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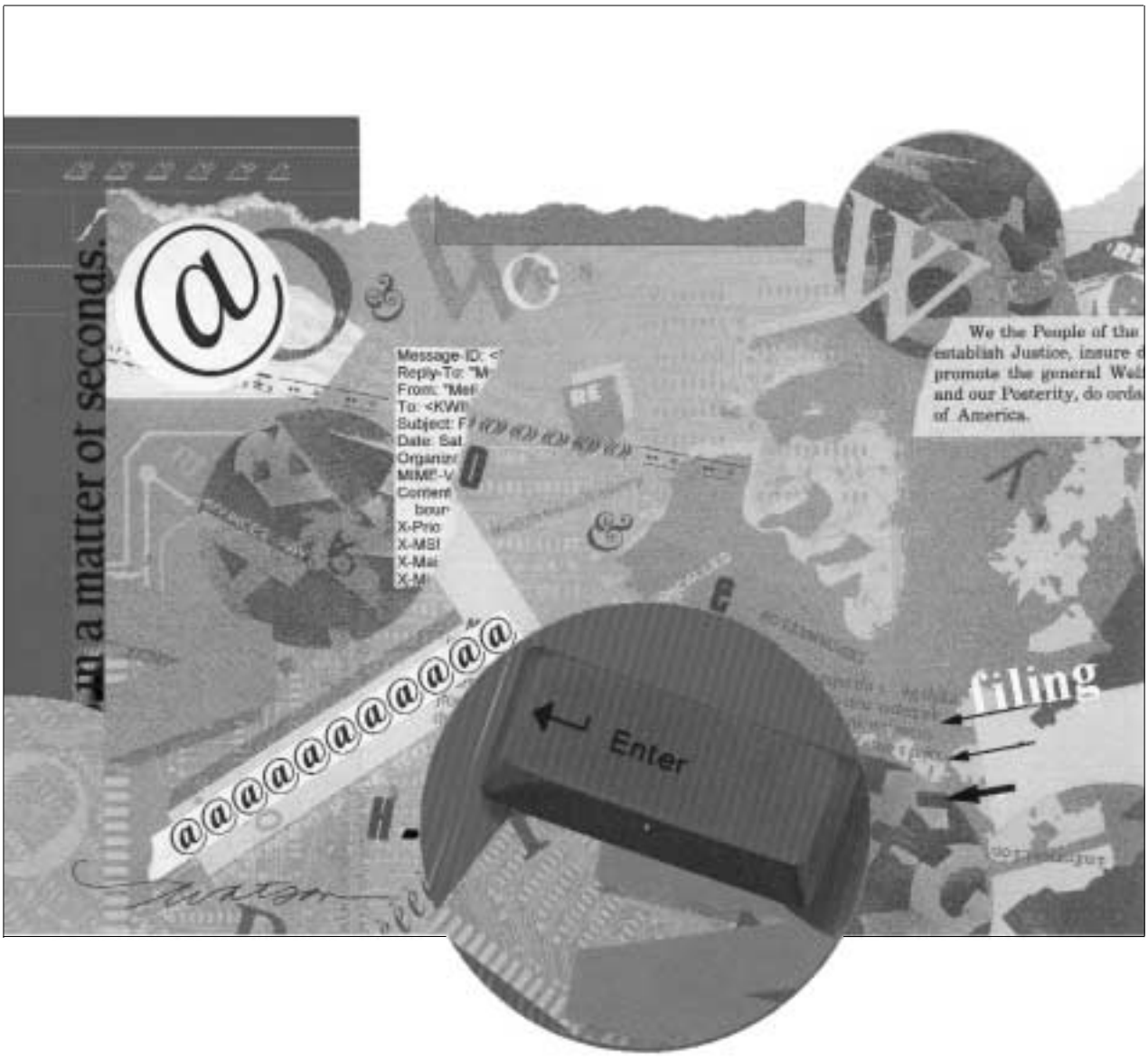

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Litigation in the 21st Century

NYSBA

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Message from the Chair

By Sharon M. Porcellio

In my first message as Chair of the greatest Section of any bar association, I discussed the challenges technology poses and our efforts to continue the Section's long-standing tradition of producing high quality substantive reports and programs while expanding participation by more recently admitted attorneys and those from broader geographic and substantive areas of practice. My next message came as the nation faced the challenge of our presidential election, and our Section readied for its Annual Meeting. Thus, it seems only fitting that my final *NYLitigator* message, written as we approach our Spring Meeting, gives me the opportunity to report on our success in responding to these challenges.

The main theme of this issue of *NYLitigator* is a very timely one, "Litigation in the Electronic Age." This theme continues the discussion begun through our Annual Meeting program—"What the Savvy Commercial Lawyer Knows about the Internet." Program Chair and our Executive Vice-Chair, Cathi Hession, and Lesley Szanto Friedman, Chair of the Section's new Internet and Litigation Committee, worked with the Corporate Counsel Section's David Perlman to put together a wide-ranging examination of the Internet-related issues most commercial litigators will likely encounter, including the basics of Internet terminology, such as metatagging and cybersquatting, and a discussion of what happens when new technology collides with established legal principles—personal jurisdiction and intellectual property, for example.

Another intersection of new technology and established legal principles is the study underway by an advisory committee of the Judicial Conference of the United States into whether to amend the Federal Rules of Civil Procedure to accommodate discovery of electronic information. This Section's Committee on Federal Practice, chaired by Greg Arenson, did its usual stellar job in analyzing the current federal discovery rules and their applicability to electronic information to make the recommendations adopted by the Section and outlined in the article, "Does Discovery of Electronic Information Require Amendments to the Federal Rules of Civil Procedure?" This is no doubt the beginning of what will be a lengthy exchange on how the discovery process, and litigation overall, will change in the new millennium.

Although some may believe that trying to read disappearing print on the silver-faced paper from old-style facsimile transmissions is difficult discovery, in the electronic age, even locating electronic information is difficult, as described by Barry Ginsberg and Daniel P. Seymour in their piece on gathering electronic evidence. It contains a wealth of information.

Technology has also crept into litigators' interactions with the courts in another way in the past year. As explained in the article by former Administrative Judge, now Appellate Division Justice, Stephen Crane, e-filing has come to the Commercial Division. Justices Crane and Thomas Stander (Supreme Court, Commercial Division, Monroe County) have been tireless in their efforts to familiarize as many attorneys as possible with the new system. Once again, this is just the beginning. In her State of the Judiciary address, Chief Judge Judith Kaye noted that the goal is "State-wide e-filing as soon as possible."[1]

"Although some may believe that trying to read disappearing print on the silver-faced paper from old-style facsimile transmissions is difficult discovery, in the electronic age, even locating electronic information is difficult . . ."

While these changes allow easier access to information, they also raise other issues, not the least of which are privacy concerns. Our Section is once again on the cutting edge of these developments. Our previously mentioned Internet and Litigation Committee tackled this issue through an in-depth CLE program on "Privacy in the Electronic Age," while continuing our efforts at collaboration by joining with the Corporate Counsel and International Law Sections in this endeavor. The program expands on the discussion of privacy issues begun at the Annual Meeting. The Sections involved and program topic show that we are truly in a global marketplace.

Despite all of the developing technology, as noted earlier, there are established legal principles within which even the global marketplace operates. We are delighted to have an article by a first-time contributor, Stephen L. Brodsky, about one such principle—"Defending an Agent Against a Claim for Breach of Warranty of Authority."

Another basic for all attorneys is the attorney-client relationship. Ideally, technology helps forge those relationships. In this issue, Michael Oberman, a member of the Section's Executive Committee, reviews a must-read book edited by our Section founder, Bob Haig, exploring partnering between inside and outside counsel.

The goal of increased participation continues with our Spring Meeting, co-sponsored by the Corporate Counsel Section. Chair-Elect Jay Safer worked with Corporate Counsel Chair Gary Roth and others to put together an exciting and informative program. The program examines the presidential election and then switches gears to examine how corporate counsel decide whether to use arbitration for commercial disputes and the role of the judiciary in arbitration. They assembled top-notch participants for a thoroughly enjoyable and interesting program at The Sagamore. The location is important because it also allows us to continue our efforts at having more geographically broad-based participation. We are very pleased to have increased involvement from central and northern New York. From the Spring Meeting at Niagara-on-the-Lake, Ontario (just across the border from Buffalo) last year, to the Annual Meeting in New York City and the Spring Meeting this year at The Sagamore, the Section has geographically covered the state and beyond. Our substantive reports and programs have also spanned the full spectrum.

It has been one wonderful and unbelievably short year. What has made it an incredible year is all of the people with whom I have had the opportunity to work more closely. They have been invigorating. My most heartfelt thanks go to my successor, Jay Safer. He has been supportive and helpful beyond belief. He always volunteered, without even being asked. Also, Executive Vice-Chair Cathi Hession, Treasurer Lew Smoley, Treasurer-Elect Lesley Szanto Friedman, and my colleague, Secretary Brian Bocketti, have answered the call all year long. They have upheld the fine tradition of their predecessors, and I hope they enjoy their future service to the Section as much as I expect to.

Endnote

1. Judith S. Kaye, *The State of the Judiciary 2001* at 12 (January 8, 2001).

REQUEST FOR ARTICLES

If you have written an article and would like to have it published in The *NYLitigator* please submit to:

Jonathan D. Lupkin, Esq.
Solomon, Zauderer, Ellenhorn,
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45 Rockefeller Plaza
New York, NY 10111

Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information, and should be spell checked and grammar checked.

Electronic Filing in the Commercial Division—How It Can Help the Practitioner and the Client

By Hon. Stephen G. Crane

Introduction

Late last year, at the fifth anniversary of the founding of the Commercial Division, I had the privilege of announcing that electronic filing had come to the Commercial Division in New York County. Since then, electronic filing had also been introduced in the Monroe County Commercial Division, and it became clear that the Division would once again be on the forefront of progress for the court system in our state.

Our professional training, and perhaps the cast of mind that makes us interested in the law, may lead some of us to be wary of technological innovation. No doubt, when young Bill asked to use the garage for a project, his father, good lawyer that he was, would have counseled his son to "stick with softball." In the case of e-filing, there are many advantages for busy commercial lawyers and clients. It is the aim of this brief article to explain what they are.

First, a few words about our new system and the e-filing project.

E-filing began with a typically visionary determination by Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman in 1997 that the New York court system should explore the benefits of filing by electronic means. Its utility had been suggested by similar systems put into place elsewhere. The Advisory Committee on Civil Practice (George F. Carpinello, Chair), the Division of Technology of the Unified Court System, and two e-filing Advisory Committees, one composed of attorneys and one of court staff, all labored long and hard to bring this vision to reality. Additionally, the federal courts contributed generously with a wealth of useful advice in light of their experience in this area.

In 1999, the Legislature approved e-filing in a limited form.[1] It addressed through appropriate legislation how actions could be commenced and service could be made, what the form of "papers" should be, and how court fees could be paid. The Commercial Division in New York and Monroe counties and the tax certiorari part in Westchester County have the honor of being the venues for experimental e-filing in our state. In authorizing filing by electronic means, the Legislature provided for pilot programs in these counties only. The future of electronic filing in New York will be significantly influenced by the results of the Commercial Division and Westchester pilot projects.

As set out in greater detail below, e-filing permits parties to commence or to convert actions and pursue them in the New York County Commercial Division by electronic means. Documents are filed on an official Web site on the Internet. A party may commence an action electronically by filing the initial papers with the County Clerk via the Web site. The Clerk will provide an index number and accept payment of the required fee electronically. The filer then serves on the other parties a Notice Regarding Availability of Electronic Filing, a standard form that is posted on the Web site. All appearing parties must then consent to the use of e-filing. Parties who are served with process and who consent can thereafter be served electronically. After each successive document is filed on the Web site, an e-mail message reporting the filing is transmitted to all parties. Pursuant to the regulations governing e-filing which are set forth in Rule 202.5-b of the Uniform Rules for the Trial Courts (hereinafter "Uniform Rule"),[2] documents are deemed filed when they are received by the Unified Court System's server, a computerized storage device.[3]

"Our professional training, and perhaps the cast of mind that makes us interested in the law, may lead some of us to be wary of technological innovation."

The rules provide that the assigned Judge must also consent to the case being e-filed. The Justices of the Commercial Division in New York and Monroe counties have agreed to take part in this project. A Justice will reject a case for e-filing only if extraordinary circumstances so require, although it is hard to imagine what such circumstances might be. Cases commenced in hard-copy form can be transformed into e-filing cases. Conversely, if there is a reason to terminate e-filing in a particular case, it can be converted to a hard-copy matter.

I predict that, in the not-too-distant future, most cases in our state will be filed electronically; the explosive and revolutionary expansion of the Internet in recent years furnishes the trajectory for this innovation. The Commercial Division in New York County and the other venues provide a glimpse at the shape of this future. Yet more concrete signs are there to be seen. In Michigan, for example, the Governor has proposed the establishment of a "cybercourt" and other jurisdictions are considering something similar. Though we have begun the journey down a road that will be traversed in the future, our challenge now is to make the travel smooth and to fill in the potholes promptly. How do we get from here to there? In New York County, the journey begins with e-filing business cases in our Commercial Division.

"I predict that, in the not-too-distant future, most cases in our state will be filed electronically; the explosive and revolutionary expansion of the Internet in recent years furnishes the trajectory for this innovation."

In creating the software that powers our e-filing system, the Division of Technology of the Unified Court System, headed by Noel Adler, Esq., wisely avoided reinventing the wheel. Rather, it surveyed other e-filing venues and studied with close attention the mandatory electronic filing system in the Southern District Bankruptcy Court, a pioneer in this technology. Users familiar with that system will detect many similarities in our own.

There has been other careful preparation. The staff of our court has been working with the e-filing software for many months to ensure that cases will be processed in our court easily and reliably.

The Advantages of E-Filing

The advantages of filing electronically are numerous and compelling. First, the system is easy to learn. I say that with confidence born of personal experience as I, myself, took a training course. Although I do not qualify as an expert, I am, as a result of that course, competent in the use of the system, and I have a good basis for assuring the reader that anyone can learn it with ease. Because our system resembles that of the Southern District Bankruptcy Court, there exists among the commercial Bar a wealth of knowledge that will smooth the experience for those who file by electronic means in our court. Many Managing Attorneys and Managing Clerks work with the Bankruptcy Court's program every day and can make an especially fast and easy transition to our system.

Our e-filing Web site contains an electronic User's Manual, and one can learn how the system works by consulting the Manual alone. We are going beyond that, though, to ease the user's way into our system. Our court has begun to present training programs for practitioners. We offer a brief, but information-packed, "hands-on" course to all practitioners free of charge. Those who take the course will receive two CLE credits, also for free. In addition, we will be working with the Computer Lab of the New York County Lawyers' Association, which has an extensive training background and offers a course on the Bankruptcy Court's program. The Lab will present a similar course about our system.

In order to use the system, an attorney or *pro se* party registers as a Filing User.[4] When registering, the User submits an e-mail address so that communications about the case can be easily received. The User is given an identification number (a "User ID") and a password. This information will be kept in confidence by the clerk. This ensures the integrity of the e-filing process.[5]

The registration process is simple. A registration form is provided on the Web site. No personal visit to the court is required. Once an attorney is registered as a Filing User, he or she may use e-filing an unlimited number of times in multiple cases. There is no need to re-register. The registering individual can designate several e-mail addresses. These assist in facilitating efficient notification to the firm about developments in a case.

The e-filing system consists of two parts: the system itself (the "live" system) and a "duplicate" that serves as a practice system. Once the user registers and receives a password, he or she can use the practice system to learn in a practical way all about how e-filing works. We urge everyone to do this. There is no limit except the user's energy. As with the real system, the practice system is accessible to any attorney with a desktop or laptop computer and a connection to the Internet.

Because our system has been modeled on the Bankruptcy Court's, users can have more confidence in its capacities than they otherwise might if our system had been the first to leave the gate. Many of the imperfections that afflict all new enterprises have already been discovered and resolved.

The skeptical lawyer, habituated to the contemplation of disasters, may worry that the system will "crash." If so, will the user or the client bear the consequences? The rules that govern our program provide

safeguards for the user, namely, an automatic extension of time of one day for each day the system experiences a technical failure (except for deadlines that by law may not be extended).[6] The regulations clearly define what constitutes a "technical failure," so the attorney will know where he or she stands at all times.[7]

Furthermore, the court has created a Helpline (212-748-5305) to assist the user if a technical problem arises or the user does not recall some item of information touched on in one of our training courses. Trained members of the Commercial Division staff will provide a prompt and knowledgeable response to any question that may arise.

"Those who file electronically in our court can have a greater degree of confidence that their case will be retained in the Commercial Division in our County than is possible with paper proceedings."

Those who file electronically in our court can have a greater degree of confidence that their case will be retained in the Commercial Division in our County than is possible with paper proceedings. Commercial Division Justices are authorized to transfer cases out of the Division. The *Guidelines for Assignment of Cases to the Commercial Division*, issued in December 1998, indicate the kinds of cases that presumptively will be retained in the Commercial Division. Contract disputes, actions involving corporate affairs, and other similar cases will presumptively be retained if they involve $125,000 or more. However, the *Guidelines* have recently been revised to provide that commercial cases *will be retained in the Division* if they involve only $25,000 or more and are filed electronically. Thus, an attorney whose case falls within the definition of a commercial case can be assured that it will definitely remain in the Division if it is filed electronically.

With e-filing, papers can be filed easily. The software prompts the user to type in the case name and to take the other necessary steps. Once a case exists, the user basically attaches a document to an on-line filing box which sends the document to the system. That is all it takes to file.

There is no reason for concern about how papers can be signed under this system. Signing, of course, is required by Section 130-1.1-a of the Rules of the Chief Administrator. A paper filed or served electronically is considered to have been signed when the paper identifies the registered person as a signatory.[8] For a Filing User, the use of the User ID and password is equivalent to physical signing. Filing Users who file or serve papers signed by non-Users represent that they possess the originals and agree to produce them upon request.[9] Thus, security is achieved with the utmost ease and simplicity.

Once a paper is filed, the system sends a message to the relevant court clerks so they can act on the paper immediately. The program ensures an unprecedented degree of attention to filings by court staff.

The filing attorney might worry that the paper being filed will be destroyed or diverted by technological gremlins. Not to worry! As noted, each Filing User upon registration provides an e-mail address. Promptly after filing, the system sends a message to the filer confirming that the filing was made. Occasionally, a clerk may find a defect, for instance, if a paper from one case were inadvertently appended to a message regarding another. In such circumstances, the system will promptly send a message to the filing attorney advising that there was a defect and stating precisely what it is. The filing attorney can depend upon receiving full and prompt information about the status of papers sought to be filed.

The filer likewise need not worry about meeting deadlines with papers that contain defects. The rules provide that papers are deemed "filed" when lodged with the system.[10] When payment of a fee is required, the papers will be deemed filed when accompanied by credit or debit card information.[11]

"Attorneys often seem to need time to make last-minute changes to their papers. With our system, they will have lots more of this crucial time."

Payment of fees could not be easier. The system provides for payment by credit or debit card and the transaction can be executed on-line very quickly. The process resembles what is used countless times every day in the commercial sector of the Internet.

Electronic filing greatly expedites and simplifies the process of getting papers to court. Messengers do not have to deliver original papers, perhaps in a rush to meet a 5 PM closing time. Papers can be filed with the system at any hour of the day or night; weekdays, weekends, and even holidays.[12] Attorneys often seem to need time to make last-minute changes to their papers. With our system, they will have lots more of this crucial time.

Some might regret the loss, under an e-filing system, of the opportunity to submit papers beautifully typed, prepared, organized, and bound. Papers whose physical condition is intended to reflect the high quality of their substance are a source of pride for many commercial lawyers. However, the answer to this concern is for the firm in an e-filing case to submit a courtesy copy.

File retrieval is another major advantage of the e-filing system. For at least some attorneys, retrieving files in the office at present is time-consuming and something of a nuisance. Perhaps, the file room is on a different floor or in another building. Now, with e-filing, an attorney can retrieve the case file instantaneously on the office desktop computer simply by going to the Web site. Attorneys can view the file while at home or away from the office on other business or even on vacation (Heaven forfend). Papers need not clutter desks, tables or floors. Access to the file can be obtained at any time of the day or night. An electronic docket serves as an index to filed papers so that working with the file is easy and convenient. The file can be accessed simultaneously by many users, which, of course, is not possible with a paper file. With e-filing, an attorney can easily search through all filed cases (other than those sealed by court order) to find similar or other cases of interest.

"What about orders and judgments, our doubting attorney might ask? How complicated are those? The answer is—not at all!"

In the e-filing system, service of process is effected as provided by the CPLR or electronically if that method is consented to.[13] Absent consent at the outset, original initiating papers are served in the normal manner, accompanied by a Notice Regarding Availability of Electronic Filing.[14] Once a matter has become an e-filing case, service can be made via the Web site. The user files a paper with the Web site. Within 24 hours, the User electronically transmits a Notice of Filing of the paper to all e-mail addresses of record. The Notice identifies the paper and sets forth the date and time of filing. That transmission constitutes service.[15] The parties can then proceed to the Web site to view the document. Proof of service is filed on the Web site as well. Service can be made at any time anywhere. How could service be quicker, easier, or less expensive?

The system provides instantaneous notice of all developments in every e-filing case. Whenever anything happens in a case, such as the issuance of a decision on a motion, an e-mail message is sent to registered attorneys for all parties informing them of the development. In the case of a decision, the text would then be available on the Web site. It would be difficult to achieve broader or more rapid notification of case activity than is achieved by our system. Some private providers may currently offer notification systems, but none can provide both instantaneous notice and access to the text of decisions just rendered. A dependable notification system such as this, we know, is much sought after by practitioners and a unique benefit of e-filing.

What about orders and judgments, our doubting attorney might ask? How complicated are those? The answer is—not at all! Under the regulations, the clerk shall automatically file orders and judgments in accordance with the e-filing protocol.[16] When an order or judgment is entered, the clerk will send e-mail notification of the event to all parties.[17] A party may then serve formal notice of entry on another party by sending a copy of the notification received from the clerk, a copy of the document, and a statement that the transmittal constitutes notice of entry for the purposes of starting the appeals clock.[18]

Our hypothetical worried lawyer might fear that e-filing means unwanted publicity for lawsuits brought against the client. There might be concerns about disclosure of corporate confidences, such as marketing projections, or the prospect of a meritless lawsuit against a client being seized upon by a disgruntled shareholder, to make life difficult for corporate officers. This worry is greatly overstated. Sealing is available to protect trade secrets and business confidences. More specifically, the e-filing system has been designed to permit sealing of files when circumstances so require. If the court makes the necessary findings pursuant to Part 216 of the Uniform Rule, a case can be easily sealed. It is *even possible to seal individual documents* if the court so approves, as is frequently done in federal court.[19]

Furthermore, a substantial portion of the litigation in the Commercial Division neither involves anything that could conceivably inconvenience or embarrass parties if broadly disclosed, nor do the vast majority of Commercial Division cases involve sensitive issues concerning financial data about corporate operations. I have in mind cases brought to recover on a promissory note, for example, or to recover damages for breach of a contract to deliver goods as a result of untimely or nonconforming delivery; or a case founded upon different interpretations of key contractual language, such as that governing remedies available to a party to a transaction; or a dispute as to whether, in the light of certain language, there even was a contract rather than an agreement to agree. There is simply no reason, from the perspective of the lawyers and their clients, why routine, non-sensitive cases such as these should not be filed electronically. To the contrary, the benefits

described here clearly carry the day. This is especially true of cases in which modest sums are at stake under the recent revision of the *Guidelines*. We do not ask that firms file all their cases in the Division by electronic means. If each of the firms that practice regularly in the Division were to file some cases of the types I described, the Division would be able to run a meaningful pilot project and a good test of the system.

Conclusion

The foregoing amounts to a powerful case for practitioners in the Commercial Division to visit the future by filing electronically today with our court. For its convenience, speed, and practical utility, e-filing is clearly a vast improvement over the old-fashioned paper process. But the skeptical attorney need not take my word for it; he need only consult those who are familiar with the Bankruptcy Court's system and highly enthusiastic about its quality. Just as those who have used advanced word processing software would never again depend on handwriting or even the typewriter to prepare and edit a text of any length, so too e-filing will soon become the new standard for case processing in our courts.

"For its convenience, speed, and practical utility, e-filing is clearly a vast improvement over the old-fashioned paper process."

The best way to get from here to there is for the Commercial Division to run a successful pilot program. This is where the commercial Bar comes in. Attorneys can benefit in so many ways from filing electronically. But our court, and ultimately the e-filing program for the entire state, can benefit too. The challenge now is for you to use our pilot project frequently and thoroughly so that we can make improvements and learn lessons about how best to develop e-filing in all cases in the future.

In authorizing our pilot project, the Legislature established a time limit—July 2002—and required that the Chief Administrative Judge report on the results. In order for Judge Lippman to do this, we need a statistically meaningful body of cases filed electronically during the project. We urge all commercial lawyers who practice in New York County to give serious consideration to filing cases by electronic means. Send us some cases—we are sure you will not regret it. And, you will be doing a public service by helping us test and improve our system.

So pick up the phone and let us know you are about to file electronically. You will benefit and so will your client and you will incidentally perform a great public service. Be part of the future today—file electronically![20]

Endnotes

1. 1999 N.Y. Laws, Ch. 367.
2. For ease of reference, a copy of the Uniform Rule pertaining to electronic filing has been included as an appendix to this article.
3. Uniform Rule 202.5-b(e)(4). Uniform Rule 202.5-b(3)(4).
4. Uniform Rule 202.5-b(d).
5. *Id.*
6. Uniform Rule 202.5-b(k).
7. *Id.*
8. Uniform Rule 202.5-b(f).
9. Uniform Rule 202.5-b(f)(2).
10. Uniform Rule 202.5-b(e)(4).
11. *Id.*
12. *Id.*
13. Uniform Rule 202.5-b.
14. Uniform Rule 202.5-b(b)(i).
15. Uniform Rule 202.5-b(g)(2).
16. Uniform Rule 202.5-(j).
17. *Id.*
18. *Id.*
19. Uniform Rule 202.5-b(m).
20. The progress that has been made in e-filing in New York State is due to the vision and leadership of Chief Judge Kaye and Chief Administrative Judge Lippman; the work of the Division of Technology under the direction of Noel Adler, Esq.; and the contributions of the Advisory Committee on Civil Practice and the two e-filing Advisory Committees. Special mention must be made of Thomas Gleason, Esq., of Albany, who has contributed his wisdom and countless hours of his limited free time to this project. Amy Vance, Esq., from Counsel's Office of the Unified Court System, has served as chief aide to Judge Lippman in getting legislative approval for this project and bringing it to fruition. The progress to date would not have been possible without Amy's tireless efforts. The Commercial Division of New York County salutes them all!

Judge Crane is the former Administrative Judge of Supreme Court, Civil Branch, New York County and a Justice of its Commercial Division. On March 15, 2001, Governor Pataki elevated Justice Crane to Associate Justice on the Appellate Division, Second Department. Justice Crane acknowledges with deep gratitude the forever faithful and tireless Robert C. Meade, Esq., First Deputy Chief Clerk and amanuensis par excellence, in preparing the first draft of this effort.

Revised FBEM Regulations
Approved by the Administrative Board

Part 202 of the Uniform Rules for the Supreme and the County Court

202.5-b Filing by Electronic Means

(a) Application

(1) The Chief Administrator of the Courts may establish a pilot program in which papers may be filed with the Supreme Court by electronic means (FBEM). The program shall be limited to commercial claims in the Monroe County and New York County Supreme Court Commercial Divisions, and tax certiorari claims in the Westchester County Supreme Court.

(2) "Electronic means" for purposes of these rules shall mean any method of transmission of information between computers or other machines, other than facsimile machines, designed for the purpose of sending and receiving such transmissions, and which allows the recipient to reproduce the information transmitted in a tangible medium of expression.

(3) An "action" for the purposes of these rules shall include a special proceeding.

(4) "Hard copy" shall mean information set forth in paper form.

(b) Designation of Actions Subject to FBEM

(1) In any case designated pursuant to this section, a party may commence an action by filing the initiating papers by electronic means with the County Clerk, or by filing a hard copy of those papers with the County Clerk. Upon such filing, the County Clerk shall provide the filing party with a copy of a Notice Regarding Availability of Electronic Filing in a form approved by the Chief Administrator. If that party desires that action be subject to FBEM, the party shall serve the other parties with such Notice, together with the initiating papers.

(2) If all parties appearing consent to the use of FBEM, and a Filing User pursuant to subdivision (d) appears for each party, then the parties shall sign a Consent to FBEM satisfying the requirements of subdivision (c), and the party serving the Notice shall file that Consent with the court. [,together with a Request for Judicial Intervention.] The Consent [and Request for Judicial Intervention] may be filed by electronic means. A judge [who elects to participate] assigned to a case in the FBEM pilot program shall be denominated a "participating judge," and upon the assignment of a participating judge, the clerk shall so notify the parties. If the judge assigned does not wish to be a "participating judge" or orders at any time that the action should not be subject to FBEM, the clerk shall direct the parties to file all papers, including any papers previously filed electronically, in hard-copy form. The assigned judge shall note on the initial Preliminary Conference Stipulation and Order form whether the action is subject to FBEM. [No action shall be subject to FBEM until ordered by the court.] All papers may be served and filed in hard-copy form in accordance with the Civil Practice Law and Rules until an action is subject to FBEM. Upon an action being subject to FBEM, all papers shall be served and filed in accordance with this section.

(3) The parties may apply at any time for an order that an action be subject to FBEM by submitting a Consent by all parties to FBEM satisfying the requirements of subdivision (c), which application the court in its discretion may grant or deny.

(4) When an action becomes subject to FBEM, the court may direct that papers previously filed in the action in the County Clerk's office be filed electronically. The parties shall be responsible for converting all previously filed hard-copy documents into electronic form.

(5) The court may terminate or modify the application of FBEM to an action at any time and may excuse a party from compliance with any provision of these rules in order to prevent prejudice and promote substantial justice.

(6) When a case subject to FBEM is removed from FBEM, in whole or in part, the clerk shall convert into hard-copy form those documents comprising the case file which had been received by FBEM.

(c) Consents to FBEM and E-Mail Addresses of Record

(1) The consent to FBEM shall state that the submitting parties consent to the use of FBEM in the action, including consent to be bound by the service and filing provisions in these rules, and shall set forth the Internet e-mail address of each attorney of record and each unrepresented party for the purposes of service and giving notice of each filing (the "E-Mail Addresses of Record"). The consent to FBEM shall further state that the parties agree to comply with the User's Manual approved by the Chief Administrator; whether the parties consent to service of attachments by e-mail; and that the parties have successfully exchanged test e-mail messages, specifying whether those messages were with or without attachments, with other parties consenting to FBEM at the E-Mail Addresses of Record.

(2) Each attorney of record and each unrepresented party may include up to three Internet e-mail addresses as E-Mail Addresses of Record for that attorney or party.

(3) The New York State Unified Court System Internet Site ("UCS Internet Site") shall include for each action subject to FBEM a current list of the E-Mail Addresses of Record maintained by the County Clerk and the Chief Clerk of the Supreme Court. Access to e-mail addresses may be restricted to prevent unwanted e-mail solicitations. Each attorney of record and each unrepresented party shall promptly serve notice upon all parties of any change in such person's E-Mail Addresses of Record, and shall promptly notify the appropriate clerks of such change, including identifying to the clerks each action subject to FBEM in which the e-mail address must be updated and confirming that such person has received test e-mail messages successfully from all persons who have consented to FBEM in the action.

(d) Filing Users, Passwords and Other Attorney Information

(1) An attorney admitted to practice in the State of New York, or admitted pro hac vice for purposes of an action, may register as a Filing User of the UCS Internet Site. A party to an action subject to FBEM who is not represented by an attorney may register as a Filing User of the Internet Site for purposes of such action. Registration shall be by paper on a form prescribed by the appropriate clerk, which shall require identification of the action and the name, address, telephone number and Internet e-mail address of the Filing User. An attorney registering as a Filing User shall declare on the registration form that the attorney is admitted to the Bar of the New York State or admitted pro hac vice in the particular action. If, during the course of the action, an unrepresented party retains an attorney who appears on the party's behalf, the appearing attorney shall ask the clerk to terminate the party's registration as a Filing User upon the attorney's appearance.

(2) A Filing User shall notify the clerk immediately of any change in the information provided in the Filing User's registration.

(3) A Filing User shall be issued a User Identification Designation ("User ID") and a password by the appropriate clerk upon registration. The clerk shall maintain a confidential record of issued User Ids and passwords.

(4) A Filing User shall maintain as confidential, except as provided in subparagraph (6), the User ID and password issued by the clerk. Upon learning of the compromise of the confidentiality of either the User ID or the password, the Filing User shall immediately notify the appropriate clerk, who shall issue the user a new User ID or password as appropriate.

(5) The clerk may at any time issue a new User ID or password to any Filing User. A Filing User may at any time obtain a new User ID or password upon request to the clerk by following procedures prescribed by the clerk.

(6) In the event the Filing User authorizes another person to file a paper on the Filing User's behalf using the User ID and Password of the Filing User, such Filing User shall retain full responsibility for any papers filed.

(e) Electronic Filing of Papers

(1) In any case subject to FBEM, all papers required to be filed with the clerk shall be filed electronically on the UCS Internet Site, except as expressly provided herein. Only a Filing User as defined in subdivision (d) may file papers under FBEM.

(2) Every paper filed electronically shall be signed for the purposes of Part 130 of the Rules of the Chief Administrator [22 NYCRR] in accordance with subdivision (f). The paper shall provide the signatory's name, address, and telephone number.

(3) Whenever a paper is filed electronically that requires the payment of a filing fee, the papers shall include a separate credit or debit card authorization sheet and shall contain the card number or other information of the party or attorney permitting such card to be debited by the County Clerk for the payment of the filing fee. The card authorization shall be kept separately by the clerk and shall not be a part of the public record. The Chief Administrator may permit other methods of paying filing fees from remote locations, such as electronic funds transfers and digital cash payments, and may provide guidelines for their use.

(4) Papers may be transmitted at any time of the day or night to the UCS Internet Site, and will be deemed filed upon the receipt of those papers by that Site, provided, however, that where payment of a fee is required, the papers will not be deemed filed unless accompanied by a completed credit card or debit card authorization sheet. No later than the following business day, the clerk shall transmit electronically to the sender a Confirmation of Electronic Filing. When papers initiating an action are filed electronically, an index number shall be assigned to the case and the number shall be transmitted to the filing party as part of the Confirmation of Electronic Filing.

(5) When a paper has been filed electronically, the official record shall be the electronic recording of the paper stored by the clerk. Such document also may be filed in hard-copy form with the appropriate clerk. The participating judges may request courtesy hard copies of the papers.

(6) A Filing User seeking to file electronically any paper that requires a judge's signature shall also transmit such document in hard copy form to the court. Orders signed by a judge shall be filed in hard-copy form, converted into electronic form by the appropriate clerk, and entered into the official record.

(7) A participating judge, by use of a password and participating judge designation issued by the clerk, may approve preliminary conference, scheduling, and other non-dispositive orders which shall be effective upon filing and issuance of an electronic notice of entry by the clerk.

(8) Nothing in the procedures for FBEM shall be interpreted to permit access to material filed under seal except upon order of the court.

(f) Signatures

A paper filed or served electronically shall be deemed to be signed by a person (the "signatory") when the paper identifies the person as a signatory in compliance with paragraph (1), (2), or (3). The filing or service shall bind the signatory as if the paper were physically signed, and shall function as the signatory's signature.

(1) In the case of a signatory who is a Filing User, such paper shall be deemed signed regardless of the existence of a physical signature on the paper, provided that such paper is filed using the User ID and password of the signatory.

(2) In the case of a signatory who is not a Filing User, such as an affiant or a deponent, or who is a Filing User but whose User ID and password will not be utilized in the electronic filing or service of the

paper, such paper must be physically signed by the signatory before it is filed. A Filing User who files or serves such paper represents that he or she possesses the executed hard copy of such paper and agrees to produce it at the request of a party or the court.

(3) A party may add his or her signature to a filed paper by signing and filing a Certification of Signature for such paper in a form prescribed by the Chief Administrator. Such Certification shall provide the title, sequential number on the list of papers filed, and date and time filed of the paper being so signed.

(g) Service on Parties Who Have Consented to FBEM

(1) An attorney or party seeking to effect service upon the opposing party to obtain personal jurisdiction may serve the party by any of the methods permitted by Article 3 of the CPLR, or may serve the party by electronic means if the party agrees to accept service by this method. A party that agrees to accept service by electronic means shall provide the serving party or attorney with an electronic confirmation within 24 hours of service that the service has been effected.

(2) An attorney or a party filing an interlocutory paper pursuant to the FBEM procedures shall, on the day of filing, send electronically a Notice of Filing of the paper to all E-Mail Addresses of Record. Such Notice shall provide the sequential number on the list of documents filed and the title of the paper filed, and the date and time filed, as set forth in the Confirmation of Electronic Filing received from the court. The party receiving the Notice of Filing shall be responsible for accessing the UCS Internet Site to obtain a copy of the paper filed. The electronic transmission of the Notice of Filing shall constitute service of the paper on the addressee. Proof of service shall be filed electronically with the court pursuant to the FBEM procedures, but such proof of service need not itself be served on other parties. Nothing in this section shall preclude a party from utilizing other service methods permitted by the CPLR.

(h) Service on Parties Who Are Added to the Case

(1) In an action subject to FBEM, initial service of papers on parties who are added to the case shall be in hard-copy form and shall include, in addition to the papers, a notice that the action is subject to FBEM. Responsive papers may be served in hard-copy form and shall include (i) a Consent to FBEM for purposes of the action, or (ii) a statement that the party does not wish to utilize the FBEM option and will file and serve all papers in hard-copy form. Papers served on a party that declines the FBEM option shall be served in hard-copy form.

(2) In an action subject to FBEM, a proposed intervenor or other person seeking relief from the court who is not a party may: (i) file a consent to FBEM procedures and thereby, upon being represented by or registering as a Filing User, become subject to FBEM procedures for such an application, or (ii) file or serve papers in hard-copy form, together with a statement that he or she does not wish to utilize the FBEM option.

(i) List of Papers Filed

(1) For each action subject to FBEM, the UCS Internet Site shall provide a sequentially numbered list of all papers filed with the court and shall note the entry of any order or judgment by the court, regardless whether such paper was filed electronically. The record of those filings and entries for each case shall constitute the List of Papers Filed.

(j) Notice and Entry of Orders and Judgments

In an action subject to FBEM, the Clerk shall file electronically orders and judgments of the court in accordance with the procedures for FBEM, which shall constitute entry of the order or judgment. This shall not prevent the appropriate clerk from filing and maintaining a paper copy of such orders or judgments, in his or her discretion. At the time of the entry of an order or judgment, the clerk shall transmit by e-mail to the E-Mail Addresses of Record a notification that the order or judgment has

been entered and shall make a note in the Electronic Filing Index of the transmission. Such notice by the clerk shall not constitute service of notice of entry by any party. A party may serve notice of entry of an order or judgment on another party by separately transmitting to the party to be served the notification received from the clerk, a copy of the order or judgment, together with an express statement that the transmittal constitutes notice of entry.

(k) Technical Failures

The appropriate clerk shall deem the UCS Internet Site to be subject to a technical failure on a given day if the Site is unable to accept filings or provide access to filed documents continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon of that day. The clerk shall provide notice of all such technical failures on the UCS Internet Site and by means of the UCS Internet Site status line, which persons may telephone in order to learn the current status of the Site. When filing by electronic means is hindered by a technical failure, a party may file with the appropriate clerk in hard-copy form. With the exception of deadlines that by law cannot be extended, the time for filing of any paper that is delayed due to technical failure of the UCS Internet Site shall be extended for one day for each day in which such technical failure occurs, unless otherwise ordered by the court.

(l) Electronic Filing of Papers Not Otherwise Permitted to be Filed

In any action subject to FBEM procedures, the court may enter an order authorizing the electronic filing of discovery requests, discovery responses, discovery materials, or other matter to the degree and upon terms and conditions to which all of the parties (or non-parties producing such materials) have previously agreed in a stipulation submitted to the court. In the absence of such an order, no party shall file electronically any such materials except in the form of excerpts, quotations, or selected exhibits from such materials as part of motion papers, pleadings, or other filings with the court.

(m) Copyright, Confidentiality, And Other Proprietary Rights

(1) Submissions pursuant to FBEM shall have the same copyright, confidentiality, and proprietary rights as paper documents.

(2) In an action subject to FBEM, any person may apply for an order prohibiting or restricting the electronic filing in the action of specifically identified materials on the grounds that such materials are subject to copyright or other proprietary rights, or trade secret or other privacy interests, and that electronic filing in the action is likely to result in substantial prejudice to those rights or interests. Unless otherwise permitted by the court, a motion for such an order shall be filed not less than five days before the materials to which the motion pertains are due to be produced or filed with the court.

Litigation and Digital Investigations: Gathering Electronic Evidence in the Computer Age

By Barry Ginsberg and Daniel P. Seymour

Assessing the Digital Landscape

Daniel P. Seymour

In 21st century litigation, questions invariably arise as to the existence, nature, admissibility, legal status, legitimacy, etc. of at least one piece of electronic evidence. Often, however, its status as *electronic* evidence is clouded by the fact that it is delivered as a memorandum, an e-mail message, a piece of correspondence, or an Internet Web site that has been printed out on a piece of paper. Once printed, of course, the "electronic" aspect to electronic evidence tends to disappear. No longer at issue is the content of prior versions or random fragments of such evidence, or, for that matter, the significance of a computer usage analysis of the computer(s) generating the evidence, both of which often shed light on the facts and circumstances surrounding the creation of that evidence.

What do we hope to find in searching through electronic evidence? To answer that question requires an understanding of what, exactly, constitutes electronic evidence. For purposes of this article, we assume that electronic evidence excludes, for example, electron microscopic analyses of hard disk drives and other computer storage media that might reveal the existence and nature of residual shadow data—data that has survived overwriting because of the imprecise movements of the mechanical arms guiding the read / write heads on magnetic media. We are more concerned here with the kinds of evidence that is found on electronic devices typically used in the business environment and that can be extracted using sophisticated, but accessible, technology. With that in mind, a workable, but by no means exhaustive, characterization of electronic evidence consists of two parts. First, as it relates to computers, electronic evidence is the magnetically stored file that you print out from your favorite software program. The result is, or at least should be, familiar: a formatted document printed on paper resembling what you see on the computer screen when you tell the computer to print it. Second, electronic evidence is any kind of collateral information regarding that computer file itself. This kind of information is typically as important as the very content of the file. Put differently, with each file there may be associated various dates and times, login accounts, or other information about the file that is unrelated to the substance of the document itself.

Barry Ginsberg

The exact nature of what we might expect to find in a digital investigation may vary depending on the type of litigation, the allegations by or against the parties to the suit, and their business lines. For example, in a breach of contract investigation, we may wish to focus on customer or client lists. A sexual harassment suit might call for examinations of an employee's Internet or other online activity. Software developers who feel their intellectual property has been downloaded or otherwise compromised may require us to focus on the electronic product itself; i.e., by comparing source code to determine copyright infringement issues. Nevertheless, if we find a memorandum, or a contemporaneously prepared note (whether deleted or not), that implicates a previously uninvolved third party, this kind of electronic evidence cuts across allegations and business lines; it is common to any kind of wrongdoing. And, of course, the seeming omnipresence of e-mail in the workplace always inclines the digital investigator to at least inquire about its use in any particular case.

> *"The exact nature of what we might expect to find in a digital investigation may vary depending on the type of litigation, the allegations by or against the parties to the suit, and their business lines."*

In addition, matters in which electronic forgery, such as a suspicious memorandum or e-mail message, is at issue require careful digital analysis to determine correct dates and times as well as indications of potential authorship.

Kinds of Digital Information

Having indicated the kinds of cases and relevant issues with respect to which electronic evidence may assist in litigation, we would like to address specific

categories of electronic repositories of information by characterizing them and generally describing the kinds of evidence, if any, we may expect to find on each. We do not address the legal status of electronic evidence, nor do we address specifically case law and legislation relating to such evidence, since these areas are well covered in the literature.

Workstation Hard Disk Drive

A workstation is a computer, whether laptop or desktop, at a user's desk or in his or her office through which he or she typically logs into a network of some kind to perform business tasks including receiving and sending e-mail, composing memoranda and letters, and browsing the Internet. Depending on the specific technical configuration, a workstation most likely contains a hard disk drive. The workstation hard disk drive is the gold mine that contains (and, fortunately or unfortunately, retains) information of all kinds including correspondence, e-mail, software application usage logs, data fragments, and myriad other kinds of information—including particular keystrokes. The workstation hard disk drive is therefore the starting point for computer usage analyses.

A computer usage analysis uses information stored on the hard disk drive to establish how a computer has been used, and sometimes for what purpose. Such analyses rely upon the fact that, in general, computers are designed to retain data. While the data retained may be the third paragraph of a memorandum typed six months ago and then revised one day later, it may also include a listing of every Internet Web site ever visited by the user of that computer.

Even if the network environment is configured such that certain types of information, such as e-mail, are not as a matter of course stored on the workstation hard disk drive, they may very well contain fragments or remnants of e-mail messages. Many computer networks are designed to have centralized e-mail message stores, or post offices housing individual mailboxes, in which the contents of messages are stored on shared network servers. Whether this is so depends upon a variety of technical circumstances and the particular philosophy of the information technology department. But the fact that an e-mail message store is not physically located on a particular workstation hard disk drive does *not* mean that there is nothing related to that e-mail message stored on that drive. There are a variety of files and other data that may contain substantive information regarding e-mail that may exist on the drive as a result of the way the operating system (Windows 2000, for example) processes information.

In addition, in many digital investigations, personal e-mail is at issue. Often, whether or not this is the case is not known until after an investigation is launched. In any event, e-mail in general is, in some form or another, stored on the workstation hard disk drive. In the case of the free web-based e-mail services such as Yahoo! or Hotmail, investigating e-mail usage overlaps with investigating the use of the Web—see below. In other cases, entire message stores might reside on the drive. This happens to be the case with most dial-up Internet server provider accounts. Finally, e-mail messages from a personal account may only reside on the service providers' servers unless specifically downloaded and stored "off-line" by the user (America Online, for example).

While network usage and access logs can assist in developing usage histories of the Internet in a particular matter, by far the most fruitful source of Internet usage intelligence can be developed by examining the files stored on a workstation hard disk drive. In typical network configurations, when a user accesses the Internet, files are downloaded and stored, albeit temporarily, on the local (workstation) hard disk drive. In addition, history files may yield clues as to Internet use.

"With respect to the automatically downloaded files—collectively known as a cache—it is possible historically to reconstruct the actual Web sites visited on the Internet by a given user."

With respect to the automatically downloaded files—collectively known as a cache—it is possible historically to reconstruct the actual Web sites visited on the Internet by a given user. It is even possible to determine fairly precisely the dates and times particular Web sites were visited based upon information developed using techniques associated with historical computer usage analyses. For web-based email services such as Yahoo! and Hotmail, these same kinds of forensic considerations apply since such services are, well, Web-based.

Finally, even if user-created documents such as memoranda are stored on shared network drives, there is a chance that those documents, either in their entirety or in fragmented form, exist on the workstation hard disk drive as well. For example, when a document in a word processing program is created, printed and saved to a network drive, a temporary file may, unbeknownst to the user, be created on the local drive containing all or part of the document. Such files and fragments may also be associated with dates, times, and users, further increasing (or mitigating) their significance.

The bottom line here is that the workstation hard disk drive is, at a minimum, the most likely source of valuable and hidden electronic evidence in many kinds

of corporate digital investigations, and its preservation and custody must be closely guarded as early on in the litigation process as possible. In fact, it makes sense to err on the side of caution whether you are the plaintiff or defendant by sequestering the hard disk drives of any individuals who may be involved in a litigation—whether named or not. Hard drives are cheap and the price of compromising their integrity for the purposes of litigation probably will not be cost-effective in the long run.

Finally, as is often the case in trade secret and intellectual property theft situations, whether particular kinds of information in particular computer files have been downloaded or copied onto some other removable media may be a critical issue. Again, network access logs may help here, but the real hard evidence will reside on the workstation hard disk drive. Recently accessed file lists, the Windows registry, temporary files, and countless other sources of forensic information need to be analyzed to make a determination of theft, or at least a determination that files had been downloaded.

Network Server

Computer networks typically consist of centralized devices that are shared amongst large numbers of users who access them through their own individual computer. A network server is such a device. Other kinds of devices include routers, firewalls, and hubs that in different ways enable access by individuals who, hopefully, are appropriately authorized for such access.

Servers are robust, varied and highly specialized pieces of high technology that are the basis of most computer networks in mainstream business today. They do not, in general, retain the kinds of forensically recoverable information that workstation hard disk drives do, nor are they nearly as replaceable. When the proverbial "server is down" message is distributed over a network when a server is not functional at a particular point in time, most services likewise are not functional. The server is the workhorse that makes computer networks work.

Depending upon the function and configuration, network servers typically contain centralized e-mail message stores, Internet access logs, shared files and network access logs. In addition, they are usually subject to a disaster recovery plan that requires them to be "backed up" periodically to avert long-term damage to an organization if they are seriously functionally compromised. (See below for more on backup media.) This is often a significant difference between a server and a workstation—workstations are not normally backed up as a matter of policy.

Generally, there are different servers depending upon the kind of information or service being shared. There are e-mail servers, print servers, file servers, Internet servers, Web servers, proxy servers, servers that help other servers . . . you get the picture. Each one may house critical information in any given litigation. The forensic potential of network servers is, nevertheless, somewhat limited as compared to workstation hard disk drives if only because of the higher level of activity servers tend to enjoy. Data on server drives tend to get overwritten much more frequently.

Still, servers are a valuable source of e-mail and shared documents that might not exist elsewhere in the system. Network access logs containing information regarding a particular individual's usage of the system may only be found on a network server, for example. Similarly, concurrent and surreptitious monitoring of a particular individual's computer usage may be enabled over a network. These kinds of considerations are important when the subject of an investigation is an identified employee of your client. Finally, servers may record dial-in users' activity as well as activity relating to Web sites and other shared access points.

"[A]s is often the case in trade secret and intellectual property theft situations, whether particular kinds of information in particular computer files have been downloaded or copied onto some other removable media may be a critical issue."

Backup Tapes

Perhaps the least well understood repository of digital information is the computer backup tape. A backup tape is designed to implement a disaster recovery policy in the event of a major and devastating episode such as a fire that damages computer equipment beyond operability. Backup tapes created during the normal course of business are, almost of necessity, incomplete if only because they are time slices of information and lag behind continuing computer operations.

Similarly, backup tapes do not record, for example, all e-mail messages passing through a system. If you send me a message in the morning, I read it in the afternoon and delete it before I leave work, the backup tape created that evening by the system will not record that email message. Why? Because it wasn't in the system at the time the tape was written to, which is typically during the night after normal business hours.

Also, network backup tapes do not normally record information residing on workstation hard disk drives. But even if they did, their forensic value would be limited since backup tapes only record "live" files; that is, files that exist on the system at the time the tape is created. Deleted files and other gems of the forensic analyst are left behind.

Finally, backup tapes cannot easily be read once they are removed from the network environment that created them. As a general rule, at least some of that environment must be recreated on outside machines prior to accessing the information they contain. For example, a backup tape of an e-mail server that also contains all the messages on the system at the time the tape was created cannot simply be plugged into a computer and reviewed. A new network environment must first be prepared including not only the operating and messaging systems, but also tape backup software compatible with the software that originally created the tape. The moral here is that backup tapes are not like disks. They cannot simply be moved from one computer to another without significant preparation.

Removable Media

Removable media include Zip® and Jaz® disks, floppy disks, magneto-optical disks, CD-ROMs, and the like, that are capable of being relatively easily accessed and moved from computer to computer. This category of storage media is obviously important to trade secret and intellectual property theft matters where the inappropriate removal of proprietary data is at issue.

Technologies for forensically examining such media are developing but are still uneven. Different media store information in distinct formats, so no one software tool is likely to include the capability of analyzing them all. Nevertheless, they often contain information important to a particular issue in litigation and should not be overlooked.

Methods for Information Gathering

The most influential and determinative factor regarding how one goes about gathering electronically stored information hinges on the type of access we have to the device. Simply put, is it theirs or ours? Normally, when conducting a digital investigation of our client's equipment, one can expect to have unfettered access to everything one needs. But when the other side is compelled (or offers, which normally will not happen) to allow access to electronic evidence, they will typically not allow the removal of the devices containing the evidence from their premises or control. Hence, one must conduct an on-site examination.

But the preferred method for analyzing electronic evidence is to create a mirror image of it, bring it to the lab (while securing the original—it is evidence after all) and conduct the analysis in a controlled and known environment. There are several software products on the market that are capable of creating mirror images of, for example, hard disk drives. The most important specification that any given product must meet is that it be capable of imaging the *entire* disk drive, deleted files and all. (Obviously, the product must not in any way alter the disk drive being imaged.) This will also ensure that the analysis will include some of the more arcane areas on disk drives such as file and RAM slack space, partition tables and unpartitioned sectors (we'll spare the reader from a technical characterization of such areas).

"Technologies for forensically examining . . . [removable] media are developing but are still uneven."

Once one has an exact duplicate of the original, the analysis consists of applying various software tools so as to organize and extract information appropriate to a particular issue in litigation. There are a number of such tools, including ones to carry out keyword searches on the entire drive, undelete files, inspect the disk at a very low level, and the like. Which ones get used in a particular case depends upon what's at issue and what the investigator hopes to achieve.

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Mr. Seymour is a Managing Director in DSFX's Digital Security and Investigations Group. He holds a Master's degree from the University of London, King's College and is a Ph.D. candidate in theoretical foundations of information processing systems. He has extensive experience in designing and building investigative databases as well as conducting forensic examinations of computers and other high-tech equipment and is an expert on the Internet and online security. He has served as a court-recognized expert witness in these fields.

Appendix

Internal Investigations: Special Considerations for Pre-Litigation Internal Situations

For a variety of internal investigations in the pre-litigation phase, there are some special considerations that must be taken into account. These matters include everything from trade secret and intellectual property theft to "inappropriate" computer or telecommunications use to sexual harassment and discrimination investigations to fraud, embezzlement, and product theft cases to unauthorized data manipulation and access. Actually, the list is longer these days since the use of computers has become so prevalent.

The most important consideration to be addressed prior to engaging computer forensics experts revolves around the nature of the policies employees have agreed to and signed. Specifically, is there an acceptable use policy spelling out the appropriate and inappropriate use of computers, telephones, and other equipment owned by the employer? If there isn't, one's ability to conduct an internal digital investigation may be somewhat limited.

But if there is such a policy in place, then an investigator can go ahead and extract the relevant data and analyze it without a trace (making sure not to disturb the dust on top of the computers that have been targeted). Typically, this includes an after-hours visit to image a hard disk drive and bring it to the lab for analysis, leaving the subject of the investigation unaware of what's actually going on.

And that unawareness might also benefit other ongoing investigative activities including the installation and use of computer surveillance tools. As indicated, this can be done over the network, but this needn't be the case. Tools surreptitiously installed on a workstation hard disk drive can record keystrokes and even create "screen shots"—visual images of what a user is seeing while using the computer—that can be quietly e-mailed to whomever has been designated.

Does Discovery of Electronic Information Require Amendments to the Federal Rules of Civil Procedure?

Summary

The Advisory Committee on the Civil Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Advisory Committee") has been studying whether any changes to the Federal Rules of Civil Procedure are required to accommodate discovery of electronic information.

The Section recommends that no change in the Federal Rules of Civil Procedure should be made. The issues involving electronic information can be dealt with under the present rules. At most, it may be appropriate to provide guidelines or commentary in The Manual for Complex Litigation or elsewhere to guide analysis by practitioners and the courts as novel questions arise.

What Is Electronic Information?

Some definitions and descriptions of electronic information (which does not include voicemail) are necessary before analyzing discovery issues relating to it.

Active Data consist of information readily available and accessible to computer users through file manager programs.

Embedded Data or **Metadata** consist of information contained within an electronic version of a document that may not be apparent in a print-out, such as the date the document was created, the identity of the author, the identity of subsequent editors, the distribution route for the document, or the history of editorial changes.

Replicant Data are copies automatically made and saved to the user's hard drive.

Residual Data are deleted files to which the reference has been removed from the directory listings and the file allocation table, but which have not been overwritten.

Back-Up Data consist of information copied to removable media in the event of a system failure, usually only of data on a centralized storage medium or network, and frequently in compressed form.

Legacy Data consist of information stored on media that can no longer be accepted or organized in a format that can be read using current software.

In addition, in connection with the Internet, there are a few specific types of electronic information.

Bookmarks are one-click shortcuts created by the user and stored on the user's computer.

Cache Files are a record of Internet addresses visited by the user and graphic elements on those pages created and stored automatically by the user's computer.

Cookies are information about the user placed in a file by a Web site operator.

From these definitions and descriptions several issues emerge. One is a concern with the impermanence of active data. It can be altered easily and a print-out of the document or its appearance on a screen may not indicate any change or what existed before the change. Litigants can be justifiably concerned that important information may be altered deliberately or in the ordinary course in a manner that might not be noticeable on its face.

One response to this concern might be to retrieve embedded or replicant data. However, that is not routinely available and may require some technical expertise for retrieval. It also therefore may require some extra expense.

The question of retrieving embedded or replicant data also raises a metaphysical issue: Is embedded data or other electronic information created automatically by a computer, such as a cache file, a "document" subject to discovery under the Federal Rules of Civil Procedure? Judge Shira A. Scheindlin has suggested that computer-generated information is not a discoverable document under Rule 34(a)'s definition, which includes "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."[1] The argument is that information appended electronically and automatically is not a "data compilation." We believe that any judge faced with this metaphysical argument will hold that any electronic information, no matter how generated, is a "document" within Rule 34.[2]

Another issue that emerges from the definitions and descriptions above is what role, if any, should be accorded an intent to remove or destroy a copy. By striking or clicking a delete button, instruction or icon, a person presumably intends to toss away or destroy the information in the document, whether it is an e-mail, a draft of an agreement, a spreadsheet with incorrect data, or a piece of correspondence that is never sent. However, "deleting" on a computer does not remove

the information until it is overwritten or scrambled, and even then it may still be able to be recreated, albeit at a significant increase in the cost of retrieval.[3] Should the intent of the user be honored? If not, under what circumstances should the information be retrieved, and at whose cost?

Related to the role of intent is the question of retrieving relevant information from back-up data and legacy data, the difficulty of which is compounded by the relative ease of storing huge amounts of electronic information. Back-up tapes or cartridges are regularly created for the purpose of restoring entire computer systems if they should happen to crash; they are not created for the purpose of preserving information relevant to a particular litigation. As a side effect, relevant information may be preserved along with a massive amount of other information necessary to the operation of a particular computer system.[4] Therefore, one must search a massive amount of backed-up electronic information to locate those relatively few pieces of arguably relevant electronic information. Who should bear the burden of such a search in terms of time, personnel and cost?

For legacy data, there is the further complication of re-creating the environment in which the original electronic information was created and stored. Sometimes computer museums must be consulted to locate the appropriate hardware to accept the outmoded media, and special programs must be written to convert the data into usable form.[5] Who should bear this burden?

Do the Federal Rules Need to Be Amended?

In our view, any analysis of the applicability of the Federal Rules of Civil Procedure to electronic information starts with a fundamental principle: if the information is relevant to the claims or defenses in a case it should be discoverable, whether the information is in traditional or electronic form under Rule 26(b)(1). However, in allocating the burdens of producing electronic information, the costs of producing the information should be weighed against its benefit and importance.[6] These principles, already ensconced in the Federal Rules of Civil Procedure and applied by the courts to disputes involving electronic and other information, are sufficient to deal with the issues arising in regard to electronic information. Further amendment is not necessary.

Preservation and Spoliation

Preservation of information is not specifically covered by the Federal Rules of Civil Procedure. Case law has developed the rule that when it is reasonably foreseeable that a claim may be asserted, a party must preserve relevant information.[7] There seems little reason to change this standard just for electronic information. Further, adding a rule for preservation of electronic information to the Federal Rules of Civil Procedure without a more general rule covering all information would be anomalous. A proposed amendment to Rule 34(b) to require information to be preserved only "whenever information . . . is requested" is far too late in many lawsuits, especially for active data.

Thus, attorneys for corporate litigants should routinely advise their clients to preserve their electronic information when they become aware of a potential claim. The electronic information to be preserved might include data files created by word-processing, spreadsheet or other applications software, electronic mail, electronic calendars, telephone logs and databases (including structural information).[8] It should be (i) copied from file servers, desk-top computers, back-up tapes or cartridges or wherever else it is stored and (ii) preserved on tapes, cartridges or CDs. Such a back-up should avoid questions of alteration of active data and should preserve embedded and residual data.

For more complex claims, such as antitrust or securities claims,[9] judgment may have to be used to determine what steps to take to preserve relevant information, just as should be done now with regard to non-electronic information. A reasonable retention policy for electronic information should be adopted by companies, just as is done for information stored on paper. Nonetheless, as with discovery of non-electronic information, the steps taken to preserve relevant electronic information for any litigation may be second-guessed by a court.[10]

If spoliation should occur, there appears to be ample authority under Rule 37 to impose appropriate sanctions. For example, in *Illinois Tool Works, Inc. v. Metro Mark Prods., Ltd.*,[11] the district court under Rules 37(a)(4)(A) and 37(b)(2) imposed attorneys' and a computer expert's fees and costs upon a party which deliberately disconnected hardware and corrupted data in violation of an order to preserve the integrity of computers and information stored upon them.

Initial Disclosure

Beginning December 1, 2000, initial disclosure of information, including a copy or a description by category and location of all data compilations, supporting a party's claims or defenses (whichever is applicable) became mandatory in all cases.[12] Since one of the theories behind initial disclosure, which the Section has opposed in the past, is that it merely requires responses to a standard set of initial interrogatories and document requests, it has been suggested that initial disclosure be expanded to include a description of any computer system or media maintained by the disclosing party from which discoverable information might be obtained,

including the nature of such discoverable information, the software program used to store such information, the nature of any back-up medium, and the nature of any computer network or e-mail system maintained by the disclosing party.

The Section concurs with Southern District of New York Judge Lewis Kaplan's comment at an October 27, 2000 conference on computer-based discovery held at the Brooklyn Law School under the aegis of the Advisory Committee that, since initial disclosure is a bad idea, it should not be expanded. Moreover, the need for discovery of electronic information is not yet so ubiquitous that a description of the computer systems on which it is stored should automatically be a subject of disclosure and discovery in every case. Most personal injury plaintiffs should not be expected in every case to describe their home computer systems to determine if there is discoverable material on them. On the other hand, multinational corporations should not have to describe their numerous computer systems in many locales in every contract action. The proposal assumes a condition that it is not yet evident will ever exist: that all information will be electronically stored and electronically retrievable. When such a condition is true, it may be time to amend the federal rules to require automatic disclosure of the nature and extent of electronic information storage and retrieval systems. Until then, the parties should investigate electronic storage and retrieval systems only when required by the circumstances of the case.

Discovery Conference and Pre-Trial Order

Similarly to the proposal for initial disclosure, it has been suggested that the storage and retrieval of electronic information should be a mandatory subject to be discussed at the parties' initial discovery conference under Rule 26(f) and at the subsequent pre-trial conference with the court. Again, it does not appear to the Section that issues concerning retrieval of electronic information are so ubiquitous that it should be a required regular topic of conversation among parties to a lawsuit. If production of electronic information will be an issue, we feel confident that the attorneys for the parties will raise it during discovery and pre-trial conferences and the issue will be presented.

The Burden of Discovery

The crux of the issues that have arisen with regard to electronic discovery is the allocation of the burden and cost of retrieval and production of electronic information. While some have argued that the current rules do not provide a sufficient guide, the Section believes they do.

Under Rule 34, a party need only produce a document to be inspected, and the requesting party generally bears the cost of reproduction (by photocopier or handwritten notes). However, the Advisory Committee Note to the amendment to Rule 34 in 1970 provides that the producing party "may be required to use [its] devices to translate the [electronic] data into usable form," thereby apparently shifting the burden and cost of producing electronic information to the producing party. Nonetheless, the courts have long had the authority (and have exercised it) to adjust the burdens and costs of production of electronic information depending on the benefits to be gained under Rules 26(b)(2) and 26(c).[13]

The Section believes that for active data, replicant data, and embedded data, the burden and cost of production should almost always be borne by the producing party. For back-up data and residual data, the costs and benefits should be weighed and the costs and burdens shared appropriately. For legacy data, the costs will more often be shifted in whole or in part.

(i) Active, Replicant and Embedded Data

For active data, the producing party should almost always bear the initial burden and cost of production. The producing party is responsible for choosing its own application programs and should therefore be responsible for using those application programs to produce relevant information.[14] Further, imposing the burden to produce active data on the producing party will encourage it to take steps to preserve that information once it becomes aware of a potential claim. In addition, the producing party should bear the burden of reviewing the electronic information to screen out irrelevant and privileged information, which should be done using its application programs.

The same analysis and reasoning applies to replicant and embedded data where the producing party's application program creates and links additional data to the document residing in active files which is to be produced. Further, the technical expertise to access the embedded data or replicant data should exist with the producing party that is using the application program.

To take a simple example: if a document is created in a WordPerfect word-processing program, but the requesting party only uses a Microsoft Word word-processing program, it is reasonable and appropriate for the producing party to produce the document using its application program. Further, to the extent that embedded data for that document is to be produced, it is the producing party's WordPerfect word-processing program that must be used to retrieve that information. As a corollary, the producing party should not have to bear the cost of "translation" from WordPerfect to Word.[15]

(ii) Residual or Back-Up Data

For residual and back-up data, the technical requirements of retrieval become more complex and costly and the separation of relevant information becomes more burdensome than for active, embedded or replicant data. To search for residual data, it may be necessary to make a mirror image of the hard drive of a computer. *See Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 167 F.R.D. 90, 112 (D. Colo. 1996) (defendants' expert sanctionably failed to copy all relevant information by doing a file-by-file backup instead of creating a mirror image, which would have collected every piece of information on the hard drive). To search back-up data may require re-creating the computer environment in which the data was originally recorded. Moreover, the electronic information on a hard drive or on back-up media may include a massive amount of irrelevant information related to the operation of the computer system or matters unrelated to the litigation. The relevant information must be separated from the irrelevant, the difficulties of which search are compounded by the lack of any organizing principle for storage of electronic information on electronic media.[16]

For residual and back-up data, courts should rely on the balancing test articulated in Rule 26(b)(2)(iii) to weigh the costs and benefits. For example, in *Bills v. Kennecott Corp.*,[17] the court considered the following non-exclusive factors in exercising its discretion to deny the producing party's motion to shift the costs of producing electronic information:

> (1) [t]he amount of money involved [$5,411.25] is not excessive or inordinate; (2) [t]he relative expense and burden in obtaining the data would be substantially greater to the requesting party as compared with the responding party; (3) [t]he amount of money required to obtain the data as set forth by the defendant would be a substantial burden to plaintiffs; [and] (4) [t]he responding party is benefited in its case to some degree by producing the data in question.

Even where the retrieval cost was a more substantial $50,000 to $70,000, one court refused to shift costs because "the costliness of the discovery procedure involved is a product of the defendant's record-keeping scheme over which the plaintiffs have no control."[18] However, another court distinguished between data that could be produced with no more than *de minimis* programming, for which the costs would not be shifted, and production of data requiring special programming, for which it required the requesting party to pay.[19] And a third court determined that the costs of restoring residual data (256 hours and $15,675 per employee's computer) did not justify the expected benefit from restoring all deleted files.[20]

Courts have also retained computer forensic experts as officers of the court,[21] at the requesting party's sole expense to create a mirror image of a computer's hard drive, which is then provided to the producing party's counsel, who undertakes the burden (and cost) of reviewing the documents on the mirror image to produce relevant, non-privileged documents and information.[22] Further, as of September 2000, it appears that software, called EnCase, has been developed "to review the evidence and perform basic analysis of the mirror-imaged drives."[23]

(iii) Legacy Data

Legacy data will generally present the strongest case for shifting the cost of retrieval to the requesting party. The argument that the producing party has chosen its computer system loses some force, because the producing party has abandoned the computer system on which the legacy data was originally created. Therefore, the argument that the party seeking the information, which might require extraordinary efforts to retrieve, should pay the cost of that retrieval carries more weight. However, if both parties would benefit from the retrieval of the information, such as transaction data in an antitrust price-fixing case, there is an argument for dividing the cost of re-creating the computer system on which the legacy data was first recorded. Further, it may make sense to sample the universe of legacy data to determine statistically whether the benefit of finding relevant information will justify the cost of retrieval, before determining to proceed with a full retrieval and search of the information available.[24]

* * *

The Section concludes that no federal rule can predict technological or software developments concerning the retrieval of residual, back-up or legacy data. The balancing of costs and benefits embodied in the current Rules is the best approach for determining whether discovery of such information should be undertaken, and, if so, at whose expense.

Form of Production

The issues relating to the form of production of electronic information are: (1) May a producing party, at its option, produce electronic information in hard copy or electronic form? (2) May the requesting party require that information already produced in hard copy, also be produced in electronic form, or vice versa? (3) If the requesting party can require the production of electronic information in both forms, should it have to pay for the second copy?

Rules 34 and 33 appear to allow the producing party to choose the form in which to produce electronic information. Rule 34(a) places on the producing party the burden of translating data compilations into reasonably usable forms. Rule 34(b) requires a producing party to produce documents as they are kept in the usual course of business or organized to correspond to categories in the request. Thus, it appears that Rule 34 allows the producing party to choose whether to produce electronic information in electronic form (as it is "kept in the usual course of business") or in hard copy ("organize[d] . . . to correspond with the categories in the request"). Rule 33(d) allows parties responding to interrogatories to answer by allowing a requesting party to make copies or compilations of records from which an answer may be derived or ascertained, if the burden of deriving or ascertaining the answer is substantially the same for both. It would appear that this rule permits a producing party to choose the form of the information to be reviewed by the requesting party.

The case law appears to be split on the question of whether the producing party must produce electronic information in a second form, once it has been produced in one form. In *In re Air Crash Disaster at Detroit Metro. Airport*,[25] the district court directed McDonnell Douglas Corporation to produce a nine-track computer tape of a flight director simulation program and data, even though it had previously produced a hard copy. Applying a balancing approach, the court found that it would not be unduly burdensome for McDonnell Douglas to produce the data in computer readable form, which would reduce unnecessary costs and delays of the requesting party to manually load the program and accompanying data.

In *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*,[26] Judge Becker required plaintiff to create a computer readable tape containing certain data previously supplied in paper computer print-out reports in answer to interrogatories. However, because "the defendants ha[d] expressed their willingness to pay the costs of whatever operations [we]re necessary to manufacture a computer-readable tape . . . the problem of allocating the burden of discovery expense, which might be significant . . . [wa]s nonexistent there."[27]

In *Anti-Monopoly, Inc. v. Hasbro, Inc.*,[28] Magistrate Judge Peck stated that "[t]he law is clear that data in computerized form is discoverable even if paper `hard copies' of the information have been produced." However, the court required the requesting party to pay the cost ($6,680 to $7,680) of "special programming" to retrieve the data.[29]

In *Sattar v. Motorola, Inc.*,[30] Motorola produced e-mails in the form of 4-inch tapes, which were inaccessible to Sattar because he lacked the equipment and software to read them. The court of appeals approved the district court's exercise of discretion in not directing Motorola to produce at its expense 210,000 pages of hard copy of e-mails, but instead to download at its expense the data from the tapes to a conventional computer disk, to loan Sattar a copy of the necessary software or to offer Sattar on-site access to its computer system.

On the other hand, in *Williams v. Owens-Illinois, Inc.*,[31] the court of appeals upheld the district court's exercise of discretion in allowing the defendant to provide to plaintiffs in an employment discrimination case only hard-copy wage cards and not computer tapes with that data, while also requiring the defendant to process whatever computer runs the plaintiffs requested.

The Section concludes that, under the existing rules, the producing party in the first instance may choose the reasonably usable form of electronic information to be produced, but that the balancing test of Rule 26(b)(2)(iii) should be applied to determine whether a second copy must be produced, and, if so, at whose expense. This encourages the parties to try to resolve the form of the production of the electronic information in light of the needs of the case.

Conclusion

Perhaps surprisingly, the Federal Rules of Civil Procedure governing discovery currently do sufficiently cover the discovery and disclosure of electronic information. If the information is within the scope of discovery under Rule 26(b)(1) it should be produced, although courts should exercise their discretion under Rules 26(b)(1) and 26(b)(2)(iii) to allocate the burdens and costs of producing any electronic information in light of the benefits and importance of that information to the case. While these standards provide no bright line applicable to all electronic information, they do provide the greatest likelihood that substantial justice will prevail in connection with the production of electronic information during discovery in litigation.

Endnotes

1. *See* Scheindlin & Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?* 41 B.C. L. Rev. 327, 346-47, 371-74 (2000).
2. *See Anti-Monopoly, Inc. v. Hasbro, Inc.*, 94 Civ. 2120 (LMM) (AJP), 1995 WL 649934, at *2 (S.D.N.Y. Nov. 3, 1995) (Peck, M.J.) ("today it is black letter law that computerized data is discoverable if relevant").
3. Withers, *Computer-Based Discovery In Federal Civil Litigation*, 2000 Fed. Cts. L. Rev. 2, at II.D. (2000).
4. *See, e.g., Linnen v. A.H. Robins Co.*, 10 Mass. L. Rptr. 189, 1999 WL 462015 (Super. Ct. 1999) (back-up tapes recorded all use of the intra-office communication capabilities, electronic mail communications, and any word-processing files, spreadsheets, and models).

5. Withers, *Is Digital Different? Electronic Disclosure and Discovery in Civil Litigation*, http://www.kenwithers.com/bileta/elecdisc.htm, at III.D.1. (Dec. 30, 1999).

6. Rules 26(b)(1), 26(b)(2)(iii).

7. *Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 888-889 (S.D.N.Y. 1999); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984); *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 485-86 (S.D. Fla. 1984); *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 2d (Callaghan) 423, 427, 1977 U.S. Dist LEXIS 16078, at *11 (N.D. Ind. May 2, 1977); *see* Gorelick, Marzen and Solum, *Destruction of Evidence* ¶ 3.12, at 104 (1989).

8. *See* Feldman, *The Essentials of Computer Discovery*, at III.A., American Bar Association (July 2000).

9. In a securities action subject to the Private Securities Litigation Reform Act of 1995, "[d]uring the pendency of any stay of discovery . . . any party . . . with actual notice of the allegations . . . shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects . . . that are relevant to the allegations, as if they were the subject of a continuing request for production of documents," 15 U.S.C. § 78u-4(b)(3)(C)(1).

10. *See Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) ("even if the court finds the policy to be reasonable given the nature of the documents subject to the policy, the court may find that under the particular circumstances certain documents should have been retained notwithstanding the policy").

11. 43 F. Supp. 2d 951, 957, 962-63 (N.D. Ill. 1999).

12. Rule 26(a)(1).

13. Rule 26(b)(2) allows courts to control discovery that is "(i) . . . unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;" or where "(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

    Rule 26(c) allows courts to decide that "(2) that the disclosure or discovery may be had only on specified terms and conditions" or "(5) that discovery be conducted with no one present except persons designated by the court."

14. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 94 C 897, MDL 997, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995) ("if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk").

15. *But see Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1171 (7th Cir. 1998) (Seventh Circuit approved as entirely reasonable a district court's requirement that a party, which had produced e-mails in the form of 4-inch tapes inaccessible to the requesting party, who lacked the equipment and software to read them, to (i) download the data from the tapes to conventional computer disks or a hard-drive, or (ii) loan the requesting party the necessary software, or (iii) offer on-site access to its own system).

16. Withers, *Computer-Based Discovery In Federal Civil Litigation*, 2000 Fed. Cts. L. Rev. 2, at II.E.1. (2000).

17. 108 F.R.D. 459, 464 (D. Utah 1985).

18. *In re Brand Name Prescription Drugs Antitrust Litig.*, 94 C 897, MDL 997, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995) (quoting *Delozier v. First Nat'l Bank of Gatlinburg*, 109 F.R.D. 161, 164 (E.D. Tenn. 1986)).

19. This distinction appears to form the basis for the American Bar Association Section of Litigation Civil Discovery Standard 29(a)(iii) requiring the requesting party to pay any "special expenses" incurred in producing electronic information. This standard, however, is too broad, because it is not limited just to the recovery of residual data or legacy data and does not allow a court to balance the difficulty, or lack thereof, in retrieving relevant information from back-up data. *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 94 Civ. 2120 (LMM) (AJP), 1996 WL 22976, at *2 (S.D.N.Y. Jan. 23, 1996).

20. *Alexander v. Federal Bureau of Investigation*, 188 F.R.D. 111, 117 (D.D.C. 1998).

21. *See* Rule 26(c)(5).

22. *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 641-42 (S.D. Ind. 2000); *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054-55 (S.D. Cal. 1999).

23. Patzakis, *Electronic Evidence Discovery: From High-End Litigation Tactic to Standard Practice*, Federal Discovery News, Vol. 6, No. 10, at 4 (Sept. 2000).

24. *See Linnen v. A.H. Robins Co.*, 10 Mass. L. Rptr. 189, 1999 WL 462015, at *5 (Super. Ct. June 16, 1999).

25. 130 F.R.D. 634, 636 (E.D. Mich. 1989).

26. 494 F. Supp. 1257, 1258, 1260, 1261 (E.D. Pa. 1980).

27. 494 F. Supp. at 1262.

28. 94 Civ. 2120 (LMM) (AJP), 1995 WL 649934, at *1 (S.D.N.Y. Nov. 3, 1995).

29. *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 94 Civ. 2120 (LMM) (AJP), 1996 WL 22976, at *2 (S.D.N.Y. Jan. 23, 1996).

30. 138 F.3d 1164, 1171 (7th Cir. 1998).

31. 665 F.2d 918, 932-33 (9th Cir. 1982).

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Defending an Agent Against a Claim for Breach of Warranty of Authority

By Stephen L. Brodsky

An agent that contracts in the name of a disclosed principal may face liability even if it assumed no obligations under the contract.[1] If the agent's principal disavows the contract, the party that dealt with the agent may contend that the agent acted without authority in negotiating or executing the contract. That party may bring a common law action against the agent for breach of warranty of authority and seek recovery for damages it suffered as a result.[2]

Defending against this kind of claim first requires an understanding of its underpinnings. The cause of action is not premised on the failed contract.[3] If the agent lacked authority to bind the principal, the contract at issue is unenforceable for lack of mutual assent[4] and cannot support a breach of contract cause of action.[5] Moreover, the agent is not liable for the obligations in that contract (unless the agent explicitly assumed such liability), because it executed the contract in a representative capacity.[6] The claim derives from the notion that an agent implicitly warrants to others its authority to act on behalf of its principal and should be liable to those who rely on the warranty.[7] The agent's lack of intent to deceive is no defense.[8]

While no New York case has listed each element of a cause of action for breach of warranty of authority to contract on behalf of a disclosed principal, the body of case law illustrates that its elements are: (1) the defendant purported to contract as an agent on behalf of a disclosed principal[9]; (2) the agent lacked authority from the principal[10]; (3) the agent's lack of authority was not manifest[11]; and (4) the contract would have been enforceable had it had been authorized.[12]

Defense on the Elements

Whether the Defendant Acted as an Agent for Another

As an initial matter, the defendant must have purported to act as the agent for the relevant principal. *Lorillard, Inc. v. M.V. "Lefkadian Sky," S.A.*, involved a shipment of plaintiff's cargo that was damaged in transit.[13] After the company that had shipped the plaintiff's goods closed its business, the former agent of that company negotiated with the plaintiff on behalf of a new shipping company that assumed the route and that sought to avoid litigation with the plaintiff over the loss. After those settlement discussions failed, the plaintiff sued the shipping agent for enforcement of a settlement agreement (which the court analyzed as a claim for breach of warranty of authority). The court dismissed the claim against the shipping agent, finding that it had made clear to the plaintiff in the settlement discussions that it was no longer an agent for the company that had shipped the plaintiff's goods, and the company it acted for had no obligation to the plaintiff.[14]

Whether a party acted as an agent for another does not depend on its formal relationship with that party. In *Riverside Research Institute v. KMGA, Inc.*, the New York State Court of Appeals held that a landlord had purported to act as an agent for one of its own tenants.[15] There, the landlord induced the tenant's subtenant to vacate its premises in connection with a complex leasing arrangement that ultimately failed. The Court upheld the subtenant's claim against the landlord for breach of warranty of authority and held the landlord liable for a judgment by the tenant against the subtenant for rent due on the premises.[16]

The Agent's Lack of Authority

The agent must have lacked the requisite authority at the time it acted on behalf of the principal. While its principal may subsequently repudiate its authority, if the agent had authority at the time it dealt with the third-party, the agent will not be liable. In *King World Prods. Inc. v. Financial News Network*,[17] the plaintiff sued both a corporate defendant for breach of a sublease and the corporation's officer for breach of warranty of authority to enter into the sublease on the corporation's behalf. The corporation defended the suit by denying the officer's authority to execute the sublease. The court found that the corporation had given the officer actual and apparent authority at the time of the sublease and awarded judgment against the corporation.[18]

While an agent's good faith reasonable belief as to its authority is no defense to the claim, as noted below, it bears on the agent's right to indemnity from the principal.[19]

The Agent's Lack of Authority Must Not Have Been Apparent

An agent will not be held liable on a claim for a breach of warranty of authority if its lack of authority was manifest.[20] If it was manifest, the agent's implied

warranty is not a *but for* cause of the plaintiff's loss.[21] The plaintiff may not recover if it did not or could not rely on the agent's authority.

For example, in *Sisler v. Security Pacific Business Credit, Inc.*, the court dismissed a breach of warranty of authority claim for a lack of "justifiable reliance."[22] In that case, trust beneficiaries sued an assignee of their trust interest who, in turn, asserted a third-party claim against the trustees for breach of warranty of authority to assign the interest. Because the assignee received and reviewed the trust instruments prior to the assignment, the court held it was "on notice of the legal effect of their terms."[23] If the trustees exceeded their authority, the assignee "knew or should have known of that fact" and could not recover from them.[24]

Similarly, in *Broughton v. Dona*, where the plaintiff sued an insurance agent for breach of warranty of authority to bind an insurer to an insurance policy, the court dismissed the claim against the agent because the insurance application stated it was "subject to the approval" by the insurer. The plaintiff was therefore "clearly put on notice of [the agent's] lack of authority" to bind the insurer.[25]

Conversely, in *Mickles v. Atlantic Brokerage Co., Inc.*, where retailers sued a fruit broker in connection with a failed produce purchase, the court held that the broker may have assumed an appearance of authority, through telegrams it sent, which "superceded" prior limitations on its authority that were known by the plaintiffs.[26] Finding that the plaintiffs "were not in a position to judge for themselves" the scope of the broker's authority, the court reversed a defense verdict on the claim and remanded for a new trial.[27]

In requiring reasonable reliance, a breach of warranty of authority claim appears similar to a claim for equitable or promissory estoppel.[28] The plaintiff cannot estop the agent from denying its warranty of authority if it did not reasonably rely on that warranty.

Whether the Contract Would Otherwise Have Been Enforceable

Under New York law, a contract requires an offer and acceptance, consideration, agreement on "essential" or "material" terms, a mutual intent to be bound, and a legal objective.[29] New York's statute of frauds also requires certain contracts to be in writing.[30] Therefore, if the contract giving rise to a breach of warranty of authority claim lacks an element of formation (or a writing in a proper case), the agent will not be liable in connection with the contract. Under those circumstances, the plaintiff cannot claim a right that it lost due to the agent's purported lack of authority, as the failed contract would not have been enforceable even if it had been authorized.

In *Lorillard, Inc. v. M.V. "Lefkadian Sky," S.A.*, discussed above, the court dismissed the breach of warranty of authority claim against the shipping agent on the additional grounds that "there was no meeting of the minds" on the settlement agreement the plaintiff sought.[31] The defendant shipping agent was therefore not liable, irrespective of whether it acted as an agent for the company that shipped the plaintiff's cargo or for the new company that took over the shipping route.[32]

New York courts have also dismissed breach of warranty of authority claims where the contract at issue was barred by the statute of frauds[33] or where it would have violated applicable statutory law.[34] Accordingly, careful consideration of all of the facts bearing on the underlying contract's enforceability may result in a successful defense.[35]

Other Defenses

The Statute of Limitations for Breach of Warranty of Authority

Rarely addressed in the case law is the statute of limitations for the claim. Civil Practice Law and Rules (CPLR) 213(2), which concerns, among others, actions based on implied contractual liability, provides for a six year statute of limitations. CPLR 206(b) additionally requires that a breach of warranty of authority claim accrue from the time that the plaintiff "discovered the facts constituting lack of authority." However, CPLR 203(g), which concerns claims based on an actual or imputed discovery of facts, states that such claims must be brought within the longer of (1) two years of the plaintiff's actual or imputed discovery of such facts, or (2) "the period otherwise provided."

One federal decision, *Group Health, Inc. v. Blue Cross Assoc.*, reconciled these CPLR provisions to hold that the statute of limitations for a claim of breach of warranty of authority is the longer of six years from the time when the agent warranted its authority (i.e., when the claim accrued) or two years from the time when the plaintiff discovered or should have discovered the wrongfulness of the warranty (i.e., the plaintiffs' actual or implied discovery of its claim).[36]

Calculation of Damages

Another line of attack against a breach of warranty of authority claim is a challenge to the theory of damages. The measure of damages for the claim appears somewhat unsettled under New York law. The New York State Court of Appeals has stated that an agent is liable for all damages that "naturally flow from reliance upon its assertion of authority."[37] This "reliance" measure of damages is contrary to the Restatement of Agency, which allows damages not only for the "harm caused" but also

for "the amount by which [the third-party] would have benefited had the authority existed."[38] The New York State Court of Appeals has neither expressly rejected nor adopted this "expectation" damages measure, however.[39] Moreover, one treatise characterizes New York law as embracing reliance and broad consequential damages.[40] Finally, one federal court has endorsed the Second Restatement's "expectation" damages measure. In that case, the court awarded the plaintiff the amount it would have received had the contract been authorized, less the amount the plaintiff earned in mitigating its damages.[41]

In any event, the proper measure of damages should be "out-of-pocket" reliance damages, not "benefit-of-the-bargain" or "expectation" damages. As noted, a breach of warranty of authority claim is not based upon the contract at issue. In addition, by requiring that the agent's lack of authority not be manifest, the cause of action is similar to estoppel-based claims which award reliance damages.[42] Two New York courts have awarded reliance-based damages on breach of warranty of authority claims. One awarded a plaintiff the difference between the purchase price it paid for stock to the agent less the amount it received in selling the stock.[43] The other held that the agent would be liable to pay a judgment awarded against the party that had relied on the agent's authority.[44]

Recovery from the Principal

If an agent is held liable on a claim for breach of warranty of authority, it may be entitled to indemnity from its principal on the grounds that the principal should rightfully bear the loss.[45] While the agent may have lacked actual authority to negotiate or execute the contract, the principal, by its actions, may have caused the agent to reasonably believe that it had the appropriate authority.[46] Accordingly, in defending an agent against a claim for breach of warranty of authority, one should be mindful of the agent's rights against its own principal.

Endnotes

1. If the agent did not assume liability for or in addition to the principal, the agent itself cannot be held liable on the contract. *Savoy Record Co. v. Cardinal Export Corp.*, 15 N.Y.2d 1, 4, 254 N.Y.S.2d 521 (1964); *Crimmins v. Handler & Co.*, 249 A.D.2d 89, 91, 671 N.Y.S.2d 469, 471 (1st Dep't 1998); *Harry Kolomick, Inc. v. Shelter Rock Estates, Inc.*, 172 A.D.2d 492, 567 N.Y.S.2d 845, 846 (2d Dep't 1991).
2. *Moore v. Maddock*, 251 N.Y. 420, 167 N.E. 572, 574 (1929); *Riverside Research Institute v. KMGA, Inc.*, 108 A.D.2d 365, 489 N.Y.S.2d 220 (1st Dep't 1985), *aff'd*, 68 N.Y.2d 689, 506 N.Y.S.2d 302 (1986).
3. *Moore*, 251 N.Y. at 425; *New Georgia Nat. Bank of Albany, G.A. v. J. & G. Lippmann*, 249 N.Y. 307, 309, 164 N.E. 108, 109 (1928); *H.L.C. Bendiks, Inc. v. Frank & Moloney, Inc.*, 197 Misc. 420, 421, 95 N.Y.S.2d 533, 534 (N.Y. Sup. Ct. 1950) (noting that breach of warranty of authority claim based on a failed contract with an arbitration clause is accordingly not arbitrable pursuant to that provision); *Cargo Ships El Yam, Ltd. v. Stearns & Foster Co.*, 149 F. Supp. 754, 763-64 (S.D.N.Y. 1956).
4. *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1985); *Aniero Concrete Co., Inc. v. New York City Constr. Auth.*, No. 94 Civ. 3506 (CSH), 2000 WL 863208 (S.D.N.Y. June 27, 2000) (stating "there must be an overall agreement to enter into a binding contract); *Universal Reinsurance Co., Ltd.*, No. 95 Civ. 8436, 1999 WL 771357 at *4 (S.D.N.Y. Sept. 29, 1999); *Teachers Ins. And Annuity Assoc. of America v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987) (noting "more is needed than agreement on each detail, which is overall agreement (or offer and acceptance) to enter into the binding contract).
5. *See* 2A N.Y. Jur. 2d *Agency and Independent Contractors* § 328 (1998).
6. *See Savoy*, 15 N.Y.2d at 4, 254 N.Y.S.2d at 521; *Crimmins*, 249 A.D.2d 89, 91; *Harry Kolomick*, 172 A.D.2d 492**,** 567 N.Y.S.2d at 846.
7. *Riverside*, 68 N.Y.S.2d at 689, 500 N.Y.S.2d at 303; *H.L.C. Bendiks*, 197 Misc. at 421, 95 N.Y.S.2d at 534; *Harriss v. Tams*, 258 N.Y. 229 (1932); *Moore*, 251 N.Y. at 425 ("If the defendant attempted to make a contract on behalf of the corporation without authority, then according to a long line of judicial decisions, it is but just that the loss occasioned by there being no contract with the principal should be borne by the agent who acted without authority"); *Baltzen v. Nicolay*, 53 N.Y. 467 (1873) (same); *E.F. Hutton & Col., Inc. v. First Florida Secs., Inc.*, 654 F. Supp. 1132, 1143 (S.D.N.Y. 1987); *Christman v. Maristella Compania Naviera*, 293 F. Supp. 442, 443 (S.D.N.Y. 1968). *See also* Restatement (Second) of Agency §§ 329, 330 (1958).
8. 2A N.Y. Jur. 2d *Agency and Independent Contractors* § 328 (1998); *Christman*, 293 F. Supp. at 444 (a cause of action for breach of warranty of authority is not "founded on the tort of deceit"). If the agent knowingly misrepresented its authority, it may separately be liable for fraud. *New Georgia Nat. Bank*, 249 N.Y. at 312; *See also* 3 Am. Jur. 2d *Agency* § 304 (1986).
9. *Lorillard, Inc. v. M.V. "Lefkadian Sky," S.A.*, No. 82 Civ. 8583, 1987 WL 15577, at *3 (S.D.N.Y. Aug. 3, 1987).
10. *Group Health Inc. v. Blue Cross Ass'n.*, 739 F. Supp. 921, 929 (S.D.N.Y. 1990) (dismissing claim for breach of warranty of authority on summary judgment where record contained no evidence that principal repudiated agent's authority and viewing claimant with burden of proof on this element of the claim); *American Mut. Servs. Corp. v. United States Liability Ins.*, 293 F. Supp. 1082, 1084 (E.D.N.Y. 1968). *But see E.F. Hutton*, 654 F. Supp. at 1143 (viewing the defendant agent as having the burden to prove that it had authority from its principal).
11. *Broughton v. Dona*, 101 A.D.2d 897, 898, 475 N.Y.S.2d 595, 597 (3d Dep't 1984) (no claim for breach of implied warranty in part because the lack of authority was manifest to the third party); Restatement (Second) of Agency §§ 329, 331 (1958).
12. *Gracie Square Realty Corp. v. Choice Realty Corp.*, 305 N.Y. 271, 282, 113 N.E.2d 416, 421 (1953); *Sisler v. Sec. Pac. Bus. Credit, Inc.*, 201 A.D.2d 216, 614 N.Y.S.2d 985, 988-89 (1st Dep't 1994); *Broughton*, 101 A.D.2d at 898, 475 N.Y.S.2d at 596-97; *Douchkess v. Campbell*, 64 N.Y.S.2d 554, 559 (N.Y. Sup Ct. 1946); *Lorillard*, 1987 WL 15577, at *3. *See generally* Restatement (Second) of Agency § 329 (1958); 2A N.Y. Jur. 2d *Agency and Independent Contractors* § 330 (1998).
13. *Lorillard*, 1987 WL 15577, at *1.
14. *Id.* at *3.
15. 68 N.Y.2d. 689, 692, 506 N.Y.S.2d 302, 302 (1986).
16. 68 N.Y.2d at 691, 506 N.Y.S.2d at 303.
17. 660 F. Supp. 1381 (S.D.N.Y. 1987).
18. *Id.* at 1383.
19. *See infra* section entitled "Recovery from the Principal."
20. *Broughton*, 101 A.D.2d at 898, 475 N.Y.S.2d at 597 (no claim for breach of implied warranty in part because the lack of authority was manifest to the third party); Restatement (Second) of Agency §§ 329, 331 (1958).

21. *See De Persia v. Merchants Mutual Cas. Co.*, 268 A.D. 176, 179, 49 N.Y.S.2d 324, 328 (2d Dep't 1944) ("[W]here there is no mistake, misrepresentation, or deception as to any matter of fact, although, for some legal reason, the principal may not be bound, one party is presumed to know the law as well as the other, and each contracts at his peril as to the legal effect of what is done").

22. 201 A.D.2d 216, 221, 614 N.Y.S.2d 985, 988 (1st Dep't 1994).

23. *Id.*

24. *Id. See also Scientific Holding Co., Ltd. v. Plessey, Inc*., 510 F.2d 15, 24 (2d Cir. 1974) (third party cannot claim reliance upon apparent authority if it knows or should have known of a relevant limitation on the agent's authority or the agency's termination) (citing cases); *Aries Ventures Ltd. v. AXA Finance S.A*., 729 F. Supp. 289, 301 (S.D.N.Y. 1990).

25. *Broughton*, 101 A.D.2d at 898, 475 N.Y.S.2d at 597.

26. 209 A.D.182, 185, 204 N.Y.S. 571, 574 (4th Dep't 1924).

27. *Id.*

28. *See Metropolitan Life Ins. Co. v. Childs Co.*, 230 N.Y. 285, 292 (1921) ("An estoppel rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury."); *Cybercron Corp. v. Calldata Sys. Dev., Inc.*, 47 F.3d 39, 44 (2d Cir. 1995) (promissory estoppel requires "an injury sustained by the party asserting the estoppel by reason of the reliance").

29. *See Adjustrite Systems, Inc. v. GAB Servs., Inc*., 145 F.3d. 543, 548 (2d Cir. 1998); *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239, 252 (2d Cir. 1985), *cert. denied*, 473 U.S. 906 (1985); *Brodie v. New York City Transit Auth.*, No. 96 Civ. 6813, 2000 WL 557313, at *3 (S.D.N.Y. May 5, 2000); *Rappaport v. Buske*, No. 98 Civ. 5255, 2000 WL 1224828, at *4 (S.D.N.Y. Aug. 29, 2000); *Michael Coppel Promotions Pty v. Bolton*, 982 F. Supp 950, 953 (S.D.N.Y. 1997); *Oscar Prods., Inc. v. Zacharius*, 893 F. Supp. 250, 255 n. 3 (S.D.N.Y. 1995).

30. N.Y. Gen. Oblig. Law § 5-701 (McKinney 1989). *See, e.g., Perfect Trading Co., Inc. v. Goldman, Sachs & Co.*, 236 A.D.2d 221, 653 N.Y.S.2d 116 (1st Dep't 1997); *Foscarinis v. Seldman*, 192 A.D.2d 388, 596 N.Y.S.2d 369 (1st Dep't 1993); *Kantor v. Watson*, 167 A.D.2d 297, 562 N.Y.S.2d 39 (1st Dep't 1990).

31. *Lorillard*, 1987 WL 15577, at *3. The broker negotiating on behalf of the plaintiff failed to inform the plaintiff of settlement agreement conditions relayed to it by the defendant shipping agent on behalf of the new shipping company. *Id.*

32. *Id.*

33. *See, e.g., Gracie Square*, 305 N.Y. at 282 (dismissing claim on the pleadings against two corporate officers who negotiated real property sale on behalf of corporate defendants because the contract, as alleged by the plaintiffs, was oral); *Baltzen v. Nicolay*, 53 N.Y. 467 (1873); (reversing a judgment on a breach of warranty of authority claim on the grounds that it was based on an improper presumption of a written contract and remanding the case for a new trial).

34. *See, e.g., Broughton*, 101 A.D.2d at 898, 475 N.Y.S.2d at 597 (dismissing breach of warranty of authority claim against an insurance agent in part because the contract at issue would have violated applicable insurance law).

35. As an example, based on the principle that if parties do not intend to be bound prior to executing a complete written contract, their prior agreement is unenforceable, *Adjustrite*, 145 F.3d at 548; *Sheck v. Francis*, 26 N.Y.2d 466, 311 N.Y.S.2d 841 (1970), one may argue that the agreement was an enforceable proposal in the absence of a final agreement.

36. *Group Health Inc.*, 739 F. Supp. at 928.

37. *See Riverside*, 68 N.Y.2d at 691. *See also Harris v. Tams*, 258 N.Y. at 234; *Moore*, 251 N.Y. at 426.

38. Restatement (Second) of Agency § 329, cmt. j. This appears analogous to "expectation" or "benefit-of-the-bargain" damages for a breach of contract. *See First Nat'l Bank of Chicago v. Jefferson Mortgage Co.*, 576 F.2d 479, 490 (3d Cir. 1978).

39. In *Riverside*, one of the decisions in which it set forth this "reliance" measure of damages, the Court of Appeals supported its statement by citing to the Second Restatement of Agency sections both for an agent's breach of warranty and for a misrepresentation of authority. 68 N.Y.2d at 671, 506 N.Y.S.2d at 304 (citing Restatement (Second) of Agency §§ 329, 330). In *Broughton v. Dona, Jr*., the Third Department cited to the Second Restatement of Agency §§ 329, Comment (j), but not for the expectation damages principle stated therein, 101 A.D.2d at 897, 475 N.Y.S.2d at 596.

40. *See* 2A N.Y. Jur. *Agency and Independent Contractors* § 328 (1988) ("the measure of damages . . . is the loss which has resulted to the third person as a natural and probable consequence of the want of authority; it is not limited by the contract but embraces all injuries resulting from the wrongful assumption, including the costs incurred by the third person in an unsuccessful action against the alleged principal to enforce the unauthorized contract").

41. *Cargo Ships El Yam v. Stearns & Foster Co.*, 149 F. Supp. at 765-770. Practically, the damages awarded were the same as reliance damages.

42. A claim for promissory estoppel would similarly entitle the plaintiff only to those amounts expended in reliance. *Cyberchron Corp. v. Calldata Sys. Dev., Inc*., 47 F.3d 39, 46 (2d Cir. 1995); *Oscar Prods., Inc. v. Zacharius*, 893 F. Supp. 250, 256 (S.D.N.Y. 1995).

43. *E.F. Hutton*, 654 F. Supp. at 1143 (where broker implicitly warranted it had authority to sell and deliver securities to another brokerage firm on behalf of seller, plaintiff brokerage firm received the difference between what it paid to the selling broker and the amount the brokerage firm received in mitigating its damages in a sale of the stock).

44. *Riverside Research*, 506 N.Y.S.2d at 303 (where a landlord that held itself out as the agent of a tenant which subleased a portion of building and where the landlord had induced a subtenant to vacate its premises, the landlord was liable for the tenant's award against subtenant for unpaid rent on the sublease).

45. Restatement (Second) of Agency § 438(2)(b); *In re Schick*, 223 B.R. 661, 664 (S.D.N.Y. Bankr. 1998) (upholding viability of agent's third-party claims against principal); *McLeod v. Dean*, 270 F. Supp. 855, 857 (S.D.N.Y. 1967); *Lipsig, Sullivan & Liapakis, P.C .v. Bykofsky*, 181 A.D.2d 567, 581 N.Y.S.2d 192 (1st Dep't 1992)(same).

46. *See Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc.*, 51 F. Supp. 2d 457, 474 (S.D.N.Y. 1999) ("[a]n agent enjoys implied authority to enter into a transaction when verbal or other acts by a principal reasonably give the appearance of authority to the agent."(quoting *Greene v. Hellman*, 51 N.Y.2d 197, 204, 433 N.Y.S.2d 75 (1980)). An agency relationship itself is created by words or conduct by the principal which, reasonably interpreted, causes the agent to believe that the principal desires it to act on the principal's account. *Nationwide Life Ins. Co., v. Hearst/ABC-Viacom Entertainment Servs.*, No. 93 Civ. 2680, 1996 WL 263008, at *7 (S.D.N.Y. May 17, 1996); Restatement (Second) of Agency § 26.

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Attachment Disorder: Cleaning Up the Last Century's Law on the Availability of Attachment in Aid of International Arbitration

By Michael B. Smith

Introduction

In international commercial arbitration, just as in international commercial litigation, the availability of a preliminary attachment can be of tremendous importance to the parties. At the beginning of any dispute between parties to an international commercial transaction, whether arbitrable or not, each party runs the risk that the other will hide or dispose of its assets before a decision can be reached and/or a judgment entered. The entire proceeding, be it litigation or arbitration, is of little value if the judgment cannot effectively be enforced because the losing party has no reachable assets. In the context of international arbitration, where the governing rules and the powers of the parties and institutions involved are often less clearly defined, it can be particularly difficult to obtain such provisional relief as attachment in aid of arbitration. This article will discuss the various options available to a party to an arbitration who seeks to obtain an attachment, as well as the various sources of applicable law and their impact on the process. It will address the current split that exists in U.S. decisional law regarding the availability of judicially-ordered attachment in aid of international arbitration, both at the federal level generally and between the Second Circuit and New York State specifically. Finally, the author will recommend some possible steps to be taken to bring U.S. law into the twenty-first century, making it more "user-friendly" in its approach to attachment in aid of international arbitration.

Ensuring That a Final Judgment Is Enforceable

It has been suggested that there are many purely practical reasons for the increased difficulty of obtaining provisional measures in aid of arbitration:

> . . . most arbitrators are much more reluctant than national courts to order provisional measures. Arbitrators often are sensitive to the fact that their powers derive from private agreement and to the legal uncertainties outlined below concerning their powers and the possibilities of enforcement. Similarly, like a national court, arbitral tribunals will be concerned about prejudging the merits of the parties' dispute or appearing partial. As a result, arbitrators are often very hesitant to order compulsory provisional measures, even in circumstances in which a court might.
>
> Moreover, even when arbitrators are willing to grant provisional relief, it is often not practicable for them to do so. Provisional measures are usually needed at the outset of the parties' dispute. Ordinarily, however, no arbitral tribunal will be in place and functioning at the beginning of the parties' dispute; even after the request for arbitration has been filed, the process of selecting and confirming the arbitrators can take several months. As a consequence, provisional measures can often not practicably be obtained from the arbitrators.[1]

Nonetheless, provisional measures are often a practical necessity for the parties to an arbitration. When one of the parties to a dispute agrees to submit the issue to arbitration, that party has at least four courses of action vis-à-vis the ultimate enforceability of the final judgment.

Do Nothing

A party to arbitration may choose to rely on the good faith of the other party (or parties). In such a case, the party would simply proceed with the arbitration, waiting for the moment of final judgment. When that moment arrives, if the debtor in judgment refuses to pay, the prevailing party may seek to have the judgment enforced by a national court. However, a judgment cannot be enforced in a vacuum: if the judgment debtor has secreted its assets, or destroyed, damaged, or dissipated them, it is too late at this point to recover that which may be owed. The losing party has already had all the time that passed between the decision to arbitrate (which may itself have been litigated), the naming of the arbitrators, discovery (if any was conducted), and the arbitral proceeding itself, to conceal its assets in order to avoid the jurisdiction of the enforcing tribunal. For obvious reasons, this method offers little

protection, and is not the most desirable course of action. Indeed, an attorney would be remiss, to say the least, if she did not seek to do more to protect her client's interests.

Write Enforceability into the Contract

A second possibility is to incorporate into the contract, at its formation, a clause that ensures the cooperation of the parties in case the dispute is submitted to arbitration. This clause could take various forms. The Court of Appeals of New York, for example, has suggested that, in order to ensure the effective enforcement of an arbitral judgment that requires the payment of a sum of money, the parties to a contract include "security clauses," like performance bonds or escrow accounts.[2] If the contractual equivalent of attachment is included in the contract as a condition precedent to the arbitration, then it may become unnecessary to seek formal injunctive relief, and thus become embroiled in the complicated, traditional legal framework that arbitration is generally expected to avoid. Naturally, this course of action requires the consent of all parties to the contract, and—unlike injunctive relief—would almost certainly require *all* the parties to put up security against a judgment. This could be unsatisfactory to many parties, including those who feel their opponents represent a particular risk, or those who would find themselves at a greater disadvantage as a result of having to put up security (i.e., financially weaker parties). Also, the question of enforcement still remains—if one of the parties disputes the security clause, or refuses to comply with it, recourse to the courts will still be necessary.

Seek an Order of Attachment from the Arbitrator(s)

The third possibility arises out of the power that many arbitral tribunals have to issue pre-judgment relief. This power, like many of the procedural issues that may surface during an arbitration, can arise from and be governed by various sources of law. First, one must look to whatever treaties may be applicable; then, one must consider the applicable domestic law (often chosen by the parties in the contract); third, of course, one must examine the contract between the parties as a source of authority; and, finally, one must look to the rules,[3] if any, that control the arbitration.[4] The two treaties most commonly applicable in the sphere of international arbitration are the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)[5] and the 1975 O.A.S. Inter-American Convention on International Commercial Arbitration (Panama Convention).[6] Neither directly addresses the power of arbitrators to grant pre-judgment relief. As for domestic law, "[a]n arbitrator will seldom grant provisional relief unless he is satisfied that the curial law allows him to do so."[7] Parties are, of course, entitled to specifically address the issue of provisional relief in the contract, as discussed briefly, *supra*, or to choose arbitration rules that give the arbitrators the power to grant such relief. As for arbitration rules, the rules of all the leading institutions include some language granting the arbitrators the power to grant "necessary" or "appropriate" provisional relief.[8]

Although most arbitrators have the power, at least on paper, to grant provisional relief, their power to enforce such relief is virtually nonexistent.[9] Let us take, as an example, the hypothetical situation of two parties, one in Paris and one in Buenos Aires, who submit to an AAA arbitration in New York. Let us further assume that the Argentine party seeks to attach the French party's goods in the UK, and that the tribunal orders such relief pursuant to its authority under Article 21 of the AAA International Arbitration Rules. AAA rules notwithstanding, the tribunal is powerless to enforce the attachment without the help of the British courts. Therefore, if a party to arbitration seeks to obtain preliminary injunctive relief, that party may seek such relief from the arbitrators; however, if the other party is not cooperative, recourse must be made to local courts for the enforcement of the provisional remedy.

Federal courts in New York have routinely enforced attachments ordered by arbitrators. The Second Circuit has long recognized that arbitrators have "substantial power to fashion remedies that they believe will do justice between the parties."[10] In *Sperry*, the court affirmed an order of the district court enforcing an arbitral award which provided for the creation of a joint escrow account for the proceeds of the letter of credit at issue in that case. More recently, the Southern District has upheld the power of a panel of arbitrators to require a party to post a security bond against a final judgment,[11] and to order one party to fund a joint escrow account which would be distributed according to the final award.[12]

New York State law is similarly favorable to the enforcement of arbitral awards.[13] In *J. Brooks Securities, Inc. v. Vanderbilt Securities, Inc.*, the Supreme Court of New York upheld the authority of an arbitral tribunal to issue a temporary injunction in order to preserve the integrity of the arbitral proceeding.[14] The court held that "the power of the court 'to enforce' the arbitration agreement (CPLR 7501) includes the power to see that the arbitration is not rendered a nullity by reason of arbitral and judicial impotence."[15]

The unity of the courts in upholding and enforcing the authority of arbitral tribunals to issue provisional relief, including orders of attachment, is appropriate and refreshing. Unfortunately, the profile of the law regarding judicial orders of attachment in aid of arbitra-

tion, which may be required when an arbitral order of attachment would come too late in the proceedings, is far less smooth.

Seek Attachment from the Courts

This brings us to the fourth possibility: seeking preliminary injunctive relief in aid of arbitration directly from the courts. The rules of most arbitral tribunals specifically permit such extra-arbitral activity. The AAA, WIPO, UNCITRAL, and CPR rules all allow a party to request interim measures from a judicial authority without waiving its right to arbitrate.[16] The ICC and LCIA rules allow parties to apply to competent judicial authorities for interim measures *before* the commencement of the arbitration without waiving or prejudicing their rights under the arbitration; they also allow such recourse *during* the arbitration in "appropriate" or "exceptional" circumstances, respectively.[17] ICSID rules require the parties to have "stipulated in the agreement recording their consent" that they wish to request provisional measures from some other authority.[18] However, this is only one of the hurdles that must be overcome when seeking pre-judgment relief in aid of arbitration in a national court. For example, one must choose from *which* national court to request the relief. First, one must determine which courts are competent to grant such relief. Generally, the most convenient—and most likely competent—tribunal, will be the forum in which the assets to be attached are located. Nonetheless, it may be that the jurisdiction in which the arbitration is located is more convenient. For example, if the law of the place of arbitration is more favorable to the party seeking provisional relief, that party may want to first seek to have the order issued in that jurisdiction, and then seek to have that order enforced by the jurisdiction in which the assets are located. This is especially likely to occur when the law of the jurisdiction in which the assets lie tends to give greater deference to foreign judgments than to the demands of foreigners seeking relief.[19] However, seeking provisional relief directly from the jurisdiction where the assets are located will generally be the most prudent course of action.[20]

Federal Case Law on the Availability of Attachments in Aid of Arbitration Is Divided and Unclear

In order to seek such relief from a judicial authority (or to intelligently make the decision to seek it), one must understand the law that will be applied by the court in question. In the case of international arbitration, United States federal law is codified in the Federal Arbitration Act of 1925 (F.A.A.).[21] The F.A.A. also incorporates the provisions of the New York Convention[22] and the Panama Convention.[23]

The F.A.A. is applicable in both federal and state courts[24] (i.e., federal and state courts have concurrent jurisdiction to enforce the F.A.A., which does not by itself confer federal jurisdiction[25]), but it is not the only law applicable to international commercial arbitration in either court. The Supreme Court has upheld the application of state procedural law regarding arbitration even where the application of that law would achieve a result different from that obtained under the F.A.A., if the parties have agreed in their contract to abide by the state rules.[26] In *Volt*, the Court reasoned that the California Arbitration Act—although permitting a stay of arbitration where, under the F.A.A., it would go forward—did not violate Congress' "principal purpose of ensuring that private arbitration agreements are enforced according to their terms," and thus was not pre-empted by the federal Act.[27] Indeed, it is well recognized that there are gaps in the F.A.A., and that these gaps should be filled by applicable state law, if any exist.[28] Specifically, state courts may apply state *procedural* law applicable to international arbitration.[29]

Chapter I of the F.A.A. recognizes and authorizes three types of provisional remedies: stays of proceedings (Section 3),[30] orders to compel arbitration (Section 4),[31] and attachments (Section 8).[32] Section 8 of Chapter I authorizes the courts to order attachment only when the court has subject matter jurisdiction arising out of admiralty.[33] Thus, Section 8 is only relevant to disputes in which one party seeks to attach the other's ship or cargo. However, courts have interpreted Section 3 to permit attachment in any arbitration arising out of interstate or foreign commerce, as long as the case was referred to arbitration pursuant to a stay of proceedings under that section.[34] In 1944, the Second Circuit took the view that Section 3 modifies the natural course of litigation only insofar as it substitutes arbitration for trial at common law.[35] Reasoning from this view, the Court concluded that "an arbitration clause does not deprive a promisee of the usual provisional remedies," including prejudgment attachment.[36] The Court went on to reject the argument that the explicit mention of attachment in Section 8, but not in Section 3, indicated Congress' intent to preclude the availability of attachment.[37]

On the other hand, if an arbitration arises out of Section 4 (order to compel arbitration), it is unclear whether the same interpretation of the F.A.A. would apply. In *Greenwich Marine, Inc. v. S.S. Alexandra*, the Second Circuit rejected *in dicta* the notion that Section 8 somehow transferred the right to attachment to Section 4.[38] The *Greenwich Marine* court found the legislative history of little help, but questioned why

> the drafters would ever condition the right to seizure on the mere allegation of "the kind of claim that the district

> court would have had the power to entertain," which presumably could be satisfied in every case where the arbitral clause was a part of a maritime contract and the controversy involves some aspect of that contract.[39]

But the analysis does not end here.

If the terms of the New York or Panama conventions are applicable, then Chapter 1 of the F.A.A. only applies to the extent that the provisions of the applicable treaty are not in conflict with its own.[40] The Conventions are applicable when the issue before the court concerns an arbitration agreement or arbitral award[41] arising from the legal relationship between parties which is considered "commercial," and which has some reasonable connection outside the United States.[42] Should both Conventions apply, the F.A.A. says that the New York Convention will pre-empt the Panama Convention unless a majority of the parties to the arbitral agreement are citizens of states which are members of the O.A.S. and have ratified or consented to the Panama Convention.[43]

Federal decisional law is divided in its approach to the Conventions as they apply to preliminary remedies in aid of international arbitration. In 1974, the Third Circuit announced that the New York Convention prohibited United States courts from ordering an attachment in aid of international arbitration.[44] It was the opinion of that Court that Article II(3) of the Convention[45] demands that the judicial tribunals of the party states remain completely uninvolved with a case in arbitration until a final judgment has been reached.[46] In 1981, the Fourth Circuit applied the same rule.[47]

In the Second Circuit, where perhaps the majority of such questions arise in the United States, the Court of Appeals has taken a different stance.[48] In 1990, the Second Circuit decided that the Convention does not prohibit the granting of provisional remedies[49] in aid of international arbitration.[50] In that case, plaintiff Borden, a multi-national corporation incorporated in New Jersey with offices in New York, asked for a preliminary injunction to prevent the use of certain containers by the defendant, a Japanese company with offices in New York, until the arbitration was concluded.[51] The court held that where a party seeks pre-judgment relief *in aid of* arbitration—that is, when that party does not seek to *evade* in some manner the arbitration—then § 206 of the F.A.A. and the New York Convention authorize the court to order such relief.[52] Furthermore, the court relied upon New York State procedural law, specifically CPLR 7502(c),[53] which "specifically provides for provisional remedies in connection with an arbitrable controversy."[54]

Four years later, relying on the Second Circuit's opinion in *Borden*, the Southern District of New York ordered an attachment against the funds of the defendants, pending the final judgment of an arbitration proceeding in London.[55] In *Alvenus*, the Southern District found that "[i]n permitting injunctions in aid of arbitration, C.P.L.R. 7502(c) brings New York State in line with every signatory of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards."[56] However, just last year, the Second Circuit narrowed its holding in *Borden*, reading CPLR 7502(c) to apply only to arbitrations taking place in New York.[57]

New York State Courts Have Taken a Different View

The federal split is only half the story, however. The state courts of New York, applying exactly the same law as the Second Circuit courts in *Borden* and *Alvenus*, have come to the opposite conclusion. In *Cooper v. Ateliers de la Motobecane, S.A.*,[58] the New York Court of Appeals came down on the side of the Third and Fourth Circuits, holding that the courts could not order pre-judgment attachments in aid of arbitration.[59] The Court of Appeals found unpersuasive the argument that attachment was necessary in aid of arbitration in order to ensure that a party could recover its reward.[60] Instead, the Court was swayed by the notion that allowing judicially-ordered attachments in aid of arbitration would subject foreign parties to unfamiliar law—and reasoned that American entities would not want to be subjected to foreign attachment laws in other countries.[61] While finding that a proceeding to compel arbitration is not an action seeking a money judgment, and therefore that an order of attachment is not available in that circumstance, the Court did acknowledge that an order of attachment obtained in a contract action *before* the dispute is subjected to arbitration would remain valid.[62]

It is significant that the *Cooper* decision came down in 1982, before Article 75 of the CPLR was revised; at the time of the *Cooper* decision, CPLR 7502(c) did not exist.[63] Nonetheless, in 1988, the First Department of the New York Appellate Division revisited the question and concluded that the Court of Appeals' decision was still controlling.[64] *Drexel* arose out of a specific request, under CPLR 7502(c), for an order of attachment in aid of arbitration. The court acknowledged that CPLR 7502(c) authorizes attachment in aid of arbitration on the sole ground that the eventual arbitral award may be rendered ineffectual without it.[65] However, the court went further, distinguishing between domestic and international arbitration. The court found that CPLR 7502(c) was precluded by the New York Convention, which, under *Cooper*, proscribes attachment in aid of arbitration.

> This court, relying upon the authority of [*Cooper*], has held that in instances in which the UN convention is applicable, the "arbitration is governed by the UN Convention, and pursuant to the terms thereof, we find that prejudgment attachment is prohibited. It was the intention of the UN Convention that there should be no significant judicial intervention until *after* an arbitration award is made.[66]

Interestingly, the *Drexel* court explicitly sidestepped the petitioner's argument that *Cooper* failed to address several decisions finding attachments to be consistent with the terms of the Convention, insisting that "regardless of the validity of [petitioner's] assertion, the fact remains that this court is bound by [*Cooper*].[67]

The Current Confusion in the Case Law Must Be Clarified

The current legal landscape presents, at best, contradiction and uncertainty to a party to an international arbitration seeking an attachment from a New York court. One strange result of *Cooper* and its progeny is that, while it may be easier for parties to a domestic arbitration to obtain attachment from New York courts than it is for litigants appearing in those same courts (due to the lower standard required by CPLR 7502(c)), parties to an international arbitration are precluded from seeking such an order at all, unless one or both of the parties is from a state which is *not* party to the New York Convention,[68] or where federal law applies in New York State court because the matter is a maritime action.[69] Another is that parties to international arbitration (at least, international arbitrations taking place in New York) who seek attachments in the federal courts of the Second Circuit would be able to obtain such relief, under precisely the same law that precludes it in the state court. Furthermore, the *Cooper* line of cases begs the following question: Since Federal Rule of Civil Procedure 64 incorporates New York procedural law,[70] does the New York Court of Appeals' interpretation of the statute not apply as well?[71]

The Second Circuit has interpreted F.A.A. § 206 as allowing federal courts to entertain application for provisional remedies in aid of arbitration, and has held that this is consistent with the "provisions and . . . spirit" of the New York Convention.[72] Thus, if the federal courts must adopt the state courts' interpretation of CPLR 7502(c), then that provision will be pre-empted by federal and international law. However, this would preclude the availability of attachments under the less stringent standards of CPLR 7502(c) in federal courts as well as in state courts.

Finally, because the Federal Arbitration Act does not provide any basis for subject matter jurisdiction, cases involving only foreign entities will not be able to get into federal court based on diversity of citizenship, and thus (assuming that they are both parties to one of the Conventions), will be unable to obtain a preliminary attachment. It would appear, then, that—despite the Court's stated reasoning—the *Cooper* decision has itself injected a tremendous level of uncertainty into the area of international commercial arbitration.

Cooper and its progeny have established an inefficient and ineffective status quo that is in direct opposition to the aims of the federal and state legislatures, as well as of the international community. For these reasons, it should be addressed and overruled by statutes at the state and/or federal level.

As noted *supra*, *Cooper* was decided before CPLR 7502(c) was promulgated. Nonetheless, subsection (c) of that statute is clearly in conflict with the Court of Appeals' holding in *Cooper*. One might reasonably have assumed that *Cooper* was thus overruled by the new CPLR 7502(c), to the extent that the two were in conflict with each other. Indeed, the First Department in *Drexel* began its opinion with careful examination of CPLR 7502(c) in which it found that "the possibility that an arbitration award may be rendered ineffectual in the absence of an order of attachment is sufficient under the statute to support provisional relief."[73] Nonetheless, the court then concluded that, although CPLR 7502(c) would "ordinarily" have entitled the petitioner to an order of attachment, it was superseded in the case of international arbitration by the Court of Appeals' interpretation of federal law in *Cooper*, *viz.* the New York Convention. The *Drexel* court's following of *Cooper* in the face of CPLR 7502(c), is understandable in light of the Third Circuit's *McCreary* decision and the lack of any Second Circuit law on the issue, but this reasoning is hardly satisfying in light of the result. While accepting on the one hand the New York legislature's assessment that pre-judgment attachment in aid of arbitration should be *easier* to obtain than it would be in aid of litigation, the court also relied upon the reasoning in *Cooper,* which included the claim that"[i]t is open to dispute whether attachment is even necessary in the arbitration context."[74] By doing so, the court essentially voided CPLR 7502(c) by accepting a *per se* rule that the criteria for obtaining relief under the statute (the possibility that an arbitration award may be rendered ineffectual) was presumptively satisfied.

The *Cooper* and *Drexel* opinions both emphasize the "injection of uncertainty" that would be created by allowing attachment in aid of arbitration. The *Cooper* court, following *McCreary*, assumed that limiting foreign parties' need to navigate the legal systems of this

nation would further the purposes of arbitration. Neither decision acknowledges that a party's need for attachment in aid of arbitration may outweigh its desire to avoid the courts.[75] By the time the *Drexel* court addressed the issue, it was adopting a questionable rule that was in direct conflict with the statutory law of the state, on the grounds that it was avoiding uncertainty.

Finally, there is the conclusion, drawn by the courts in *McCreary*, *Cooper*, and *Drexel*, that the New York Convention precludes the involvement of the courts to grant pre-judgment relief in aid of arbitration. The source of this conclusion appears to be the *McCreary* court's reading of the word "shall" in Article II(3) of the New York Convention:

> There is nothing discretionary about Article II(3) of the Convention. It states that district courts *shall* at the request of a party to an arbitration agreement refer the parties to arbitration. The enactment of Pub. L. 91-368 [the codification of the New York Convention in Chapter II of the F.A.A.], providing a federal remedy for the enforcement of the Convention, including removal jurisdiction without regard to diversity or amount in controversy, demonstrates the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context.[76]

This reasoning seems, on its face, to make sense: arbitration is an *alternative* to the court system, and the involvement of the courts should generally be kept to a minimum. However, the goal of the F.A.A. and the Conventions, as recognized even by the court in *McCreary*, is to eliminate "vestiges of judicial reluctance to enforce arbitration agreements."[77] Yet in the face of the possible unenforceability, is not the refusal of the Third Circuit and the New York State courts to provide an avenue for pre-judgment attachment tantamount to a judicial reluctance to enforce arbitration agreements? Furthermore, even a brief examination of the myriad extant arbitration rules (such as the one undertaken in this article) reveals the international arbitration community's virtually unanimous desire to have courts intervene to provide pre-judgment relief.[78] The drafting, acceptance, and use of these rules by citizens of signatory countries effectively belies the validity of the *McCreary*/*Cooper* interpretation of the New York Convention.

Certainly, it is easier to see the error of the *McCreary* court's reasoning in hindsight, now that—over a quarter of a century later—international commercial arbitration has become far more visible, regulated, and examined. Even *Cooper* and *Drexel* are now relatively old cases. Significantly, they predate the Second Circuit's decision in *Borden*. In the author's opinion, *Borden* represents the more appropriate approach. It is consistent with New York State law as embodied in CPLR 7502(c) (if not in the decisional law of that state); it is consistent with the purposes and provisions of the Federal Arbitration Act; it is consistent with the New York Convention, at least as interpreted by every major arbitral institution that operates under it; and it is consistent with the efficient and effective functioning of international commercial arbitration. *Cooper* and *Drexel* are outdated decisions whose effect on the present landscape of international commercial arbitration is primarily confounding.

Recommendations

The substantial difference between the law applied by state courts and the law applied at the federal level (and the further disagreement between federal courts) is problematic—it threatens to confuse even parties familiar with American law (to say nothing of foreign parties to arbitration), and encourages forum shopping, which substantially interferes with the goals of the F.A.A. and the Conventions. It would be appropriate for the New York State legislature to once again amend CPLR 7502, adding the following provision (in substance if not in form):

> *(d) International arbitration. The provisions of subsection (c) of this section shall be applicable to all international arbitrations, including those governed by the F.A.A. and/or the New York Convention and Panama Convention. To the extent that federal courts are not unified in their interpretation of the F.A.A. or the Conventions, the courts of this state shall adopt an interpretation consistent with the broadest application of this section.*

In this way, perhaps, the courts can be encouraged to do now what the First Department should have done 13 years ago when deciding *Drexel*: recognize that *Cooper* has been undermined by subsequent developments (and Second Circuit case law) and abrogated by statute.

Legislative action at the state level would be helpful, but it by no means represents a certain or complete remedy. For one thing, there exists the possibility that state courts will continue to follow *McCreary*, despite repeated attempts to express a contrary preference on the part of the legislature. Of greater concern, however, is the confusion and contradiction that would remain at the federal level, even after New York State corrected its own law. It is time for the *McCreary*/*Borden* split to be

addressed and resolved, whether legislatively or by the Supreme Court. An elegant solution might be for Congress to adopt the UNCITRAL Model Law on International Commercial Arbitration,[79] which was drafted and adopted by the United Nations Commission on International Trade Law in 1985, with the goal of eliminating inadequacies and disparities within and between national laws relating to international arbitration. This would create a uniform federal law familiar to most, if not all, parties to international commercial arbitration, and would conform federal law in this country to the needs and expectations of parties to international arbitrations.

If arbitration is to fulfill its promise of being an effective, efficient way for parties to resolve international disputes, then the laws of New York and of the United States must recognize the modern landscape of such disputes. To this end, legislators and judges should seek to *clarify* that law and ensure the enforcement of attachments in aid of international arbitration.

Endnotes

1. Gary B. Born, International Commercial Arbitration in the United States 756 (Klumer L. & Tax. Pub., 1994).
2. *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 414, 442 N.E.2d 1239, 1242, 456 N.Y.S.2d 728, 731 (N.Y. 1982).
3. Although arbitration rules are generally determined by the institution conducting the arbitration, in the case of *ad hoc* arbitration, the parties may agree upon a particular institutional set of rules, a set of "ad hoc" rules promulgated by institutions such as the United Nations Commission on International Trade (UNCITRAL) or the Center for Public Resources (CPR), or on their own rules.
4. *See* Born, *supra* note 1, at 756.
5. June 10, 1958, 21 U.S.T. 2517.
6. January 30, 1975, 14 I.L.M. 336.
7. Born, *supra* note 1, at 757.
8. *See, e.g.*, International Chamber of Commerce (ICC) Arbitration Rules Article 23; American Arbitration Association (AAA) International Arbitration Rules Articles 21, 27.7; London Court of International Arbitration (LCIA) Arbitration Rules Article 25, International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules Articles 39, 47; World Intellectual Property Organization (WIPO) Arbitration Rules Articles 46, 62; UNCITRAL Arbitration Rules Articles 26, 32.1; CPR Arbitration Rules 13, 14.1.
9. For this reason, "tribunal ordered provisional relief will generally not be enforceable in a national court unless the curial law permits such relief and the law of the enforcement jurisdiction provides for judicial enforcement of the tribunal's orders." Born, *supra* note 1, at 757.
10. *Sperry International Trade, Inc. v. Government of Israel*, 689 F.2d 301, 306 (2d Cir. 1982).
11. *Compania Chilena de Navegacion Interoceanica v. Norton, Lilly & Co.*, 652 F. Supp. 1512, 1516 (S.D.N.Y. 1987).
12. *In the Matter of the Arbitration between Konkar Maritime Enterprises, S.A. v. Compagnie Belge D'Affretement*, 668 F. Supp. 267, 271 (S.D.N.Y. 1987).
13. S*ee, e.g., Sprinzen v. Nomberg*, 46 N.Y.2d 623, 629, 415 N.Y.S.2d 974, 977 (N.Y. 1979) (upholding the power of arbitrators to issue permanent injunctions, holding that "an arbitrator's award will not be vacated for errors of law and fact," and stating that courts will not "second-guess" arbitrators' conclusions).
14. 126 Misc. 2d 875, 484 N.Y.S.2d 472 (N.Y. Sup. 1985).
15. *Id.*, 484 N.Y.S.2d at 474.
16. AAA International Arbitration Rules, Article 25.3; WIPO Arbitration Rules, Article 46(d); UNCITRAL Arbitration Rules, Article 26(3); CPR Arbitration Rules, Rule 13.2.
17. ICC Arbitration Rules, Article 23.2; LCIA Arbitration Rules, Article 21.3.
18. ICSID Arbitration Rules, Article 25.3.
19. *See, e.g.*, George A. Bermann, *Provisional Relief in Transnational Litigation*, 35 Colum. J. Transnat'l L., 553, 557 (1997) (". . . it may also be necessary in cases of transnational provisional relief to distinguish between situations in which a party to foreign litigation seeks relief from a U.S. court and situations in which a foreign court issues its own order of relief and the U.S. court is merely asked (typically by the party in whose favor it was granted) to 'enforce' it. The U.S. court may want to treat these situations differently, precisely because in the latter case the foreign court has issued its decree; surely international comity carries greater weight when the foreign court has actually spoken."). However, it should also be noted that signatories of both the New York and Panama conventions are more likely to enforce arbitral awards than foreign judgments, insofar as there are no equivalent treaties. *See* Robert B. Von Mehren, *Enforcement of Foreign Arbitral Awards in the United States*, 771 PLI/Comm 147, 153-54 (1998).
20. "Particularly where attachment or similar remedies are sought, only the jurisdiction where the defendant's assets are located may be able to grant meaningful provisional relief. That is because security measures often have only territorial effect and, even when they purport to apply extraterritorially, enforcement may be impossible. In these circumstances, deference to the state where the arbitration is pending may not be warranted." Born, *supra* note 1, at 810.
21. 9 U.S.C. §§ 1 *et seq.*
22. 9 U.S.C. §§ 201 *et seq.*
23. 9 U.S.C. §§ 301 *et seq.*
24. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272, 115, S. Ct. 834, 130 L.Ed.2d 753 (1995).
25. *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25, n. 32, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983).
26. *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477, 109 S. Ct. 1248, 1255, 103 L. Ed. 2d 488 (1989).
27. *Id.*, 489 U.S. at 478.
28. *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 4 (1st Cir. 1988), *cert. denied*, 489 U.S. 1077, 108 S.Ct. 1527, 103 L.Ed.2d 382 (1989) (noting that "even when federal law applies to an arbitration agreement, the Federal Arbitration Act has never been construed to preempt all state law on arbitration.") *Bock v. Drexel Burnham Lambert, Inc.*, 143 Misc.2d 542, 541 N.Y.S.2d 172, 174 (N.Y. Sup. 1989) (recognizing that state law may "supplement the FAA 'on matters of collateral to the agreement to arbitrate,'" including matters of procedure when brought in state courts) (*quoting New England Energy*, *supra*, 855 F.2d at 4, n. 2).
29. *Id., Southland Corp. v. Keating*, 465 U.S. 1, 16, n. 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (holding that the Federal Rules of Civil Procedure do not apply to F.A.A. proceedings in state courts).
30. "If any suit or proceeding be brought in any of the courts of the United States upon any issue referral to arbitration under an

agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3.

31. "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

32. "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award." 9 U.S.C. § 8.

33. *Id.*

34. *Murray Oil Products Co. v. Mitsui & Co., Ltd.*, 146 F.2d 381, 384 (2d Cir. 1944).

35. *Id.*, 146 F.2d at 383; *but Cf. Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 76 S. Ct. 273, 100 L.Ed. 199 (1956) (disagreeing generally, *in dicta*, with the *Murray Oil* court's description of § 3—compelled arbitration as "merely a form of trial," without addressing the question of whether the availability of provisional remedies was affected).

36. *Id.*, 146 F.2d at 384.

37. *Id.* ("A possible, and the only rational, explanation for Sec. 8 is that it was adopted out of abundant caution, admiralty procedure being regarded as somewhat apart and esoteric; but that it was implicitly assumed that actions brought under Sec. 3 would proceed throughout in accordance with the practice, applicable to them if arbitration were not the method of trial.").

38. *Greenwich Marine, Inc. v. S.S. Alexandra*, 339 F.2d 901, 904 (2d Cir. 1965) ("The purpose of section 8 is to relieve a party from making an election between the libel-cum-seizure remedy, on the one hand, and the order-to-arbitrate remedy on the other hand—not to append the right to seizure to the order-to-arbitrate remedy of section 4."). It should be noted that *Greenwich Marine* was a maritime case, whereas *Murray Oil* was not.

39. *Id.*, 339 F.2d. at 904, n. 1.

40. 9 U.S.C. §§ 208 ("Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."); 9 U.S.C. §§ 307 ("Chapter 1 applies to actions and proceedings brought under this chapter to the extent Chapter 1 is not in conflict with this chapter or the Inter-American convention as ratified by the United States.").

41. It should be noted that, at least in the Second Circuit, the New York Convention is not applicable to the execution of foreign judgments *confirming* arbitral awards. *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d. 1313, 1319 (2d Cir. 1973), *cert. denied*, 416 U.S. 986, 94 S. Ct. 2389, 40 L.Ed.2d 763 (1974) ("We hold then, that, since the Convention on Recognition itself and its enforcing legislation go only to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards, New York state law is not preempted to the extent that it permits, regulates, and establishes a procedure for the enforcement of the foreign money judgment."); *but Cf. Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218 (1st Cir. 1995).

42. 9 U.S.C. § 202 ("An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . fall under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.").

43. 9 U.S.C. § 305.

44. *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1038 (3d Cir. 1974) ("Quite possibly foreign attachment may be available for the enforcement of an arbitration award. This complaint does not seek to enforce an arbitration award by foreign attachment. It seeks to bypass the agreed upon method of settling disputes. Such a bypass is prohibited by the Convention if one party to the agreement objects."); *but Cf. Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044, 1051 (N.D.Cal. 1977) ("This court, however, does not find the reasoning of McCreary convincing . . . nothing in the text of the Convention itself suggests that it precludes prejudgment attachment.").

45. "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." New York Convention, Art. II(3), *supra* note 4.

46. *McCreary*, *supra* note 44.

47. *I.T.A.D. Associates v. Podar Brothers*, 636 F.2d 75 (4th Cir. 1981) (canceling an attachment ordered by the state court) (citing *McCreary*, *supra* note 44).

48. *See, e.g., Murray Oil Products Co. v. Mitsui & Co., supra* note 34, 146 F.2d at 384 ("[arbitration clause] does not deprive the promisee of the usual provisional remedies.").

49. But did not specifically address the issue of preliminary attachment.

50. *Borden, Inc. v. Meiji Milk Products Co., Ltd.*, 919 F.2d 822, 826 (2d Cir. 1990), *cert. denied*, 500 U.S. 953, 111 S. Ct. 2259, 114 L.Ed.2d. 712 (1991) ("We hold that entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to [9 U.S.C.] § 206.").

51. Borden also asked for an order to compel Meiji to arbitrate.

52. "Entertaining an application for such a remedy, moreover, is not precluded by the Convention but rather is consistent with its provisions and its spirit." *Borden*, *supra* note 50, 919 F.2d at 826.

53. "The supreme court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subdivision (a), may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose) if the application is made before commencement, except that the sole ground for the granting of the remedy shall be as stated above. The form of the application shall be as provided in subdivision (a)." McKinney's N.Y. Civ. Prac. L. & R. § 7502(c) (1990).

54. *Borden*, *supra* note 50.

55. *Alvenus Shipping Co., Ltd. v. Delta Petroleum (U.S.A.) Ltd.*, 876 F.

Supp. 482, 487-88 (S.D.N.Y. 1994). In *Alvenus*, the court relied alternatively on Fed. R. Civ. P., which permits pre-judgment relief "upon a showing of irreparable harm and the likelihood of success on the merits," *id.*, and on Fed. R. Civ. P. 64, which incorporates state procedural law (in this case, N.Y. CPLR 7502(c)).

56. *Id.*, 876 F. Supp. at 488.

57. *ContiChem LPG v. Parsons Shipping Co., Ltd.*, 229 F.3d 426, 432-33 (2d Cir. 2000) (finding that a party to maritime arbitration in London was not entitled to provisional relief under CPLR 7502(c)).

58. 57 N.Y.2d 408, 456 N.Y.S.2d 728 (N.Y. 1982).

59. *Id.*, 456 N.Y.S.2d at 728 ("In [*McCreary*, *supra* note 44] the Third Circuit ruled that the language 'refer[ing] the parties to arbitration' precludes the courts from acting in any capacity except to order arbitration, and therefore an order of attachment could not be issued. To hold otherwise would defeat the purpose of the UN Convention.") (citations omitted). Three of the seven judges in the Court of Appeals dissented in *Cooper* and concluded that the New York Convention *does not* prohibit pre-judgment attachment in support of arbitration:

> In response to the majority, I add that: (1) nothing in the UN Convention or in the history of its negotiation or its implementation by Congress suggests that the word "refer" as used in section 3 of article II of the UN Convention was intended to foreclose the use of attachment where permitted by the law of the jurisdiction in which the attachment is obtained; (2) in light of the majority's concessions that foreign arbitration awards are enforced on the same terms as domestic awards, that there are circumstances under which a domestic award may be enforced under our law through use of a pre-award attachment and that the UN Convention speaks only in terms of post-award security, and of the fact that the UN Convention does not specifically address the subject of pre-award attachment, the UN Convention cannot properly be said to have proscribed such an attachment by implication; and (3) the use of attachment in maritime contract cases arbitrated under the Federal statute cannot properly be distinguished from arbitration-related attachment permitted under State statutory and decisional laws, for the UN Convention makes no distinction; it either permits or proscribes both. In my view, absent more specific language of proscription in the UN Convention, it permits both.

Id., 456 N.Y.S.2d at 732.

60. *Id.*, 456 N.Y.S.2d at 731-32.

61. *Id.*, 456 N.Y.S.2d at 732.

62. *Id.*, 456 N.Y.S.2d at 731. New York courts have uniformly held that under CPLR 7502(c), parties to domestic arbitration need not demonstrate irreparable harm or a likelihood of success on the merits (as they would in connection with a litigation) in order to obtain an order of attachment. *See, e.g., National Telecommunications Association v. National Communications Association*, 189 A.D.2d 573, 592 N.Y.S.2d 591 (N.Y. App. Div. 1993).

63. CPLR 7502 was amended in 1985 to include the new § 7502(c).

64. *Drexel Burnham Lambert Incorporated v. Heinz Ruebsamen, Jr.*, 139 A.D.2d 323, 330, 531 N.Y.S.2d 547, (N.Y. App. Div. 1988).

65. *Id.*, 331 N.Y.S.2d at 550.

66. *Id.*, 351 N.Y.S.2d at 551 (citing *Shah v. Eastern Silk Industries, Ltd.*, 112 A.D.2d 870, 871, 493 N.Y.S.2d 150, 151 (N.Y. App. Div. 1985)), *aff'd*, 67 N.Y.2d 918, 501 N.Y.S.2d 1028 (N.Y. 1986).

67. *Id.*, 531 N.Y.S.2d at 552.

68. The First Department has held that the *Cooper* rationale does not apply where the security provided by the Convention's enforcement provisions does not exist. *Intermar Overseas, Inc. v. Argocean S.A.*, 117 A.D.2d 492, 503 N.Y.S.2d 736 (N.Y. App. Div. 1986). Query whether the Intermar court's interpretation of *Cooper* would extend to arbitration governed by the Panama Convention.

69. *Id.*, *Lerner v. Karageorgis Lines*, 66 N.Y.2d 479, 497 N.Y.S.2d 894 (N.Y. 1985).

70. ". . . all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held. . . ." Fed. R. Civ. P. 64.

71. Similarly, will New York State adopt the Second Circuit's reading of New York case law in *ContiChem*, *supra* note 57, finding that attachment in aid of international arbitration *is* available under CPLR 7502(c), but only when that arbitration takes place in New York?

72. *Borden*, *supra*, note 51; *Alvenus*, *supra*, note 55.

73. *Drexel*, *supra* note 64, 531 N.Y.S.2d at 550.

74. *Cooper*, *supra* note 58, 456 N.Y.S.2d at 731.

75. In fact, this is most likely to occur in the precise situation addressed by CPLR 7502(c): where the award would probably be rendered ineffectual without pre-judgment attachment.

76. *McCreary*, *supra* note 44, 501 F.2d at 1037 (citations omitted).

77. *Id.*

78. *See* summary of arbitration rules, *supra* notes 16-18.

79. 24 L.L.M. 1302 (1985). Article 9 of the Model Law reads: "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

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When *Federal Civil Practice* was first released, its stated aim was to "make the vast and complex subject of federal practice comprehensible to every practicing attorney." That it is one of the most successful reference texts ever published by the New York State Bar Association is evidence that the goal of this book has been accomplished to a great degree.

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BOOK REVIEW:
Successful Partnering Between Inside and Outside Counsel

Edited by Robert L. Haig, West Group and ACCA, 2000, 4 volumes, 6,032 pages with four form diskettes

Reviewed by Michael S. Oberman

Bob Haig threatens to become for legal treatises what John Grisham is to legal fiction—the prolific master of the genre.

New York litigators already are (or most surely should be) well acquainted with *Commercial Litigation in New York State Courts* and *Business and Commercial Litigation in Federal Courts*, two invaluable treatises edited by Mr. Haig. Each treatise provides comprehensive coverage of virtually all procedural and substantive issues likely to be encountered in litigating commercial cases in, respectively, New York State and federal courts, with the individual chapters authored by judges or leading practitioners. They are books to be consulted in every commercial case.

Mr. Haig's latest work is *Successful Partnering Between Inside and Outside Counsel*, a joint project of West Group and the American Corporate Counsel Association (ACCA). Unlike the earlier treatises, which present in sequence the procedural stages in commercial actions and then address in alphabetical order the most commonly litigated substantive areas of commercial law, *Successful Partnering* has a less predictable scope and, in fact, the title of the treatise does not come close to describing its true dimensions. One could imagine a modest-sized book on the everyday dealings between inside and outside counsel that could be read from cover to cover, allowing the reader quickly to gain some practical guidance on how to enhance that working relationship. *Successful Partnering* is not that book; as conceived and executed, it is much more.

"Bob Haig threatens to become for legal treatises what John Grisham is to legal fiction—the prolific master of the genre."

This treatise consists of 80 chapters (typically running 50-100 pages per chapter and to a total of 6,032 pages), each written by a Fortune 500 corporation general counsel together with a senior partner from a major law firm. Forty-four of the chapters address all aspects of the relationship between inside and outside counsel, with a heavy emphasis on the management of legal work by corporate legal departments. Representative chapters include "The Make or Buy Decision" (i.e., whether to use inside or outside counsel) (Ch. 3); "Billing" (Ch. 14); "Law Department Management" (Ch. 17); "Local and Specialized Outside Counsel" (Ch. 20); "Benchmarking and Evaluation" (i.e., the establishment of specific goals within a defined set of criteria) (Ch. 30); and "Professionalism" (Ch. 37). Thirty of the chapters treat substantive law, transactions and litigation procedures, each explored in the context of the specific subject—partnering strategies for inside and outside counsel. The last six chapters are case studies, such as "Ford Motor Company, Changing the Law of Punitive Damages through Litigation" (Ch. 80).

"Although each is written by a different author team, all chapters provide a scope note; discuss the subject matter with a detail reflecting a wealth of first-hand, practical experience; and digest the lessons learned in a user-friendly practice checklist."

The editor describes his work in the forward (at xvii) as "a roadmap, a gold mine of relentlessly practical insights and advice about the dynamics of corporate legal issues." He adds (at xix) that the "book not only alerts readers to the problems they are likely to encounter, but also tells them exactly what they should do to resolve those problems under various circumstances. The authors go beyond general recommendations and provide readers with the concrete details and nuts and bolts advice." This is a good summary of what one finds when tackling almost any of the chapters. Although each is written by a different author team, all chapters provide a scope note; discuss the subject matter with a detail reflecting a wealth of first-hand, practical experience; and digest the lessons learned in a user-friendly practice checklist.

For the inside litigator, *Successful Partnering* should be a welcome companion for the day-to-day management of litigations, providing concrete advice for the entire case cycle from pre-engagement planning to post-

engagement evaluation. And chapters such as "Pre-Litigation Management and Avoidance" (Ch. 2) and "Management of Corporate Documents" (Ch. 29) warrant special study aimed at reducing the chance of your company getting into litigation and at preventing unnecessary problems in litigation through advance planning.

For the outside litigation counsel, *Successful Partnering* offers the most comprehensive insight available into the thinking of general counsel—the people who retain us and who rate our work. The collective experience of the general counsels who wrote these chapters offers many lessons to be adapted in representing other corporations. There are also numerous chapters that provide guidance for situations that may not arise regularly in your practice, such as "Representing a Client with Insurance" (Ch. 25) or "Internal Investigations" (Ch. 35), as well as for situations that do regularly arise, such as "Attorney-Client Privilege and Attorney Work Product Protections" (Ch. 33, a very comprehensive 165-page discussion). While *Successful Partnering* is probably not going to be for outside litigators the type of constantly used reference work like either of the two *Commercial Litigation* treatises, it is a very helpful work to have at hand when seeking new representations and in servicing existing corporate clients.

Successful Partnering contains over 200 useful forms in print and on disk, including engagement letters, outside counsel guidelines, early case assessments, law department mission statements and protective orders. The four-volume treatise is published in a loose-leaf notebook format, which allows for the future addition of new chapters, for annual updates with replacement pages and supplements, and for easy removal of the forms for photocopying. However, in reading briskly through entire chapters, I was aware that the pages are less secure than those in a bound volume.

It is almost impossible to imagine how such an exhaustive, first-rate, 80-chapter, 6,032-page treatise on the collaboration of inside and outside counsel came into existence. It can best be explained by the name "Haig" on the cover.

Michael S. Oberman is a partner in the Litigation and Intellectual Property Departments of Kramer Levin Naftalis & Frankel LLP. He has served as a member of the Executive Committee of the Commercial and Federal Litigation Section of the New York State Bar Association since the Section's formation in 1989 and of the predecessor Committee on Federal Courts from 1977-89. He has also served as a member of the Commercial Courts Task Force, which created the Commercial Division of the New York State Supreme Court.

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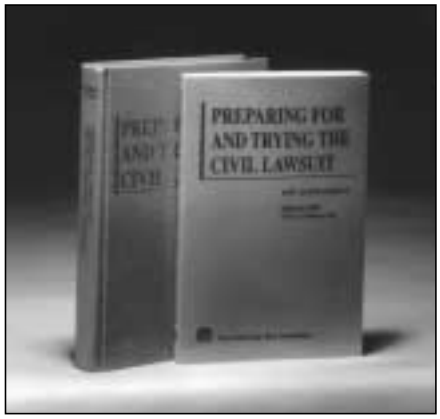

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