



April 21, 2004 NYC  
front page

NEWS

# In Brief

**New Administrative Judge for Courts Outside City Named**  
Justice Jan H. Plumadore, the administrative judge for the 11 counties in the northeast section of the state, will succeed Deputy Chief Administrative Judge Joseph J. Traficanti Jr. as the top administrator for courts outside New York City. In a second appointment announced yesterday, Judge Judy H. Kluger, who already is deputy chief administrative judge for court operations, will become statewide director for drug treatment court programs, a second post held by Judge Traficanti. Justice Plumadore, 61, who was first elected to the bench in Franklin County in 1977, began overseeing the courts in the 11 counties that make up the Fourth Judicial District in 1994. Ten years later, he was elected to the Supreme Court. Judge Traficanti, who has been a deputy chief administrative judge since 1991, announced in March that he would leave his post in May to start a career in international legal consulting. — *Daniel Wise*

**Sassower Found Guilty of Disrupting Congress**  
Judicial gadfly Elena Sassower was convicted yesterday of one count of disrupting Congress for speaking out during last year's Senate confirmation hearing of Judge Richard C. Wesley, a former Court of Appeals judge who now sits on the U.S. Court of Appeals for the Second Circuit. Ms. Sassower has for years spoken out against the judicial system in New York, alleging that it is corrupt. She was convicted after a week-long trial in Superior Court in Washington, D.C., court spokeswoman Leah Guowitz confirmed yesterday. Ms. Sassower could face a prison term of six months and a \$500 fine. Sentencing is scheduled for June 1. — *Tom Perrotta*

**WorldCom Emerges From Bankruptcy as MCI**  
After spending 21 months in bankruptcy, WorldCom emerged from Chapter 11 protection yesterday. The \$104 billion bankruptcy was the largest in the nation's history. Like leading executives at other fallen corporate giants, WorldCom's former CEO Bernhard Ebbers was indicted for securities fraud in March. He has pleaded not guilty, but five

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## DECISIONS

# Of Interest

### FIRST DEPARTMENT

- **TORTS:** Fact that unavailable mechanism might have prevented accident does not denote negligence. *Tsaropoulos v. The State of New York, App. Div., (p. 18, col. 1).*
- **GOVERNMENT:** Police ordered to reconsider status of officer acquitted in Diallo case. *Matter of Boss v. Kelly, Supreme Court, New York, (p. 18, col. 1).*
- **LANDLORD/TENANT LAW:** Liability, damages imposed on landlord for

■ **ALTERNATIVE DISPUTE RESOLUTION:** Though default was not willful, defaulting party must pay arbitrator's fee, \$200 costs to defendant. *Juniper Walk Condominium v. Patriot Management Corp., City Court, Westchester, (p. 20, col. 3).*

### UNITED STATES COURTS

■ **BUSINESS LAW:** Alleging defendants' knowledge or recklessness insufficient to meet minimum pleading standard. *ATO RAM II Ltd. v. SMC Multimedia Corp., SDNY, (p. 20, col. 3).*

# Appellate Court Holds Law Against Unwanted Faxes Constitutional

BY CERISSE ANDERSON

IN THE first New York appellate ruling on the constitutionality of a federal ban on unsolicited advertising faxes, the Appellate Term in Brooklyn has reversed two lower courts and declared the law does not impinge upon First Amendment protections for commercial speech.

A three-judge panel of the Appellate Term for the 2nd and 11th judicial districts in the Second Department (covering Brooklyn, Queens and Staten Island) unanimously overturned rulings from Civil Courts in Brooklyn. The lower courts had dismissed actions seeking damages under the 1991 federal law that sought to quell annoying unsolicited advertisements sent to consumers' fax machines.

In *Rudgayzer & Gratt v. Enine*, 2002-1700, and *Bonime v. Perry Johnson Inc.*, 2002-1740, the two cases that were consolidated for appeal, the court said in its unsigned memorandum decision that the Telephone Consumer Protection Act (TCPA) (47 USC §227) did not unconstitutionally bar any advertising content.

"It simply forbids its transmission by fax to an unwilling recipient, while leaving open to the advertiser all other means of conveying the information," the court said, citing a decision of the U.S. Court of Appeals for the Eighth Circuit, *Missouri ex rel. Nixon v. American Blast Fax Inc.*, 323 F3d 649 (2003).

The Eighth Circuit had reversed the district court decision that had been relied on by the Brooklyn lower court judges in 2002.

Although the law is federal, its primary enforcement is in state courts. The statute bars any person within the United States from using "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."

Treble damages can be awarded if the offending transmissions were "willful or knowing."

The Appellate Term reinstated the actions that had been dismissed, granted the plaintiffs' summary judgment on the issue of liability and remanded the cases to the Civil Courts for the assessment of damages.

The fax in the *Rudgayzer & Gratt* case was sent by defendant Fax.com on behalf of Enine and announced a "strong buy" recommendation for a particular stock. It clearly fell within the statute's definition of an "unsolicited advertisement," the court said.

The fax in the *Bonime* case was a closer call, the judges said, but it had "the effect and purpose of advertising." It mentioned the defendant's name, Perry Johnson Inc., and invited calls for further information.

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# Novel Use of Estoppel Rule Halts Civil Case With Criminal History

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