NEW YORK STATE SENATE

THE STENOGRAPHIC RECORD

ALBANY, NEW YORK

May 31, 2002

11:10 a.m.

REGULAR SESSION

LT. GOVERNOR MARY O. DONOHUE, President

STEVEN M. BOGGESS, Secretary

P R O C E E D I N G S

THE PRESIDENT: The Senate will please come to order.

I ask everyone present to please rise and repeat with me the Pledge of Allegiance.

(Whereupon, the assemblage recited the Pledge of Allegiance to the Flag.)

THE PRESIDENT: With us today, once again, to give the invocation is the Reverend Peter G. Young, from Blessed Sacrament Church in Bolton Landing, New York.

REVEREND YOUNG: Let us pray.

Following the events of yesterday, of our Vietnam Memorial dedication and the completion of our World Trade Center demolition, we gather with the respect of those who have served in our armed forces, and we now plan for the site restoration from the 9/11 attack on our state and our country.

It's with a patriotic spirit that we assemble in this chamber today to remember all of the deceased resulting from these two events. We pray that You will bless them and honor them in Your name.

Amen.

THE PRESIDENT: Reading of the Journal.

THE SECRETARY: In Senate, Thursday, May 30th, the Senate met pursuant to adjournment. The Journal of Wednesday, May 29, was read and approved. On motion, Senate adjourned.

THE PRESIDENT: Without objection, the Journal stands approved as read.

Presentation of petitions.

Messages from the Assembly.

Messages from the Governor.

Reports of standing committees.

Reports of select committees.

Communications and reports from state officers.

Motions and resolutions.

Senator Fuschillo.

SENATOR FUSCHILLO: Thank you, Madam President. On behalf of Senator Velella, please place a sponsor's star on Calendar Number 1098.

THE PRESIDENT: The bill will be

so starred, Senator.

SENATOR FUSCHILLO: Madam President, on behalf of Senator Kuhl, on page number 33 I offer the following amendments to Calendar Number 748, Senate Print Number 4154, and ask that said bill retain its place on Third Reading Calendar.

THE PRESIDENT: The amendments are received, and the bill will retain its place on the Third Reading Calendar.

Senator Johnson.

SENATOR JOHNSON: Madam President, are there any substitutions at the desk?

THE PRESIDENT: Yes, there are, Senator.

The Secretary will read.

THE SECRETARY: On page 29, Senator Fuschillo moves to discharge, from the Committee on Health, Assembly Bill Number 228C and substitute it for the identical Senate Bill Number 4989A, Third Reading Calendar 661.

On page 34, Senator Johnson moves to discharge, from the Committee on Rules, Assembly Bill Number 11254 and substitute it

for the identical Senate Bill Number 6810, Third Reading Calendar 766.

On page 66, Senator DeFrancisco moves to discharge, from the Committee on Veterans and Military Affairs, Assembly Bill Number 9648 and substitute it for the identical Senate Bill Number 6235, Third Reading Calendar 1245.

And on page 67, Senator Kuhl moves to discharge, from the Committee on Investigations, Taxation and Government Operations, Assembly Bill Number 10533 and substitute it for the identical Senate Bill Number 6654, Third Reading Calendar 1249.

THE PRESIDENT: The substitutions are ordered.

Senator Johnson.

SENATOR JOHNSON: There is a privileged resolution at the desk by Senator Bonacic. May we please have the title read and move for its immediate adoption.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: By Senator Bonacic, Legislative Resolution Number 5830,

commending the valedictorians and salutatorians and honored students of the 40th Senate District in recognition of their outstanding accomplishments, at a celebration to be held at the State Capitol on June 5, 2002.

THE PRESIDENT: The question is on the resolution. All in favor signify by saying aye.

(Response of "Aye.")

THE PRESIDENT: Opposed, nay.

(No response.)

THE PRESIDENT: The resolution is adopted.

Senator Johnson.

SENATOR JOHNSON: Madam President, I'd like to announce that there will be an immediate meeting of the Rules Committee in the Senate Republican Conference Room.

THE PRESIDENT: There will be an immediate meeting of the Rules Committee in the Majority Conference Room.

Senator Johnson.

SENATOR JOHNSON: May we now have

the noncontroversial reading of the calendar.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: Calendar Number 227, by Senator Larkin, Senate Print 3896, an act to amend the Racing, Pari-Mutuel Wagering and Breeding Law, in relation to --

SENATOR PATERSON: Lay it aside, please.

THE PRESIDENT: The bill is laid aside.

THE SECRETARY: Calendar Number 300, by Senator Libous, Senate Print 5492A, an act authorizing the Commissioner of Transportation.

SENATOR MORAHAN: Lay it aside for the day, please.

THE PRESIDENT: The bill is laid aside for the day.

THE SECRETARY: Calendar Number 510, by Senator Marcellino, Senate Print 4467B, an act to amend the Environmental Conservation Law, in relation to the collection, sale and exportation of ginseng.

THE PRESIDENT: Read the last

section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 536, by Member of the Assembly Gottfried, Assembly Print Number 10378, an act to amend Chapter 884 of the Laws of 1990, amending the Public Health Law.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 545, by Senator Seward, Senate Print 6722A, an act to amend the Insurance Law, in relation to

the organization of advance premium corporations.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 4. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 626, by Senator Kuhl, Senate Print 5108A, an act to amend the Alcoholic Beverage Control Law, in relation to certain licenses.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 3. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number

843, by Senator Johnson, Senate Print 6652A, an act to amend the Vehicle and Traffic Law, in relation to the franchised sale of house coaches.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 4. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 848, by Senator Trunzo, Senate Print 7011A, an act to amend the Vehicle and Traffic Law, in relation to commercial driver license.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 4. This act shall take effect on the 90th day.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is

passed.

THE SECRETARY: Calendar Number 886, by Senator DeFrancisco, Senate Print 7172, an act to amend the Executive Law, in relation to voluntary missing child prompt response.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 4. This act shall take effect on the 120th day.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1073, by Senator Nozzolio, Senate Print 6441, an act to amend the Real Property Tax Law, in relation to the veteran's alternative exemption.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1104, by Senator Alesi, Senate Print 7167A, an act to amend the Environmental Conservation Law, in relation to prohibiting.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect on the 180th day.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1161, by Senator Johnson, Senate Print 7209A, an act to amend the Retirement and Social Security Law, in relation to the membership of certain regular substitute teachers.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 4. This

act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1192, by Senator Rath, Senate Print 7121, an act to amend the Education Law, in relation to prescriptions.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 3. This act shall take effect on the 120th day.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1237, by Senator Volker, Senate Print 1082A, an act to --

SENATOR PATERSON: Lay it aside, please.

THE PRESIDENT: The bill is laid

aside.

THE SECRETARY: Calendar Number 1238, by Senator Kuhl, Senate Print 2309, an act to amend the Retirement and Social Security Law, in relation to the partial direct deposit.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 39.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1239, by Senator Saland, Senate Print 3191A, an act to authorize the city school district of the City of Poughkeepsie.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 40.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1240, by Senator Hannon, Senate Print 3932, an act to amend the Not-for-Profit Corporation Law, in relation to authorization.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 40.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1241, by Senator Trunzo, Senate Print 4671, an act to amend the Transportation Law, in relation to the regulation of transportation.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 20. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 41.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1242, by Senator Spano, Senate Print 5330A, an act to amend the Local Finance Law, in relation to bonds and notes of the City of Yonkers.

THE PRESIDENT: There is a home-rule message at the desk.

Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 41.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1243, by Senator Leibell, Senate Print 6092, an act in relation to legalizing, validating, ratifying and confirming certain acts and proceedings.

THE PRESIDENT: There is a local

fiscal impact message at the desk.

Read the last section.

THE SECRETARY: Section 4. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 41.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1244, by Senator Alesi, Senate Print 6149, an act in relation to redistributing 2001 bond volume allocations.

THE PRESIDENT: There is a local fiscal impact note at the desk.

Read the last section.

THE SECRETARY: Section 17. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 41.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1250, by Senator Oppenheimer, Senate Print

6963B, an act to authorize the City of New Rochelle to sell or lease certain lands.

THE PRESIDENT: There is a home-rule message at the desk.

Read the last section.

THE SECRETARY: Section 5. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 41.

THE PRESIDENT: The bill is passed.

THE SECRETARY: Calendar Number 1253, by Senator Espada, Senate Print 7345, an act to amend the Military Law, in relation to establishing a survivor's benefit.

THE PRESIDENT: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

THE PRESIDENT: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 41.

THE PRESIDENT: The bill is passed.

Senator Morahan, that completes the reading of the noncontroversial calendar.

SENATOR MORAHAN: Thank you, Madam President. Could we have the controversial reading of the calendar, please.

THE PRESIDENT: The Secretary will read.

THE SECRETARY: On page 10, Calendar Number 227, by Senator Larkin, Senate Print 3896, an act to amend the Racing, Pari-Mutuel Wagering and Breeding Law, in relation to antitrust exemptions.

SENATOR PATERSON: Explanation.

THE PRESIDENT: Senator Larkin, an explanation has been requested.

SENATOR LARKIN: David, Senator Paterson, this bill adds a new section to the Racing and Wagering Law to exempt thoroughbred, harnesses, quarterhorse racing associations, and OTBs from state and federal antitrust laws when these racing organizations enter into negotiations with each other to coordinate the dates and times under which they will conduct racing and pari-mutuel.

In essence, David -- David, two

things. This bill was introduced in March of last year. To date, we have had no opposition to it.

There is a federal court law that we guided this by, or did it. The U.S. Supreme Court, in a ruling of Parker versus Brown, held that these types of exemptions are permissible under state law.

In fact, this bill, based on federal law, grants antitrust exemptions to certain professional sports leagues. So we just followed federal law.

ACTING PRESIDENT MARCELLINO: Senator Paterson.

SENATOR PATERSON: Senator, I'm not opposed to the bill. You did address, in part, what --

ACTING PRESIDENT MARCELLINO: Senator Paterson, are you asking the Senator to yield?

SENATOR PATERSON: Yes, I am, Mr. President.

ACTING PRESIDENT MARCELLINO: Do you yield, Senator?

SENATOR LARKIN: Yes.

ACTING PRESIDENT MARCELLINO: The Senator yields.

SENATOR PATERSON: Senator, my question is, in terms of the federal law, how do we establish the exemption through a state statute?

Now, I understand what the Supreme Court is saying, that that can actually happen. But wouldn't that be through some act of Congress? How can we on our own establish the exception?

SENATOR LARKIN: Well, they're doing it in other states right now. They're doing it in the state of Maryland, Georgia, Kentucky, using the same Supreme Court decision.

And what it all -- all it basically amounts to, David, is to allow these individual entities to coordinate their events so that everybody is not having the same event on the same day.

And what it does is it deprives our local governments of revenue that they normally would have if these events were properly scheduled so that everybody could

take advantage of them, not 19 events on one day.

SENATOR PATERSON: Satisfactory. Thank you.

ACTING PRESIDENT MARCELLINO: Any other Senator wishing to be heard on this bill?

Seeing none, read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT MARCELLINO: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 45.

ACTING PRESIDENT MARCELLINO: The bill is passed.

The Secretary will read.

THE SECRETARY: Calendar Number 1237, by Senator Volker, Senate Print 1082A, an act to amend the Civil Practice Law and Rules, in relation to simplified case resolution.

SENATOR DOLLINGER: Explanation, please.

ACTING PRESIDENT MARCELLINO:

Senator Volker, an explanation has been requested by Senator Dollinger.

SENATOR VOLKER: Yeah. This is a bill that was actually sent to us by the New York State Bar Association. And it is part of a group of bills that has been suggested to simplify case resolution in the tort system.

Let me, first of all, say that this can only be done by agreement of both parties. And what it does is to provide for a simplified case resolution for the commencement of the action or the preliminary proceedings and so forth, and provides for a waiver of the jury trial, as well as some other rules.

It would involve cases where the amounts involved are under $75,000. And as I said, you have to keep in mind here that it would only occur where both parties agreed before the process began.

ACTING PRESIDENT MARCELLINO: Senator Paterson.

SENATOR PATERSON: Mr. President, if Senator Volker would yield for a question.

SENATOR VOLKER: Certainly.

ACTING PRESIDENT MARCELLINO: Senator Volker yields.

SENATOR PATERSON: Mr. President, my inclination is to vote against this bill. Any type of legislation that would in a sense coerce parties to actually waive a jury trial, or maybe to even elect to narrow the issues of a case, I just think has some ramifications.

However, from the explanation that Senator Volker has advised us of, this actually sounds like something that's pretty creative and something that actually is done in part already in some areas of the state.

So I guess my question to Senator Volker is that if the parties agree to do this, to what extent are they informed of what is actually going to transpire in terms of narrowing the issues, waiving the trial, in these cases that would call for money judgments less than $75,000 a year?

Because if you can establish for me that the defendant and the plaintiff are not making this decision in the dark, then I guess this is actually a good system that we might want to implement.

SENATOR VOLKER: Well, I think, Senator, that's a very good question.

Of course, you know, I think you're talking about actions here that -- and by the way, this language, it includes language that says that you cannot use this to recover damages for personal injury or wrongful death. Just so that you understand it, this is limited to certain tort actions where, in 99 percent of the time, obviously you have attorneys involved who are going to inform their clients of exactly what they're facing. And I would assume any decent plaintiff's attorney would inform his client or her client as to what the ramifications would be.

And where -- it would seem to me that this would be useful in these cases that are cases that are more like contract arguments or something of that nature where, you know, the jury actually gets confused sometimes over something like this and you really want a judge to make the decision, because the judge is more capable, when you come right down to doing it, than trying to put it to a jury.

I realize -- and to be honest with you, I know what the trial lawyers are concerned about. And I happen to agree with the trial lawyers on this one -- not on this bill, but on -- but they're worried about the slippery slope and about the fact that we're going to do more and more away from juries and all this.

I happen to agree with them. I don't think that we should -- we should be very careful about how we deal with the American system and move away too much from the system, the jury system and from the tort system that has been pretty good to us, although I think it's a little out of kilter right now.

But I really think that this is a step forward in resolving certain limited cases. What you have here, I think most plaintiff's attorneys probably won't want to do this. But for certain cases, particularly, it seems to me, contract cases or complicated cases that involve issues that are not the kind of issues that maybe have any emotion or anything involved, it seems to me that a

plaintiff's attorney would be very, very inclined to do this sort of thing.

SENATOR PATERSON: Mr. President, I think I'm going through a transitional period where the -- menopause? No, that's not it -- where the desire to be mature and flexible is overcoming the initial reactions, probably coming from the id of my soul, because Senator Volker's point of view makes a lot of sense.

If he would yield for another question.

ACTING PRESIDENT MARCELLINO: Senator Volker, will you yield to Senator Paterson's id?

SENATOR VOLKER: I certainly will yield to Senator Paterson. And I hope that I am finally growing up myself here.

Go ahead, Senator.

ACTING PRESIDENT MARCELLINO: That makes two of us.

SENATOR PATERSON: Yes, Mr. President, we're definitely moving in a direction -- I just heard Senator Volker talk about his agreement with the trial lawyers.

And I think that he's explained this bill to my satisfaction with respect to the plaintiff's election in this case.

Now, what I do notice is that the defendant has to opt out. In other words, there's a presumption --

ACTING PRESIDENT MARCELLINO: Excuse me, Senator.

Can we have a little order in the house, please.

SENATOR PATERSON: There is a presumption that the defendant will be a party to this unless the defendant specifically opts out. Why did you choose to draft the legislation in that way rather than to make sure that the defendant was a party to the agreement?

Because if the defendant chooses not to be represented by counsel, perhaps it might never have been made clear that this is something that the defendant might not want to choose to accept.

SENATOR VOLKER: I think the reason for the opt-out provision is that the plaintiff's attorney, the plaintiff, is really

the one that would be most likely to get -- to bring this action, quite obviously. The plaintiff is the one complaining. The plaintiff is the one who is bringing the action. And therefore it would be the plaintiff who would be the beginning of the case, so to speak.

So as far as the defense is concerned, the defense then has the right to just say: "No, I'm out of it, I don't want to do that." Rather than get into some conversation as to whether it should be done or not, the defendant frankly can just say "I do not want to be involved in this."

I think that's why we did it that way, is to give that clear option to the defense that they just have to get out of it.

SENATOR PATERSON: Mr. President, if Senator Volker would yield for one last question.

SENATOR VOLKER: Certainly.

ACTING PRESIDENT MARCELLINO: He does.

SENATOR PATERSON: I think the adroit persuasiveness of Senator Volker has

overcome me.

But I would like to ask him one last time, is he sure that in these cases the defendant always knows that there's something that he or she is opting out of?

In other words, it's kind of like if you're not represented by counsel, there are procedures that are already taking place, it's already started, and you may never have even been aware that you had an option.

So what I was just looking for was an assuredness that there is, in a sense, advanced notice so that the defendant may review whether or not this is a good idea. I'm just on the general point of feeling that when we have judicial proceedings that the parties should not be negotiating in the dark.

SENATOR VOLKER: I think you're absolutely right.

But let me say, of course, it's a good argument for the fact that you kind of have your hands behind your back if you don't have an attorney, particularly if you're a defense person and the other person has an attorney.

It seems to me that the likelihood is that if you're in that situation, that would probably almost never happen. Because if somebody, a defendant, sees that the other person has an attorney, unless he's kind of a jerk, if you'll excuse me, or not informed, he would certainly -- he or she would certainly want one.

But let me just point out to you that any judge worth his salt is going to, when he sees this kind of a process and realizes that you've got a defendant who's not represented by an attorney, it would almost be malpractice or unethical for the judge not to specifically inform that defendant of what he's in for by not considering the possibility of opting out of such a process.

ACTING PRESIDENT MARCELLINO: Senator Paterson.

SENATOR PATERSON: Mr. President, on the bill.

ACTING PRESIDENT MARCELLINO: Senator Paterson, on the bill.

SENATOR PATERSON: I'm going to vote for the bill, but with the strong

admonition here that it's not really whether or not the defendant is represented by counsel that alarms me about what we're about to do, it's that we have a procedure that does require that the plaintiff agree to it.

So that if the plaintiff wasn't represented by an attorney, the situation would still be in many respects within the plaintiff's sight to make that determination. But I'm just afraid of a defendant who might not have the resources or just may have made a blunder and does not necessarily decide to seek counsel in this case.

Even though they've made that mistake, there might be a way to at least make sure that we include in the legislation an opportunity for the defendant to be informed.

ACTING PRESIDENT MARCELLINO: Senator Dollinger.

SENATOR DOLLINGER: Will the sponsor yield to couple of questions, Mr. President?

ACTING PRESIDENT MARCELLINO: Senator Volker, do you yield for a question or two?

SENATOR VOLKER: Yes.

ACTING PRESIDENT MARCELLINO: He yields.

SENATOR DOLLINGER: What happens in the instance of a default by the defendant?

The plaintiff sues the defendant and, as I'm sure you're familiar, at least in my practice we get contract cases and other disputes where there's a default on the issue of liability but you have to, quote, prove your damages. You have to go in and produce oral testimony of the actual damage sustained by the defendant.

Is this procedure permissible in a default situation where there's default on a liability issue?

SENATOR VOLKER: Yeah. Keep in mind that this doesn't involve personal injury or wrongful death or any of those kinds of thing.

SENATOR DOLLINGER: Right.

SENATOR VOLKER: I suppose that there certainly could be testimony on that, and it is a so-called simplified procedure.

So you're right. I guess if there

is a default, the defendant still has -- you know, has already opted out because he's already opted out of the regular course of things.

So that's true, they would go through the same procedure of testimony and so forth on appeal. Or not on appeal, but I mean to prove damages and so forth.

SENATOR DOLLINGER: Through you, Mr. President, if the sponsor will continue to yield.

SENATOR VOLKER: Certainly.

ACTING PRESIDENT MARCELLINO: He yields.

SENATOR DOLLINGER: I want to make sure there are from -- it talks here about the preliminary proceedings and it describes what the court can do, limiting discovery and doing other things.

But one thing that they don't mention is having any form of trial, any form of actual presentation of live witnesses for resolution, potentially, of disputes that could only be resolved by someone visibly observing the witnesses testifying under oath.

For example, in the creation of a contract. I said there was a contract; he said there wasn't. There are damages that flow. And you may get deposition testimony that's, you know, irreconcilable about the creation of the contract.

My only question is -- and I like this idea, because it's somewhat similar to what we do in Rochester with our deferral to arbitration. From my point of view, it's even better than that, because it keeps experienced trial judges watching the case, monitoring the case. They're used to evaluating it.

But my question is, you talk about the dispositional memos, and a lot of this is stuff that lawyers do before a case goes to a final conference and you present your facts and your evidence in written form. But is there anything in here that says that if there were a factual dispute, even a small one, that if the judge wanted to see that he could order a trial or a quick hearing just on that issue alone?

SENATOR VOLKER: Well, there's nothing -- I don't believe there's anything in

here that says that. But there's also nothing that says if there's some issue that is not anticipated, that a judge, for instance -- not necessarily a trial, but I suppose could certainly order a hearing.

I mean, it's -- once you submit to the judge, the judge could do virtually anything, when you come right down to it, to resolve the issue.

And the whole idea is to simplify it. So a judge, for instance, could say: We'd better have a hearing specifically on that issue, bring in your proof tomorrow or the next day, whatever. And if it's two -- for instance, a plaintiff and a defendant, it might have been the attorneys, then I assume it would be a very simplified process and they just bring in whatever they wanted to bring in before the judge.

And as you and I know, in any of these proceedings if it turns out that for some reason there is something way out of whack, if the person is completely incapable, the judge could even appoint an attorney, you know, or ask the fellow to get an attorney

because it's something that he's not capable of handling.

The simplified process doesn't mean that the judge doesn't have the authority to do the same things that a judge would normally do in a case proceeding.

SENATOR DOLLINGER: So the list of that (A) through (H) which talks about controlling discovery, it doesn't include a specific reference to --

ACTING PRESIDENT MARCELLINO: Gentlemen. Gentlemen, if I could, you're -- I know the instinct when you're so close together is to talk to each other. But when you do that, the stenographer can't -- no one else can hear the intensity and fantastic nature of this debate. So we would like to hear you.

SENATOR DOLLINGER: So again, through you, Mr. President, if Senator Volker will continue to yield.

SENATOR VOLKER: Sure.

ACTING PRESIDENT MARCELLINO: The Senator yields.

SENATOR DOLLINGER: So the list

of (A) through (H), which is the options available to a trial judge monitoring this case, even though it doesn't include a reference to the actual trial of a contested issue that would require a fact determination by the judge, nonetheless it's -- this is not an attempt to preclude him from holding such a factual hearing if it were necessary in the context of the case.

SENATOR VOLKER: No. If you read the section, it says in furtherance of these purposes, the -- it says -- wait a minute here. It says: In furtherance of these purposes in court, by a judge personally acting in such a preliminary -- or anytime thereafter may, may -- and it goes on to list (A) through (H.)

But there's nothing that says that the judge can't even go farther and order whatever needs to be done to resolve the issue.

SENATOR DOLLINGER: Okay. Through you, Mr. President, if the sponsor will yield to a question.

SENATOR VOLKER: Yes.

ACTING PRESIDENT MARCELLINO: He yields.

SENATOR DOLLINGER: Let me ask you the question that will be asked someday on appeal if this becomes law, Senator Volker.

Does the judge have the power, under this section, to award a judgment in excess of $75,000 if it's warranted by the facts and circumstances? If the plaintiff has made a mistake and underestimated his case and the proof later shows that he's entitled to $100,000, can he award a judgment for $100,000, or is he completely restricted to the $75,000 which is the limit in this?

SENATOR VOLKER: It would be my opinion, and based on what I know of this section, that if it turned out that both people had agreed to this procedure assuming it was under $75,000, and it ended up more, it would seem to me that the judge could still order it.

I suppose that the losing party could appeal on that basis. My assumption would be that such an appeal would probably be thrown out, because the fact that -- the

$75,000 certainly is a guide to bringing any action. But I think if it turns out that it should be more -- and that's very honestly particularly so if both people were represented by attorneys. I suppose if the defendant or whoever lost was not represented by an attorney, it might be something that could be more apt for an appellate judge to -- but I would think that given the nature of this process, that it possibly would hold, even though it turned out to be -- as long as it wasn't a million -- as long as it wasn't so out of control that it would be way above the $75,000, I think it would hold.

SENATOR DOLLINGER: I'm not -- I just -- at least in my experience, Senator Volker, that's always a question that tends to come up -- there's a procedure set up and a cap on it -- because eventually there's an issue unforeseen at the time of pleading that comes up that increases the value of the claim. And I was just interested in your opinion on it.

The last question, if Senator Volker will continue to yield, Mr. President.

ACTING PRESIDENT MARCELLINO: I'm sure he does.

SENATOR DOLLINGER: Senator, the provisions that you set forth here that would allow an appellate judge to overturn the disposition granted by the trial judge, are they meant to mimic those set forth in the arbitration law? In the sense that, as you know, there are very -- the scope of appeal in arbitration is significantly less than it is in a general civil action.

Is it your intention to similarly confine the scope of appeal and the basis for overturning an appeal in this case?

SENATOR VOLKER: I would think that given the nature of this process that once both parties agree to the process, it would seem that the appeal process would be more limited.

Although not as specifically limited, though, as arbitration, as you know. Because the arbitration appeals are pretty -- very unusually strict, is what I'm saying.

SENATOR DOLLINGER: Right. Right.

SENATOR VOLKER: I don't think this would be as strict.

But I would think that given the nature of the process, that they certainly wouldn't be in the same nature as a normal appeal would be.

SENATOR DOLLINGER: Okay. The reason why -- through you, Mr. President, just on the bill briefly.

ACTING PRESIDENT MARCELLINO: Senator Dollinger, on the bill.

SENATOR DOLLINGER: Senator Volker, I guess I'm struck by the similarity in the provision here with respect to the scope of appeal and the provision with respect to arbitration.

Arbitrations, as you properly point out, are very limited in their review by the civil courts in the sense that it's only when there's a clear error in the computations or a very substantial departure from law that those arbitration awards are overturned.

The whole theory being that when the parties consent to the adjudication in a non-courtroom proceeding, they are bound by

that adjudication. It's supposed to be final and binding.

I think in this statute, in this proposed statute, what you've done is really mimicked the arbitration rules. That is, the disposition lacks a serious rational foundation as to be arbitrary and capricious, a standard well-known to lawyers.

And in essence we're saying that it's a little bit less rigorous than the arbitration review, which is either gross mistake of fact or error in the computation. The arbitrary and capricious standard with respect to arbitration decisions really doesn't apply.

I mean, it's -- we discarded that in the CPLR about twenty years ago, I think, to our credit. Because arbitrary and capriciousness -- the determination of arbitrary and capriciousness ended up being arbitrary and capriciousness.

So it seems to me that putting that standard in is not a bad resolution for this process. I'm going to agree with Senator Paterson. I guess at first blush I looked at

this proposal and said, well, we're taking away people's right to a trial by jury.

I think so long as that's done with the assistance of counsel, with the proper notice, with the supervision of a trial judge, who I assume can provide the same kind of balance and the same governance in these cases that is needed, that will be fair and even-handed, it seems to me that this is not a bad way to go.

The plaintiff will get a chance to make an up-front decision that in essence he doesn't want a jury trial and that he wants an expedited process. The defendant has an opportunity to come in, much like in federal practice, you file an action, you don't file a right for a jury demand. The defendant can come in and file a demand for a jury. That's in essence what this procedure does.

I understand my friends at the Trial Lawyers are concerned about that slippery slope. I would suggest in this case we've put enough safeguards in to suggest that the slope is not that slippery this time. And although it may be slightly pitched downhill

toward, at some point in the future, other changes in our civil justice system, I don't think this is as slippery a slope as it's portrayed to be.

I'll be voting in the affirmative.

ACTING PRESIDENT MARCELLINO: Are there any other Senators wishing to be heard?

Seeing none, read the last section.

THE SECRETARY: Section 2. This act shall take effect on the first day of January.

ACTING PRESIDENT MARCELLINO: Call the roll.

(The Secretary called the roll.)

ACTING PRESIDENT MARCELLINO: Count the nay votes and announce the results.

THE SECRETARY: Those recorded in the negative on Calendar Number 1237 are Senators Breslin, Brown, DeFrancisco, Hassell-Thompson, L. Krueger, Montgomery, Onorato, Schneiderman, A. Smith, M. Smith, and Stavisky. Ayes, 40. Nays, 11.

ACTING PRESIDENT MARCELLINO: The bill is passed.

Senator Johnson, that completes the

controversial calendar.

SENATOR JOHNSON: May we please return to reports of standing committees. There's a report of the Rules Committee at the desk.

ACTING PRESIDENT MARCELLINO: Return to reports of standing committees.

The Secretary will read.

THE SECRETARY: Senator Bruno, from the Committee on Rules, reports the following bills:

Senate Print 138, by Senator Volker, an act to amend the Alcoholic Beverage Control Law;

5207, by Senator Wright, an act to amend the Public Service Law;

6606, by Senator Hoffmann, an act to amend the Real Property Tax Law;

7180, by Senator Balboni, an act to amend the Public Authorities Law;

7353, by Senator Spano, an act to amend the Labor Law;

7407, by Senator Stafford, an act to amend the Environmental Conservation Law;

7412A, by Senator Meier, an act to

amend the Social Services Law;

7428, by Senator Velella, an act to amend Chapter 557 of the Laws of 2002;

7434, by Senator Marcellino, an act to authorize;

7436, by Senator Bonacic, an act to amend the Town Law;

And 7452, by Senator Wright, an act to amend Chapter 640 of the Laws of 1990.

All bills ordered direct to third reading.

ACTING PRESIDENT MARCELLINO: All in favor of accepting the report of the Rules Committee signify by saying aye.

(Response of "Aye.")

ACTING PRESIDENT MARCELLINO: Opposed, nay.

(No response.)

ACTING PRESIDENT MARCELLINO: The report is accepted. All bills are reported to Third Reading Calendar.

Senator Johnson.

SENATOR JOHNSON: Mr. President, I'd like to call up Calendar Number 1258 at this time.

ACTING PRESIDENT MARCELLINO: The Secretary will read Calendar Number 1258.

THE SECRETARY: In relation to Calendar 1258, Senator Wright moves to discharge, from the Committee on Rules, Assembly Bill Number 11123A and substitute it for the identical Senate Bill Number 7452, Third Reading Calendar 1258.

ACTING PRESIDENT MARCELLINO: Substitution ordered.

The Secretary will read.

THE SECRETARY: Calendar Number 1258, by the Assembly Committee on Rules, Assembly Print Number 11123A, an act to amend Chapter 640 of the Laws of 1990.

ACTING PRESIDENT MARCELLINO: Read the last section.

THE SECRETARY: Section 2. This act shall take effect immediately.

ACTING PRESIDENT MARCELLINO: Call the roll.

(The Secretary called the roll.)

THE SECRETARY: Ayes, 51.

ACTING PRESIDENT MARCELLINO: The bill is passed.

SENATOR SEWARD: Mr. President.

ACTING PRESIDENT MARCELLINO: Senator Seward.

SENATOR SEWARD: Mr. President, I would ask unanimous consent to make this statement. On May 20th, Senate Bill Number 7430, Calendar Number 1210, passed on a slow roll call. I was unavoidably out of the chamber at that time at a meeting.

And I would just like the record to note that had I been in the chamber, I would have voted no.

ACTING PRESIDENT MARCELLINO: The record will so indicate.

Senator Wright.

SENATOR WRIGHT: Mr. President, on behalf of Senator Meier, on page 67 I offer the following amendments to Calendar Number 1251, Senate Print Number 7135A, and ask that said bill retain its place on Third Reading Calendar.

ACTING PRESIDENT MARCELLINO: The amendments are received and adopted, and the bill will retain its place on the Third Reading Calendar.

Senator Johnson.

SENATOR JOHNSON: Is there any further housekeeping at the desk?

ACTING PRESIDENT MARCELLINO: No, Senator, the house is clean.

SENATOR JOHNSON: There being no further business, I move we adjourn until Monday, June 3rd, at 3:00 p.m., intervening days being legislative days.

ACTING PRESIDENT MARCELLINO: On motion, the Senate stands adjourned until Monday, June 3, at 3:00 p.m., intervening days being legislative days.

(Whereupon, at 11:54 a.m., the Senate adjourned.)