated time will result in the arrest or imprisonment of the consumer, unless such action is lawful and the company intends to take such action; 3) the procedures employed by the courts; and 4) that once a suit is commenced restitution cannot be accepted by the company. The firm also agreed to discontinue collecting a $2 handling fee on a returned check unless such fee is legally chargeable.

In *State of New York* v. *Unique Ideas, Inc.* (85 Misc 2d 258, 85 Misc 2d 262, 380 NYS 2d 439, modified and affirmed 56 AD 2d 295, 392 NYS 2d 12, modified 44 NY 2d 345) the State's highest court passed upon fines imposed for civil contempt of court arising from violations of a consent judgment in a consumer protection case brought by this bureau. The highest court declined to fine multiple contempts based upon each separate misrepresentation made to consumers as had the courts below, but provided instead that money seized by the State, representing part of the monies paid by consumers, could be held by the State as a provisional fine while attempts are made to locate the victims of the fraud. The Attorney General was ordered to try to locate and reimburse the victims and to hold on to the fund "for a further suitable period to cover the discovery, submission and satisfaction of yet unknown claims." After restitution is completed to the extent possible, the final fine will be set by the court.

In 1978, further contempt proceedings were instituted in an earlier case involving a firm which did photographic enlargements. The firm continued to accept orders but failed to deliver the enlargements for many months despite an original injunction and several intervening fines for contempt. Finally, during 1978, the Attorney General sought imprisonment for civil and criminal contempt. As of this writing, the court has granted the Attorney General's motion but has not yet fixed the punishment.

It should also be noted that our bureau is given the assignment of prosecuting violations of the agriculture and markets law referred to us by that sister state agency, the Department of Agriculture and Markets. We have set aside a separate unit within our bureau which handles such matters almost exclusively. As of the date of this writing, for 1978, we have opened 885 cases and closed 658 cases and collected $42,814 in penalties.

Mediation

The bulk of the matters handled by the Bureau are resolved through the mediation efforts of the staff. The Attorney General has prided himself on this phase of his office and has steadfastly encouraged this function. The Bureau receives literally thousands of complaints a year, most of which are assigned to our professional staff for the purpose of personal mediation. The Bureau is proud of its record in this area and has been able to assist countless consumers with their day to day consumer problems, and in the most part very successfully, often after the consumer was unable, for one reason or another, to resolve his individual complaint himself.

Education and Other Activities

The need for information about existing state laws, affecting daily consumer decision making, is vital for the protection of the consumer. To partially fill this need, we provided educational services to the public through community projects, a speakers program, media employment, and interagency participation.

Established in 1971 and continuing strong today, our consumer reachout program, designed for people who have consumer problems, but who, for one reason or another, are unable to come to our offices for assistance, have provided much needed help and information. These self-help centers represent a cooperative effort between the community and the Attorney General's Office. Currently 26 centers are operable within New York City and environs, with more planned for 1979.

Our ongoing weekly half-hour radio show, entitled "Consumer Protection" on WNYC-AM from 9:30–10 PM Monday evenings has brought to the attention of our listening audience, a potpourri of consumer information, which we make special efforts to keep current.

Our office, testified before a New York State Assembly hearing discussing legislation which would regulate travel agents. At another State Assembly hearing, we discussed some of the concerns the Attorney General has uncovered in the funeral industry, especially regarding casket pricing practices. Meetings were also held, and helpful hints offered, to the FDA and the CPSC in their inquiries on food coloring and toy safety.

Legislation

This year, as in the past, Assistant Attorney General Stephen Mindell, in charge of the bureau, prepared a summary of the consumer legislation passed by the legislature. The articles appeared in the New York Law Journal on June 13, 1978 and August 17 and 18, 1978.

REAL ESTATE FINANCING BUREAU

ARTHUR S. LEVINE
Assistant Attorney General In Charge

Introduction

The upward trend in the real estate market noted in the 1976 Annual Report, confirmed in the statistics of the 1977 Annual Report, was further confirmed by the volume of registrations of real estate syndications and cooperative and condominium offerings filed with the Real Estate Financing Bureau for the first ten months of 1978. (November and December, 1978 statistics were not available as of the writing of this report).

Further, evidence of this trend is the substantial increase in cooperative and condominium conversion plans submitted and filed during the course of this year. The number of conversion plans is particularly significant because it reflects the existence of a strong market among members of the public who are not necessarily involved in the real estate industry except to the extent that they occupy space for personal use. It is also evidence of the lack of sufficient newly-constructed rental housing to satisfy the needs of a significant portion of apartment dwellers whose only alternative is to purchase apartments.

This movement has brought fear and hardship to apartment renters who do not wish to purchase or cannot afford the prices demanded by owners converting to cooperatives and condominiums. It has also resulted in the unwillingness of some owners to negotiate with tenants for improvement in the terms of the offerings. The fear and hardship thus created is reflected in the large number of complaints made to this office and the investigations which flow therefrom.

During this year an increasing number of tenant groups and committees have requested appearances at their meetings of representatives of the Bureau to explain the laws relative to the conversion procedure. Since these meetings are conducted in the evenings at or in the vicinity of the affected premises, the Bureau is hard-pressed to find the personnel to accommodate all the demands. Increased service to the community in this regard is dependent upon an increase in the size and the staff, and replacement of departing personnel.

Syndication Division

During the ten months ending October 31, 1978, in comparison with the entire previous year, the number of real estate security offerings registered by the Division increased 5.7% and the number submitted increased 9%. The total dollar amount of real estate securities registered exceeded $9.8 billion for the ten months. The total dollar amount of registration fees collected by the Division increased 34%. The Syndication Division has jurisdiction over all real estate securities which are offered and sold primarily as investments.

A statistical summary of the Division's real estate syndication registration activities during the ten months ending October 31, 1978, in comparison with the preceding entire year, follows:

	1977	1/1/1978 to 10/31/1978
Number Submitted	702	765
Number Registered	672	710
Withdrawn or Denied	27	46
Under Review at Year End	55	62
Total $ Amount Registered	$10,177,161,508.07	$9,885,693,541.05
Fees Collected	$ 321,948.00	$ 435,950.00

The large (relative to the shorter time period) increase in the number of syndication offerings submitted to the Division and registered by it reflects both improvement in real estate market conditions and the enhanced popularity of the real estate limited partnership. The Tax Reform Act of 1976 drastically reduced the tax shelter advantages of many other types of investment and thereby increased the relative importance of the real estate partnership as a tax shelter investment vehicle. Most of these limited partnership syndications were sold at "private offerings" within the § 4(2) exemption of the 1933 Securities Act and were not registered with the Securities and Exchange Commission. Registration in New York was through exemption under Section 352-g of the General Business Law, granted upon written application and the payment of full syndication filing fees. The syndications submitted during the ten months ranged in size from $45,000.00 to $200,000,000.00. These figures are the amounts of the equity offerings and do not include amounts of mortgage financing for which the limited partners are generally not liable. In addition to the limited partnerships, and syndications fully registered with the SEC, a large number of government-related debt security syndications were registered by exemption during this period.

The Division also handles offerings of securities made only to residents of New York. A statistical summary of intrastate security registrations during the ten months ending October

31, 1978, in comparison with the preceding entire year, follows:

Intrastate Offerings	1977	1/1/1978 to 10/31/1978
Number Submitted	9	6
Number Registered	8	3
Withdrawn or Denied	1	2
Under Review at Year End	10	11
Total $ Amount Registered	$6,259,305.00	$965,500.00
Fees Collected	$ 9,626.53	$ 2,327.50

The intrastate statute covers offerings of securities which are exempt from federal registration because they are intrastate. Intrastate registrations which are an insignificant part of the Division's total workload, declined during the period.

Cooperative and Condominium Division

(Includes Homeowner Associations and Miscellaneous Offerings of Cooperative Interests in Realty Which Are User-Oriented)

During the last three years the real estate industry concerned with cooperatives, condominiums and homeowner associations has continued to experience a major upswing in public offerings of these types of real estate interests. This segment of the industry has shown a remarkable recovery from the severe economic effects of 1976 as may be seen from the following tables. All statistical data for 1978 covers the period January 1 through October 31, 1978.

Total Number of Offering Plans.

	1976	1977	1978 (as of 10/31/78)
Submitted for Filing	167	300	397
Accepted for Filing	121	249	295

In addition, there was an increase in the number of applications to test the market.

The total dollar value of the offerings which were accepted for filing in the years 1976, 1977 and 1978 are as follows:

	1976	1977	1978
Condominiums	$242,599,400.48	$607,565,640.00	$360,779,026.00
Cooperatives	73,198,585.22	103,909,868.00	330,684,548.00
Coop. Pub. Asst.	7,633,427.50	–0–	–0–
Homeowner Assn. and Misc.	10,759,142.00	18,919,498.97	17,921,747.00
TOTAL	$343,190,555.20	$730,395,006.97	$709,385,321.00
Total Fees Collected	$ 113,950.00	$ 216,350.00	$ 295,100.00

Sponsor-developers of plans were required to amend their offering plans in order to continually assure full disclosure to the consuming public. This resulted in the following record of amendment submissions and acceptances:

	1976	1977	1978
Amendments Submitted	695	815	745
Amendments Accepted	658	675	689
Fees Collected	$36,400.00	$33,800.00	$34,450.00

The total filing fees collected for these years for all initial filings and amendments are as follows:

1976	1977	1978
$146,700.00	$250,150.00	$329,550.00

In addition, the Division's staff of architects and engineers spent 103 man-days in the field to physically inspect the condition of existing properties, new construction projects and the records of the local municipal authorities having jurisdiction over these projects.

In order to assure the Department that no high pressure sales techniques were used and to audit the sales practices of sponsor-developer, the Division's investigators were required to make 81 field inspection trips. In addition, the investigators performed 675 personal background investigations on sponsors and their sales personnel.

These results were achieved even though this Division lost the services of three experienced reviewing attorneys and have not yet replaced these attorneys who had left the State service or been assigned other duties. The reviewing staff now consists of one principal attorney, two associate attorneys, two attorneys, one associate architect and three associate engineers.

Of those offering plans accepted for filing in 1978 the following involved novel developments and concepts.

Loft Conversions

In years past, there had been a growing trend in various parts of New York City to convert existing manufacturing and commercial buildings to residential use. A new type of purchaser was sought, the "Urban Pioneer". In 1977 the Division began a program to advise this segment of the purchasing public that such buildings could not lawfully be occupied for residential purposes. In addition, the Department required the sponsor-developers to require the cooperative corporation to convert the common areas to residential use and to supervise each apartment (or floor) purchaser to hire a licensed architect or engineer to draw plans and supervise the conversion of each apartment (or floor) to residential use and to obtain a Certificate of Occupancy for residential purposes.

This program was implemented without specific statutory authority but received total voluntary acceptances by the sponsor-developers. In July, 1978 the Department received legislative support for its program in the passage of Ch. 509 of the Laws of 1978 which required sponsors to submit plans and specifications for common area alteration and to require purchasers to accomplish unit alteration and the obtaining of a permanent Certificate of Occupancy for residential purposes within 2 years from the date the sponsor received temporary municipal certificates for the alteration of the common area. This furthered the Department's goal of full disclosure, gave the Department statutory authority to require municipally-approved plans and specifications in advance of accepting an offering plan for filing, and assured the public and purchasers of an orderly recycling of older manufacturing buildings to residential use. Thus far into 1978 there have been 52 offering plans submitted for loft conversion.

At an asking offering price of $63 million, an average of $175,000 per apartment, the Sovereign, located at 425 East 58 Street, is among the highest-priced cooperative offerings ever to be made in New York. The offering consists of shares in a cooperative corporation which owns the building while holding a lease on the underlying land. Other parties retain rights as owners of the land and mortgagees of the building and the leasehold. In order to obtain for himself a favorable income tax result under Section 351 of the Internal Revenue Code, the sponsor conveyed the building and leasehold to the cooperative corporation before shares of the corporation were offered to the public. As a result, provisions were necessary to protect purchasers against title problems and unknown liabilities of the corporation arising prior to the offering. Also involved are other unusual questions of title, financing and Federal Tax Law.

Northway Medical Condominium in Yonkers and Suburban Medical Center Condominium in Williamsville involve infrequently used sections of the Condominium Act relating solely to business condominiums. Both projects required innovative approaches to allocation of common expenses, right of present occupants through the Board of Managers to screen potential purchasers, scope of easements over common elements to be granted unit owners and procedures to be followed in case of condemnation.

Gramercy Spire Condominium, located at 142 East 16 Street, is a building financed with federal funds which is now sought to be converted to cooperative ownership. From the proposed conversion arises an unusual interplay between local and federal law and regulation. As a result of the federal funding, the Federal Department of Housing and Urban Development has the power to suspend certain provisions of local rent laws relating to rent increases and rights to continued occupancy. The local laws also contain specific provisions regarding cooperative and condominium conversions. The scope of the federal agency's right to bypass these provisions has been limited in the past by case law and, in this case, as a result of litigation by the tenants. Involved are novel issues of disclosure of rights of tenants and purchasers to possession of apartments and as to the amount of permissible rents.

Enforcement and Litigation

Despite further reductions in the staff during 1978, the Enforcement and Litigation Section of the Real Estate Financing Bureau commenced more than 300 additional investigations during the first ten months of 1978. As general economic conditions improved, the public purchased and invested in more real estate securities (see registration figures). Such purchases and investments gave rise to a significant number of complaints and inquiries – many of which were satisfactorily resolved by the intercession by our office. The more complicated complaints resulted in investigations involving service of subpoenas, examination of witnesses, books and records, and preparation for litigation.

Investigations, which disclosed evidentiary proof of violations of the relevant statutes and regulations, terminated in 57 promoters, developers and issuers being the subject of 35 Assurances of Discontinuance and Injunctions. These en-

forcement proceedings during the first ten months of 1978 yielded $53,400 in costs paid to the State. In addition, indictments (from prior years and 3 more defendants indicted by the Bureau during 1978) resulted in 3 convictions and a lengthy criminal trial begun in October which, it is estimated, will not be concluded before the beginning of 1979.

All forms of enforcement proceedings by the Real Estate Financing Bureau resulted in more than $740,000 in restitution being offered to New York investors who had paid or obligated themselves to pay for cooperative interests in realty. In addition, the Bureau has been successful in two matters in having the Court appoint a receiver and a referee to marshal the assets prior to an offer of restitution to the investors. In each instance, the monies are in bank accounts awaiting Court approval for an appropriate plan of restitution. Such restitution is imminent, and will exceed $260,000 (*People* v. *Development Services Inc.*) in one instance, and $3,495,000 in the other (*People* v. *Leo Kossove*).

In one of the more significant cases, the Bureau obtained an order permanently barring a real estate promoter from the securities business in New York. The promoter had raised more than $5 million from investors in six limited partnerships in violation of the New York Real Estate Syndication Act. In another matter, the office obtained an indictment of a promoter who fraudulently induced an elderly woman to invest $75,000 in an unregistered limited partnership interest in the ownership of an apartment building on the Grand Concourse in the Bronx.

The felony convictions obtained in *People* v. *Rosano, Newmark, Naples and Village Mall Townhouses, Inc.* noted in the 1977 Annual Report resulted in prison terms for Rosano and Newmark and a suspended sentence for Naples, fines against the corporation defendant and an order of restitution of approximately $125,000.00. The full execution of the sentences is awaiting the results of appeals taken by the defendants.

Presently awaiting a decision of the Court of Appeals is *People* v. *Central Federal Savings and Loan Assoc.*, a matter involving an allegation by the Attorney General of usurious loans to condominium purchasers in contravention of banking laws and regulations brought under Section 63 (12) of the Executive Law seeking a permanent injunction and restitution.

SECURITIES BUREAU

ORESTES J. MIHALY
Assistant Attorney General in Charge

In January of 1957 when Attorney General Lefkowitz assumed the office of Attorney General the Securities Bureau was primarily concerned with the activities of fraudulent over-the-counter securities brokers and frauds perpetrated upon the public as a result of these so-called boiler rooms. Since that time, however, the scope of the concern of the Securities Bureau has greatly expanded. The record of the Securities Bureau for the year 1978 is an excellent example of its ever widening role in the protection of the New York investing public.

In 1976 the Securities Bureau commenced one of the most comprehensive investigations in its history into allegations that fictitious transactions had been placed upon the options tape of the American Stock Exchange by options specialists on the floor of the Exchange. As a result of that investigation eleven American Stock Exchange specialists in call options were arrested during this past year following the filing of eight indictments charging approximately 1,000 counts of the crime of violating the State's General Business Law and falsifying business records. These arrests followed the indictment and arrest in December of 1977 of Robert Reid, a former Vice President of the American Stock Exchange in charge of the Options Program. He was charged with alleged perjury committed when he denied under oath during the Securities Bureau's investigation that he had directed or solicited the specialists to print such transactions on the tape.

The defendants resisted the indictments vigorously and addressed several motions to them. This Bureau successfully defended the indictments. A ruling by Justice Irving Lang of the New York County Supreme Court holding that no intent is required in a criminal prosecution under § 352-c of the General Business Law will be a significant holding for future reference.

In July of this year after a three week trial defendant Reid was acquitted on eight counts of the indictment. The jury remained "hung" on the remaining counts after nearly four days of deliberation. These latter counts were dismissed on motion of the Attorney General in the interest of justice later in the year.

Seven of the eleven specialists who were indicated were fined by Judge Lang a total of $74,000 in the Fall of 1978. The defendants also were permanently enjoined from engaging in such practices in he future. Judge Lang adjourned further decision on the criminal charges in contemplation of a dismissal if the defendants do not violate the provisions of the state securities law during the next six months. A trial date has been set for the remaining four defendants.

During the disposition of these indictments Judge Lang complimented the investigation and action taken by this Bureau as a significant factor in deterring the practice of printing fictitious trades on the tape.

In September of this year United Technologies Corporation of Hartford, Connecticut filed a registration statement under the Securities Takeover Disclosure Act in connection with its proposed takeover of Carrier Corporation headquartered in Syracuse, New York.

The Attorney General ordered the first public hearing under this statute which went into effect in November, 1976. After a thorough investigation including two days of public hearings in October during which the chief executive officers of both corporations were examined under oath by members of the staff, a decision was rendered on November 10, 1978 vacating the temporary stop order of October 2, 1978 and authorizing the continuance of the takeover bid by United Technologies Corporation upon finding that the full and fair disclosure requirements of the statute had been met.

In connection with these state securities disclosure acts members of the staff of the Securities Bureau have been active in aid of the filing of an amicus brief relating to the appeal of the State of Idaho from a decision of the federal court for the Fifth Circuit Court of Appeals which declared the Idaho State Takeover Disclosure Act unconstitutional.

During the course of this past year the Attorney General cautioned New York investors with respect to the newest wrinkle in the investment field. The public was warned about high pressure fraudulent diamond promotions. A Diamond Task Force to handle complaints in this burgeoning area of concern was established and has been conducting intensive investigations.

Members of the Securities Bureau staff travelled to Syracuse, New York and presented evidence before the Onondaga County Grand Jury which led to indictments against three upstate unregistered securities salesmen. Indictments charging Robert C. Rogers, John H. Schell and David C. Walters with grand larceny in connection with the sale of several million dollars worth of unregistered bonds to elderly residents of the Syracuse and upstate area were handed down. After defending several motions addressed to the indictments the defendants entered guilty pleas. The major malefactors, Rogers and Walters, were ordered to make restitution total-

ling approximately $70,000. The sentencing is scheduled for late November of this year at which time the Attorney General will ask for stiff prison sentences in this white collar crime because of the heinous nature of their activities – preying on elderly persons.

In the theatrical field a major investigation conducted by the Securities Bureau resulted in the suspension of Nathan Posnick, the Head Box Office Treasurer of Carnegie Hall. The investigation stemmed out of the inability of the public to purchase the amount of tickets advertised as available to a Vladimir Horowitz concert at Carnegie Hall in January of 1978. Posnick was suspended after allegedly diverting 300 tickets to a New Jersey gyp ticket broker. In addition to the action taken against the treasurer, injunctive action was taken against two officials of the Carnegie Hall corporation, Julius Bloom, formerly the director of corporate planning and vice chairman of the Board of Directors of Carnegie Hall and Stuart J. Warkow, house manager. Bloom and Warkow were ordered to correct any misleading advertisements concerning the availability of tickets at Carnegie Hall in the future and Carnegie Hall agreed to revise its ticket distribution procedures as a result of the investigation by this Bureau.

The authority of the Attorney General to suspend or revoke the registration of ticket personnel in theatrical box offices was expanded by legislative action in 1978 to extend our authority over box offices at sports arenas throughout the State.

Francis O'Keefe, an erstwhile theatre ticket agent, was indicted for grand larcey for misrepresenting to two elderly ladies that he would invest $45,000 of their monies in Broadway productions of "Chicago" and "The Wiz". In fact, O'Keefe had no connection with the shows and the investment was never made. O'Keefe pleaded guilty to grand larceny and was sentenced to one year in prison.

A permanent injunction was obtained against Otto & Yitka Kozak, officers of Filmaco, Inc., as a result of fraudulent activities in connection with the promotion of foreign films.

The Attorney General named a committee of prominent industry representatives to act as an advisory committee to the Securities Bureau in connection with the recommendation of statutes and regulations pertaining to the regulation of investment advisors and their implementation.

Acting on instructions of the Attorney General, the Chief of the Securities Bureau testified before the Commodity Futures Trading Commission in February of 1978 in Washington, D.C. and supported a proposal by that federal agency to ban London options selling by rule. This had been the position of this Bureau since 1975. Subsequent to this appearance the Commodity Futures Trading Commission did move to ban the sale of London options.

Other actions taken during the course of the year involved an injunction against Drillers Petroleum Corporation and its president Michael De Benedetto in connection with the sale of oil operating agreements and oil leases. An advance fee scheme was stopped by injunctive action taken in the case of Fernando Augusto Ford. Ford never fulfilled his promises to provide loans to prospective borrowers who paid advance fees ranging from $500 to $2,500. The New York County District Attorney's office indicted Ford for grand larceny.

Further activity in the area of unregistered employee benefit plans continued during 1978. The Registration Division of this Bureau took action against such companies as Walt Disney Productions, Eastman Kodak Company, Bausch & Lomb, Inc., Boise Cascade Corporation and Motorola, Inc. and others. A total in excess of $90,000 was received as costs in connection with these enforcement actions during the year.

In May, 1978 a permanent injunction against Monex International, Ltd. d/b/a Pacific Coast Coin Exchange and its president Louis E. Carabini was entered in New York County Supreme Court. This concluded three years of litigation against the defendants. Restitution in the amount of $300,000 in credits and cash was ordered to be given to customers of Monex.

The end of this year saw increasing activity by boiler rooms operating in the gold bullion sales to the public probably caused by the recent attractive position of gold in the world market. Investigation of several such firms has been commenced.

LAW ENFORCEMENT

CIVIL RIGHTS BUREAU

DOMINICK J. TUMINARO
Assistant Attorney General In Charge

In 1978, the Civil Rights Division handled sixty court cases and over one hundred other matters which did not require litigation. Among the Division's principal activities were the following cases and matters.

Health Insurance Association of America v. *Harnett* (Court of Appeals, N.Y. State)

The Division represented the Superintendent of Insurance in an action challenging the constitutionality of Ch. 843, Laws of 1976. Effective January 1, 1977, this statute required all insurance companies providing health insurance coverage in New York to include coverage for maternity care to the same extent as other coverage. The Legislature had enacted this statute in recognition of the spiraling costs of maternity care and the virtual absence of any affordable insurance in this area being offered by insurance companies.

Twenty-two insurance companies subject to the new law and their professional association attacked the law as unconstitutionally depriving them of due process, as violating the Contracts Clause of the United States Constitution when applied to existing policies which the insurer had no choice but to renew at the policy-holder's option, and as providing insufficient time for compliance. This Division argued that the statute was a constitutional exercise of the police power for a clear public need.

The State Court of Appeals unanimously affirmed the decision of the Appellate Division, First Department, which had also unanimously affirmed the decision of the State Supreme Court, New York County, holding that the statute was constitutional but that it could not constitutionally apply to existing policies which had to be renewed at the policyholder's demand. The cause of action alleging insufficient lead time was withdrawn by stipulation.

Delta v. *Kramarsky, SDHR & WCB*

The Civil Rights Division has been handling the defense of the new amendments to the Disability Benefits Law which provide that a woman is entitled to receive 8 weeks of disability benefits following a normal pregnancy if she is unable to return to work due to her pregnancy. This legislation, enacted in August, 1977, is being challenged by fourteen major airlines that claim that the law is unconstitutional and illegal. They claim it is pre-empted by ERISA, in violation of Title VII and the Railway Labor Act.

The defense of this case is unique since if the Division is successful, a benefit would be extended to pregnant women which the Supreme Court has held is not required under Title VII or 1983. We are contending that, although it may not be required, it is not inconsistent with Federal law for New York State to grant greater benefits to employees if the Legislature so desires.

Board of Education v. *Califano, SDHR & N.Y.S. Department of Education*

The Civil Rights Division is seeking summary judgment in this action commenced in the Southern District by the Board of Education to determine the legality of the State defendants' policy that health and physical education teachers be hired and seniority determined on the basis of one list of males and females. This is consistent with the rationale that there is no "bfog" for the position of HPE and that females may teach males and vice versa.

Hawley v. *Cuomo* (App. Div., 2nd Dept.)

The Civil Rights Division continues to provide legal representation to the Secretary of State in defending orders designed to prohibit blockbusting or panic selling. In *Hawley* v. *Cuomo,* an order issued on July 21, 1976 by the Secretary of State which prohibited licensed real estate brokers and sales people from soliciting listings from homeowners in the boroughs of Queens and Kings, was challenged by real estate brokers who contended that such order was invalid as not having been issued after a public hearing and that such order was unconstitutionally overbroad. The order in question had been promulgated at the request of over 15,000 homeowners in those two boroughs.

After a full trial, the authority of the Secretary of State to issue the type of order in question was sustained as well as the authority of the Secretary to promulgate the order without first holding a public hearing. However, the Court held that the evidence presented did not warrant an order of borough-wide scope and thus enjoined the enforcement of the particular order. The Appellate Division, Second Department, affirmed and both parties have appealed to the Court of Appeals.

Zutell v. *Department of State*

The Civil Rights Division successfully defended the rule-making power of the Secretary of State to prohibit real estate

brokers from relocating to a non-solicitation area. In 1971, the Secretary of State, promulgated Rule 175.20 which provided that no real estate broker could relocate his office without prior approval of the Department of State. In denying the application of Mr. Zutell, a real estate broker, to relocate to a non-solicitation area and in granting the Department of State's motion to dismiss, the Supreme Court held that the Secretary of State had broad power to safeguard the public interest and that the application of Rule 175.20 was a proper exercise in furtherance of that power. The Court also sustained Rule 175.20 against an attack that it was arbitrary, capricious and unconstitutional.

Moody v. *Mario M. Cuomo*

The Civil Rights Division is also defending Rule 175.20 against a similar challenge in the case of *Moody* v. *Mario M. Cuomo.* This case is presently pending in Supreme Court, New York County.

Lefkowitz v. *Pratt Institute*

Pursuant to the terms of an assurance of discontinuance executed in August of 1976, the Division is in the process of conducting the second compliance review of the school's affirmative action program to determine whether the prior complaints of racial and sex discrimination in hirings and promotions at Pratt Institute have been resolved.

Association of Personnel Agencies of New York v. *Ross* (Court of Appeals, N.Y. State)

The Division successfully defended the constitutionality of General Business Law § 187, which prohibits employment agencies from discriminating on the basis of sex and subjects violators to possible criminal sanctions. Plaintiffs argued that private employment agencies were deprived of equal protection since, under the General Business Law, not all classes of employment agencies are subject to such statutory regulation and penalties. The State Court of Appeals unanimously affirmed the decision below dismissing the complaint for failure to state a cause of action.

Fullilove v. *Carey* (Sup. Ct., Albany Co.)

The Civil Rights Division represented the Governor in defense of the constitutionality of Executive Order No. 45 which was challenged by building and construction industry associations and officers. The Executive Order, promulgated in January, 1977, requires affirmative commitments by State and State-assisted contractors and subcontractors to assure equal opportunity for qualified minority group persons and women. Petitioners challenged the order as exceeding the legislative policy respecting the obligations of public contractors under existing provisions of the Labor Law. The Division defended the order as a proper exercise of the Governor's power to specify the terms of State contracts and under his constitutional responsibility and authority to enforce the State policy against discrimination as reflected not only in the Labor Law but in the many provisions of the Human Rights Law and Civil Rights Law.

The State Supreme Court, in an order entered at Special Term, invalidated the order relying on a Court of Appeals decision in a case involving an affirmative action order issued by the Mayor of New York City (*Broidrick* v. *Lindsay*, 39 N.Y. 2d 641 [1976]).

In an appeal to the Appellate Division, Third Department, the decision of Special Term was affirmed with a dissent by the Presiding Justice Mahoney. The case is presently on appeal to the New York State Court of Appeals.

Fullilove v. *Kreps, State of New York and City of New York* (U.S. Cir. Ct. of Appeals Second Cir.)

The Division represented the State of New York as a grantee under the Public Works Employment Act in the above action brought by building and construction industry representatives who challenged the constitutionality of § 103 (f) (2) of the Public Works Employment Act of 1977 which requires 10% minority business enterprise participation in any local public works project funded by the Federal government under the Act. The State of New York is a potential grantee under the Act of millions of dollars of vitally needed funding for construction projects.

The District Court, in a decision by Judge Werker, dismissed the complaint, finding that the MBE requirement is a valid and necessary provision for the accomplishment of Congress' goal of promptly alleviating the handicap imposed upon minority businesses due to the lingering effects of discriminatory conduct in the construction industry.

Plaintiffs appealed to the Court of Appeals for the Second Circuit which unanimously affirmed the District Court's decision holding that the government's interest in overcoming the disadvantages resulting from past discrimination is sufficiently compelling to justify a remedy which requires the use of racial preferences such as the MBE requirement.

Lefkowitz v. *Independent Northern Klans, Inc.* (N.Y. Ct. of Appeals)

The Division represented the Secretary of State in instituting a proceeding to dissolve the corporation and to enjoin the directors of a Ku Klux Klan type of organization to file documents (including a roster of membership) with the Department of State as required by § 53 of the New York Civil Rights Law. The Klan respondents, contending that the law did not apply to them, refused to file the materials requested and won a decision at Special Term, Albany County, upon the Court's finding that the Klan employed a pledge rather than a secret oath. Special Term sustained the constitutionality of the State law which had also been challenged by the Klan respondents. On appeal, the Appellate Division agreed with the Attorney General's contention that the Klan did, in fact, use a secret oath, affirmed the constitutional holding of Special Term and restored the complaint. The Klan then appealed to the New York Court of Appeals the decision of the Appellate Division, Third Department. After a failure by the Klan respondents to perfect their appeal in timely manner, the Court of Appeals, on its own motion, dismissed the appeal and remanded the case to Special Term where the ACLU sought to raise anew the constitutional issues which had been previously adjudicated by Special Term and affirmed by the Appellate Division. The Civil Rights Division opposed three motions by the respondents and cross-moved for summary judgment. Special Term denied the motions of respondents and granted the Division's motion for the relief requested in the petition. In compliance with the Court's order, the organization has been dissolved.

Credit Complaints

The Civil Rights Division has continued to satisfactorily resolve numerous complaints received from women (frequently referred by NOW) who charge that they have been refused credit on account of their sex or marital status.

EDUCATION BUREAU

FREDERICK NACK
Assistant Attorney General In Charge

The Education Bureau handles the enforcement of the laws regulating those professions which are licensed by the New York State Department of Education and which come under the jurisdiction of the Board of Regents.

Criminal prosecutions are maintained in the criminal courts throughout the State of New York against persons practicing or attempting to practice any of these professions without being licensed. In some instances a presentation of the facts is made to a Grand Jury of a particular county and an indictment returned by such a tribunal.

During 1978, there were many attempts by unlicensed persons to practice various professions including medicine. The Bureau successfully prosecuted 40 such criminal cases.

Fines levied by the criminal courts in the sum of $3,275 were collected for the year. In addition to such prosecutions, the Bureau also obtained injunctions barring the illegal practice of professions. The Bureau also disposed of 236 administrative proceedings directed towards the licenses of professionals including physicians, nurses, dentists, engineers, accountants, chiropractors, pharmacists, etc., for professional misconduct.

In these disciplinary proceedings prosecuted by us, the offenses committed by the license holders consisted chiefly of convictions of crime, narcotic drugs, fraud or deceit, gross negligence and unprofessional conduct.

In the field of pharmacy, these disciplinary proceedings were conducted against pharmacists who sold narcotic drugs, barbiturates and amphetamines to persons without medical prescriptions.

In the field of medicine, there were several proceedings against physicians who prescribed narcotic and hypnotic drugs to addicts and other persons illegally and without proper medical examinations.

In all of these proceedings, the licenses were revoked or suspended and additionally, the sum of $15,750 was collected by virtue of monetary assessments against the violators as provided by statute.

The Bureau also handled appeals which were taken from decisions of the Board of Regents which revoked or suspended licenses.

This Bureau also acts as counsel to the New York State Education Department and frequently confers with and assists officials of that Department in matters pertaining to professional conduct and law enforcement.

EMPLOYMENT SECURITY BUREAU ALBANY AND NEW YORK CITY

MURRAY SYLVESTER
Assistant Attorney General In Charge

This Bureau handles widely diversified litigation. It represents the Industrial Commissioner, as appellant or respondent, in all appeals through the courts from decisions of the Unemployment Insurance Appeal Board and in other litigation arising under the Unemployment Insurance Law (Labor Law, Art. 18) and related statutes. It institutes and conducts actions on behalf of the Commissioner for moneys owed to the unemployment insurance fund and on questions raised in the administration of Federal as well as State unemployment insurance laws. It appears for the Commissioner in bankruptcy, arrangement, reorganization, general assignment, decedent estates and foreclosure proceedings with respect to claims filed therein. It institutes and conducts criminal prosecutions based upon violations of the Unemployment Insurance Law and related statutes. The Bureau also conducts litigation of other kinds which is occasionally brought against or proposed by those administering the Unemployment Insurance Law.

On January 1, 1978, 2,176 appeals were pending in the Appellate Term, First Department, the Appellate Division, Third Department and the New York Court of Appeals. During the year up to November 1, 1978, 1,860 additional appeals were received making a total of 4,036 appeals. Of these 1,457 were disposed of, leaving 2,579 pending as of November 1, 1978 including 16 cases in the Court of Appeals and one case in the Appellate Term of the Supreme Court.

Briefs were written in 367 appeals from decisions of the Unemployment Insurance Appeal Board which were argued or submitted in 1978 up to November 1, 1978. Of 350 decisions on the merits rendered by the Court of Appeals and the Appellate Division, Third Department, 328 were in favor of the Industrial Commissioner. In 1978 to November 1, 83 appeals opposed by the Commissioner were dismissed by the Court for failure to prosecute or for untimeliness, 10 were withdrawn by stipulation and 994 were deemed abandoned pursuant to Rule 800.12 of the Appellate Division, Third Department.

The Bureau receives custody of Appeal Board records on their way to the Appellate Division and is charged with making them available to the parties. Claimants-appellants *pro se* are advised by this Bureau with a view toward enabling them to place their appeals in readiness for submission to the Appellate Division, Third Department. Approximately 1,163 parties or their representatives received assistance with their cases.

Before November we received for criminal prosecution 219 cases. The Bureau disposed of 2,562 matters in all. A total of $1,268,990 was collected and restored to the Unemployment Insurance Fund. This includes $1,058,291 obtained in various civil actions and proceedings and $210,069 paid by defendants in the course of criminal proceedings. There were 143 convictions of those who had committed unemployment insurance fraud (Labor Law, § 632), 97% of those brought to court for judgment.

Recent developments in applicable legislation have, on balance, foreshadowed an increase in the work of the Bureau. The expiration in 1978 of the Federal Emergency Unemployment Compensation Act of 1974 as well as the "triggering off" of extended benefits (Labor Law, § 601) operated to reduce the maximum number of benefit payments to which an unemployed claimant might become entitled. These developments do not affect the volume of original claims although a certain amount of related appellate business, questions arising in the course of a period when benefits are being paid, would have less time in which to develop. More significant are the Federal Unemployment Compensation Amendments of 1976 (P.L. 94-566) which prescribe extension of coverage in 1978 to many categories of employees not heretofore protected by State law. It is accordingly expected that the Bureau will sustain a net increase in work load in 1979.

Improved discovery of unemployment insurance fraud is expected as a result of the new statewide wage reporting system (L 1978, ch 545). One specific purpose of the statute is "identifying fraud and abuse within the unemployment benefits system" (Tax Law § 171-a, subd. [4]). This too will serve to increase the Bureau's work.

LABOR BUREAU

DANIEL POLANSKY
Assistant Attorney General in Charge

The Labor Bureau protects the rights of wage earners and injured employees by enforcing the provisions of the law for their benefit contained in various statutes such as Workmen's Compensation Law, Labor Law, State Industrial Code, Disability Benefits Law, Volunteer Firemens Law and Articles of 11 and 25A of the General Business Law. Cases pursuant to the above statutes are instituted both in the civil and criminal courts within the City of New York and throughout the State, depending upon where the violations are committed. The proceedings are commenced and pleadings prepared from the main office of the Labor Bureau in New York City whose staff enforces the applicable statutory provisions in greater New York City and in Nassau, Suffolk, Westchester, Rockland and Putnam counties. Cases instituted in upstate counties are handled through several offices of the Department of Law located in the principal cities of the State, in addition to its office in New York City.

Actions are processed principally in the Criminal Courts against employers for failure to pay wages, minimum wages or supplementary fringe benefits; for the illegal employment of minors and women in industries and for the failure of employers to carry workers' compensation and/or disability benefits insurance for injuries sustained by their employees, all of which are misdemeanors under the applicable statutes. Another important function of the Labor Bureau is to represent the Workers' Compensation Board on civil appeals to the Appellate Courts from decisions and/or awards by that Board, which appeals are taken pursuant to provisions of the Workers' Compensation Law, Disability Benefits Law or the Volunteer Firemens Law. Each year these appeals number in the hundreds.

Aside from advising and counselling the members and staffs of the Workers' Compensation Board and the Labor Department on all their legal problems, the Labor Bureau also institutes civil suits on behalf of the Industrial Commissioner for the collection of penalties imposed for the failure to pay inspection fees due to the Labor Department and, at the request of the Wor Compensation Board, steps are taken to effectuate collection of awards of compensation made against uninsured employers in the amount of $5,000 or more, by the entry of judgments against them and the institution of supplementary proceedings to compel payment where the employers fail voluntarily to satisfy the judgments.

It is noteworthy that among the many cases on appeal handled by the Labor Bureau an unusual situation was involved in *Matter of Slotnick* v. *Howard Stores Corp.* 44 N Y 2d 887, decided this year. In that case a traveling district manager of a men's clothing store, whose job required him to visit various branch units of the employer, was found, one afternoon at 3 P.M. wandering in the street naked in a dazed and bruised condition in the Borough of Manhattan, City of New York which was many miles away from the last branch store he had visited that day in the Borough of Queens. During the course of the day in question he phoned in from one of the branch stores at about 12 noon, and was not heard from thereafter. The employee contracted a cold and related asthma complications from his exposure and there appeared to be no facts to explain his being found naked during the afternoon that day in a semi-conscious state on the street. The employee died from his injuries and, on a claim for compensation filed by his widow alleging that her husband's demise resulted from an accidental injury, an award of death benefits was found to be due her. The case was contested on the ground that there was no proof that he was engaged in work activities at the time he was found semi-conscious and naked on the street. The Board and both the Appellate Division and Court of Appeals upheld an award in her favor based on the statutory and common law presumption in favor of injured employees where their accidents involving traumatic injuries are unwitnessed, unexplained, and arise in the course of their outside activities. It was held that in the absence of substantial evidence to disprove the presumptions that had to be produced by the employer, the award of death benefits was justified.

Another case decided by the Appellate Division, Third Department on October 19, 1978 is noteworthy as a case of first impression. In *Matter of DeMuro* v. *Sidney Greenwald doing business as Maple Leaf Nursing Home* 65 App. Div. 2d 660, (Third Department, October 17, 1978), the Court for the first time had occasion to interpret and apply the new provisions of Section 120 of the Workers' Compensation Law, which bars an employer from discriminating against an employee because he or she has made a claim or attempted to claim workers' compensation benefits, and further provides that if the employee is discharged for that reason or in any other manner penalized, the employer is liable for a monetary penalty and he can be directed to restore the employee who was discharged from his employment, with compensation to the employee for any loss of wages because of his or her discriminatory dismissal. In the cited case, the Court upheld

the validity of this law and affirmed a finding made by the Board that the employer had discriminated against the employee by discharging her because she had instituted a claim against him for injuries sustained in the course of her employment. The Board's decision, upheld by the Court, directed the claimants reinstatement in her former position with back pay in the sum of $16,383 and further fined the employer $200 as a penalty for a violation of the provisions of Section 120 of the statute.

Significant results were obtained by the Labor Bureau during the year of 1978 which included the disposition of 216 workers' compensation and labor appeals pending in the courts including the Appellate Division, Third Judicial Department and in the Court of Appeals. In this connection the Bureau was successful in upholding the decisions in 83 percent of the cases actually argued or considered on appeal.

The Labor Bureau also prosecuted and closed 649 criminal cases against defendants for violation of the workers' compensation law and the labor law; handled, entered and proceeded toward the collection of awards by the entry of 451 judgments and writs in supplementary proceedings consisting of restraining notices, subpoenas and executions against the property of judgment debtors; appeared and participated in 81 foreclosure actions where the Workers' Compensation Board was a defendant; upheld awards in favor of injured employees or their dependents upon the successful conclusion of workers' compensation appeals in the sum of $1,348,054.95; obtained restitution on claims and awards of compensation of $425,518.67; for injured workmen, their widows and dependents in cases where their employers failed to secure workers' compensation insurance or where the insurance carriers had become insolvent; obtained allowances of restitution after the institution of criminal proceedings against delinquent employers for unpaid wages and fringe benefits due to claimants under the labor law of $368,314.64; and obtained fines and penalties through court action against violators of the labor law and the workers' compensation law in the sum of $100,335.50. Finally, the Labor Bureau collected costs against employers and insurance carriers on appeals decided in favor of the Workers' Compensation Board in the sum of $16,161.30.

SPECIAL PROSECUTIONS BUREAU

ALLAN N. SMILEY
Assistant Attorney General In Charge

The activities of the Special Prosecutions Bureau are statewide, broad in scope and its investigations and prosecutions run the gamut of New York's civil and penal statutes and common-law.

Many of the Special Prosecutions Bureau's criminal case assignments stem from § 63 subd. 3 of the Executive Law which directs the Attorney General, at the request of a State officer, to prosecute indictable offenses in violation of a law which a State officer or agency head is required to execute. The Special Prosecutions Bureau, in addition, conducts investigations and prosecutes violations of many statutes, including the Tax Law, Public Health Law, General Business Law, Real Property Law, General Corporation Law, as well as the Penal Law.

The Special Prosecutions Bureau acts upon complaints of violations of the State Health Law from the State Health Commissioner and has obtained convictions of individuals who have practiced radiology without a license and acted as x-ray technicians and operators of medical laboratories without licenses. In addition injunctions have been obtained against various persons and entities operating without proper licenses or without licenses.

The Special Prosecutions Bureau is requested by the Secretary of State of the State of New York to prosecute persons who falsely hold themselves out to be licensed real estate brokers in violation of the State Real Property Law. The Bureau also investigates fraudulent apartment referral services and has succeeded in closing down numerous unlawful enterprises, again in violation of the Real Property Law.

The Special Prosecutions Bureau uses to the full advantage, in the public interest, the Attorney General's historic common law power to abate nuisances. The Bureau has used the "nuisance theory" to alleviate the complaints of harrassed residents whose neighborhoods were invaded by "teenage clubs", "after hour clubs" and similar clubs. Actions are commenced against establishments where evidence is obtained of illegal dealings on the premises and whose clients obstruct the neighborhood streets during evening hours.

An ever increasing area of work for the Bureau has been the criminal prosecutions of violators of the New York State tax laws. These cases were referred by the State Tax Commissioner, though some times they are conducted on our own initiative. The Bureau prosecutes more violators of the State Tax Laws each year than do all the sixty-two District Attorneys in this State combined.

In past years and again this year, in cases referred by the State Insurance Department, the Special Prosecutions Bureau alleged that a company which guaranteed to used car buyers that it would make repairs, if necessary, was doing an insurance business without the required license. We alleged that the firm contracted with the used car dealers to inspect vehicles for resale. The contract allegedly provided for the firm to issue a one year or 12,000 mile warranty on the power train components of approved vehicles, and called for the dealer to issue the warranty at a fee which was added to the auto's purchase price to the consumer. The firm allegedly had service contracts with various service stations to repair malfunctions in the power train subject to the warranty. The affidavits of many purchasers of the warranty were submitted as exhibits in the complaints. Court orders were obtained enjoining the firm from operating such an insurance business.

Numerous cases were referred to this Bureau for prosecution under the Motor Vehicle Repair Shop Registration Act, requiring the registration of all motor vehicle repair shops operating within the state. In order to maintain a "registered" status, repair shops must fulfill certain requirements designed to protect the consumer. At the Bureau's suggestion, the Commissioner of Motor Vehicles established procedures to expedite enforcement of the registration provisions. The Bureau has successfully implemented the program.

Pursuant to requests by the State Department of Health, the Special Prosecutions Bureau initiates actions seeking injunctive relief against establishments operating as nursing homes without the required approval of the Department of Health. The Bureau obtains judgments prohibiting such operations. Likewise, pursuant to requests by the State Board of Social Welfare, the Special Prosecutions Bureau initiates actions seeking injunctions against establishments or boarding houses operating as senior citizens homes without the requisite board approval. The Bureau seeks injunctions prohibiting the owners of such establishments from admitting new residents or operating, as the case may be.

In a case of first instance, pursuant to the request of the Department of Health, the Special Prosecutions Bureau obtained a preliminary injunction prohibiting a labor union from going on strike against nursing homes in Nassau and Suffolk Counties. The injunction prevented a strike for almost a year. The matter is now being litigated in the federal courts.

The Special Prosecutions Bureau continues to receive requests from the Bureau of Manpower Program Development and Occupational School Supervision of the State Education Department to investigate and prosecute private business schools which have not complied with the licensing requirements. The Bureau conducts many investigations of private business schools which allegedly operate without being licensed. The Bureau initiates actions, when necessary, seeking injunctive relief against private business schools and as a result of our investigations and after instituting legal proceedings, many private business schools comply with the licensing requirements or go out of business. If necessary, the Bureau will institute a criminal proceeding against a private business school if the owner fails to obtain a license.

An increasing area of activity for the Bureau has been the criminal prosecution of private investigators, watch guard and patrol agencies who have not complied with the licensing requirements of the General Business Law. A new area of activity has been the moonlighting of police officers as private investigators or proprietors of guard agencies without being properly licensed to do so by the Secretary of State.

As aforementioned, the Department of Taxation and Finance increased the enforcement of the criminal provisions of the Tax Law, and the Bureau handled a substantial number of criminal prosecutions for income tax, franchise tax, sales tax and withholding tax violations. In instances where sales tax and withholding taxes are involved the Bureau secures felony indictments against the corporations and individuals on the theory that these were trust fund monies and that the use of these funds by the defendants amounted to a larceny.

A new area of activity for the Bureau has been the representation of wardens of State penal institutions in State Habeas Corpus proceedings. The petitioners often mislabel the proceeding, calling it an Article 78 proceeding when it should be "habeas corpus" and visa versa. However, if the relief sought is in the nature of habeas corpus relief, the Bureau represents the Warden of the institution in which the petitioner is incarcerated. Another new area of activity for the Bureau are prisoner related Article 78 proceedings in which the head of a prisoner related State Agency or Institution is the respondent.

The Welfare Inspector General has continued to ask our assistance in the performance of his duties and responsibilities. The Bureau seeks Court orders to compel compliance of subpoenas issued by the Inspector General.

Another example of the varied requests made of this Bureau is the State Athletic Commissioner's request that we enjoin or otherwise seek the cessation of unlicensed and unauthorized wrestling matches and exhibitions. The Special Prosecutions Bureau has successfully complied with said requests. The Commissioner has also requested that we sue for gross receipt payments due the State from the telecasts of various boxing matches. The Bureau is currently involved in such litigation.

As seen thus far, the Bureau's investigations and prosecutions, civil and criminal are quite varied. At the request of the Commissioner of the Office of General Services, we prosecuted and convicted an electrical contractor for grand larceny committed as it installed lighting at a State hospital. Another investigation for O.G.S. resulted in the recovery of over $150,000 in royalties due to the State for sand dredged. In civil settlements alone the Bureau has recovered enormous sums of money for the State.

In many cases we not only convict the wrongdoer but obtain restitution for the State. For example, at the request of the State Tax Commissioner a few years ago, we recovered about $50,000 in income tax refunds after we prosecuted a former Special Agent of the I.R.S. for grand larceny committed by filing fraudulent State tax returns.

The Bureau over a period of years continued an inquiry into abuses of the insurance industry with particular attention to alleged arbitrary cancellation of policies and failures to renew coverage as well as arbitrary reduction of adequate coverage. We remedied the situation as best we could by writing proposed legislation to cure these evils, some of which was enacted.

Another lengthy investigation, running over a year, was at the request of the Commissioners of Mental Hygiene and Social Services who asked that we look into the treatment of and aftercare provisions for dischargees from State mental institutions. The investigation focused on the housing arrangements and foster home care for former patients in the area surrounding Creedmoor Hospital in Queens, New York. Most of these individuals are welfare recipients who, by virtue of the care required, were eligible for special housing allotments. It was discovered that, contrary to the family atmosphere concept envisioned by the Department of Mental Hygiene in discharging patients into the community, an unintended commercial aspect pervaded the program curtailing the therapeutic effect that had been sought by its institution. Certain of the alleged foster families originally approved by the State on a single home basis, were found to be operating a string of private homes into which numbers of the former mental patients were accepted for the purpose of obtaining the special welfare rates. Under these circumstances the patients were unable to receive the attention intended by the Department of Mental Hygiene.

The investigation also revealed the participation by State employees at the mental hospitals in the foster family program thus creating a conflict of interest that must result in

either dereliction on the job on the part of such employee or failure on his part to give adequate care to the released patient, thus defeating the aim of the discharge program. As a consequence of the investigation there has been a closer liaison between the responsible City and State agencies and this office has drafted legislative proposals to curb the abuses prevalent in the present foster care program.

At the same period of time, at the request of the Department of Motor Vehicles, Special Prosecutions brought an action to recover hundreds of gypsy cabs whose owners had unwittingly surrendered them to unscrupulous taxi fleet owners after being victimized in a scheme whereby they were to receive low cost liability insurance on the installment plan from the fleet. Those drivers who were unable to keep up the premium payments surrendered their cabs as part of a collateral agreement with the fleet owners and were left without means to make a living. The owners who were also bogus insurance brokers often failed to secure any insurance at all for the drivers. This Bureau secured a judgment restraining the fleet owners from engaging in fraudulent practices, providing for the restoration of the cabs to their rightful owners and also dissolving the offending corporations.

The Special Prosecutions Bureau has conducted prosecutions of cigarette smugglers at the request of the Department of Taxation and Finance. While most of these cases are referred to the local District Attorneys, this Bureau has achieved success in this field and has obtained convictions which have resulted in jail terms for violators, a comparative rarity to date.

In a typical case a year or so ago, the Bureau closed a facility charged with fraud in boosting medicare bills. The operators of a "Medical Service Center," charged with "ping ponging" patients from one physician or therapist to another without the patient's need or request, thereby building up fees to be paid by Medicare or Medicaid, were put out of business. The defendants were barred from engaging in various persistent fraudulent and illegal acts in violation of state law. We brought the action charging abuses in the rendering of X-ray services and treatment, the use of unskilled and unlicensed personnel, solicitation of patients, unlawful billing practices and overutilization of the facility. The practice of "ping ponging" patients is the sending of a patient without need or his request for more than one physical or medical or technical service and charging Medicaid or Medicare with the unnecessary treatment. Many of the patients were either elderly or on welfare. The sole purpose of the ping ponging was to build fees to be collected from the government. Patients were directed repeatedly to take a battery of medical and other tests including complete physical examinations, electrocardiagrams, allergy tests, blood tests and X-rays when, in fact, the patients did not need such treatment. Among the most vicious practices charged involved the taking of X-rays of patients where the X-ray machine was without film. X-rays taken of other patients' backs or other parts of the body were then sent to the examining physician and bills were submitted to Medicare and Medicaid for the bogus X-ray examination.

In another typical case, the Bureau stopped the operation of an unauthorized "mini cancer detection facility". A nonprofit corporation was established to set up neighborhood cancer research and information center. It was stopped from attempting to operate a "Mini Cancer Detection Facility" without the approval of the Public Health Council, as required by law.

At about the same time, pursuant to requests by the State Board of Social Welfare, the Special Prosecutions Bureau initiated several actions seeking injunctive relief against establishments which had been or were operating as senior citizens homes without the required approval of the Board. The Bureau obtained injunctions prohibiting the operation of these facilities. Buildings authorized to be run as boarding houses were enjoined in a similar manner and were also enjoined from holding themselves out as senior citizens homes, homes for adults, or homes for the elderly. The Special Prosecutions Bureau also received requests from the Department of Health to seek injunctive relief against "Boarding Houses" which the Department charged with admitting people who were actually in need of nursing care. In such cases the Bureau sought to have those people in need of nursing care placed in proper facilities and an injunction issued to prevent the defendants from operating premises in the future as nursing homes.

In a novel case the Bureau moved to stop an unlicensed out of State company from insuring used cars in New York. We charged that a company which guarantees to used car buyers that it will make repairs if necessary is operating an insurance business in New York State without a license, and obtained an order enjoining the firm from operating an insurance business in New York State without a license. The firm had contracted with used car dealers to inspect vehicles for resale. The contract allegedly provided for the firm to issue a one year or 12,000 mile warranty on the power train components of approved vehicles, and called for the dealer to issue the warranty at a fixed price which was added to the auto's purchase price to the consumer. The firm had service contracts with various service stations to repair malfunctions in the power train subject to the warranty. Some 1,277 automobiles covered by the warranty malfunctioned and required repair by the defendant. This was about 7-1/2 percent of the approximately 17,000 vehicles covered by the warranty. The

Bureau's action was brought at the request of the New York State Insurance Department who contended that the firm had been doing an insurance business in the State of New York, and never had a license issued by the Department of Insurance permitting it to do an insurance business in the state.

In a novel case, at the time, the Bureau moved against a hotel terming it a "chamber of horrors". Charging that the operators of the hotel had permitted the building to become a chamber of horrors spreading death, fear and filth among residents and other persons in the surrounding community, we began an action to outlaw the corporate operation and to seek a receiver who would be empowered to evict tenants engaged in unlawful activities. Proceeding under our common law powers to abate a public nuisance when the health, safety and welfare of the public is threatened, we spelled out appalling conditions stemming from the operation of the hotel. For instance, children were accosted and subjected to obscene remarks, prostitutes and transvestites openly wandered in and out of the hotel, nude males exposed themselves from windows; and garbage and litter were continually thrown from windows. Many of the residents of the area complained that the single room occupancy hotel was a home for prostitutes, narcotic addicts and alcoholics, whose activities threatened to destroy the community. We successfully moved in Supreme Court for an order to enjoin the operation of the hotel in the aforesaid condition and sought the appointment of a receiver with power to evict all individuals engaged in illegal activities.

As mentioned earlier, cases are referred to this Bureau for prosecution under the Motor Vehicle Repair Shop Registration Act. This act requires the registration of all motor vehicle repair shops operating within the State. It is designed to further highway safety by promoting proper and efficient repair of motor vehicles, and to protect the consumer from dishonest, deceptive and fraudulent practices in the repair of motor vehicles. In order to maintain a "registered" status, repair shops must fulfill certain requirements designed to protect the consumer. Each shop must record all work done on an invoice. If used replacement parts are installed this must be noted. The repair shop must make available to the customer, upon timely written demand, all replaced parts, components or equipment except any sold on an exchange basis or sold subject to a warranty. Upon the request of a customer the shop must furnish to the customer a written estimate of parts and labor necessary for a specific job, and cannot charge for any work or parts in excess of the estimate without the consent of the customer. At this Bureau's suggestion the Commissioner of Motor Vehicles established procedures to expedite enforcement of the registration provisions. This Bureau implemented the program.

In an interesting tax case over a year ago, a jury returned a verdict of guilty against a defendant for failing to file Income Tax and Unincorporated Business Tax returns. The defendant had claimed that the State was paying for abortions, which were against his religious principles and he therefore refused to pay his taxes. The defendant had even sought to remove this case to the Federal Court on the theory that his constitutional rights were being violated, but we were successful in remanding it back to the State Supreme Court where the defendant was ultimately convicted. In another case at this same time, a defendant was sentenced to the County jail for violation of the State Sales Tax Law, which was the first time a jail sentence has been meted out in this type of case.

We have been highly successful in obtaining convictions in tax cases. This Bureau has many cases pending in which informations and indictments have been filed.

In a case last year, a defendant violated the Insurance Law by doing an insurance business without a license. Defendant gave a guarantee, that if a check was made with an "inspected" checkwriting machine and the subscriber suffered a loss due to forgery or alteration, defendant would pay the loss. The court issued a permanent injunction, costs and dissolved the corporation. In another matter a defendant violated the Insurance Law by giving a guarantee, that if the Internal Revenue Service did an audit of subscriber's Income Tax and charged additional tax, it would pay said tax. The court issued a permanent injunction and a $3,000 judgment.

Acting on a request from the Department of Health, the Special Prosecutions Bureau instituted an action against a nursing home company to recover monies advanced to it from the Nursing Home Development Fund. The monies were to be used in connection with the development costs of the construction of the facility. In a case of first impression, the court granted the State's motion for summary judgment ($191,110.31) arising from the failure of the nursing home company to obtain a mortgage loan for the project and to proceed to construction.

In late 1977 a defendant pleaded guilty to violation of the Real Property Law, acting as an apartment referral agency without obtaining a license from Department of State. This was a case of first instance. The defendant corporation, for a fee paid in advance, provided its customers with a list of apartments supposed to be available in the geographic area, price and size requested by the customer. This type of service may not be provided without obtaining a license from the Department of State.

In a novel case defendants were enjoined from engaging in the unauthorized practice of law under section 476(a) of the Judiciary Law. The defendants were engaged in the business of selling do-it-yourself divorce kits under a trade name. The divorce kit in question is a thorough compilation of all that is needed to process an undefended divorce action from beginning to end. In this case, the defendants offered more to the public than the kits and forms for sale. The defendants established an attorney-client relationship with the public, wherein the Court held that the defendants were giving legal advice and thus were practicing law.

The aforesaid are but just a few of the many types of cases handled by the Special Prosecutions Bureau. Our scope of duties and responsibilities are almost endless.

For example, at the request of the Insurance Department, this Bureau is asked to commence actions to recover the penal sum of bonds. This generally arises when a surety bond issued to the State on behalf of a broker, agent or carrier, contains language enabling recovery when fraudulent or dishonest practices are conducted in connection with the transaction of business, or, for untrustworthiness of the party or firm.

The Banking Department requests this Bureau to investigate the actions and conduct of shareholders or officers of various banking institutions. These particular investigations are quite delicate in that they must be conducted without causing a run on the bank. The investigations generally are resolved by a takeover of the investigated bank by another banking institution.

The Attorney General is a member of the Law Enforcement Assistance Administration Crime Control Planning Board of New York State. A member of this Bureau's staff attends every meeting on behalf of the Attorney General, making recommendations either for or against the allocation of Federal funds for State and local law enforcement projects. In the same vein, a member of this Bureau is on the Law Department's Ethics Committee.

State laws regulate the weight, size and length of vehicles using State roads. For many years this Bureau had a task force that worked with the State Police, the New York City Police and other County Police Departments, in the enforcement of this law. The task force would, for example, set up simultaneous road-blocks on every State and County road running East to West and West to East from the tip of Suffolk County into New York City. As a result, almost every vehicle on that given day that violated specifications or that did not comply with safety requirements, was given a citation. The fine was $100 for the first offense and increased substantially for a subsequent offense. The task force on any given day, which generally started at five in the morning and ended at sunset, found hundreds of violators. It acts as a deterrent to help save our roads from the abuse of over-weight vehicles and at the same time moved many more truck owners to carry the required safety equipment.

In September, 1978 the Bureau was assigned a new line of cases referred by the Department of Social Services regarding the Department's Medicaid Fraud and Abuse Program. The Department has requested that we bring affirmative suits in State Courts to obtain restitution of excess Medicaid payments in appropriate circumstances. The Medicaid Fraud and Abuse Control Program is a major project of Social Services and a goal of the highest priority for the Governor. The Commissioner of Social Services predicts that he will refer a significant number of cases to the Special Prosecutions Bureau.

As seen from the aforesaid, white-collar crime is of great concern to this Bureau. We regard it as the fastest growing sector of crime. Over recent years we have found that the "honest" man, after years of "honest" work, suddenly dips into government funds through non-payment of taxes or other categories of crime. Theft from government cannot exist unless one or more of the following elements exist: influence of organized crime; police corruption; misconduct by elected and appointed government officials; a person who does not think of himself as a criminal and whose major source of income is something other than crime; lack-luster enforcement against white-collar crime; apathy from the public with regard to white-collar crime; selective non-enforcement of the law; ignorance of laws; difficulty of compliance with the law; the willingness of the public to associate with white-collar offenders; and de-emphasis of integrity and ethics in business.

The Special Prosecutions Bureau is proud of its role in he combat against white-collar crime in spite of all of the obstacles mentioned above.

LAWYER FOR THE PEOPLE

APPEALS AND OPINIONS BUREAU

RUTH KESSLER TOCH
Solicitor General

The volume of work for the staff of the Appeals and Opinions Bureau increased in 1978 not only by reason of the number of cases which we handled but because of the recent new rules of the Courts in which we appear hold counsel in their courts firmly to short timetables for filing of briefs, particularly respondent's briefs. These rules, of course, are necessary to keep court calendars moving.

Under the supervision of the Solicitor General, the staff of the Appeals and Opinions Bureau and the staff of other Bureaus and district offices handle all appeals except those handled by the New York City office. Mainly these appeals are in the Appellate Division, Third and Fourth Departments, the Court of Appeals (particularly those from decisions of the Third and Fourth Departments), the United States District Courts, the United States Court of Appeals and the Second Circuit of the United States. Some cases are handled by the Appeals and Opinions Bureau in courts of first instance, e.g. Retirement cases, tax cases and litigation in which the primary issue is a challenge upon a state statute or upon official act under the United States or New York Constitution.

Salient cases we have handled in 1978 are discussed farther on in this Report.

Here, are discussed several significant matters which commenced in 1977 – and earlier – and moved to various stages of development in 1978.

One such matter is that of the claims of various Indian Tribes to land in New York State. These claims have and have had their counterparts in other States.

During the 1970s, Indian tribes in the Eastern United States have begun to assert claims to their aboriginal lands in several states. These claims revolve around alleged irregularities in the transfers of these lands to the States in question. With three major land claims pending against the State of New York this State has been in the forefront in the development of this area of law. Lawsuits have been threatened to date by representatives of the Oneida, Cayuga and St. Regis-Mohawk Indians. The United States, through the Department of Interior, seeks to bring actions on their behalf.

In an effort to arrive at an amicable solution to this problem, the State of New York has participated in a series of negotiations with representatives of the Federal Government, the New York Congressional delegation and the Indian tribes involved. Similar negotiations have resulted in the proposed settlements in the States of Maine and Rhode Island.

Negotiations to this point have concerned claims of the Cayuga and St. Regis-Mohawk Indians. The claim of the Oneida Indians has not been the subject of formal discussions at this time due to factional disputes within that tribe.

The St. Regis-Mohawk Claim

The St. Regis-Mohawk Indians were parties to a treaty made with the United States dated May 20, 1796 known as the treaty with the seven nations of Canada. As a result of this treaty, strips of land along the Grass River and another six mile tract of land were granted to the St. Regis-Mohawk Indians. Most of these lands have been conveyed to the State of New York by the St. Regis-Mohawk Indians. It is the St. Regis-Mohawk Indians contention that these conveyances were made in violation of the Indian Non-Intercourse Act, because there was no United States Commissioner present at the time of the making of these grants.

The Cayuga Claim

The Cayuga claim is based on a treaty made by the Cayuga Nation with the State of New York in 1789. Under this treaty, lands abutting Lake Cayuga were confirmed to the Cayuga Nation. The Cayuga Indians made a number of grants of land to the State of New York conveying all of these lands. It is their contention as it is that of the St. Regis-Mohawk Indians that most of these grants were in violation of the Indian Non-Intercourse Act because there was no Commissioner present at the time of the making of the grants.

The State's position has always been that its title and that of its successors in interest in all of these lands is valid. Nevertheless, the pendency or the threat of litigation concerning the title to these lands is a serious concern to the present owners.

The negotiations have made significant progress in limiting the Indians' claims and achieving hope for a final resolution which will protect the rights of those claiming title through the State.

A case which had its genesis in 1977 is that between the United States and the Division of State Police.

The United States Civil Rights Act of 1964 was enacted to provide a more extensive statutory basis to enforce civil rights in the Federal courts. Title VII thereof relates to equal employment opportunities. It goes beyond former remedies

under the Fourteenth Amendment and 42 USC § 1983 in that remedial action can be established upon the effects or results of an employer's hiring practices without regard to discriminatory intent. In 1971, the United States Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, held that examinations used for hiring and promotion purposes, while factually neutral, may in fact be discriminatory where it appears that such examinations have an adverse impact on minority groups or females. The burden is on the employer to demonstrate that the examination is valid, i.e., related to the duties of the job.

In 1972, Congress extended Title VII to cover governmental and municipal employers. Immediately thereafter, the Division of State Police took steps to recruit vigorously for minority and female members and to develop an entrance examination which was job related and at the same time would reduce adverse impact on minorities and females. It was estimated at that time that the development of such an examination would take approximately three years.

In the interim, the State Police held an examination in March, 1973. The "male only" requirement formerly in effect had been dropped and women were admitted to the examination. The women did not, however, fare well on the required physical agility test, and it became necessary to select women out of rank order.

A totally new examination, developed with technical assistance of the United States Civil Service Commission, was conducted in September, 1975 and a list established in June, 1976. The results showed "adverse impact" upon minorities and females, i.e., that the number of persons from each of such groups who passed the examination was less than 80% of the number of white males who passed. As a result, the United States Department of Justice commenced an action under Title VII and related statutes in the United States District Court, Northern District of New York, against the State of New York and William G. Connelie, Superintendent of State Police, on September 8, 1977. Attempts by the Federal Government to restrain the appointment of a class of troopers scheduled to be appointed on September 19, 1977, and to cut off Federal assistance to the State from the Law Enforcement Assistance Administration (LEAA) were successfully opposed by the New York State Attorney General, counsel for the defendant. Upon the statistical evidence showing a disparity in the employment of minorities and females in the State Police, the Court issued a restraining order against further appointments on October 25, 1977.

Additional modifications on the restraining order were obtained by the Attorney General to permit the appointment of classes in February, 1978 and September, 1978, upon the condition that additional numbers of minorities and females be added to such classes. During the pendency of the action, over 350 new Troopers have been appointed from the eligible list, including more than 50 blacks, Hispanics and females.

Extensive discovery proceedings were conducted between September, 1977 and May, 1978. During the same period of time, efforts were made to fashion a consent decree under which the State could appoint greater numbers of minorities and females as Troopers consistent with its ability to recruit qualified individuals for such appointment. These efforts were unsuccessful.

The matter went to trial on May 31, 1978 and was concluded on July 21, 1978. The defendants were represented by Assistant Attorneys General John Q. Driscoll, Henderson G. Riggs and Joseph A. Romano.

Under the principle established by the U.S. Supreme Court in *Griggs* v. *Duke Power Co.*, *supra*, a prima facie showing of adverse impact by the plaintiff in a Title VII case shifts the burden to the defendant to prove that its selective procedure is job-related; i.e., that there is a demonstrable relationship between the employment test and the knowledge, skills and abilities required for successful performance on the job. Accordingly, the defendants here produced extensive evidence to show (1) that the examination was founded upon a complete and accurate analysis of the requirements of the job (mental, physical and attitudinal) based upon the Job Element Method developed by Mr. Ernest S. Primoff of the United States Civil Service Commission, and (2) that the examination, consisting of mental and physical components, involved the use of the requisite KSA's in responding to hypothetical problem situations and combining physical and mental resources in simulated job situations.

Numerous witnesses were called from among the ranks of the State Police, psychologists from the USCSC and recognized independent experts in the field of industrial psychology.

Since the conclusion of the trial, counsel for the parties have been engaged in the preparation of findings of fact and conclusions of law and briefs for their respective positions.

Proposed findings were submitted by the plaintiff United States on September 20, 1978, and by the State of New York on November 15, 1978. The filing of rebuttal findings, defendant's brief and plaintiff's reply should be completed by December 31, 1978.

Penn Central Transportation Company (PCTC) went into bankruptcy June 21, 1970. The proceeding is in the Federal District Court in Pennsylvania. That Court issued an order directing that no taxes be paid until further order of the Court. Thus neither New York State nor its municipalities were paid taxes owed them by Penn Central or as they became due.

There was little activity until April 1, 1976 when most of PCTC's rail properties were transferred to Conrail. In December of 1976 PCTC filed its first plan of reorganization which was amended twice and on March 17, 1978 the final plan was approved. The Consummation date was set for October 24, 1978 and on October 25, 1978 the State of New York received $6,903,433 in cash. On December 5, 1978 promissory notes in the amount of $17,551,002 were issued by PCTC to the Comptroller of the State of New York and the Department of Taxation and Finance. Certain of them were improperly prepared and at the Comptroller's request were returned for correction.

As an ancillary matter the question of setting aside the New York State Retirement System's Pan Am building mortgage was settled in favor of the State of New York. The Trustees were trying to have the lease and the mortgage set aside as being executory contracts.

The Trustees of Penn Central Transportation Company were attempting to set aside the lease and mortgage so that they could take over the Pan Am building (the fee to which they own) free and clear of any liens. Their theory was that if they could disaffirm the lease and the mortgage they would own the building and land outright.

On August 10, 1978 Judge Fullam found that they were not such executory contracts as should be set aside under the Bankruptcy Law.

Matter of Clemente v. *Berger & Fahey* (45 N.Y. 2d 756) was a proceeding brought to review the question of whether the Commissioner of a County Social Services agency has standing to challenge the fair hearing decision of the Commissioner of the State Department of Social Services. The Court of Appeals held that local commissioners of Social Services have no standing in proceedings under CPLR Article 78 to seek additional review of the determinations of the State Commissioner; that local Commissioners are agents of the State and may not substitute their interpretations for those of the State Department or the State Commissioner; that Section 353 of the Social Services Law provides that with respect to fair hearing determinations of the StateCommissioner, all such decisions shall be binding on the Social Services official involved and shall be complied with.

Bates v. *Toia* was another Court of Appeals decision (October 26, 1978) also involving the relation between the Commissioner of Social Services (Westchester County) and a County. The County Commissioner challenged the validity of certain regulations of the State Department which extend Aid to Dependent Children benefits to a woman after her fourth month of pregnancy on behalf of her unborn child. The County Commissioner contended that the State Commissioner had acted beyond his authority in enacting such regulations since the regulations conflicted with state and federal statutes authorizing Aid to Dependent Children benefits. The County argued that only born children were eligible to receive benefits under such statutes. The Court of Appeals unanimously reversed the Appellate Division, Third Department, and upheld the validity of the regulations based on the broad statutory power of the Commissioner to enact regulations in the Aid to Dependent Children program. Moreover the Court stated that by furnishing indigent women with ADC benefits so that proper prenatal care so vital to physical and mental well being of the unborn child can be provided, the Commissioner and the Legislature were fulfilling their constitutional duty to aid the needy.

Two Court of Appeals decisions in 1978 involving Medicaid payments to nursing homes are *Kaye* v. *Whalen* and *Clove Lakes Nursing Home* v. *Whalen*.

In *Kaye* v. *Whalen* (44 N.Y. 2d 754, leave to rearg. den. 44 N.Y. 2d 949, app. dismd. _____ U.S. _____ (October 30, 1978), the Court of Appeals unanimously affirmed the order of the Appellate Division, Third Department, which upheld the retroactive application of new Medicaid reimbursement rates pursuant to Chapter 76 of the Laws of 1976 for the State's residential health care facilities.

The challenge was based *inter alia* upon the alleged unconstitutional impairment of existing contractual rights and the failure by the State to obtain prior federal (HEW) approval for changes in the reimbursement methodology. The Court rejected these arguments and upheld both the retroactive and prospective application of Medicaid reimbursement rates promulgated pursuant to Chapter 76 of the Laws of 1976.

The United States Supreme Court, upon motion, dismissed the appeal for want of a substantial federal question on October 30, 1978.

Clove Lakes Nursing Home a Staten Island nursing home, contended that it was denied due process of law because the State Health Department refused to hold a hearing before it recouped certain Medicaid overpayments. This recoupment order resulted from a departmental audit which disallowed numerous expenses claimed by the nursing home, in the amount of about $450,000. The Health Department sought to collect this amount by retroactive reduction of the reimbursement rates of the nursing home.

The Court said that the nursing home is entitled to a hearing to contest the audit but that the department is not constitutionally required to hold the hearing before it recoups the alleged overpayments. The Court distinguished this situation from a pre-recoupment hearing which is mandatory when a welfare recipient may find his benefits terminated or reduced.

"Clove Lakes is a business, not beset by subsistance problems of a welfare recipient," the Court said.

The Court noted that the Health Department gave the nursing home the opportunity to challenge the audit through written submissions before the rate adjustment went into effect and that the nursing home took part in an earlier hearing held by the department before the audit was made final.

This ruling clarified a vexing problem because several lower courts had come to different conclusions as to when a hearing had to be held in Medicaid recoupment cases. The Court did emphasize, however, that a hearing must be held promptly after the Health Department commences recoupment.

Sullivan v. *Siebert* was a proceeding brought by the New York State Public Interest Research Group to compel various State departments to file their annual reports with the Legislature which were required by the Executive Law to be filed by May 15 and were not so filed. Prior to the return date several of the Departments had filed their reports and the petition was dismissed as to them. As to the remaining respondents the Court held that the contents of the annual reports are within the judgment and discretion of the Department Heads, therefore the filing of the reports should not be compelled by mandamus which is available only to compel the performance of an administerial duty. The Court noted that this is particularly so when there is no proof that the reports will not be filed when they are completed.

As can be seen further from the summaries of the salient cases farther on in this report we have had a busy year briefing and arguing significant cases.

Opinions

An important function of the Attorney General as the State's Chief Legal official is the rendering of Opinions to State Departments and Agencies and to attorneys for municipalities. The first are the formal opinions of the Attorney General. The latter are the informal opinions of the Attorney General.

The subjects of the opinions range over wide areas. They construe statutory provisions, advise state departments and agencies as to the scope of their authority and frequently resolve issues of jurisdiction.

The formal opinions are in some cases prepared in the Appeals and Opinions Bureau and in all cases reviewed in the Appeals and Opinions Bureau. They are finally reviewed by the Attorney General.

Informal opinions are prepared for the most part in the General Laws Bureau and are reviewed in the Appeals and Opinions Bureau before they are issued.

Concurrent Resolutions

The Constitution, Article XIX, requires the Legislature to request an opinion from the Attorney General as to every concurrent resolution proposing an amendment to the State Constitution, the inquiry is written as to whether the proposed amendment affects any provisions of the Constitution other than the one it amends. It does not require nor does the Attorney General pass upon the substance of the proposed amendments.

The inquiries are made of the Attorney General both upon first passage and second passage of the proposed constitutional amendment. In every legislative session hundreds of such resolutions are submitted to the Attorney General.

APPEALS AND SPECIAL LITIGATION

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

The Bureau is charged with the prosecution and defense of all appellate litigation in which the State, its officers and agencies are parties pending in the State appellate courts in the First and Second Departments and appeals therefrom to the State Court of Appeals and United States Supreme Court and all appeals in the United States Court of Appeals, Second Circuit, and any appeals therefrom to the United States Supreme Court including any such appeals direct to that court from decisions of any three-judge District Court for the Eastern and Southern Districts of New York. The Bureau also conducts the appeals to other appellate courts throughout the State involving matters handled by the New York City offices of the Education, Employment Security, Antitrust and Securities and Public Financing Bureaus having statewide jurisdiction.

The staff of the Bureau is also available for constitution and advice to members of the staff of other Bureaus in the several New York City offices. Numerous briefs prior to submission to the courts are reviewed for approval by the First Assistant Attorney General and other members of the Bureau.

The financial emergency of the City of New York has continued to occupy a significant amount of the time and resources of the Bureau represented by Assistant Solicitor General Shirley A. Siegel. In anticipation of the expiration on June 30, 1978 of the federal Seasonal Financing Act, a four-year financial plan was developed for the City of New York involving significant new financial commitments by the banks, pension funds and the United States Government, which in turn necessitated major revisions of the Municipal Assistance Corporation (MAC) Acts and of the Financial Emergency Act for the City of New York (FEA), which were enacted by the State Legislature in June and in September of 1978. The June amendments were promptly challenged as unconstitutional (*De Milia* v. *Emergency Financial Control Bd., et al.*); a temporary restraining order was denied and the defendants' motions to dismiss are *sub judice*. The Department of Law participated in numerous meetings on various financing agreements, which were finally executed in mid-November. The execution of the Agreements to Guarantee by the Governor was approved as to form by Attorney General; the Secretary of the Treasury and the Mayor were also signatories. In the City's first venture into the private market since 1975, unguaranteed City notes were sold to the financial institutions for seasonal financing.

In connection with the foregoing, in addition to rendering in a customary role an opinion on the validity of the MAC statutes, the Attorney General rendered an opinion on the validity of the 1978 amendments to the FEA, notably the State pledge and agreement under § 10-a not to alter the assumptions on which the financing was arranged, specifically for example not to terminate the existence of the Financial Control Board so long as the federal guarantee or any MAC or City obligations containing the State pledge will be outstanding, in no event beyond the year 2008.

The Attorney General, through Mrs. Siegel, was active as bond counsel for the State with respect to several issues of State securities, State guaranteed debt of the Job Development Authority and authority debt of the State Housing Finance Agency and the Dormitory Authority.

Various applications of the securities laws of the State were had in significant cases. The Bureau, by Assistant Attorney General Juviler appeared in the Texas Federal Court to express our position in the defense of state tender offer statutes in *Great Western United* v. *Kidwell* and appeared as amicus in the Fifth Circuit in pursuit of such defense. Mrs. Juviler also successfully defended in the Appellate Division First Department the conviction in *People* v. *Day* of four persons for larceny in security transactions.

The office also submitted for consideration by the Court of Appeals the test of the usury laws as respects multi-mortgage transactions by banks in real estate financing in *People* v. *Central Federal Savings & Loan Assn.* The Bureau of Real Estate Financing had labelled the transactions usurious and had obtained leave in the Court of Appeals to press that contention. The Court of Appeals, however, by a narrow majority insisted that the pre-construction charges did not constitute the interest. Assistant Solicitor General Siegel was assigned to and did argue the case in that Court. That case also raised the question of the standing of the Attorney General, which was questioned by the Bank. The Court of Appeals, by treating the merits, implicitly upheld the standing of the Attorney General to maintain the proceeding.

Notable in the protection against consumer frauds is the affirmance by the First Department of the landmark injunction and provisions for restitution in *State* v. *General Motors* successfully argued by Mrs. Juviler. The case is now pending appeal in the Court of Appeals.

Highly significant also are *Matter of Bernstein* v. *Toia* and *Matter of Lee* v. *Toia.* In *Bernstein,* the Court of Appeals upheld ceilings on shelter allowances for welfare recipients and in *Lee* that federal SSI recipients were entitled to state home relief payments if the latter was larger. These appeals too were handled by Mrs. Juviler.

In *Frank* v. *State* of New York the Bureau successfully defended in the Court of Appeals the validity of the judicial reform amendments to Article VI of the New York Constitution and in *Uniform Firefighters Association* v. *City of New York* successfully defended at Special Term the constitutionality of the residence exceptions contained in Public Officers Law, § 3 and 30, in favor of uniformed policemen, firemen and corrections officers. These cases were handled by Assistant Solicitor General Daniel M. Cohen.

In a bankruptcy court appeal to the U.S. Court of Appeals, Second Circuit, In re *Stirling Homex Corp.* the Bureau by Assistant Attorney General John M. Farrar secured a first impression appellate decision giving the State's sales and use tax claims priority in Chapter X liquidation as a matter of equity. The court wrote a strong persuasive opinion in that case.

In special instances, deputies in the Bureau appear and participate in lower court proceedings or trials. Outstanding, of course, is *Levittown* v. *Nyquist* in which, after trial, the lower court found the educational finance system of the State unconstitutional. The trial was over a long extended period in which this office was represented by Assistant Attorney General Amy Juviler.

During the course of the year, Assistant Attorney General Orenstein resigned to accept appointment and subsequent election to the District Court in Nassau County. In this Bureau he rendered exceptional services particularly in appeals raising constitutional questions in criminal proceedings.

At the end of the year, the First Assistant Attorney General Samuel A. Hirshowitz who had served in that capacity for twenty years, retired.

CHARITABLE FOUNDATIONS BUREAU

WARREN M. GOIDEL
Assistant Attorney General In Charge

The Charitable Foundations Bureau supervises the administration of property devoted to charitable purposes. Its responsibility encompasses charitable foundations, whether in trust or corporate form, estates in which dispositions are made for charitable purposes and corporations or unincorporated associations which carry out charitable functions as well as trusts in which the present or ultimate interest is charitable.

Pursuant to the provisions of Section 8-1.4 of the Estates, Powers and Trusts Law most of these organizations are required to register and report annually to the Bureau. The jurisdiction of this Bureau is statewide, and, in addition to the registration requirements and the review of annual reports, the Bureau is engaged in litigation throughout the state with respect to matters affecting charitable organizations both registered and exempt.

In addition, the Bureau has been assigned the responsibility of reviewing applications for the formation of Not-for-Profit corporations in the metropolitan area and has continued its educational program for members of the Bar with respect to the requirements, consents and approvals for such incorporations under the recently revised provisions of the Not-for-Profit Corporation Law.

The following is a statistical survey of the activities of this Bureau for the eleven month period terminating November 30, 1978:

Registrations Filed	1,729
Reports Received	16,200
Fees Collected	$446,083.00
Office Conferences	1,587
Reports Examined	6,882
Litigated Matters	1,068
Certificates of Incorporation	2,191

The activities of the Bureau are substantially underwritten by the nominal fees charged to each entity for the filing of the annual financial statements.

The Bureau has continued its attempt to reduce the amount of litigation in which it was involved, wherever possible, by conferring with attorneys, accountants and foundation directors and managers with reference to problems encountered by them with respect to the Estates, Powers and Trusts Law, the Internal Revenue Code, and the Not-for-Profit Corporation Law. In an effort to minimize the expense to charitable entities of protracted litigation and to mediate disputes between various interested parties, conferences are held to establish points of agreement and to suggest solutions developed in previously litigated matters which had successfully solved similar problems.

These conferences were further utilized for the purposes of discussing claims by the Bureau with reference to suspected improper management of foundations and funds gleaned from the examination of the annual reports submitted or brought to the attention of the Bureau by periodic reports of adverse determinations received from the Internal Revenue Service.

A review of a private foundation's annual report revealed that the Internal Revenue Service had taken adverse action and had imposed penalty taxes against it. An investigation of the activities of that foundation indicated self-dealing on the part of the founder, usurpation of investment opportunities which had proven valuable and jeopardizing investments by the foundation at his insistence resulting in loss to the foundation of approximately $2½ million. After negotiation with the Bureau, an agreement was entered into for the reimbursement to the foundation of the entire $2½ million plus the amounts of the penalties incurred totalling in excess of $3,200,000 together with interest. Appropriate guarantees and safeguards for the refund of this money were provided, and to date, in excess of one-half million dollars has been refunded.

In negotiations with the trustees of a charitable foundation, the Bureau recovered the sum of $112,000 as reimbursement to the charity for losses sustained by the foundation as a result of investment in speculative securities in a margin account.

In various litigated matters throughout the state the legal position taken by the Bureau in opposition to the positions of fiduciaries and non-charitable legatees of estates have resulted in a saving in excess of $500,000. In almost every case a novel question of law was considered.

The Bureau participated in a settlement of a case against the trustees of numerous trusts in another state resulting in the payment by the trustee to the foundation of a million dollars as compensation for their alleged breach of fiduciary duty. Numerous complicated questions of law and fact were involved and the Bureau acted in close cooperation with the Attorney General of that other state who had the responsibility for protecting the charitable interest.

It has been the Attorney General's position and the law of the State of New York that the Attorney General of the situs of a trust or estate has the sole responsibility and authority for the supervision of the activities of the fiduciary and the protection of the charitable interest. In line with this position, the Attorney General of the State of New York declined to intervene as *amicus* in an action commenced by the Attorney General of Delaware against the trustees of a Florida trust which he alleged was for the benefit of Delaware charitable beneficiaries. Thirty-eight other states joined in support of his action. To date the Florida court has sustained New York's view of the law by dismissing the complaint but the matter is presently on appeal in the State of Florida.

In another matter of interest to the bar, mentioned in last year's report. the appeal in *Matter of Dow,* App. Div. 4th Dept. from Surrogate's Court of Monroe County which denied a fee to the Attorney General in a construction proceeding has been argued and, at this writing, is still awaiting decision.

The Bureau has recently completed and submitted to the Appellate Division, Second Department, a brief in support of the constitutionality of Section 421 of the Real Property Tax Law which provides for exemption from taxation of the property held by certain classes of charitable organizations. The particular question on this appeal involved New York City's taxation of the property where a lessee which itself would have been entitled to exemption was using the property pursuant to an arrangement whereby the tax exempt lessor was receiving compensation in excess of amounts stipulated in Section 421 (2) of the statute. This matter, likewise, is awaiting decision by the Court.

The Bureau has instituted an action on behalf of the ultimate charitable beneficiaries against the founder of a foundation and his commercial corporation and the directors thereof for failure to pay dividends on preferred stock to certain charitable corporations to whom he had donated this stock. A judgment dismissing the complaint was awarded by the Supreme Court, New York County with respect to the stock held by all of the charitable entities other than the foundation created by the donor. An appeal is presently pending asserting the primary right of the Attorney General to sue on behalf of the ultimate charitable beneficiaries and to correct what is believed to be the erroneous view of the Court that this right is merely derivative.

Section 4943 of the Internal Revenue Code requires private foundations to divest virtually all excess business holdings in order to avoid the imposition of excise taxes. Since the prospective purchaser of such business holdings is very often a member of the foundation, the transaction may involve self-dealing. The Attorney General is a necessary party to any proceeding involving the divestitute of such assets and, indeed, may be the only party without self-interest.

In addition, court proceedings pursuant to Sections 510 and 511 of the Not-for-Profit Corporation Law are often required in these matters since the assets very often comprise all or substantially all of the charity's net worth. The accountants of the Bureau spend considerable time analyzing the financial statements of the enties involved and the Bureau has been instrumental in effectuating greater compensation and better terms.

The most time consuming activity of the Bureau involved a concerted effort to find a transferee within the State of New York which was willing to accept and perpetuate a valuable collection of maps, journals, atlases and periodicals owned by the American Geographical Society, which the Society proposed to transfer with court approval to a foreign educational institution. Virtually every educational, library and relevant museum within the State as well as the Cultural Affairs Department of the City of New York was contacted by the Bureau in an attempt to avoid the loss of this asset to the State of New York. When it became apparent that there was no institution within the State financially capable of appropriately maintaining this collection, the Bureau was instrumental in effectuating an orderly transfer of the material and having the Supreme Court of the State of New York retain jurisdiction over the agreement affecting the transfer. In addition, through our efforts the Society was able to encourage substantial donations from major foundations for the purpose of enabling them to continue as a viable entity within the State of New York.

The foregoing were just a sample of the variety of matters dealt with by the Bureau during the year. A number of the matters arise through the interchange of information between the Attorneys General of the several states, the Internal Revenue Service, other governmental agencies and the public. The frequency of the interchange of information between governmental agencies is increasing, and, since every complaint or question submitted is necessarily examined into, the work of this Bureau has increased and will continue to increase over the years.

CLAIMS AND LITIGATION BUREAU

DONALD P. HIRSCHORN
Assistant Attorney General In Charge

The Claims and Litigation Bureau is headquartered in Albany, which is the location of the Bureau Head's offices and the central docket and file room for Court of Claims matters. Regional offices of this Bureau are located in conjunction with Court of Claims offices in the following cities: Binghamton, Buffalo, New York, Poughkeepsie, Syracuse, and Watertown. In addition, an investigator from the Bureau is situated in Rochester to service the Court of Claims case load in the Rochester District. The regional offices in Binghamton, Poughkeepsie and Watertown also handle considerable general legal work for the Department in those geographic areas for the reason that they are the only district offices in those particular cities. Those three offices therefore have a dual function, servicing the Claims and Litigation Bureau, and also performing general duties directly under the Solicitor General as head of the upstate offices and the First Assistant Attorney General who is responsible for downstate offices.

The primary function of the Bureau of Claims and Litigation is to prepare and litigate the defense of all claims against the State in the fields of tort, appropriation and contracts. The Bureau also handles affirmative actions for the recovery of damages sustained by reason for destruction of State-owned property, many Article 78's in the State Supreme Court, a variety of actions in Federal Courts, affirmative actions for the recovery of monies due and owning to various State agencies, many appellate matters, Mental Hygiene hearings, consumer fraud matters, various special proceedings, all small claims under the State Finance Law, preparation and filing of appeals in matters originally handled by the Bureau, and the review of numerous requests from State officers and employees under the provision of Section 17 of the Public Officers Law.

The Bureau also handles contract and lien matters consisting of: (1) the examination and approval of insurance charters, contracts, bonds, undertakings, leases and miscellaneous documents submitted by the various State agencies; and (2) the examination of validity and legality of securities purchased for the investment of State funds as well as the legality of the issuance of all State bonds and notes. Attorneys in this section also appear in actions involving liens upon public improvements. The approval of State contracts involves review of over 25,000 agreements each year.

The increasing awareness by the public of the many services available in our offices in the Poughkeepsie, Binghamton-Elmira and Watertown areas has led to an increase in the duties and responsibilities of the Bureau notable in the area of consumer frauds. The three local offices closed 2,782 consumer fraud matters, collecting $651,739.47 for consumers in the area.

The Bureau during the period of January 1, 1978 through September 30, 1978 received 789 Court of Claims matters and closed 798 claims.

For this reporting period statistically ending September 30, 1978 the Bureau had a net total increase of matters handled from the last full calendar year of 2,964. The number of Notices of Intention filed was up 979 to a total of 6,015. An increase was also noted in General Litigation matters handled which rose by 1,847. Collections in the Collections section totalled $1,996,319.78.

Reorganization of the Bureau described in the 1977 Report continued in 1978. The Contract Approval Unit was further enlarged and given additional duties at the request of the Attorney General. These included review of and assistance in preparation of documents and opinions related to the offerings for sale of the bonds of the State and various authorities. Due to a freeze in hiring, particularly with respect to non-professional staff, continued reorganization of certain functional areas had to be delayed. The segregation of the "Health and Related Fields Unit" in the general litigation section and the designation of a coordinator from that unit as described in the 1977 Report has proved very valuable. The affected State agencies have indicated their support and appreciation for this reorganization move made during 1977 and continued this year.

Samples cases of note handled by the Bureau during 1978 included the following:

Cases Decided

MOTOR TUG CHANCELLOR, INC.
United States District Court
for the Eastern District of New York
Civil Action No. 73-CV-1733

Tried September 19-25 and November 2, 1978
(Honorable Charles P. Sifton, Judge)
Decision Not Yet Reported

On May 20, 1973 a collision occurred between Tug Barge Flottila and a pier supporting the Northumberland Bridge.

This action was commenced by the owner of the Tug Salutation, Motor Tug Chancellor, Inc. in the United States District Court for the Eastern District of New York. Motor Tug Chancellor, Inc. sought to limit its liability to the value of the tug as of the date of the collision pursuant to 46 U.S.C., § § 183, et seq. The State interposed its claim for damages in excess of $500,000.00 and, upon motion, was permitted to interplead as third-party defendants, the Captain and First Mate on the tug at the time of the collision and the corporations which served as operating agents for the tug, employed the crew on the tug and maintained the tug.

Limitation of liability was denied on the grounds that the tug was unseaworthy due to the pilot's lack of skill and the ownership corporation was deemed to have had prior knowledge of this unseaworthy condition. The State was allowed a full recovery on its damages.

WEINFELD v. STATE OF NEW YORK,
Court of Claims Claim
No. 60230 – Entered in the Court of Claims
May 30, 1977 (Decision per DeIorio, J.)
62 A D 2d 443 (A D 3d, August 4, 1978)

The State allegedly made use of a suggestion submitted by the claimant under the Employee Suggestion Program. Claimant's suggestion had never actually been adopted; however, claimant had been given an award of $500.00. The suit sought $799,500.00, the balance that claimant alleged was owing based upon 10% of the first year's net saving to the State as a result of said suggestion.

The Court of Claims denied a motion to dismiss on the ground that the cause of action was stated based upon a statute. The Appellate Division, Third Department, unanimously reversed, and held that as a matter of law no cause of action was stated and that there was lack of subject matter jurisdiction in the Court of Claims. The Court pointed out that discretionary actions may only be reviewed pursuant to CPLR, Article 78. On August 22. 1978 a notice of appeal was filed to the Court of Appeals by the claimant.

FARKAS v. STATE, Court of Claims, Claim No. 61247
(Decision October 27, 1978, per Lowery, J.
Entered October 30, 1978)
(Will be printed in official reports)

A State Police Officer had issued an appearance ticket for a traffic violation that did not occur in his presence. A claim was brought for malicious prosecution, abuse of process and negligence.

The Court found that, as no information was filed, no legal proceedings had been commenced and therefore the action for malicious prosecution was dismissed. Similarly, the abuse of process claim was dismissed as no "collateral advantage" or "ulterior purpose" was established.

The claim based upon negligence was dismissed on the basis that CPL, § 155.20 was, at best, ambiguous, and existing case law indicated that an appearance ticket could be issued for a traffic violation not occurring in the officer's presence. The Court further found that the withholding of the filing of the simplified traffic information further insulated any injury or damage from a causal connection to the issuance of a ticket.

STATE OF NEW YORK v. UTICA CHRYSLER PLYMOUTH AND CHRYSLER CORPORATION, Supreme Court,
Albany County Index No. 11699-76

(Decision per Conway, J.
Dated and entered May 18, 1978)

This case involves an automobile purchased by the State for use by the Office of Criminal Justice Services. In December of 1976, when the automobile was some six weeks old and had accumulated approximately 1,800 miles, the automobile caught fire and was totally destroyed while warming up in a State employee's driveway. Suit was brought upon the theories of negligence and breach of warranty. The Court, after a jury trial, found for the plaintiff for the full value of the car.

The Court held the dealer jointly and severally liable under the theory that the dealer warranted the automobile as it had not disclaimed the standard Chrysler warranties and had not cross-claimed against the manufacturer.

It is noteworthy that the Court charged the jury under the theory of strict products liability, therefore requiring that a seller be responsible, in strict products liability, for the value of the loss of a defective product.

This expansion of the usual theory of strict products liability in personal injury cases might mean that a seller could quite possibly be liable beyond the Uniform Commercial Code four-year statute of limitations for a loss suffered due to a defective product.

STATE OF NEW YORK v. BERNARD J. KENNEDY
Supreme Court, Albany County Index No. 1464-78

(Decision per Miner, J.
Dated November 18, 1978;
Entered November 24, 1978)

This is a collection action for amounts due and owing the State for care given defendant's daughter by the Department of Mental Hygiene. The defendant sought to interpose an affirmative defense alleging that the State failed to provide proper care and supervision for his daughter. The allegations were that defendant's daughter contracted an infection, sustained facial lacerations leaving a permanent scar, and that she chipped a tooth due to the negligence of the State of New York.

The Court held that these isolated instances of injury do not demonstrate "gross deficiency" in care and maintenance as described in the cases cited by defendant. In addition, the Court went on to say that any action against the State founded upon negligence should have been brought in the Court of Claims.

Cases Pending

CONSOLIDATED EDISON v. STATE BOARD OF EQUALIZATION AND ASSESSMENT, et al.
Supreme Court, Albany County Index No. 11747-74
(Including all related Con Ed Matters)

Before Honorable Harold E. Koreman,
Acting Supreme Court Justice

These proceedings involve petitions by Con Ed to review special franchise assessments on their property levied by the SBEA for the years 1974 through 1977, inclusive.

The City of New York, as well as several communities in Westchester County, have intervened in all of the proceedings.

This case has significant legal and financial impact. The major legal issue, of first impression in this State, is whether the review of special franchise assessments under Real Property Tax Law, § 740 should be identical with the review of ordinary assessments as outlined by Real Property Tax Law, § 720.

The financial impact, if Con Ed is successful in these proceedings, is that the intervenors would lose many millions in tax dollars.

LAPOINTE v. STATE OF NEW YORK,
Court of Claims Claim No. 62568

(Filed October 30, 1978)

This is the first of a potential 500 to 1,000 claims arising out of the "Love Canal" pollution. The instant claim demands $12,000,000.00 in damages for injuries sustained as a result of the leakage of toxic chemicals which were buried in the Love Canal area of the City of Niagara Falls.

Presently, the Buffalo office is in receipt of 111 Notices of Intention to file claims.

The discovery of burial areas of toxic materials, and the attention being given to these potential health hazards all over the country is of great concern to our citizens and makes these claims of great interest. The resolution of this claim may have nationwide impact.

APPENDIX A

COMBINED STATISTICAL REPORT
BUREAU OF CLAIMS (UPSTATE AND NEW YORK) AND
LITIGATION (ALBANY) – CALENDAR YEAR
1/1/78 – 9/30/78

Claims Matters	On Hand 1/1/78	Received	Closed	On Hand 9/30/78
Notices of Intention	5,036	1,289	310	6,015
Motions to File Claims	58	58	50	66
Special Assignments	251	99	52	298
Small Claims	277	380	568	89
Claims (filed Court of Claims)	4,162	789	798	4,185
Severed		5		
Restored		27		
TOTAL CLAIMS MATTERS	9,784	2,647	1,778	10,653
TOTAL LITIGATION MATTERS	18,042	7,134	5,288	19,889
TOTAL CONSUMER FRAUD MATTERS	845	2,984	2,782	1,047

WATERTOWN DISTRICT

TOTAL MATTERS (not including Frauds)	152	108	84	176

CONTRACT APPROVAL SECTION

TOTAL MATTERS (Contract)	558	20,194	20,171	581
TOTAL COMBINED MATTERS	29,381	33,067	30,103	32,345
NET INCREASE IN MATTERS				2,964

VARIOUS DEPARTMENT HEARINGS (BINGHAMTON)

Requests Rec'd	Hearings	Withdrawals
86	38	48

COLLECTIONS

Litigation (Albany)		
Collections for 1978 1/1 – 9/30		1,996,319.78
Consumer Frauds (Binghamton-Elmira, Poughkeepsie and Watertown)		651,739.47
Collections for 1978 1/1 – 9/30	TOTAL	2,648,059.25

APPENDIX B

STATE OF NEW YORK
COURT OF CLAIMS
1/1/78 – 9/30/78

SUMMARY – 1978 REPORT

Number of claims in which awards were made by the Court

183

Amount claimed in claims in which awards were made by the Court

$84,452,159.83

Amount claimed in claims disposed of by the Court

$6,467,515,476.51

Number of claims dismissed by the Court

615

Amount claimed in claims dismissed by the Court

$6,383,063,316.68

Number of claims Pending 9/78

4,185

Total number of claims disposed of during the year

798

Amount awarded in claims disposed of by the Court

$19,587,543.19

Amount claimed in claims pending September, 1978

$7,664,885,599.50

CLAIMS

	Number	Amount Claimed	Amount Awarded
Awards made by the Court	183	$84,452,159.83	$19,587,543.19
Dismissed by the Court	615	$6,383,063,316.68	
Pending September 30, 1978	4185	$7,664,885,599.50	
Disposed of by the Court	798	$6,467,515,467.51	

MOTIONS

	Number
Disposed of by the Court	973

APPENDIX C

1/1/78 – 9/30/78

BUREAU – LITIGATION – (ALBANY)

		On Hand 1/1/78	Received	Closed	On Hand 9/30/78
18.	AFFIRMATIVE ACTIONS AND PROCEEDINGS				
	(A) Contracts	15,781	6,122	4,362	17,539
	(B) Torts	1,169	741	742	1,168
	(C) Special Proceedings	11	3	2	17
	(D) Injunctions (Conservation Law)	3	2	0	5
	(E) Injunctions (Health Law)	7	4	1	9
	(F) Injunctions (Education Law)	2	0	0	2
	(G) Injunctions (Labor Department)	0	0	0	0
	(H) Injunctions (Transportation)	8	0	0	7
	(I) Injunctions (Social Welfare)	4	0	0	4
	(J) Injunctions (State)	0	0	0	0
	(K) Injunctions (Thruway)	3	0	0	2
	(L) Injunctions (Troopers)	0	0	0	0
	(M) Civil Penalty (Conservation Law)	2	0	0	2
	(N) Civil Penalty (Insurance Law)	1	0	0	1
	(O) Deposit State Funds	1	0	0	1
	(P) Veteran Relief Funds	0	0	0	0
	(Q) Grade Crossing Elimination	0	0	0	0
	(R) Canal Law	3	0	0	3
	(S) Collected Fines	2	1	0	3
	(T) Miscellaneous	376	67	65	378
	(U) Declaratory Judgments	33	12	3	42
	(V) Opinions	2	1	0	3
	(W) Workmen's Compensation	0	0	0	0
	(X) Civil Actions	45	14	7	52
	(Y) Tax Law	4	0	0	4
	(Z) Encroachments	0	2	0	2
	a Violation of Highway Law	1	0	0	1
	b (Transportation) Rentals	235	50	32	253
19.	(a) Defense of State Employees	7	19	0	26
	(b) Defense of Proc. Under Article 78 CPLR	341	89	46	359
	(c) Injunction – Civil Service	0	1	0	1
	(d) Health Dept. – Penalty		4	0	4
	TOTAL MATTERS	18,041	7,132	5,260	19,888

COLLECTIONS

Amount Received by Bureau	$1,412,670.20
Amount Received by Departments After Action by Bureau	583,649.49
Total Collections Since 1/1/78	$1,996,319.78

FINANCIAL SUMMARY
1/1/78 – 9/30/78

RECEIPTS

Collections Made Directly by Litigation Bureau

Mental Hygiene – Patients	$ 32,928.35
Employees Retirement System	562,235.06
Damages to State Property	180,484.77
Excessive Costs or Contracts	611,322.26
Miscellaneous	9,002.68
Rental Arrears	16,697.18
Total Received	$1,412,670.30

Collections Effected For Other Departments

Mental Hygiene – Patients	$ 11,134.74
Employees Retirement System	43,484.00
Damages to State Property	98,359.13
Excessive Costs or Contracts	402,437.68
Miscellaneous	7,996.08
Rental Arrears	20,237.86
Total Advised	583,649.49

Total Collections Since the Beginning of the Year	$1,996,319.78

APPENDIX D

1/1/78 – 9/30/78

CONTRACT APPROVAL SECTION – CLAIMS & LITIGATION BUREAU

ALBANY

	On Hand	Received	Disposed of	On Hand
Liens	558	39	16	581
Special Proceedings	0	19	19	0
APPROVAL OF:				
Bonds	0	4,138	4,138	0
Contracts	0	15,987	15,987	0
Note Opinions	0	11	11	0
Insurance Charters	0	0	0	0
	558	20,194	20,171	581

APPENDIX E

DEPARTMENT OF LAW
REPORT OF COLLECTIONS

1/1/78 – 9/30/78

BUREAU – POUGHKEEPSIE CLAIMS & LITIGATION
COLLECTIONS AND RESTITUTION EFFECTED FOR STATE

		Total of Direct and Indirect
A.	Collections:	
	1. Costs in Actions & Proceedings	$3,150.00
	COLLECTIONS AND RESTITUTIONS EFFECTS FOR THE PUBLIC	
B.	Restitutions:	
	1. Consumer Frauds	$566,991.29
		$570,141.29

APPENDIX F

LAW DEPARTMENT
WATERTOWN, NEW YORK

1/1/78 – 9/30/78

	On Hand 1/1/78	Opened	Closed	On Hand 9/30/78
Agriculture				
Civil Penalty Action	4	4	1	7
Fraud & Complaints				
Investigations	187	323	299	186
Miscellaneous	0	48	48	0
Litigation & Claims				
Claims on Behalf of State	45	16	10	60
Civil Proceed. Behalf of State	3	1		3
Defense Proceedings – Article	18	9	13	15
Defense of State Employees/ Agencies	4	1		7
Miscellaneous	5	1	1	9
Labor				
Non-Payment of Wages	1			1
Mental Hygiene				
Miscellaneous	40	38	31	51
Social Services				
Miscellaneous	0	0	0	0
Trusts & Estates				
Judicial Settlement	25	13	4	38
Miscellaneous				
Actions & Proceedings	7	4	3	10
Various	0	21	21	0
TOTAL	339			387

SUMMARY

Cases on Hand Beginning of Year	339
Cases Opened During the Year	479
Cases Closed During the Year	431
Cases on Hand End of Year	441
Collections	387
Consumer Fraud Restitutions	$28,496.76
	$36,003.69

COLLECTIONS

Consumer Fraud		
Direct Restitution		$ 7,591.97
Indirect Restitution		28,364.12
Cost Penalties		47.60
	TOTAL	$36,003.69
Department of Taxation and Finance		
Collections		$ 188.88
Department of Mental Hygiene		
Collections		$26,307.88
Department of Labor		
Restitution		$ 2,000.00
	TOTAL	$64,500.45

ENVIRONMENTAL PROTECTION BUREAU

JOHN PROUDFIT
Assistant Attorney General In Charge

This bureau has responsibility for litigation and legislation involving all aspects of environmental law, acting on its own initiative, in response to citizens complaints and at the request of State agencies. We are continually engaged in activities directed at restraining air, water and noise pollution and in protecting freshwater and tidal wetlands, endangered animal species and other natural resources. In 1978 we have continued, through litigation, participation in administrative proceedings, and legislation to work toward rational, safe and conservation-oriented priorities in the use of energy.

Air, Water and Noise Pollution

We are continuing to use both statutory remedies and the Attorney general's common law power to seek abatement of public nuisances to enjoin serious acts of air, water and noise pollution. As a result of our review and investigation of the effect of toxic chemicals on the groundwater we became involved in the problem of cesspool and septic tank cleaners used on Long Island. A determination was made by our environmental engineer and the County Health Department that these additives were contributing directly to the pollution of the groundwater in Nassau and Suffolk County and to the closing of a number of public wells in that area. The Attorney General requested eleven companies to voluntarily refrain from the sale and distribution of their products (as presently constituted) on Long Island. Nine companies complied with the request and one company submitted data which is currently being reviewed. The non-complying company is being sued in a precedent setting action for water quality violations and for the creation of a public nuisance (*New York* v. *Jancyn Manufacturing Corp.*) This is an important case in a growing area of concern over toxic pollution.

In *New York* v. *Warren Bros. et al,* the Second Department affirmed a lower court decision, after trial, which found the existence of a nuisance at a landfill site in Baldwin, New York and imposed a penalty of $10,000 for violation of the ECL sections relating to water pollution and operation of a landfill site.

In *People* v. *Mattiace Industries, Inc.* we were successful in obtaining a conviction on all 20 counts in a criminal proceeding against a petrochemical company and three officers for discharging oil into marine waters and for their failure to notify State authorities. After a full trial the court imposed fines totalling $75,000.

We also continued our active participation in U.S. Environmental Protection Agency hearings concerned with power plant damage to the Hudson River Fishery.

In 1978 we received an increasing number of enforcement actions from the Department of Environmental Conservation, which we presently are prosecuting. Several of these involve flagrant violations of the law and rules governing the operation of incinerators, others involved violation of air quality regulations concerning parking facilities. In *Macley Realty Corp.* v. *DEC* we successfully defended the Department in an Article 78 proceeding attacking the denial of an indirect air pollution source permit for a parking garage.

The bureau has continued to respond to citizen complaints, conducting more than 140 investigations in 1978. Many of these complaints involved excessive noise caused by faulty air conditioners and refrigerator systems, discotheques and other businesses. Most of the noise complaints were successfully resolved without the resort to litigation. Other problems similarly resolved have included noxious odors and fumes. We are continuing our efforts to respond to complaints to provide a speedy and effective means of relief for citizens deprived of their rest and tranquility, so important to the quality of life.

Architectural and Natural Resources

We continued our involvement in 1978 in the field of protecting architectural landmarks. We filed an *amicus* brief in the Supreme Court in the appeal of the decision protecting Grand Central Station. (*Penn Central Transp. Co.* v. *City of New York*) The United States Supreme Court upheld the landmark designation.

Our enforcement of the Tidal Wetlands and Freshwater Wetlands Acts continues. A number of our wetlands cases are approaching the trial stage. In *Town of Monroe* v. *Carey*, in which we successfully defended the Freshwater Wetlands Act against a home-rule challenge, we have filed our brief in the Court of Appeals and are awaiting oral argument.

In the Department of Interior's Continental Shelf Program involving offshore oil drilling we submitted technical comments on the draft environmental impact statement for lease

No. 49, describing a number of environmental hazards in the proposed program and suggesting various remedies.

Endangered Species and Humane Animal Care

The need to enforce the Mason and Harris laws protecting endangered species of animals remains a major priority. Many investigations were commenced during 1978, with a considerable number resulting in detailed and enforceable assurances of discontinuance. Some of these came from the Department of Environmental Conservation and others were initiated by our bureau.

A related field, the humane treatment of animals, is, if anything, growing in importance. We have developed an almost unique competence among State Attorneys General in this area. During the last year we successfully litigated the closing down of two major pet retailers, who sold thousands of sick and dying dogs to members of the public. A number of other complaints of this nature were settled by informal assurances of discontinuance. An upstate shelter and one on Long Island agreed to make major changes in their methods of handling animals and dealing with the public after investigations.

We completed a unique comprehensive survey of the treatment of animals by shelters in New York State, the results of which were distributed to the various participants. Data of this kind had previously been unavailable and is of crucial importance in determining what policies shelters and humane agencies should follow. We also participated with such agencies as the ASPCA, the New York City Department of Health, the New York State Department of Agriculture and Markets, the New York State Humane Association and numerous other offices in investigations and other joint activities. We receive complaints in this area nearly every day. Finally, and possibly most important. we answered hundreds of inquiries as to the humane curriculum for schools, which we had a major hand in preparing, and which is unique in this country.

Energy and Utilities

The year 1978 saw a boom in the interest in and development of solar energy. In order to assist the public the Attorney General had the bureau put together a consumer's guide to solar heating. Hundreds of these manuals were distributed in response to requests by the public.

Because of the rapid development in this area a number of companies sold solar units to the public which were unable to meet the claims made for them. This bureau investigated many complaints and obtained an assurance of discontinuance against one manufacturer, calling for replacement and correction of deficiencies. This is an area in which we expect to become increasingly active in response to its growth as an industry.

The bureau continued to monitor the nuclear waste problem in West Valley, near Buffalo. A report by the Task Group, which was chaired by our environmental engineer, was completed in November. The bureau will continue to take an active part in seeking a solution to the decommissioning and decontamination of this potentially hazardous waste site.

We continued our activity as a party to the Nuclear Regulatory Commission proceeding on national rulemaking on nuclear waste impacts. We filed closing testimony and briefs concerning the high costs of nuclear waste management and nuclear facility decontamination and decommissioning.

We were successful in our support of New York City's regulations restricting the transport of radioactive materials in the Metropolitan region. Early this year the United States Department of Transportation issued a favorable decision in this matter.

We also intervened in the U.S. Court of Appeals on behalf of New York, Texas, and Wisconsin in support of the federal decision deferring the reprocessing and use of plutonium in nuclear reactors in the United States. (*Westinghouse Electric Corp.* v. *U.S. Nuclear Regulatory Commission).*

In *Mtr. of the New York State Council of Retail Merchants, Inc. et al.* v. *PSC and LILCO,* we filed an *amicus* brief in the Court of Appeals in support of time-of-day metering ordered by the Public Service Commission.

Legislation

In 1978, as in the past, the bureau drafted a number of bills which were introduced into the Legislature. This year also saw the passage of a number of laws which had emanated from bills proposed by this bureau. The legislature passed legislation providing for regulation of recombinant DNA research. Also passed was a comprehensive, revised State Dog Law, which embodied a number of the suggestions we helped formulate over the past several years.

Members of the bureau testified before legislative committees on the local, state and federal level, as we continued to urge and support laws to protect and enhance the environment.

In 1978 the Bureau opened 129 investigations and 46 actions and proceedings before the courts and administrative agencies. Sixty investigations and fifty-one actions and proceedings were closed and $2,700.00 in costs were recovered.

GENERAL LAWS BUREAU

JACK W. HOFFMAN
Assistant Attorney General In Charge

The primary responsibility of the General Laws Bureau is the defense of the State of New York, its agencies and departments and on some occasions, individual officers including but not limited to the Governor. These cases arise in numerous ways and are brought by various forms of legal proceedings: civil rights actions, mandamus actions or certioraris and Article 78's against commissioners and standard summonses and complaints against agencies and boards where these boards have a regulatory function.

In the past few years, one of the largest activities of the bureau has been to represent the Department of Correctional Services, the Commission of Corrections and the officers and employees of both. The actions commenced against these officials are generally brought by inmates in State and, on occasion, local correction facilities. The cases may take several forms and often include the Attorney General or the Governor of the State as a party defendant. The two forms are generally writs of habeas corpus and civil rights actions for money damages. The civil rights proceedings are brought in the Northern Federal District Court and this bureau handles all Northern District Court cases brought by inmates. More personnel of the bureau have been assigned to handle these matters as the workload has increased year by year. The reason for this has been the allocation of federal moneys to legal services groups. These groups act as advocates for inmates throughout the State. Consequently, the lawyers that are hired present cases as requested and usually on a much more complex scale than if the inmates themselves presented the case. A great deal of time must be spent in preparation of a defense. A further reason has been the attitude of the Federal Circuit Court of Appeals in the allocation and directive to issue summonses and complaints to the federal district courts. In other words, when the Northern Federal District Court reviews a complaint, it then issues a summons to the defendents named to be served by the U.S. Marshall. If a State official is named in the complaint as having violated the civil rights of an inmate, an investigation of all the facts surrounding the incident complained of must be made in order that a proper defense be made in the district court. Investigators must travel great distances in the pursuit of affidavits and evidence and many times attorneys themselves must spend a week at penal institutions to gather their proof. In addition to this type of criminal matter, the habeas corpus cases are brought at the Supreme Court level in Albany, Ulster and Washington counties. On occasion, these cases may be returnable in some other county within the jurisdiction of the General Laws Bureau. It should be noted here that this bureau handles matters in 17 counties. Habeas corpus cases necessitate the bringing of prisoners before the court in these counties where the assistant assigned must present a defense to the particular proceeding. A third type of criminal case should be mentioned as the bureau must devote a great deal of its time and effort to it. This is the defense of the State Board of Parole for its determinations in regard to prisoners both at the State and local level. Parole officers in local areas are often the target of an action contending the wrongful revocation of parole. The Board itself is the defendant in many cases contending inproper hearings or improper release procedures. Examination of the minutes and hearings of the Board of Parole must often be made before adequate defense can be prepared.

In regard to civil proceedings against State boards and agencies, they can be categorized as Article 78 proceedings pursuant to the Civil Practice Law and Rules. A great number of these are brought against county departments of welfare and against the State Commissioner of Welfare usually to review the allowance or disallowance of aid to a dependant family of one form or another. Another form of Article 78 is the attack upon the State Civil Service Department and also the individual departments for an alleged error in the form and manner of hiring or removal of a State officer or employee. The contention generally being that the agency has not followed Civil Service rules or regulations. These can often be very complex proceedings and are many times sent back for a trial by the court because there are insufficient facts presented in the petition. Many weeks may be consumed in such a matter. We also appear and defend the judges of the State through all levels that have been taken over by the unified court system through the Office of Court Administration. The number of Article 78 cases received from the first of the year to date has been 118.

The bureau handles very few affirmative action cases, however, there are cases instituted for the Department of Agriculture and Markets which are brought against restaurants, farmers, and others. These can be categorized as enforcement proceedings and usually lead to a fine or penalty.

We also handle Workmen's Compensation cases and State Labor Law violation cases. Workmen's Compensation cases are brought on direction of the Workmen's Compensation Board on behalf of injured persons where the employer failed

to carry compensation and in labor cases where the employer failed to perform some act required by the Labor Law such as providing a safety device. The penalty here can be both civil and criminal and a recalcitrant employer can be jailed. This is one of the few cases of a criminal nature where the district attorney does not prosecute.

In regard to taxes the bureau handles hundreds of matters referred to us by the State Tax Commission. These could be generally designated as Article 15 proceedings under the Real Property Actions and Proceedings Law, as well as mortgage foreclosures and bankruptcies. The papers in every case must be reviewed by an attorney and the claim of the State Tax Department must be interposed. On occasion, the attorney handling these must appear in court to defend the State's priority of tax lien. The number of cases received up to the third quarter of this year is 2,055.

The bureau also receives a copy of every application for incorporation of a not-for-profit corporation in the upstate area and also petitions for leave to sell property. These applications must be reviewed to determine whether the purposes stated within the application do not violate or interfere with any State agency. A copy is generally referred to each department of the State which may have an interest. The total number of certificates processed this year number 666.

In regard to the Department of Mental Hygiene, the bureau acts at the Department's request to have a conservator named for incompetent persons. These cases sometimes exist for many years during a lifetime of the person confined in a State hospital. As a result, estates are required to file accountings and return moneys from the incompetent's estate in payment for the care given. The total money recouped for the Department of Mental Hygiene to date is in the amount of $132,877.97. It should also be noted that this office acts on behalf of decedent's estates where there are no known heirs in regard to the escheat of moneys to the State. In regard to its public function the bureau has three main types of work: opinions, advising municipalities and the public in regard to legal problems by phone, and the consumer fraud function.

In regard to municipal affairs, the bureau is recognized statewide as having the foremost attorneys in the field. In view of this we are called upon and send representatives to the meetings of all larger municipal groups throughout the State, such as the Association of Towns, Conference of Mayors, County Officers, and so forth. The bureau issues opinions of an informal nature to municipal counsel throughout the year. It should be noted here that opinions are also requested by State agencies, divisions and department heads including the judiciary. Such opinions differ from those issued to municipalities in that they are formal opinions of the Attorney General rather than informal.

In regard to the Consumer Fraud function, the bureau has an active program of volunteers from law schools and the State University. These students earn credits while learning the general nature of consumer problems. The Consumer Fraud section of the General Laws Bureau is the largest consumer fraud unit upstate and it refers many matters to various regional consumer fraud units. In addition, telephone calls and advice to the public number in the thousands. The unit institutes proceedings in court to seek injunctions pursuant to Section 63 of the Executive Law. Also, many assurances of discontinuance are entered by the Bureau with various businesses to prevent deceptive business practices. Over 3,365 complaints have been received this year. Restitution for the consumers in an amount over $196,000 has been obtained and costs returned to the State for legal proceedings amounts to $15,850 to date.

The Utica office and Monticello office are considered as part of the General Laws Bureau. Cases are routed through the General Laws Bureau to these offices. Most cases assigned to Plattsburgh are also routed through this bureau. Reports are rendered to the bureau from district offices.

LEGISLATIVE BUREAU

FRANKLIN K. BRESELOR
Assistant Attorney General In Charge

Because of the broad range of responsibilities of the Office of the Attorney General and because of the Attorney General's sensitivity and responsiveness to the needs of citizens and the problems of State government, the Legislative Bureau is responsible for developing and proposing a great many recommendations for legislation. Over the years, more than 200 recommendations have been enacted into law. At the 1978 Session of the Legislature, eleven of the Attorney General's proposals passed the Senate and fifteen passed the Assembly. Eight bills passed both houses, all of which were signed by the Governor and became laws. The following is a summary of the Attorney General's recommendations which were enacted into law:

An amendment to the Public Officers Law concerning indemnification of State employees – It has become increasingly common for employees of the State to be involved in lawsuits as a result of performing their duties. In 1971 a bill, prepared by the Attorney General, was enacted which codified the right of employees to be indemnified by the State from losses in such suits, provided their conduct was within the scope of their public employment. Under that law, the Attorney General provided legal representation for the employee. In the years since the enactment of that bill, the State has experienced an enormous growth in the numbers and kinds of lawsuits involved, and the Attorney General's role has become increasingly complex. As a result, the Attorney General submitted legislation to revise the Indemnification Statute at the 1977 Legislative Session. This bill passed but was vetoed by the Governor so that a more comprehensive stature could be enacted. In accordance with the Governor's mandate in his veto memorandum, the Attorney General's representatives, along with those of the Comptroller, the Governor, and the Senate and the Assembly, undertook a long series of negotiating and drafting meetings. This bill is the result of that intensive effort. It establishes a scheme of providing legal representation and indemnification to all State employees and will be a model for indemnification legislation applicable to other government employees. (Ch. 466)

An amendment to the General Business Law in relation to personnel involved in sporting events – The Attorney General is responsible for supervising the syndication of theatrical productions and has played a major role in preventing abuses of consumers in the sale of tickets. Legislation enacted at the request of the Attorney General requires the registration of theatrical personnel to help prevent unreliable individuals from participating in the management of theatrical events. It has become apparent that the same abuses and dangers exist in the promotion of sporting events. This bill extends to sporting events personnel the registration requirements applicable to theatrical personnel. (Ch. 226)

An amendement to the County Law in relation to the admissibility of blood alcohol tests – In carrying out his responsibility to defend the State, the Attorney General has often defended cases involving automobile accidents in which the State is alleged to be responsible because of the design, maintenance or control of a highway. Occasionally, these cases involve one car accidents in which the driver is killed. At the time of the enactment of this bill, there were pending against the State, several such lawsuits in which damages totalling over five million dollars were sought, and in which the blood alcohol content of the decedent showed a high degree of intoxication. It is essential to the defense of the State that the evidence of this intoxication be admitted so that its effect in causing the accident will be evaluated in determining whether the State is liable. This amendment permits the admission of this evidence. (Ch. 421)

An amendment to the Court of Claims Act in relation to venue of appeals from decisions of the Court of Claims – Chapter 115 of the Laws of 1978 permitted these appeals to be taken in any department of the State instead of being limited to the third and fourth Departments of the Appellate Division, as had been the case under prior law. In order to permit an orderly transition to this new rule, the Attorney General, in cooperation with the Appellate Division, First Department and the office of Court Administration, proposed this bill which would make the change effective on the first of March, 1979, rather than May 9, 1978. (Ch. 429)

An amendment to the Public Health Law in relation to recombinant DNA experiments – A major development in the field of genetics with vast implications for the scientific community and the general public is the discovery of processees by which genetic information from different organisms can be combined. These experiments have enormous potential for scientific research and practical benefit. At this writing organisms are already under development, which could be used to clean up oil spills and to produce cheaply good quality insulin for the treatment of human diabetics. However, there is also fear that these experiments could create dangerous organisms which must be properly confined in order to prevent contamination of the environment and/or infection in members of the public. This bill creates a framework in which the Department of Health

will register and regulate the conduct of these experiments. (Ch.488)

An amendment to the Civil Practice Law and Rules in relation to amending bills of particulars – A technical amendment to the CPLR in 1978 purported to allow the amendment of bills of particulars in ordinary lawsuits. It appeared, however, that the bill would have the unintended effect of being applicable also in actions brought before the Court of Claims. The effect of this result would have been a substantial complication in Court of Claims practice and great additional effort and expense by the State in defending these claims. This bill makes the rule allowing amendments to bills of particulars inapplicable in Court of Claims Practice. (Ch. 297)

An amendment to the General Business Law in relation to fingerprinting of persons employed in the securities industry – This bill, supported by the Attorney General, in cooperation with representatives of the securities industry, would eliminate duplicative requirements for filing of fingerprints, and extend the requirement of filing to all registered broker dealers. Since the enactment of New York's Law to require the filing of fingerprints, the United States Securities and Exchange Commission has adopted rules which also require such filing. In the interest of economy, this bill provides for the acceptance of the Federal filing as satisfaction of the State requirement. (Ch. 498)

An amendment to the Personal Property Law in relation to the holder-in-due-course rule – At common law when a person signed a note or contract, the rights of the creditor could be assigned to a third party. If a person had a disagreement with the original creditor, he would still have to pay the third party and work out his differences with the original creditor separately. This is known as the holder-in-due-course doctrine and the third party is the holder-in-due-course. This doctrine is clearly unfair to consumers who sign contracts or notes to pay for merchandise and then have to pay the holder-in-due-course, even though the merchandise fails to perform. The advent of wide spread credit card business and bank credit cards has complicated this situation. Under the old law, if a consumer, for example, made a "Master Charge" or "Visa" purchase and the merchandise failed or was not delivered, he would still have to pay the "Master Charge" or "Visa" bank. This bill provides that the third party creditor (holder-in-due-course) will be subject to the claims and defenses that the consumer has against the seller. This bill is consistent with recently proposed Federal regulations and provides substantially greater benefits to New York consumers. (Ch. 643)

At this writing the Legislature has not yet adjourned but stands in recess; additional Legislative activity is possible, although not likely.

Additional functions assigned to the Legislative Bureau include the following:

Memoranda for the Governor – To this point in the 1978 Legislative Session and the 1978 extraordinary session, 19,579 bills have been introduced of which 833 were passed and submitted to the Governor for approval. The Governor requested the recommendation of the Attorney General with respect to 723 of these. The Department of Law responded with 183 formal memoranda.

Review of decisions of the Crime Victims Compensation Board (Executive Law, Article 22) – Through the month of October, 1978, 4,981 decisions of the Board were reviewed on behalf of the Attorney General, of these 1,967 made awards to innocent victims of crime. The Legislative Bureau also consults with the Crime Victims Compensation Board concerning difficult award decisions, legal questions which may arise in the administration of this program, and ways in which the Department of Law can participate in making this program more efficient and effective.

Review of applications for disposition of State records (State Finance Law, § 186) – During 1978 more than 300 proposed programs of record destruction will be submitted to the Attorney General for review. The Legislative Bureau reviews such requests in consultation with other Bureaus in the Department and with other affected agencies, as necessary.

Advisory Committee on Ethical Standards (Executive Law, § 74) – The Bureau acts as liaison with the Attorney General's Advisory Committee and provides resource material and support. The Committee convened formally twice in 1978.

Sunshine Law (Public Officers Law, Article 6 and 7) – The Bureau has had a special responsibility with respect to the Freedom of Information Law, the Open Meetings Law and the State Administrative Procedure Act. In addition to advising in the establishment of departmental regulations to assure full compliance with these laws, the head of the Bureau has been designated Freedom of Information Appeals Officer for the Department of Law. As the public becomes more aware of its rights under the Freedom of Information Law an increasing number of requests, access decisions, and appeals are being processed by the Department. In this connection, the Bureau monitors current administrative and judicial activity in the Freedom of Information area, maintains contact with the Committee on Public Access to Records, and provides resource information for staff attorneys involved with Sunshine Law matters.

Litigation and opinions – The Bureau provides liaison with the Legislature and provides materials on legislative history for attorneys in the Department requiring this information. Because the Bureau enjoys close relationship with Appeals and Opinions Bureau, when time permits, it accepts assignments of opinions and litigation which involve issues related to its other functions.

LITIGATION BUREAU

GEORGE D. ZUCKERMAN
Assistant Attorney General In Charge

The Litigation Bureau prosecutes and defends actions on behalf of the State, its officers and agencies in virtually all substantive areas of the law. Assistant Attorneys General assigned to the Bureau appear in all state and federal courts in the New York City metropolitan area, as well as in the United States Supreme Court. Among the more than 5,000 court cases handled by the Litigation Bureau in 1978, the following were of special importance:

UNITED STATES SUPREME COURT CASES

New York Telephone Co. v. *N.Y.S. Dept. of Labor.*

On October 30, 1978, Maria L. Marcus, former Chief of the Litigation Bureau argued in the United States Supreme Court, on behalf of the New York State Department of Labor in *New York Telephone* v. *New York State Department of Labor.*

This case challenges the consitutionality of New York's Unemployment Insurance Law as it relates to the payment of unemployment benefits to striking employees. The appellant argues that New York Labor Law § 592.1 is preempted by the National Labor Relations Act. Specifically, they claim that the NLRA was intended by Congress to be the controlling law in the area of industrial controversy, that the purpose of the NLRA is to foster collective bargaining, and that New York's law frustrates this purpose because it helps to finance strikes by paying unemployment benefits to strikers.

We refuted this argument by reviewing the legislative history of the Social Security Act, the law that authorized and encouraged States to adopt their own unemployment compensation statutes. This legislative history shows that Congress was aware of the NLRA as well as New York's unemployment insurance law since both were adopted prior to the Social Security Act. From its inception New York's law provided for the payment of benefits to strikers. The legislative history further establishes that Congress has repeatedly rejected attempts to bar payments to strikers during the last 40 years. Moreover, the enactment of legislation regarding food stamps and Aid to Families with Dependent Children shows that Congress does not regard aid to strikers as incompatible with national labor policy.

Several other active cases are on the hold calendar in the Southern District awaiting the decision of the Supreme Court in the above case. They are: *Otis Elevator* v. *New York Dept. of Labor, Eagle Electric Mfg. Co.* v. *N.Y.S. Dept. of Labor* and *American Broadcasting Co.* v. *N.Y.S. Dept. of Labor.* (Kathleen H. Casey, Assistant Attorney General.)

Ambach, et. al. v. *Norwick, et. al.* – United States Supreme Court.

Plaintiffs challenge the constitutionality of Education Law § 3001(3) which limits permanent certificates for public school teachers to citizens and aliens who have applied for citizenship. Aliens may obtain temporary certificates under certain circumstances. Education Law § 3001-a (first preference aliens under quota disabilities); Education Law § 3005 (exchange teachers); 8 NYCRR § 80.2(i) (aliens unable to become citizens because of federal statutory disabilities and aliens needed to meet emergent instructional needs). A three-judge district court declared the statute unconstitutional on equal protection grounds. 417 F. Supp. 913 (SDNY, 1976). The Supreme Court noted probable jurisdiction in May 1978 after sustaining the constitutionality of New York's exclusion of aliens from the State Police under Executive Law § 215 (3). *Foley* v. *Connelie,* 435 U.S. 291, 98 S. Ct. 1067 (1978). The case will probably be argued in January, 1979. It is significant because it will determine whether aliens may be excluded from public positions which are not strictly identified with the three branches of government (e.g., legislators, police, jurors) but which are acknowledged to have a political function (i.e. teachers educate children for their roles as "future citizens"). (Judith A. Gordon, Assistant Attorney General.)

On November 7, 1978, the Supreme Court of the United States heard argument in our appeal in the case of *Barry* v. *Barchi*, 77-803. A three-judge district court in the Southern District of New York had held, 436 F. Supp. 775 that § 8022 of the Unconsolidated Laws unconstitutionally denied a harness trainer due process and equal protection of the laws because it authorized the suspension of his license without a hearing prior to any disciplinary action or soon enough thereafter; and because it allegedly treated harness licensees more severly than thoroughbred licensees in not allowing prior hearings. (Robert S. Hammer, Assistant Attorney General.)

Flagg Brothers Co., Inc. v. *Brooks.*

The Supreme Court reversed the Court of Appeals, (*Brooks* v. *Flagg Broth. Co., Inc.*, 553 F.2d 764), finding no state action in a warehouse's non-judicial enforcement of its statutory lien for unpaid charges. The complaint was dis-

missed. Reported at 436 U.S. 149, 56 L Ed 2d 185. (A. Seth Greenwald, Assistant Attorney General).

County Court of Ulster County v. *Allen* 568 f2 998 (2nd Cir. 1978) Crt. granted,October 2, 1978.

The Second Circuit, on habeas corpus review, struck down as facially unconstitutional Penal Law Section 265.15(3). This section provides that presence in an automobile of certain enumerated weapons is presumptive evidence of its possession by all persons occupying the vehicle. The Supreme Court granted cert. on October 2, 1978.

Petitioners brief, wherein the statute's facial constitutionality was defended, also included a point arguing that respondents' waiver of an objection to an incomplete jury charge foreclosed habeas corpus review under the doctrine of *Wainwright* v. *Sykes*. Argument is scheduled for February, 1979 in the U.S. Supreme Court. (Assistant Attorney General Eileen Shapiro).

Other Major Cases

In *Levittown* v. *Nyquist*, 94 Misc 2d 466 (Sup. Ct., Nassau Co., the State's Education Finance system was declared unconstitutional, on the grounds that the availability of educational resources is largely a function of disparate real property wealth. The court also held that the aid formula is unconstitutional in that it fails to take account of four of the Big Five Cities' "municipal overburden" (i.e. their need to provide other services), and their other "overburdens" relating to higher proportions of handicapped and disadvantaged pupils, their higher absenteeism rates, and their generally higher costs. Proposed judgments have been filed by all sides, and a motion to re-argue on the basis of changes in the current state aid formula is now also pending. (Assistant Attorneys General Amy Juviler and Rosalind Fink).

In *Ryder Truck Lines* v. *Maiorano*, 44 N Y 2d 364, the New York Court of Appeals upheld the constitutionality of the No-Fault Automobile Insurance Law insofar as it allows employees injured in on-the-job accidents to collect first-party No-Fault benefits from their employer's No-Fault insurors, offset by the amount allowable under Worker's Compensation (Assistant Attorney General Rosalind Fink).

Labor disputes of public employees in the metropolitan New York City area were of critical importance during the period covered by this report.

Assistant Attorney General Harold Tompkins obtained a preliminary injunction in state court restraining employees of Mabstoa and the Transit Authority from striking the buses and subways of the City of New York; a temporary restraining order in Federal Court which resulted in employees of certain unions of the Long Island Railroad is not taking strike action; and a temporary restraining order in State Court against the employees of the Triborough Bridge and Tunnel Authority from shutting down key tunnel and bridge facilities.

The significant decision by this Bureau *Staten Island Rapid Transit Operating Authority* v. *International Brotherhood of Electrical Workers*, 57 A D 2d 614 lv to app. den. 42 N Y 2d 804 *cert. den.* 434 U.S. 934, 54 Lawyers Ed. 2d 293 which sustained a Taylor Law injunction restraining a January, 1977 strike against S.I.R.T.O.A. which left thousands of commuters and residents of Richmond County without rail transportation, was again tested in the Court in April 1978 when the same employees struck this railroad. An around the clock marathon two week trial resulted in the convictions for criminal contempt of two of the striking labor leaders. At the time of the conviction the employees returned to work and the railroad resumed service (Assistant Attorney General Harold Tompkins).

In *Collelouri, Taxpayers Union of Long Island* v. *New York State Public Employment Relations Board* an important challenge was made in Supreme Court, Nassau County to the constitutionality of binding arbitration of certain public employee wage disputes. The Taxpayers claim the Legislature improperly delegated its power to tax by allowing the arbitration of disputes which results in higher wages for public employees and therefore higher taxes. The challenge to the constitutionality of this arbitration procedure was denied and a direct appeal to the New York Court of Appeals has been taken by the plaintiffs. (Assistant Attorney General Paul M. Glickman and Harold Tompkins).

Johnson v. *Lefkowitz* (566 Fed. 866)

This is a civil rights actior in which the plaintiff challenged, *inter alia*, the constitutionality of § 70 of the New York Retirement and Social Security Law which provides for the mandatory retirement of tenured civil service employees at age 70. The Second Circuit held that the statute is a reasonable expression of state policy and clearly meets constitutional standards. A petition for certiorari is presently pending. (Assistant Attorney General Lillian Z. Cohen).

People v. *Toni Smith* (2nd Cir., 1978)

In this case the New York Court of Appeals unanimously upheld the constitutionality of Penal Law § 240.37 which prohibits loitering in public places for the purpose of prostitution. The Court rejected arguments that the statute was vague, overbroad and chilled the exercise of First Amendment rights. Although the defendant had absconded, the Court reached the merits because the issues presented affected a substantial public interest and were likely to recur because of the continual enforcement of the statute. (Assistant Attorney General Lillian Z. Cohen).

People ex rel. Dale v. *Davis*, N.Y.L.J., April 6, 1978, p. 12, col. 6, affd. A D 2d (1st Dept.), lv. app. den. 45 N Y 2d 707, 774 (September 1, 1978).

The Bronx Supreme Court held that the nature and history of the writ of habeas corpus as a speedy device for release of improperly held individuals made it inappropriate for class action status. An adjudicated delinquent placed with Division for Youth Title II can be held in secure detention at Juvenile Center pending transfer to a Division program. The Court rejected claims that such detention contravenes the Executive Law and Family Court Act, deprives juveniles thus held of their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and inflicts inhuman treatment on them in violation of the Eighth Amendment. (Assistant Attorney General Robert J. Schack.)

Group House of Port Washington, Inc. v. *Board of Zoning and Appeals of the Town of North Hempstead, et. al.*, 45 N Y 2d 266 (1978).

The Attorney General submitted a brief *amicus curiae* on behalf of the State Department of Social Services. The Court of Appeals upheld our position that a group home for seven to twelve children and two surrogate parents is a family for the purpose of a local single-family zoning ordinance. The fact that an authorized agency operating the group home intends individual children to be returned from it to natural families does not make it a transient facility. (Assistant Attorney General Robert J. Schack.)

United States ex rel Palmieri v. *LeFevre*, No. 78-2048 (2nd Cir., September 20, 1978).

Dismissal of habeas corpus petition affirmed. The Court held that there is no direct authority for provision to an indigent defendant of a free transcript of his co-defendant's trial. If there were such a right, it would have to be based on a strong showing of need for the transcript. No such showing was made. (Assistant Attorney General Robert J. Schack.)

"Sinhogar" v. *Parry*, Misc 2d (N.Y. Co. Sup. 1977), affd. 63 A D 2d 635 (1st Dept.), lv. app. den. A D 2d (September 26, 1978).

Action challenging out-of-state placement of children on Federal and State statutory and constitutional grounds. Interlocutory appeal affirmed denial motion by New York City Department of Social Services to join State Department of Mental Hygiene as party defendant. In an opinion of first impression, the State Supreme Court defined respective responsibilities of DMH and local DSS for mentally ill and retarded children who do not need hospitalization. It held that DMH is not responsible for providing appropriate placements for these children. (Assistant Attorney General Robert J. Schack.)

In the Matter of *Sol Feigman*, Petitioner v. *Daniel Klepak*, as Commissioner of New York State Office of Drug Abuse Services, Respondent (Cited as *Feigman* v. *Klepak*, 62 A.D. 2d 816 [First Dept., June 27, 1978]).

In this Article 78 proceeding, petitioner a licensed psychiatrist who had been operating a methadone maintenance treatment center, sought a review and annulment of respondent's determination to revoke its approval of petitioner's operation of the clinic.

Pursuant to a statutory hearing, the administrative hearing officer found that petitioner had continuously violated the rules and regulations of the Office of Drug Abuse Services by repeatedly increasing without authority the number of patients over a one-year and three-month period to a total of 346 patients, when the facility was only authorized to handle 225 patients. As a result, there was improper medical supervision of the patients participating in the program.

The First Department held that the record supported the findings of the hearing officer, and confirmed the decision of the Commissioner of the Office of Drug Abuse Services revoking approval for petitioner's continued operation of the methadone maintenance treatment program. (Assistant Attorney General Allan S. Moller.)

Leigon v. *State Tax Commission*. Supreme Court New York County. Attack on the authority of the State Tax Commission to hold the petitioner personally liable for sales tax liability pursuant to Sections 1131, 1133, of the Tax Law. In a case of apparently first impression, the Court sustained the Tax Commission's findings that as an officer of the debtor corporation, petitioner was personally liable. (Deputy Assistant Attorney General Gerry Feinberg.)

In *Samuel Alexander* v. *Harold J. Smith*, 582 F 2d 212 (2d Cir., August 7, 1978), cert. denied,_____ U.S._____ (1978), petitioner claimed that his first confession to the police which was inadmissible because of an ineffective waiver of his *Miranda* rights tainted his subsequent confession which was introduced into evidence. In rejecting this contention and affirming the district court's denial of a petition for a writ of habeas corpus, the Court of Appeals held *inter alia* that even if petitioner's first confession was taken in violation of his *Miranda* rights, the subsequent confession could nonetheless still be voluntary in view of the totality of the circumstances. (Assistant Attorney General Tyrone Mark Powell.)

In *Carney* v. *Henry*, a habeas corpus proceeding brought in the Eastern District of New York, the petitioner challenged the constitutionality of New York's second degree rape ("statutory rape") law, Penal Law Section 130.30. Specifically, petitioner argued that the statute is sexually discriminatory in that it proscribes intercourse between a male over 18 and a female under 14, but fails to proscribe intercourse between a female over 18 and a male under 14.

The District Court (Pratt, J.) distinguished a First Circuit case holding the New Hampshire "statutory rape" law to be sexually discriminatory and found the New York statutory scheme to serve important governmental objectives in protecting young women against the more serious physiological consequences of injury and pregnancy. The Court thus held Section 130.30 to be compatable with the Equal Protection Clause. (Assistant Attorney General Clement H. Berne.)

MENTAL HYGIENE BUREAU

THOMAS P. DORSEY
Assistant Attorney General In Charge

The Mental Hygiene Bureau is primarily responsible for providing legal representation to the Department of Mental Hygiene as well as its constituent psychiatric centers, developmental centers, and aftercare clinics within the principal geographic area of the Bureau's operations. Other state agencies and institutions represented by the Bureau in various matters include the Office of Alcohol and Substance Abuse, Department of Correctional Services, Downstate Medical Center and Helen Hayes Hospital. The scope of the Bureau's activity encompasses a wide variety of legal services and in 1978 court attendance in all matters exceeded 1,500 days.

General Representation

In addition to those matters referred to under other captions, the Bureau handles a broad range of litigated matters, principally for the Department of Mental Hygiene and its facilities. These include surrogate proceedings involving patients' estates or estates in which patients have an interest and Family Court matters involving patients or their children as well as plethora of motions, Article 78 proceedings, Article 75 proceedings, and various other actions and proceedings in Supreme Court, local and Federal District Courts. In 1978 more than 3,000 of such matters were received and closed out.

In surrogate proceedings handled by the Bureau, the question of whether or not a trustee can be compelled to invade the corpus of a testamentary trust to prevent the life beneficiary from becoming a public charge when the trust instrument provides for invasion of corpus in the discretion of the trustee, has given rise to conflicting results in different jurisdictions.

Estate of Arthur C. Damon, N.Y.L.J., 3-14-78, p. 12, col. 3, (Sup. Ct., Queens Co.), held that the trustee had authority to invade the corpus to pay the expenses of the hospitalization of the beneficiary in Pilgrim Psychiatric Center and that the refusal to do so constituted an abuse of the discretion reposed in the trustee pursuant to the terms of the will, (Assistant Attorney General Franklin F. Bass). On the other hand, *Estate of Martin Escher*, N.Y.L.J.,6-2-78, p. 13, col. 5, (Sur. Ct., Bronx Co.), held that the trustee would not be compelled to invade the trust corpus to pay the expenses of the hospitalization of the beneficiary in the Rockland Psychiatric Center upon the grounds that public assistance has evolved from being a "gift" into a "right", (Assistant Attorney General Marie A. Beary). Both of these cases are being appealed.

Recently there has been an increase in actions seeking injunctions against the Department of Mental Hygiene. One case of particular interest was *Society for Good Will to Retarded Children, Inc., et al. v. New York State Dept. of Mental Hygiene, etc., et al.*, [Supreme Court, Suffolk County (Baisley, J.), Feb. 17, 1978]. There, plaintiffs sought an injunction against any further admissions to the Suffolk Developmental Center, particularly from the Northeast Nassau Psychiatric Center. Plaintiffs motion for a preliminary injunction was denied and the action discontinued by plaintiffs, (Assistant Attorney General Sall J. Sidoti and Assistant Attorney General Anne Marsha Tannenbaum).

Another significant action for injunctive relief involves a group of home owners in Westchester who are seeking to prevent the establishment of a community residence for retarded persons presently in state developmental centers, upon the grounds that such a residence would violate a restrictive covenant limiting the use of the property in question to one-family residences. In this case, the court has denied a motion by the plaintiffs for a preliminary injunction [*Hill, et al.*v. *Esposito, et. al.*, Supreme Court, Westchester County, (Burchell, J.) Oct. 11, 1978] (Assistant Attorney General William J. Caplow).

A recurring problem has been the demand for patient records in connection with disciplinary arbitrations between the Department of Mental Hygiene and its employees pursuant to the contracts between the State and the employee unions. In *Matter of the Application of Camacho*, [Supreme Court-Suffolk County, (Baisley, J.), April 12, 1978], wherein grievant's attorney sought an order of discovery of a patient's psychiatric history and clinical record in just such an arbitration proceeding, Supreme Court, rejecting the Department's contention that such records were privileged under the physician-patient privilege of CPLR 4504, found that the patient had waived any such privilege and ordered that the records be turned over to grievant's attorney should the patient be called as a witness by the arbitrator. The matter was appealed to the Appellate Division-Second Department and is presently before that court, (Assistant Attorney General Anne Marsha Tannenbaum). In a similar vein, the Department has moved for quashal of the subpoena issued in the disciplinary arbitration proceeding between *CSEA (Alfonso Bell) v. Manhattan Psychiatric Center* on the ground that the

psychiatric histories and clinical records demanded are confidential pursuant to Sec. 33.13 of the Mental Hygiene Law and privileged under Sec. 4504 of the CPLR, (Assistant Attorney General Anne Marsha Tannenbaum).

The Bureau also represented the Department in actions for annulments pursuant to *Domestic Relations Law,* Section 141, and proceedings for the appointment of committees or conservators for state patients.

There were more than 800 orders authorizing elective surgery obtained for Department facilities during the year, most of which required evidentiary hearings.

Appeals

In 1978 the Bureau handled 16 appeals for the Department of Mental Hygiene and the Office of Alcoholism and Substance Abuse, some of which are referred to under other captions.

In *Palmer v. New York State Department of Mental Hygiene,* 45 N.Y. 2d 958 (July 6, 1978) the appellant had contended that in view of the alleged failure to provide him with actual notice of his certification as a mentally ill individual in 1953, due process required that he be afforded a hearing as to whether he was mentally ill at the time and the expurgement of all records with respect to the alleged certification. Making the observation that: "There are some consequences of wrongs, if that there were, which are irreversible"; a unanimous Court of Appeal held that appellant was not entitled to a hearing on his mental state in 1953 since he was no longer certified as mentally ill and that nothing the courts could do could change the fact that appellant was treated for mental illness whether or not the ground for such treatment was present or whether any such commitment was tainted by procedural or substantive defects. Furthermore, the courts could not order the expungement of records in the absence of legislative authority therefor. In a subsequent plenary proceeding brought by Palmer in the United States District Court for the Eastern District of New York (78C1558) summary judgment was granted to defendant. (Assistant Attorney General Anne Marsha Tannenbaum)

Collections

The Bureau is responsible for prosecuting claims for reimbursement for maintenance of patients in psychiatric and developmental centers as well as hospital charges of the Downstate Medical Center. During 1978, more than 500 maintenance cases were received from the Department of Mental Hygiene while more than 600 were closed. Downstate Medical Center referred approximately 60 cases for collection and more than 100 cases were closed.

As a consequence of the maintenance cases and other actions and proceedings in which the Bureau participates, it also collects funds for the benefit of patients in Department facilities. These include sums for luxury funds, burial funds, annulment security pursuant to *Domestic Relations Law*, section 141, and patients accounts pursuant to *Mental Hygiene Law*, section 29.23.

The total amounts collected during 1978 again exceeded $2,000,000.

Sanity Hearings

The Bureau represents the Department of Mental Hygiene and the Department of Correctional Services in various proceedings involving involuntary hospitalization. These include retention proceedings pursuant to *Criminal Procedure Law*, article 730 and hearings pursuant to *Jackson v. Indiana*, 406 U.S. 715, which involve defendants deemed to be unfit to proceed to trial; non-jury and jury hearings pursuant to *Criminal Procedure Law*, section 330.20, involving persons acquitted of crimes by reason of mental disease or defect; commitments and retentions of mentally ill prisoners pursuant to *Correction Law,* section 402, and jury reviews thereof; *Mental Hygiene Law* retentions and jury reviews involving the mentally ill and the mentally retarded; and writs of habeas corpus obtained by patients committed for any reason.

During 1978 members of the Bureau spent over 400 days in court in connection with more than 7,000 such cases.

In a civil commitment retention proceeding involving one *Carrie Greene, a patient at Creedmoor Psychiatric Center*, the New York Civil Liberties Union challenged the civil commitment statutes as failing to require proof beyond a reasonable doubt of the necessity for confinement and contended that the privilege against self-incrimination forbade the use of statements made by the patient in such a proceeding. Supreme Court (Queens County) found these objections to be without merit and, after a jury review of the proceeding, the patient was ordered retained in the custody of the Department. (Assistant Attorney General Alfred B. Annenberg) The matter has been appealed to the Appellate Division-Second Department but remains unperfected by appellant; who has, in the interim, elected to institute a plenary action in the United States District Court of the Eastern District of New York.

Narcotic Matters

The Bureau represents the Office of Alcoholism and Substance Abuse in proceedings for the involuntary certification of drug dependent persons pursuant to *Mental Hygiene Law*, article 81. These include non-jury and jury certification hearings; hearings prior to medical examinations; and writs of habeas corpus. During the past year, court attendance amounted to more than 350 days in connection with approximately 1,200 of such matters.

REAL PROPERTY BUREAU

HASTINGS MORSE
Assistant Attorney General In Charge

This bureau represents all State departments and agencies as legal counsel in their programs involving the acquisition and possession of land for public purposes pursuant to the various Eminent Domain statutes or through purchase, Federal grant, gift or devise. In addition, this office supervises the disposition of State lands by the various departments through sale, conveyance, grant or lease.

The specific duties of the Attorney General in relation to such matters are mandated by the various appropriation statutes authorizing departments to act and also by the Eminent Domain Procedure Law. Such duties require the Attorney General to certify to the acquiring agency all interests in the lands to be acquired, the raising and disposing of objections to title, and direction to the acquiring department to make payment either pursuant to an agreement or the Decision of the Court of Claims. It is anticipated that approximately 3,400 such matters will be completed for payment in 1978.

The following sums of money, in round numbers, have been directed by this office for payment by the various departments and are an indication of the magnitude of the operation noted above:

Department of Transportation	$25,677,640.00
Department of Environmental Conservation	4,343,782.00
Department of Mental Hygiene	446,706.00
Office of Mental Retardation and Developmental Disabilities	189,206.00
State University of New York	228,500.00
Executive Department-Division for Youth	357,437.00
Executive Department-Office of Parks & Recreation	4,786,230.00
Department of Correctional Services	9,739.00
Department of Health	28,147.00
Power Authority	1,007,000.00
Metropolitan Transportation Authority	683,448.00
Total	$37,757,835.00

In addition, this office in 1978 certified title and approved agreements entered into by the New York State Housing Finance Agency with State University of New York concerning the financing of the construction of university facilities; 51 projects were handled having a total estimated project cost of $620,523,000.00.

Another function of this office implements the statutory duty of the Attorney General to review and approve proceedings brought under Article 12 of the Real Property Law (The Torrens Title Registration Act) to register titles and transfers occurring thereunder. This review and approval is required both to protect the State's interest in such property and the "Assurance Fund" established by said law. Approximately 300 of these matters are processed by the New York City section of this bureau every year.

The Public Lands Law requires the Attorney General to report to the Office of General Services regarding the following matters:

1) Lands abandoned to said office by various State departments;
2) State lands for which an application has been made for a grant by the State of Letters Patent or an easement; and also
3) Lands which said office seeks to sell at public auction.

Also, pursuant to said Public Lands Law, this office, upon review, assents to the order of the Commissioner of General Services for the sale by the local public administrator of lands which escheated to the State. In 1978 this bureau processed 567 of the above matters.

This bureau, by its New York City section, enforced Article 7 of the General Obligations Law which requires landlords to deposit lease security monies in interest bearing accounts in trust for tenants, and also to make restitution to said tenants upon their satisfactory performance under the terms of their lease. As of November 29, 1978, $124,773.21 has been paid to residents of the Metropolitan New York City area by their landlords as a result of actions taken by this section. Also, this section has received approximately 1,760 new written complaints this year and closed about 1,425 of such cases.

The New York City section of this bureau also appears on behalf of the New York State Tax Commission in mortgage foreclosure actions brought in the first and second judicial departments to protect the State's lien for unpaid Franchise taxes in any surplus money proceedings arising from such actions. These cases number about 2,000, of which, approximately 50 are now pending.

The bureau also reviews and approves title to land acquired by municipal governments pursuant to both Federal and State grant programs. As of November 30, 1978, 70 parcels were processed with State grants-in-aid totaling $354,221.55. Federal grants which are advanced as "first instance" funds by the State, totaled $1,051,216.00 for four parcels.

In addition, this bureau has processed the acquisition by the Department of Environmental Conservation of a gift of 7,100 plus or minus acres of land in Suffolk County from RCA Global Communications, Inc. Another gift of land from the Corning Glass Works to the Office of Parks & Recreation is currently in process; said gift covers approximately 500 acres in Steuben County.

The New York City Real Property Bureau operates as a District Office, with a main office located in Albany, and is under the supervision of the Hon. Hastings S. Morse, Jr., as Assistant Attorney General in Charge. This district office performs several different functions related to real property titles and possession in the New York City and Long Island region. The bureau writes deeds for the transfer of State lands as requested by the Transportation Department and is occasionally engaged in court proceedings in relation to obtaining possession of State lands for this Department. It also certifies titles in claims in eminent domain cases in the region.

Our office appears on behalf of the New York State Tax Commission when it is named in mortgage foreclosure cases brought by private individuals in the First and Second Judicial Departments. In these cases, which number approximately 2,000, our bureau acts to protect the State's franchise tax liens and currently has claims pending in about 50 Surplus Money Proceedings in the various Supreme Courts in the First and Second Judicial Departments.

This office carries out the Attorney General's statutory duties of approving the titles being transferred under the provisions of Article 12 of the Real Property Law, generally known as the Torrens Title Registration Act. Attorneys or their assistants from the New York City and Long Island area very frequently bring these court papers in personally to this office. Even if the papers are sent by mail, the attorneys are under pressure of time to clear these titles before the closing dates for the sales of the premises. Approximately 300 of these matters are handled every year in this office (284 so far this calendar year).

The Rent Security section of this office handles the complaints of tenants who failed to receive reimbursements of their rent security deposits even after termination of their tenancy or were unable to obtain interest on their security deposits as required by Article 7 of the General Obligations Law. So far this year, as of November 29, 1978, $124,773.21 has been paid to metropolitan area tenants by their landlords as a result of actions taken by this section of the bureau. This section of the bureau has received approximately 1760 new written complaints this year and closed about 1425 cases. It also receives thousands of phone calls for information and assistance during the year, a good percentage of which are made by landlords and attorneys requesting interpretations of Article 7 of the General Obligations Law.

TRUSTS AND ESTATES BUREAU

IRWIN M. STRUM
Assistant Attorney General In Charge

The Trusts and Estates Bureau enforces the common law and statutory powers of the Attorney General in the area of gifts to religious, educational and charitable organizations and institutions. The Attorney General does not represent any charitable entity but rather represents as his statutory wards the "ultimate charitable beneficiaries", *i.e.*, the general public. In addition, this bureau represents the Comptroller in matters of abandoned property, particularly with reference to deposits for the benefit of unknown distributees or in connection with withdrawal proceedings after such deposits.

Most of the matters handled by this bureau are in the Surrogate's Courts and involve proceedings concerning decedents' estates. Some matters, however, particularly those involving *inter vivos* trusts, are Supreme Court proceedings.

The Trusts and Estates Bureau is a litigation bureau within a specialized area and many of our cases require a full trial with all of the normal pretrial procedures involved in litigation. Those cases which do not require a full trial but rather are litigated purely on a question of law, such as a construction proceeding, require the submission of briefs or memoranda.

Additionally, this bureau handles all of its own appeals.

Within the latter part of 1978 we argued two appeals before the Supreme Court of the United States involving the constitutionality of New York State statutes, *i.e.*, the constitutionality of EPTL 4-1.2(a) in *Matter of Lalli*, and the constitutionality of § 111 of the DRL in *Caban* v. *Mohammed*. We are awaiting a determination of the United States Supreme Court in each of these cases. Additionally, we have filed a motion to dismiss or affirm before the United States Supreme Court in *Matter of Fay* which involves the constitutionaltiy of EPTL 4-1.2(b) and are awaiting a decision of the United States Supreme Court with regard to that motion.

We have also been involved in other courts with questions concerning the constitutionality of said statutes and have successfully defended various Surrogates in *ALMA Society, Inc.* v. *Mellon* in the United States District Court for the Southern District of New York with regard to the constitutionality of the sealing provisions of the New York State statutes involving adoption.

We were also involved in a similar case decided in the Surrogate's Court, Bronx County, where the constitutionality of our adoption statutes was upheld.

This bureau, which has forged new ground on behalf of the Attorney General with regard to his supervision of public trusts, has commenced a very important action against Michael Kan, former curator of the Brooklyn Museum with regard to his activities while at the museum. This action concerns the fact that various artifacts were deaccessioned by Mr. Kan for small amounts of money and were later resold for much larger amounts.

As a result of our action against Mr. Kan, the Board of the Brooklyn Museum has changed its deaccession policy so as to protect the collection.

The Museum of the American Indian, as a result of the actions of this bureau, has become a viable and responsible public trust. We are still awaiting a final inventory as to that museum's collection and further action against certain former trustees may still be necessary. The action against Mr. Dockstader, the former director of that museum, is still pending.

In addition to these cases which are presently in actual litigation, we are currently conducting inquiries into certain activities at the Metropolitan Museum of Art concerning the use of space at that institution and the deaccessioning of a particular piece from the collection for an amount which may have been far below its true value.

An inquiry is also in progress concerning the Drummond Collection at the Museum of Natural History.

This bureau is handling a claim against the Treasury of the United States of America on behalf of the New York State Comptroller acting for the New York State Abandoned Property Fund with regard to tax overpayments by New York State residents which overpayments have not been returned by the Treasury by reason of their inability to locate those residents. It is the position of New York State that the money, after a seven year period, belongs in its Abandoned Property Fund rather than in the Treasury of the United States. It is impossible to determine the amount of money involved and it will be necessary in the event of litigation that an accounting be requested from the Treasury. However, a conservative estimate would indicate that the fund in question would be in the area of several million dollars.

We are also representing the State Comptroller on behalf of the Abandoned Property Fund with regard to a claim against the Director of Finance of the City of New York as to funds deposited with him for the benefit of unknown dis-

tributees. It is the state's position that those funds should have been deposited directly with the State Comptroller in the Abandoned Property Fund rather than deposited with the city's Director of Finance for a five-year period. This claim also is presently for an undetermined amount but involves many millions of dollars.

An example of the nature of the litigation handled by this bureau during the previous year can be found in the *Estate of Frank Gregory* in the Surrogate's Court, Westchester County. The Attorney General, in order to protect the interests of the decedent's unknown distributees, filed objections to an alleged testamentary instrument offered for probate. Our investigation indicated that that instrument was in fact a forgery and was not executed by the decedent.

The case was tried before the Court and a jury, and the determined, based upon expert testimony produced by the Attorney General, that the will in fact was not executed by the decedent in accordance with law and the instrument was denied probate.

Certain aspects of the now famous *Matter of Rothko* in which we were instrumental in obtaining a judgment in excess of 9 million dollars against the executors of the estate and Marlborough Galleries, on behalf of our statutory ward, the ultimate charitable beneficiaries, are still continuing.

An accounting proceeding, which the ousted executors have rendered of their transactions, is pending. Numerous objections have been filed to these accountings. Additionally, a proceeding to construe the impact of EPTL 5-3.3, elections on the charitable interest, is also pending. The question to be determined is whether the charitable half, as fixed by the right of election, is valid as the date of death in 1970 or as of the time of distribution. In this regard it is to be remembered that the residue of the estate consists primarly of Rothko paintings which have accelerated enormously since death.

As we approach the close of 1978, this bureau has on hand 8,026 open matters. These include 5,694 accountings, either in the Surrogate's or the Supreme Court; 1,570 probate proceedings; 156 construction proceedings; 8 administration proceedings; 102 withdrawal proceedings and 496 special matters which include such things as a widow's right of election, a claim against the estate, or an investigation being conducted by the bureau into the activities of a public trust. To date, the total number of matters received by this bureau in 1978 is 2,013, and the total number of matters concluded during the same period is 9,174. Additionally, we presently have 31 appeals pending.

During the first nine months of 1978, $3,975,140 was deposited either directly in the Abandoned Property Fund or with the Director of Finance of the City of New York, for later deposit in that fund for the benefit of unknown distributees.

From January to September, as a result of the efforts of this bureau, we have additionally protected or obtained $6,252,510 for the benefit of our statutory wards, the ultimate charitable beneficiaries.

WATER AND AIR RESOURCES BUREAU

STANLEY FISHMAN
Assistant Attorney General In Charge

This Bureau, upon request of the Commissioners of Environmental Conservation and Health, and the Adirondack Park Agency, institutes actions for injunctions and penalties and prosecutes criminal proceedings for violation of the State's environmental protection laws, including the Water and Air Pollution Control Laws, the Stream Protection Act, the Freshwater Wetlands Act, the Realty Subdivision Law, the rules and regulations relating to operation and maintenance of refuse disposal areas and to sanitary conditions at hotels, motels, trailer parks and other "temporary residences", and the Adirondack Park Agency Act (Environmental Conservation Law, Articles 17, 19, 15, 24; Public Health Law, Article 11; 6 NYCRR Part 360 and 10 NYCRR Parts 6 and 7; Executive Law, Article 27, respectively). The Bureau handles the Adirondack Park Agency and Department of Health matters statewide, and Department of Environmental Conservation proceedings originating or returnable in the Third and Fourth Judicial Departments, and also handles certain federal court proceedings involving the interests of the Department of Environmental Conservation. In addition, where environmental issues are involved, the Bureau also represents other State Departments (e.g., Department of Transportation, Office of General Services, New York State Police, Department of Mental Hygiene).

The Bureau also defends the Commissioners of Environmental Conservation and Health, the Adirondack Park Agency and the Freshwater Wetlands Appeals Board in Article 78 proceedings initiated to review orders or determinations of those agencies under the aforementioned statues, and also defends declaratory judgment or other actions involving the aforementioned (and miscellaneous other environmental protection) statutes.

The Bureau also handles appeals in the aforementioned cases and proceedings.

The Bureau handles complaints relative to public nuisance conditions and actions invloving State-owned lands under water, drafts formal and informal opinions, and drafts and comments upon the constitutionality of environmental protection legislation.

On January 1, 1978, the Bureau had on hand 148 pending cases in various stages of litigation. During the 1978 calendar year (through December 4, 1978), 78 new cases were received, making a total of 226 cases handled by the Bureau. A summary of the types of actions brought and Article 78 proceedings defended, and pertinent comments thereon, follows.

A. AFFIRMATIVE ACTIONS

1. Water and Air Pollution Abatement

Five actions were instituted. Eight actions were terminated by judgment or stipulation for abatement of the pollution or agreement on a construction timetable or upon voluntary compliance. One request to institute legal action was withdrawn. Twelve actions are pending in various stages of litigation.

Four criminal prosectuions were handled by the Bureau. Two of these prosecutions resulted in convictions, assessment of fines and necessary remedial measures being taken. Two prosecutions are pending.

2. Refuse Disposal Areas
(Solid Waste Management Facilities)

Three actions were instituted and one case reopened upon failure to comply with the terms of a judgment previously obtained. One consent judgment for injunctive relief was obtained. Twelve actions are pending.

3. Temporary Residences

Two actions were instituted to compel compliance with the State Sanitary Code. Default, consent and partial summary judgments were obtained in three actions, together with immediate and conditional penalties. Four cases in which judgments for penalties were obtained, but preliminary collection efforts were unsuccessful, were transferred to the Claims and Litigations Bureau for further collection proceedings. Ten actions are pending in various stages of litigation.

4. Realty Subdivisions

One action was instituted, two actions resulted in necessary remedial work being completed by the realty subdivider, and a third action resulted in a judgment for penalties against individuals who had illegally divided a small tract and then removed from the State. Two actions in which judgments for penalties were obtained, but preliminary collection efforts were unsuccessful, were transferred to the Claims and Litiga-

tion Bureau for further collection proceedings. Eight actions are pending in various stages of litigation.

The first Court of Appeals decision on the constitutionality of the Realty Subdivision Law *(State of New York, et al.* v. *Rutkowski, et al.*, 44 N Y 2d 990 [1978]), resulted in reversal of an Appellate Division, Third Department holding that such statutes were unconstitutionally vague. The Court of Appeals, accordingly, reinstated the complaint in the action for an injunction and penalties.

5. Stream Protection

Four actions are pending in various stages of litigation. An action against Niagara Mohawk Power Corporation to recover monies expended by the State in removing debris blocking the navigation channels of the Hudson River – which debris migrated from behind a dam removed by Niagara Mohawk without taking necessary measures to prevent such migration – was settled by Niagara Mohawk's payment of the sum of $1,750.000.

6. Adirondack Park Agency

Three actions were commenced, one of which resulted in voluntary corrective action by defendant to abate its violations of the Adirondack Park Agency Act. Two requests to institute legal action were withdrawn by the Agency. Five actions are in various stages of litigation. A couterclaim filed on behalf of the Agency, seeking removal of a portion of a building constructed in violation of the shoreline setback restrictions of the Act, was dismissed on the ground that no mean high water mark for Lake George had ever been officially established (*Tyler* v. *APA*, 92 Misc 2d 754 [Sup. Ct., Warren Co.]). Another referral is being held in abeyance pending negotiations between the Agency and respondent relative to voluntary compliance. Seven additional requests are being held in abeyance at the request of the Agency.

7. Public Nuisance Complaints

The Bureau received sixteen complaints from the public concerning a wide range of environmental problems throughout the State. One action instituted as a result of a complaint received terminated with the Court, after trial, rendering a precedent setting decision permanently enjoining operation of a stock car raceway as a public nuisance (*State of New York* v. *Waterloo Stock Car Raceway, Inc. and Seneca County Agricultural Society*, 409 N.Y.S. 2d 40 [Sup. Ct., Seneca Co., February 2, 1978]). Three of these complaints were referred to local authorities or State departments having initial and primary responsibility. Two files were closed after investigation failed to reveal the existence of a public nuisance. Voluntary abatement was effected in one case. Twelve complaints are pending in various stages of investigation or until completion of abatement measures in progress.

8. Miscellaneous Actions

Forty-six cases of varying types, civil and criminal, including actions to enjoin restaurant violations of the State Sanitary Code, seeking removal of encroachments on flood control easements and state-owned lands under waters and a barge obstructing navigation of the Barge Canal, and to collect penalties for violations of the Fish and Game Law and other environmental protection statutes, were handled during this period. Six actions were commenced. Nine actions resulted in voluntary remedial action or judgments granting injunctive relief and/or penalties. Two actions were discontinued, one after payment of penalties and the other upon a town's recision of its abandonment of two roads providing access to State reforestation areas, and five requests were withdrawn.

Five cases in which judgments for penalties were obtained but preliminary collection efforts proved unsuccessful, were transferred to the Claims and Litigation Bureau for further collection proceedings.

Other referrals in this category are either pending in various stages of litigation or are being reviewed prior to institution of the action.

B. ARTICLE 78 PROCEEDINGS TO REVIEW DETERMINATIONS OF THE COMMISSIONERS OF ENVIRONMENTAL CONSERVATION, THE ADIRONDACK PARK AGENCY, AND MISCELLANEOUS PROCEEDINGS DEFENDED

The Bureau defended eighty-three Article 78 proceedings and miscellaneous actions seeking either to set aside orders of the Commissioners of Environmental Conservation or Health or the Adirondack Park Agency or attacking the constitutionality of the State's environmental protection statutes.

Fourteen of these cases were dismissed (ten at Special Term and four on appeal); eleven proceedings were discontinued by court order or stipulation, or withdrawn; three proceedings were terminated as a result of the failure of the petitioner to prosecute the proceeding within the time provided by law or because the matter had become moot.

Five cases were closed upon receipt of advice from the Department of Environmental Conservation that the proceedings should be considered inactive.

In *Modjeska Sign Studios, Inc.* v. *Berle*, 43 N Y 2d 468 (1977), wherein our Court of Appeals had upheld the constitutionality of Environmental Conservation Law, § 9-0305 (requiring a permit prior to placing of off-premises advertising signs in the Catskill and Adirondack Parks), plaintiff's application to the United States Supreme Court for a writ of certiorari was denied. The case has been remanded to the New York State Supreme Court for hearing as to the reasonableness of the six and one-half year amortization period provided for removal of signs existing at the time of enactment of the statute.

The Bureau represented the New York State Department of Mental Hygiene in five proceedings instituted by the Federal Environmental Protection Agency to abate air pollution, and successfully handled an appeal from a Court of Claims judgment against the State for damages for failure to issue a permit for open burning of refuse (*Charles O. Desch, Inc.* v. *The State of New York*, 45 N Y 2d 882 [10/24/78]).

In a United States Circuit Court of Appeals, D.C. Circuit action (*State of New Jersey* v. *United States Environmental Protection Agency)*, judicial leave was obtained for the State of New York to intervene on behalf of petitioner in an action to review the Federal Environmental Protection Agency's national designation of status of various areas with respect to attainment/non-attainment of National Ambient Air Quality Standards.

By permission of the Appellate Division, Third Department, an appeal is pending before that Court on a Special Term order enjoining removal of State Police Troop "B" Headquarters from Malone to Ray Brook until further proceedings under the Adirondack Park Agency Act and State Environmental Quality Review Act are instituted and completed.

In a case of first impression (*Matter of Rappl & Hoenig* v. *Department of Environmental Conservation*, 61 A D 2d 20 [4th Dept., 1/20/78]), the Appellate Division affirmed a Special Term decision holding that the Freshwater Wetlands Act is applicable to artificially-created wetlands as well as to natural wetlands. However, in view of the fact that the wetlands have allegedly been created through recent action of surrounding developers and municipalities, the Court remanded the matter to Special Term to determine "whether the flooding of its [petitioner's] property could be eliminated without harm to the environment". The case is presently on appeal to the Court of Appeals.

In another case of first impression (*Mtr. of Spears, et al.* v. *Berle, et al.*, 63 A D 2d 372 [3rd Dept., 8/2/78]), the Court held that the Commissioner's denial of an interim permit deprives petitioners of all reasonable use of their property and remanded the matter to the Commissioner to determine whether he would issue the permit requested or proceed under the Condemnation Law to acquire title. This case is presently on appeal to the Court of Appeals.

In *Town of Porter* v. *Chem-Trol Pollution Services and Berle, Commissioner*, an action against a Department of Environmental Conservation permittee to enjoin excavation for a "Secure Landburial Facility" (based on an alleged violation of a local ordinance), an order granting plaintiff a preliminary injunction was reversed by the Appellate Division (60 A D 2d 987 [4th Dept., 1978]).

In an appeal from a conviction for violation of Environmental Conservation Law, § 9-0305, the case was remanded to Justice Court for a new trial (*State* v. *Excelsior Restaurant)*.

The remaining proceedings are still pending, thirteen of which are before appellate courts for review or on appeal. Significant decisions are discussed at length under "Salient Cases".

D. PENALTIES

Penalties, fines and costs totaling $41,341.25 (including conditional penalties) were recovered against industries and individuals who were found to have violated the State's environmental protection laws. Additonally, $1,750,000 was recovered in an action against Niagara Mohawk Power Corporation for expenses incurred in removing debris blocking navigation channels of the Hudson River (see discussion under "STREAM PROTECTION", *supra*).

E. LEGISLATION

During the 1978 Legislative Session, the Bureau received thirteen requests from the Attorney General's Legislative Bureau for the preparation of memoranda to the Governor on proposed legislation submitted to the Attorney General for opinion, and submitted eleven memoranda in response thereto.

F. OPINIONS

The Bureau received ten requests for opinions concerning the State's environmental protection statutes and rendered five formal and two informal opinions. Two requests were referred for response to agencies having primary jurisdiction and one opinion is in the process of preparation.

DISTRICT OFFICES

AUBURN OFFICE

EDWIN W. BARRY
Assistant Attorney General In Charge

Statistically speaking, on the basis of the first ten months of 1978, the Auburn office will experience a significant increase in the number of cases opened during the year as compared to the past several years. Because of time limitations, a realistic projection of the last two months of 1978 will definitely reflect this sizeable increase not only in number of cases, but also in monies collected by the office.

In fact, upon the firm case load during 1978, the office shows that a total of 586 cases have been received to date, as compared with a total of 468 in all of 1977. The office has closed a total of 547 cases to date as compared to an overall closure in 1977, of 490 cases. Therefore, on a projection of two additional months, the office will have opened in the vicinity of 648 cases, while closing 627 cases, a substantial total increase over last year.

There also appeared, once again, a wide variety of cases together with greater selectivity resulting from Prisoners' Legal Services handling of matters for prisoners in Auburn and Elmira Correctional Facilities and the Mental Health Information Service advising patients of the various psychiatric centers handled by the office, of their rights. This trend caused greater and extensive preparation by the office in each individual case and also reflected in the increase of appeals processed as a result of their activities.

Total collections and restitutions both direct and indirect amounted to $287,576.69, which although slightly less in comparison to 1977, did reflect substantial increases in the more important and selective categories. Again projecting for the final two months of 1978, we should for all purposes increase the final total of collections.

The office one again, in addition, showed greater activity than last year by handling inquiries and providing services to the general public, local bar and other State offices, all of whom utilized the services and facilities of the office more than in 1977.

An innovation by the office the last half of this year, namely, holding all prisoner related matters at the particular prison site, has not as of this date, shown a perceptible effect on case load, but there is reason to believe that this will eventually result in some decrease of such matters.

Consumer Protection cases fully processed during the first ten months of 1978 show a substantial increase over the entire year of 1977. A compilation shows that the office opened to date 161 cases compared to 125 in 1977, while closing 142 cases as against 114 in 1977. Collections for this period amounted to $17,232.50 as compared to $1,881.00 in 1977. This increase will be even greater when the total 1978 figures are available. In addition to the aforementioned, the subject matter of the complaints varied greatly and the office referred a great number of complaints to other District offices, Attorney General's office in other states as well as to Federal offices for their assistance and which is not reflected in office statistics aforementioned.

Writs of habeas corpus and proceedings under CPLR Article 78 after the first ten months of 1978 show an increase over the entire year of 1977. The office received a total of 199 cases as compared to 182 cases in 1977 and closed 189 cases as against 210 cases in 1977. Projecting these figures for the entire year of 1978 will necessarily show a substantial increase in caseload which averages approximately 45% of the office's entire work load.

The Department of Correctional Services has during the past year opened a number of minimal security camps throughout the State which has added additional cases to the office as well as additional court appearances throughout the central part of the State.

Appeals of the aforementioned classification which were fully processed in the office for the first ten months of 1978 consisted of 19 cases of which 19 cases have been closed. They are slightly less than 1977, although pending appeals could put the office ahead of last year's figures.

The appeals received from the Elmira Correctional Facility are not included in the above figures as this past year they were referred to our Albany office for handling out of the Third Judicial Department. This number was quite sizeable and reflects an overall increase in appeals in this category of cases emanating from this office.

Retention hearings emanating from Willard and Elmira Psychiatric Centers respectively, reflected a dramatic increase for the ten months period over the total in 1977. The office received and processed 79 new cases as against a total of 22 in 1977, and proceeded to close 72 cases in 1978 as compared with 22 cases in all of 1977. The increase in size of the physical plant and population of the Elmira Psychiatric Center together with changes in the Mental Hygiene Law, plus greater activity by the Mental Health Information Service, together accounted for this sizeable increase and this trend should continue on a permanent basis.

Representation by the office in a variety of legal matters for the Department of Mental Hygiene during the past ten

months of the year increased significantly over 1977. Statistics indicate that we handled a total of 68 new matters for the Department this year. in comparison to a total of 65 during all of 1977. Closures to date amount to 62 cases so far this year as compared to a total of 65 in entire 1977. A year end figure will reflect a substantial increase in our representation. A total of $102,483.54 has been collected for and on behalf of the Department and their patients to date which already tops the amount collected in all of 1977 by a significant amount.

The office handled an interesting case brought by several employees and former employees at the Willard Psychiatric Center wherein the Director of the facility as well as other employees were alleged to have mistreated patients, used funds and facilities for their own benefit and in general were charged with malfeasance and misfeasance of their office. Three various groups carried out extensive separate investigations and hearings which finally determined that there was no basis for the charges. The office was involved in a number of proceedings during the Spring and Summer of 1978 in this connection.

Trust and Estate matters handled by the office, together with several abandoned property matters for and on behalf of the Comptroller's office for the first ten months of 1978 approximated our year end 1977 figures. The office handled a total of 31 new cases compared to 30 in 1977, and closed 27 cases as against 28 in 1977. The office collected a total of $163,962.52 in this phase of operation to date.

The office's representation of the Labor Department was reduced so far this year to a total of 3 new cases, compared to 9 in 1977, and we closed 8 cases as against 15 in 1977. However, our collections for the Department increased over last year, totalling to date $3,798.13 consisting of wage claims, fines and restitution.

Further representation by the office was spread out over a number of Departments and subjects which rounded off the work handled by the office so far in 1978.

The office became involved in defending the Department of Correctional Services in a joint action, brought by a number of Orthodox Jewish inmates who are residence at the Auburn Correctional Facility asking that they be furnished a "Kosher" diet together with all the dietary provisions as required under their religious beliefs. The matter was one of the first commenced by the State prisoners and is still pending on a negotiation basis prior to a reserved court decision.

Upon reflection and analysis together with future projections the results and range of matters handled by the Auburn District Office appear to be both substantial and gratifying to its personnel. Production was at an overall all time high and the year to date has been one of satisfaction. It is anticipated from our present outlook that 1979 will be as productive if not more so than the past year.

BUFFALO OFFICE

MICHAEL G. WOLFGANG
Assistant Attorney General In Charge

The pace of activity in the Buffalo District Office has quickened as the number of matters and their complexity has heightened during the first 11 months of the year 1978.

The office opened 3,450 cases in 11 months as compared to 3,338 matters in the 12 months of 1977. Closed were 2,956 matters as contrasted with the full year total of 2,598 cases in 1977.

Monies collected totaled $389,094.20 with some major estate funds already earmarked for turn over to the State Comptroller in January, 1979 and deferred until the end of the bank interest period.

The Consumer Frauds section affected restitution for 11 months in the sum of $120,561.56, again contrasted with $101,459.73 for all of 1977. They opened 1,564 new matters and closed 1,422 matters through November 30th.

Prisoner litigation continued to represent a significant part of our case load. Two attorneys traveled several days each week to Attica Prison to represent State Correction personnel and the Department in Writs of Habeas Corpus and prisoner Article 78 proceedings. 432 cases were opened through November 30th and 285 cases were closed.

Federal litigation continued to involve prisoners also with 71 Federal Writs of Habeas Corpus received and 73 cases closed through November 30th. Additionally, 106 Civil Rights actions were opened which consisted primarily of matters from Attica Correctional Facility complaining of medical treatment, punishment, conditions of confinement, and transfers between correctional facilities. Closed were 96 such matters.

We received 218 Probate of Wills matters and closed 122 cases. 229 new Judicial Settlement of estates were received and 177 matters closed.

A sizeable increase in Mental Hygiene matters during the 11 months of 1978 was noted as 242 cases were opened as contrasted with 121 for the entire year of 1977. Closed were 289 cases as compared with 99 for all of 1977.

The Buffalo Office was called upon to defend the proposed cleanup of the chemical landfill site located in Niagara Falls and which has come to be known popularly as the Love Canal.

Described as an environmental time bomb which has exploded, the Love Canal was used as a disposal site for highly toxic chemical wastes by government and industry.

The plaintiffs in *Burton, etc., et al.* v. *The People of the State of New York, et al.* sought a preliminary injunction to prevent the remedial construction ordered by the Governor and coordinated by a joint task force from the offices of the Departments of Transportation, Health, and Environmental Conservation. The remedial construction was designed to prevent the spread of the highly toxic chemical wastes and to collect those wastes for permanent safe disposal.

The Supreme Court in rejecting the plaintiff's application found that the Governor's task force was employing the best available techniques and safety precautions in the planned construction and that the construction must continue for the benefit of the entire community.

In *James English* v. *The Zoning Board of Appeals of the Town of Evans*, the office of Mental Health, represented by the Attorney General, intervened in behalf of James English who had commenced a special proceeding to have declared invalid a section of a local zoning ordinance being used to prevent the establishment of a community residence for the care of mentally retarded adults. The community residence plan was developed by the Office of Mental Health to provide long term residences to persons unlikely to attain the ability to live independently in a short time.

The Supreme Court refused to permit the exclusionary zoning law to be used as the means for preventing the establishment of the community residence for the mentally retarded.

In the field of corrections, the Buffalo Office successfully prevented the formation of a Prisoner's Labor Union at the Attica Correctional Facility.

The plaintiff in *Haymes* v. *Montanye*, commenced a civil rights action in the United States District Court asserting a First and Fourteenth Amendment right to organize a labor union within the walls of Attica. The court rejected the plaintiff's claims and awarded the State over a thousand dollars in costs.

HARLEM OFFICE

JACQUELYN R. BULLOCK
Assistant Attorney General In Charge

The Harlem Office has continued to maintain a pattern of growth and excellence in rendering service to the people of this community and the State.

The overall average cases received has increased in comparison to last year.

Total cases received were:	612
Total recovery of cash monies were:	$24,843.04
Total recovery of goods and services were:	$63,482.66

In addition to resolution of consumer complaints, this office has and continues to be active in the area of consumer education and protection. Assistant Attorney General Bullock appeared approximately ten times as a radio guest for various consumer programs and once on N.B.C.-T.V. Positively Black.

Ms. Bullock initiated and convened a meeting with major supermarket executives whose stores do business in the Harlem area. The purpose of the meeting was to discuss cleanliness, prices and quality of foods being offered in the area.

As a result of meetings had between the Harlem office and the New York City Department of Investigation, Bureau of Marshals, suggestions made by Assistant Attorney General Bullock were implemented and upon approval of the Appellate Division, became a part of the regulations of N.Y.C. Marshals. These regulations state that during evictions marshals are now required to give tenants a copy of an inventory sheet and a notice advising tenants of their rights regarding storage of their goods.

Another common and unconscionable consumer problem was addressed by this office, viz. the giving of low estimates for storage and sending subsequent high bills. Deputy Assistant Attorney General Jose L. Torres has been successful in obtaining a temporary restraining order in *Lefkowitz* v. *3 Brothers Moving and Storage*. The matter has been set down for a hearing. This office continues to struggle with this problem which has a major impact on low income consumer areas and has received no legislative regulatory attention.

Deputy Assistant Attorney General Torres and Willie R. Acosta, Legal Aide worked diligently in the matter of *Lefkowitz* v. *Jolly Cholly, Inc.* This case involved a used car dealer who advertised and sold cars without being duly licensed. After several consumer complaints, members of the Department of Motor Vehicles assisted this office in the investigation. Finally *Jolly Cholly* consented to an order enjoining them from doing business until their license was approved. This case emerged from a larger case, *Lefkowitz* v. *Dime Discount, Inc.*, which is being pursued by this office.

The Harlem office has made an effort to identify unique consumer problems and to reach the multi-lingual, multi-ethnic groups we serve. As part of this effort, Deputy Assistant Attorney General Torres translated many of the forms used by this office into Spanish.

As a result of numerous consumer complaints concerning shipping household goods to the Caribbean, this office continues to alert and educate consumers of the many pitfalls. Deputy Assistant Attorney General Torres recently met with Mr. Joffery Rodgers, Regional Director of the Federal Maritime Commission in an effort to resolve consumer problems of mutual concern.

This office recognized the need to follow-up on referrals to other agencies. As a result of the intensive efforts of Thomas Mongiello, Consumer Frauds Representative, one consumer was able to recover $1,280. as a refund in the case of *Wilbur Martin* v. *Livery Associates/Nassau Insurance Co.* Again, Mr. Mongiello painstakingly working for months was able to locate a "disappearing" land sales developer who received payments since 1960 and then closed his post office box. As a result of Mr. Mongiello's efforts and the assistance of the New Jersey Attorney General's office, consumers were able to receive deeds to the property which they had paid for. The case resulted in value received for New York consumers to date of approximately $21,000. *In re Sandale Development Corporation*.

Because of Mr. Mongiello's attention, the Harlem office was responsible for the complete revision of Sachs New York Inc.'s retail installment credit agreement. Under Sach's old form, which was in use, there contained a jury waiver clause which was in direct violation of New York Personal Property Law. In addition, Sachs has provided a Spanish language form for those sales conducted in Spanish.

Assistant Attorney General Bullock attended the 9th annual International Consumers Organization Union Conference in London, England. Although this trip was not funded by the Department of Law much valuable information was gathered. During the conference, Ms. Bullock pre-

sented several resolutions which were adopted by the body in a workshop entitled, Low-Income Consumers.

Assistant Attorney General Bullock has addressed several groups, one of which was the District Council 37 A.F.M.C.S.E. Council 5. The topic of discussion was Electronic Funds Transfer – What Effects Will It Have On The Worker. Attorney Bullock and Maureen Burford, addressed over three hundred students of the Manpower Training Program.

Litigation pending is *State* v. *Dime Discount, Inc.*, involving alleged fraudulent practices of a used car dealer and its' agents, and *State* v. *Avco Financial Services of New York*, in which Assistant Attorney General Bullock has challenged the use of a broad security interest clause which attaches to statutorily exempt personal property and all household consumer goods.

Maureen Burford, Consumer Frauds Representative, is a new member of our staff. Mrs. Burford's presence has been a benefit to this office, and the consumers we serve. In the case of *O'Connor* v. *Doughboy Van Co.*, the consumer complained to this office that the storage company with whom she stored all her personal property had disappeared. Through Mrs. Burford's investigation and following a hearing, the consumer was able to recover her property valued at $4,000 plus $250 in restitution. As a result of this investigation, this office learned that six other consumers had storage lots in the warehouse from which the storage company had been evicted. All six consumers were notified; to date three consumers have removed their property.

Mrs. Burford's prompt attention was given to a consumer, who is a senior citizen, when he complained that the realtor failed to return his security deposit and that the Section 8 housing funds disbursed in his name had been withheld. As a result of Mrs. Burford's efforts the consumer received one thousand fifty-five ($1,055.00) dollars which represented the full amount due. *Singleton* v. *Kinput Realty*.

As a result of this office's intervention in a blackout related consumer complaint, many consumers were alerted to their rights in the use of the Small Claims Court. This office conducted a community workshop entitled "How to Sue in Small Claims Court". This workshop was well attended by community members and was ably assisted by staff of the Harlem Small Claims Court. Members of the New York Public Interest Research Group participated in a segment entitled How to Collect Your Judgment. This workshop was conducted by Assistant Attorney General Bullock and Esmeralda Simmons, a formal legal aide in this office.

A two-day Consumer Speak-Out workshop was conducted by this office. Members of the Department of Commerce, N.Y.S. Banking Department, Federal Maritime Commission, Consumer Credit Counseling, N.Y.C. Commission on Human Rights, N.Y.S. Food Retailers Association, N.Y.S. Department of State-Real Estate Division, United States Department of Agriculture, the N.Y.S. Department of Agriculture, New York Public Interest Research Group-Small Claims Action Center, Interstate Commerce Commission, Federal Trade Commission, Cornell University Consumer Cooperative Extension, these agencies participated by sending speakers. Consumers were given an opportunity to express their opinion and ask questions. The panels which consumers expressed the greatest interest were: Insurance, Food and Nutrition and Shipping to the Caribbean.

The Harlem office looks forward to continued success in its dedication and service to the People of this State.

HAUPPAUGE OFFICE

WALTER E. BABCOCK
Assistant Attorney General In Charge

The staff of the Hauppauge Office has been increased by the addition of another full time Assistant and a clerk-typist. As has been the situation in the past, motor vehicle problems constituted a large percentage of the complaints received, so that complaints involving motor vehicle transactions, whether for the repair or purchase of such vehicles, continue to remain the largest single category of problems confronted by the Hauppauge Office.

It is anticipated that newly enacted legislation, such as the "firm price quotation" will assist the consumer and alleviate the need for extensive legislation on matters of dispute over such price discrepancies. In this area of concern regarding motor vehicles, our office was successful in recovering full deposits for various consumers, upon cancellation of car purchase agreements.

In one instance, the selling dealer, over-anxious to make the sale, assured the consumer that the credit application by the purchaser would be approved by the lending institution, to whom such application would be forwarded by the selling dealer. However, the dealer's lending institution turned down the application because of an adverse credit report they obtained. The purchaser, while acknowledging prior problems, had not been able to recover his deposit of $3,700.00 until he presented his complaint to this office.

In a second instance, a consumer purchased a used vehicle from a dealer and the vehicle developed major engine problems during the first thirty days of its guarantee period. The dealer loaned the consumer a vehicle while he attempted unsuccessfully to repair the recently sold vehicle. This went on for about three months, and the consumer applied to our office for assistance. Our contact with the dealer resulted in the dealer agreeing to cancel the sale of the vehicle and return all monies paid by the consumer.

In another transaction, a dealer had promised to deliver a third party guarantee for the vehicle to a prospective purchaser. Upon attempting delivery of the vehicle, the dealer was not able to deliver any guarantee because the vehicle's mileage was such as to exclude it from the guarantee coverage. Our intervention on the consumer's behalf resulted in refund to the consumer of his full deposit of $1,000.00.

Our office also handled an infrequent occurring situation involving a new/used car dealer who had sold a vehicle which had a prior lien, as yet unsatisfied. The consumer had been assured by the selling dealer that proper title documents would be forthcoming from the Department of Motor Vehicles, and the selling dealer provided the purchaser with the loan of a set of dealer plates during this "short interval of five days," while the dealer obtained the required registration documents for the car. Some three months later, the consumer informed our office that he still had not received any registration or title and was, in fact, still operating the car with the dealer's plates affixed. Our staff contacts and referrals resulted in an arrest being made in connection with "doctoring of a title document," and the Department of Motor Vehicles citing the selling dealer for appropriate administrative action, as a result of the dealer's questionable sale and the indicated possible misuse of dealer registration plates.

Subsequently, proper documentation and title was issued by the Department of Motor Vehicles to the consumer, once the lien was satisfied by one of the prior owners of the vehicle.

We were faced with a rather unusual situation in which an individual had opened a savings account in a New York City bank some twenty years previously. His signature had changed throughout the years and, after submitting the passbook and two withdrawal drafts and affidavits, he still was not able to obtain his funds of approximately $12,000.00. This office contacted the bank directly, and through our efforts in cutting the red tape, he received the amount due him in a few days time.

Another complaint received by the Hauppauge Office was from a blind newsstand operator who, after cancelling magazine delivery, was experiencing delay in obtaining his security deposit as well as credit for magazines returned to a major news company. This office was instrumental in obtaining a prompt refund for the consumer in a matter of days.

In another complaint, a builder in Suffolk County had accepted deposits on new home construction from consumers. The problem was that the builder kept pushing ahead the date construction would commence for various reasons. It was determined that the deposits were held in an escrow account, in accordance with Suffolk County law and, after our office contacted the company, the consumers who requested refunds on their contracts received said monies. Approximately $6,000.00 was refunded to consumers requesting cancellation of their contracts, while others decided to go along with the delay.

A large mail order service company listed in its catalog insurance charges for United Parcel Service (UPS) delivery of

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merchandise ordered. An alert consumer determined that UPS insured articles up to $100.00 without any insurance charge, and only applied same when the value of the merchandise exceeded $100.00. The company claimed that it imposed a slight charge for processing claims in the insurance charges listed. After our office pointed out that their charges were not plainly listed, the company voluntarily agreed to change the language used in its catalog to include a statement that insurance charges also include the cost to process lost or damaged order claims by the company.

In a stock purchase situation, a consumer complained to this office that he was being billed for the purchase of 1000 shares of stock, for a total of $18,500.00, which he never ordered. He also alleged that he never had any dealings with this broker. Through the efforts of the Hauppauge Office, we were able to resolve the problem, thereby cancelling the charge to the consumer which was in error. The company had entered an order for another customer with a similar account number.

A reverse case of consumer fraud was uncovered by our office. A consumer complained that a large retailing firm had failed to give him credit for a payment made in 1976 to his charge account. The consumer presented a check which was made out to cash, and purportedly deposited by the retailer. The company endorsement and account number appeared on the reverse side of the check. Our investigator contacted the bank which negotiated the check and determined that the check had indeed not been negotiated by the retailer but had been actually cashed over the counter at a bank branch where the retailer had no account. In fact, the check was cashed by the consumer's wife at a branch located in the same town in which the consumer resided.

The company and the consumer were advised of our investigation, which disclosed that the check in question was not negotiated by the retailer.

Due to the location of the Hauppauge Ofice in a boating area, many complaints are received concerning the purchase of boats and related problems. We received complaints from consumers who had made substantial deposits on the purchase of boats from a local marina. The consumers were experiencing extensive delays, some, up to nine months, on the delivery of their boats which they had ordered for the summer season.

When the complaints were received by this office, the marina had closed shop and ceased operating. Through the combined efforts of the Hauppauge Office, a representative of the defunct marina and a Seattle manufacturer, arrangements were made to complete deliveries of the boats ordered through a local dealer.

As a result of this operation, the consumers were able to obtain their boats without any additional outlay of funds by them. Savings to the consumers as a group amounted to approximately $75,000.00.

Since the major credit card companies and banks are located in Nassau and Suffolk Counties, this office therefore receives a large volume of complaints from consumers regarding their charge accounts.

The problems encountered by the consumers involve charges to their accounts posted in error, disputes over finance charges, failure to receive monthly statements, etc.

Through the efforts of this office, we have been able to resolve the many complaints of this nature within a reasonable amount of time.

The total amount of consumer complaints received by the Hauppauge Office in 1978 amounted to 3,356.

The total cash restitution made by this office amounted to $123,911.30.

Restitution of property, merchandise, etc. as a result of efforts by this office amounted to $313,582.01.

We have experienced a tremendous increase in the appearances in the Supreme Court, Special Term, Part I, and related matters and have been able to assist the Bureaus located in New York City and in Albany by handling matters on a local level, which avoided having an Assistant travel from New York City to Riverhead.

This office also would act in executing documents on behalf of the New York Office. The Hauppauge Office facilities have also been made available on numerous occasions for hearings and conferences which alleviates the necessity of travelling to New York City by witnesses and attorneys.

Due to the cooperation of the Bar Association, more and more attorneys and process servers have become familiar with the fact that papers may be served upon the Office of the Attorney General at Hauppauge. Approximately 278 services have been made upon our office during 1978, of which about 96 comprised Orders to Show Cause.

Naturally, consumer education talks continue to be given before high school students as well as various clubs and organizations, and approximately twenty consumer talks were given by this office in 1978.

PLATTSBURGH OFFICE

CHARLES H. LEWIS
Assistant Attorney General In Charge

This office, which services the Northern Tier Counties of Essex, Clinton, Franklin and St. Lawrence, has experienced another very busy year.

The primary service offered by this office is to the Department of Correctional Services at Clinton Correctional Facility. Since that institution has been designated as a Classification Center, most inmates entering the prison system arrive at Clinton Correctional Facility and commence their series of post-conviction remedy procedures through the local courts.

The majority of cases arising out of Clinton Correctional Facility during the past year have been those attacking the validity of Adjustment Committee and Superintendents' Proceedings wherein the inmate seeks to expunge adverse criticism and dilatorious material from his record as a result of alleged misbehavior. The hearings necessitate the accumulation of records from various correctional institutions where these proceedings were maintained, and it has been necessary for us to bring witnesses from various correctional institutions to this County for trial. Some of the more notorious matters have included the Robert Garrow matter, wherein he claimed that he was not receiving proper medical assistance, and required more sunshine and an electric wheelchair, and David Berkowitz, who was the subject of a proceeding to transfer him from Clinton Correctional Facility to the Marcy Psychiatric Center.

We have represented the Department of Agriculture and Markets and the Department of Motor Vehicles in various matters, as well as the Department of Labor where we brought about payment of wages unlawfully withheld and obtained convictions for violations of that law.

Consumer matters continue to take a substantial portion of our time. We received and responded to over 500 matters, most of which deal with problems of mobile home owners and out-of-state mail order houses. We have been able to be of assistance to many New York and out-of-state consumers, and have received their appreciation expressed through the office of the Attorney General. It is difficult to measure the restitution realized by consumers, but it is substantial.

POUGHKEEPSIE OFFICE

HERBERT N. WALLACE
Assistant Attorney General In Charge

Despite an active Calendar in the Court of Claims and increases in other work done by the Poughkeepsie Office, we undertook the representation of the Department of Correction in all prisons in our geographic area.

In the consumer fraud unit of our office, the Poughkeepsie Consumer Fraud & Protection Unit has opened 2,437 new complaints and closed 2,376 complaints. A total of $694,706 has been recovered in either goods, money or services by this office. Of this amount, $292,504 represents actual monies recovered, and $402,202 represents the value of goods and services recovered for consumers. Additionally, 18 Assurance of Discontinuance agreements have been obtained thus far as a result of the investigative efforts of the Poughkeepsie Consumer Unit, in which $5,450 in costs payable to the State of New York have been paid by merchants who have agreed to cease and desist from engaging in alleged various deceptive and misleading business practices. Also, various consumer lectures and related talks have been given to schools, organizations and other interested groups throughout the area.

An important Consent Judgment was entered into by an Orange County discount house. An investigation by our consumer unit had disclosed that citizen band radios and other merchandise, which had been advertised and sold to members of the consuming public were, in fact, "factory reconditioned" merchandise. Nowhere in the advertisements in question, nor in the subsequent sale of such merchandise, was any indication given to potential purchasers that such merchandise was not new. A legal action was commenced by the Attorney General in which the retailer was charged with six counts of "false advertising" and with deceptive practices. This action culminated in the consent decree which provided that the retailer be enjoined from publishing any advertisements which failed to disclose the actual quality or condition of merchandise offered for sale to the public or which deceptively indicate or connote a different quality or condition of the merchandise than is actual.

A major investigation which had begun in 1977, designed to bring apartment owners of six or more family dwellings into compliance with recent court decisions which held that tenants of multiple dwellings must be given the option of receiving interest on their security deposits at least annually, was concluded during the early months of 1978. Hundreds of questionnaires, which were sent by the Poughkeepsie Consumer Unit to owners of apartment complexes throughout the Dutchess, Orange, Ulster, Rockland, Westchester and Putnam County areas resulted in agreements by hundreds of landlords who had thus far neglected to pay interest on an annual basis, but who agreed henceforth to do so. In total, restitution to members of the consuming public as a result of this investigation amounted to $250,000.

A Rockland County merchant agreed to cease and desist from advertising merchandise at sale prices within a specified percentage range of discount, unless all items are, in fact, offered for sale at a discount within the advertised percentage range and also agreed that at least some items within the class of advertised merchandise are, in fact, sold at the highest advertised percentage of discount. Each of the foregoing merchants paid $250.00 in costs to the State of New York.

A long-standing matter was finally resolved in 1978 when the Attorney General brought a legal action against an Ulster County developer for contempt of court. The developer had violated a previous court order obtained by the Poughkeepsie Consumer Unit, requiring him to construct functional roads throughout a residential development in Ulster County. The motion for contempt of Court, in which the Attorney General asked the court to impose a jail sentence and a fine upon the developer, finally persuaded the developer to do the necessary work in order that the road could be dedicated to the Town. The residents of the area expressed their profound gratitude for the perserverance of the Consumer Frauds Bureau in connection with this matter. The value of the road in question was conservatively estimated at $50,000.00.

In the Court of Claims, Poughkeepsie District, 90 new negligence claims were filed alleging $124,781,272.71 in damages; and 41 new appropriation claims were filed alleging damages of $4,443,935. During the year, 84 cases were closed alleging damages in the amount of $23,843,736.13. Of the cases closed, 35 were tried, 22 were settled, 9 were discon tinued, 16 were dismissed and summary judgment was obtained in 2 claims.

Other Courts

During the year, 39 Article 78 or related matters in Supreme Court were opened and 21 were closed.

ROCHESTER OFFICE

RICHARD A. DUTCHER
Assistant Attorney General In Charge

Serving a mixed urban-suburban-rural area encompassing five counties (Monroe, Livingston, Steuben, Ontario and Wayne), the Rochester District Office experienced another busy year in 1978.

Litigation, consumer protection, and involvement in mental hygiene matters continued to be important areas of activity. Litigation included Article 78 proceedings, actions for declaratory judgment, habeas corpus proceedings, tort actions for money damages, and actions for civil penalties.

While the staff represented State interests in Town, City and County courts, most matters litigated were situated in the Supreme Court, Seventh Judicial District, and, on transfer or appeal, in the Appellate Division, Fourth Judicial Department. Assistant Attorneys General from this office also participated in litigation pending before the United States District Court for the Western District of New York and in motions pending before the New York Court of Appeals.

In an interesting Civil Rights action brought in the United States District Court for the Western District of New York against an employee of the State Department of Taxation and Finance for money damages, this office obtained a dismissal protecting the State's method of collecting sales and use taxes. The plaintiff alleged that to require a vendor to collect sales and use taxes from a customer and to transmit the taxes to the State, without compensating the vendor for his tax-collecting services, constitutes the imposition of involuntary servitude contrary to the protection of Amendment XIII of the Constitution of the United States. We moved for dismissal upon the State's immunity pursuant to Amendment XI of the Constitution of the United States, and upon the complaint's lack of merit. The district court dismissed the complaint upon the grounds that the court lacked jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted.

Another significant proceeding involved the unanimous reversal by the Appellate Division, Fourth Department, of an award granted by Supreme Court, Special Term, of $3,000.00 for attorneys fees against the Department of Social Services in an action successfully attacking the constitutionality of a statute. The appellate court stated that an additional allowance for costs does not authorize or provide for the awarding of attorneys fees.

In yet another interesting case handled by the Rochester Office, a temporary restraining order obtained by a merchants' association enjoined the Department of Transportation and others from improving a hazardous railroad crossing in the business and commercial district of the Village of Fairport until January, 1979. This office, together with counsel for the Village obtained a vacatur of the restraint so that this very important project could commence immediately, as the safety of users of the highway was at stake. The reconstruction was completed in two weeks, well ahead of schedule, because the Department of Transportation crews worked overtime and weekends to finish the project. All parties are happy with the prompt completion of this important project.

During the first eleven months of 1978, the Rochester District Office closed 1,997 cases. By early December 1978, collections and restitutions, direct and indirect, amounted to $269,920.89.

SYRACUSE OFFICE

SIDNEY L. GROSSMAN
Assistant Attorney General In Charge

As the year 1978 winds down to a close it causes us to think back nearly 15 years to the time when we first were appointed by Attorney General Lefkowitz to head the Syracuse District Office.

Many changes have occurred since we came into this office both physically as well as in the type of case and volume of business. We progressed from a waiting room with secretary and private office to offices occupying the entire northeast wing of the John E. Hughes State Office Building with eight attorneys, four investigators and eight stenographers. This includes the administration of the offices of both the Litigation & Claims Bureau as well as General Laws.

A brief comparison of the change in the volume of business in the General Laws Bureau since 1963 shows that in 1963 the office received and opened 94 cases and closed 83. For the eleven months for which records are available for 1978 we opened in all categories 3131 cases and closed 2454.

In dollars collected by the office on behalf of the State for the eleven months for which we have records the sum of $104,613. was brought in for consumers in the Consumer Frauds Bureau; $20,165 in escheated estates; $88,609 collected for patient maintenance, much of this through involved Surrogate Court proceedings compelling invasion of trusts.

This office is the collection agent for the Upstate Medical Center and for that department the sum of $95,220. has been collected up to December 1, 1978.

One phase of the work of our office that has increased tremendously is in the field of social services and this has spilled over into many cases in the U.S. District Courts.

Your writer had early in the year announced his retirement on December 31, 1978 and asks understanding for the traces of reminiscence as his career with the State comes to an end.

UTICA OFFICE

ROBERT J. HAHN
Assistant Attorney General In Charge

The Utica District Office of the General Laws Bureau handled many additional consumer fraud matters in 1978, with the help of a new investigator assigned to the office and many actions were pursued in depth.

The staff was further enhanced by the assignment to Utica in September of a Senior Stenographer to replace the retiring secretary, and the appointment of a Legal Aide to continue needed assistance at the end of his summer internship.

New types of cases handled included parole matters and collections in accounting proceedings from conservators of the mental patients, for the Mental Health Patient Resources Office.

The statistical summary for matters handled for 1978 is as follows:

Consumer Fraud (includes 1872 miscellaneous consumer questions and legal inquiries answered by telephone)	3257 matters	$27,155.45 restitution
Agriculture and Markets	9 cases	$1,115.00 penalties
Mental Health Patient Resources Conservator Accountings	6 cases	$61,800.00 recovered
Mental Institution Medical Operation Orders	89	
State University of New York	2 cases	
Health Department	2 cases	
Mental Hygiene hearings, Trials, Habeas Corpus Proceedings	185	
Legal Questions Answered for State Mental Institutions	182	
Legal Questions Referred to Other Agencies	406	
Citations, subpoenaes, Divorce and Other Special Proceedings Concerning Mental Institution Patients	82	
Labor (safety violations and wage claims)	4 cases	
State Tax Department	11 cases	
Motor Vehicle	6 cases	
Social Services	12 cases	
Civil Service	4 cases	
Parole Division	6 cases	
Service of Process on Attorney General (including Court Appearances regarding Injunction requests) and Not-For-Profit applications for Incorporation	75	
Family Court Petitions to N.Y. Commissioner of Education for Funds for Handicapped	135	
Miscellaneous: Transportation Dept. Industrial Comm. Dept. of State Various Others	10 cases	
Total Matters	4483	

WATERTOWN OFFICE

GORDON H. MAHLEY, JR.
Assistant Attorney General In Charge

The Watertown Office of the Department of Law represents the interests of all state departments in three counties in northern New York, namely Jefferson, Lewis and St. Lawrence Counties. As is true in all areas, the work load has increased during the past year. During 1978, more than 700 new files have been opened. Of this there have been 510 consumer fraud cases. There were approximately 320 open files in the office at the close of business on October 30, 1978. Through that date we have received consumer fraud restitutions in the amount of $38,257.38, with total collections and restitutions for the year totaling $66,801.74.

In 1978, as in previous years, consumer fraud matters have represented a very large portion of the case load of the Watertown Office. We receive a wide variety of consumer complaints and inquiries by letters, telephone calls and walk-ins. We make every effort to resolve the complaints on an informal basis. However, at times we have to resort to our subpoena power in order to obtain a response from the companies involved.

One of our more rewarding cases involved a van-lift which was ordered by an individual who is confined to a wheel chair. This van-lift cost more than $2,300, and was fully paid for before delivery. When the consumer opened the carton she discovered that one of the necessary components, a pump valued at some $500, was missing. When we contacted the shipper they disclaimed all responsibility, stating that the carton was in perfect condition at the time of delivery. However, the complainant did not agree with this. We contacted the company who supplied the van-lift and they stated that the pump was definitely included. However, they immediately sent the complainant a replacement pump, and stated that they would have their company attorney attempt to obtain restitution from the shipping company. The complainant was extremely pleased with the assistance of this office.

Complaints to this office are quite often seasonal, with problems concerning black-top driveways, swimming pools and boats prevalent in the summer, and snow-mobile and snow-blower problems in the winter. One non-seasonal complaint involves the non-return of security deposits on rental property and we have been successful in obtaining many of these deposits for the consumer.

We appear in all courts, at all levels, including the prosecution of collection matters for the Department of Mental Hygiene and the Department of Agriculture & Markets. We are heavily involved in Article 78 proceedings in Supreme Court involving the Department of Motor Vehicles, Department of Social Services and the Department of State. We appear in many matters involving the various phases of Surrogate's Court. There are many matters pending at the present time and, curiously enough, as of this date we have 10 pro se Article 78 proceedings involving the Department of Social Services, all of which were brought by the same individual.

The office is responsible for Court of Claims matters covering the Watertown District of the Court of Claims.

In the field of Mental Hygiene we represent the St. Lawrence Psychiatric Center in various types of litigations, the most prevalent of which are retention hearings. These are requested by residents of the St. Lawrence Psychiatric Center who wish to be released from the hospital.

We spent a great deal of time in the year 1978 representing the Department of Transportation. One of the more interesting matters was a proceeding to evict a large business from their property after the appropriation maps had been filed. It was necessary to commence a proceeding against the company, and before the matter was finally resolved there were motions made in the Appellate Division, Third Department. The most interesting aspect of this matter was the fact that the contractor had indicated that he was going to hold the state responsible for millions of dollars in damages if the property was not vacated and the building demolished so that work could be commenced this fall. The matter was finally resolved to the satisfaction of all parties, and work on the project is continuing.

In the Court of Claims an unusual occurrence arose this year when the Department of Parks and Recreations appropriated some farm land in Jefferson County. Although the claim had been pending for sometime, the appraisals were not filed and exchanged until this year. Since both appraisals were in excess of $100,000 it was very unusual to find that the appraisals were only $400 apart. After conferences with the court the matter was finally settled and the claim has been discontinued.

ADMINISTRATION

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ADMINISTRATION BUREAU

ALBERT R. SINGER
Administrative Director

The Administration Bureau continued its high level of activity in providing guidance and support services to the legal bureaus while continuing to study, plan and implement improvements in both substantitive line and support staff operations. The reports of the various offices of my Bureau, detailed below, indicate some of the more noteworthy activities during the year, but of course do not reflect the continued and ongoing services provided to the legal bureaus on a day-to-day basis which contribute to the smooth operation of the Department, as well as to the continued programs of economy and efficiency.

There are some disturbing aspects seen from the Administrator's point of view in the legal services of the State that should be mentioned. These include the continuing decline of resources being made available to the Law Department despite the increased responsibilities assumed due to new legislation, increased activities of other departments requiring or resulting in the need for legal services from this Department, and the increased and necessary services that the public demands and deserves. During the past few years, with the exception of special investigations, there has been a continued reentrenchment in the resources made available to the Law Department to the point that we believe that next year can see a serious decline in the quality of legal representation unless the need for additional resources is recognized and satisfied.

Another disturbing trend has been the decentralization of money and legal staff to other agencies which has grown to dangerous proportions. This not only dilutes the availability of legal services at the point where it is needed most, but it raises very strong questions from an administrator's point of view of the economy and efficiency aspects of the legal dollar being spent by the State.

The third practice that should be reviewed is that of the central control agency's continuing interference with the internal operations of the office of an elected official. Such measures as personnel targets and expenditure ceilings below that authorized by the Legislature provides a means to seriously inhibit the effectiveness of an elected official, in this case the Attorney General, to provide services within his mandate and at least within the appropriations made available to him.

The activities below of the various sections of the Administration Bureau provide a glimpse of the activities of our Bureau.

Planning Office

In 1978, the Planning Office conducted a comprehensive study of all bureaus and district offices of the Department. Ongoing operations were analyzed within each bureau and recommendations were made, where appropriate, for improvements in operational procedures, office layout, equipment, etc. Follow-up studies will be conducted on identified problem areas.

Computer applications in which Department operations are under analysis or continuing review include:

1. Litigated Case Management System

A major project under development during the year is a system designed to develop an automated case management system. The study includes a review of computerized legal docket systems developed in other states, as well as identifying our specific needs in this important legal function.

2. Collection Unit

The Collection System was expanded to generate judgment forms for cases which had reached that stage of litigation. Two other new programs produce a monthly list of bad addresses to be checked with the Department of Motor Vehicles and a quarterly listing of cases ready for income execution. Modifications to existing programs include a new procedure to automatically reinstitute legal action on persons defaulting on payment schedules, tracking people who have repaid most of the balance before defaulting, changes to the criteria for closing cases as uncollectible, and a revision of the computer-generated letter to make it usable for a broader variety of case types.

3. Equipment Inventory System

Further refinement was made in the equipment inventory system during the year. Improvements include additional data being included for closer inventory control, and switching from a slower system to entering updates directly with the Department's terminal. Presently, there are over 13,000 pieces of equipment inventoried.

4. Charitable Foundations

A final specification package including screen layouts and report formats for the Charitable Foundations application was submitted to the OGS Computer Center programming staff.

Personnel Office

This year the Personnel Office entered into a new field when it assumed responsibility for certain promotional examinations which, in the past, had been conducted by the Department of Civil Service. The results of this new procedure has proven to be very beneficial in the speedy establishment of eligible lists. In addition, we are now conducting tests for entrance-level stenographers and typists on a decentralized basis in New York City. This also should prove useful in expediting the recruiting process.

Several new experimental training programs were developed by the CSEA-Personnel Office Training Committee, providing for indepth paralegal training and skills development for stenographers and clerical employees.

A new dental plan was instituted during the past year, which provided improved benefits for the Managerial/ Confidential group.

In the course of the administration of the current contract, the Personnel Office was responsible for the administration of the Vacation Buy-Back Program and the changes in Workmen's Compensation leave allowances.

The staff of the Personnel Office have participated in the Administration Bureau's study of all bureaus and have traveled to all of the District and Field Offices to gather information for the reports.

In the course of handling disciplinary grievance matters, the Personnel Office has developed some innovative approaches to resolution of issues. These ideas will be evaluated as to their effectiveness during the coming year.

The Personnel Office has continued to handle a wide range of activities, including competitive class recruitment, insurance matters, employee services, training, contract administration, employee counseling, and special employment programs.

Administration Finance Office

During 1978, the Administration Finance Office continued to coordinate budget requests for the Department, recommend fiscal policies, and exercise budgetary control of Departmental funds.

The General Services section continued to provide a wide range of services to the Department, including the purchase of all equipment and supplies, coordinating and controlling the installation and maintenance of telephone equipment, control of Departmental vehicles, personnel security, and supervision of mail, supply, reproduction and general housekeeping functions.

The severe cutback in the Department's budget for the past two years has required a considerable amount of fiscal planning and monitoring of personnel costs and the costs of supplies and equipment. The lack of adequate funds and the Budget-imposed vacancy freeze has had a severe detrimental effect on staff levels throughout the Department, including the Finance Office where considerable reorganization has occurred to ensure that its basic responsibilities are carried out.

The Finance Office has maintained all interest-bearing escrow accounts and prepared restitution payments to the public. In the Venture Cruise matter (approximately $575,000), we were able to invest the funds to offset the costs of administering the distribution of these funds. Arrangements were made to have the thousands of checks in this matter drawn and the account reconciled by computer. Another distribution is currently being made entirely by computer and precedures are being developed to handle most large distributions in this manner.

SALIENT CASES

SALIENT CASES

Relating to Administrative Law

Matter of Barhite v. *Dyson*, 63 A D 2d 1051 (3rd Dept., June 8, 1978)

The petitioner had been employed as a business consultant in the Department of Commerce. He was served with charges of misconduct for his failure to submit to a psychiatric examination. Rather than pursue the grievance procedure provided in a collective bargaining agreement, he instituted an Article 78 proceeding challenging the constitutionality of Civil Service Law, § 72. The Court held that the petitioner was required to exhaust his administrative remedies prior to instituting the Article 78 proceeding and the question as to the propriety of the refusal to submit to the examination was specifically excluded from the Court's decision. (Argued by Mr. Kogan.)

Finger Lakes Racing Association, Inc., etc. al v. *New York State Racing and Wagering Board*, 45 N Y 2d 471 (Court of Appeals, October, 1978).

This action involved the distribution of retained commissions from off-track pari-mutual betting in the western region of New York. The plaintiff instituted both an action for an accounting and a submitted controversy in which it attempted to overthrow certain interpretations of the Racing and Wagering Law as reflected in Rules and Regulations of the State Racing and Wagering Board. The Court of Appeals reaffirmed its previous statements as to the powers which are conferred on an administrative agency and the broad delegation of authority to the Racing and Wagering Board as set forth in the Unconsolidated Laws. Such authority, the Court held, necessarily includes the power to promulgate regulations concerning distribution of commissions retained from off-track pari-mutual bets. The Court went on, however, to say that the Racing and Wagering Board had no authority to create a rule which was out of harmony with a statute and in the one instance where such was the case, the Court nullified the rule of the Board. (Argued by Mr. Kogan.)

Relating to Aliens

Edmund Foley v. *William G. Connelie, Superintendent of New York State Police*, U.S. Supreme Court, 435 U.S. 291, 98, S. Ct. 1067, (March 22, 1978).

Upholding New York statute limiting appointment of members of state police force to citizens of United States. (Argued by Judith A. Gordon).

Relating to Appeals

Matter of Northeastern Harness Horsemen's Association, Inc. v. *New York State Racing and Wagering Board*, 65 A D 2d 665, (3rd Dept., October, 1978).

The petitioner had originally sought to enjoin the conduct of a function known as the Kentucky Derby Ball to be held on May 6, 1977. The petitioner contended that the function was in violation of certain statutes and regulations of the respondents governing off-track betting. The petitioners lost at Special Term and the Ball was held. On appeal the respondent argued that the question was academic. The Court held "Thus, the central issue presented by this appeal — whether the event as planned is legal — has become academic. As this court recently stated in *Cosgrove* v. *Hanson* (58 A D 2d 911), '[m]andamus should not be granted for the purpose of determining a moot question'. We, therefore, dismiss the appeal as moot (see *Koenig* v. *Morin*, 43 NY 2d 737)." (Argued by Mr. Kogan.)

Relating to Bankruptcy

In re *Stirling Homex Corp.*, 591 F. 2d 148 U.S. Court of Appeals, November 22, 1978.

Although liquidiation is permissible in Chapter X reorganization proceedings under Second Circuit rule, where the good faith filing of the original petition has not been challenged, and termination of the reorganization proceeding and conversion to straight bankruptcy is not warranted but liquidation is the expressed objective in a Chapter X proceeding the state's tax claims will be afforded priority status and equitable principles in appropriate circumstances, although not mandated by statute and state will be permitted to set-off refund due debtors against said priority claim. (Argued by John Farrar.)

Relating to Civil Practice

Leon Edward Wein v. *The Comptroller of the State of New York* (61 A D 2d 903, [st Dept., 1978]).

Holding that Article 7-A of the State Finance Law bars an action by a person having status only as a citizen-taxpayer to question the validity of State bond anticipation notes. (Argued by Mrs. Jean Coon.)

Matter of Ready-Mix & Supply Corp. v. *State Tax Commission*, 63 A D 2d 1044, (3rd Dept., June 1, 1978).

Holding that a petition under Article 78 of the CPLR must be served at least 20 days prior to its return date as required by section 7804 (c) of the CPLR to be jurisdictionally valid and if not so served the petition must be dismissed. (Argued by Mr. Wright.)

Relating to Civil Rights

Schanbarger v. *Connelie* 584 F. 2d 974, September 1, 1978. USCA – Second Circuit.

Relating to federal civil rights liability of State Police Official.

The Court held that the Superintendent of the New York State Police could not be held liable under the federal civil rights acts, for actions of troopers, in the absence of personal participation. *Respondeat superior* is inapplicable under the circumstances to an action pursuant to 42 USC 1983 and furthermore, the Superintendent is not the employer of the troopers. Police Officials cannot be held liable for the acts of their subordinates by virtue of their official capacities in the absence of personal involvement. (Argued by Mr. Dooley.)

Julius Shaw v. *Harrett*, 587 F. 2d 109 (U.S. Court of Appeals, November 13, 1978).

Held handicapped individuals had no Federal due process right under the Insurance Law to a hearing on allegations of rate discrimination. The court called the action "totally meritless [and making] needless demands upon state law departments and federal judges." (Argued by Patricia C. Armstrong.)

Relating to Civil Service

Matter of Denis Dillon as District Attorney v. *Nassau County Civil Service Commission*, Court of Appeals, 43 NY 2d 574, February 16, 1978.

The confidentiality expected of criminal investigators in District Attorney's offices is alone insufficient to invalidate the classification by the State Civil Service Commission as competitive. In upholding the Commission, the Court held also that similar titles may properly be classified in different civil service classifications. (Argued by Mr. Robert S. Hammer.)

Matter of Buono, et al. v. *Bahou, et al.*, 62 A D 2d 655 (3rd Dept., June 22, 1978).

Acting pursuant to Civil Service Law, § 25, the respondent Civil Service Commission had ordered the recission of the petitioners' appointments as policemen in the City of Rensselaer because of the failure of the municipal civil service commission to submit visual acuity reports for the petitioners. The petitioners contended that the respondent's action, having taken place more than three years after their appointments, was barred by the provisions of Civil Service Law, § 50, which section they contend was controlling. The Court concluded that the medical examination given to the policemen did not carry out the provisions or purposes of the Civil Service Law and that, therefore, the State Commission could intervene under section 25. Accordingly, the three-year limitation did not apply but it was only necessary that the State's action be taken within a reasonable time, which the Court found was the case herein. The Court further held that neither the respondent's action nor the visual acuity standard was arbitrary or capricious. (Argued by Mr. Kogan.)

Matter of Vatuls B. Prasad v. *Richard Merges, as Director of Wassaic Development Center, et al.* (65 A D 2d 663 [3d Dept., October 26, 1978]).

Petitioner was dismissed from his position as a Psychologist II at Wassaic Developmental Center for intentionally making a false statement of a material fact on the application for the civil service examination which resulted in his appointment at Wassaic. Petitioner had stated on the application that he had never been dismissed from any employment for reasons other than lack of work or funds and that he had never resigned in lieu of charges. Petitioner had, in fact, been terminated prior to the end of probationary periods from two civil service positions and then allowed to resign in lieu of termination.

Although petitioner's position at Wassaic had become permanent, he was not offered a hearing prior to his dismissal, but was given written notice of the reasons for his possible termination and given an opportunity to submit facts in opposition thereto by the Department of Civil Service. Petitioner commenced an Article 78 proceeding seeking back pay and reinstatement to his position pending a pretermination hearing. His petition was dismissed by the Supreme Court.

On appeal the Appellate Division held that the Department of Civil Service may terminate a public employee without a hearing pursuant to section 50 (4) of the Civil Service Law where a post-appointment investigation reveals facts which, if known prior to appointment, would have warranted disqualification, as long as the basis of the disqualification is stated to the employee in writing and the employee is given an opportunity to offer an explanation. The Court held that, because section 50 (4) of the Civil Service Law applies to employees whose probationary period has expired, the petitioner had no property interest in his employment which required a pretermination hearing.

The Court further held that there was no basis for petitioner's contention that he had been deprived of a liberty interest, because the communications between petitioner and the Department of Civil Service were not made public and because petitioner failed to affirmatively challenge the substantial truth of the material in question. (Argued by Mr. Peaslee.)

Turner v. *Berle*, 61 A D 2d 712 (3rd Dept., April 6, 1978).

The petitioner challenged the respondent's abolition of his position as having been made in bad faith. The Court, noting that it is an undisputed prerogative of the State to abolish positions in the competitive class in the interest of economy, and that it is a management prerogative to determine how the business of government shall best proceed under fiscal constraints, found that the petitioner had failed to establish a bad faith abolition inasmuch as it had not been shown that the employer had hired someone new to perform the same functions and that the petitioner had failed in his burden to show that there was not a bona fide financial reason to abolish his position. (Argued by Mr. Kogan.)

Relating to Claims

Bay Ridge Air Rights, Inc. v. *State*, 44 N Y 2d 49 (Court of Appeals, March 23, 1978).

Holding that the new cause of action for contribution based on *Dole* apportionment (*Dole* v. *Dow Chemical Co.*, 30 NY 2d 143 [1972] and CPLR, Article 14), like the old cause of action for pre-*Dole* indemnity, does not accrue until payment has been made by the party seeking indemnity or contribution and that any resulting unfairness to the State is a matter for consideration only by the Legislature. (Argued by Mr. Manley.)

Ebbets v. *State*, 64 A D 2d 794 (3d Dept., July 27, 1978).

Relating to retroactive application of section 10 (6) of the Court of Claims Act (effective Sept. 1, 1976) with regard to late claims (appropriation); and to disability of principal officer and sole stockholder of corporation as inuring to corporation.

The Appellate Division reversed an order of the Court of Claims granting leave to file a late claim holding that the 1976 amendment of the late filing provisions of the Court of Claims Act could not be retroactively applied to appropriation claims which accrued more than three years prior to September 1, 1976.

The Appellate Division also held that disability of principal officer and sole shareholder of corporation did not inure to corporation so as to toll three year period of limitations for appropriation claim, since the corporate entity has a separate and distinct existence. (Argued by Mr. Dooley.)

Fuoco v. *State* 64 A D 2d 1030 (4th Dept., Sept. 29, 1978).

Relating to retroactive application of CCA 10 (6) (effective Sept. 1, 1976) with regard to filing of late claim for negligence.

Fourth Department unanimously reversed an order of the Court of Claims granting leave to file a late claim, holding that the 1976 amendment of the Court of Claims Act could not be retroactively applied to negligence which accrued more than two years prior to September 1, 1974. (Argued by Mr. Dooley.)

Gibson v. *State*, 64 A D 2d 790 (3d Dept., July 27, 1978).

Holding that subdivision 6 of the Court of Claims Act, § 10 (conferring discretion to grant permission to file a late claim), contemplates "a formal application to the Court", rather than an affidavit opposing to dismiss, and that in any event, such an application to file a claim for an injury occurring on January 31, 1973, was barred, at the latest, by February 1, 1976.

As to the excuse of claimant's alleged amnesia caused by his injury, the Court held that even if that condition were a legal disability sufficient to toll the statute, it ceased in June 1973 when he and his attorney became aware of all the facts and therefore that any application for leave to file late was barred long before September 1976 when claimant filed his affidavit requesting late filing relief. Hence the Court of Claims order denying the State's motion to dismiss was reversed and the claim dismissed. (Argued by Mr. Manley.)

Relating to Constitutional Law

George Arthur, et al. v. *Ewald P. Nyquist, et al.* (573 F. 2d 134 [2nd Circ. 1978]).

Holding that the failure of State supervisory personnel to have intervened more forcefully in the matter of racial balancing of Buffalo schools did not constitute the requisite segregative intent to hold the State defendants reponsible for unconstitutional segregation of the Buffalo schools. (Argued by Jean Coon:)

Matter of Robinson v. *New York State Employees' Retirement System, and Levitt, Comptroller*, 46 N Y 2d 747 (Court of Appeals, December, 1978).

Petitioner, a tenured professor at State University at Buffalo medical school, appealed from an order of the Appellate Division (58 A D 2d 925), which held that Special Term correctly concluded that his retirement rights have not been diminished or impaired (as proscribed by State Constitution, Art. V, § 7), by the State Comptroller's suspension of petitioner's retirement allowance, while he continues to be employed at the State University. Petitioner contended that L. 1962, ch. 980 (the statute merging the University of Buffalo into the State University) "guaranteed" him the right to retire from his county position (which he held simultaneously, while teaching at the University), and to collect a full retirement allowance (as a retired member of the Retirement System), while retaining his salaried position at the State University.

The Court of Appeals held that although pursuant to Chapter 980, the petitioner was permitted to remain in the University's separate, private retirement plan (after the merger) "as though no merger had occurred", he nevertheless is not entitled under Retirement and Social Security Law, § 101, subd. a, to receive a full state retirement allowance, while he remains in public service. The Court held further then "there is no constitutional infirmity in this application of the statute", since under the governing statute the petitioner never "had a right" to collect a state pension while remaining in public employment. (Argued by Winifred Stanley.)

Flagg Brothers Co., Inc. v. *Brooks* 436 U.S. 149, 56 L. Ed 2d 185 (U.S. Supreme Court, May 15, 1978).

Reversing the U.S. Court of Appeals. (553 F. 2d 765), the Supreme Court held that there was no state action, a requisite for jurisdiction under 42 U.S.C. § 1983, in a warehouseman's enforcement of a statutory lien. (Argued by Seth Greenwald.)

Relating to Contempt

State of New York v. *Unique Ideas, Inc.*, Court of Appeals, 44 N Y 2d 345, May 11, 1978.

Civil Contempt fine must be sufficient to indemnify the aggrieved party. The statute in such case (Judiciary Law, § 773) calls for an assessment to establish such indemnity. The court modified a limited fine by the Appellate Division in a consumer fraud case for violation of an injunction obtained by the State and provisionally assessed a compensatory fine of $209,000. (Argued by Earl Roberts.)

Relating to Corrections

Matter of Bruce Banach v. *Ward,* 62 A D 2d 456 (3d Dept., May 18, 1978).

Reversing the judgment and denied an application to quash detainers filed by the Department of Correctional Services with Federal officials. The inmate began serving a Federal sentence, was paroled to New York State and convicted of a crime while on parole in Nassau County. He was received in Ossining Correctional Facility and placed in "out to court status" to testify at a Nassau County trial. He was then transferred by Nassau County officials to Danbury Federal Prison. When his Federal sentence expired, he was taken to Nassau County jail where he was retained for a short period of time before being returned to a State Correctional Facility. Petitioner contended that his State sentence was illegally interrupted. The Appellate Division held that while the petitioner should have been returned directly to a State Correctional Facility, the State did not lose jurisdiction over the petitioner who has not fully served a duly imposed term in New York State. Although the procedures were not followed to the letter the petitioner was not prejudiced because he received credit for the time spent in the Nassau County Jail. (Argued by Mr. Walsh.)

People ex rel. Elmore Cunningham v. *Metz,* 61 A D 2d 590 (3d Dept., February 6, 1978).

Reversing a judgment, which sustained a writ of habeas corpus and which ordered that the petitioner be granted a hearing on the revocation of his status as a participant in a work release program. The Appellate Division held that the Special Term erroneously applied the more stringent standards set by the Supreme Court of the United States in parole revocation proceedings to this disciplinary proceeding involving a State prisoner. That the Superintendent's disciplinary hearing which recommended the termination of the inmate's work release program for admittedly sniffing cocaine exceeded due process disciplinary requirements which were enunciated by the Supreme Court, so that it was not necessary to give the inmate an additional work release termination hearing. (Argued by Mr. Walsh.)

Matter of Ramirez v. *Ward,* 64 A D 2d 995 (3d Dept., September 21, 1978).

Affirming a judgment which dismissed an inmate's application seeking to remove him from the list of Central monitoring cases. The petitioner received this classification because of his record involving convictions under Federal narcotic laws and New York State drug laws. The Appellate Division held that the inmate was not entitled to a hearing before being so designated because the Superintendent has statutory authority to determine where a prisoner is to be confined as well as the degree of supervision required. Further that this classification does not deny an inmate participation in temporary release programs and transfer to a lower security institution, but merely requires prior Central Office approval. There is no due process denial because provision is made for an inmate to appeal to the Inspector General and to the General Counsel to challenge his classification. (Argued by Mr. Walsh.)

Relating to Criminal Law

Frank Lopez v. *Curry,* 583 F. 2d 1188, (2d Cir. September 15, 1978).

Holding constitutional as applied New York Penal Law § 220.25 (1) which creates a presumption of knowing possession when a defendant is present in a vehicle containing a controlled substance. However, the court sustained the district court's granting of the writ of habeas corpus because of the state trial judge's erroneous instructions which had the effect of establishing the statutory presumption as irrebuttable. (Argued by Mark C. Rutzick.)

Relating to Estates and Trusts

Matter of Mario Laili, Deceased, U.S. Supreme Court, U.S. , December 11, 1978, affirming 43 N Y 2d 65.

Upholding the validity of EPTL 4-1.2 (Subd. [a] par. [2]) which provides that an illegitimate child cannot claim as the legitimate child of his father for inheritance, if a court, during the lifetime of the father, has not an order of filiation. The court distinguished the New York law from that of Illinois held unconstitutional in *Trimble* v. *Gordon,* 430 U.S. 762. (Argued by Mr. Irwin M. Strum.)

Relating to Insurance

Health Insurance Association v. *Harnett,* Superintendent of Insurance, Court of Appeals, 44 N Y 2d 302, May 2, 1978.

Holding as constitutional 1976 law (Chapter 843) which mandates the inclusion of maternity care coverage in health and accident policies issued after January 1, 1977; held to be a reasonable exercise of the State's police power and not constitutionally as violative of the due process clause. (Argued by Arnold D. Fleischer.)

Relating to Licensees

Association of Personnel Agencies v. *Philip Ross, as Industrial Commissioner,* Court of Appeals, 43 N Y 2d 873, February 7, 1978.

Upholding constitutionality of section 190 of the General Business Law which prohibits discrimination in the handling by licensed employment agencies of referrals for employment on the basis of sex. The court held that it was not irrational for the Legislature to provide that those employment agencies which require special licensing may be subject to penal sanctions if they engage in sexual discrimination. (Argued by Arnold D. Fleischer.)

Relating to Limitation of Actions or Procedures

Frank C. McGirr v. *Division of Veteran's Affairs,* Court of Appeals, 43 N Y 2d 635, Feb. 22, 1978.

An Article 78 proceeding brought by 2 civil service employee is time-barred as against the agency which employed him, where it was brought more than four months after that agency denied a request by him for reconsideration; the agency's denial of reconsideration constituted a rejection of the demand for reinstatement and set in month the four-month period within which judicial review had to be requested. (Argued by Arlene Silverman.)

New York Public Interest Research Group, Inc., et al. v. *Arthur Levitt, et al.* 62 A.D. 2d 1074 (3rd Dept., 1978).

Holding that the six-year contract statute of limitations is applicable in an action to immediate a 1965 State lease agreement on the ground that the lease created an unconstitutional State debt, and that the action, brought 12 years after execution of the agreement, was barred by the statute of limitations, regardless of the fact that plaintiffs did not have standing to bring the action until 1975. (Argued by Jean Coon.)

Leonard Sessa et al. v. *State of New York* 63 A D 2d 334 (3d Dept., July 27, 1978).

In affirming the judgment of the Court of Claims which held that Court of Claims Act. section 10 (6) should not be retrospectively applied to restrict a time-barred claim, the Appellate Division overruled the position it had taken in *Paul* v. *State of New York,* 59 A D 2d 800, and *Lewis* v. *State of New York,* 60 A D 2d 675. The enactment, which clothed the Court with discretionary power to permit the filing of an appropriation claim for cause within six years of accrual, did not alter the three-year period to file such a claim as of right. (Argued by Martin J. Siegel.)

Relating to Negligence

Louis Cruz as Administrator v. *State of New York,* 63 A D 2d 862 (4th Dept., May 26, 1978).

Decedent drowned in pond on property adjacent to open, unfenced State Youth Correction Facility where he had been placed. Court found no liability, holding that decision to place decedent in this kind of open environment was a type of administrative, discretionary act for which the State may not be cast on liability. Further, to require more intensive surveillance than that provided would place an undue economic burden on the State with little or no assurance that it would have prevented this unfortunate accidental drowning. (Argued by Peter J. Dooley.)

Robert C. Ehlenfield v. *State of New York,* 62 A D 2d 1151 (4th Dept., April 7, 1978) mot. for lv. to app. dsmd. 44 N Y 2d 649 (June 15, 1978).

Relating to the concept of scope of employment for purposes of imposing vicarious liability, with respect to State Trooper on way to report for tour of duty.

Trooper, who lived at the barracks, was on his way to report for a scheduled tour of duty, transporting a second-hand refrigerator which he had secured for use of himself and other troopers, to be installed in the barracks, when involved in collision with claimants. Trooper was killed in collision and his widow awarded workmen's compensation benefits on finding that trooper was in course of employment for purposes of that statute.

However, as to whether he was also acting within scope of employment so as to impose vicarious liability on his employer, Court held case governed by general rule that employee driving to work is not acting in the scope of employment. Fact that he was engaged in transporting refrigerator which would incidentally benefit his employer too speculative a ground for application of doctrine of *respondeat superior.* Further facts that he operated under a quasi-military discipline even off-duty, that his off-duty conduct was regulated to some extent by his employer, that he owed certain obligations to his employer even off-duty by virtue of being a police officer, and that he was always "on call", are not sufficient to cast his employer in liability. His activities at the time of the accident were not controlled by the State. (Argued by Peter J. Dooley.)

Angeline G. Januszko, as Administratix v. *State of New York,* 61 A D 2d 1077 (3d Dept., March 9, 1978).

This case involved the negligent release by a State institution of a patient charged with attempted murder who later assaulted and killed plaintiff's intestate. The Appellate Division affirmed on the decision of Judge Lengyl (93 Misc. 2d 1041) holding that it was not foreseeable that the released patient who was found by the committing psychiatrist not to be dangerous and whom the treating psychiatrist found not to be dangerous would commit murder and, therefore, the State was not liable in damages. (Argued by Jeremiah Jochnowitz.)

Stephen Metz v. *State of New York,* 61 A D 2d 1076 (3d Dept., March 9, 1978).

Holding that an award for personal injuries from an accident caused by a fallen State signpost must be reversed and the claim dismissed even if the State's sign inspection system were inadequate because there was no proof of actual notice or of how long the sign was down and hence no actual or constructive notice. (Argued by Douglas L. Manley.)

John V. Southworth v. *State of New York,* 62 A D 2d 731 (4th Dept., June 2, 1978).

Holding the State not liable for wrongful death and personal injuries in an accident caused by an intoxicated motorist to whom the State had issued a temporary driver's license despite his record of prior convictions of driving while intoxicated and while his ability to drive was impaired by alcohol.

The Court held that since the temporary license was issued pursuant to an experimental driver rehabilitation program authorized by the Legislature, and since the procedures adopted for that program reflected "the policy judgment of the State's managerial and executive personnel acting within the province of their professional capacities", the soundness of those administrative procedures thus adopted was beyond judicial review because "such review would constitute a judicial incursion into the immunized area of basic policy decision-making of a co-ordinate branch of government".

The Court also held, as to notice, that in view of the complexities of the departmental operation and consequent reliance upon computerization, the filing of a certificate of conviction in the main office of the Department of Motor Vehicles at Albany was not notice thereof to the Syracuse district office, even two days later, *i.e.,* that "we will not premise a finding of notice upon the presence of the certificate on a clerk's desk in Albany". (Argued by Douglas L. Manley.)

Relating to Parole

People ex rel. Newcomb v. *Metz,* 64 A D 2d 219, (3d Dept., October 19, 1978).

Reversing a judgment and remitted this matter which involved the parole revocation of a person with a history of mental illness. At a parole revocation hearing, the inmate's counsel refused to allow the parolee to testify and instead attempted to introduce evidence that he was mentally ill. The Special Term ordered that commitment proceedings be held. Further, that if the parolee was held to be mentally ill but not requiring hospitalization, that he be released to the custody of the Department of Mental Hygiene for outpatient treatment. The Appellate Division held that the due process standard of fundamental fairness mandates that the petitioner's mental competency be considered, among all other relevant factors, by the Parole Board in conducting parole revocation hearings. In addition, that contrary to the opinion of Special Term, a determination of this question is not a condition precedent to the parole revocation proceeding, but merely a factor to be considered in mitigation or as an excuse for parole violation charges. That it was error for the Special Term to interject itself into the area of determining treatment of an alleged parole violator, where the present statutory and administrative structure allowed the Parole Board great discretion and flexibility in determining treatment. (Argued by John F. Walsh.)

Relating to Professions

New York State Board of Pharmacy v. *Certain Adulterated and Misbranded Drugs etc.* 46 N Y 2d 741, Court of Appeals, December 6, 1978.

Holding that under section 6808 of the Education Law every place where drugs are kept must be registered so that they may be readily inspected for and against threats to the public health and welfare. (Argued by John F. O'Grady.)

Relating to Public Authorities

Hanover Sand & Gravel, Inc. v. *N.Y.S. Thruway Authority,* (65 A D 2d 860 [3d Dept., November 16, 1978]).

In this Article 78 proceeding a supplier of sand and gravel sought to compel award to it of a contract for supply of winter abrasives on which it had submitted a low bid. The Authority had chosen not to award to petitioner after reviewing prior performance and having petitioner's material tested. Supreme Court having hearing evidence held that the determination not to award to petitioner was arbitrary and capricious and ordered the award.

Upon appeal the Appellate Division agreed with Authority that it is not subject to any statutory requirement to award purchase contracts to the lowest responsible bidder. Instead, the matter fell with the Authority's discretion and as long as there was a rational basis to the exercise of this discretion, it was beyond judicial review. The Appellate Division reversed the judgment and dismissed the petition. (Argued by Richard Dorsey.)

Relating to Public Contracts

Mason Stationery Products v. *State of New York,* and two related cases, 65 A D 2d 859 93d Dept., November 16, 1978).

Claimant Master Pad and Paper Corp. sought damages from the State of New York for alleged overpurchases on a requirements contract by the Office of General Services. Master Pad alleged that it suffered damages when the State of New York held it in breach of contract and thereafter refused to purchase supplies from Master Pad, thereby damaging its good name and reputation.

Claimant Mason Stationery Products sought damages from the State solely for its removal from a State bidders list, allegedly without just cause. Mason also alleged damages to its good name and reputation.

On appeal from an order dismissing the claims of both claimants, the Appellate Division held that a determination by the State Commissioner of General Services to remove a prospective bidder on State contracts from the State's list of acceptable bidders is a discretionary exercise of a quasi-judical governmental function for which the State is immune from liability. The Court further held that if the claimants believed that they were improperly removed from State bidders lists, their proper remedy was to commence Article 78 proceeding. (Argued by Maurice Peaslee.)

Relating to Public Health

Clove Lakes Nursing Home v. *Whalen,* 45 N Y 2d 873 (Court of Appeals, October 24, 1978).

Petitioner, a Staten Island nursing home contended that it was denied due process of law because the State Health Department refused to hold a pre-recoupment hearing.

The modified reimbursement rates and the recoupment order resulted from a departmental audit which disallowed numerous expenses claimed by the nursing home in the amount of about $450,000, the court said. The Health Department seeks to collect this amount by retroactive reduction of the reimbursement rates for the nursing home.

The Court said that the nursing home is entitled to a hearing to contest the audit but that the department is not

constitutionally required to hold the hearing before it recoups the alleged overpayments. The Court distinguished this situation from a pre-recoupment hearing which is mandatory when a welfare recipient may find his benefits terminated or reduced.

"Clove Lakes is a business, not beset by subsistance problems of a welfare recipient," the Court said.

The Court noted that the Health Department gave the nursing home the opportunity to challenge the audit through written submissions before the rate adjustment went into effect and that the nursing home took part in an earlier hearing held by the department before the audit was made final.

The Court's per curiam ruling emphasized, however, that a hearing must be held promptly after the Health Department commences recoupment. (Argued by W. Alexander Melbardis.)

Matter of N.Y.S. Dept. of Mental Hygiene v. *County of Broome,* 63 A D 2d 1076 (3d Dept., June 15, 1978).

The County of Broome questioned its liability for the cost of care and treatment of patients in State psychiatric centers who have been acquitted of criminal charges by reason of insanity and placed in such centers by court order. At issue is the interpretation of former section 43.03 (c) of the Mental Hygiene Law which provides that patients held pursuant to order of a criminal court are not liable for costs of treatment, but such cost must be paid by the county in which the court is located. Broome County contended that the County court which ordered a person acquitted by reason of insanity held in a State center was a "civil" court and not a "criminal" court and therefore the County was not liable for the cost of treatment. The Appellate Division, Third Department, rejected the argument that a committing court is a civil court and found that the County was liable for the costs of care and treatment. (Argued by Diane DeFurio Foody.)

Relating to Public Offices

New York University and Ellis Hospital v. *Whalen, Commissioner of the Department of Health,* 46 N Y 2d 734, Court of Appeals. December 6, 1978.

Construing the "Open Meetings Law" (Public Officers Law § § 95-106) the court pointed to the authority of courts "in their discretion and upon good cause shown" to declare void any action taken by a public body in violation of the statutory mandate. Not every breach automatically triggers its enforcement sanctions. Relief was denied for "failure to meet this burden." (Argued by Eileen F. Shapiro.)

Matter of Louis Resnick v. *County of Ulster,* 44 N Y 2d 279 (Court of Appeals, May 2, 1978).

By the decision in this appeal, the Court of Appeals decided the issue in three appeals, two originating in the Fourth Department and one originating in the Third Department, each of which involved the question of whether a County Legislature could validly adopt a local law authorizing the County Legislature to make appointments to fill vacancies in its own body. The Court resolved the conflicting language in the State Constitution and the Municipal Home Rule Law in favor of a construction which recognized the importance of "the manifest intent * * * to encourage local government to make a living document of the Bill of Rights for local government (N.Y. Const., art. IX, § 1 [as amd. 1964])". The Court thus concluded that a county legislature is empowered to adopt local laws such as those there in question regardless of whether the county operates under a county charter. (Argued by William J. Kogan.)

Relating to *Res Judicata*

Matter of James A. Gowan, et al. v. *Tully,* 45 N Y 2d 32 (Court of Appeals, June 13, 1978).

The petitioners were part-time estate tax attorneys who were removed in 1975 and replaced by members of a different political party. The respondent argued that the issue sought to be raised herein, *i.e.*, the legality of the discharge of the attorneys, had previously been litigated in *Matter of Nolan* v. *Tully,* 52 A D 2d 295. The petitioners argued that a new decision of the United States Supreme Court (*Elrod* v. *Burns*, 427 U.S. 347), which prohibited certain patronage dismissals, had been rendered subsequent to the *Nolan* decision and, therefore, res judicata could not apply. In upholding the application of res judicata, the Court held that tender of an additional legal issue not raised in the original action does not bar the use of res judicata merely because the United States Supreme Court had not fully articulated such issue until after the first cause of action had been adjudicated. The Court found that the foundation facts were the same in both proceedings and that the petitioners were precluded by the judgment in the first proceeding. (Argued by William J. Kogan.)

Relating to Retirement and Social Security

Matter of Richard J. Bookhout & ors., v. *Levitt,* 43 N Y 2d 612.

An appeal was taken by the State Comptroller from that part of a judgment of the Appellate Division (54 A D 2d 477), which modified the Comptroller's determination by annulling his denial of applications by petitioners (retired, elected public officials) to receive additional service credit for accumulated unused sick leave at the time of retirement. (The Appellate Division held that the Comptroller had properly determined that petitioners were not entitled to retirement credit of lump sum payments for accumulated unused vacation time.) The Court of Appeals stated that there was undisputed proof that the Comptroller has followed a consistent policy of disallowing the accumulated sick leave of all "elected officials" in the calculation of their retirement benefits. The Court pointed out that the offices of County Judge, Surrogate, Family Court Judge, County Clerk, and County Treasurer are elective; the incumbent continues to hold office until the occurrence of events such as death, resignation, or removal from office (Public Officers Law, § 30, subd. 1; § §2, 3); and as long as each of the petitioners continued in office, he or she could not be deprived of salary, even if prevented by temporary sickness from performing the duties of the office.

Reversing the judgment of the Appellate Division and reinstating the Comptroller's determination, the Court held that "sick leave" is a condition of employment which is "not an attribute of or applicable to public offices held by elected officials", and that the very nature of petitioners' offices contemplates that the petitioners generally were free to take as much or as little time off as they might wish, under a schedule they controlled. Since there was thus no base from which their unused sick leave could be measured, the petitioners are not entitled to service credit for accumulated unused sick leave in the computation of their retirement allowances. (Argued by Winifred Stanley.)

Matter of Seymour Ellenbogen v. *Levitt,* 61 A D 2d 559 (3d Dept., March 30, 1978).

Petitioner challenged the State Comptroller's computation of his retirement allowance, upon the ground *inter alia,* that the pension limitation provision in Retirement and Social Security Law, § 80-a, subd. d (par. 3) is unconstitutional as applied to him, since New York State Constitution, Art. 5, § 7, vested in him on July 1, 1940, the benefits of a retirement plan (of which he was then a member) which did not contain any limitation. Previously in 1931, petitioner became a member of the New York State Employees' Retirement System. Thereafter, in 1968, he filed an election to join the Legislative and Executive Retirement Plan (Retirement and Social Security Law, § 80-a). When he retired, petitioner contended also that the Comptroller erred in computing his "final average salary" by using the last three "calendar" years of his employment, instead of allowing him to select (as he could have, under the Employees' Retirement plan) any three-year period, regardless of the commencement and termination dates thereof.

The Appellate Division held (citing *Schacht* v. *City of New York,* 39 N Y 2d 28) that a waiver of vested pension rights is not necessarily against public policy, providing that the waiver is "clear and certain"; that the petitioner's waiver was not against public policy; and that a retiree (such as petitioner) is bound by the terms of his waiver and may not accept benefits of one retirement plan while rejecting those of another. The Court held further that if petitioner had a vested right under the Constitution to select the period upon which computation of his "final average salary" would be based, he waived that right by electing membership in the Legislative and Executive Retirement Plan, and that the Comptroller's construction of § 80-a, subd. a (par. 4), as meaning that a computation of "final average salary" is limited to three consecutive "calendar" years, is reasonable, "entitled to deference", and should not be disturbed. (Argued by Winifred Stanley.)

Relating to Social Services

Matter of Pamela Clemente v. *John J. Fahey,* 45 N Y 2d, 756 (Court of Appeals, July 13, 1978).

This proceeding brought up for review the question of whether the Commissioner of a County Social Services agency has standing to challenge the fair hearing decisions of the Commissioner of the State Department of Social Services. The Court of Appeals reversed the decision of the Appellate Division holding that local commissioners of Social Services have no standing in proceedings under CPLR Article 78 to seek additional review of the determinations of the State Commissioner. In so holding, the Court noted that local Commissioners are agents of the State and may not substitute their interpretations of the regulations for those of the State Department of the State Commissioner. The Court continued that section 353 of the Social Services Law provides that with respect to fair hearing determinations of the State Commissioner, all such decisions shall be binding on the Social Services official involved and shall be complied with. The Court further noted that even were the State law not to preclude such challenges by local commissioners, the mandate of the Federal law would do so. (Argued by Lew A. Millenbach.)

Bates v. *Toia* 45 N Y 2d 460. (Court of Appeals, October 26, 1978).

The Commissioner of Social Services of Westchester County challenged the validity of certain regulations of the

State Department of Social Services which extend Aid to Dependent Children benefits to a woman after her fourth month of pregnancy on behalf of her unborn child. The County Commissioner contended that the State Commissioner had acted beyond his authority in enacting such regulations since the regulations conflicted with state and federal statutes authorizing Aid to Dependent Children benefits. The County argued that only born children were eligible to receive benefits under such statutes. The Court of Appeals unanimously reversed the Appellate Division, Third Department, and upheld the validity of the regulations based on the broad statutory power of the Commissioner to enact regulations in the Aid to Dependent Children program. Moreover the Court stated that by furnishing indigent women with ADC benefits so that proper prenatal care so vital to physical and mental well being of the unborn child can be provided, the Commissioner and the Legislature were fulfilling their constitutional duty to aid the needy. (Argued by Diane DeFurio Foody.)

Matter of Ismae Dunbar v. *Toia, Commissioner of Social Services,* 45 N Y 2d 764 (Court of Appeals, July 13, 1978).

The Court of Appeals affirmed the order of the Appellate Division, First Department, (61 A D 2d 914) directing that a public assistance recipient who has requested a fair hearing be granted access to her entire case file and all documents to be used at the fair hearing, subject to the right of the agency to redact names of informants who are not to be witnesses. (Argued by Herbert J. Wallenstein in the Court of Appeals; argued by Gerald Slotnik in the Appellate Division.)

Matter of Valeska McManus v. *D'Elia, Commissioner of Nassau County Department of Social Services, et ano.,* A D 2d 2nd Dept. (December, 1978).

Upheld the denial of medical assistance to an applicant whose receipt of the proceeds from the sale of her homestead rendered her ineligible for benefits. The court held that the conversion of the homestead to cash removed the exemption otherwise applicable to the transfer of a homestead under subd. 1 of Social Services Law, § 366. (Argued by Joseph F. Wagner.)

State of New York v. *Robert Francis,* N.Y. Law Journal, June 16, 1978.

Required a professional fund raiser retaining 75% of all funds received through his efforts, to communicate to the public and percentage of funds actually going to the charity both orally and upon any written material including receipts used by it. The issue of denial of a temporary injunction was appealed to the Appellate Division, First Department and argued in December. (Argued by Herbert J. Wallenstein.)

Peninsula General Nursing Home v. *Sugarman,* Court of Appeals, Commissioner of Social Services, 44 N Y 2d 909, June 8, 1978.

Holding that Social Services Law § 366 and the regulations thereunder are constitutional as against the claim of a nursing home that it is thereby denied an opportunity for a fair hearing to challenge a determination denying eligibility for medical assistance to a patient. (Argued by Judith A. Gordon.)

Miriam Winters v. *Lavine, Individually and as Commissioner,* 574 F 2d 46 (2nd Circuit, January 16, 1978).

The Second Circuit Courtt affirmed the United States District Court's dismissal of plaintiff's claim for reimbursement for the services of a Christian-Scientist nurse under the New York Medicaid Program holding that plaintiff was collaterally estopped from re-litigating in the federal courts the contention that such denial of reimbursement was unconstitutional since the state courts had already decided the issue that such nurse was not registered within the terms of the State Education Law. (Argued by Maryellen Weinberg.)

Relating to Student Loans

State of New York v. *Joan Monastero,* 62 A D 2d 792 (3d Dept., June 29, 1978).

The defendant had been in default on a student loan for several years when the State instituted suit. The defendant raised the Statute of Limitations as a defense arguing that the acceleration clause in the note automatically required the entire note to be due and payable upon the first default in payment. The Court relying on the decision in *State* v. *Wilkes* (41 N Y 2d 655), stated that a student loan is not a commercial transaction and since it is subject to several contingencies which are in sole control of the borrower, to permit a discharge of loans such as this on the basis of Statute of Limitations would be out of harmony with the purpose of the act. The Court found that the statute does not run until the lender has been advised by the student that payments are due under the provisions of the note and since such had not occurred herein, the Court found that the action was timely commenced. (Argued by William J. Kogan.)

Relating to Taxation

Matter of A.R. Gundry, Inc. v. *New York State Tax Commission,* 43 N Y 2d 867, (Court of Appeals, February 7, 1978).

Holding that a tax assessment for highway use taxes could be based upon a sampling of the taxpayer's tachograph records, which were available, despite the fact that the taxpayer had reported the tax on the basis of mileage used in tariff schedules where the taxpayer could not show that it had relied upon a regulation or official advice which would have prevented it from keeping tachograph records or other records which would further explain tachograph records. (Argued by Nigel G. Wright.)

Matter of Albany Calcium Light Co. v. *State Tax Commission* 44 N Y 2d 986 (Mr. Bush).

Matter of Albany-Edison Oxygen Co. v. *Tully, et al.* 47 N Y 2d 988 (Mr. Wright).

Holding that for purposes of the Sales and Use Tax Law, Article 28 of the Tax Law, the mere fact that goods (gas cylinders in these cases) have been sold or rented to customers does not in itself qualify the purchase of those goods as a tax exempt purchase for resale if those goods were not purchased with the expectation of making such sales. (Argued by Mr. Bush and Mr. Wright.)

Matter of Faulkner, Dawkins & Sullivan v. *State Tax Commission,* 63 A D 2d 764, (3d Dept., May 4, 1978).

Holding that under the Unincorporated Business Tax all amounts paid by a partnership to commission salesmen who were also nominal members of the firm must be treated as a distribution of partnership profits and not as deductible salaries or other compensation. (Argued by Nigel G. Wright.)

Holley S. Claredon Trust v. *State Tax Commission,* 43 N Y 2d 933, (Court of Appeals, February 22, 1978, cert. den. U.S. October 2, 1978).

The Court of Appeals affirmed a judgment of the Supreme Court at Special Term in Monroe County and declared that section 618 (subd [4]) of the Tax Law (as amd by L 1973, ch 718, § 2) unconstitutional insofar as it applied retroactively to the 1972 income tax liability of plaintiff, an *inter vivos* New York trust, since, although retroactivity provisions in tax statutes, if for a short period, are generally valid, the apparent absence of a persuasive reason for retroactivity, with its potentially harsh effects, offends constitutional limits, especially when the tax imposed is one which might exert significant influence on personal or business transactions. (Argued by Francis V. Dow.)

Long Island Lighting Co. v. *State Tax Commission* 45 N Y 2d 529, (Court of Appeals, November 2, 1978).

Section 253-a of the Tax Law provides that a mortgage recording tax shall be paid to the City of New York with respect to a mortgage covering real property located within and without the City in a manner similar to that prescribed in the first paragraph of section 260 of the Tax Law which concerns real property situated in two or more counties and provides that apportionment of the tax paid shall be based on the relative assessment rolls. The taxpayer, when paying the mortgage tax herein, applied equalization rates to actual assessment figures. The State Tax Commission determined that an additional tax was due in the amount of $29,000 employing the actual assessment figures.

Taxpayer filed an application for a refund after paying the additional tax. After a hearing, the State Tax Commission denied the refund. Upon review, the Appellate Division annulled the State Tax Commission's determination and remitted the matter for further proceedings (55 A D 2d 79). The Court of Appeals granted leave to appeal to that Court.

The Court of Appeals rejected the taxpayer's argument that had been accepted by the Appellate Division that the equalization rates must be applied to actual assessments to achieve equality and fairness in the apportionment. The taxpayer relied on the last sentence of section 260 which provides that where the provisions for apportionment between tax districts are inapplicable or inadequate, the Tax Commission shall establish a basis of apportionment that will be "equitable and fair". The Court in rejecting the taxpayer's argument held that a "fairer" tax formula might have been adopted is of no moment because the objective may well have been the production of optimum revenue rather than a fair or balanced formula. It was observed that the statute (§ 260) had been interpreted and applied by the State Tax Commission during its 70-year existence as it was in the instant case and had the Legislature chosen to do so when it enacted section 253-a in 1971, it could have easily incorporated the equalization concept for determination of the tax. Since it did not do so, the statute must be taken to have the same meaning after the enactment of section 253-a as it had before the enactment. The order of the Appellate Division was reversed, and the determination of the State Tax Commission confirmed. (Argued by Lawrence J. Logan.)

Matter of Frederick L. Marshall v. *State Tax Commission*, 62 A D 2d 1124, (3d Dept., April 26, 1978).

Holding that the Unincorporated Business Tax applies to the profits on the sale of realty where that realty had been purchased immediately prior to the sale under an option

contained in a lease and a business was operated on the premises; if the petitioner was not in business it would not have had the option; furthermore, the profits being taxed were realized because of the necessary liquidation of the business. (Argued by Nigel G. Wright.)

Matter of Merrick Estates Civic Association, Inc. v. *State Tax Commission*, 65 A D 2d 669, (3d Dept., Oct. 26, 1978).

Holding that fees charged by a homeowner's beach association are dues which are taxable under the dues tax, section 1105(f) (2) of Article 28 of the Tax Law, relying upon precedent under the former Federal dues tax in the absence of a body of State law on the subject. (Argued by Nigel G. Wright.)

Matter of Norman H. Meyer, et al. v. *State Tax Commission*, 61 A D 2d 223, (3d Dept., February 16, 1978, lv. to app. den., 44 N Y 2d 645).

The Tax Department conducted a sales tax audit of petitioner's four retail drug stores for two separate three year periods. Because of inadequate sales records maintained by petitioner, the Department's auditors relied upon records of purchases by the drug stores in determining sales taxes due for the two periods. The purchase audits did not take into account markup differentials between taxable items and nontaxable drug items, but were based upon a uniform markup of all items purchased by the store for resale.

In an Article 78 proceeding to review the Tax Commission's determination of sales tax due during the audit periods, petitioner contended that, because of the extremely high markup on drugs sold in his store and the very low markup on taxable items, the auditing methods were invalid. The Appellate Division held that pursuant to section 1138 of the Tax Law, the Tax Commission is authorized to determine sales tax liability by an analysis of purchases rather than sales where the taxpayer fails to keep adequate sales records. The Court found that the purchases audits used by the Tax Department were facially sound and that petitioner failed to establish that the *existence* of markup variations was sufficient to overcome the apparent validity of the audit and require further proceedings. (Argued by Maurice Peaslee.)

Matter of Sandy Hill Corporation v. *State Tax Commission* (61 A D 2d 550 [3d Dept., 1978]).

Petitioner which produces and sells paper manufacturing machines claimed an exemption from sales and use taxes, among other items, on materials purchased to build a sanitary pumping station. The exemption for sewage treatment facilities results from the State Tax Commission's interpretation of Tax Law, § 1115, subd. (a), paragraph 12, which included as production machinery, equipment and materials purchased to treat waste from a production process. The Court stated the rule in construing exemptions in taxing statutes as " 'An exemption from taxation' must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption" *(People ex rel. Savings Bank of New London* v. *Coleman,* 135 N Y 231, 234; see *Matter of Young* v. *Bragalini,* 3 N Y 2d 602, 605-606, *supra*). Indeed, if a statute or regulation authorizing an exemption is found, it will be "construed against the taxpayer", although the interpretation should not be so narrow and literal as to defeat its settled purpose'. (*Matter of Grace* v. *New York State Tax Comm.,* 37 N Y 2d 193, 196.)" The Court held that the respondent Tax Commission, in construing its own regulation that the exemption applied to waste treatment facilities and not to waste transport facilities, did not act unreasonably or irrationally. (Argued by Joseph F. Gibbons.)

Matter of Aaron Elkind v. *State Tax Commission,* 63 A D 2d 789, (3d Dept., May 11, 1978).

Petitioner, a partner in several partnerships owning various parcels of real property in the names of the individual partners, rather than the partnerships, received compensation from the partnerships for managing the property and preparing leases, renting apartments, supervising superintendents and generally exercising other responsibilities of a landlord-tenant relationship. The State Tax Commission assessed a tax deficiency upon the ground that the compensation received by the petitioner for these duties as subject to the unincorporated business tax. Petitioner claimed that Tax Law, § 703, subd. (e) " 'Holding, leasing or managing real property. – An owner of real property, a lessee or a fiduciary shall not be deemed engaged in an unincorporated business solely by reason of holding, leasing or managing real property.' " exempted him from the unincorporated business tax. The Appellate Division held that when a taxpayer claims the benefit of a statute providing an exemption from taxation, the taxpayer assumes the burden of proof of entitlement to the benefit and that since the Tax Commission has reasoned that the property managed by the petitioner was partnership property owned by the partnership, rather than the petitioner, its construction of the word "owner" in subdivision (e) of section 703 was sustained by the facts and that its determination should be confirmed. (Argued by Joseph F. Gibbons.)

FINANCIAL REPORT

FINANCIAL REPORT

Category	Direct 1977	Direct 1978	Indirect 1977	Indirect 1978
I. Collections and Restitutions Effected for the State				
A. Collections:				
1. Abandoned Property	$ 390.98	$ 5,728.11	$ 290,850.66	$ 4,879,615.89
2. Costs in Actions and Proceedings	162,954.61	217,678.71		489,450.39
3. Damage to State Property			387,886.65	2,098,703.76
4. Excessive Costs on Contract				382,656.55
5. Fines and Penalties:				
a. Agriculture & Markets	67,677.16	80,888.03		5,437.15
b. Anti-Trust				66,500.00
c. Environmental Quality			100,014.98	16,245.88
d. Labor Law Violations			177,323.95	4,763.57
e. Licensed Practice			4,510.00	28,950.00
f. Special Investigations				
g. Unlicensed Practice			3,145.00	8,100.00
h. Workmen's Comp. Law Violations			13,880.00	99,301.56
i. Miscellaneous		33,010.00	10,850.00	66,278.60
j. Other State Agencies				1,094,576.88
6. Industrial Commissioner				122,674.13
7. Institutions & Hospitals			168,743.65	194,590.38
8. Patient Maintenance			3,663,488.21	3,259,967.74
9. Refund of Expenses	9,052.61	4,036.92		
10. Rental Arrears			126,008.27	
11. Special Investigation				8,655.00
12. Taxes:				
a. Bankruptcies			15,062.75	29,815.10
b. Corporation			3,726.86	6,642.67
c. Decedents Estates			905,624.12	200,669.24
d. Mortgage Foreclosure			17,051.04	7,493.90
e. Income			31,076.25	2,239.75
f. Unemployment Insurance			729,185.00	960,953.75
g. Sales			83,369.41	141,772.30
h. Miscellaneous			73,548.77	2,730.92
13. Student Loans and Tuition			1,228,955.33	885,842.63
14. Miscellaneous			7,501.27	
15. Interest on Rent Security Deposits			144,707.35	222,271.16
B. Restitutions:				
1. Anti-Trust Litigation	$	$	$	$ 3,339.06
2. Employees Retirement System			4,645,927.62	
3. Unemployment Insurance			478,653.11	598,828.00
Total Collections and Restitutions Effected for the State	**$ 240,081.36**	**$ 341,341.77**	**$13,311,090.25**	**$15,889,065.96**
II. Collections and Restitutions Effected for the Public				
A. Collections:				
1. Injured Workmen	$	$	$ 584,821.30	$ 499,728.07
2. Wage Claimants			448,916.94	532,874.89
3. Workmen's Compensation Appeal			1,242,105.80	1,348,054.95

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Category	Direct 1977	Direct 1978	Indirect 1977	Indirect 1978
B. Restitutions:				
1. Charity Frauds			2,419,488.00	3,200,834.00
2. Consumer Frauds	51,644.27	738,854.62	*9,181,465.77	1,384,845.02
3. Stock Frauds			537,301.75	702,423.68
4. Coop. Cond. R.E. Synd.			2,198,297.82	1,715,706.12
Total Collections and Restitutions Effected for the Public	**$ 51,644.27**	**$ 738,854.62**	**$16,612,397.38**	**$ 9,384,466.73**
III. Reimbursement for Services Rendered by the Law Department				
A. East Hudson Parkway Authority	$ 10,055.08	$ 3,084.81	$	$
B. Federal Government Capital Construction Projects			175,861.02	627,122.78
C. Insurance Law Section 32A			3,666.00	10,832.00
D. Power Authority	44,160.06	429,375.62		
E. Metropolitan Transportation Authority	36,561.96	8,468.33		
F. Thruway Authority	9,457.73	9,872.66		
G. Volunteer Firemen's Benefit Law			511.00	509.00
H. Workmen's Comp. Law Section 151			419,776.00	451,535.00
I. Workmen's Comp. Law Article 9			15,534.00	18,445.00
Total Reimbursements	**$ 100,234.83**	**$ 450,801.42**	**$ 615,348.02**	**$ 1,108,443.78**
IV. Filing Fees				
A. Broker-Dealer Exemptions	$ 59,880.50	$ 60,160.00	$	$
B. Broker-Dealer Statements	72,440.00	77,840.00		
C. Charitable Foundations	438,379.66	466,933.39		
D. Fingerprint Processing	158,893.00	113,530.00		
E. Investment Advisory Amendments	3,175.00	3,275.00		
F. Investment Advisory Registration	22,700.00	26,700.00		
G. Principal Statements	23,818.00	19,758.00		
H. Real Estate Syndications	736,461.53	1,172,377.09		
I. Salesmen Statements	108,730.00	103,160.00		
J. Supplemental Statements	120,125.00	125,850.00		
K. Security Takeover Disclosure	13,148.50	13,500.00		
Total Filing Fees	**$1,757,738.19**	**$2,183,083.48**	**$**	**$**
V. Miscellaneous Receipts				
A. Sale of Publications	$ 970.00	$ 350.00	$	$
B. Subpoena Fees	40.00	232.26		
Total Miscellaneous Receipts	**$ 1,010.00**	**$ 582.26**	**$**	**$**
Grand Total of Receipts	**$2,150,708.65**	**$3,714,663.55**	**$30,538,835.65**	**$26,381,976.47**

*Total includes judgment of $5,011,000 awarded by court in *State v. GMC* and not yet collected.

EXECUTIVE STAFF OF THE DEPARTMENT

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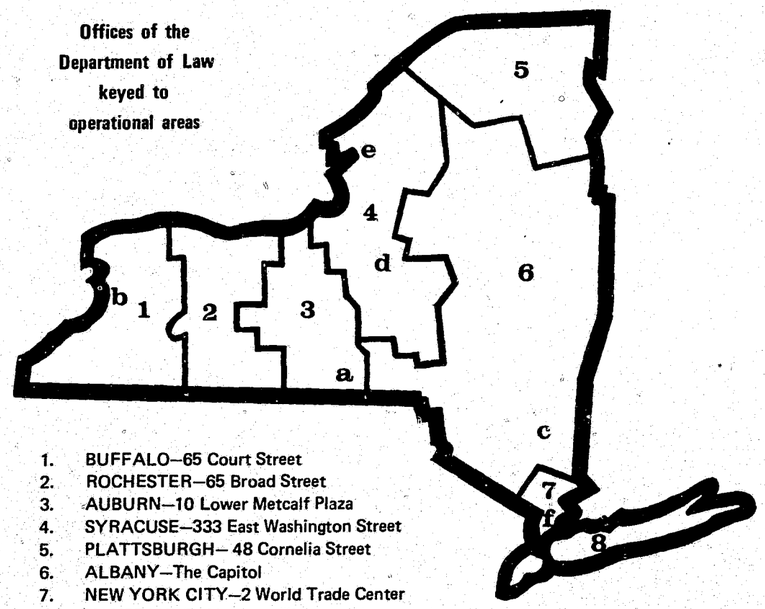
Ruth Kessler Toch . . . . . *Solicitor General*
Samuel A. Hirshowitz . . . . . *First Assistant Attorney General*
Joseph L. Fristachi . . . . . *Executive Assistant Attorney General*
Allan Starr . . . . . *Executive Assistant to the Attorney General*
Charles W. Stickle . . . . . *Executive Assistant to the Attorney General*
Albert R. Singer . . . . . *Administrative Director*

Offices of the Department of Law keyed to operational areas



1. BUFFALO—65 Court Street
2. ROCHESTER—65 Broad Street
3. AUBURN—10 Lower Metcalf Plaza
4. SYRACUSE—333 East Washington Street
5. PLATTSBURGH— 48 Cornelia Street
6. ALBANY—The Capitol
7. NEW YORK CITY—2 World Trade Center
8. HAUPPAUGE—Veterans Highway

FIELD OFFICES

a. BINGHAMTON—44 Hawley Street
b. BUFFALO—125 Main Street
c. POUGHKEEPSIE—40 Garden Street
d. UTICA—207 Genesee Street
e. WATERTOWN—317 Washington Street
f. HARLEM—163 West 125th Street

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