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THE *YELLOWSTONE* INJUNCTION, OR "HOW TO VEX YOUR LANDLORD WITHOUT REALLY TRYING"

INTRODUCTION

Often the Butterfly Effect of Chaos Theory[1] applies to law as well as physics. Who would have thought that a woman waiting for a train to Far Rockaway would transform tort law?[2] Or that the boastful advertisement of one of the many quacksalvers in Merry Olde England would provide a new approach to the law of contracts?[3] Likewise, who would have believed that a Queens strip mall lacking a fire sprinkler system would transform landlord-tenant law in New York State when the New York Court of Appeals handed down its decision in *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*[4] Since that day, courts in New York have interpreted *Yellowstone* as standing for the proposition that a tenant, served with a default notice[5] by a landlord, may seek an injunction to stay the running of the curing period with little or no proof.[6]

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[1] The Butterfly Effect is a common example used to demonstrate how a nonlinear system, such as weather, turbulence in fluids, fractal geometry, atomic and sub-atomic physics and even the dynamics of a ball bouncing on a table, is sensitive to initial conditions. It is "the notion that a butterfly stirring the air today in Peking can transform storm systems next month in New York." JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE 8 (1987). Similarly, law, which can be as unpredictable as the weather, has nonlinear elements in its social equation.

[2] Palsgraf v. Long Island R. R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

[3] Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256.

[4] 21 N.Y.2d 630, 237 N.E.2d 868, 290 N.Y.S.2d 721 (1968).

[5] A standard provision in commercial and residential leases is that if the tenant defaults in fulfilling any of the terms of the lease, the landlord shall give the tenant a written notice to cure (that is, to fix) the default (a "notice to cure"). If the tenant does not cure within the specified time, then the landlord may cancel the lease by giving the tenant a written notice of default ("default notice") which usually provides an additional period of time to cure. *See* A 261 Lease Agreement, Paragraph 15, Julius Blumberg, Inc. (1978); Standard Form of Store Lease, Paragraph 17, The Real Estate Board of New York, Inc. (1975).

[6] Continental Towers Garage Corp. v. Contowers Assocs. Ltd. Partnership, 141 A.D.2d 390, 529 N.Y.S.2d 322 (1st Dep't 1988); Jemaltown of 125th St., Inc. v. Leon Betesh/Park Seen Realty Assocs., 115 A.D.2d 381, 496 N.Y.S.2d 16 (1st Dep't 1985); Herzfeld & Stern v. Ironwood Realty Corp., 102 A.D.2d 737, 477 N.Y.S.2d 7 (1st Dep't 1984); Finley v. Park Ten Assocs., 83 A.D.2d 537, 441 N.Y.S.2d 475 (1st Dep't 1981);

The *Yellowstone* injunction decisions are ripe with drama. They contain undertones of the great white tenant doing battle with the peg-legged landlord that any fan of Melville could appreciate. Thrown in on top of that is a judiciary that often seems, at best, hopelessly confused.[7] Taken as a whole, the *Yellowstone* injunction cases would be mildly amusing,[8] but for the

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Podolsky v. Hoffman, 82 A.D.2d 763, 441 N.Y.S.2d 238 (1st Dep't 1981); Fratto v. Red Barn Farmers Mkt. Corp., 144 A.D.2d 635, 535 N.Y.S.2d 53 (2d Dep't 1988).

[7] *See* Fifty States Mgmt. v. Pioneer Auto Parks, 46 N.Y.2d 573, 389 N.E.2d 113, 415 N.Y.S.2d 800 (1979) (reversed or denied granting of *Yellowstone* injunctions because tenant failed to take action within the default period); *see also* Health 'n Sports, Inc. v. Providence Capitol Realty Group, Inc., 75 A.D. 2d 884, 428 N.Y.S.2d 289 (2d Dep't 1980); Wuertz v. Cowne, 65 A.D. 2d 528, 409 N.Y.S.2d 232 (1st Dep't 1978); W.F.M. Restaurant, Inc. v. Austern, 75 Misc.2d 350, 347 N.Y.S.2d 645 (Sup. Ct. Nassau County 1973); 30-88 Steinway St., Inc. v. H.C. Bohack Co., 65 Misc. 2d 1076, 319 N.Y.S.2d 679 (Civ. Ct. N.Y. County 1971).

But cf. Fratto v. Red Barn Farmers Mkt. Corp. 144 A.D. 2d 635, 535 N.Y.S.2d 53 (2d Dep't 1988) (court reversed denial of *Yellowstone* injunction *nunc pro tunc* to date of application because supreme court "should have" granted it). *See, e.g.*, Continental Towers Garage Corp. v. Contowers Assocs. Ltd. Partnership, 141 A.D.2d 390, 529 N.Y.S.2d 322 (1st Dep' 1988); 144 E. 40th St. Leasing Corp. v. Schneider, 125 A.D.2d 195, 508 N.Y.S.2d 459 (1st Dep't 1986); Jemaltown of 125th St., Inc. v. Leon Betesh/Park Seen Realty Assocs., 115 A.D.2d 381, 496 N.Y.S.2d 16 (1st Dep't 1985); East Side Car Wash v. K.R.K. Capitol, Inc., 102 A.D.2d 157, 476 N.Y.S.2d 837 (1st Dep't 1984).

Numerous courts misstate the policy behind *Yellowstone* injunctions. *See, e.g.*, Suarez v. El Daro Realty, Inc., 156 A.D.2d 356, 548 N.Y.S.2d 313 (2d Dep't 1989); Heavy Cream, Inc. v. Kurtz, 146 A.D.2d 672, 537 N.Y.S.2d 183 (2d Dep't 1989); Philex Enters., Inc. v. Lanzner, 131 A.D.2d 452, 515 N.Y.S.2d 874 (2d Dep't 1987); Podolsky v. Hoffman, 82 A.D.2d 763, 441 N.Y.S.2d 239 (1st Dep't 1981); Madison Ave. Specialties, Inc. v. Seville Enters., Inc., 40 A.D.2d 784, 337 N.Y.S.2d 590 (1st Dep't 1972); Westside Towers, Inc. v. Hevro Realty Corp., 40 A.D.2d 664, 337 N.Y.S.2d 244 (1st Dep't 1972).

Still other courts misapply the *Yellowstone* test. *See, e.g.*, Post v. 120 E. End Ave. Corp., 62 N.Y.2d 19, 464 N.E.2d 125, 475 N.Y.S.2d 821 (1984); Somekh v. Ipswich House, Inc., 81 A.D.2d 662, 438 N.Y.S.2d 362 (2d Dep't 1981).

[8] *See* Novak v. Fischbein, Olivieri, Rozenholc & Badillo, 151 A.D.2d 296, 542 N.Y.S.2d 568 (1st Dep't 1989) (court finds that failure of former attorneys to obtain a *Yellowstone* injunction did not constitute legal malpractice because the legislature's passing of Real Property Actions and Proceedings Law ("RPAPL") section 753(4) *during* the landlord-tenant proceedings gave the plaintiff another avenue for relief); Podolsky v. Hoffman, 81 A.D.2d 763, 441 N.Y.S.2d 239 (1st Dep't 1981) (genuine issue of material fact whether "noxious odors" were in fact coming from tenant's apartment); Philex Enter., Inc. v. Lanzer, 131 A.D.2d 452, 515 N.Y.S.2d 874 (2d Dep't 1987) (court determined that tenant's selling of items which depict or replicate male genitalia is not "obscene" or "pornographic" as defined under the lease; one wonders whether the landlord, who was obviously concerned that items of this nature not be sold from a store on his property, realized that the word *philex*—the name of the corporation—apparently has its root in the Greek word φιλην (philein), to love, whence derives the words *philander* ("to make love insincerely"), necrophilia ("an erotic attraction to corpses") and *philogyny* ("fondness for women"). WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY at

fact that they carve out a needless exception to the traditional standard of proof necessary for injunctive relief.[9]

This Comment examines the development of the *Yellowstone* injunction doctrine, looking at how New York courts have eroded the traditional burden of proof necessary to obtain injunctive relief in a *Yellowstone* situation. This Comment also discusses the status of the *Yellowstone* injunction today, noting those areas where courts no longer grant, or no longer should grant, a stay on the running of the curing period on a default or violation notice. Finally, this Comment proposes that either the courts revise the *Yellowstone* test, or that the New York legislature pass legislation to solve the problems inherent in *Yellowstone* situations.

I. BACKGROUND

On November 9, 1966 the landlord for Yellowstone Shopping Center in Forest Hills, New York, received an order from the New York City Fire Department to install an automatic sprinkler system in the cellar of one of its leased stores.[10] The landlord wrote three letters to First National Stores, Inc., the tenant of the store, demanding that it comply with the Fire Department's order.[11] Apparently not having received a satisfactory response, the landlord, pursuant to the lease, sent the ten-

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1346 (9th ed. 1979); Somekh v. Ipswich House, Inc., 81 A.D.2d 662, 438 N.Y.S.2d 362 (2d Dep't 1981) (court found a genuine issue of material fact as to whether keeping a dog in an apartment was a violation of lease's "no pets" provision); Weidman v. Tomaselli, 81 Misc. 2d 328, 365 N.Y.S.2d 681 (Sup. Ct. Rockland County 1975) (*Yellowstone* does not apply because residential lease found to be one of adhesion due to the general housing shortage in Rockland County).

[9] The standard test for injunctive relief is: (1) the likelihood of ultimate success on the merits; (2) whether irreparable injury will occur absent injunctive relief (no adequate remedy in law); and (3) a balancing of equities in favor of petitioner. Finley v. Park Ten Assocs., 83 A.D.2d 537, 441 N.Y.S.2d 475 (1st Dep't 1981); Albini v. Solork, 37 A.D.2d 835, 326 N.Y.S.2d 151 (2d Dep't 1971); Schuller v. D'Angelo, 117 Misc. 2d 528, 458 N.Y.S.2d 501 (Sup. Ct. N.Y. County 1983). *See generally* 67 N.Y. JUR. 2D *Injunctions. But see* Douglas Laycock, *The Death Of The Irreparable Injury Rule*, 103 HARV. L. REV. 688 (1990).

[10] First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21 N.Y.2d 630, 634, 237 N.E.2d 868, 869, 260 N.Y.S.2d 721, 722 (1968).

[11] The landlord based its demand on a lease provision that read: "Lessee agrees to observe and comply with all requirements of governmental authority relating to matters affecting the leased premises only and involving the use of the leased premises over which lessee would exercise control during the normal course of its business operation . . . ." *Yellowstone*, 21 N.Y.2d at 635-36, 237 N.E.2d at 869-70, 290 N.Y.S.2d at 723-24.

ant written notice that if it did not cure the violations within ten days, the lease would terminate.[12] On the tenth and final day of the cure period, the tenant brought an action for a declaratory judgment that it was not in violation of the lease.[13] On the issue of who was responsible for installing the sprinkler system,[14] the New York Court of Appeals ultimately affirmed the appellate division's decision in the landlord's favor.[15]

However, the appellate division in its 5-to-2 majority opinion also decided that although the court could declare that the lease had terminated due to the tenant's default, it would not because the "tenant was acting in good faith when it brought the declaratory judgment action."[16] Instead, the majority gave the tenant twenty days to install a sprinkler system that conformed with the Fire Department's order, or to pay if the landlord had already installed such a system, and permanently enjoined any eviction proceedings on the issues decided.[17] The court based this part of its decision on *Ferguson v. Village of Hamburg*,[18] which held that "[o]nce a court of equity has jurisdiction of a case, it has the power to dispose of all the matters at issue and grant complete relief."[19] The court of appeals, also in a 5-to-2

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[12] Article 12 of the lease provided: "In case lessee shall default in the performance of any covenant or agreement herein contained, and such default shall continue for ten (10) days after receipt by the lessee of written notice thereof given by lessor, then lessor, at the option of lessor, may declare said term ended, and may re-enter upon the leased premises either with or without process of law, and remove all persons therefrom." *Yellowstone*, 21 N.Y.2d at 634-35, 237 N.E.2d at 869, 290 N.Y.S.2d at 722-23.

[13] The tenant based its action on the lease provision entitled LESSOR'S REPAIRS which provided that lessor was "to make all repairs to or alterations of the leased premises which may be required by governmental authority." *Yellowstone*, 21 N.Y.2d at 635, 237 N.E.2d at 869, 290 N.Y.S.2d at 723.

[14] The tenant brought its action in Supreme Court, Queens County. The supreme court dismissed the complaint on the grounds that tenant's cause of action is more appropriate as a defense to a summary proceeding by the landlord. On appeal, the parties, by stipulation, authorized the appellate division to decide the controversy as a matter of law. *Id.*

[15] The court of appeals affirmed that part of the appellate division's decision holding that under the lease, First National was "responsible for repairs, alterations, or additions to the premises required by governmental authority as a result of *its specific use* of the premises" and that "the necessity for the sprinkler system arose primarily because of the manner in which the tenant used its premises." *Yellowstone*, 21 N.Y.2d at 636, 237 N.E.2d at 870, 290 N.Y.S.2d at 724-25 (emphasis in original).

[16] *Yellowstone*, 28 A.D.2d 873, 874, 281 N.Y.S.2d at 875 (2d Dep't 1967).

[17] *Id.*

[18] 272 N.Y. 234, 5 N.E.2d 801 (1936).

[19] *Yellowstone*, 28 A.D2d at 873, 281 N.Y.S.2d at 874 (quoting *Ferguson* 272 N.Y. at

decision, reversed the appellate division's grant of injunctive relief.[20] The court of appeals relied on its even earlier decision in *Graf v. Hope Building Corp.*[21] The *Graf* court decided, over the vigorous dissent of Chief Judge Cardozo, that the "[s]tability of contract obligations must not be undermined by judicial sympathy."[22] Similarly, in *Yellowstone* the court announced that

> in a proper case, a court has the fullest liberty in molding its decree to the necessities of the occasion. But, it cannot grant equitable relief if there is no acceptable basis for doing so. Here, the lease has been terminated in strict accordance with its terms. *The tenant did not obtain a temporary restraining order until after the landlord acted* . . . . The sympathetic attitude of the majority below is understandable, but must be rejected.[23]

The *Yellowstone* court, in following the *Graf* majority, declined to follow Cardozo's position that "[e]quity follows the law, but not slavishly nor always. If it did, there could never be occasion for the enforcement of the equitable doctrine."[24]

Graf involved a mortgage acceleration clause. Cardozo, in his dissent, concentrated on the fact that the defendant was late on only a small portion of one payment out of a series of forty because of a clerk's mathematical error.[25] The renowned jurist presaged the appellate division's "good faith" argument in *Yellowstone* when he emphasized that a court, in its role as a court of chancery,[26] can take into account "the measure of the hardship, [and] the extent of the oppression"[27] of the default upon the lender, versus whether the default was "due to mere venial inattention and if relief can be granted without damage to the lender."[28]

In the end, the seven judges in the appellate division and

239, 5 N.E.2d at 802).

[20] *Yellowstone*, 21 N.Y.2d at 638, 237 N.E.2d at 871, 290 N.Y.S.2d at 725.

[21] 254 N.Y. 1, 171 N.E. 884 (1930).

[22] *Id.* at 4, 171 N.E. at 885.

[23] *Yellowstone*, 21 N.Y.2d at 637, 237 N.E.2d at 871, 290 N.Y.S.2d at 725 (emphasis added).

[24] *Graf*, 254 N.Y. at 9, 171 N.E. at 887 (Cardozo, C.J. dissenting) (citing Hedges v. Dixon County, 150 U.S. 182, 192 (1893) and 13 HALSBURY, LAWS OF ENGLAND 68).

[25] *Graf*, 254 N.Y. at 7-8, 171 N.E. at 886.

[26] In American jurisprudence, the terms "court of chancery" and "court of equity" are interchangeable. *See* BLACK'S LAW DICTIONARY 428-29 (4th ed. 1951).

[27] *Graf*, 254 N.Y. at 10, 171 N.E. at 887 (Cardozo, C.J. dissenting).

[28] *Id.*

court of appeals who believed that the court's equitable power allowed them to declare that First National's lease was not terminated, lost to their seven brothers, who could not imagine tampering with a contract's provisions. However, while protecting the "[s]tability of contract obligations,"[29] the court of appeals' opinion, by virtue of its harsh result, laid the groundwork for what has become today's *Yellowstone* injunctive relief. Although the *Yellowstone* decision was pro-landlord, it signaled to tenant lawyers with clients who had been served with a notice to cure or notice of default that they could seek a preliminary injunction to stay the running of the cure period. In response to the harsh effects of not granting a stay, as evinced in *Yellowstone*, the lower courts began to issue these *Yellowstone* injunctions routinely, preventing landlords from terminating leases.[30]

II. THE BUTTERFLY EFFECT

A. *The Butterfly Flaps its Wings*

The first two years after *Yellowstone* produced no decisions of any real interest or controversy.[31] But in 1972, *57 E. 54 Realty Corp.*,[32] a decision from the New York County Appellate Term,[33]

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[29] *Yellowstone*, 21 N.Y.2d at 638, 237 N.E.2d at 871, 290 N.Y.S.2d at 725.

[30] Paul A. Batista, *'Yellowstone', Revisited: The Pendulum Has Swung*, N.Y. L.J., Dec. 29, 1983, at 1.

[31] Wienerwald 8th St., Inc. v. Third Brevoort Corp., 38 A.D.2d 525, 326 N.Y.S.2d 860 (1st Dep't 1971) (tenant took immediate action and needed an extra 30 days to complete the work); 150 E. 58th St. Assocs. v. Fletcher, 35 A.D.2d 947, 316 N.Y.S.2d 644 (1st Dep't 1970) (stay on notice to cure granted because there was a justiciable issue as to whether the notice to cure was valid); Swan Prods. Co. v. 130-30 Bldg. Corp., 35 A.D.2d 789, 315 N.Y.S.2d 223 (1st Dep't 1970) (tenant did not move for injunctive relief within the cure period).

[32] 57 E. 54 Realty Corp. v. Gay Nineties Realty Corp., 71 Misc. 2d 353, 335 N.Y.S.2d 872 (Sup. Ct. N.Y. County 1972).

[33] In New York, the court of appeals is the state's court of last resort. Below it are the main intermediate appellate courts that have four departments. The First Department includes Bronx and New York counties. The Second Department comprises Dutchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk and Westchester counties. The Third Department contains Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Tioga, Tompkins, Sullivan, Ulster, Warren and Washington counties. The Fourth Department includes Allegeny, Cayuga, Chautauqua, Erie, Genesee, Herkimer, Jefferson, Lewis, Livingston, Monroe, Niagara, Oneida, Onondaga, Ontario, Orleans, Oswego, Seneca, Steuben, Wayne, Wyoming and Yates counties.

Below the appellate divisions is the main court of original jurisdiction—the supreme

marked a shift in this genre of landlord-tenant cases. The *57 E. 54 Realty Corp.* court refused to terminate a tenant's lease, even though the tenant was late two months in a row in paying rent[34] on the principle that "the law abhors the forfeiture of leases,"[35] especially when the forfeiture results from nonpayment of rent. While the court held that *Yellowstone* "does not mandate the contrary," the decision was insincere in its homage, flying directly in the face of *Yellowstone*.[36] Ruling that the time had come for the law of leases to catch up with the law of contracts, the lower court decided, without citing any precedent, that "[t]o strictly enforce provisions of leases in such circumstances is to run counter to all modern thinking."[37] The court stated:

> Touching bottom, what did [the] landlord actually lose by the delay in the payment of tenant's rent? A given amount of interest. It could have compelled payment of the rent and of the interest by non-payment proceedings. It chose not to. Instead, it chose surreptitiously to reacquire the space.[38]

In arguing contrary to both *Yellowstone* and *Graf* (although in line with Cardozo's dissent in *Graf*), the appellate term was the tail wagging the dog. By basing its decision on attitudinal

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court's role is larger and higher than that of the other trial courts in recognition of the fact that the supreme court has general jurisdiction, while all the other trial courts have limited subject matter jurisdiction. Almost level with the supreme court are the court of claims and surrogate's, county and family courts, that have a process territorial scope equal to that of the supreme court. N.Y. CONST. art. VI, § 1(c).

Below these courts are the New York City Civil Court, New York City Criminal Court, the district courts, town courts and village courts that are limited in both subject matter and territorial jurisdiction. The judges in the city and district courts must be lawyers, while judges of town and village courts do not have to be lawyers. N.Y. CONST. art. VI, § 20(a).

The appellate division of each department has the authority to create an appellate term out of the supreme courts. If created, these appellate terms hear appeals from the New York City Civil Court, New York City Criminal Court, the district courts, town courts and village courts. There are currently appellate terms in the First and Second Departments. *See* DAVID D. SIEGEL, HANDBOOK OF NEW YORK PRACTICE § 9 (1978).

[34] In his concurring opinion, Justice Lupiano pointed out that the tenant had actually paid its rent late almost every month for almost 5½ years. *57 E. 54 Realty Corp.*, 71 Misc. 2d at 355, 335 N.Y.S.2d at 874.

[35] *57 E. 54 Realty Corp.*, 71 Misc. 2d at 355, 335 N.Y.S.2d at 873 (1st Dep't 1969)(citing 220 W. 42 Assoc. v. Cohen, 60 Misc. 2d 983, 985, 302 N.Y.S.2d 494, 496 (1969)).

[36] *Id.* at 354, 335 N.Y.S.2d at 873.

[37] *Id.* at 355, 335 N.Y.S.2d at 874.

[38] *Id.*

jurisprudence instead of the concurring opinion's course of conduct argument,[39] the lower court opened the door to an era of extreme pro-tenant doctrine.[40] This decision also illustrates why courts began handing out *Yellowstone* injunctions to tenants as freely as candy is given to children on Halloween.[41] The *57 E. 54 Realty Corp.* court fashioned a heavy presumption that the tenant has a right to keep its lease, which the landlord's contractual rights cannot upend. In effect, the court determines, before the substantive issues have been joined, that absent the injunctive relief, there is an irreparable injury to the tenant. Therefore, the equities scale presumably tips in favor of the tenant.

B. *The Air Stirs*

The court's determination in *57 E. 54 Realty Corp.*, although significant, was limited in impact by the fact that it came out of an appellate term. But five months later the First Department's appellate division echoed the appellate term's sentiments in *Madison Avenue Specialties, Inc. v. Seville Enterprises, Inc.*[42] The *Madison Avenue* court decided that the question of whether there was a breach in the lease was unimportant. The only issue considered was whether "there may be equitable considerations which would forbid forfeiture as the remedy."[43] The court went on to say that "[w]here such elements are present the injunction is appropriate. Otherwise the lease will be terminated. Where the supreme court could fashion the proper remedy but the civil court lacks jurisdiction to do so, injunction

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[39] *See supra* note 35.

[40] *See* Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 805-6 (1974) (under the subsection entitled "Doctrines Openly Hostile to the Landlord and the Lease"); Batista, *supra* note 30, at 1; *cf.* RESTATEMENT (SECOND) OF PROPERTY § 13.1 cmt. a (1976) (because promises by the tenant induced the landlord to enter the lease, failure on the part of the tenant to perform within a reasonable time after being requested to do so is a valid reason for the landlord to terminate). *But see* Stacey L. Wallach, *'Yellowstone' Revisited II—A Different View of Doctrine*, N.Y. L.J., Feb. 21, 1984, at 1 (*Yellowstone* injunction is helpful because it brings both parties in front of a judge faster than if the landlord had brought a summary proceeding in Civil Court, and is justified in that controversies can be decided on the merits without forfeiture hanging over the tenant's head.).

[41] Special Term, Part I of Supreme Court, New York County, noted that *Yellowstone* injunctions "have been granted as a matter of routine." Wilen v. Harridge House Assocs., 116 Misc. 2d 724, 455 N.Y.S.2d 1006, 1007 (Sup. Ct. N.Y. County 1982).

[42] 40 A.D.2d 784, 337 N.Y.S.2d 590 (1st Dep't 1972).

[43] *Id.* at 785, 337 N.Y.S.2d at 591 (citing *Yellowstone*).

should issue."[44] But the First Department failed to identify these "equitable considerations." Further, by refusing to look at the merits of the case, the court destroyed the traditional test of whether the party seeking injunctive relief has a likelihood of winning.

C. *The Legislature is Momentarily Awakened*

In 1982 the New York State legislature amended Real Property Actions and Proceeding Law ("RPAPL") section 753 by adding a new subdivision 4, which stated that "in the event that such [a summary] proceeding is based upon a claim that the tenant or lessee has breached a provision of the lease, the court *shall* grant a ten day stay of issuance of the warrant, during which time the respondent may correct such breach."[45] What led the legislature to amend the law is uncertain.[46] The new section applies only to violations of New York City residential leases that do not involve nonpayment[47]—the subject of the majority

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[44] *Id.*

[45] N.Y. REAL PROP. LAW § 753 (McKinney 1979 & Supp. 1992) ("RPAPL") (emphasis added).

[46] There is little legislative history on the amendment to section 753. *See* 1982 N.Y. Laws, c. 870, § 1; N.Y. LEGIS. REC. AND INDEX 1982. Senate Bills 9212, introduced April 12, 1982, passed June 30, 1982. Assembly Bill A13035, introduced June 14, 1982, passed July 2, 1982. *See also* Post v. 120 E. End Ave. Corp., 96 A.D.2d 697, 464 N.Y.S.2d 108, 109 (1st Dep't 1983) (noting limited legislative history to this amendment).

Why the legislature chose ten days as the amount of time is also not obvious from the legislative history. The section that applies to nonpayment proceedings outside New York City provides for a discretionary stay of four months. RPAPL § 751(4)(a).

The section that applies to non-payment proceedings within New York City provides for a discretionary stay of six months. RPAPL § 753(1). The legislature might have given a short stay period since the stay is mandatory. Connecticut, which has a similar provision, provides for a 20 day stay of execution in non-payment proceedings involving residential dwellings and trailer parks. CONN. GEN. STAT. § 47a-36 (1978). Leases published by The Real Estate Board of New York, Inc. and Julius Blumberg, Inc. have standard notice to cure periods of 15 and 5 days respectively. Perhaps the legislature decided that the average of these two common lease provisions was sufficient time to cure a residential lease violation.

[47] *See* Top-All Varieties, Inc. v. RAJ Dev. Co., 151 A.D.2d 470, 542 N.Y.S.2d 259 (2d Dep't 1989); Sal De Enter., Inc. v. Stobar Realty, Inc., 143 A.D.2d 180, 531 N.Y.S.2d 628 (2d Dep't 1988); Parksouth Dental Group, P.C. v. East River Realty, 122 A.D.2d 703, 505 N.Y.S.2d 633 (1st Dep't 1986). Nonpayment proceedings are controlled by RPAPL § 749, § 751(1-3) and § 755. Because these sections provide for a discretionary stay of eviction proceedings, *Yellowstone* injunctions are unnecessary. For example, RPAPL section 755 provides that the court may stay summary proceedings to dispossess a tenant for nonpayment of rent when the tenant can show she stopped paying rent because the conditions of the premises are dangerous to her life, safety or health.

of the *Yellowstone* injunction cases at the time.[48] Effective on July 29, 1982, it was only three months before a court referred to this new section in a published opinion.

In *Glen Oaks Village Owners, Inc. v. Mauro*[49] the Housing Court in Queens County (which is within the Second Department) gave the tenant, in a summary hold over proceeding,[50] the new mandatory ten day stay of issuance of the warrant for eviction, even though the tenant had failed to appear at trial. The court noted that under the mandatory language of the statute, the respondent's failure to appear was not an issue. Since a residential lease was involved and the action was not for nonpayment, RPAPL section 753(4) applied, and therefore the court must give the tenant an additional ten days to cure its violation. It further noted that although the stay authorized by the new amendment was not technically the same as a *Yellowstone* injunction, it was substantially the same in that it "constitutes a conditional limitation on the landlord's right of termination of the leasehold by reason of a breach of a provision of the lease."[51] Apparently the rest of the courts in the Second Department agreed because there has not been another reported case since *Glen Oaks*, where a Second Department court granted a *Yellowstone* injunction in a residential lease dispute.

At first it seemed that the First Department also adopted the reasoning in *Glen Oaks*. In four decisions of rapid succession, the First Department ostensibly agreed with the Second Department. In *Wilen v. Harridge House Associates*[52] the court said that even though it "had not had the opportunity to study the legislative history, [the amendment] would appear to have as a primary purpose the elimination in most cases of the *Yellowstone* injunction and the heavy traffic between the Civil Court and the Supreme Court which it spawns."[53] In *Schuller v. D'Angelo*[54] the court recognized that although "the application for a *Yellowstone* injunction is not ordinarily subject to the

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[48] *See* Batista, *supra* note 30, at 3.

[49] 117 Misc. 2d 151, 457 N.Y.S.2d 679 (Civ. Ct. N.Y. County 1982).

[50] A hold over proceeding is a proceeding to remove a tenant who is occupying the premises after his lease has expired.

[51] *Glen Oaks Village Owners*, 117 Misc. 2d at 152, 457 N.Y.S.2d at 680.

[52] 116 Misc. 2d 724, 455 N.Y.S.2d 1006 (Sup. Ct. N.Y. County 1982).

[53] *Wilen*, 116 Misc. 2d 724, 455 N.Y.S.2d at 1007; *see supra* note 33.

[54] 117 Misc. 2d 528, 458 N.Y.S.2d 501 (Sup. Ct. N.Y. County 1983).

same strictures as other injunctions . . . [n]evertheless, a request for a *Yellowstone* injunction is still a prayer for equitable relief, which requires that plaintiff make a sufficient showing that she has no adequate remedy at law. It is clear that the new statute affords such a remedy."[55] The appellate division then denied *Yellowstone* injunctions in *Mannis v. Jillandrea Realty Co.*[56] and *Klausner v. Frank*,[57] also on the grounds that RPAPL section 753(4) made the injunctive relief unnecessary.

Apparently unhappy with the easy, clear and concise decisions in *Wilen*, *Schuller*, *Mannis* and *Klausner*, the First Department flip-flopped and unanimously reversed the lower court's decision in *Wilen*.[58] It then implicitly overruled *Schuller*, *Mannis* and *Klausner* in *Post v. 120 East End Ave. Corp.*[59] The First Department now decided that the new amendment did not apply because "[n]othing in the legislation's sponsor's memorandum indicates such a purpose"[60] and "it makes no endeavor to treat . . . the legal theory underlying [the effect of *Yellowstone*]."[61]

Quite correctly, the court of appeals reversed the First Department in *Post*.[62] The court recognized that although the statute did not expressly authorize the revival of a lease which under the court of appeals' *Yellowstone* decision would terminate, it implicitly authorized such a revival. The court based its understanding on the limited legislative history of RPAPL section 753(4), pointing to the Memorandum of Senator Leon Bogues which stated that the amendment was made in response to tenants' "reasonable expectation that they will have an opportunity to cure once they have been advised by the court that,

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[55] *Id.* at 532-33, 458 N.Y.S.2d at 504.

[56] 94 A.D.2d 676, 463 N.Y.S.2d 3 (2d Dep't 1983).

[57] 95 A.D.2d 653, 463 N.Y.S.2d 200 (2d Dep't 1983).

[58] Wilen v. Harridge House Assocs., 49 A.D.2d 123, 463 N.Y.S.2d 453 (1st Dep't 1983).

[59] 95 A.D.2d 697, 464 N.Y.S.2d 108 (1st Dep't 1983). Plaintiff, a psychiatrist, used his apartment to see patients, violating his lease which specified that the apartment was for private dwelling use only. Plaintiff submitted his order to show cause before RPAPL section 753(4) had come into effect. The supreme court granted the *Yellowstone* injunction, signing the order subsequent to the new RPAPL statute's effective date. On appeal by landlord, the First Department affirmed the order.

[60] Wilen v. Harridge House Assoc., 94 A.D.2d at 126, 463 N.Y.S.2d at 455.

[61] *Post*, 95 A.D.2d at 697, 464 N.Y.S.2d at 109.

[62] 62 N.Y.2d 19, 464 N.E.2d 125, 475 N.Y.S.2d 821 (1984).

in fact, they have breached the lease provision."[63] Also indicative of the New York State legislature's intent was the Governor's bill jacket which indicated that there had been opposition to the bill precisely because it would allow revival of a lease.[64] The court also stated that if RPAPL section 753(4) allowed the tenant to cure once it was determined that a lease provision was breached, but did not allow revival of the lease, then the amendment would be mere "surplusage."[65]

The *Post* court also noted that aside from statutory interpretation

> there are sound policy reasons for interpreting the statute in this way. Civil Court has jurisdiction of landlord tenant disputes . . . and when it can decide the dispute, as in this case, it is desirable to do so . . . . *Yellowstone* injunctions have impaired the effectiveness of summary proceedings, however, by enabling tenants to go into Supreme Court where delay may be encountered because of crowded calendars and pretrial proceedings available in plenary actions. Moreover, if the landlord prevails in Supreme Court, he must still go into Civil Court to evict the tenant. Under the amended statute the tenant's claim may properly be alleged as defenses to the summary proceedings and complete relief may be obtained in Civil Court . . . . To this extent the statute limits our holding in *First National Stores v. Yellowstone Shopping Center*.[66]

D. *The Weather in New York is Affected*

With the court's decision in *Post*, the *Yellowstone* doctrine was limited, and still is limited, to commercial disputes involving lease violations.[67] However, the same problems that necessitated the passage of RPAPL section 753(4) still plague commercial lease disputes.

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[63] *Id.* at 27, 464 N.E.2d at 128, 475 N.Y.S.2d at 824 (citing N.Y. LEGIS. ANN., 1982, at 280). *See supra* note 46 and accompanying text.

[64] *Post*, 62 N.Y.2d at 27, 464 N.E.2d at 128, 475 N.Y.S.2d at 824.

[65] *Id.*

[66] *Post*, 62 N.Y.2d at 27-28, 464 N.E.2d at 129, 475 N.Y.S.2d at 825.

[67] *Cf.* Weinberg v. Norson Realty Corp., 132 Misc. 2d 1055, 506 N.Y.S.2d 504 (Sup. Ct. N.Y. County 1986). Since RPAPL section 753(4) applies to a residential lease, the relaxed *Yellowstone* injunction standard does not apply when a tenant applies for a stay on the statutory ten day cure period. Because the tenant did not demonstrate, but merely alleged, that ten days was an insufficient amount of time to cure, the court denied an additional stay; the tenant did not meet its burden to obtain injunctive relief. *But see* Seligmann v. Parcel One Co., 170 A.D.2d 344, 566 N.Y.S.2d 45 (1st Dep't 1991); Ernestus v. 10 W. 66th St. Corp., N.Y. L.J., August 26, 1992, at 22 (Sup. Ct. N.Y. County 1992).

The First Department built upon its *Madison Avenue* decision in *Podolsky v. Hoffman*.[68] There, the court identified the tenants' "substantial property interest in their lease" as the equitable consideration that makes a *Yellowstone* injunction mandatory in most commercial cases. Also, the court announced that the reason it must continue handing out this injunctive relief is so that "if [tenants] prevail on the merits their success will not be nullified by the lease having terminated."[69] The First Department's announcement revealed a pronounced misunderstanding about the issues involved in granting a *Yellowstone* injunction. It is an undisputed fact that if a tenant wins (whether in civil court or in supreme court) on the merits, then the default notice was defective and therefore of no consequence.[70] Later, the court of appeals in *Post* clearly rearticulated the policy behind *Yellowstone* injunctions: that the *only* danger to the tenant is when he loses on the merits, i.e. the landlord had a legitimate basis for serving the notice to cure, and the lease is void.

After *Post* courts continued to declare that even if the tenant was wrong, the law so abhors forfeiture of a lease that courts must do what they can to protect the tenant's property rights.[71] To accomplish this goal, courts continued to chip away at what was left of the traditional standard of proof necessary for equitable relief.

In seeking to soften the requirements for a *Yellowstone* injunction, courts often looked to *Finley v. Park Ten Associates*,[72] a pre-*Post* case in which the First Department declared that "the standards normally applicable to temporary injunctive relief have little application to a *Yellowstone* situation."[73] The *Finley* court abolished "the three usual requirements" that an applicant show: "1) that he will ultimately likely prevail on the merits; 2) that he would suffer irreparable hardship if the injunction were not granted; and 3) that the equities weigh in his

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[68] 82 A.D.2d 763, 441 N.Y.S.2d 238 (1st Dep't 1981).

[69] *Id.* at 239.

[70] *Post*, 62 N.Y.2d at 25, 464 N.E.2d at 127, 475 N.Y.S.2d at 823.

[71] *See* Langham Mansions Co. v. Bodine, 117 Misc. 2d 925, 461 N.Y.S.2d 147 (Sup. Ct. N.Y. County 1983).

[72] 83 A.D.2d 537, 441 N.Y.S.2d 475 (1st Dep't 1981).

[73] *Id.* (emphasis added).

favor."[74] Elaborating on its own opinions in *Podolsky* and *Finley*, rather than on court of appeals precedent, the First Department decided that *Yellowstone* injunctions deserve their own special test: (1) that a notice to cure threatening termination of the lease be served on the petitioner; (2) that there is a cure other than eviction available;[75] and presumably (3) that the motion to the court be made before the lease becomes void under the notice to cure. The standard for the second prong of this new test is basically that the tenant comes to court and claims in boilerplate language that there is a practical method to cure the illegality without resort to eviction. The First Department continues to stand by its three-prong *Yellowstone-Finley* test.[76] The Second Department also formally adopted this test in *Fratto v. Red Barn Farmers Mkt. Corp.*[77] It is ironic that *Yellowstone*, which dictated judicial control over sympathy, has now become the label for a doctrine that twists traditional standards for equitable relief precisely for sympathetic purposes.

III. "ONE OF THE BRIGHTEST GEMS IN THE NEW ENGLAND WEATHER IS THE DAZZLING UNCERTAINTY OF IT":[78] *The Exceptions To The Rule?*

Even with such a low threshold test, courts acknowledge five circumstances when they should not, or might not, grant a *Yellowstone* injunction. Three of the five "should not" circumstances are readily apparent and easy to show to a court: (1) that the court has the ability to revive a voided lease through statute (as with RPAPL section 753(4) in all residential cases); (2) that the tenant did not move for an injunction before the lease became void under the notice to cure;[79] and (3) that the lease gives

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[74] Demler v. Bing & Bing Mgmt., Inc., 116 Misc. 2d 793, 456 N.Y.S.2d 624, 626 (Sup. Ct. N.Y. County 1982).

[75] *Id.*

[76] Continental Towers Garage Corp. v. Contowers Assocs. Ltd. Partnership, 141 A.D.2d 390, 529 N.Y.S.2d 322 (1st Dep't 1988); Jemaltown of 125th St., Inc. v. Leon Betesh/Park Seen Realty Assocs., 115 A.D.2d 381, 496 N.Y.S.2d 16 (1st Dep't 1985); Herzfeld & Stern v. Ironwood Realty Corp., 102 A.D.2d 737, 477 N.Y.S.2d 7 (1st Dep't 1984).

[77] 144 A.D.2d 635, 535 N.Y.S.2d 53 (2d Dep't 1988).

[78] Mark Twain, Address on New England Weather, *in* NEW ENGLAND SOCIETY (Dec. 22, 1876).

[79] Fifty States Mgmt. v. Pioneer Auto Parks, 46 N.Y.2d 573, 389 N.E.2d 113, 415 N.Y.S.2d 800 (1979); *Yellowstone*, 21 N.Y.2d 630, 237 N.E.2d 868, 290 N.Y.S.2d 721

the tenant no opportunity to cure.[80]

Two of the five "might not" circumstances are harder to demonstrate to a court. The first circumstance is when there is no practical way for the tenant to cure other than by moving out of the leased premises. The second circumstance is when the tenant somehow, even with such a minute threshold in place, fails to express a desire to cure the violation.

A. *When the Tenant has No Practical Way to Cure Without Vacating the Premises*

Childress v. Lepkis[81] involved a tenant using commercial space for residential purposes. The appellate division, First Department, found that, if in fact the lease prohibited such a use, the only way the tenant could cure this default was to move out.[82] The court also correctly pointed out that if indeed there was no violation of the lease, then there would be nothing to cure and the lease would remain intact.

The "no practical way to cure" exception was rendered virtually nonexistent within the First Department by *Demler v. Bing & Bing Mgmt., Inc.*[83] and *Herzfeld & Stern v. Ironwood Realty Corp.*[84] In these cases, courts in the First Department found that even violations of the Certificate of Occupancy ("C. of O.") under the New York City Building Code are not enough to defeat the granting of a *Yellowstone* injunction, because there is always the possibility of amending the Building Code Occupancy Use of the C. of O.[85] The First Department is apparently

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(1968).

[80] Newmann v. Mapama Corp., 96 A.D.2d 793, 466 N.Y.S.2d 331 (1st Dep't 1983) (tenant must have a lease to apply for a Yellowstone injunction); 233 E. 86th St. Corp. v. Park E. Apts., Inc., 131 Misc. 2d 242, 499 N.Y.S.2d 853 (Sup. Ct. N.Y. County 1986) (no right to cure under the lease); Boyarsky v. Froccaro, 125 Misc. 2d 352, 479 N.Y.S.2d 606 (Sup. Ct. N.Y. County 1984) (no cure provision in the lease); Boyle v. Pogs Constr. Corp., 74 Misc. 2d 307, 344 N.Y.S.2d 210 (Sup. Ct. N.Y. County 1973) (contract, not a lease involved).

[81] 72 A.D.2d 724, 443 N.Y.S.2d 63 (1st Dep't 1979).

[82] *But cf.* Taylor v. Eli Haddad Corp., 118 Misc. 2d 253, 460 N.Y.S.2d 886 (Sup. Ct. N.Y. County 1983) (in the First Department) (later held that there are other ways to cure residential use of commercial space and therefore injunctive relief is proper under the *Yellowstone* doctrine).

[83] 116 Misc. 2d 793, 456 N.Y.S.2d 624 (Sup. Ct. N.Y. County 1982).

[84] 102 A.D.2d 737, 477 N.Y.S.2d 7 (1st Dep't 1984).

[85] Typical commercial leases, such as those published by The New York Real Estate Board, Inc. and Julius Blumberg, Inc., contain a provision that the tenant shall comply

willing to bar *Yellowstone* injunctions only for violations of zoning ordinances,[86] even though there are no published cases directly involving such a circumstance.[87]

In the Second Department, the C. of O. exception is still viable because of the appellate division's decision in *Times Square Stores Corp. v. Bernice Realty Co.*[88] There the court recognized that it cannot force the landlord to cooperate in the tenant's application to amend the C. of O. Ergo, the tenant has no

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with all requirements of all federal, state, municipal and local governments. Under New York State Multiple Dwelling Law section 301 ". . . no dwelling constructed as or altered or converted into a multiple dwelling after April eighteenth, nineteen hundred twenty-nine, shall be occupied in whole or in part until the issuance of a certificate of compliance or occupancy." N.Y. MULT. DWELL. LAW § 301(2) (McKinney 1974). The City of New York issues a C. of O. through the Department of Buildings. A C. of O. contains the permissible use and occupancy (for each floor and, in the case of apartments, condominiums and co-operatives, for each unit) by rating each floor and/or unit by: (a) Live Load Pounds Per Square Foot; (b) Maximum Number of Persons Permitted; (c) Zoning Dwelling of Rooming Units; (d) Building Code Habitable Rooms; (e) Zoning Use Group; (f) Building Code Occupancy Group; and (g) Description of Use. Although the Building Department issues the C. of O., the permissible use and occupancy categories are controlled not only by the New York City Building Code, but also by the New York City Fire Code and New York City Zoning Resolutions.

The Building Code Occupancy Group is classified by letter codes under New York Administrative Code sections 27-237 through 27-267 and Table 3-1, as follows: A-High hazard; B-1-Storage (moderate hazard); B-2-Storage (low hazard); C-Mercantile; D-1-Industrial (moderate hazard); D-2-Industrial (low hazard); E-Business; F-1a-Assembly (theaters, etc.); F-1b-Assembly (churches, concert halls, etc.); F-2-Assembly (outdoors); F-3-Assembly (museums, etc.); F-4-Assembly (restaurants, etc.); G-Education; H-1-Institutional (restrained); H-2-Institutional (incapacitated); J-1-Residential (hotels, etc.); J-2-Residential (apartment houses, etc.); J-3-Residential (one- and two-family dwellings), and; K-Miscellaneous. Pursuant to New York Administrative Code section 27-220, applications for a change in the certificate of occupancy (for any category except zoning use group) must be made by, or on behalf of, the owner of the building premises.

[86] Zoning Use Groups are classified by number codes under the New York City Zoning Resolutions. Use Groups 1 and 2 are residential, Use Groups 3 and 4 are community facilities, Use Groups 5 through 11 are commercial, Use Groups 12 through 15 are recreational, and Use Group 16 is for general services. The Zoning Resolutions assign Use Groups to the different parts of the five New York City counties by complex geographical boundaries, each boundary permitting one or more Use Groups. Only legislation passed by the New York City Council can change the Zoning Resolutions, although the New York City local community boards may grant variances on a case-by-case basis.

[87] There is one lower court opinion that discussed, in *dicta*, the tenant not having the ability to cure because the violation involved zoning problems. However, the court denied a *Yellowstone* injunction on the ground that the lease did not have a cure provision. Boyarsky v. Froccaro, 125 Misc. 2d 352, 479 N.Y.S.2d 606 (Sup. Ct. N.Y. County 1984).

[88] 107 A.D.2d 677, 484 N.Y.S.2d 591 (2d Dep't 1985).

way to cure other than to vacate the premises.[89]

B. *When the Tenant Shows No Desire to Cure*

Recent decisions recognize that there are times when the tenant's behavior warrants denial of a *Yellowstone* injunction. In *Cemco Restaurants, Inc. v. Ten Park Ave. Tenants Corp.*[90] the First Department upheld the supreme court's denial of a *Yellowstone* injunction. *Cemco* started out as a typical *Yellowstone* situation. The landlord served a notice to cure because the tenant had opened a transvestite musical revue in violation of a lease provision that the premises be conducted and operated in a "dignified manner."[91] The tenant, in moving for a *Yellowstone* injunction, denied that there was a lease violation.[92] Of course, in almost every *Yellowstone* situation the tenant denies that there is a violation, but here the tenant forgot to state in its papers that if there was a violation, it was willing cure it. The *Cemco* court found that while the tenant had met the *Yellowstone* threshold the injunction will be denied[93] if: (1) the tenant fails to "show" that it is willing to cure, short of vacating the premises, and (2) the landlord's "other evidence is sufficient to show that it is likely to prevail on the merits, that [tenant's] conduct will cause irreparable harm, and that the equities favor [the landlord]."[94]

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[89] One unpublished lower court decision in the First Department since *Times Square v. Bernice* appears to contradict these potential exceptions. This opinion, however, failed to reach the merits of the alleged C. of O. violations advanced by the landlord. *See* Sixty-Six Crosby Assocs. v. Soho Plaza Corp., No. 90-25926, slip op. (Sup. Ct., N.Y. County June 5, 1991)(consolidated with Sixty-Six Crosby Assocs. v. Soho Plaza Corp., No. 91-1974). The court refused to examine, without comment, the overwhelming evidence showing that plaintiffs had no way to cure without vacating the premises. Ignoring defendants' numerous affirmations, exhibits and memoranda of law in opposition that showed severe violations of the C. of O. Building Code Use Groups and Zoning Resolution Use Groups, the court granted a *Yellowstone* injunction because "[p]laintiffs are presently trying to cure alleged violations." *Sixty-Six Crosby Assocs.*, slip op. at 3.

[90] 135 A.D.2d 461, 522 N.Y.S.2d 151 (1st Dep't 1987).

[91] *Cemco*, 135 A.D.2d at 461-62, 522 N.Y.S.2d at 152.

[92] *Id.* at 463, 522 N.Y.S.2d at 153.

[93] *Cemco* is noteworthy because it hints that a landlord might successfully deflect a *Yellowstone* situation if it can launch a preemptive strike by requesting a declaratory judgment that the tenant is violating the lease. Of course, due to the expenses involved, this strategy is only appealing when the violations are so clear that the landlord would win on a motion for summary judgment.

[94] *Cemco*, 135 A.D.2d. at 463-64, 522 N.Y.S.2d at 154.

Similarly, the Second Department relied on *Cemco* in *Linmont Realty, Inc. v. Vitocarl, Inc.*,[95] refusing to overturn the denial of a *Yellowstone* injunction. The court reasoned that:

> The plaintiff herein has made no offer to cure any of the charged defaults, alleging instead that many of the alleged defaults listed in the "Notice of Termination of Lease" were not its responsibility, that various conditions did not exist as claimed by the defendants, and that the remainder of the defaults had been waived by the defendants' acceptance of rent with knowledge of their existence. In the absence of a good faith showing of a willingness to cure, the *Yellowstone* injunction was properly denied.[96]

The First Department then followed with *American Airlines, Inc. v. Rolex Realty Co., Inc.*[97] The court based its decision on the tenant having moved for the injunction too late. The court in *American Airlines* noted that "long after the notice to cure and notice of termination were served, [the tenant] continued the conduct complained of in the default notice."[98] Of course in every *Yellowstone* situation the tenant continues the conduct complained of in the default notice. Under the strict *Yellowstone-Finley* three-prong test, the courts should not have considered the tenants' behavior or the landlords' likelihood of success. One can only hope that these cases presage a move back towards the traditional standards of proof required for equitable relief.

IV. "'TUT, TUT, CHILD,' SAID THE DUCHESS. 'EVERYTHING'S GOT A MORAL IF ONLY YOU CAN FIND IT'."[99]

It is clear that courts' sympathetic attitude is warranted when a tenant will lose its property right for a minor and correctable violation. But it is unclear why courts refuse to use the traditional tests for equitable relief. If the tenant just needs a little more time to correct the violation, or if a true dispute arises over an ambiguity in the lease (as in the original *Yellowstone* case), an injunction would issue under the traditional equity tests. Courts argue that tenants need more protection than

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[95] 147 A.D.2d 618, 538 N.Y.S.2d 277 (2d Dep't 1989).
[96] *Id.* at 618, 538 N.Y.S.2d at 278.
[97] 165 A.D.2d 701, 560 N.Y.S.2d 146 (1st Dep't 1990).
[98] *Id.* at 703, 560 N.Y.S.2d at 148.
[99] Lewis Carroll, ALICE'S ADVENTURE IN WONDERLAND ch. 9 (1865).

landlords. But this image of the landlord always wronging the tenant, or always being in a position of superiority, is not demonstrated by the cases. If one looks at the majority of *Yellowstone* cases, it becomes apparent that a good number of tenants who brought *Yellowstone* actions could have cured the violation with little cost within the period given to cure and were at least equal to the landlord in financial or legal power.[100] In the meantime, the landlord has a tenant using his property for a use not permitted by the lease. If such a use is in violation of building, zoning, fire or criminal codes, the landlord, as the owner of record, is the party who is cited with the violation, and usually fined.[101] Therefore, the landlord pays when the tenant refuses to cure the violation.

If the *Yellowstone* doctrine is supposed to save powerless tenants who unknowingly lose their leases because of minor violations, it is too costly a cure. Only the wealthy individual or commercial tenant can afford the costly *Yellowstone* action. This is probably why the overwhelming majority of *Yellowstone* decisions come out of the First Department, specifically New York County.[102] The average tenant, when faced with a notice to cure, fixes the violation or negotiates with the landlord for more time.[103] Very few small business owners are (or residential tenants were) willing to expose themselves to the long and costly *Yellowstone* proceedings to decide whether they can keep their store sign up, or keep their poodles in their apartments, in direct violation of their leases.

Moreover, the *Yellowstone* doctrine has become so formulaic as to lead to absurd results. If a tenant fails to throw in a *mea culpa* with respect to his "alleged" violation,[104] he might not get the injunction, even if there is a justiciable issue.[105] But

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[100] The cost of bringing an action for a *Yellowstone* injunction and the high potential for an appeal by either side, regardless of the lower court's decision, would necessarily mean that the tenant has deep pockets.

[101] *See* NEW YORK ADMINISTRATIVE CODE § 27-113 (1992).

[102] Wallach, *supra* note 40, at 5.

[103] Wallach, *supra* note 40, at 1.

[104] This encompasses boilerplate language to the effect that if the court does indeed find a violation, the tenant is then willing to cure.

[105] *Compare* Philex Enterprises, Inc. v. Lazner, 131 A.D.2d 452, 515 N.Y.S.2d 874 (2d Dep't 1987) (tenant was selling items which depicted or replicated male genitalia and the landlord served notice to cure based on lease provision prohibiting the sale of "obscene" or "pornographic" material; court granted tenant *Yellowstone* injunction) *with*

if the tenant remembers to recite the magic phrase "if there is a violation I will go to reasonable lengths to cure," he will probably get the injunction, even if there is no reasonable way for him to cure without vacating the premises.[106] The tenant's ability to delay curing what is often a clear violation of the lease provides the tenant an enormous, undisputable and unfair advantage.[107] The New York Court of Appeals should make it clear that the test for a *Yellowstone* injunction, as described in *Finley*, is inappropriate, and that lower courts should adhere to the traditional burden for injunctive relief.

If *Yellowstone* is about equity, it should accord with the traditional standards for equitable relief. If there is a true dispute over a lease, or the tenant needs more time to cure, the court's sympathy is both appropriate and welcome; Cardozo said as much in *Graf*.[108] State courts in New Jersey and Connecticut follow the traditional standards for equitable relief in lease disputes.[109] Otherwise, when a cure is either impossible or more expensive than litigation, the tenant has no reason to negotiate with the landlord. When a tenant is clearly violating the lease, courts should not allow the tenant to avoid responsibility to

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Cemco, 135 A.D.2d 461, 522 N.Y.S.2d 151 (1st Dep't 1987) (Tenant was operating a transvestite musical and landlord served notice to cure based on lease provision that premises be occupied in a "dignified manner"; court denied tenant *Yellowstone* injunction.).

[106] *See, e.g.*, Times Square Stores Corp. v. Bernice Realty Co., 107 A.D.2d 677, 484 N.Y.S.2d 591 (2d Dep't 1985); Herzfeld & Stern v. Ironwood Realty Corp., 102 A.D.2d 737, 477 N.Y.S.2d 7 (1st Dep't 1984); Demler v. Bing & Bing Mgmt., Inc., 116 Misc. 2d 793, 456 N.Y.S.2d 624 (Sup. Ct. N.Y. County 1982).

[107] Post v. 120 E. End Ave. Corp., 62 N.Y.2d at 28, 464 N.E.2d at 125, 475 N.Y.S.2d at 825 (1984).

[108] *See supra* notes 22-28 and accompanying text.

[109] In summary proceedings involving commercial leases, Connecticut courts use the standard injunctive relief test to decide whether to grant a stay (Connecticut Mobile Home Ass'n. Inc. v. Jensen's, Inc., 424 A.2d 285 (Conn. 1979); Seaboard Oil Co. v. Williamson, 1 Conn. Supp. 47 (1935)). These Connecticut cases are tempered by the same position that Cardozo took in *Graf*. Damato v. Gilman, 16 Conn. Supp. 276 (1949).

New Jersey provides that the landlord shall serve a three-day notice of default on a tenant (including a commercial tenant) committing "any breach or violation of any of the covenants or agreements in the nature thereof contained in the lease" before starting an action for removal. N.J. REV. STAT. § 2A:18-53(c). While a "hardship" stay is available to residential tenants under N.J. REV. STAT. § 2A:42-10.6, any stay to a commercial tenant may be awarded only under the traditional standards for injunctive relief. Spialter v. Testa, 392 A.2d 1265, *aff'd*, 408 A.2d 444 (N.J. 1978); Morocco v. Felton, 270 A.2d 739 (N.J. 1970); Galka v. Tide Water Assd. Oil Co., 30 A.2d 881 (N.J. 1943); Red Oaks v. Dorez, Inc., 184 A. 746 (N.J. 1936).

cure.

Another alternative is for the New York State legislature to preempt all *Yellowstone* situations by adding a statute to the RPAPL for commercial tenants in and out of New York City, similar to RPAPL section 753(4).[110] If the stay is mandatory, the legislature should weigh whether a ten day cure is sufficient time to cure violations that do not warrant a forfeiture of the lease, against the burden put on the landlord by having a violation of the contract. Another approach is to make the stays discretionary, subject to the traditional test for injunctive relief, as in the case of nonpayment proceedings. Typically, discretionary stays allow a longer time period to cure than do mandatory stays. The best way to decide the appropriate time period is to look at the market. A commercial lease typically has a rider that expands the cure period to thirty or sixty days. While such a statute will not satisfy all landlords or all tenants, it is certainly better than the current inequitable standard embodied in the twisted judicial interpretation of the *Yellowstone* injunction doctrine.

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[110] Although the New York Court of Appeals clearly limited the *Yellowstone* doctrine to commercial disputes involving lease violations, courts in the First Department have already begun to erode the court of appeals' *Post* decision. *See* Seligmann v. Parcel One Co., 170 A.D.2d 344, 566 N.Y.S.2d 45 (1st Dep't 1991); Ernestus v. 10 W. 66th St. Corp., N.Y. L.J., August 26, 1992, at 22 (Sup. Ct. N.Y. County 1992).