



## INSIDE THIS ISSUE

- 1 Why It's So Hard to Recover Your Legal Fees in New York
- 1 Is Civil Litigation an Oxymoron?
- 2 How You Can Get More Than One Chance to Win Your NY Lawsuit
- 3 Check Out Our New Website!
- 4 School Teacher Gives Children Needle to Share to Draw Blood – Without Consequence

### New Beginnings, Bittersweet Memories

As many of you know, in the aftermath of my father's untimely passing, my mother acted boldly, picked herself up and made a new life for herself in our ancestral homeland - in Israel.

This new chapter of our lives has now reached an important milestone, for lack of a better term: my mother has settled into a new home she can call her own (she had moved around a bit, trying to find the "right" place for herself), and she is (hopefully) on the cusp of selling the home of my adolescence.

As I'm sure you can imagine, this is truly bittersweet for me. On the one hand, I am sad to bid a final farewell to a house that contains so many memories; on the other hand, I am really happy to see another family bringing back some warmth into that home.

## Why It's So Hard to Recover Your Legal Fees in New York

If only I had a dollar for every time I've been asked this question ...

New York follows what is called the "American Rule," which means that each party must bear its own costs and legal fees that arise out of the litigation process. Therefore, even if you win a [breach of contract](#) case outright, you won't be able to recover those costs from the losing party.

There are two exceptions to that rule. The first is a very minor one: there are *some* statutory fees that you are permitted to recover, and those are set forth in Article 82 of New York's Civil Practice Law & Rules. Typically, and unless an appeal was involved, these fees will amount to less than \$1,500. There is a second exception that can have real teeth - and therefore consequences - though:

*If the parties had previously agreed to it by contract.*

To that end, there is one context where such a provision has been increasingly found - and that is in employment agreements. These clauses are frequently paired with mandatory arbitration clauses that strongly favor the employer, and are designed to make it extremely difficult for the employee to sue the employer for wrongful termination or breach of the employment agreement - that is, assuming the employee is not an at-will employee. (For more information on this last topic, please see "[3 Reasons Why Your Employment Agreement May Be Worthless](#)").

## Is "Civil Litigation" an Oxymoron?

In a [breach of contract](#) and [non-compete](#) case I was recently hired to defend, I had a very odd first phone conversation with my adversary. And at the end of the call, I told him that I would be following up with a short e-mail memorializing our "pleasant conversation."

His response took me by surprise: "Please don't include in the letter that our conversation was pleasant; I might want to forward it to my client, and I don't want them to know that our conversation was cordial."

Me: "Are you serious?"

Answer: "Yes. Let's just keep it professional."

Continued on page 3

For more articles, reports, videos, news and analysis on these and other important legal issues

Visit our Web Site at [www.JonathanCooperLaw.com](http://www.JonathanCooperLaw.com)

We strongly encourage the readers of our monthly newsletter to provide feedback about issues they would like to see addressed in our future publications.

To do so, please contact us through our website, [www.JonathanCooperLaw.com](http://www.JonathanCooperLaw.com) or via e-mail at [jmcooper@jmcooperlaw.com](mailto:jmcooper@jmcooperlaw.com)

## *How You Can Get More Than One Chance to Win Your New York Lawsuit*

At first blush, the notion that you can get more than one shot to win a New York litigation sounds like precisely the type of fodder for tort reform - and even basic litigation reform - advocacy everywhere. After all, from a defendant's perspective, it's bad enough that I got sued for this once; now you're telling me I can get sued for the same thing again?

Stated differently, "When will this case finally be OVER?"

The truth is, that a plaintiff can get a proverbial "second bite at the apple" - but only in certain limited circumstances. This is where the doctrine of res judicata, which is Latin for "a claim that has already been judged," (and in legalese is known as "claim preclusion") comes into play.

Under New York law, "[R]es judicata bars future litigation between the same parties, or those in privity with the parties, of a cause of action arising out of the same transaction or series of transactions as a cause of action that was either raised or could have been raised in a prior proceeding."

As you might - or should - have expected, there is a caveat to this rule:

In order for res judicata, or claim preclusion, to apply, the first case must have reached a final conclusion that was not based on a technicality, but on the actual merits (or the lack thereof) of the case.

Thus, for example, if the first action was dismissed based upon the failure of the complaint to state a claim upon which relief can be granted (i.e., even if everything you claim is true, there is no legal theory under which you can recover under New York law), that will not be deemed a merits-based conclusion, and res judicata will not apply to bar a second claim that is properly pled.

---

*"In order for claim preclusion to apply, the first case must have reached a final conclusion that was based on the actual merits of the case."*

---

### **Law Offices of Jonathan M. Cooper**

#### Long Island

483 Chestnut Street  
Cedarhurst, NY 11516  
516.791.5700

#### New York City

135 West 29<sup>th</sup> Street  
Suite 801  
New York, NY 10001  
(By Appt. Only)

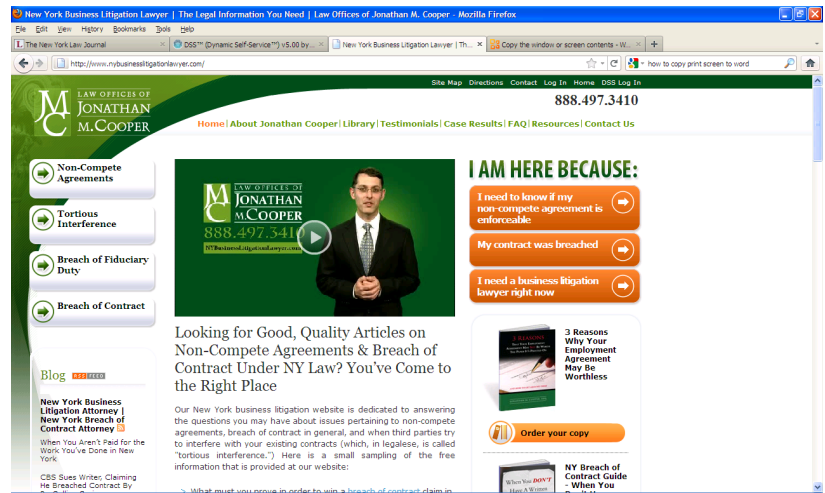
**We Appreciate Your  
Referrals!**

*This publication is intended to educate small businesses and individuals about general litigation matters, as well as personal injury and defective product issues. It is not intended to be legal advice, and does not constitute an attorney-client relationship until we have a written agreement. To discuss your particular issues or case, please contact the Law Offices of Jonathan Cooper at 516.791.5700.*

## Check Out Our New Website!

We are very excited to introduce our new website, which is dedicated business litigation issues, with a particular focus on non-compete agreements, breach of fiduciary duty, and breach of contract.

The site is designed to answer even more of the questions we've been getting on these issues - so that New York consumers can be better educated about their legal issues - *before they even contact a lawyer.*



[www.NYBusinessLitigationLawyer.com](http://www.NYBusinessLitigationLawyer.com)

### Is “Civil Litigation” an Oxymoron?

*cont'd from page 1*

Admittedly, I was taken aback. And even though this isn't the first time another lawyer has told me such a thing, it still bothers me. Here's why: I go out of my way to emphasize to my clients that I will always try to be as pleasant as possible, and to extend courtesies to my adversaries. And there is nothing “unprofessional” about it.

To the contrary, as one of my colleagues recently put it: “You can disagree without being disagreeable.” Quite frankly, I think attorneys who insist on maintaining that “litigation means war” or scorched earth policy do their clients a grave disservice. Here are but three (3) important reasons:

- (1) By refusing to extend courtesies, the case will last longer, and prove more expensive for their clients, as they pursue needless fights over unimportant issues;
- (2) By taking uncompromising and intractable positions, they may very well assure that either they or their client (or both) is viewed less favorably by the judge or jury; and,
- (3) By refusing to work with the other side to the litigation, they are likely to alienate them, making it far more difficult - if not impossible - to resolve the case short of a full-blown trial, which is often contrary to the client's best interests.

---

*“Attorneys who maintain that ‘litigation means war,’ or take a scorched earth policy do their clients a grave disservice.”*

---

**COMMUNICATION POLICY:** As a general rule, Mr. Cooper does not accept unscheduled phone calls. This policy affords Mr. Cooper the ability to pay closer and more focused attention to each case, resulting in more efficient and effective representation for his clients. Moreover, it avoids the endless and needless game of phone tag played by most businesses and law firms. To schedule a phone call or in-person appointment with Mr. Cooper, please call his office at 516.791.5700.

## *School Teacher Gives Children Needle to Share to Draw Blood – Without Consequence*

This is horrifying.

In a news story that was reported on July 22, a primary school teacher allowed his students to share a needle for the purpose of drawing blood. Apparently, the teacher is a diabetic, and the school children were fascinated by how he would check his blood glucose level by drawing blood from his finger. He then encouraged them to share a needle when pricking themselves.

Recognizing the manifest health concern that this posed, the Education Department notified the parents of these children, and asked them to get those children tested for possible blood-related diseases.

Here's one other aspect to the story that I find

rather disturbing:

***The teacher wasn't fired.***

While I understand that we should be leery of depriving someone of their livelihood, the primary and paramount concern is always the children's safety - or at least it should be.

And, even giving this teacher the benefit of the doubt, his lapse of judgment is, to be blunt, way too big for him to be allowed to continue teaching in a classroom.



LAW OFFICES OF  
JONATHAN  
M. COOPER

483 Chestnut Street Cedarhurst, New York 11516-2019

Phone:  
516.791.5700

Fax:  
516.791.8188

E-mail:  
[jcooper@JonathanCooperlaw.com](mailto:jcooper@JonathanCooperlaw.com)