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NYLitigator

A Journal of the Commercial & Federal Litigation Section
of the New York State Bar Association

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Commercial and Federal Litigation Section

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Message from the Chair

By Carrie H. Cohen

This issue is a wonderful example of the varied and important work of our Section. Our Spring Meeting was terrific and we were blessed by warm sunshine in the Berkshires. As always, the weekend panels were thought provoking and resulted in lively debate between panelists and the audience. An excerpt from the MCLE materials distributed at the Meeting is reproduced herein. It is a fascinating read titled "Discovery from Non-Parties in Arbitration," by Jamie A. Levitt, a Partner at Morrison & Foerster LLP and an At-Large Member of our Section's Executive Committee.

The Section was honored to bestow our Robert L. Haig Award on past President of the New York State Bar Association, Mark H. Alcott, a Partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP and former Chair of our Section. The Haig Award was bestowed on Mark Alcott by the Honorable Lewis A. Kaplan, United States District Judge for the Southern District of New York, who received our Section's Stanley H. Fuld Award at our 2007 Annual Meeting. Included in this issue are Mark Alcott's inspiring remarks upon receipt of the Haig Award and Judge Kaplan's warm introduction. Also included are some of the numerous tribute letters to Mark Alcott that were read during the Award ceremony.

This issue also demonstrates the interesting work of our committees and includes a Report by our Committee on Antitrust Litigation, chaired by Jay Himes, Bureau Chief, Antitrust, Office of the Attorney General, and Hollis Salzman of Labaton Sucharow LLP, on the impact of the United States Supreme Court case *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004). Rounding out the issue are an article on enforcing United States judgments in England and Wales and an article entitled "Sovereign Terrorist? Applying the FSIA to Cases of International Terrorism."

My congratulations to David J. Fioccola, who is an Associate at Morrison & Foerster LLP and the new editor of the *NYLitigator*, for his inaugural issue. And, many thanks to Bernard Daskel of Lynch Daskal Emery LLP for his extraordinary past service as editor of the *NYLitigator*.

I hope you enjoy this issue of the *NYLitigator*. If you are interested in submitting any articles for future issues, please contact David Fioccola at dfioccola@mofo.com.

Remarks on Presentation to Mark H. Alcott of the Robert L. Haig Award for Distinguished Public Service

Commercial and Federal Litigation Section Spring Meeting, May 5, 2007

By Honorable Lewis A. Kaplan

My own experiences with after-dinner speeches at Bar dinners remind me of the words of Henry VIII to Anne Boleyn: "Do not worry, madam. I shall not keep you long."

It is an honor and privilege to be with you tonight and to have been asked to present the Robert L. Haig Award for Distinguished Public Service to Mark Alcott.

Hon. Lewis A. Kaplan, United States District Judge, Southern District of New York (left), presents the Section's 2007 Robert L. Haig Award to then-NYSBA President and former Section Chair Mark H. Alcott of Paul, Weiss, Rifkind, Wharton & Garrison, LLP on Saturday, May 5, 2007.

As some of you may know, Mark and I go back a very long way. We met almost 40 years ago when I showed up as a new summer associate at Paul, Weiss, and we practiced law together until I left for the bench in 1994. If I may, I would like to draw a connection between those earliest days at Paul, Weiss and the reason that we are gathered here together.

The New York Bar has had a long tradition of public service. Titans such as Joseph Choate, whose lovely home, Naumkeag, is right here in the Berkshires, Henry Stimson, Harrison Tweed, Cyrus Vance, and many others compiled enviable records of public service while pursuing active and distinguished careers at the Bar. The Paul, Weiss firm that Mark and I joined a few years apart was very much in that mold. It was led by Simon H. Rifkind, who needs no introduction to this group and who served in a host of public capacities, including as a judge of the Southern District. The firm included many other public-minded partners. It actively encouraged all of its lawyers to participate fully in the life of our community, local and national, by taking on missions in the public interest in addition to practicing law. Mark learned well in that environment.

Mark Alcott excels in the practice of law. He is an accomplished litigator and trial lawyer. And he's not just a city slicker who worries only about stocks and bonds. Why, shucks, he's really just a country lawyer at heart.

Some years back, Mark acted as lead counsel for the grain industry in numerous class actions alleging price-fixing in the sale of American wheat to Russia. He defended one of the nation's largest chicken producers in the massive broiler chicken antitrust litigation. And he demonstrated his true versatility when he represented the estranged wife in one of the largest equitable distribution matrimonial actions ever tried.

In short, Mark has had a wonderful professional career, a fact recognized by his election to fellowship in the American College of Trial Lawyers and his service also as chair of the Downstate New York Committee of the College. But that is not the central focus of tonight's event, so let me turn to Mark's service to the Bar and the wider community of which we all are part.

Mark has been involved in public life and public service from the day I met him. I remember his important involvement in Liz Holtzman's successful primary challenge to House Judiciary Committee chairman Emanuel Celler in 1972. And that was only the start.

Mark long has served as a mediator and special master in both state and federal courts. He has been active in civic and philanthropic affairs. But his first love, I think, has been this Association and the improvement of the courts of the State of New York.

Mark was one of the important figures in the formation and growth of the Commercial and Federal Litigation Section. He chaired its task force that proposed the creation of a statewide commercial court and then served on Chief Judge Kaye's committee to implement that proposal. This led directly to the creation of the Commercial Division of the New York Supreme Court, one of the most important innovations in the New York court system in

Robert L. Haig applauds Mark H. Alcott, the recipient of the award which bears his name.

the last 20 years. And of course, prior to his election as President of this Association, he served as Chair of this Section.

Mark's tenure as President of this Association further exemplifies his commitment to public service, to improving access to the courts and the professional lives of lawyers, and to the rule of law.

First, he was been a stalwart defender of the independence of the courts without which, to quote what Yogi Berra would have said if he'd thought about it, no legal system is worth the paper it is printed on. He has campaigned for merit selection of judges. He has inveighed against arbitrary, age-based retirement of judges. He has strongly backed the much needed increase in the compensation of our state judges. He was among the leaders of the outcry against the disgraceful suggestion by a now former Defense Department official that corporate clients boycott law firms whose lawyers represent Guantanamo prisoners.

Second, Mark has made equal opportunity within the legal profession a priority. He has enlisted the Honorable George Bundy Smith to head a Special Committee on the Civil Rights Agenda in an effort to increase racial diversity in the legal system and the legal profession. He has advocated abolition of mandatory, age-based forced retirement in law firms. He has focused attention on the problems of women and others returning to the profession after temporary departures.

Third, Mark has been a voice for basic fairness. He has led the Association's effort to combat prosecutorial overreaching in the interest of maintaining fairness in the criminal process. He was the lead sponsor in the ABA House of Delegates of a resolution condemning aspects of the by now well-known Thompson Memorandum.

Finally, Mark's signature initiative has been the Empire State Counsel program, which celebrates lawyers who render 50 hours of free legal services to the poor. The last data that I saw indicated that over 500 members of the Association had qualified and that the number was growing. Thus, Mark has taken important steps in promoting access to the legal system for those most in need.

I would be remiss, of course, if I did not acknowledge that Mark has not done this alone. He has enjoyed the strong support of his lovely wife, Susan, as well as three wonderful children. But in the last analysis, it is Mark Alcott who stands as an exemplar to those who believe that lawyers can and should serve the public as well as themselves. I am proud to count him among my friends and proud to have been his partner. It is my honor to present him with the Section's Robert L. Haig Award for Distinguished Public Service.

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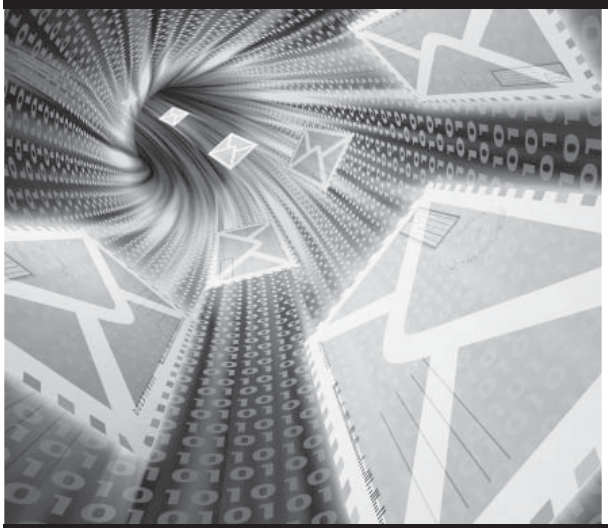

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Recipient of Robert L. Haig Award for Distinguished Public Service: Acceptance Remarks by Mark H. Alcott

One of the President's most satisfying jobs is to participate in award ceremonies honoring members of our profession who have rendered outstanding service. I had the great opportunity to do just that several months ago, at the Annual Meeting of this Section, when Lewis Kaplan received the Stanley Fuld award. Surely no one could have been more worthy of that distinction than this great lawyer and judge; and the fact that he has been a dear friend for almost 40 years made the experience even more deeply gratifying.

Mark H. Alcott accepting the 2007 Robert L. Haig Award for Distinguished Public Service.

But I started participating in State Bar Awards long before becoming President. Some 15 years ago, I sponsored Lesley [Friedman Rosenthal} for the Association's Young Lawyer of the Year Award, and stood proudly by as she received that honor for her exceptional pro bono, Bar Association and professional achievements. Even then, we knew that Lesley would become one of the brightest stars in the State Bar firmament.

And when I became Section Chair, I created the award for Distinguished Public Service. Of course, there could be no other recipient of the first such award than Bob Haig, the legendary founder of our Section; the man who has given so much to our profession; and, of special personal importance, the man who recruited me to become involved in this wonderful Bar Association more than 20 years ago—just as he did for so many others. And, of course, we named the award after him.

So for me to receive this award, at this time, in the twilight of my presidential term; from the Section that remains my first love; in the name of the man who started me on this long and adventurous road; during the tenure of the woman who has been my protegee and close colleague from the earliest days; and with an excessively generous presentation from someone who is not only himself a distinguished public servant but also a friend I warmly admire—this is a moment of high drama and intense emotion for me.

Thank you, Lew;

Thank you, Bob;

Thank you, Lesley;

Thank you my friends and colleagues. I will long remember this occasion.

When I took office, my predecessors imparted two pieces of widsom:

- This will be the greatest experience of your professional life; and
- It will pass in the blink of an eye.

They were right on both accounts.

Forewarned with this advice, I knew there was only one way to conduct my presidential term: seize the moment. In so doing, I have tried to pursue the role I assumed at the outset—voice of the profession; advocate for the public—and I have emphasized the themes I believe to be most compelling and urgent: promote major reform; strengthen and defend core values.

Much of my recent effort has focused on reform. This is an opportune moment to pursue the role of reformer. We have a new Governor, who has made "reform" his mantra. We have a new term for our great, long-time Chief Judge, who has achieved important reforms and keeps adding to her list.

So, change is in the air. But resistance to change remains strong, and it will require vigorous effort to implement our more far-reaching agenda. I have been supplying the former, and I am optimistic that we will achieve the latter.

Let me focus on three of the major reforms that have engaged my recent attention, reforms that are important not only in themselves but also because they illustrate the theme of continuity of policy, as presidents come and go.

The first reform is not my initiative. It is a long-standing policy of the Association, but the opportunity to pursue it arose on my watch, and I have seized that opportunity. I refer, of course, to merit selection of judges.

In the wake of the *Lopez-Torres* decision, I brought this policy to the fore and pressed it, despite the doubters and the "realists." As a result, without question, our Association has emerged as the leading advocate and spokesman for this very important reform. I have given countless speeches, written numerous articles, been interviewed repeatedly, and participated in many debates on this subject. I spent a full day at the Capitol, lobbying for our entire legislative agenda, including judicial selection reform. We met with legislators, legislative staff and the Governor's office.

It is true that the Supreme Court has now granted *certiorari* in *Lopez-Torres*, but that doesn't hurt our position. The major argument that the self-styled pragmatists have used against our proposal is that it will take too long to enact a constitutional amendment; accordingly, they say, a watered-down solution must be adopted immediately to deal with the "emergency" arising from the injunction issued in *Lopez-Torres*. Those arguments are now gone. A Supreme Court decision is at least a year away, and it is far from clear that the decision will be definitive; there could well be a remand. The difference between the time needed to enact a constitutional amendment and the time that will be consumed by the *Lopez-Torres* case has narrowed considerably.

We will file an *amicus* brief in the Supreme Court, along with the New York City Bar and the Fund for Modern Courts, urging affirmance of the lower court ruling striking down New York's judicial convention system. But the decision in *Lopez-Torres*, whatever it is and whenever it finally comes, will not resolve the policy question facing New York. The Supreme Court will tell us what is constitutionally permissible; it will not tell us what is equitable or desirable. And so, our Association has continued to advocate for true reform to eliminate partisan politics from the judicial selection process.

In so doing, we have developed a close relationship with the Governor's staff and have given them significant technical assistance and advice on reform issues. The success of that effort became clear quite recently, when the Governor's office called to advise me that he was about to propose judicial selection and court restructuring reforms closely resembling our proposals, and to ask me to make a statement in his press announcement of the plans. I was pleased to do so.

We shall move forward, buoyed by the knowledge that we have the strong support of the Governor, the outspoken support of the newspaper editorialists and, most importantly, the overwhelming support of our members. I believe we will see important progress on merit selection before the year ends.

The second reform is one that I initiated at the outset of my term and that came to fruition at my final House of Delegates meeting as president: age discrimination against lawyers in the form of mandatory retirement policies.

When I raised this issue, no one was thinking about it, much less talking about it, much less advocating for reform. Now, it has captured national attention. I have been flooded with media inquiries, and the initiative has been reported everywhere—from the *New York Times*, to the *CBS Evening News*, to National Public Radio to the *New York Law Journal*. And coming soon—a special report in the *AARP Bulletin*! At the invitation of the ABA, I lectured on this subject at the National Conference of Bar Presidents. I hear about it from supportive lawyers wherever I go.

Age is the last bastion of discrimination in the legal profession. Mandatory retirement has largely disappeared from—and indeed has been prohibited by law in—most sectors of the economy, but it remains deeply rooted in law firms.

It is particularly ironic, and unfortunate, that even though we are living longer and healthier lives, mandatory retirement remains the norm at large law firms; and, in fact, the witching hour keeps getting younger.

Make no mistake—these mandatory retirement policies constitute age discrimination. They would be unlawful but for a technicality: the victims are law firm partners who, until now, have been deemed to be employers rather than employees, and thus not covered by existing anti-discrimination statutes.

Even that may be changing. The Equal Employment Opportunity Commission has argued, and the Seventh Circuit has held, that one who is partner for other purposes might nonetheless be considered an employee for this purpose, if his firm is run by a tight-knit executive committee or a managing partner, and the individual in question does not control the firm's management policies. To that I would make only one comment: If someone is being forced to retire involuntarily, how can it possibly be argued that he controls the firm's management policies?

The direction in which the case law is moving seems clear. But there is a larger issue here. Society has made a judgment in every other field that we are not going to put people out to pasture arbitrarily, solely because of age. The legal profession should not be fighting a rearguard action against this public policy. On the contrary, it should be at the cutting edge of fairness and fair employment practices.

Gray lawyers are not only the last group against whom discrimination remains legally permissible; they are also the last group against whom discrimination appears to be socially acceptable. We embrace the "up-or-out" policy, which welcomes scores of associates in their 20s and early 30s, but eases them out in their late 30s, and excludes them altogether in their 40s. It is commonplace to staff cases on the basis of age; to request a "younger lawyer" on the matter, or sometimes "a lawyer with gray hair"; we speak of "young partners" and older partners. Were you ever referred for a medical problem to someone identified as a "young doctor"? I never was. Thus, ending mandatory retirement in law firms will require more than a change of law or policy—it will require a different mindset, a change in culture.

To start a dialogue and encourage firms to look at their policies and change this culture, I formed a Special Committee on Age Discrimination in the Profession,

headed by Mark Zauderer, a distinguished former Chair of this Section. Its charge was not to reach a conclusion on the legality of mandatory retirement practices; we seek neither a legislative nor a judicial solution. Rather, its mandate was to examine the issue, determine the propriety of mandatory retirement, and suggest solutions that enable law firms and senior partners to benefit from the experience, skill, and business relationships of such lawyers.

As you would expect from any project led by Mark Zauderer, the committee issued an eye-opening, groundbreaking report, concluding that mandatory age-based retirement is not only unacceptable as an employment practice, but also contrary to the best interests of clients, lawyers, and law firms.

The committee's report was unanimously approved by the Executive Committee and the House of Delegates, a rare phenomenon. It is now the public policy of the New York legal community, consistent with the public policy of the United States. We are urging law firms to consider it, to discuss it, and ultimately to adopt it.

Simultaneously, we are urging the State of New York to extend to all judges—not just Supreme Court Justices—the ability to remain in office until age 76, as a first step to complete elimination of age-based mandatory retirement. I AM CONVINCED THAT THESE REFORMS ARE COMING.

The third reform is a new initiative of mine that will come to fruition not in my term, but in the term of my successor or my successor's successor. It could have a major impact on the way we practice law.

I have appointed a Special Committee to re-examine the issue of lawyer specialization, co-chaired by another distinguished former Chair of this Section, Gerry Paul, along with Anne Reynolds Copps. Currently, New York lawyers can't hold themselves out as specialists. They can't use the "S" word. But, as we know, and as the membership of this Section attests, many lawyers do, in fact, specialize. There is a strong impulse to inform clients and potential clients of this fact, and clients hunger for this information.

So we resort to euphemisms, such as: "My practice is limited to real estate matters," or "I concentrate on immigration work." Or, we invoke our affiliation with an outside group: "I am a member of the International Academy of Tax Lawyers"; or "I am certified by the National Council of Probate Practitioners." But when we resort to these circumlocutions, we risk generating as much confusion as enlightenment. And when we refer to these affiliations, we have to issue a lengthy disclaimer that makes the affiliation meaningless.

In any case, why should we deny consumers vital information about our qualifications? Why should we give certifying authority to outside groups, who are not credentialed by, or subject to oversight from, the New York court system or legal profession?

It has been more than 20 years since our Association looked at the issue of specialization. It is time to look at it again. Last November, at my urging, the House of Delegates approved a major change to Rule 7.4 of the Proposed Rules of Professional Conduct. The Proposed Rule allows a lawyer to state that he or she is a specialist *if* the lawyer is "certified as a specialist by an organization that has been approved or accredited by the American Bar Association or the New York State Bar Association."

Of course, this new language must be approved by the Presiding Justices. But, even as they consider it, it's time for us to explore the issue in depth. That is what Gerry Paul's Special Committee will be doing. This is the start of a long process, and I look forward to the outcome.

I can't leave the issue of reform without mentioning the state's deplorable failure to approve a judicial salary increase or a salary commission. That failure cast a dark shadow on the horizon of reform.

It has been more than eight years since New York's judges received a pay adjustment. That's the longest stretch for any judiciary in the country, and it is unacceptable, by any reasonable standard. Yet the stalemate continues; and so we must continue to fight for compensation adjustments until they become a reality.

The failure to act on judicial salaries raises issues that go beyond basic fairness and equity. It threatens the independence of the judiciary, one of our core values. Freezing judicial compensation; causing the real dollar value of judges' salaries to decline; forcing judges to go hat-in-hand as supplicants to the other, co-equal branches of government, whose acts they have a constitutional mandate to review without fear or favor; sending a message to the public that our courts and judges are held in such low regard—these actions and refusals to act undermine judicial independence.

Our nations' founders understood the linkage between judicial compensation and judicial independence. In the clarion call to freedom that marked our nation's birth—the Declaration of Independence—America's founders identified specific examples of tyranny by King George III. The indictment expressly included his usurpation of judicial autonomy. In the words of the Declaration, the King "made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries."

Here we are, 230 years later, confronting the same issue. And we are doing so at a time of heightened threats to independence of the courts and the legal profession.

Independence of the bench and bar are the cornerstones of our legal system, the enduring concerns of our

Association, and they are irrevocably linked. That is why those who attack the courts and judges also attack lawyers and the legal profession. So our Bar Association is in the vanguard of the fight to defend the reputation of our profession, resist political interference in our court system and preserve the independence of our judiciary.

I can assure you that, no matter how many June Firsts come and go, the New York State Bar Association—whoever is serving as its President—will be in the vanguard of the fight to defend the reputation of our profession, to protect the neutrality of our court system and to preserve the independence of our judiciary.

There has never been a time when the courts were more deserving or more in need of our support. Our courts are grappling with the defining issues of this era. They are on the front lines of the battle to preserve due process and our constitutional birthright, while the country is locked in a grim struggle with a lethal but almost invisible adversary. And they are engaged in that battle at a time of zealous attacks against courts, judges and lawyers—attacks that threaten the independence of our legal institutions. It is up to us, the leaders of the bar, to resist these attacks.

Almost 65 years ago, a Great Chief Judge of the Court of Appeals—who was depicted in Judge Rosenblatt's talk last night—Irving Lehman addressed the Annual Meeting of the New York State Bar Association on this very issue. This year marks the 131st anniversary of the birth of Chief Judge Lehman; and, by significant coincidence, in a few weeks, we will also mark the 131st anniversary of the birth of the New York State Bar Association.

Judge Lehman addressed the New York State Bar Association on many occasions, but never with more urgency than at that Annual Meeting of January 23, 1943, in the darkest days of World War II. As he spoke, the shadow of Nazi tyranny had fallen over most of Europe, and the Holocaust, in all its fury, was engulfing millions.

That was the context in which Judge Lehman talked about judicial independence. He described examples of outstanding courage and independence by judges in the occupied countries—the resignation by the entire Supreme Court of Norway, rather than bow to the dictates of the German occupiers; and the mass work stoppage by more than 1,000 Belgian judges, who refused to hear cases or render decisions, for the same reason. Judge Lehman told our predecessors in 1943 that a member of the Association, a lawyer from Rochester, sent a note to the Court of Appeals about these acts of bravery, asking: "Did you ever wonder whether our judges could meet the same challenge?"

This was Judge Lehman's response:

"No! The Judges of the Court of Appeals have never wondered about that. They have never doubted that we would meet that challenge if ever it could [arise] . . . and we have known, too, that when we met that challenge, the Bar of the State of New York would stand firmly behind us; for not only judges, but lawyers in every country where the . . . law prevails are the same, and will firmly defend liberty guaranteed by law. . . . When [our armed forces], now fighting [overseas], triumphantly come marching home, they must find here, untarnished and unweakened, the freedom guaranteed by law which they have [so] gloriously defended."

In some generations, judicial independence has been threatened by tyrannical dictators or invading armies. In our generation, the threats to judicial independence arise from ideological passions; cultural disputes; and the need to preserve freedom, liberty and due process, while fighting a different kind of war, against an invisible but lethal enemy. And in this state, at this time, the independence of our courts is undermined by the failure to provide fair compensation to the judiciary.

Today's threats to the independence and integrity of bench and bar are no less real than those of an earlier age. They require our constant vigilance and passionate advocacy. They require us to speak our minds and raise our voices. I can assure you that we always will; so that, when the question is put to us that was put to Chief Judge Lehman—"Have you ever wondered whether our judges and lawyers can meet this challenge?"—we will be able to give the same answer:

"No. We have never wondered about that. We have never doubted that our judges would meet that challenge; and when they do, the Bar of the State of New York will stand firmly behind them."

That is a small taste of what I have been doing and saying over the past 11 months, and I hope it tells you what an extraordinary experience it has been to serve as President of our great Association this year—a challenging year; an important year; a productive year; a thrilling year. And, as my predecessors assured me, it has been the greatest experience of my professional life.

On June 1—but not a day before—I will leave office.

These remarks have a valedictory flavor, but please don't think of them as my last gasp. It is true that June 1 looms. But I still have all of May before I pass the baton. Think how much mischief I can create in that time!

It has been and continues to be a great ride. And, as the poet said, "I have miles to go before I sleep."

Tributes to Mark H. Alcott on His Receipt of the Robert L. Haig Award

The following remarks were delivered to Mark H. Alcott upon receipt of his Haig Award by members of the Commercial and Federal Litigation Section who could not attend the ceremony:

Jay G. Safer of Lord, Bissell & Brook LLP:

Most people awake to the sound of music or a buzzer. Not me. I try to set my alarm to the comforting sound of Mark Alcott's voice in his radio messages to the world. There is no snoozing when Mark speaks!

I have known Mark for many years, beginning when I started the practice of law at Paul Weiss. To me, Mark has always been a great lawyer and a great human being—then and now.

Mark first introduced me to the Commercial and Federal Litigation Section. Mark was a true leader and innovator in those initial Commercial and Federal Litigation Executive Committee meetings I attended when he was Chair of the Section. He saw that the Section had a special role to play in the New York State Bar Association and in the legal community. Mark served as a role model and continued to encourage me and so many others to take leadership positions in the Section and the New York State Bar Association. Lesley [Friedman Rosenthal] is a perfect example of someone who has been a terrific Chair and who has told me that she has long hoped Mark would receive the recognition he so richly deserved. Mark has had many fine hours. I spent many hours with Mark at the New York State Bar Association Executive Committee meetings. I can tell you, whether you agreed or not with his view, with his calm and reassuring voice and that unique smile (or is it a grin?), he always had the respect of everyone.

Mark has had a distinguished career before and since he was elected President-Elect and President. Many things stand out in my mind, but here is one of them. On several occasions, even before his term as President-Elect began, Mark was asked to assume the role as temporary Chair at House of Delegates meetings when some of the most controversial issues had to be resolved. He was confronted with one of the most difficult tasks a Chair of the House of Delegates can face. He was suddenly being tested in front of everyone before he even took office. Could Mark be cool and with a smile? How did he do? He did great! Perhaps for some, having to keep control when passions were high, keeping your cool, having to enforce strict rules on speaking, and yet play a fair and neutral role could have been difficult, but not for Mark. That was one of Mark's many fine hours because it again showed he was a leader.

Yet so many more were to come during his term as President. I knew when he chaired those difficult sessions he was going to be one hell of a President—unafraid to speak out on important issues regardless of their controversial nature, and doing it with style. He did not disappoint. He has taken the New York State Bar Association to new heights on so many fronts and initiatives it is hard to keep count. He is unwilling to accept less than the ultimate goal of true reform and continues to speak out on one important issue after another.

I told Mark to tape all his radio messages and put them on a disk so he could listen to them after his term ends. Maybe we could sell them and give CLE credit.

Congratulations Mark! You have earned our thanks!

John M. Nonna of LeBoeuf, Lamb, Greene & MacRae LLP:

The Commercial and Federal Litigation Section has produced leaders of the organized bar who have worked tirelessly to improve the justice system in New York and bring reform where needed. Bob Haig was the founder of this tradition. Tonight's recipient of the award named in Bob's honor has carried that tradition of leadership to new heights as President of the New York State Bar Association. A voice for reform as chair of the section and officer of the state bar, now as President, Mark has been at the forefront of every major issue affecting the legal profession and the delivery of justice to our citizens.

I regret that I cannot be here tonight to celebrate Mark's success and join in the well-earned tribute to him. But, more important than physical presence, this message conveys my sincerest appreciation and deepest respect for Mark's contributions to the bar and the clients it serves.

Lewis M. Smoley:

Mark's leadership on so many fronts has been truly exemplary. We owe much to his tireless efforts on behalf of the Section, in the formation of the Commercial Division, as a senior officer and now president of the Association and simply as model that even the best of attorneys could well emulate.

Gerald G. Paul of Flemming Zulack Williamson Zauderer LLP:

I am particularly sorry to miss the presentation of the Haig Award to Mark Alcott—for three reasons:

1. Bob Haig, our founding Chair, is a great friend, not only of our Section, but of all who practice law in this country. The debt we owe Bob for his contributions to our profession is immeasurable, and each year when we present the Haig Award, we also honor Bob.

2. Lew Kaplan, a long-time partner and friend of Mark's, who is presenting the award, was a true star of the Harvard Law School Class of 1969. The esteem in which Judge Kaplan is held by the bench and bar today is no surprise to those of us who were dazzled by his brilliance some 40 years ago. I can't think of a better way to honor Mark Alcott than to have Judge Kaplan present him with the Haig Award.

3. And, of course, there's Mark himself. As Lesley knows from having served as Mark's hand-picked Secretary of the Section during his year as our Chair, I succeeded Mark as Vice-chair, Chair-Elect and Chair, and so I had the pleasure of working closely with Mark for two years on the activities of the Section. And what an apprenticeship it was! Here are just a few of the innovations that this visionary leader thought up and implemented:

    - Our first Spring Meeting: I chaired it; it was in Cooperstown; among the speakers and panelists were Judge Miner, who was our Keynoter, Judge Lippmann, Judge Milonas, and Judge Traficanti, and these "new" federal judges: Judge Parker, Judge Scheindlin, Judge Baer, and Judge Koeltl.

    - The Commercial Division Task Force: This special committee that Mark formed issued a ground-breaking report advocating the creation of a Commercial Division of the New York State Supreme Court. Our report led directly to Chief Judge Kaye's creation of her own Task Force and the founding of the Commercial Division.

    - The *NYLitigator*: Under Cathi Hession's editorship, our Section's journal got off to a great start and, more than a decade later, it continues to be an important resource for articles on a variety of commercial litigation subjects.

These three accomplishments alone reflect the lasting impact Mark's tenure as Chair has had not only on our Section's work, but on our Court system and our profession.

Of course, Mark's service to the organized bar hardly ended when his year as Chair of the Section was over. Indeed, the subjects that have highlighted his year as President of our Association are indicative of the breadth of Mark's interests and his insights into issues that matter in the lives of all of our citizens that lawyers are uniquely able to influence, such as Pro Bono Legal Services, Judicial Selection, Court Reform, Aging Lawyers, and Specialization in the Law, just to name a few.

I am proud of our Section's leadership for your selection of my friend Mark Alcott as this year's recipient of the Haig Award. Mark was an extraordinary Chair of our Section and he is building a spectacular legacy as President of the New York State Bar Association. Mark is a hard act to follow, as I know from experience.

Kathryn Grant Madigan of Levene Gouldin & Thompson LLP:

What a privilege it has been to serve as Mark's President-Elect and to be a part of his leadership team. I'm sorry I can't be there this weekend, but I know that the rest of the Executive Committee of the Association joins me in congratulating Mark on receiving this prestigious award.

Discovery from Non-Parties in Arbitration

By Jamie A. Levitt

I. Introduction

Non-party discovery in arbitration differs significantly from non-party discovery in civil litigation. As might be expected from an institution designed to simplify dispute resolution, arbitration does not permit wide-ranging discovery.[1] Specifically, arbitrators have narrower powers than judges to compel documents and testimony from non-parties.[2] This article sets out the limits on non-party discovery prior to an arbitration hearing. This will help lawyers in various stages of arbitration: drafting the arbitration agreement, choosing a forum (or private association), requesting evidence prior to the hearing, or defending against such requests.

A. Applicable Laws

Unless the parties agree otherwise, the Federal Arbitration Act ("FAA") or applicable state law governs discovery in arbitration proceedings.[3] Intrastate arbitrations are governed by the laws of the applicable state.[4] Most states have adopted some version of the Uniform Arbitration Act ("UAA") or the Revised Uniform Arbitration Act ("RUAA").[5] Alternatively, parties may agree to arbitrate disputes in private associations, such as the American Arbitration Association ("AAA") or Judicial Arbitration and Mediation Services ("JAMS").[6] This article takes up federal law, New York law, and those two private associations.

B. Non-Party Discovery at an Arbitration Hearing

Under the FAA, arbitrators can compel non-party discovery during the arbitration hearing, subject to the territorial limits of Rule 45(b)(2) of the Federal Rules of Civil Procedure.[7] Section 7 of the FAA provides:

> The arbitrators selected either as prescribed in this title [9 U.S.C. §§ 1 *et seq.*] or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as witnesses and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.[8]

The FAA also provides that an arbitrator may petition a district court to compel the attendance of persons who refuse to testify, or to punish them for contempt.[9]

II. Federal Law Governing Pre-Hearing, Non-Party Discovery

A. Pre-Hearing Document Production

As noted above, an arbitrator has the power under FAA § 7 to compel the production of documents from non-parties at a hearing.[10] Less clear, however, is whether an arbitrator can compel a non-party to produce documents prior to a hearing. Numerous circuit and district courts have opined on the issue, and can be divided into two broad categories. The first line of decisions says that an arbitrator can compel a non-party to produce documents prior to a hearing.[11] A second line of decisions holds the opposite, that an arbitrator cannot compel a non-party to produce documents prior to a hearing.[12] Finally, the Second Circuit admits that there are "open questions" about this issue, and leaves the decision to lower courts.[13] It should be noted that district courts sitting in the Second Circuit, including one in the Southern District of New York, have held that an arbitrator *cannot* compel a non-party to produce documents prior to an arbitration hearing.[14]

1. Circuits Where Arbitrators Can Compel a Non-Party to Produce Documents Pre-Hearing

a. Sixth Circuit

The Sixth Circuit has recently announced a broad, though not unfettered, rule permitting arbitrators to subpoena documents from a non-party prior to a hearing.[15] In *WJBK-TV,* the court held that "a labor arbitrator is authorized to issue a subpoena *duces tecum* to compel a third party to produce records he deems material to the case either before or at an arbitration hearing."[16] The decision leaves the determination of materiality to the arbitrator, who may subpoena the requested documents.[17]

The *WJBK-TV* decision drew on two decisions—from district courts located in the Sixth and Eleventh Circuits—where district courts determined that arbitration panels have broad powers to compel discovery from non-parties prior to a hearing.[18] The Sixth Circuit decision did not go quite so far, purposely eschewing discussion of whether an arbitrator could compel the deposition of a non-party prior to a hearing.[19]

b. Eighth Circuit

The Eighth Circuit has also adopted a permissive standard with respect to non-party, pre-hearing document production.[20] The court held that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."[21] While this may seem sweeping, it is important to remember that the subpoenaed third party was not a mere bystander in this case, but "a party to the contract that is the root of the dispute."[22] Thus, an arbitration panel could conceivably require that the non-party bear *some*

relationship to the underlying dispute before compelling the production of documents.[23]

2. Circuits Where Arbitrators May Not Have the Power to Compel a Non-Party to Produce Documents Pre-Hearing

a. Fourth Circuit

The Fourth Circuit has taken a more restrictive approach to pre-hearing discovery from non-parties.[24] On the one hand, the Fourth Circuit narrowly interpreted FAA § 7: "By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them'; that is, to compel testimony by non-parties at the arbitration hearing."[25] On the other hand, the Fourth Circuit also suggested that pre-arbitration compulsion is theoretically possible in some cases.[26] In an earlier decision, the Fourth Circuit required a party to show a "special need or hardship" in order to compel pre-hearing discovery.[27] In a more recent decision, the Fourth Circuit again required a "special need" for the compulsion of discovery.[28] The court did not, however, elaborate how a party could show this special need, noting that, at the very least, it would require showing the information is not otherwise available.[29]

b. Third Circuit

The Third Circuit has taken the most restrictive approach.[30] After carefully parsing FAA § 7, the court concluded that the "language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."[31] While the holding in *Hay* may seem unambiguous, a concurrence seems to open up the possibility for pre-hearing compulsion.[32] Judge Tchertoff noted that the FAA gave arbitrators "the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings.[33] This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance."[34] Thus, there may be ways to get around even the most restrictive of interpretations.

The Third Circuit's reasoning has found favor with courts in neighboring jurisdictions.[35] The Southern District of New York, for instance, has cited the *Hay* decision with approval.[36] In particular, the court noted that the contractual nature of arbitration made it "particularly inappropriate to subject parties who never agreed to participate in the arbitration in any way to the notorious burdens of pre-hearing discovery."[37]

In sum, courts have varied on the issue of whether an arbitrator may compel a non-party to produce documents prior to an arbitration hearing. To offer meaningful advice on this issue, a lawyer would have to examine the jurisprudence of the relevant circuit. It should be noted that, even in the more restrictive jurisdictions, under the right factual scenario, courts may be willing to interpret the rules in order to compel pre-arbitration document production from non-parties.

B. Pre-Hearing Witness Testimony

Although an arbitration panel has the power under FAA § 7 to compel attendance of a witness at an arbitration hearing, it is less clear whether the panel can compel deposition testimony from a non-party prior to a hearing. Few courts have addressed this issue specifically, but the Southern District of New York has repeatedly taken a dim view of this practice.[38]

Judge Scheindlin first opined on the issue: "After weighing the policy favoring arbitration against the rights and privileges of non-parties, this Court concludes that an arbitrator does not have the authority to compel non-party witnesses to appear for pre-arbitration depositions."[39] Judge Scheindlin distinguished compelling document production from compelling a deposition.[40] While "[c]ommon sense encourages the production of documents prior to the hearing," a deposition may require a non-party to appear twice: first at the deposition, and then at the arbitration hearing.[41] Furthermore, a pre-hearing deposition could also lead to "harassing or abusive discovery" of the non-party.[42] Three subsequent decisions in the Southern District have upheld Judge Scheindlin's reasoning.[43]

Nevertheless, district courts in two other states have arrived at a different conclusion.[44] In the first decision, the Northern District of Illinois reasoned that "[i]mplicit in the power to compel testimony and documents for purpose of a hearing is the lessor [*sic*] power to compel testimony and documents for purposes prior to hearing."[45] The second decision, in the District of Minnesota, looked approvingly to the first, but did not elaborate on it.[46]

C. New York State Law

In New York State, two provisions speak to the availability of subpoenas for arbitrators under the Civil Practice Law and Rules.[47] First, under CPLR 7505, "[a]n arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas."[48] Second, CPLR 2302(a) permits arbitrators, among others, to issue subpoenas without a court order.[49] New York courts have interpreted these provisions to allow arbitrators to compel the production of documents or testimony from non-parties.[50] Whether this also applies to a non-party *prior* to a hearing has yet to be decided.

New York case law suggests that an arbitrator may compel both testimony and documents from a non-party.[51] "It is not disputed that the arbitrators have the power to summon witnesses, and, in a 'proper case,' to require production of books and records."[52] In *Panamerican*, the court cited the "relevancy and materiality of the documents sought" and the "purpose and necessity for the production" as elements a court must consider in making the decision to compel.[53] In the end, the court compelled

a non-party to produce documents regarding an alleged sale to one of the arbitrating parties.[54] The court, however, remanded the case to Special Term for them to consider the non-party's application to appoint a referee to determine whether certain documents were confidential.[55]

More recent decisions have also held that arbitrators "[a]re statutorily authorized to issue subpoenas, whether *ad testificandum* or *duces tecum*."[56] In *Reuters Ltd. v. Dow Jones Telerate, Inc.*, because the party sought only documents from a non-party, the court did not squarely address the issue of compelling testimony.[57] In the end, because the requests for document production were "patently overbroad, burdensome and oppressive," the court did not compel the production of any documents.[58] Nevertheless, the opinion suggests that an arbitrator has the power to subpoena a non-party for testimony.[59]

Of course, a party may have to show the relevance of the requested documents.[60] "[A]n arbitrator can compel even one not a party to the agreement to produce books and records if such documents are shown to be pertinent, material, or necessary to any matter lawfully under consideration before him."[61] In that case, the court compelled the production of checks and bank statements from a non-party.[62] Because the non-party was the parent corporation of an arbitrating party, and was liable for the subsidiary corporation's contracts, the information was useful in determining how much the moving party would be owed.[63]

While New York courts have not definitively decided whether an arbitrator may compel discovery prior to an arbitration hearing, they have shown a willingness to do so during the hearing.[64] If a party provided a compelling reason for the necessity of a non-party to testify or produce documents, even prior to a hearing, a court may well be persuaded.

D. Uniform Arbitration Act ("UAA")

The UAA empowers arbitrators to issue document and testimony subpoenas to non-parties.[65] However, it is not always clear whether this power extends to the period before the hearing or simply to the hearing itself.[66] In Pennsylvania, a subpoena may be served on a witness "who is unable to attend the hearing."[67] This suggests that a pre-hearing appearance or document production is at least theoretically possible. The Revised Uniform Arbitration Act, adopted in over a dozen states, has a similar provision, subject to a similar interpretation.[68]

E. American Arbitration Association ("AAA")

The AAA Commercial Arbitration Rules and Mediation Procedures do not specifically provide for non-party discovery prior to an arbitration hearing.[69] Rather, three provisions give some guidance. First, Rule 21, "Exchange of Information," provides:

> (a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct
>
> i) the production of documents and other information, and
>
> ii) the identification of any witnesses to be called.
>
> (b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
>
> (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.[70]

While this provides for both document production and testimony, it is unclear as to the timing of such requests. Nevertheless, a lawyer trying to obtain discovery prior to the hearing could point to the "expedited nature of arbitration" as evidence for early compulsion.[71]

Second, Rule 31(d), "Evidence," provides that an "arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently."[72] Though this may seem sweeping, it is important to remember that courts still require a federal or state law to authorize the issuance of a subpoena.[73]

Third, in the context of large, complex commercial arbitration, the AAA Rules provide:

> At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.[74]

Here again, an arbitrator would need to cite state or federal law to order the deposition of a non-party.[75] While AAA does not have any provision precisely on point, a strong case could be made for both kinds of subpoenas prior to a hearing.

F. JAMS

JAMS gives the clearest guidance for discovery from non-parties prior to arbitration.[76] Rule 21(a) of the JAMS Comprehensive Arbitration Rules and Procedures provides that an arbitrator "may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing."[77] Of course, this relatively sweeping power is open to contestation; Rule 21(a) later provides that:

> [i]n the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who will promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence."[78]

Thus, JAMS allows both for comparatively liberal pre-hearing discovery and the speedy resolution of discovery disputes when they arise. Finally, Rule 21(b) allows any JAMS office to serve as a hearing location in order to facilitate access by a third party.[79]

III. Conclusion

Because pre-hearing, non-party discovery in arbitration varies considerably, lawyers must be aware of the relevant laws and key cases in their jurisdiction. If the arbitration is held in a private association, lawyers need to realize the differences among them. JAMS clearly authorizes both kinds of subpoenas from non-parties prior to a hearing; AAA may also.[80] In state or federal courts, however, lawyers need to pay close attention to the particular legal landscape of the jurisdiction.

Endnotes

1. *See Hilti Inc. v. Oldach*, 392 F.2d 368, 371-372 (1st Cir. 1968) (holding that a plaintiff seeking a "wide ranging scope" of discovery is not in line with arbitration); *see also Atlas Floor Covering v. Crescent House & Gardening Inc*, 333 P.2d 194, 218 (Cal. Ct. App. 1958) (holding that discovery in arbitration is limited to a standard of materiality and relevancy).
2. *Compare* 9 U.S.C.§ 7 (providing that arbitrators can summon in writing any person before them and to produce relevant documents deemed material), *with* Fed. R. Civ. P. 26(b)(1) (providing that discovery in courts can pertain to any matter not privileged, relevant to the claim, or reasonably calculated to lead to the discovery of admissible evidence, any tangible item as well as the identity and location of persons having knowledge of any discoverable matter).
3. *See Jung v. Ass'n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 153 (D.D.C. 2004) (holding that in the absence of agreement to the contrary the "FAA" defines the scope of an arbitrator's authority).
4. *See Allied-Bruce Terminix Cos. v. Dobson*, 684 So.2d 102, 104-5 (Ala. 1995) (holding that a lack of interstate activity bars the use of the FAA).
5. Nancy Lasersohn, *Arbitration Seems Appealing, but Has Myriad of Pitfalls*, N.Y. Times, Oct. 5, 1986, at 11NJ (stating that the Uniform Arbitration Act has been adopted by most states); Martin Domke, *Domke on Commercial Arbitration* § 7:2 (Aug. 2007) (stating that 49 states have adopted either the Uniform Arbitration act or Revised Uniform Arbitration Act).
6. American Arbitration Association, http://www.adr.org (last visited Oct. 8, 2007); Judicial Arbitration and Mediation Services, http://www.jamsadr.com/welcome/about.asp (last visited Oct. 8, 2007).
7. Fed. R. Civ. P. 45(b)(2) provides that a subpoena may be served anywhere within the district of the issuing court, or anywhere within 100 miles of the place of the deposition, hearing, or trial. If there is an accompanying federal statute, a court may authorize service of a subpoena in any other place following a proper application and showing of cause. *Id.*
8. 9 U.S.C. § 7.
9. *Id.*
10. *Id.*
11. *See Am. Fed'n of Television & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999) (holding that FAA's provision giving arbitrator right to compel production of documents from a third party also allows production prior to a hearing); *see also Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (D. Tenn. 1993) (holding that an arbitrator can compel production of documents prior to a hearing).
12. *See COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999) (holding that the FAA does not authorize arbitrators to order non-parties to appear at depositions, or provide documents during pretrial discovery); *see also Gresham v. Norris*, 304 F. Supp. 2d 795, 796-7 (E.D. Va. 2004) (holding that arbitrators do not have the authority to compel pretrial depositions or production of documents).
13. *See Nat'l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999).
14. *See Odjfell ASA v. Celanese AG*, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004). Though an outlier in this regard, *Odjfell* denied a subpoena *duces tecum* and a subpoena *ad testificandum* directed at a non-party. Other courts in the Southern District have compelled documents, but not depositions, from non-parties. *See* Part II.
15. *Am. Fed'n of Television & Radio Artists*, 164 F.3d at 1009.
16. *Id.*
17. *Id.* at 1010.
18. *See Stanton v. Paine Webber Jackson & Curtis, Inc.*, 685 F. Supp. 1241, 1243 (S.D. Fla. 1988) ("[T]he court finds that under the Arbitration Act, the arbitrators may order and conduct such discovery as they find necessary."); *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42, 45 (M.D. Tenn. 1993) ("The power of the panel to compel production of documents from third-parties for the purposes of a hearing implicitly authorizes the lesser power to compel such documents for arbitration purposes prior to a hearing.").
19. The Sixth Circuit specifically did "not reach the question of whether an arbitrator may subpoena a third party for a discovery deposition relating to a pending arbitration proceeding." *Am. Fed'n of Television & Radio Artists*, 164 F.3d at 1009, n.7.
20. *Sec. Life Ins. Co. of Am. v. Duncanson & Holt*, 228 F.3d 865, 870-71 (8th Cir. 2000).
21. *Id*. at 870.
22. *Id.* at 871.
23. *Id.*
24. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004) (recognizing and adopting the Fourth Circuit's plain language approach to § 7). *See also Hawaiian Elec. Indust., Inc. v. HEI Power Corp.* 2004 WL 1542254, at *5 (S.D.N.Y. Jul. 9, 2004) (recognizing "[t]he Fourth Circuit['s] reli[ance] on the plain language of 9 U.S.C. § 7").
25. *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999) (emphasis added).
26. *Id*. at 276 ("[I]n *Burton* we contemplated that a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship.").
27. *See Burton v. Bush*, 614 F.2d 389, 391 (4th Cir. 1980).
28. *COMSAT*, 190 F.3d at 276.
29. *Id*.

30. *See Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004). By solely relying on the plain language of 9 U.S.C. § 7, without allowing an exception for "special need or hardship," the Third Circuit has interpreted § 7 even more restrictively than the Fourth Circuit. *Id*.
31. *Id at* 407.
32. *Id.* at 413 (Tchertoff, J., concurring).
33. *Id.* (Tchertoff, J., concurring).
34. *Id.* (Tchertoff, J., concurring).
35. *See Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*, 430 F.3d 567, 580 (2d Cir. 2005).
36. *See, e.g., Odjfell ASA v. Celanese AG*, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004), *aff'd sub nom. Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*, 430 F.3d 567, 580 (2d Cir. 2005).
37. *Id.* at 507.
38. *See Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 73 (S.D.N.Y. 1995); *see also Procter & Gamble Co. v. Allianz Ins. Co.*, 2003 U.S. Dist. LEXIS 26025, at *4, *7 (S.D.N.Y. Dec. 2, 2003).
39. *Integrity Ins. Co.,* 885 F. Supp. at 71.
40. *Id.* at 73.
41. *Id.*
42. *Id.*
43. *See Procter & Gamble Co.* 2003 U.S. Dist. LEXIS at *7 ("Because the burden on non-parties outweighs any harm to the institution of arbitration, the Court holds that an arbitrator may *not* compel a non-party to an arbitration to submit to a deposition.") (emphasis in original). *See also Nat'l Union Fire Ins. Co. v. Marsh USA, Inc.*, 2004 U.S. Dist. LEXIS 12716, at *4 (S.D.N.Y. May 25, 2004) ("Two judges in this district have also concluded that, under 9 U.S.C. § 7, arbitrators do not have the power to issue subpoenas for the deposition testimony of non-party witnesses."); *Atmel Corp. v. LM Ericsson Telefon, AB*, 371 F. Supp. 2d 402, 403 (S.D.N.Y. 2005) ("This Court finds the thoughtful reasoning of Judge Scheindlin in *Integrity* particularly persuasive.").
44. *See Amgen, Inc. v. Kidney Ctr. of Del. County, Ltd.*, 879 F. Supp. 878, 880 (N.D. Ill. 1995); *Security Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 1999 U.S. Dist. LEXIS 23385, at *8-9 (D. Minn. Jul. 1, 1999), *aff'd, In re Security Life Ins. Co. of Am.*, 1999 U.S. Dist. LEXIS 23386 (D. Minn. Aug. 6, 1999).
45. *Amgen*, 879 F. Supp. at 880.
46. *Sec. Life Ins. Co. of Am.*, 1999 U.S. Dist. LEXIS, at *9.
47. CPLR 2302; CPLR 7505.
48. CPLR 7505.
49. CPLR 2302.
50. *See Integrity Ins. Co. v. Am. Centennial Ins. Co.*, 885 F. Supp. 69, 71 (S.D.N.Y. 1995); *see also In re Re-Anne Mfg. Corp.*, 1 Misc. 2d 717, at 720, 149 N.Y.S.2d 161, at 165 (Sup. Ct., N.Y. Co. 1955).
51. *See Integrity Ins. Co.*, 885 F. Supp. at 71; *see also In re Re-Anne Mfg. Corp.*, 1 Misc. 2d at 720, 149 N.Y.S.2d at 165.
52. *Minerals & Chemicals Philipp Corp. v. Panamerican Commodities*, 15 A.D.2d 432, 433, 224 N.Y.S.2d 763, 765 (1st Dep't 1962).
53. *Id.*
54. *Id.* at 434, 224 N.Y.S.2d at 765.
55. *Id.* at 434-35, 224 N.Y.S.2d at 766.
56. *Reuters Ltd. v. Down Jones Telerate, Inc.*, 231 A.D.2d 337, 341, 662 N.Y.S.2d 450, 453 (1st Dep't 1997).
57. *Id.*
58. *Id.* at 344, 662 N.Y.S.2d at 455.
59. *Id.* at 341, 345, 662 N.Y.S.2d at 453, 455.
60. *See id.* at 341-42, 662 N.Y.S.2d at 453; *see also Panamerican Commodities*, 15 A.D.2d at 433, 224 N.Y.S.2d at 765.
61. *In re Re-Anne Mfg. Corp.*, 1 Misc. 2d 717, 720, 149 N.Y.S.2d 161,165 (Sup. Ct., N.Y. Co. 1955).
62. *Id.* at 721, 149 N.Y.S.2d at 166.
63. *Id*.
64. *Panamerican Commodities*, 15 A.D.2d at 433, 224 N.Y.S.2d at 765; *see also In re Re-Anne Mfg. Corp.*, 1 Misc. 2d at 721, 149 N.Y.S.2d at 166; *see also Reuters Ltd.*, 231 A.D.2d at 340-341, 662 N.Y.S.2d at 453.
65. *See, e.g.*, 10 Del. C. § 5708; 42 Pa. C.S. § 7309.
66. *See, e.g., Hay Group, Inc. v. E.B.S. Acquisition Corp*., 360 F.3d 404, 406 (noting that a non-party witness may be required to bring documents to the arbitration proceeding but may not necessarily be subpoenaed solely to produce documents); *Savage v. Commercial Union Ins. Co.*, 326 Pa. Super. 204, 217 (Pa. Super. Ct. 1984).
67. 42 Pa. C.S. § 7309(b).
68. Revised Unif. Arbitration Act § 17(b) ("Upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed or is unable to attend a hearing.").
69. *See Oceanic Transp. Corp. v. Alcoa S.S. Co*., 129 F. Supp. 160, 161 (S.D.N.Y. 1954) (finding that the rights of a non-party witness were protected from the arbitrator's subpoena).
70. American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes), Amended and Effective Sept.15, 2005, R-21 Exchange on Information, http://www.adr.org/sp.asp?id=22440 (last visited Oct. 8, 2007) ("AAA Rules").
71. George H. Friedman, *The Role of Administered Arbitration*, http://www.lectlaw.com/files/adr13.htm (last visited Oct. 8, 2007) ("The AAA's rules are flexible and can be varied by mutual agreement of the parties.").
72. AAA Rules, Evidence, R-31.
73. *See, e.g., Integrity Ins. Co.*, 885 F. Supp. at 71 ("[A]n arbitrator's power over nonparties derives solely from the FAA."); *Valdes v. Swift Transp. Co.*, 292 F. Supp. 2d 524, 532 (S.D.N.Y. 2003) (noting that AAA Rules and the CPLR provide for subpoenas, and that the arbitrator therefore "would likely be empowered to compel the appearance of the out-of-state witnesses with knowledge of the events in question.").
74. AAA Rules, Management of Proceedings, L-4.
75. *See Integrity Ins. Co*., 885 F. Supp. at 71.
76. *In re Betzold*, 316 B.R. 906, 910 (Bankr. D. Ill. 2004).
77. JAMS Comprehensive Arbitration Rules and Procedures, Revised March 26, 2007, Rule 21(a), http://www.jamsadr.com/rules/comprehensive.asp. A similar provision appears in Rule 16 of the JAMS Streamlined Arbitration Rules & Procedures, http://www.jamsadr.com/rules/streamlined.asp (last visited Oct. 8, 2007).
78. *Id.*
79. *Id.*; Rule 21(b).
80. *See Stanton v. Paine Webber Jackson & Curtis, Inc.,* 685 F. Supp. 1241, 1243 (S.D. Fla. 1988) (finding that pre-hearing non-party discovery by arbitrators was not improper).

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Reaping the Rewards: Enforcing U.S. Judgments in England and Wales and Enforcing Foreign Money Judgments in New York

By James A. Normington and Jeremy A. Colby

To many lawyers, there is nothing more satisfying than the feeling of success associated with being awarded judgment in a case. There are many difficulties, however, if the litigation involves one party that is outside the jurisdiction. The initial complications of convincing a court to accept jurisdiction of the matter can be dwarfed by the difficulties of enforcing a money judgment outside the jurisdiction. This article looks at the issue in two parts. The first part examines the difficulties of enforcing a U.S. judgment in England and Wales, while the second part examines enforcing foreign money judgments in New York.

I. The English Approach to Foreign Judgments

Like the U.S., the U.K. is not one single jurisdiction. There are 3 distinct jurisdictions: England and Wales, Scotland, and Northern Ireland. Each jurisdiction has its own rules, judiciary, and appellate system. Scots law adopts the principles of Roman law, while England and Wales operate on common law principles. This article will deal only with the rules relating to England and Wales.[1]

England and Wales have a system that permits enforcement of foreign judgments. The enforcement system operates a number of gateways. Depending upon their country of origin, judgments will be enforced via different law and procedure.[2] The first gateway applies to countries who are signatories to the Brussels Regulation 2001, The Jurisdiction and Judgement Regulation,[3] and the Lugano Convention of 1998. The second gateway applies to countries that have bi-lateral agreements with the U.K. and reciprocal enforcement rights.[4] The third gateway applies to countries which have neither a bi-lateral treaty nor a convention with the U.K.; these countries are required to use the common law procedure.[5] At the present time there is no bi-lateral agreement between the U.S. and the U.K.[6] Nor is the U.S. a signatory to any of the regulations of conventions applicable to the first gateway. Consequently, U.S. judgment creditors[7] are required to rely on common law, and English courts will recognize a U.S. judgment only if it satisfies the relevant criteria.

English common law recognizes a U.S. judgment as an implied contract to pay.[8] This allows the judgment creditor to commence proceedings for judgment based upon the value of the debt. The judgment creditor will not be required to have the matter listed for trial on the issues; the matters can be brought before the courts by an application for summary judgment.

The first step is for the judgment creditor to file proceedings in the jurisdiction of England and Wales. The process involves completing a claim form and filing it with the court. The claim form will then be served on the defendant. Once served, the judgment debtor will then have the opportunity of raising any defenses. If the judgment debtor fails to file a defense, then the judgment creditor can apply for summary judgment.

A. Defenses

There are a number of defenses available to a judgment debtor, such as lack of jurisdiction, finality of the judgment, and the type of damages at issue. Although the court should give consideration to each of these factors before making its judgment, in reality the court will be led by counsel and it is the responsibility of the debtor's legal representatives to raise the relevant defense. Attorneys in the U.S. considering enforcing a U.S. judgment in England should consider any probable defense prior to issuing a claim in order to avoid the costs of litigating when there is no reasonable prospect of success.

1. Jurisdiction Defenses

In determining whether to enforce a U.S. judgment, English courts will consider whether the U.S. court had jurisdiction over the defendant under English rules pertaining to the conflict of laws.[9] Under these rules, the court will consider whether the debtor submitted or consented to the jurisdiction of the foreign court.[10] This can be demonstrated by the voluntary appearance of the debtor in the foreign court. A judgment debtor is not to be regarded as having made a voluntary submission to jurisdiction by the fact that he appeared before the foreign court to: (a) contest jurisdiction; (b) to ask the court to stay or dismiss the proceedings on the basis that the point in dispute is subject to arbitration or to determination of the courts in another country; or (c) to protect property seized or threatened with seizure in the proceedings.[11]

If the debtor, however, did not appear in the proceedings, then the English courts can infer acceptance of jurisdiction in one of three ways. First, courts can infer acceptance of jurisdiction if the debtor was present in the jurisdiction at the time of commencement of the proceedings.[12] For an individual this may be inferred by residency. A company or corporation will be deemed to be "present" within in the jurisdiction if it was trading or operating within the jurisdiction at the material time

the U.S. proceedings commenced. Second, jurisdiction can be inferred if there is an exclusive jurisdiction clause in writing between the parties. Such a provision will be upheld by the English Courts, a position summarized by the Court of Appeal:

> The parties here have quite deliberately chosen that their dispute shall be decided in the Courts of this country, and it would need strong grounds in my view to deprive either party who sought to take advantage of that course from receiving the advantage which he expects from it.[13]

Finally, contractual clauses relating to the acceptance of service of process will also be interpreted as the judgment debtor consenting to the foreign jurisdiction, unless it can be demonstrated that there are strong reasons for an exclusive jurisdiction or service clause not to apply.[14]

Once the issue of jurisdiction is decided, English courts must then be satisfied that the judgment debtor was aware of the original proceedings.[15] The judgment creditor will be required to produce evidence that there was effective service of the original proceedings on the judgment debtor.

2. Finality

To be enforceable, the U.S. judgment must be conclusive on its merits, i.e., the U.S. court must have given a final and reasoned verdict.[16] The right to appeal a decision does not prevent a judgment from being registered, but judgments that are subject to an ongoing appeal are not capable of registration until the relevant appeal judgment has been delivered.[17] The English courts will not accept U.S. judgments that are interim awards. Equally, the original judgment must be for a defined sum or amount.[18] Obviously, there is a need for the English courts to be guided on the issue of the finality of the U.S. judgment:

> [T]he question as to what is the law of a foreign State on a particular matter is treated in our Courts as a question, not of law, but of fact. We are not entitled to look at an American report, and say on the authority of that report that the American law is so and so. It must be proved by the evidence of experts in that law.[19]

A witness statement from a suitably qualified attorney setting out the relevant law is generally required to demonstrate that the judgment is a final award. In the absence of such evidence, the English Courts will assume that the law is the same as that in England and Wales.[20]

3. Punitive Damages

The English approach to damages differs from those adopted in the U.S. courts. A small number of English cases are decided by juries[21] with most claims being decided by a judge alone.[22] Awards for general damages follow judicial guidelines[23] and as a consequence English compensatory awards are substantially lower than their U.S. equivalents.

Crucially, in England, awards for punitive damages are rare and the courts will not enforce awards for damages that are punitive or penal in nature.[24] The approach adopted by English courts follows the advice of Chief Justice Marshall, formerly of the U.S. Supreme Court: "The courts of no country execute the penal laws of another."[25]

The English courts have ruled that the prohibition on penal damages also extends to cases involving revenue suits.[26]

4. Multiplied Damages Awards

Parliament legislated against awards for multiple damages, which includes any award arrived at by a multiplication calculation, and, as a result, such awards are unenforceable in England and Wales.[27] For these purposes, U.S. judgments involving the Racketeer Influenced and Corrupt Organizations Act[28] are classified as awards for multiple damages by the English Courts.

Multiple damages per se will not preclude an entire judgment from being registered in the U.K. Only the identifiable part of the award that is based on the multiplier calculation will be unenforceable.[29] A judgment that involves a multiple damages element must identify the multiplied amount. An English court will then be able to deduct the multiple damages amount from the remainder of judgment and enter summary judgment for the non-multiplied sum.[30] Only when it is impossible to identify the exact amount of multiple damages will the entire judgment be unenforceable.

5. Other Defenses

In addition to the defenses set out above, the debtor can also raise a number of generic defenses.[31] It will be a defense if the debtor can demonstrate that the judgment was obtained by fraud,[32] either on the part of the creditor or the foreign court.[33] A debtor may also argue that it would be contrary to public policy to register and enforce the judgment in the U.K.[34] Finally, a judgment debtor may plead that the original proceedings were contrary to the rules of natural or substantive justice.[35]

6. Statutes of Limitations

Because England treats U.S. judgments as contractual obligations, there is a time limit for commencing proceed-

ings.[36] The English element of the proceedings must be initiated within six years of the original judgment. However, if there is a shorter time limit prescribed by U.S. law, then the shorter of the two time limits will apply. Once the six-year time period has elapsed, any claim to the interest accruing on the judgment debt is also barred.[37] There are exceptions to the six-year rule and the advice of an English barrister should be sought at the earliest opportunity if it appears that the judgment falls outside the six-year limitation period.[38]

B. Procedural Considerations

Attorneys in the U.S. should note that there are two levels of court in England and Wales. The County Court is the appropriate setting for claims up to £15,000 while the High Court is suitable for debts in excess of £15,000. It is often thought that the High Court exists only in London, which is untrue. The High Court has District Registries throughout England and Wales.

English legal proceedings in relation to a U.S. judgment can be brought in any of the High Court District Registries.[39] The obvious advantage to not registering a foreign judgment in London is cost. As with most capital cities, it is more expensive to do business in London; this is equally true when it comes to pursuing legal actions. Unlike in U.S. jurisdictions, solicitors (the equivalent of an attorney) do not have automatic rights of audience in the High Court,[40] and the services of a barrister will be required in addition to retaining the services of an English solicitor. Once again costs may be reduced by utilizing solicitors and barristers outside the greater London area.

C. Summary

In brief, U.S. attorneys considering whether or not to enforce a U.S. judgment in England should contemplate the following issues:

1. Ensure that the U.S. Court had jurisdiction under the English definition of conflict of laws rule.
2. Ensure the judgment is not one for multiplied damages. If the judgment contains an element involving a multiplier calculation, then ensure that the judgment states the exact proportion attributable to the multiple damages.
3. Ensure that English proceedings are commenced within six years of the original judgment.
4. Ensure that the judgment is accompanied by evidence from a suitably qualified attorney that the U.S. court that granted the judgment is final.
5. Retain the services of an English solicitor and barrister; consider using firms and chambers outside of London.

II. Enforcing Foreign Money Judgments in New York

This part of the article looks at the flip side of the coin—enforcing foreign money judgments in New York State. American businesses are increasingly looking abroad for new markets and partnerships. This trend is facilitated by the Internet, which makes international opportunities available to small and mid-size businesses. With expanded international commerce, however, comes increased likelihood of litigation.[41] This section examines actions seeking to enforce foreign money judgments and arbitration awards. Although it is easier to register judgments from sister states under CPLR Article 54, New York Courts are relatively deferential in enforcing foreign awards under CPLR Article 53.

A. Foreign Money Judgments

Foreign money judgments ("FMJs")[42] must be "recognized" or converted into a New York judgment in order to be enforced in New York. FMJs obtained in a foreign country with "sound procedures" (i.e., impartial tribunals and regular proceedings providing due process) will be enforced in New York State and federal courts *unless*: (1) the foreign court lacked personal or subject matter jurisdiction; (2) the FMJ was fraudulently obtained; or (3) enforcement of the FMJ would offend New York public policy.[43]

It is a risky strategy to default in a foreign lawsuit and seek to defend the enforcement action on the ground that the foreign court lacked personal jurisdiction. If the American court finds that personal jurisdiction exists, the party will have waived any legal or factual errors by the foreign court and cannot collaterally challenge the FMJ.[44]

1. "Sound Procedures": FMJs from countries with fair and impartial judicial systems will receive great deference. Not surprisingly, common law jurisdictions (like Canada or England) receive the greatest deference and procedural differences will not render an FMJ unenforceable.[45] New York courts evaluate the soundness of the legal *system* from which the FMJ originates, not the procedure employed in a particular case.[46]

2. Personal Jurisdiction: Personal jurisdiction to support an FMJ exists where the defendant: (1) was personally served in the foreign state; (2) voluntarily appeared in the foreign proceedings (except in an *in rem* action);[47] (3) agreed to submit to the jurisdiction of the foreign court with respect to the subject matter of the action; (4) was domiciled in the foreign state when the foreign action was initiated or, for corporate defendants, has a principal place of business or otherwise acquired corporate status in the foreign state; (5) maintains a business office on the foreign state and the foreign action arises out of business done by that office; (6) operated a vehicle in the foreign

state related to the foreign action; or (7) had "other bases" recognized by New York courts.[48] The final catch-all provision is very broad and includes any jurisdictional basis recognized by New York courts.[49] In light of CPLR 5305(b), New York courts liberally construe the personal jurisdiction provisions in favor of enforcement.[50] For example, in *Solomon Ltd. v. Biederman & Co.*, the First Department affirmed summary judgment enforcing a U.K. default judgment where the defendant engaged in written and verbal communications with the English party and the defendant's agent met with the plaintiff for one hour in London.[51] Physical presence in the foreign jurisdiction, however, is *not* necessary for a finding of personal jurisdiction.[52]

Enforcement of an FMJ in New York does not require that the judgment debtor be subject to personal jurisdiction in New York.[53] This is the case because enforcement of the FMJ is a ministerial function and because enforcement is *in rem* (*i.e.*, against property located in New York) rather than *in personam*.

3. Fraud: The fraud exception requires fraud on the foreign court, not the alleged fraud in the underlying transaction upon which the foreign proceeding is based.[54] A "clear showing" of fraud is required to avoid an FMJ.[55]

4. Public Policy: The public policy exception to the enforcement of FMJs is narrow and infrequently satisfied.[56] It is only satisfied where an FMJ "undermine[s] the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property."[57]

5. CPLR Article 53: The United States is not a party to any convention relating to the enforcement of foreign judgments.[58] New York, however, enacted the Uniform Foreign Money-Judgments Recognition Act to improve the reciprocal treatment given to New Yorkers involved in foreign litigation.[59] This Act is codified in Article 53 of the CPLR governing the enforcement of FMJs—and New York law governs FMJ enforcement actions in federal court.[60] FMJs are enforceable by an action on the judgment, a motion for summary judgment in lieu of a complaint, or in a pending action (by way of counterclaim etc.).[61]

CPLR 5304(a) contains two mandatory conditions for enforcement of an FMJ, for which a judgment creditor bears the burden of proof.[62] An FMJ will not be recognized if (1) the foreign country lacks impartial tribunals or procedures compatible with due process requirements; or (2) the foreign court lacked personal jurisdiction.[63]

CPLR 5304(b) contains seven discretionary grounds for non-recognition of an FMJ—for which a judgment debtor bears the burden of proof.[64] An FMJ need not be recognized where: (1) the foreign court lacked subject matter jurisdiction; (2) the defendant lacked sufficient notice of the foreign proceeding; (3) the FMJ was obtained by fraud; (4) the cause of action upon which the FMJ was based is repugnant to New York public policy; (5) the FMJ conflicts with another final and conclusive judgment; (6) the FMJ was contrary to an agreement to the parties to resolve the dispute outside the judicial process (i.e., contrary to an arbitration agreement); and (7) where personal jurisdiction is based only on personal service, the foreign court was a "seriously inconvenient forum."[65] Parties opposing FMJs may also seek to stay enforcement where the *possibility* of appeal remains in the foreign jurisdiction.[66] Although FMJs will not be rubber-stamped by New York courts, defenses to the underlying claim are not available.[67] An FMJ reduced to a New York judgment will be enforced in dollars rather than the currency of the underlying FMJ because New York follows the breach-day rule.[68]

B. Foreign Arbitration Awards

Foreign arbitration awards may be enforced in the United States under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("the New York Convention"), which was implemented by 9 U.S.C. §§ 201 *et seq.* A party may seek confirmation in a district court within three years after a foreign arbitration award is made.[69] Grounds for denying confirmation are limited to defenses enumerated in Article V of the New York Convention.[70] For example, the defense that the panel exceeded its powers set forth in the Federal Arbitration Act is not a defense under Article V of the New York Convention.[71] Article V's defenses are: (1) incapacity or invalidity of the arbitration agreement; (2) the party opposing enforcement lacked sufficient notice of the appointment of the arbitrator or of the arbitration proceedings; (3) the award exceeds the scope of the arbitration agreement; (4) "composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement"; (5) the award is not yet binding or has been set aside or suspended by a competent authority of the country from which the award was made; (6) the subject matter is not capable of settlement by arbitration; or (7) "recognition or enforcement of the award would be contrary to the public policy of the country in which enforcement or recognition is sought."[72] The public policy defense to an arbitral award "applies only where enforcement would violate the forum state's most basic notions of morality and justice"—and "violation of United States foreign policy does not contravene public policy" within the meaning of Article V of the New York Convention.[73]

The process for recognition and enforcement under the Convention is similar to the registration of a sister-state judgment under 28 U.S.C. § 1963. Indeed, the "confirmation of an arbitration award is characterized as a summary proceeding that merely makes what is already a final arbitration award a judgment of the court."[74] In other words, the "showing required to avoid summary conformance is high."[75]

Foreign arbitral awards may be enforced in New York under the New York Convention or may be reduced to a foreign judgment and enforced as an FMJ under CPLR Article 53 as discussed above.[76] New York arbitral awards may either be confirmed in New York or may be enforced in a foreign jurisdiction under the New York Convention.[77]

A party may also seek to stay enforcement of an award in favor of a proceeding pending in the country where the award originated. Courts facing stay requests will consider the following factors: (1) expeditious dispute resolution and avoiding costly litigation; (2) status of foreign proceeding and estimated time until such proceeding is resolved; (3) whether award would receive greater scrutiny in foreign proceedings under a less deferential standard of review; (4) the characteristics of the foreign proceeding (including whether the proceeding was brought to stay or enforce the award and the timing of the initiation of the foreign proceeding); (5) the balance of hardships; and (6) "other circumstances that could tend to shift the balance in favor of or against adjournment."[78] Stay decisions will be reviewed under an abuse of discretion standard.[79] Nonetheless, stays should not be lightly granted—even where an appeal is pending in the foreign jurisdiction seeking to set aside the arbitral award.[80]

III. Conclusion

With the benefits of increased international commerce and Internet activity comes the potential peril of being hailed into a foreign court. Consequently, businesses large and small should seek legal advice concerning options for minimizing the chances of foreign litigation. For example, contracts specifying venue and the governing law are two obvious first steps. Structuring business transactions in a way that minimizes the likelihood of foreign litigation, if possible, may also be an option depending on the nature of the business and the creativity of one's attorney. Alternatively, if foreign litigation is not avoidable, there may be options for selecting a forum or in seeking recognition of a foreign defense verdict in New York.[81]

Endnotes

1. References in this article to "England" or "English" apply equally to the courts in Wales over which the English courts have jurisdiction.
2. *Enforcement of Foreign Judgements*, Blackstone's Civil Practice (William Rose et al. eds., Oxford University Press 2006).
3. Council Regulation (EC) No.44/2001.
4. Incorporating countries are covered by the Administration of Justice Act 1920 (U.K.), or The Foreign Judgements (Reciprocal Enforcement) Act 1933 (U.K.).
5. *Enforcement of Foreign Judgements*, Blackstone's Civil Practice (William Rose et al. eds., Oxford University Press 2006).
6. *Enforcement of Judgments*, United States Dep't of State, http://travel.state.gov/law/info/judicial/judicial_691.html.
7. This is the term applied to parties seeking the enforcement of a foreign judgment by the U.K. Civil Procedure Rules. Civil Procedure Rules, 2006, CCR Order 25, Rule 1 (U.K.). The parties who have had judgment against them are known as the judgment debtors. *Id.* For the purposes of this article the judgment creditor and the judgment debtor will be referred to as the creditor and the debtor respectively.
8. *Grant v. Easton*, (1883) 13 Q.B.D. 302 (U.K.).
9. *Sirdar Gurdyal Singh v. Radjah of Faridkote*, [1894] A.C 470 (P.C. 1894) (appeal taken from Punjaub).
10. *Harris v. Taylor*, [1915] 2 K.B. 580 (U.K.).
11. Civil Jurisdiction & Judgements Act, 1982, ch. 27, § 33 (U.K.).
12. *Adams v. Cape Industries plc*, [1990] ch. 433 (U.K.).
13. *Unterweser Reederei GmbH v. Zapata Off-Shoe Company: The Chaparral*, [1968] 2 Lloyd's Rep 158, 164 (Widgery LJ) (U.K.).
14. *Import Export Metro Ltd v. Compania Sud Americana De Vapores SA*, [2003] EWHC 11 (Comm) (U.K.).
15. G. Solomons, *Enforcement of Foreign Judgments: Jurisdiction of Foreign Court*, *The International and Comparative Law Quarterly*, 25 Int. Comp. Law. Q. 665 (July 1976).
16. *Harrop v. Harrop*, [1920] 3 K.B. 586 (U.K.).
17. Civil Procedure Rules, 2006, Rule 74 (U.K.).
18. *Beatty v. Beatty*, [1924] 1 K.B. 807, 816 ("No doubt for a judgment to be final it must be for a certain sum." Scrunton LJ) (U.K.).
19. *Id*. at 815.
20. *Id*.
21. Juries are still used in cases in actions relating to defamation.
22. http://www.jsboard.co.uk/publications/pdfs/2%20_jurisdiction.pdf.
23. Guidelines for the Assessment of General Damages in Personal Injury Cases (OUP, September 2006).
24. *United States of America v. Inkley*, [1989] Q.B. 255 (C.A.) (U.K.).
25. *The Antelope*, 10 Wheat. 66, 123 (1825).
26. *Re State of Norway's Application* (Nos. 1 and 2) [1990] 1 A.C. 723 (U.K.).
27. Protection of Trading Interests Act, 1980, § 5(1) (prohibiting registration of awards that are arrived at by a multiplication calculation).
28. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*
29. *Lewis v. Eliades*, [2003] EWCA Civ 1758 (U.K).
30. *Id*. at 1762.
31. These defenses are generic in that they are not specific to this type of litigation and are available to any defendant before the English Courts.
32. *Owens Bank Ltd v. Fulvio Bracco*, (1992) 2 A.C. 443 (U.K.).
33. *Jet Holdings Inc v. Patel*, [1990] 1 Q.B. 335 (U.K.).
34. *Solimany v. Solimany*, [1999] Q.B. 785 (U.K.).
35. *Adams v. Cape Industries plc*, [1990] Ch. 433 (U.K.).
36. Limitation Act, 1980, ch. 58, § 5.
37. *Elder v. Northcott*, [1930] 2 ch. 422 (U.K.).
38. Limitation Act, 1980, ch. 58, § 33.
39. Civil Procedure Rules r. 74.3(2).
40. Higher Courts Qualification Regulations 2000.
41. Jeremy A. Colby, *The Modern Trend Towards Universal Electronic Service of Process*, 51 Buff. L. Rev. 337, 345 (2003) (discussing expanding scope of inter-jurisdictional contacts resulting from

e-commerce and service of process abroad for litigation in New York and U.S. federal courts).

42. Money judgments are judgments for a sum of money "other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters." Civil Practice Law & Rules 5301(b) (CPLR). New York courts, however, also extend the same policy of liberal recognition and enforcement to foreign declaratory judgments. *Koehler v. Bank of Bermuda, Ltd.*, No. M18-302(CSH), 2004 WL 444101, at *10 (S.D.N.Y. Mar. 10, 2004).

43. *Ackerman v. Levine*, 788 F.2d 830, 837-38, 842 n.12 (2d Cir. 1986) (citing, *inter alia*, *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381 (1926)).

44. *Id*. at 842 (enforcing West German default judgment); *see Koehler*, 2004 WL 444101, at *10.

45. *Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*, 899 F. Supp. 1248, 1252 (S.D.N.Y. 1995).

46. *The Soc'y of Lloyd's v. Edelman*, No. 03 Civ. 4921(WHP), 2005 WL 639412, at *4 (S.D.N.Y. Mar. 21, 2005).

47. *Nippon Emo-Trans Co. Ltd. v. Emo-Trans, Inc.*, 744 F. Supp. 1215, 1225 (E.D.N.Y. 1990).

48. CPLR 5305.

49. *Koehler*, 2004 WL 444101, at *9.

50. *Id*. (citing *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 221, 762 N.Y.S.2d 5, 9 (2003)).

51. *Solomon Ltd. v. Biederman & Co.*, 177 A.D.2d 350, 350, 576 N.Y.S.2d, 118, 118 (1st Dep't 1991).

52. *Wimmer Canada, Inc. v. Abele Tractor & Equip. Co.*, 299 A.D.2d 47, 49-51, 750 N.Y.S.2d 331, 333-336 (3d Dep't 2002) (finding personal jurisdiction in Canada under CPLR 5305(b), despite lack of physical presence, because defendant maintained an ongoing relationship, including two lines of credit, with Canadian manufacturer and there is a direct nexus between the business relationship and the FMJ).

53. *Lenchyshyn v. Pelko Elec.*, 281 A.D.2d 42, 49-50, 723 N.Y.S.2d 285, 292, 293 (4th Dep't 2001).

54. Koehler, 2004 WL 444101, at *15.

55. *Canadian Imperial Bank of Commerce*, 899 F. Supp. at 1254.

56. *Ackerman*, 788 F.2d at 841.

57. *Id*.

58. *Attorney General of Canada v. Gorman*, 2 Misc. 3d 693, 695, 769 N.Y.S.2d 369, 370-71 (Civ. Ct., Queens Co.); *see* U.S. Department of State website, http://travel.state.gov/law/info/judicial/judicial_691.html (last visited Oct. 9, 2007) (discussing the current state of the law concerning enforcement of foreign judgments); *see also* U.S. Department of State website, http://www.state.gov/s/l/c3452.htm (last visited Oct. 9, 2007) (same). A Hague Convention on jurisdiction and enforcement of foreign judgments, however, is currently being debated. *See* Hague Conference on Private International Law website, http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (last visited Oct. 9, 2007) (setting forth the proposed Convention); CPtech's Page on the Hague Conference on Private International Law's Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, http://www.cptech.org/ecom/jurisdiction/hague.html (last visited on Oct. 9, 2007) (discussing the Hague Conference on Private International Law's Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters); CBI Business Summary-Hague Convention on Jurisdiction and Enforcement of Foreign Judgments, http://www.cbi.org.uk/ndbs/cbi_bss.nsf/8dee44d616d5b99280256c5b004f042a/80256fa500620dde80256c930063fcde?OpenDocument (last visited on Oct. 9, 2007) (discussing the Hague Conference and the hope that the United States would become a signatory).

59. *See* CPLR art. 53, note (2007); *Koehler*, 2004 WL 444101, at *10. It is debatable, however, that this goal has been realized because many jurisdictions, including England, are reluctant to enforce American judgments because of opposition to punitive damage awards and purportedly inflated judgments stemming from jury trials.

60. *Canadian Imperial Bank of Commerce*, 899 F. Supp. at 1252 (citing *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195, 204 (2d Cir. 1987)).

61. CPLR 5303.

62. *Wimmer Canada*, 299 A.D.2d at 49, 750 N.Y.S.2d at 332; *Attorney General of Canada*, 2 Misc. 3d at 699-702, 769 N.Y.S.2d at 373-375.

63. CPLR 5304(a).

64. *Attorney General of Canada*, 2 Misc. 3d at 697, 769 N.Y.S.2d at 371.

65. CPLR 5304(b); *Wimmer Canada*, 299 A.D.2d at 49, 750 N.Y.S.2d at 332 (noting that the "seriously inconvenient forum" exception would generally not be invoked unless an analogous case would be dismissed under New York law under the doctrine of *forum non conveniens*).

66. CPLR 5306.

67. *Attorney General of Canada*, 2 Misc. 3d at 701, 769 N.Y.S.2d at 375 (quoting Professor Siegel's point that Article 53 is unlike Article 54, governing the recording of judgments from sister states, inasmuch as Article 53 requires a motion/action to convert a foreign judgment into a New York judgment as opposed to the simple act of recording the sister state's judgment in a county clerk's office).

68. *Competex, S.A. v. Labow*, 783 F.2d 333, 341 (2d Cir. 1986).

69. 9 U.S.C. § 207.

70. *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 313 (2d Cir. 1998).

71. *Encyclopedia Universalis S.A. v. Encyclopedia Britannica, Inc.*, 403 F.3d 85, 91-92 (2d Cir. 2005).

72. *Alcatel Space, S.A. v. Loral Space & Commc'ns Ltd.*, No. 02 Civ. 2675(SAS), 2002 WL 1391819, at *4 n.4 (S.D.N.Y. June 25, 2002).

73. *MGM Prods. Group, Inc. v. Aeroflot Russian Airlines*, No. 03 Civ. 0500(RMB), 2003 WL 21108367, at *4 (S.D.N.Y. May 14, 2003) (citation and internal quotation marks omitted); *see also Karen Maritime Ltd. v. Omar Int'l Inc.*, 322 F. Supp. 2d 224, 226 (E.D.N.Y. 2004) (citing cases declining to apply public policy exception).

74. *MGM Prods. Group, Inc.*, 2003 WL 21108367, at *2.

75. *Encyclopedia Universalis*, 403 F.3d at 90 (denying confirmation where arbitration panel was improperly constituted).

76. *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 769 F. Supp. 514, 517 (S.D.N.Y. 1991).

77. *Id.*

78. *Europcar Italia*, 156 F.3d at 317-18.

79. *Id.* at 317.

80. *MGM Prods. Group, Inc.*, 2003 WL 21108367, at *5.

81. *See, e.g., Byblos Bank Europe, S.A. v. Syrketi*, 12 Misc. 3d 792, 794, 819 N.Y.S.2d 412, 414 (Sup. Ct., N.Y. Co. 2006).

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Sovereign Terrorist? Applying the FSIA to Cases of International Terrorism

By Matthew Thomas

I. Background

On September 11, 2001 ("9/11"), nineteen members of the al Qaeda terror network attacked the United States. They hijacked four commercial airliners and used them to destroy the World Trade Center in New York City and severely damage the Pentagon in Washington, D.C.[1] The destruction took over three thousand lives and caused many billions of dollars in property damage.[2] Following this attack, thousands of survivors, the estates of those killed, and insurance carriers brought suit against over two hundred individuals and organizations alleged to have supported the al Qaeda terror network.[3] The Multidistrict Litigation Panel brought six cases[4] arising out of the attacks together into the Southern District of New York under 28 U.S.C. § 407.[5]

The Honorable Richard Conway Casey issued two opinions, one on January 18, 2005 ("*Terrorist Attacks I*"),[6] and a second on September 21, 2005 ("*Terrorist Attacks II*") (collectively the "*Terrorist Attacks* cases"),[7] wherein he decided numerous motions to dismiss. While filed separately, each motion to dismiss was based either upon application of the Foreign Sovereign Immunity Act (the "FSIA"),[8] lack of personal jurisdiction, or failure to state a claim.[9] In deciding these motions, the district court did not fully examine the FSIA and its application to the defendants.[10]

Three of the defendants dismissed in *Terrorist Attacks* cases provide excellent examples of the confusion surrounding the application of the FSIA to individuals suspected of providing support to terrorists. The dismissal in *Terrorist Attacks I* of Prince Sultan and Prince Turki (the "Prince Defendants") shows how the District Court has not examined the whole scope of the FSIA as it applies to individuals, while the dismissal of the Saudi High Council (SHC) in *Terrorist Attacks II* exemplifies how an organization erroneously receives immunity merely because of its close ties with a sovereign. In both of these cases, the District Court did not give proper deference to the claims made by the plaintiffs, which resulted in the dismissal of these defendants.

This article will review the decisions in the *Terrorist Attacks* cases and then provide an overview of the key provisions of the FSIA and the Antiterrorism Act.

A. Prince Sultan and Prince Turki

In *Terrorist Attacks I*, the Southern District granted immunity to Prince Sultan and Prince Turki, two members of the Saudi government, and other members[11] of the royal family.[12]

Prince Sultan holds the third highest position in the Saudi government as the Minister of Defense and Aviation and the Inspector General of the Armed Forces.[13] Additionally, he is the Chairman of the Supreme Council of Islamic Affairs (the "Supreme Council"), where he controls Saudi Islamic policy.[14] The plaintiffs asserted that the Supreme Council controls the Saudi government's philanthropy, a position which the Prince refutes.[15] Furthermore, the plaintiffs asserted that Prince Sultan met with Osama bin Laden in 1990.[16] Principally of note for the purposes of this discussion are Prince Sultan's personal donations, made over the last twelve years, in an amount in excess of $6 million to Islamic charities.[17] These charities included the International Islamic Relief Organization (IIRO), al Haramain, the Muslim World League (MWL), and the World Assembly of Muslim Youth (WAMY).[18] The plaintiffs claimed that these organizations provided material support to terrorist groups, including al Qaeda, and also named them as defendants in the consolidated actions.[19]

Prince Turki served as the Director General of the Saudi General Intelligence Directorate (GID) and subsequently as the Saudi Ambassador to the United Kingdom and the Republic of Ireland.[20] Plaintiffs asserted that Prince Turki, while serving as Director General of the GID, met with bin Laden five times.[21] Moreover, Prince Turki is alleged to have maintained close connections to Muhamed Galeb Kalaje Zouaydi, an al Qaeda financier.[22] The plaintiffs further claimed that Prince Turki met with the Afghani Taliban for the purpose of securing a deal for mutual protection between bin Laden and the Saudi royal family.[23] Specifically, the plaintiffs asserted that Prince Turki "facilitated money transfers from wealthy Saudis to the Taliban and al Qaeda," and that, under his order, the GID trained an al Qaeda operative and assisted "two of the September 11 hijackers."[24] Prince Turki is also alleged to have personally and willingly donated to numerous charities that allegedly financed al Qaeda, including IIRO, MWL, WAMY, SHC, Saudi Joint Relief Committee for Kosovo and Chechnya (SJRC), and al Haramain.[25]

In response to the complaint, Prince Turki issued a declaration in which he denied supporting both al Qaeda and bin Laden.[26] The Prince insisted that the meeting he had with the Taliban, al Qaeda, and bin Laden was solely connected to counterterrorism activities he was conducting on behalf of the Saudi government.[27]

In considering the motions of Prince Sultan and Prince Turki, the district court focused on their roles as agents of the Saudi government.[28] The court considered persuasive authority from a number of recent court decisions that

concluded that FSIA immunity covered individuals acting within their role as foreign government officials, and found that sovereign immunity under the FSIA might apply to the Princes "to the extent their alleged actions were performed in their official capacities."[29] The plaintiffs relied primarily on *Dole Food Co. v. Patrickson*[30] to counter the Prince Defendants' assertions of their sovereign instrumentality status under the FSIA.[31] The district court rejected this argument, as the Supreme Court in *Dole* did not focus on individuals covered by the FSIA.[32]

The district court began to explore the exceptions to the FSIA as they may have applied to the Prince Defendants.[33] The court found that the commercial activity exception did not include charitable giving.[34] The plaintiffs' primary contention was that donations to these charities amounted to money laundering, which the Second Circuit considers to be a "commercial activity."[35] However, the Second Circuit has said that the FSIA requires a commercial activity to be a lawful act.[36] The district court reasoned that money laundering is illegal, and, therefore, cannot be a "commercial activity" under New York law and the FSIA.[37] This was the extent of the court's analysis of the commercial activity exception to the FSIA.[38]

The district court primarily discussed the "exception to the exception" of the FSIA that allows for tortious acts resulting from discretionary conduct of a sovereign to retain immunity.[39] The court defined "discretionary acts" as decisions "grounded in social, economic, and political policy."[40] The court also contrasted the rule governing the relevance of the location of the tort as proffered by the District of Columbia in *Burnett v. Al Baraka Investment and Development Corporation*, where the location of the tort is secondary to the location of the injury,[41] with the rule used in the Second Circuit that the tort must occur within the United States.[42] The plaintiffs conceded that the tortious acts did not occur within the United States.

Briefly, the court considered the Anti-Terrorism Act (the "ATA")[43] and the state-sponsored terrorism exception to the FSIA, stating that there existed a separation of powers issue concerning the discretion of the executive branch to identify a sovereign as a terrorist.[44] As Saudi Arabia is not listed by the State Department as a state sponsor of terrorism, the court explains, it cannot lose immunity under the FSIA.[45]

Specifically looking to the case presented by the Prince Defendants, the court found that there was no tortious activity to exempt them from immunity.[46] The plaintiffs argued that the Prince Defendants "knew or should have known" that their contributions to charitable organizations would support al Qaeda.[47] The court focused on a conspiracy argument, stating that the Prince Defendants did not aid and abet sufficiently under New York law for there to be a conspiracy to commit a tortious act within the United States.[48] The court also found that the plaintiffs' theory of causation stretched too thin to directly connect the Prince Defendants with the plaintiffs' injuries.[49]

The court drew an analogy between the plaintiffs' claims and the case of *Halberstam v. Welch*.[50] In *Halberstam*, the United States Court of Appeals for the District of Columbia found a woman jointly liable for a homicide committed during a burglary even though she was neither a physical participant during the acts nor even present at the scene when the crimes were committed.[51] The court reasoned that because the woman lived with the man who committed the crimes during a period of time where he committed a number of burglaries, and also assisted in the accounting activities and secrecy of his criminal enterprise, her actions and resulting relationship with the man were sufficient for an extension of joint liability.[52] However, in *Terrorist Attacks I*, the United States District Court for the Southern District of New York found that the plaintiffs' evidence was insufficient to prove that the defendants had enough knowledge of the al Qaeda connection to hold them similarly liable.[53] The plaintiffs offered into evidence facts that they believed linked the defendants with the events of 9/11.[54] The court found this evidence insufficient to make such a connection.[55] The plaintiffs further argued that the defendants should have known to whom their money was going and for what purpose after the broadcast of bin Laden's and al Qaeda's public statements, which clearly showed a severe animus toward the United States.[56] The court found that the plaintiffs did not draw a strong enough link between the Prince Defendants' acts and the acts of al Qaeda, stating, "They have not, however, pleaded facts to support an inference that the Princes were sufficiently close to the terrorists' illegal activities to satisfy *Halberstam* or New York law."[57] The court thus granted the Prince Defendants' motions to dismiss for lack of subject matter jurisdiction under the FSIA.[58]

B. The Saudi High Commission

In *Terrorist Attacks II*, the district court dismissed the claims against the SHC, an organization closely tied to the Saudi government.[59] The SHC was created in 1993 by decree of King Fahad bin Abdulaziz al-Saud to provide aid to Muslims living in Bosnia.[60]

The plaintiffs asserted that the SHC was diverting funds away from foreign aid toward terrorist groups.[61] In support of their argument, the plaintiffs pointed to accounting irregularities in the amount of $41 million.[62] Bosnian aid associations insisted that money earmarked for them by the SHC following the fall of Srebrenica in 1995 never reached Bosnia.[63] Since 9/11, the Bosnian government has investigated the SHC for its ties to terrorist organizations and spreading of radical Islam in Bosnia.[64] Additionally, the plaintiffs alleged that the SHC provides cover for al Qaeda operatives to enter Bosnia and also offered evidence that several SHC workers have been arrested for plotting a terrorist attack against an embassy

of the United States.[65] The plaintiffs further alleged that during a U.S. military raid on the SHC headquarters in Sarajevo in October of 2001, certain documents were discovered relating to the 9/11 attacks as well as attacks against the U.S. embassies in Kenya, Tanzania and the *U.S.S. Cole*.[66] Furthermore, significant evidence was recovered of another planned attack against the United States, including delivery system information, false identification, and maps of potential targets.[67] The plaintiffs stated that this was sufficient evidence that the SHC is a logistical element of al Qaeda.[68]

The district court, however, never reached the merits of the SHC's liability.[69] The court first addressed whether SHC was an element of a foreign sovereign and, thus, eligible for immunity under the FSIA.[70] The SHC stated that it was an organ of the Saudi government used to provide humanitarian relief to Muslims.[71] The defendants argued that SHC was the vessel through which the Saudi government made donations in Bosnia-Herzegovina.[72] As such, the head of SHC's European office enjoyed diplomatic immunity.[73] According to statements made by a Minister of State on the Council of Ministers in the Kingdom of Saudi Arabia, the SHC was chaired by a government official and distributed funds according to the policy of the Saudi Arabian government.[74] The Minister contrasted this structure with that of Saudi private charities, which receive government approval and disperse funds in accordance with their own charters.[75] The plaintiffs stated that the SHC represented itself as non-governmental while operating in Bosnia and that even if the SHC were an organ of the Saudi government, these representations constituted an implicit waiver of immunity.[76] However, the plaintiffs' argument failed when the court relied on Second Circuit precedent, which requires a "clear and unambiguous" waiver of immunity, which the SHC clearly did not offer here.[77] Examining the evidence regarding the creation and management of SHC, the district court found it to be an organ of the Saudi government and eligible for immunity under the FSIA.[78]

The only exception to the FSIA that the district court examined with regards to SHC was the torts exception.[79] This discussion focused on whether SHC acted in a discretionary role for the Saudi government.[80] The district court found that the dispersal of charitable funds by the Saudi government was a discretionary act.[81] As such, the "exception to the exception" applies, and SHC enjoys immunity from suit under the FSIA.[82]

II. The Applicable Law

The *Terrorist Attacks* cases specifically address the FSIA as a method of asserting subject matter jurisdiction over defendants connected to a sovereign.[83] The FSIA is an incredibly complex statute intended to address the extent to which a foreign sovereign nation may be sued in United States courts. It is not, however, the only statute relevant to the plaintiffs' claims.[84] The ATA provides causes of actions arising out of terrorist conduct, as well as policy concerns that must be addressed with any such case.[85] A proper analysis of any claim involving terrorism and a foreign sovereign should address both of these statutes.

A. The Standard of Review

District courts are tasked with analyzing additional facts, including affidavits and other evidence, when determining a jurisdictional question under the FSIA.[86] As was stated by the Circuit for the District of Columbia in *Phoenix Consulting, Inc. v. Republic of Angola*, "[T]he court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon a motion to dismiss."[87] This examination is necessary because of the overlap often inherent between a motion to dismiss on jurisdictional grounds and the facts of the allegations.[88]

A foreign sovereign must present a *prima facie* case that it qualifies as such.[89] While the evidence produced by the sovereign is given great weight, the plaintiff is given an additional opportunity to show that the defendant is excluded from immunity under one of the exceptions included in the FSIA.[90] It is ultimately up to the foreign sovereign to demonstrate why immunity under the FSIA should apply, or, alternatively, why one of the exceptions should not apply.[91] In determining an entity's sovereign status, investigation of the nature of the alleged acts in question must be focused on the nature of the actions, not on any possible motive existing behind those actions.[92] The purpose of this rule is to promote principles of equality and justice when addressing whether a foreign entity *deserves* immunity under the FSIA, not to promote adherence to a cold, formulaic approach.[93] Should the exceptions appear in the pleadings or should the foreign sovereign fail to refute them, the court should deny the motion.[94]

B. The Foreign Sovereign Immunity Act

Actions dealing with foreign sovereigns are legally and politically sensitive.[95] The FSIA smoothes international political tensions[96] by creating a presumption that foreign sovereigns, their organs, and their agents, are immune.[97] This presumption includes freedom from suit, not merely freedom from liability,[98] and its terms are interpreted broadly to apply to any action against a foreign state.[99] This is only a presumption, however, and may be rebutted under the two exceptions for when a foreign state engages in either tortious conduct or commercial activity.[100] In fact, it has been held that the FSIA provides reasons *not* to extend immunity rather than an overarching grant of immunity.[101]

The philosophy of absolute immunity formerly employed by the courts is no longer applicable.[102] Furthermore, there is no limitation that the United States cannot have adjudicatory jurisdiction over extraterritorial entities only when there is a substantial or foreseeable effect on

the United States.[103] However, even at the time of *Schooner Exchange v. McFaddon*,[104] it was recognized that such grants of immunity were not constitutionally ensured; they are discretionary matters of "grace and comity."[105] Congress has the power to determine what acts by foreign states are culpable in domestic federal courts,[106] and executes this power under Article I of the Constitution in its exercise of control over issues of foreign commerce.[107] This subjective standard gives American courts great latitude in obtaining jurisdiction over a foreign entity when circumstances would make it manifestly unjust to grant immunity.[108]

Under the FSIA, a foreign "sovereign" includes any "agency or instrumentality" of any "organ" of the foreign state.[109] The FSIA defines an "agency or instrumentality of a foreign state" as any entity:

> (1) that is a separate legal person, corporate or otherwise, and (2) that is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) that is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.[110]

While this presumption of immunity applies to individuals, it applies only when those individuals are acting pursuant to their official state duties.[111]

In determining whether an entity or individual is considered an "organ" of a foreign sovereign, five factors are generally considered:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.[112]

When the weight of these factors does not favor an entity, it would be contrary to the principles of the FSIA to apply immunity.[113] These principles are also limited such that an agent of the foreign state cannot recruit another agent on a lower tier of the government to act as part of that foreign state.[114] In other words, entities that are only remotely connected with the foreign state through an intermediary cannot enjoy the same immunity as the state itself.[115]

Foreign corporations, which are often the subjects of FSIA analysis, provide excellent examples for other types of entities that may be connected to the sovereign but still operate independently.[116] For a foreign corporation to be considered an instrumentality of the foreign sovereign, the sovereign must own a majority of the corporation.[117] The separation of entity and foreign sovereign can be bridged only if: (1) the government so controls the entity that the entity becomes an agent of the state or (2) maintaining the separation between entity and state would be fraudulent or unjust.[118] It is not for the United States to question the way a foreign government chooses to structure itself, as such interpretation could cause "substantial uncertainty" in international and economic relations.[119] The Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior De Cuba* adopted the rule already applied by other nations, "that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."[120]

These interpretations of the FSIA are consistent with a restrictive view of sovereign immunity. This view would include acts of a foreign sovereign in furtherance of its public objectives, but would not include the private or commercial acts done by agents of the foreign sovereign.[121] The Supreme Court has explained that under the restrictive view, "immunity is confined to suits involving the foreign sovereign's public acts."[122] This rule was adopted by the State Department through the issuance of the Tate Letter,[123] in which the State Department began weighing in on cases pending judicial determination as to whether the FSIA applies. Courts typically deferred to the Executive's position on the case as to whether or not to grant immunity.[124] This system allowed for foreign pressure on the United States to change the outcome of individual actions.[125] In instances where such pressure or input was absent, the court would decide upon immunity questions itself, making the question of immunity subject to either judicial or executive action.[126] It was to rectify these issues that Congress passed the FSIA.[127] The FSIA was modeled after the long-arm statute of the District of Columbia District Court.[128] Following this model and philosophy, the FSIA is a mechanism with which to get jurisdiction over a foreign entity, not a mechanism to prevent jurisdiction from being given.[129]

The purpose of the FSIA is to "define the jurisdiction of the United States courts in suits against foreign states"[130] and establish a method of gaining jurisdiction over those states when appropriate.[131] The FSIA is the sole grounds of gaining jurisdiction over a foreign sovereign.[132] This covers both application of subject matter jurisdiction and personal jurisdiction.[133] However, the application of the FSIA has no effect on liability itself.[134] This makes personal jurisdiction far less relevant when an entity is subject to subject matter jurisdiction under the FSIA.

Under the FSIA, there are several exceptions to the presumption of immunity.[135] The first is when a sover-

eign engages in a commercial activity.[136] Second, when a sovereign engages in tortious conduct, and that conduct is not the result of a discretionary sovereign action, immunity does not apply.[137] Immunity can also be made inapplicable by means of explicit or implicit waiver by the foreign sovereign.[138]

A final exception to the FSIA for state-sponsored terrorism was added in 1996 under the Antiterrorism and Effective Death Penalty Act (AEDPA).[139] A state officially designated as a state sponsor of terrorism enjoys no immunity for terrorism or for providing material support to terrorists.[140] The State Department identifies nations as state sponsors of terrorism based upon their use of terrorism "as a means of political expression" and their harboring of terrorists within their borders.[141] The official list of state sponsors of terrorism currently includes six nations: Cuba, Iran, Libya, North Korea, Sudan, and Syria.[142] As Saudi Arabia is not included in this list, it cannot be exempted under the state-sponsored terrorism exception.[143]

1. The Commercial Activity Exception

The purpose of the commercial exception to the FSIA is to ensure that immunity applies only to sovereign acts, and not acts that are not unique to the governing of a sovereign.[144] The FSIA explains that a "commercial activity" is "either a regular course of commercial conduct or a particular commercial transaction or act."[145] However, the statute provides no guidance as to a definition for the term "commercial."[146] Courts have applied a definition of "commercial" consistent with the restrictive view of foreign sovereign immunity at the time that the statute was enacted.[147] The term is interpreted broadly to include any commercial activity carried on by a state that has the requisite "substantial contact" with the United States.[148] Analysis of the commercial exception consists of three tiers: (1) determining the existence of a commercial transaction; (2) a "significant nexus" between the activity and the cause of action; and (3) that the activity has a substantial effect within the United States.[149]

The commercial exception under the FSIA requires the commercial conduct to have "a direct effect in the United States."[150] The Second Circuit has stated that "[a]pplying the term [direct effect on the United States] to a corporation is not simple."[151] The chain of causation between the act and the jurisdiction cannot be a "tangled causal web" which does not demonstrate the "requisite immediacy to establish jurisdiction."[152] In the Second Circuit, there must be a "significant nexus" between the alleged commercial activity and the cause of action.[153] The test is applied by asking if the commercial activity is included in the "gravamen" of the cause of action while "rejecting arguments based on different wording of the clauses of § 1605(a)(2)."[154] In other words, the district courts must determine whether the plaintiff has a valid argument favoring an exception under the FSIA, or whether plaintiff's assertion of the commercial exception is merely a "semantic ploy."[155] The primary application of the term governs instances "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it."[156] The Supreme Court elaborated in *Argentina v. Weltover*:

> Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial" activity, because private companies can similarly use sales contracts to acquire goods.[157]

The crucial question on applying the commercial exception of the FSIA to a sovereign's actions is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce [emphasis in original]."[158] As implied, motive behind an action is irrelevant to its commercial status.[159] The Supreme Court indicated that, in these analyses, the distinction between an activity's purpose and its nature must be maintained.[160]

Generally, charitable contributions are not considered commercial activities under the FSIA.[161] Examples of a foreign sovereign's engagement in economic activity include: governmental sale of a service or product; leasing of property; borrowing of money; employment or engagement of laborers, clerical staff or public relations or marketing agents; and investment in a security.[162] Still, these provide only general examples and guidelines for when the commercial activity exception may or may not apply.

2. Tort Exception to the FSIA

A defendant claiming immunity under the FSIA is subject to immunity from liability for tortious conduct only if that conduct occurred within the scope of its status as an instrumentality of the sovereign and that conduct was the result of a discretionary act.[163] Determination of the scope of this status is done through analogy to state law of *respondeat superior* for tort claims.[164] While the purpose behind the tort exception to the FSIA was to remove immunity for trivial matters, such as traffic accidents, it is applied to any torts existing within the body of tort law.[165] The statute does specify certain torts for which the exception for immunity does not apply.[166] Unfortunately, the complexity of the statute (allowing the torts to exist within the "exception to the exception" for giving immunity) makes it very difficult to determine which torts not enumerated in the statute exempt the actor from immunity.[167]

In determining whether the tort exception applies, district courts are required to identify the relevant gov-

ernment activities.[168] The district court must then address whether the actions were sufficiently tortious under state law.[169] Finally, the district court must determine whether the tortious act was "non-discretionary."[170]

At least one district court has defined discretionary functions as "acts which are performed at the 'planning level' of government, as opposed to those at the 'operational level.'"[171] The conduct is examined by its nature, not by the actor, to determine if it is a discretionary governmental function.[172]

3. Waiver of Immunity

Foreign sovereigns may also explicitly or implicitly waive immunity under the FSIA.[173] Three implicit waivers exist: (1) when a foreign state has agreed to an alternate arbitration forum, (2) when a foreign state has conceded that the law of another country governs the action, or (3) when a foreign state fails to raise sovereign immunity in a responsive pleading.[174] These waivers are interpreted narrowly, particularly when the plaintiffs allege that the defendant has impliedly waived its immunity.[175] Courts typically will not extend implicit waivers to entities not party to the relevant agreement (such as an arbitration clause).[176] The purpose behind reading such waivers this narrowly is to prevent the district courts from being flooded with litigation against foreign sovereigns.[177]

Explicit waivers must clearly show that the foreign sovereign wishes to waive its immunity from suit in the United States.[178] The waivers must be in writing that includes provisions for waiver of immunity.[179] With such a stringent requirement for implicit waivers, it is unlikely that such a waiver of immunity would successfully be argued.[180]

C. The Antiterrorism Act

The first case to address the civil remedies under the ATA was the Seventh Circuit decision *Boim v. Quranic Literacy Institute & Holy Land Foundation for Relief and Development*.[181] In *Boim*, the court addressed a definition of "involved" as it related to the charge of being "involved" with "international terrorism" under the ATA.[182] The court stated that a lack of legislative etymology for the terms "involve" and "international terrorism" leads to a conclusion that many different levels of activity might meet the statutory requirement, making it unclear precisely what is the proper rule.[183] Following the legislative history, the definition of terrorism and the cause of action arising from it is derived from the assertion of claims over terrorism on the high seas via application of general maritime law and the Death on the High Seas Act (DHSA), which ensures jurisdiction over such acts.[184]

For a plaintiff to recover under the ATA, there must be a showing of proximate cause between the plaintiff's injury and an act of international terrorism.[185] A showing of foreseeability of a plaintiff's injury is sufficient to meet the proximate cause requirement.[186] It is the policy of the United States that a demonstration that a donor was aware that it was providing funds to terrorists and that the contribution of those funds would substantially support the terrorist act in question is sufficient to hold the donor liable.[187]

Limiting liability for international terrorist acts to those few who actively participated in the terror act itself violates the purpose of the ATA.[188] It has been held that "[t]he statute clearly is meant to reach beyond those persons who themselves commit the violent act that directly causes the injury."[189] Limiting liability to those who "pulled the trigger" in acts of terror would be ineffective, supposing the terrorists survive, because they are unlikely to have assets available to give remedy to the victims.[190]

The statute expressly provides for treble damages against anyone involved in terrorism, specifically to interrupt the cash flow of terrorist organizations.[191] This intended interruption extends to prevent fund-raising for terrorism, both as a punishment against the terrorists, as well as a deterrent from engaging in such financial activities within the United States.[192] However, courts have been reluctant to apply liability for donating money to terrorists.[193] An exception to this general unease occurs when it can be demonstrated that the donor had the knowledge and the intent to further terrorist acts.[194] Failure to find liability against those who financially support terrorism would "thwart[] Congress' clearly expressed intent to cut off the flow of money to terrorists at every point along the causal chain of violence."[195] Without funding, the terrorists cannot operate, and "[t]he only way to imperil the flow of money and discourage the financing of terrorist acts is to impose liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts."[196]

Congress extended this donor liability to those who indirectly support terrorists through intermediary organizations.[197] "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[198] This taint outweighs the donor's intent.[199] And any organization that engages in terrorist activity and poses a threat to the security of the United States becomes tainted.[200]

In *Mwani v. bin Laden*,[201] the Court of Appeals for the District of Columbia Circuit found that terrorist acts which occurred in Kenya against American citizens were sufficient to obtain personal jurisdiction over terrorists.[202] The court said, "[i]n this case . . . there is no doubt that the defendants 'engaged in unabashedly malignant actions directed at [and] felt in this forum.'"[203] By engaging in terrorist activities against American citizens, bin Laden and al Qaeda had "fair warning" that they would be subject to jurisdiction within the United States.[204]

The court in *Boim* stated that "[w]hen it passed [18 U.S.C.] sections 2339A and 2339B, Congress undoubtedly intended that the persons providing financial support to terrorists should also be held criminally liable. . . . [The Congressional record] indicates an intention to cut off the flow of money in support of terrorism generally."[205] Through 18 U.S.C. §§ 2333 and 2331(1), Congress created civil liability "at least as broad" as the criminal liability for acts of international terrorism, subject to the establishment of knowledge and intent.[206]

Endnotes

1. *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 779 (S.D.N.Y. 2005).
2. *Id.*
3. *Id*. at 779–80 (falling into one of several categories: al Qaeda and its members and associates; state sponsors of terrorism; and individuals and entities, including charities, banks, front organizations, terrorist organizations, and financiers who provided financial, logistical, and other support to al Qaeda).
4. *Id*. at 765, 779 (consolidating six cases which include: *Burnett v. Al Bakara Inv. & Dev. Corp.*, 03 MDL 1570 (RCC); *Ashton v. Al Qaeda Islamic Army*, 02 Civ. 1616; *Tremsky v. Osama bin Laden*, 02 Civ. 6977; *Salvo v. Al Qaeda Islamic Army*, 02 Civ. 7300; *Burnett v. Al Bakara Inv. & Dev. Corp.*, 03 Civ. 5071; *Fed. Ins. v. Al Qaida*, 03 Civ. 5738; *Barerra v. Al Qaeda Islamic Army*, 03 Civ. 6978; and *Vigilant Ins. v. Kingdom of Saudi Arabia*, 03 Civ. 8591).
5. *Id*. at 779 (governing multidistrict litigation).
6. *Id*.
7. *In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005).
8. 28 U.S.C. §§ 1602 *et seq*.
9. *Terrorist Attacks I*, 349 F. Supp. 2d at 780-81; *Terrorist Attacks II*, 392 F. Supp. 2d at 546.
10. *See generally Terrorist Attacks I*, 349 F. Supp. 2d 765; *Terrorist Attacks II*, 392 F. Supp. 2d 539.
11. The Saudi Royal Family Directory, *available at* http://www.datarabia.com (last visited Sept. 24, 2007) (providing a centralized resource for information on Saudi Arabian business, government, and the Saudi royal family).
12. *Terrorist Attacks I*, 349 F. Supp. 2d at 789.
13. *Id*. at 783–84.
14. *Id*. at 784.
15. *Id*.
16. *Id*.
17. *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 784 (S.D.N.Y. 2005).
18. *Id*.
19. *Id*. at 785.
20. *Id.; see also* Royal Embassy of Saudi Arabia, *Prince Turki Al-Faisal Biography*, *available at* http://www.saudiembassy.net/county/government/turkibio.asp (last visited Sept. 23, 2007). Prince Turki also served as Saudi Ambassador to the United States from 2005 to 2007, a position he was appointed to subsequent to the decision in *Terrorist Attacks I*. *Id. Terrorist Attacks I* incorrectly referred to Prince Turki's former title as Director of the Department of General Intelligence (DGI) instead of using the proper terminology of Director General of the General Intelligence Division (GID).
21. *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d at 785.
22. *Id*. ("Prince Turki is alleged to have close ties with an al Qaeda financier, Mr. Zouaydi, and is allegedly implicated in Mr. Zouaydi's financial support of al Qaeda."). *See also* Tim Golden & Judith Miller, *Threats and Responses: The Saudi Connection; Al Qaeda Money Trail Runs from Saudi Arabia to Spain*, N.Y. Times, Sept. 21, 2002, at A10 (In a suit by the families of the victims of the 9/11 attacks, plaintiffs alleged that Zouaydi worked as an accountant for two members of the Saudi Royal family).
23. *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d at 785–86 ("Prince Turki is alleged to have met with members of the Taliban and representatives of bin Laden and agreed not to extradite bin Laden or close terrorist camps in exchange for bin Laden's protection of the Saudi Royal Family.").
24. *Id.* at 786.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Terrorist Attacks I*, 349 F. Supp. 2d at 788 ("This court finds that immunity may be available to Prince Sultan, as the third-highest ranking member of the Saudi government, and to Prince Turki, as the Director of Saudi Arabia's Department of General Intelligence."); *see also Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 286–87 (S.D.N.Y. 2001) (explaining that it has been generally recognized that individuals employed by a foreign state's agencies or instrumentalities are deemed 'foreign states' when they are sued for actions undertaken within the scope of their official capacities").
29. *Terrorist Attacks I*, 349 F. Supp. 2d at 788 (stating that several courts have recognized that "immunity under the FSIA extends also to agents of a foreign state acting in their official capacities") (quoting *Bryks v. Canadian Broad. Corp.*, 906 F. Supp. 204, 210 (S.D.N.Y. 1995) (internal quotes omitted)). *See also Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990) ("Nowhere in the text or legislative history does Congress state that individuals are not encompassed within 28 U.S.C. § 1603(b).").
30. 538 U.S. 468 (2003).
31. *Terrorist Attacks I*, 349 F. Supp. 2d at 788 ("The Federal Plaintiffs argue that the FSIA cannot apply to Prince Turki because, as of September 10, 2003 when the complaint was filed, Prince Turki was the Saudi ambassador to the United Kingdom, a position the Federal Plaintiffs allege is not entitled to immunity under the FSIA."). The plaintiff's argument in this case had primarily relied on *Dole Food Co. v. Patrickson* to counter the Prince Defendants' assertions of their sovereign instrumentality status under the FSIA. *Id.* The Supreme Court case held that "instrumentality status is determined at the time of the filing of the complaint," and plaintiffs argued that this meant that in assessing Prince Turki's immunity under FSIA the district court should consider only Prince Turki's position as ambassador to the United Kingdom and not his position in the GID since he was ambassador at the time the complaint was filed. *Id.* The plaintiffs then argued that FSIA immunity was not designed to protect foreign ambassadors and was therefore inapplicable to Prince Turki. *Id.* The district court rejected this argument, stating that the Court in *Dole* did not consider when an individual is granted immunity under the FSIA. *Id*. at 789. The court held that "the relevant inquiry for individuals is simply whether the acts in question were undertaken at a time when the individual was acting in an official capacity." *Id.* Since Prince Turki was alleged to have committed the acts in question while he was Director General of the GID, it was that position—and not his position as ambassador—that was considered by the court in making its determination of immunity under the FSIA.
32. *Terrorist Attacks I*, 349 F. Supp. 2d at 789 (holding Prince Sultan and Prince Turki immune from suit for their official acts unless it was found that an exception under the FSIA applied).

33. *Id.* at 792. The court explored the three exceptions to foreign sovereign immunity: (1) the commercial activities exception; (2) the state sponsor of terrorism exception; and (3) the torts exception. *See* 28 U.S.C. § 1605(a)(2), (a)(7), and (a)(5).

34. *Terrorist Attacks I*, 349 F. Supp. 2d at 793 ("To the extent any Plaintiffs' claims are based on a Defendant's contributions to charities, those acts cannot be considered commercial"); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) ("A foreign state engaging in 'commercial' activities 'do[es] not exercise powers peculiar to sovereigns. . . .") (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 692, 704 (1976)).

35. *Terrorist Attacks I*, 349 F. Supp. 2d at 793 (discussing the plaintiff's argument that the Kingdom of Saudi Arabia, Prince Sultan, and Prince Turki financed terrorism by contributing to charities known to support terrorist activities and that such donations were essentially money laundering); *see also U.S. v. Goodwin*, 141 F.3d 394, 399 (2d Cir. 1997) (stating that "[m]oney laundering is a quintessential economic activity").

36. *Terrorist Attacks I*, 349 F. Supp. 2d at 79*; see also Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984) (holding that the "alleged 'kidnapping' by a foreign state is not 'commercial activity' under the FSIA because a private person cannot lawfully engage in that activity").

37. *Terrorist Attacks I*, 349 F. Supp. 2d at 793 (stating that because "money laundering is an illegal activity" under 18 U.S.C. § 1956 "it cannot be the basis for the applicability of the commercial activities exception"); *see also Letelier*, 748 F.2d at 798 (holding alleged participation in an assassination is not a lawful activity and therefore not a commercial activity for purposes of the FSIA).

38. *Terrorist Attacks I*, 349 F. Supp. 2d at 793; *see also Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980) (holding acts of false imprisonment and battery were not commercial activity).

39. *Terrorist Attacks I*, 349 F. Supp. 2d at 801 (stating that the tort exception deprives a foreign sovereign of immunity when the act is tortious and not discretionary); *see also Berkovitz v. U.S.*, 486 U.S. 531, 536 (1988) (establishing a two part inquiry to determine whether a government employee's act falls within exception including: (1) if there was any element of choice; and (2) if the discretion was rooted in political and social policy).

40. *Terrorist Attacks I*, 349 F. Supp. 2d at 794 (quoting *Marchisella v. Gov't of Japan*, No. 02 Civ. 10023, 2004 WL 307248, at *2 (S.D.N.Y. Feb. 17, 2004)).

41. 292 F. Supp. 2d 9, 19 n.4 (D.D.C. 2003) (disagreeing with the argument that § 1605(a)(5) requires that the entire tort, both the tortious conduct and the injury, take place in the United States); *see Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring) ("The Foreign Sovereign Immunities Act . . . preserves immunity for tort claims unless injury or death occurs in the United States").

42. *Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 200 (2d Cir. 1999) ("[T]he Supreme Court has held that this exception 'covers only torts occurring within the territorial jurisdiction of the United States'") (quoting *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 441 (1989)).

43. 18 U.S.C. §§ 2231 *et seq.*

44. *Terrorist Attacks I*, 349 F. Supp. 2d at 828; *see* 18 U.S.C. § 2331(1) (defining international terrorism acts as (1) violent acts dangerous to human life; (2) intended to intimidate civilians; and (3) occur mainly outside of United States jurisdiction).

45. *Terrorist Attacks I*, 349 F. Supp. 2d at 803 (finding that the United States State Department had not designated the Kingdom a state sponsor of terrorism); *see also* The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States: Al Qaeda Aims at the American Homeland 171 (2004) ("We have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded the organization.").

46. *Terrorist Attacks I*, 349 F. Supp. 2d at 801.

47. *Id*. at 787*; see also Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1018 (N.D. Ill. 2001) (holding that a plaintiff must prove knowledge and intent).

48. *Terrorist Attacks I*, 349 F. Supp. 2d at 798 (aiding and abetting "requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer") (quoting *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 295 (1992))*; see also Robinson v. Gov't of Malay.*, 269 F.3d 133, 146 (2d Cir. 2001) ("To sustain federal jurisdiction on generic allegations . . . absent an assertion or evidence of a factual predicate for such jurisdiction, would invite plaintiffs to circumvent the jurisdictional hurdle of the FSIA. . . .").

49. *Terrorist Attacks I*, 349 F. Supp. 2d at 801 ("The Court has reviewed the complaints in their entirety and finds no allegations from which it can infer that the Princes knew the charities to which they donated were fronts for al Qaeda.")*; see also Halberstam v. Welch*, 705 F.2d 472, 487–88 (D.C. Cir. 1983) (requiring the defendant to be generally aware of his role as part of an overall illegal or tortious activity at the time he provides assistance to be liable as a "joint venturer").

50. 705 F.2d 472 (D.C. Cir. 1983).

51. *See id.* at 487–88 (holding that when the woman assisted the robber, it was foreseeable that violence and killing could be a consequence of the robbery).

52. *Id; see also Jones v. City of Chi.*, 856 F.2d 985, 992 (7th Cir. 1988) (explaining that to be liable as a conspirator it is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them).

53. *See Terrorist Attacks I*, 349 F. Supp. 2d at 800–801; *see also United States v. Durrive*, 902 F.2d 1221, 1225 (7th Cir. 1990) (explaining that a defendant's mere knowledge of, approval of, association with, or presence at a conspiracy is insufficient to establish the participation element).

54. *Terrorist Attacks I*, 349 F. Supp. 2d at 799–800. The plaintiffs' exhibits alleged that the defendants were funneling donations to al Qaeda. *Id.* at 799.

55. *Id.* at 799–801.

56. *Id*. at 799.

57. *Id*. at 800–801.

58. *Id.* at 802.

59. *See Terrorist Attacks II*, 392 F. Supp. 2d at 551–52.

60. *Id.* at 547–548; *see* Matthew Levitt, *Cracking Down on Terrorist Financing*, Harvard International Review, Fall 2002, at 8.

61. *Terrorist Attacks II,* 392 F. Supp. 2d at 548.

62. *Id.*

63. *Id*.

64. Brian Whitmore, *Saudi "Charity" Troubling to Bosnian Muslims*, The Boston Globe, Jan. 27, 2002, at A22.

65. *See Terrorist Attacks II*, 392 F. Supp. 2d at 548.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 574 (determining that this case lacks a constitutional challenge and therefore cannot proceed to examine the merits without establishing the necessary jurisdictional requirements).

70. *See Terrorist Attacks II*, 392 F. Supp. 2d at 548. The court stated, "even if Plaintiffs alleged that SHC was tortiously liable for the attacks of September 11, such allegations could not overcome the discretionary function exception." *Id*. at 555.

71. *Id.* at 551.

72. *Id.*

73. *Id.*

74. *Id.* Decisions regarding causes to support and recipients for Saudi High Commission funds are within the discretion of the Executive Committee, the Supreme Commission, and the Prince. *Id*.

75. *Id.* at 551-52.

76. *Id.* at 553.

77. *Id. See Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 261 (2d Cir. 2003) (requiring waiver that unambiguously waives claims of immunity from legal actions in this country); *see also Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) (finding no abuse of discretion even though the district court resolved the jurisdictional issue without holding evidentiary hearings since factual disputes were readily ascertainable from the record).

78. *See Terrorist Attacks II*, 392 F. Supp. 2d at 553.

79. *Id.* at 555.

80. *Id.*

81. *Id.*

82. *Id.* (explaining that since all decisions regarding the distribution of funds were within the sole discretion of Chairman Prince Salam and his advisors, and because the SHC was guided by the Kingdom's policies on Bosnia-Herzegovina, the SHC's alleged misuse of funds was a result of a discretionary function, and therefore could not overcome SHC's immunity).

83. *Terrorist Attacks II,* 392 F. Supp. 2d at 547.

84. *Carey v. Nat'l Oil Corp.,* 592 F.2d 673, 676 (2d Cir. 1979) (explaining the concept behind the Foreign Sovereign Immunity Act, its nature, and the goals it accomplishes); *See Terrorist Attacks II,* 392 F. Supp. 2d at 546 (noting the various statutes under which plaintiffs have brought claims).

85. 18 U.S.C. § 2239.

86. *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (2d Cir. 1993); *see also Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 (5th Cir. 1989) (stating that a district court may consider conflicting evidence contained in affidavits and make its own resolution of disputed jurisdictional facts).

87. 216 F.3d 36, 40 (D.C. Cir. 2000) (stating that when a defendant questions the factual basis for the court's jurisdiction, the court must go beyond the pleadings to resolve the issue); *see also Filetech S.A. v. Fr. Telecom S.A.*, 157 F.3d 922, 932 (2d. Cir. 1998) (holding that the district court should have looked outside the pleadings to the submissions, which contradicted and supported the allegations of jurisdiction pleaded in the complaint).

88. *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah,* 184 F. Supp. 2d 277, 296 (S.D.N.Y. 2001); *see Robinson v. Gov't of Malay.*, 269 F.3d 133, 142 (noting that the jurisdiction and merits inquiries overlap to the extent that each requires examination of the applicable substantive law).

89. *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) (noting that a motion to dismiss for failure to state a claim, in a challenge to FSIA subject matter jurisdiction, the defendant must present a "*prima facie* case that it is a foreign sovereign" (quoting *Cargill Int'l*, 991 F.2d at 1016)); *see also Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 295 (S.D.N.Y. 1987) (noting that "the defendant must establish a prima facie case that it is a sovereign state or an instrumentality of a sovereign state").

90. *Virtual Countries, Inc.* 300 F.3d at 241–42. *See Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665 F. Supp. 323 (S.D.N.Y. 1987) (stating that the presumption of immunity under FSIA is overturned only if the plaintiff demonstrates that the defendant's sovereign activity falls under one of the exceptions to immunity).

91. *Cargill Int'l*, 991 F.2d at 1016. *See Robinson*, 269 F.3d at 141 n.8 (describing that this burden must be met by a preponderance of evidence).

92. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (holding that whether an alleged act of a foreign sovereign is commercial in nature, the court must decide whether the particular actions, whatever the motive behind them, are the type of actions by which a private party engages in trade, traffic or commerce); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277 (S.D.N.Y. 2001) (holding that the parties' subjective motivations for entering into the transaction are immaterial).

93. *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 633–34 (1983); *see Republic of Argentina*, 504 U.S. at 617 (describing that the language of FSIA forecloses the argument that the line between "nature" and "purpose" rests upon a formalistic distinction that is neither useful nor warranted).

94. *Baglab, Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 293–94 (S.D.N.Y. 1987); *see Gibbons v. Undaras na Gaeltachta*, 549 F. Supp. 1094, 1106 (S.D.N.Y. 1982) (describing that the plaintiff's motion to dismiss must be granted unless plaintiff can locate an applicable exception to the defense of sovereign immunity).

95. H.R. Rep. No. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606; *see also Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 493 (stating that actions against foreign sovereigns raise sensitive issues with respect to the foreign relations of the United States).

96. H.R. Rep. No. 94-1487, at 12–13; *see also* 1976 U.S.C.C.A.N. at 6611.

97. 28 U.S.C. § 1604.

98. *Robinson,* 269 F.3d at 141 (citing *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169 (5th Cir. 1994)) (noting that "immunity under the FSIA is immunity from suit, not just from liability"); *see also Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988).

99. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 484 (1983) (quoting *Verlinden B.V. v. Cent. Bank of Nig.*, 488 F. Supp. 1284, 1292 (S.D.N.Y. 1980)).

100. *Robinson,* 269 F.3d at 139–140; *see Kato v. Ishihara*, 360 F.3d 106 (2004) (holding under FSIA, a foreign state is presumptively immune from the jurisdiction of the United States courts unless a specified exception applies).

101. *Burnett*, 274 F. Supp. 2d. at 106; *see also Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1011 (finding that funding alone is "actionable . . . as Congress . . . intended to allow plaintiffs to recover from anyone alone the causal chain of terrorism").

102. *Verlinden*, 461 U.S. at 486; *but cf. Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812) (holding that there was a very broad grant of immunity to foreign sovereigns).

103. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 617-18 (1992); *Martin v. Republic of South Africa,* 836 F.2d 91, 94 (2d Cir. 1987).

104. 11 U.S. at 116. The Supreme Court adopted a very broad philosophy of sovereign immunity, granting it upon anything tied to the foreign sovereign.

105. *Verlinden*, 461 U.S. at 486.

106. *Id.* at 494 n.19.

107. *Id.* at 496; *see generally*, *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation*, 730 F.2d 195, 198-99 (5th Cir. 1984).

108. *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 395 (D. Del. 1978).

109. 28 U.S.C. § 1604.

110. *Kao Hwa Shipping Co., S.A., v. China Steel Corp.*, 816 F. Supp. 910, 913 (S.D.N.Y. 1993) (citing 28 U.S.C. § 1603 (b)).

111. *See Park v. Shin*, 313 F.3d 1138, 1144 (9th Cir. 2002); *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005).

112. *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004).

113. *Id; see generally Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000).

114. *Filler*, 378 F.3d at 219.

115. *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995).

116. *In re Air Crash Disaster Near Roselawn, Ind. On Oct. 31, 1994*, 96 F.3d 932, 937 (7th Cir. 1996).

117. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003).

118. *Baglab, Ltd. v. Johnson Matthey Bankers, Ltd.*, 665 F. Supp. 289, 294 (S.D.N.Y. 1987) (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629-30 (1983)).

119. *First Nat'l*, 462 U.S. at 626.

120. *Id.* at 626-27.

121. *See, e.g., Antares Aircraft, L.P. v. Nigeria*, 999 F.2d 33, 34 (2d Cir. 1993) (holding Nigeria immune under the FSIA because although Nigeria was engaged in a commercial activity, its acts did not have a direct effect in the United States); *but see Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607,620 (1992) (holding Argentina's rescheduling of maturity dates on bonds to be paid in New York a commercial activity having a direct effect in the United States and thus triggering the exception to sovereign immunity under the FSIA).

122. *Verlinden v. Cent. Bank of Nig.*, 461 U.S. 480, 487 (1983).

123. 26 Dep't State Bull. 984–985 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711–16 (1976) (stating, "The [State] Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases.").

124. *Verlinden*, 461 U.S. at 487*; see also Mexico v. Hoffman*, 324 U.S. 30, 34 (1945) (stating that, in the context of judicial seizure of a friendly foreign government's vessel, this deferential practice is founded on the policy that the national interests are best served through diplomatic channels).

125. *Verlinden*, 461 U.S. at 487; *see Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990) (discussing the historical background surrounding the passage of FSIA).

126. *Verlinden*, 461 U.S. at 487–88; *Hoffman*, 324 U.S. at 34–35.

127. *Verlinden*, 461 U.S. at 488*; see also Chuidian,* 912 F.2d at 1100.

128. *Harris v. Vao Intourist, Moscow*, 481 F. Supp. 1056, 1061 (E.D.N.Y 1979) (citing H.R. Rep. No. 94-1487, at 13 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6612).

129. *Harris*, 481 F. Supp. at 1061–62.

130. H.R. Rep. No. 94-1487, at 6.

131. *Id.* at 23–27. *See also Chuidian*, 912 F.2d 1095, 1100.

132. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)); *see also Robinson v. Gov't of Malay.*, 269 F.3d 133, 138–39 (2d Cir. 2001).

133. *Int'l Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 10 (2d Cir. 1989); *Harris v. Vao Intourist, Moscow*, 481 F. Supp. 1056, 1062.

134. 28 U.S.C. § 1606. *See also Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 294 (1987) (stating that, "The FSIA does not affect the substantive law determining liability of a foreign state or instrumentality").

135. 28 U.S.C. § 1605.

136. *See* 28 U.S.C. § 1605(a)(2). *See, e.g., Argentina v. Weltover*, 504 U.S. 607, 614, 617, 620 (1992) (concluding that when a government acts as a private player in the market, the foreign sovereign's acts are "commercial" in nature).

137. *See* 28 U.S.C. § 1605(a)(5). *But see Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (holding sovereign immunity applied when Saudi police engaged in intentionally tortious conduct and thus illustrating the extent of "discretionary sovereign action").

138. *See* 28 U.S.C. § 1605(a)(1). *See also Verlinden v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983).

139. *See* 28 U.S.C. § 1605, *amended by* Antiterrorism and Effective Death Penalty Act of April 24, 1996, Pub. L. No. 104-132, Title II, Subtitle B Jurisdiction for Lawsuits Against Terrorist States; *see also Estates of Ungar v. Palestinian Auth.*, 153 F. Supp. 2d 76, 93 (D.R.I. 2001) (granting in part and denying in part defendants' motions to dismiss), *rev'd in part*, 228 F. Supp. 2d 40 (D.R.I. 2002) (denying all motions to dismiss), 215 F.R.D. 36 (D.R.I. 2003) (granting plaintiffs' motion to enter default against defendants), *aff'd*, 2003 U.S. App. LEXIS 27782 (D.R.I. 2003).

140. 28 U.S.C. § 1605(a)(7); *see also Ungar*, 153 F. Supp. 2d at 93.

141. Office of the Coordinator for Counterterrorism, State Dep't, Overview of State Sponsored Terrorism, (2001), *available at* http://www.state.gov/s/ct/rls/crt/ (follow "2000" hyperlink; then follow "(I) Overview of State-Sponsored Terrorism" hyperlink).

142. Office of the Coordinator for Counterterrorism, State Dep't, State Sponsors of Terrorism, *available at* http://www.state.gov/s/ct/c14151.htm. Iraq was removed from the list in 2003 as a result of U.S. occupation. *See* http://www.state.gov/s/ct/rls/crt/ (follow "2003" hyperlink; then follow "Report (html format)" hyperlink; then follow "Overview of State-Sponsored Terrorism" hyperlink).

143. *See Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 17 (D.D.C. 2003) ("It is undisputed that the Kingdom of Saudi Arabia had not been designated a "state sponsor of terrorism" on September 11, 2001. The state-sponsored terrorism exception is inapplicable").

144. *See generally Republic of Argentina. v. Weltover*, 504 U.S. 607, 614-15 (1992); *Verlinden*, 461 U.S. at 486-89 (arguing for a restrictive theory of immunity).

145. *See* 28 U.S.C. § 1603(d).

146. *See* 28 U.S.C. § 1603; *Saudi Arabia v. Nelson*, 507 U.S. 349, 359 (1993) (stating that the Act's description of commercial activity is a definition distinguished only by its "diffidence"); *see also Weltover*, 504 U.S. at 612 ("This definition, however, leaves the critical term 'commercial' largely undefined").

147. *See Nelson*, 507 U.S. at 359 (restating the initial interpretation in *Weltover* that the meaning of "commercial" should be interpreted by deferring to Congress' understanding of it); *see also Weltover*, 504 U.S. at 612–13 ("[T]he meaning of 'commercial' [for purposes of the Act must be the meaning Congress understood the] restrictive theory [to require] at the time the statute was enacted").

148. 28 U.S.C. § 1603(e); *see also Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 293 (S.D.N.Y. 2001) ("[C]ommercial activity carried on in the United States is defined extremely broadly under the FSIA, as including any commercial activity 'having substantial contact with the United States'") (internal quotation marks omitted).

149. *See Reiss v. Societe Centrale Du Groupe Des Assurances Nationales*, 235 F.3d 738, 747 (2d Cir. 2000) (pointing out that the exception which Reiss based his action on was "commercial activity carried on in the United States by [a] foreign state"). *See also Virtual Countries Inc.*, 300 F.3d 230, 241 (2d Cir. 2002) (holding that "even if the complaint detailed legally significant acts, the district court would have been correct to dismiss the complaint based on the plaintiff's failure to show a causal connection between those acts and the alleged injury it sustained").

150. 28 U.S.C § 1605(a)(2).

151. *See Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981) (explaining that because a corporation is intangible, it calls for a different inquiry); *see also Virtual Countries Inc.*, 300 F.3d at 238–39 (citing *Texas Trading,* 647 F.2d at 312).

152. *See Virtual Countries, Inc.*, 300 F.3d at 238 (finding that there was not sufficient immediacy); *see also Weltover*, 504 U.S. at 618 (finding the effect too remote and attenuated to satisfy the "direct effects" requirement of the FSIA).

153. *See NYSA-ILA Pension Trust Fund v. Garuda Indonesia*, 7 F.3d 35, 38 (2d Cir. 1993) ("In construing the commercial activity exception, courts have required that a significant nexus exist between the commercial activity in this country upon which the exception is based and a plaintiff's cause of action"); *see also Leutwyler*, 184 F. Supp. 2d at 293 ("[T]here is little doubt that, at a minimum, there must be a 'significant nexus' between the commercial activity at issue and the causes of action").

154. *See Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for A.W. Galadari*, 12 F.3d 317, 329–30 (2d Cir. 1993) (stating that the court was "unpersuaded" by petitioner's textual argument); *see also Leutwyler*, 184 F. Supp. 2d at 293 (finding "little sense" in the textual argument).

155. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993) (finding the Nelsons' attempt to claim failure to warn was, in fact, a semantic ploy); *see also Leutwyler*, 184 F. Supp. 2d at 299 (dismissing Count V of Leutwyler's claim).

156. *See Republic of Argentina. v. Weltover*, 504 U.S. 607, 614 (1992) ("[W]e conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA").

157. *See id.* at 614–15; *see also Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 749 (S.D.N.Y. 2004).

158. *Nelson*, 507 U.S. at 360–61 (reiterating past assertions that this is a question of behavior, not motivation).

159. *Weltover*, 504 U.S. at 614 (explaining the difference between "nature" and "purpose"); *Leutwyler*, 184 F. Supp. 2d 277, 290 (S.D.N.Y. 2001) ("[T]he parties' subjective motivations for entering into the transaction are immaterial for the purpose of ascertaining whether it falls within the commercial activity exception").

160. *Weltover*, 504 U.S. at 615 (reiterating the difference between nature and purpose). *See also Daventree Ltd.*, 349 F. Supp. 2d at 749.

161. *See supra* n. 34; *see also Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82, 83 (D.D.C. 2004).

162. *See Letelier v. Republic of Chile*, 748 F.2d 790, 796 (2d Cir. 1984) (citing S. REP. NO. 94-1310 at 16 (1976)) (laying out the instances discussed in the Senate report); *see also Napolitano v. Tishman Constr. Corp.*, No. 96 CV-4402, 1998 U.S. Dist. LEXIS 3754 at *9-10 (E.D.N.Y. 1998) (stating that "[t]he legislative history of the FSIA provides that a contract for the repairs of an embassy building or for the construction of a government building fall under the definition of commercial activity").

163. *See* 28 U.S.C. § 1605(a)(5).

164. *See First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 622 (1983) ("Thus, where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances"); *see also Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1025 (9th Cir. 1987) (noting that the determination of whether the act was performed within the scope of employment requires the application of the doctrine of *respondeat superior* as governed by state law); *Skeen v. Federative Republic of Brazil*, 566 F. Supp. 1414, 1417 (D.D.C. 1983) (holding that where state law provides a rule of liability, such as defining scope of employment, courts must use state law).

165. H.R. Rep. No. 94-1487, at 20–21 (1976) ("Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities"); *see also Robinson v. Gov't of Malaysia*, 269 F.3d 133, 143 (2d Cir. 2001) (citing H.R. Rep. No. 94-1487); *Argentine Republic v. Amerada Hess Shipping Corp.*, 448 U.S. at 439–40 (1989) (stating that Congress' primary purpose in enacting section 1605(a)(5) was to eliminate foreign immunity for traffic accidents and other torts committed in the U.S. for which liability is imposed by domestic tort law).

166. 28 U.S.C. § 1605(a)(5)(B) ("[T]his paragraph shall not apply to . . . any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights").

167. *See generally Bryks v. Canadian Broadcast. Corp.*, 928 F. Supp. 381 (S.D.N.Y. 1996).

168. *Robinson*, 269 F.3d at 142 ("[T]he district court was required, first, to determine what the relevant activities of the Malaysian government were"); *accord Doe I v. State of Israel,* 400 F. Supp. 2d. 86, 104 (D.D.C. 2005) (noting that a proper analysis of FSIA immunity inevitably requires, at the onset, an examination of the defendant's activities claimed by the plaintiff).

169. *Id.* ("Second, the court was required to decide whether those acts were tortious under the law of the State of New York"); *see First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba,* 462 U.S. 611, 620 (1983) (The Court characterized FSIA under similar claims of the Federal Tort Claims Act (FTCA). Therefore, substantive law of the forum, rather than federal common law, or international law, will govern the claim); *see also Barkanic v. General Admin. of Civil Aviation of People's Republic of China,* 923 F.2d 957, 961 (2d Cir. 1991) ("Because we believe that applying the forum state's choice of law analysis will help ensure that foreign states are liable in the same manner and to the same extent as a private individual under like circumstances, 28 U.S.C. § 1606, we conclude that incorporation of state choice of law rules is appropriate here.").

170. *Barkanic*, 923 F.2d at 961. ("Finally . . . the court would have been required to decide whether those acts were 'non-discretionary'"); *see Youming Jin v. Ministry of State Secretary*, 475 F. Supp. 2d 54, 63 (D.D.C. 2007) ("In assessing whether the tortious act or omission exemption applies, the court must first determine whether the alleged acts constitute tortious acts and second, whether the defendant actors committed those tortious acts while acting within the scope of their employment").

171. *Olson v. Republic of Singapore*, 636 F. Supp. 885, 886 (D.D.C. 1986) (recognizing the general rule of immunity for acts performed at the operational level, while no immunity is granted for those performed at the planning level); *Napolitano v. Tishman Constr. Corp.*, 1998 U.S. Dist. LEXIS 3754 at *12 (E.D.N.Y. 1998); *but see Joseph v. Office of Consulate Gen. Of Nigeria*, 830 F.2d 1018, 1026 (9th Cir. 1987) (holding that while the Ninth Circuit previously followed this reasoning as in *Olson v. Gov't of Mexico*, 729 F.2d 641, 645, 647 (9th Cir. 1984), the "planning" versus "operational" distinction has since been abandoned "pursuant to the Supreme Court's decision in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense,* 467 U.S. 797 (1984)").

172. *Olson*, 636 F. Supp. at 886 ("The nature of the conduct rather than the status of the actor, governs whether the discretionary function exception applies in a given case. . . ."); *accord Napolitano*, 1998 U.S. Dist. LEXIS 3754 at *13.

173. 28 U.S.C. § 1605(a)(1) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived immunity either explicitly or by implication. . . ."); *see Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2d Cir. 1993) ("The waiver exception permits federal courts to assert jurisdiction over any foreign sovereign that waives its immunity 'either explicitly or by implication'"); *Joseph*, 830 F.2d at 1022 (noting that the waiver exception denies immunity in all cases where the foreign government has either explicitly or implicitly waived immunity).

174. H.R. Rep. No. 94-1487, at 18 (1976); *Zernicek v. Petroleos Mexicanos*, 614 F. Supp. 407, 411 (S.D. Tex. 1985); *Cargill Int'l S.A.,* 991 F.2d at 1017 (listing three examples of implicit waivers from the House Report).

175. *Cargill Int'l S.A.*, 991 F.2d at 1017 (noting that courts have typically construed the waiver clause narrowly); *see Joseph*, 830 F.2d at 1022 ("The waiver exception is narrowly construed"); *see also Zernicek*, 614 F. Supp. at 411 ("Cases involving arbitration clauses illustrate that provisions allegedly waiving sovereign immunity are narrowly construed"); *Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fid.*, 689 F. Supp. 1340, 1351 (S.D.N.Y. 1988) (noting that courts narrowly construe the waiver clause in order to avoid an increase in jurisdiction which would result in an increase in litigation).

176. *See Cargill Int'l S.A.*, 991 F.2d at 1017 ("[I]t is rare for a court to find that a country's waiver of immunity extends to third parties not privy to the contract. When the case involves an implied waiver, we think that a court should be even more hesitant to extend the waiver in favor of third parties. We agree with these courts that such a waiver will not be implied absent strong evidence of the sovereigns intent"); *see also Napolitano*, 1998 U.S. Dist. LEXIS 3754 at *7.

177. *See Cargill Int'l S.A.*, 991 F.2d at 1017; *Maritime Ventures Int'l, Inc.*, 689 F. Supp. at 1351 (stating that courts have narrowly interpreted the language of the statue in order to avoid an increase in litigation).

178. *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 261 (2d Cir. 2003) (holding that foreign states are immune from prejudgment attachment unless immunity was clearly and unambiguously waived prior to judgment); *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 416 (2d Cir. 1983) ("The requirement that the waiver of immunity from prejudgment attachment be *explicitly* made is underscored both by the plain language of § 1610(d) and by the contrast between § 1610(d) and § 1610(a)."") (emphasis in original).

179. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989); *Napolitano*, 1998 U.S. Dist. LEXIS 3754 at *5.

180. *Castro v. Saudi Arabia*, 510 F. Supp. 309, 312 (W.D. Tex. 1980) ("A foreign state does not waive its sovereign immunity by merely entering into a contract with another nation. There must be an intentional and knowing relinquishment of the legal right"); *but see* H.R. Rep. No. 94-1487, at 18 (1976) (stating that a properly executed waiver prevents "a foreign state which has induced a private person into a contract by promising not to invoke its immunity . . . [from] go[ing] back on its promise and seek[ing] to revoke the waiver unilaterally").

181. 291 F.3d 1000, 1001, 1009 (7th Cir. 2002).

182. *Id*. at 1009.

183. *See id.* at 1009–10.

184. *See id*. at 1009; *see also* H.R. Rep. No. 102-1040, at 5 (1992); *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854, 857 (S.D.N.Y. 1990), *vacated and remanded*, 937 F.2d 44 (2d Cir. 1992).

185. 18 U.S.C. § 2333 (1992) ("Any national of the United States injured in his or her person, property, or business by reason of an act or international terrorism . . . may sue therefor[] in any appropriate district . . . and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees"); *see Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265–66 (1992) (finding that similar language required a showing of proximate cause) (citing *Associated General Contractors of Cal., Inc. v. Carpenters,* 459 U.S. 519, 529, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)); *Boim*, 291 F.3d at 1011 (citing *Associated General Contractors of Cal., Inc.*, 459 U.S. at 265-66).

186. *Boim*, 291 F.3d at 1011–12; *see Suzik v. Sea-Land Corp.*, 89 F.3d 345, 348 (7th Cir. 1996) (citing *Bently v. Saunemin Township,* 83 Ill. 2d 10, 413 N.E.2d 1242, 1245, 46 Ill. Dec. 129 (Ill. 1980)); *see also* Restatement (Second) of Torts §§ 440–447 (1965).

187. *See Boim*, 291 F.3d at 1014 (citing S. Rep. 102-342 at 22 (1992)); *see also Halberstam v. Welch*, 705 F.2d 472, 477-78 (D.C. Cir. 1983).

188. *See* H.R. Rep. No 102-1040 at 4 (1992); *see also Boim*, 291 F.3d at 1014.

189. *Boim*, 291 F.3d at 1011.

190. *Id*. at 1021 (citing S. Rep. 102-342 at 22 (1992)); *see Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 188 (1994) (stating that aiding and abetting causes of action deters secondary actors from contributing to criminal activities and that the plaintiffs are made whole).

191. S. Rep. No. 102-342, at 22 (1992); *Boim*, 291 F.3d at 1011.

192. 136 Cong. Rec. S4568-01 (1990).

193. *See generally Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that the donation of money is an expression protected by the First Amendment); *United States v. Assi*, 414 F. Supp. 2d 707 (E.D. Mich. 2007) (finding that the First Amendment did not protect a donor providing military paraphernalia to a terrorist organization).

194. *See Boim*, 291 F.3d at 1011.

195. *Id*. at 1021; *see* S. Rep. No. 102-342 at 22 (1992).

196. *See Boim*, 291 F.3d at 1021.

197. *Boim,* 291 F.3d at 1027.

198. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, §301(7), 110 stat. 1210, 1247.

199. *Boim,* 291 F.3d at 1027.

200. 8 U.S.C. § 1189(a)(1)(c) (2004); *Boim*, 291 F.3d at 1027.

201. 417 F.3d 1 (D.C. Cir. 2005).

202. *Id*. at 13.

203. *Id*. (quoting *Panavision Int'l, LP v. Toeppen,* 141 F.3d 1316, 1321 (9th Cir. 1998)).

204. *Mwani*, 417 F.3d at 13 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977)).

205. *Boim*, 291 F.3d at 1014. *See* S. Rep. No. 102-342 at 22 (1992).

206. *Boim,* 291 F.3d at 1015.

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Trinko and Beyond

I. Introduction

In *Verizon Communications, Inc. v. Trinko* ("*Trinko*"),[1] the Supreme Court made one of its relatively infrequent forays into the substantive law governing liability under Section 2 of the Sherman Act. Although Verizon, and federal enforcers, urged the Court to use the case to announce a broadly applicable doctrine protecting the opportunities of a monopolist to compete, the Court's decision did not accept that invitation.[2] Consequently, although *Trinko* points in a direction, it does not offer any particular analytic framework to resolve Section 2 issues.

This article evaluates the impact of *Trinko* in telecommunications cases as well as in cases involving other regulated industries. Next, we examine whether *Trinko* announced a new pleading standard in refusal-to-deal cases, which requires plaintiffs to allege that a monopolist abandoned a prior and profitable course of dealing. We then go on to explore the Court's monopoly leveraging analysis and what it portends for future Section 2 cases. Finally, the article examines Justice Stevens's concurring opinion and assesses the traction of his standing analysis in the lower courts.

II. The *Trinko* Decision

Trinko arose in the backdrop of the Telecommunications Act of 1996 ("Telecommunications Act"),[3] which requires Incumbent Local Exchange Carriers ("ILECs") to share their network elements in a non-discriminatory fashion with competing local exchange carriers ("CLECs"), such as AT&T.[4] Briefly, under Sections 271(c) and (d) of the Telecommunications Act, in order for an ILEC—here, Verizon (formerly Bell Atlantic)—to secure authority to sell long distance telephone service, it also must provide CLECs non-discriminatory access to certain local services.[5] Consequently, CLECs were able to contract for access to Verizon's local telecommunications lines in Verizon's service area, such as New York State, where it was the ILEC.[6]

CLECs complained to the Federal Communications Commission ("FCC") and the New York State Public Service Commission ("NY PSC") about Verizon's discriminatory practices.[7] Following investigations, the FCC and NY PSC imposed fines, remedial action, and reporting requirements on Verizon.[8] Shortly thereafter, The Law Offices of Curtis V. Trinko, LLP ("Trinko"), a commercial telephone subscriber of AT&T, filed a class action lawsuit against Verizon in the Southern District of New York.[9] Trinko alleged claims under the Telecommunications Act and the Sherman Act,[10] as well as state claims for tortious interference with contract.[11]

Trinko alleged that Verizon filled its own customers' orders before filling those of CLEC customers, and in some cases, did not fill CLEC customer orders at all.[12] Verizon's alleged motivation for this conduct was to harm CLECs, and to induce their customers to switch to Verizon's service.[13] Trinko further alleged that by favoring its own customers and discriminating against the CLECs' customers, Verizon failed to discharge its obligations under the Telecommunications Act, thereby violating the prohibitions of Section 2 of the Sherman Act.[14]

Verizon moved to dismiss the complaint, and the district court granted the motion.[15] The court held that Trinko could not demonstrate a "willful acquisition or maintenance of monopoly power" from Verizon's refusal to cooperate with AT&T and other CLECs.[16]

The Court of Appeals for the Second Circuit reversed the district court's dismissal of Trinko's Sherman Act claim, and at the same time affirmed the dismissal of Trinko's claim under the Telecommunications Act.[17] The Second Circuit held that Trinko's refusal-to-deal claims was legally sufficient under Section 2's essential facilities and monopoly leveraging doctrines, independent of the alleged Telecommunications Act violations.[18]

The Supreme Court granted *certiorari*, limited to reviewing the Second Circuit's ruling that Trinko's Section 2 claim was legally sufficient.[19] The Court reversed the decision of the Second Circuit, holding that Trinko failed to state a claim under Section 2.[20] Justice Scalia authored the majority opinion, which Chief Justice Rehnquist and Justices O'Connor, Kennedy, Ginsburg, and Breyer joined.[21]

A. The Antitrust Savings Clause in the Telecommunications Act

The Supreme Court first addressed Trinko's antitrust claims that stemmed from violations of the anti-discrimination provisions of the Telecommunications Act. For those claims, Trinko relied on the antitrust "savings clause" in the Telecommunications Act.[22] Section 152 provides that "nothing in this Act or the amendments made by this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."[23] The Court disagreed with the notion that, under the savings clause, a Telecommunications Act violation necessarily gives rise to an antitrust claim. As Justice Scalia wrote, "[t]hat Congress created these duties . . . does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim."[24] According to the majority, Trinko's claim was cognizable only if it offended antitrust principles that pre-existed the Telecommunications Act.[25]

B. Lack of "Traditional" Monopolistic Practices

Having held that a violation of the Telecommunications Act did not, in itself, sustain a Section 2 claim, the Court examined whether Verizon's conduct offended "traditional" antitrust principles.[26] Trinko argued that Verizon's conduct was actionable under Section 2 as an unlawful refusal to deal with competitors—here, AT&T and other CLECs.[27] The Court identified its prior decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[28] as the leading decision addressing this issue. In *Aspen Skiing*, the defendant owned three out of the four ski mountains. The defendant entered into a business relationship with plaintiff, owner of the fourth ski mountain, under which the two owners offered all-area ski passes. The defendant ultimately terminated this relationship and refused to provide plaintiff with any access to its ski mountains, even though plaintiff offered to purchase tickets at retail prices.[29] Although *Aspen Skiing* sustained a jury verdict in favor of a Section 2 claim, the *Trinko* Court declined to apply *Aspen Skiing* to this case.[30]

Justice Scalia began his analysis by reiterating "[t]he high value we have placed on the right to refuse to deal with other firms,"[31] and the Court's "cautious" approach in departing from that principle.[32] The Court stressed that requiring competitors to deal would dull incentives to invest and innovate both for the monopolist and for competitors.[33] Characterizing *Aspen Skiing* as "at or near the outer boundary of § 2 liability[,]"[34] the Court assessed the sufficiency of Trinko's allegations under the "limited exception" recognized in *Aspen Skiing*.[35] The facts in *Aspen Skiing* included: (1) a prior course of dealing between the monopolist and the competitor; (2) to which the monopolist voluntarily agreed; and (3) from which it presumably made a profit doing business.[36] Trinko did not allege similar facts with respect to Verizon and AT&T; nor did it allege that Verizon would have provided access to AT&T or other CLECs absent the Telecommunication Act's mandate to do so.[37] The majority held that the absence of these specific facts were fatal to Trinko's Section 2 claim.[38]

The Court also stressed that the FCC's ability to withhold access to the "lucrative"[39] long distance market would protect competition. The Court further expressed concern that applying the antitrust laws in this context would overwhelm the judiciary in the minutiae of CLEC access to ILEC networks.[40] Thus, the Court suggested that regulators, rather than Article III courts, are better equipped to deal with a regulated monopolist who is alleged to have unlawfully refused to deal with a competitor.[41] The decision concludes as follows: "The Sherman Act is indeed the Magna Carta of free enterprise, . . . but it does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[42]

C. Essential Facilities Doctrine Not Recognized

In addition to its "refusal-to-deal" claim, Trinko also alleged a Section 2 violation based on the essential facilities doctrine.[43] While acknowledging that the lower courts and some commentators have recognized the essential facilities theory of antitrust liability, the Supreme Court reiterated that it had never adopted the doctrine.[44] Expressly declining, once again, either to adopt or reject the doctrine, the Supreme Court held that on the facts alleged, the essential facilities theory did not resuscitate Trinko's Section 2 claim.[45] Bearing in mind the extensive sharing obligations that the Telecommunications Act imposes on ILECs, the majority held that the essential facilities doctrine had little, if any, application.[46] As Justice Scalia put it, "where access exists"—here, by statutory mandate—"the doctrine serves no purpose."[47]

D. Monopoly Leveraging Rejected

The Court dealt tersely with the Second Circuit's holding that Trinko's complaint stated a Section 2 monopoly leveraging claim: "To the extent that the Court of Appeals dispensed with a requirement that there be a 'dangerous probability of success' in monopolizing a second market, it erred. . . . In any event, leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected."[48]

E. No Bright Line Test for Monopolization

Verizon, supported by federal enforcers, sought to persuade the Court to use the case as an opportunity to announce a far-reaching, bright line rule to distinguish pro-competitive unilateral refusals to deal from predatory conduct actionable under Section 2.[49] Specifically, Verizon argued for a test that would insulate from liability any refusal to deal "as long as it makes business sense apart from enabling monopoly returns."[50] The analysis is sometimes referred to as the "sacrifice test" because, as a precondition to liability, it requires proof that the monopolist sacrificed short-term profits in an effort to drive rivals out of the market.[51] This argument produced opposing *amicus* briefs from a group of economists[52]—including several former chief economists for the DOJ and the originators of the sacrifice test—and from the State of New York and a group of other states.[53] Despite the extensive briefing, the Court never mentioned the sacrifice test in its decision. Although the decision mentions that the defendant in *Aspen Skiing* was prepared to forgo short-term profits, that suggests, at most, that profit-sacrifice may be a *sufficient* condition to impose Section 2 liability.[54] But the Court's decision does not answer whether profit-sacrifice is a *necessary* one.[55]

F. Justice Stevens's Concurring Opinion

Justice Stevens authored a concurring opinion joined by Justices Souter and Thomas.[56] While not challenging the result reached by the majority, these three Justices believed Trinko's claims failed to satisfy *Associated General Contractor*'s[57] antitrust standing requirements. The concurrence preferred to decide the case on this ground, without embarking on the analysis undertaken by the majority.[58]

III. *Trinko*'s Impact on Future Telecommunications Cases

Although *Trinko* limits the circumstances in which a monopolist may be sued on a refusal-to-deal theory, the Court's decision nevertheless does not express any particular analysis for resolving such claims. Thus, lower courts, which have long wrestled with the absence of standards under Section 2 to differentiate pro-competitive conduct from unnecessarily restrictive business practices, will continue to do so.[59] Similarly, although rejecting Trinko's essential facilities claim as inadequately pleaded, the Supreme Court's unwillingness to recognize or repudiate the doctrine leaves it to the lower courts to continue to wrestle over the doctrine's vitality and contours. However, the Court did note that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."[60] In that vein, *Trinko* at least provides guidance to lower courts addressing antitrust claims that arise within the telecommunications industry and in regulated industries more generally.

Because the Telecommunications Act imposes extensive obligations on CLECs to deal with ILECs, there is likely to be little room for antitrust scrutiny on either a refusal to deal or essential facilities approach.[61] The post-*Trinko* rulings in the lower courts reflect this teaching.[62] For instance, in *Covad Commc'ns Co. v. Bellsouth Corp.*,[63] the Eleventh Circuit Court of Appeals read *Trinko* to effectively sound the death knell for CLEC refusal-to-deal cases:

> *Trinko* now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen*. The relationship between AT&T and Verizon was mandated by the FTCA and thus cannot be said to have initiated a "voluntary" course of dealing, profitable or otherwise. For the same reason, Verizon cannot be said to have failed to make available to AT&T otherwise publicly marketed services, whether at retail or lower cost. *Trinko* emphasizes the coercive effect of the FTCA on incumbent LECs such as Verizon who—but for the FTCA—would not be required to make their network elements . . . available to third parties such as AT&T. In short, Covad's refusal-to-deal claims do not survive *Trinko* and must be dismissed.[64]

On the other hand, where the ILEC's refusal to deal is directed at a rival's customers, the courts are still feeling their way, despite *Trinko*.[65] In *Stein v. Pacific Bell*,[66] the Ninth Circuit considered whether the lower court properly dismissed a consumer's claim that an ILEC violated the Sherman Act by denying a competitor access to its Digital Subscriber Line ("DSL"). The court affirmed the dismissal because plaintiff's claims were "foreclosed by *Trinko*."[67] The court further stated that, as in *Trinko*, the facts of the case were distinguishable from *Aspen Skiing*.[68] The court contrasted the prior voluntary business relationship in *Aspen Skiing* to the "congressionally-imposed regulatory scheme" in *Trinko* and in the case before it.[69] Thus, the Ninth Circuit found that the case did "'not fit comfortably in the *Aspen Skiing* mold' of voluntariness."[70]

However, in *Covad Commc'ns Co. v. Bell Atlantic Corp.*,[71] Covad alleged a refusal-to-deal claim based on Bell Atlantic's refusal to sell its DSL services to would-be customers who had orders pending for DSL service with Covad.[72] In a pre-*Trinko* ruling, the district court held that Bell Atlantic's conduct related to its obligations under the Telecommunications Act, and therefore, "f[e]ll squarely outside the parameters of antitrust law."[73]

On appeal, Bell Atlantic argued that Covad had to show that Bell Atlantic suffered "short-term economic loss."[74] Bell Atlantic further maintained that Covad could not satisfy this requirement because it would not have been profitable for Bell Atlantic to sell its DSL service to a customer who would ultimately switch DSL service once Covad came to the market.[75] The Court of Appeals for the District of Columbia reversed the district court's dismissal in part. While holding to the view that, to plead a claim, Covad had to prove the refusal to deal caused Bell Atlantic to sacrifice short-term profits,[76] the court further held that Bell Atlantic's proposed economic justification for its refusal presented a question of fact, and thus, was unsuitable to resolve on a motion to dismiss.[77] Dismissal was inappropriate because it was "possible Bell Atlantic's refusal to deal reflected its willingness to sacrifice immediate profits from the sale of its DSL service in the hope of driving Covad out of the market and recovering monopoly profits in the long run."[78]

Interestingly, the D.C. Circuit did not mention *Aspen Skiing* in its analysis. Nor did it focus on a prior voluntary relationship between the parties. Instead, the court relied on *United States v. Colgate & Co.*,[79] the seminal Supreme Court refusal-to-deal case. Specifically, the D.C. Circuit cited *Colgate* for the proposition that a dominant firm may refuse to deal with a rival only when the refusal is not intended "to create or maintain a monopoly."[80] In *Trinko*, the Court quoted *Colgate* to highlight a firm's affirmative

right to refuse to deal,[81] but it omitted the qualification that the refusal not be "intended" to "create or maintain a monopoly."[82]

Since *Trinko*, courts have uniformly rejected essential facilities claims in the context of the telecommunications industry.[83] These decisions consistently hold that a facility is "available" so long as access is compelled by regulation.[84]

IV. Expansion of *Trinko* Beyond Telecomm into Other Regulated Industries

Trinko arose from the telecommunications industry. Thus, the Court took the opportunity to advise that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."[85] As the Court further explained, "[o]ne factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm."[86] However, the Court went on to note that "[w]here such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[87] More generally, however, the Court suggested a highly deferential view favoring regulation, noting that when "[t]here is nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust immunity are worth its sometimes considerable disadvantages."[88]

At least since *Silver v. New York Stock Exchange*[89] was decided in 1963, courts have asked this same basic question in applying the doctrine of implied immunity.[90] This doctrine was not available to the *Trinko* Court because of the savings clause in the Telecommunications Act.[91] Nonetheless, the Court cited implied immunity cases in asserting that the regulatory scheme "may also be a consideration in deciding whether to recognize an expansion of the contours of § 2."[92] The Court was unwilling to expand Section 2 by "adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors," and it discussed the FCC's regulatory scheme in that context.[93]

Antitrust defendants have sought to apply the *Trinko* Court's discussion to other regulated industries, arguing that the antitrust laws should not interfere with regulatory authority and expertise.[94] These subsequent attempts to apply *Trinko* to other regulated industries have not been limited to refusal-to-deal and essential facility claims.[95] And, even though implied immunity was unavailable in *Trinko*, parties have used the case to buttress implied immunity arguments.[96] Following the *Trinko* Court's discussion, lower courts have assessed the regulatory scheme at issue to determine whether it "performs the antitrust function."[97]

In both *New York Mercantile Exchange, Inc. v. Intercontinental Exchange Inc.*[98] ("*NYMEX*") and *Stand Energy Corp. v. Columbia Gas Transmission Corp.*,[99] participants in regulated industries invoked *Trinko* to argue that the antitrust laws did not impose a duty to aid competitors. This approach succeeded in *NYMEX*, where the court dismissed the defendant's essential facility and refusal-to-deal counterclaims.[100] The alleged essential facility was NYMEX's settlement prices, the access to which the CFTC regulated comprehensively.[101] Like the FCC's authority in *Trinko*, the CFTC's power to compel access made it "unnecessary to impose a judicial doctrine of forced access."[102] Moreover, the Commodity Exchange Act requires the CFTC to "take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving" its objectives.[103] Accordingly, the court concluded that "the CFTC is in a better position than a general antitrust court to determine the scope and terms of any forced sharing of settlement prices among the exchanges that it regulates, and then to oversee and enforce any such sharing of settlement prices."[104]

As to the refusal-to-deal claim, the *NYMEX* court distinguished the facts of the case from both *Aspen Skiing* and *Otter Tail*. *Aspen Skiing* did not apply because NYMEX had a legitimate business justification for its refusal to deal with the competitor-plaintiff, and because there was no prior cooperation between the parties that would raise an inference of abandonment of a prior course of profitable dealings.[105] *Otter Tail* did not apply because, in that case, the regulatory agency, the Federal Power Commission, lacked the authority to remedy the monopolist's exclusionary conduct.[106] In contrast, the CFTC "ha[d] the power to compel disclosure of the settlement prices and to regulate the scope and terms of such disclosure."[107]

Antitrust defendants had less success applying *Trinko* in *Stand Energy Corp. v. Columbia Gas Transmission Corp*.[108] Plaintiffs were shippers, wholesalers, and marketers of natural gas who alleged that pipeline owners gave preferential treatment to particular gas shippers. Plaintiffs asserted breach of contract and violation of state antitrust laws, which included refusal-to-deal claims.[109] Defendants relied on *Trinko* in moving to dismiss the refusal-to-deal claims.[110] They argued that plaintiffs had pleaded violations of only Federal Energy Regulatory Commission ("FERC") regulations, not antitrust violations.[111] Denying the motion to dismiss, the court stated:

> The [*Trinko*] Court explained at some length the regulatory framework imposed by the FCC to provide competition access in that setting, in [a] new wholesale market created by the regulatory scheme pursuant to an act "more ambitious than the antitrust laws . . . 'to eliminate the monopolies.'". . . Though FERC regulates the rates for transporting and selling natural gas in interstate com-

> merce, Defendants have not demonstrated that this case involves the same level of regulatory overlay and unique market found in *Trinko*.[112]

The court assessed whether FERC's regulatory scheme performed the antitrust function and analogized the case to *Otter Tail*.[113] Like the Federal Power Commission's regulatory scheme in *Otter Tail*, and unlike that of the FCC in *Trinko*, FERC's regulatory scheme did not incorporate antitrust authority.[114] Although FERC issued an order requiring the defendants to disgorge profits and refund certain fees, FERC's order did not "purport[] to address any anticompetitive results" of defendants' conduct.[115]

Litigants have also successfully expanded *Trinko* to accomplish an implied immunity from antitrust review.[116] In *Last Atlantis Capital LLC v. Chicago Bd. Options Exch., Inc.*,[117] the Northern District of Illinois cited *Trinko* in ruling that the SEC's consistent and pervasive regulation of options trading warranted implied repeal of the antitrust laws.[118] "Applying federal antitrust law in this area," the court reasoned, "creates the very real possibility of subjecting the defendants to conflicting standards of conduct."[119] Furthermore, "the antitrust laws conflict with an overall regulatory scheme that empowers [the SEC] to allow conduct that the antitrust laws would prohibit."[120]

Whether *Trinko* will have a significant role immunizing activity subject to non-telecommunications regulation is an open question, however, in view of the Supreme Court's recent decision in *Billing v. Credit Suisse First Boston*.[121] There, individuals who purchased stock in various initial public offerings alleged that certain offering practices manipulated the market, and subjected the defendant-underwriters to antitrust liability, as well as to liability under the securities laws.[122] The Court of Appeals for the Second Circuit held that there was no implied antitrust immunity based on pervasive SEC regulation.[123] The Supreme Court reversed, however, and in so doing articulated four factors that may form the touchstone analysis to resolve future implied immunity issues: (1) the existence of regulatory authority under the securities laws to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct; and (4) a determination that conflict affected practices that "lie squarely within an area of financial market activity that the securities law seeks to regulate."[124] Because *Billing* directly addresses the matter of implied immunity from antitrust review and *Trinko* does not, it is difficult to predict whether *Trinko* will play a role in developing this area of the law, or whether it will, instead, disappear into the shadow of *Billing*.

V. Pleading a Refusal-to-Deal Claim after *Trinko*—Is Abandonment of a Prior and Profitable Course of Dealing Required?

As a predicate to maintaining a refusal-to-deal claim, the *Trinko* Court's majority placed substantial emphasis on the fact that the monopolist in *Aspen Skiing* refused to deal with a competitor with whom it had previously and voluntarily engaged in a profitable course of dealing.[125]

Since *Trinko,* a number of courts have required rigid pleading of the *Aspen Skiing* "exception," holding that a Section 2 refusal-to-deal claim must allege the abandonment of a profitable, prior course of dealing with a competitor.[126] Thus, the *NYMEX* court explained that the plaintiff's "§ 2 claims of a refusal to deal do not fit the rubric of claims recognized by the Supreme Court in *Aspen Skiing*":[127]

> There is no history of cooperation between ICE [the plaintiff] and NYMEX in sharing the use of NYMEX's settlement prices. Therefore, NYMEX's "prior conduct sheds no light upon the motivation of its refusal to deal." *Id.* [quoting *Trinko*]. There is no indication that NYMEX is flouting consumer demand and forgoing short-term profits by refusing to cooperate with ICE. And unlike the defendant in *Aspen Skiing*, NYMEX has proffered a legitimate business justification for its refusal to deal with ICE. (Tr. 21-23.) NYMEX has a legitimate business interest in preventing its competitor, ICE, from free-riding on NYMEX's settlement prices. NYMEX's settlement prices have value because they are viewed as proxies for market prices, and NYMEX has a legitimate interest in preventing rivals from free-riding on this reputation.[128]

The Fifth Circuit reached a similar conclusion as to the necessary pleading requirements:

> Although ASAP claims that CenturyTel "voluntarily" rated calls to their numbers as local from October 2001 through March 2002, the complaint does not allege that CenturyTel understood where ASAP's switch was located at that time. So there is no indication that the prior arrangement was agreed to, and therefore presumably profitable, in the manner of the ski ticket arrangement in *Aspen Skiing*. And there is otherwise nothing that would suggest that CenturyTel is giving up short-term profits in hopes of running ASAP out of business. CenturyTel gets

> more short-term profit, not less, by charging the calls to ASAP's numbers as toll calls. Even if no one calls ASAP anymore when the calls are rated as toll, CenturyTel is not giving up profits as compared to rating calls to ASAP as local, because CenturyTel's customers pay a flat fee for local service. ASAP's allegations do not fit into the *Aspen Skiing* exception for refusal-to-deal claims, and therefore do not state a cognizable antitrust claim. The antitrust claims were therefore properly dismissed.[129]

However, it may be sufficient to allege a prior course of dealing between the alleged monopolist and any competitor, not limited to the plaintiff.[130] On that score, a Texas District Court held:

> It is of vital importance to this Court's analysis that the text on those two pages [of the *Trinko* decision] do[es] not support Defendant's contention that a cessation of voluntary business activity must have been with a § 2 plaintiff in order to satisfy the standard of *Aspen Skiing*. . . . The bottom line is that the Supreme Court's repeated use of the generic terms "rival" in both the singular and the plural [negates] Defendant's contention that only termination of a cooperative venture with a § 2 plaintiff, rather than other market participants, suffices.[131]

Still, other courts assert that *Trinko* did not change the pleading standard for refusal-to-deal claims at all.[132] But whether or not required, prudence suggests including such allegations in support of a refusal-to-deal claim whenever there is a good-faith basis to do so.[133] This is particularly so in light of the Supreme Court's recent decision in *Bell Atlantic Corporation v. Twombly.*[134] In *Twombly*, the Court held that, to plead a Sherman Act § 1 "conspiracy," the plaintiff must allege facts that "plausibly" suggest joint activity.[135] Fact allegations that are merely consistent with a conspiracy are not enough.[136] Although *Twombly* arose under Section 1, it is fairly predictable that defense attorneys will assert that the decision's announced "plausibility" standard governs Section 2 cases as well.[137]

VI. *Trinko's* Impact on Monopoly Leveraging Claims

After a number of years of uncertainty and a split in the Courts of Appeals, the decision in *Trinko* seems to have crystallized the Supreme Court's Section 2 jurisprudence on monopoly leveraging.[138] Before *Trinko*, a monopoly leveraging action could be brought in some Circuits under Section 2 against a single independent actor that lacked market power in the second or "target" market.[139] In other words, there could be a Section 2 monopoly leveraging violation even though the defendant did not monopolize, or come dangerously close to monopolizing, the target market.[140]

The *Trinko* decision dealt with this issue in a single footnote.[141] The Court held that monopolization or the dangerous probability of monopolization of the second market is an essential element of monopoly leveraging.[142] Thus, if a defendant possesses the requisite market power in the second market to have a "dangerous probability of success," the plaintiff, in almost all cases, should be able to plead attempted monopolization of the second market so long as the requisite specific intent could be alleged.[143]

Since *Trinko*, courts have dismissed several cases because plaintiffs failed to allege or demonstrate that the defendant possessed market power, or a dangerous probability of acquiring market power, in the leveraged market.[144] At the same time, courts have upheld leveraging claims when the plaintiff alleges a dangerous probability of success in monopolizing the leveraged market—a recognized attempted monopolization claim.[145]

In *Service Employees International Union Health & Welfare Fund v. Abbott Laboratories*,[146] plaintiff challenged Abbott's use of its patent on Norvir® ("Norvir"), which is a protease inhibitor ("PI"), or anti-retroviral drug, that inhibits the AIDS virus from replicating itself into new cells. Norvir is prescribed because, "along with other PIs, it both 'boosts' the antiviral effect of those PIs and reduces their harmful side effects."[147] No other drug boosts PIs as does Norvir.[148] In fact, all but one of the PIs currently on the market are boosted by Norvir.[149]

Plaintiffs alleged that in 2003, Abbott's own boosted PI, Kaletra® ("Kaletra"), began losing market share, as a result of which Abbott adopted a 478% price increase for Norvir to all manufacturers of PIs.[150] The price of Abbott's own boosted PI, Kaletra, remained largely unchanged. Plaintiff further alleged that Abbott attempted to leverage its monopoly over Norvir, secured by a patent, into a monopoly in the market for boosted PIs, where Kaletra competes.[151]

The court denied Abbott's motion to dismiss and upheld plaintiffs' leveraging claim.[152] Plaintiffs alleged that Abbott had engaged in anti-competitive behavior by leveraging its patent.[153] The district court held that misuse of intellectual property could give rise to Sherman Act liability.[154]

Other courts, however, have disagreed with this approach. In *Schor v. Abbott Laboratories*,[155] a case involving identical facts, the court ruled that legal use of patent rights cannot give rise to antitrust liability.[156] The Illinois court expressly criticized the Ninth Circuit's *Kodak* decision, and instead relied on *In re Independent Service Orga-*

nizations Antitrust Litigation,[157] where the Federal Circuit held that the legal use of a patent could not give rise to antitrust liability. *Service Employees*, however, relies not only on different circuit law, but also on a factual distinction: there, plaintiffs challenge the validity of Abbott's Norvir patent.[158] The patent challenge prevented Abbott from effectively arguing, at the pleading stage, that exercise of rights under a valid patent precludes application of the Sherman Act.

VII. Standing and Stevens's Concurring Opinion

Since *Trinko* was decided over three years ago, Justice Stevens's concurring opinion has gained little traction in the courts and among antitrust scholars. In fact, Justice Stevens's analysis has been applied in only two reported decisions, *Levine v. BellSouth Corp.*[159] and *Knowles v. Visa U.S.A., Inc*.[160] Scholars have largely overlooked Stevens's opinion, except for the few that have briefly noted their disagreement with its reasoning.[161]

Although Justice Stevens's concurrence emphasized the need to avoid duplicative recovery, denying consumer standing risks under-recovery instead. As Professor Andrew I. Gavil has explained, consumers and competitors seek to recover distinct damages.[162] A competitor can recover for lost profits on sales diverted by the defendant's exclusionary conduct.[163] But it cannot recover for higher prices resulting from that conduct.[164] Only a consumer can recover damages caused by the defendant's control over prices and the increase in rivals' prices.[165] If consumers are denied standing in exclusionary conduct cases, these damages go unrecovered.[166]

Such damages went uncompensated in *Levine v. BellSouth Corp.*, where the Southern District of Florida denied standing to customers seeking damages for increased prices resulting from BellSouth's alleged tying of local telephone service to DSL service.[167] Plaintiffs were a class of customers who were required to purchase BellSouth's local phone service in order to purchase its DSL service, in areas where BellSouth was the ILEC.[168] Plaintiffs alleged BellSouth's tying of local phone service to DSL service prevented customers from obtaining lower-priced local phone service from competitors and gave BellSouth a monopoly on local phone service in the affected areas.[169] Plaintiffs sought damages for the difference in price between BellSouth's phone service and competitors' phone service or the phone service price that would have prevailed in a competitive market.[170]

Applying Justice Stevens's reasoning, the court determined that plaintiffs did not have standing as "persons" under Section 4 of the Clayton Act because "there is only an indirect relationship between the Defendant's alleged misconduct and the Plaintiff's asserted injury."[171] Because plaintiffs alleged they are unable to receive DSL service from BellSouth over a loop that has been leased to a CLEC, "[t]he missing CLECs, as the more direct victim of BellSouth's alleged misconduct, would be in a far better position than Plaintiff[s], as a local telephone service customer[s], to vindicate the public interest in the enforcement of the antitrust laws."[172] The court did not address the CLEC's inability to recover the price-related damages sought by the plaintiffs.[173]

In a case with arguably a higher risk of duplicative recovery, *Knowles v. Visa U.S.A.*,[174] the Maine Superior Court cited Justice Stevens's opinion to note that the test for antitrust standing set forth in *Associated General Contractors*[175] still holds.[176] That test asks, among other things, whether there exists a more immediate class of potential plaintiffs motivated to enforce the antitrust laws, whether the damages or injuries claimed are speculative, whether there is a danger of duplicative recoveries, and whether there is a need for complex apportionment.[177]

Knowles followed a nation-wide class action brought by merchants alleging illegal tying of Visa and MasterCard debit cards to Visa and MasterCard credit cards.[178] The *Knowles* class consisted of consumers who alleged that these merchants' increased costs were passed on to them.[179] Noting that the Maine legislature had enacted a law repealing *Illinois Brick*, the court nonetheless relied on *Associated General Contractors* to deny standing to the plaintiffs.[180]

In *Knowles*, however, there was a lower risk of under-recovery than in *Trinko* because the "consumers" in the debit card services market—the merchants—had already recovered for their damages.[181] The merchants' damages, like the damages allegedly suffered by the plaintiffs in *Trinko*, were separate and distinct from the damages suffered by competitors in the restrained market.[182] Application of Stevens's rationale in *Trinko* and in *Levine*, in contrast, denies any end-user consumer recovery and leaves the fundamental antitrust injury of higher prices uncompensated.[183]

VIII. Conclusion

As the ensuing case law demonstrates, *Trinko* leaves almost as many issues unresolved as it resolves. For instance, while the Court's decision does provide clear guidance for future telecommunications cases, its impact on other regulated industries is less certain. The Supreme Court's subsequent *Billing* decision may, however, pick up where *Trinko* leaves off. Similarly, with regard to the Court's refusal-to-deal analysis, various lower courts have interpreted the decision: (1) to require a plaintiff to demonstrate a prior and profitable course of dealing with *the defendant*; (2) to require a prior and profitable course of dealing with *any competitor*; or (3) not to impose a particular or heightened pleading standard at all.[184]

Thus, *Trinko* is more of a land mine for antitrust practitioners seeking guidance regarding Section 2 liability than it is a landmark ruling on the law of monopolization.

Endnotes

1. 540 U.S. 398 (2004).
2. *See id.* at 410-11, 415-16.
3. 47 U.S.C. §§ 151 *et seq.* (1996).
4. Since the time of the events underlying *Trinko*, AT&T has merged with SBC, an ILEC.
5. 47 U.S.C. § 271 (1996).
6. *See Trinko*, 540 U.S. at 401-03 ("Verizon, like other incumbent LECs . . . has signed interconnection agreements with rivals such as AT&T, as it is obliged to do under § 252, detailing the terms on which it will make its networks available.").
7. *See id.* at 403 ("In late 1999, competitive LECs complained to regulators that many orders were going unfilled, in violation of Verizon's obligation to provide access to OSS functions.").
8. *See id.* at 403-04 ("Under the FCC consent decree, Verizon undertook to make a 'voluntary contribution' to the U.S. Treasury in the amount of $3 million; under the PSC orders, Verizon incurred liability to the competitive LECs in the amount of $10 million.").
9. In an unusual twist, on remand, the district court found that Trinko was not a customer of AT&T during the time in which the alleged harm occurred. *Law Offices of Curtis V. Trinko v. Verizon Commc'ns, Inc.*, No. 00 CIV 1910 (SHS), 2006 WL 2792690 at *8 (S.D.N.Y. Sept. 27, 2006).
10. 15 U.S.C. §§ 1 *et seq.* (2004).
11. *See Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 934 (1993) (listing the elements of tortious interference with a contract).
12. *Trinko*, 540 U.S. at 404.
13. *Id.* at 404-05.
14. *Trinko* alleged that the relevant market comprised those areas where Bell Atlantic n/k/a Verizon was the ILEC, and thus possessed monopoly power.
15. *Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp.*, 123 F. Supp. 2d 738, 749 (S.D.N.Y. 2000).
16. *Id.* at 741-42. The district court held, in part, that Verizon's alleged violation of the Telecommunications Act was possibly a breach of contract, but nevertheless an inadequate basis for bringing an antitrust claim. *Law Offices of Curtis V. Trinko, LLP v . Bell Atlantic Corp.*, 305 F.3d 89, 97 (2d Cir. 2002).
17. *Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp.*, 305 F.3d 89 (2d Cir. 2002).
18. Judge Sack issued a separate opinion concurring with the majority's disposition of the claims alleged under the Sherman Act and Section 202 of the Telecommunications Act, but dissenting as to its treatment of Section 251 of the Telecommunications Act. *Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp.*, 309 F.3d 71 (2d Cir. 2002) (Sack, J, concurring and dissenting).
19. Specifically, the Court granted review of the following issue: "[d]id the Court of Appeals err in reversing the District Court's dismissal of respondent's antitrust claims[.]" *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 538 U.S. 905 (2003).
20. *Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 416 (2004).
21. *Id.* at 400. Justice Stevens wrote a concurring opinion, which Justices Souter and Thomas joined. *Id.* The significance of this concurring opinion will be discussed at length later in this article.
22. *Id.* at 406.
23. *Id.* at 399 (citing 47 U.S.C. § 152).
24. *Id.* at 406.
25. *Id.* The Court's subsequent statements concerning the "difficult[ies]" the federal courts would encounter marking the boundaries of new antitrust liability for violations of Section 251(c) provide additional insight to the Court's analysis. *See id.* at 414 ("Allegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations.").
26. *See id.* at 407 ("The complaint alleges that Verizon denied interconnection services to rivals in order to limit entry.").
27. *Id.* at 408 (stating that "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal,'" but emphasizing that "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2.") (quoting *U.S. v. Colgate and Co.*, 250 U.S. 300, 307 (1919)).
28. 472 U.S. 585 (1985).
29. *Trinko*, 540 U.S. at 408.
30. *Id.* at 409-10.
31. *Id.* at 408-11 (quoting *Aspen Skiing*, 472 U.S. at 601).
32. *Id.* at 408; *see also Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984) (stating that under the Sherman Act "a business has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently").
33. *Trinko*, 540 U.S. at 407-408; *see also United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (recognizing the long recognized right of a manufacturer to "freely exercise his own independent discretion as to parties with whom he will deal").
34. *Trinko*, 540 U.S. at 409.
35. *Id.* at 409; *see also Aspen Skiing*, 472 U.S. at 585 (discussing the prior dealings between the skiing facilities and the actions taken after termination by Aspen Highlands that "made it extremely difficult for respondent to market" itself).
36. *Aspen Skiing*, 472 U.S. at 585.
37. *Trinko*, 540 U.S. at 409-10 (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 371 (1973)).
38. *Trinko*, 540 U.S. at 410.
39. *Id.* at 412.
40. *Id.* at 414; *see also Brooke Group Ltd. v. Brown & Williamson Tabacco Corp.*, 509 U.S. 209, 223 (1993) (stating anticompetitive violations "may be beyond the practical ability of a judicial tribunal to control").
41. *Trinko*, 540 U.S. at 412-13 (stating that a regulatory structure is "designed to deter and remedy anticompetitive harm"); *see Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (noting the familiarity of regulators because regulators directly control prices in regulated industries).
42. *Trinko*, 540 U.S. at 415-16.
43. *Id.* at 410-411.
44. *Id.* at 411; *Aspen Skiing*, 472 U.S. at 611 n.44 (stating that the Court found it "unnecessary to consider the possible relevance" of the essential facilities test).
45. *Trinko*, 540 U.S. at 410-11.
46. *Id.* at 399.
47. *Id.* at 411.
48. *Id.* at 415 n.4 (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993)).

49. Brief for Petitioner at 10, *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

50. Brief for Petitioner at 11, *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *see id*. at 20-23. *See also* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 7 (arguing that a refusal to deal with a competitor is lawful under Section 2, except one that "would not make business or economic sense apart from its tendency to reduce or eliminate competition"), *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

51. *United States v. AMR Corp.*, 140 F. Supp. 2d 1141, 1180 (D. Kan. 2001) (explaining Professor Stiglitz's "sacrifice" test asks whether "the alleged predator clearly passed up a more profitable alternative"). *See also MCI Commc'ns Corp. v. American Tel. and Tel. Co.*, 708 F.2d. 1081, 1112-13 (7th Cir. 1983) (explaining courts have nearly unanimously adopted a form of a cost-based test in deciding questions of predation to determine if a monopoly deliberately sacrificed revenues for the purpose of driving rivals out of the market to later recoup its losses through higher profits earned in the absence of competition).

52. Brief of Amici Curiae Economics Professors in Support of Respondent, *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682).

53. Brief of the State of New York et al. as Amicus Curiae in Support of Respondent, *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682).

54. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 399 (2004). *See also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985) (explaining that the most significant evidence that would allow the jury to conclude that the defendant was interested in reducing competition by harming its smaller competitor was that the defendant was willing to forgo short-run benefits by forgoing daily ticket sales).

55. *Trinko*, 540 U.S. at 399 (explaining that the present case does not fit within the limited exception of *Aspen* because in *Aspen* the defendant terminated a voluntary agreement with the plaintiff that suggested a willingness to forsake short-term profits whereas Verizon never engaged in a voluntary course of dealing with its rivals).

56. *Trinko*, 540 U.S. at 416-18 (Stevens, J., concurring).

57. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983).

58. *Trinko*, 540 U.S. at 417-18.

59. *See* Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 147-8 (2005) ("Notwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined. No generalized formulation of unilateral or multilateral exclusionary conduct enjoys anything approaching universal acceptance."). *See also State of Ill. ex. rel. Hartigan v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826, 908-909 (C.D. Ill. 1990) (demonstrating that there is no single test in determining an abuse of monopoly power but, rather, one looks to the record as a whole).

60. *Trinko*, 540 U.S. at 399, 411.

61. *Linkline Commc'ns, Inc. v. SBC Cal., Inc.*, No. 05-56023, slip op. at 5 (9th Cir. Sept. 11, 2007) (pointing out that the court in *Trinko* stated "that it is 'very cautious' when recognizing exceptions to the right of refusing to deal. . . ."). *See also N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 323 F. Supp. 2d 559, 568-69 (S.D.N.Y 2004) (discussing the constraints imposed on the essential facility doctrine by *Trinko* in that "essential facility claims should be denied 'where a state or federal agency has effective power to compel sharing and regulate its scope and terms'" (quoting *Trinko*, 540 U.S. at 411)).

62. *Linkline*, No. 05-56023, slip op. at 7-8 (affirming the District Court's dismissal of plaintiff's refusal to deal and essential facilities claims because they were barred by *Trinko*). *See also N.Y. Mercantile*, 323 F. Supp. 2d at 570 (ruling that under *Trinko* competitor did not have a viable essential facility claim).

63. 374 F.3d 1044 (11th Cir. 2004).

64. *Id.* at 1049.

65. *See* Marina Lao, *Aspen Skiing 20 Years Later: Aspen Skiing and Trinko: Antitrust Intent and "Sacrifice,"* 73 ANTITRUST L.J. 171, 172-73 (2005) (contending that the full implications of *Trinko* still remain unresolved); John E. Lopatka & William H. Page, *Aspen Skiing 20 Years Later: Bargaining and Monopolization: In Search of the "Boundary of Section 2 Liability" Between Aspen and Trinko*, 73 ANTITRUST L.J. 115, 118 (2005) (stating that confusion still remains in regards to monopolization standards after *Trinko*).

66. No. 04-16043, 2006 WL 751812, at *1 (9th Cir. Mar. 2, 2006).

67. *Id*.

68. *Id.* at *4.

69. *Id*.

70. *Id.* (internal citation omitted).

71. 201 F. Supp. 2d 123 (D.D.C. 2002), *aff'd in part, rev'd in part*, 398 F.3d 666 (D.C. Cir. 2005).

72. *See Covad*, 398 F.3d at 675.

73. *Covad*, 201 F. Supp. 2d at 130.

74. *Covad*, 398 F.3d at 675.

75. *See id.* at 675.

76. *See id*.

77. *See id.* at 676.

78. *Id*.

79. 250 U.S. 300 (1919).

80. *Id.* at 307.

81. *Trinko*, 540 U.S. at 408.

82. *See Colgate*, 250 U.S at 307. While quoting *Colgate, Trinko* conveniently omits the phrase immediately preceding the quotation. The phrase "in the absence of any purpose to create or maintain a monopoly" seems to establish an intent element in *Colgate* not present in *Trinko*. *Id.*

83. *See MetroNet Servs. Corp v. Quest Corp.*, 383 F.3d, 1124, 1128-30 (9th Cir. 2004) (relying on *Trinko* to reject claim); *Covad*, 374 F.3d at 1050 (same); *see also* Neil R. Stoll & Shepard Goldfein, *Is § 2 of the Sherman Act on Hold*?, N.Y.L.J. 3 n.1, Feb. 17, 2004 ("[*Trinko*] call[s] into question the parameters, if not the existence, of the essential facilities doctrine"); James Keyte, *The Ripple Effects of Trinko: How It Is Affecting Section 2 Analysis*, 20 FALL ANTITRUST 44 n.1 (ABA Section of Antitrust, Fall 2005) ("*Trinko* . . . has clearly signaled that the demise of the essential facilities doctrine . . . may be on the horizon.").

84. *See id*.

85. *Trinko*, 540 U.S. at 411.

86. *Id.* at 412.

87. *Id*.

88. *Id.* (quoting *Silver v. New York Stock Exch.*, 373 U.S. 341, 358 (1963)).

89. 373 U.S. 341.

90. *Id.* at 358; *U.S. v. Radio Corp. of America*, 358 U.S. 334, 346 (1959) (questioning whether the overall regulatory scheme of the Expediting Act demands invocation of a primary jurisdiction doctrine).

91. *Trinko*, 540 U.S. at 406.

92. *Id*. at 412; *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 730-35 (1975).

93. *Trinko*, 540 U.S. at 411-12.

94. *A.I.B. Express v. FedEx*, 358 F. Supp. 2d 239 (S.D.N.Y. 2004) (explaining defendant's assertion that *Trinko* applies to the package shipping industry); *Billing v. Credit Suisse First Boston*, 426 F.3d 130 (2d Cir. 2005) (expanding the *Trinko* discussion to the financial services industry); *Creative Copier Servs. v. Xerox Corp.*, 344 F. Supp. 2d 858 (D. Conn., 2005) (seeking to apply the *Trinko* discussion to the business services industry).

95. *Walgreen v. Organon*, 335 F. Supp. 2d 522 (D.N.J. 2004) (describing defendant Organon's argument that *Trinko* should be applied to bar plaintiffs from raising late-listing); *Creative Copier Servs v. Xerox Corp.*, 344 F. Supp. 2d 858, 865-66 (D. Conn. 2004) (explaining defendant's argument that *Trinko* established a new rule that plaintiff's complaint is deficient without specific allegations that defendant could not make a short-term profit from the challenged conduct).

96. *Billing v. Credit Suisse First Boston*, 426 F.3d 130 (2d Cir. 2005) (agreeing with defendant's argument that implied immunity was appropriate because the Securities Exchange Commission, directly and through oversight of the securities industry, either expressly permitted "tie-in" agreements or had the power to regulate such that a failure to find implied immunity would conflict with an overall regulatory scheme); *see also Texas Commercial Energy v. TXU Energy*, 2004 WL 1777597 (S.D. Tex. 2004).

97. *Trinko*, 540 U.S. at 412.

98. 323 F. Supp. 2d 559 (S.D.N.Y. 2004).

99. 373 F. Supp. 2d 631 (S.D. W. Va. 2005).

100. *NYMEX*, 323 F. Supp. 2d at 559; *see also American Channel, LLC v. Time Warner Cable, Inc.*, 2007 WL 142173, at **9-10 (D. Minn. Jan. 17, 2007) (granting motion to dismiss plaintiff's monopolization claim because the defendant's activity was regulated by the FCC).

101. *NYMEX*, 323 F. Supp. 2d at 570.

102. *Id.* at 568.

103. *Id.* at 569 (quoting Commodity Exchange Act, 7 U.S.C. § 19(b)).

104. *Id.* at 570.

105. *See id.* at 571 (citing *Trinko*, 540 U.S. at 410).

106. *Id.* at 572.

107. *Id.*

108. 373 F. Supp. 2d 631 (S.D. W. Va. 2003).

109. *Id*.

110. *Id.* at 634, 641.

111. *Id.* at 641-42.

112. *Id.* at 641 (quoting *Trinko*, 540 U.S. at 415) (internal citations omitted).

113. *Stand Energy Corp.*, 373 F. Supp. 2d at 641 (discussing *Otter Tail*, 410 U.S. 366 (1973)).

114. *See id.*

115. *Id.*; *see also In re Remeron Direct Purchaser Antitrust Litig.*, 335 F. Supp. 2d 522 (D.N.J. 2004) (rejecting defendants' argument that the Hatch-Waxman Act and Food and Drug Administration (FDA) regulations supersede the antitrust laws).

116. *See Gordon v. N.Y. Stock Exch. Inc.*, 422 U.S. 659 (1975); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

117. No. 04C397, 2005 WL 3763262, at **2-3 (N.D. Ill. Mar. 30, 2005).

118. *Id*.

119. *Id.* at *3.

120. *Id.* (quoting *In re Stock Exch. Options Trading Antitrust Litig*. 317 F.3d 134, 149 (2d Cir. 2003) (internal quotation marks omitted)).

121. 127 S. Ct. 2383 (2007).

122. *Id.* at 2387.

123. 426 F.3d 130 (2d Cir. 2005).

124. 127 S. Ct. at 2392.

125. *Trinko*, 540 U.S. at 408.

126. *See N.Y. Mercantile Exch., Inc. v. Intercontinental Exch. Inc. (Nymex)*, 323 F. Supp. 2d 559, 571 (S.D.N.Y. 2004); *see also In re Elevator Antitrust Litig.*, No. 06-3128, 2007 WL 2471805 at *4 (2d Cir. Sept. 4, 2007).

127. *NYMEX*, 323 F. Supp. 2d at 571.

128. *See id.*; *accord Horrell v. SBC Commc'n, Inc.*, No. 5:05CV88, 2006 U.S. Dist. LEXIS 15659, at *37-38 (E.D. Tex. Feb. 16, 2006).

129. *ASAP Paging Inc. v. CenturyTel of San Marcos Inc.*, No. 04-50838, 2005 WL 1491285, *4 (5th Cir. June 24, 2005); *accord. MetroNet Servs. Corp v. Qwest Corp.*, 383 F.3d 1124, 1134 (9th Cir. 2004); *see also Levine v. Bellsouth Corp.*, 302 F. Supp. 2d 1358, 1372 (S.D. Fla. 2004).

130. *See generally Z-TEL Commc'n, Inc. v. SBC Commc'n, Inc.*, 331 F. Supp. 2d 513, 539 (E.D. Tex. 2004); *In re Elevator Antitrust Litig.*, No. 06-3128-CV, 2007 WL 2471805 at *4 (2d Cir. Sept. 4, 2007) (concluding "*Eastman Kodak* does not expressly say that a § 2 claim premised on a refusal to deal cannot survive absent a prior course of dealing").

131. *Z-TEL Commc'n, Inc.*, 331 F. Supp. 2d at 539.

132. *See Creative Copier Servs. v. Xerox Corp.*, 344 F. Supp. 2d 858, 866 (D. Conn. 2004) ("nowhere in *Trinko* did the Court indicate that a complaint should be dismissed if it fails to recite the magic words 'no short-term profit.' Accordingly, though *Trinko* did highlight that anticompetitive 'refusal to deal' is the exception, and not the rule, I do not think *Trinko* heightened the pleading standard in section 2 cases."); *see also In re Elevator Antitrust Litig.*, 2007 WL 2471805 at *5 (finding *Trinko* to be an exception that applies only when a monopoly seeks to terminate a prior course of dealing with a competitor).

133. *See Nobody in Particular Presents, Inc. v. Clear Channel Commc'n, Inc.*, 311 F. Supp. 2d 1048, 1113-14 (D. Colo. 2004) (motion to dismiss denied where the plaintiff, "NIPP alleges that Clear Channel provided advertising and concert promotional support in the past because concert promotions benefit the radio station as well as the promoter. Furthermore, NIPP claims that Clear Channel now refuses this support and sacrifices short-term gains in hopes of destroying other promoters and reaping long-term monopolistic profits. Clearly, the conduct alleged in this case bears striking resemblance to the refusal to deal in *Aspen Skiing*, conduct that the Supreme Court states is proscribed by the Sherman Act."); *A.I.B. Express, Inc. v. FedEx Corp.*, 358 F. Supp. 2d 239, 250 (S.D.N.Y. 2004).

134. 127 S. Ct. 1955 (2007).

135. *Id*. at 1965-66; *see also In re Elevator Antitrust Litig.*, 2007 WL 2471805 at *3.

136. *Twombly*, 127 S. Ct. at 1965; *see also In re Elevator Antitrust Litig.*, 2007 WL 2471805 at *2.

137. *Cf. Goldstein v. Pataki*, 488 F. Supp. 2d 254, 289 (E.D.N.Y. 2007) (noting, in public use case, that "the plausibility standard announced in *Twombly* was intended to apply beyond antitrust conspiracy cases").

138. *Verizon Commc'ns Inc. v. Trinko*, 540 U.S. 398, 415 n.4 (2004). *See also N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 323 F. Supp. 2d 559, 572 (S.D.N.Y 2004).

139. *Trinko, 540 U.S.* at n.4. *See also New York Mercantile Exch. Inc.*, 323 F. Supp. 2d at 572 (stating that the Second Circuit's standard was "erroneous to the extent it dispensed with a requirement that there be a dangerous probability of success in monopolizing a second market").

140. *See, e.g., AD/SAT Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 230 (2d Cir. 1999) (stating that monopoly leveraging requires "monopoly power in one market, the use of [that] power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor in another distinct market,

and injury caused by the challenged conduct"). *See also Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 681 (2d Cir. 1985).

141. *Trinko*, 540 U.S. 398, 415 n.4.

142. *Id.*

143. *Id. See also Broadcom v. Qualcomm, Inc.*, No. 06-4292, 2007 WL 2475874, at *15 (3d Cir. June 28, 2007).

144. *See In re Educ. Testing Serv. Praxis Principles of Learning and Teaching: Grades 7-12 Litig.*, 429 F. Supp. 2d 752, 758-59 (E.D. La. 2005) (stating that a dangerous probability of monopolization is necessary to state claim for leveraging); *N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 323 F. Supp. 2d 559, 572 (S.D.N.Y. 2004) (holding that failure to plead "dangerous probability of success" was fatal to the leveraging claim). Other leveraging claims have been dismissed where the courts reasoned that *Trinko* narrows the range of actionable anti-competitive conduct. *See Morris Comm. Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1294 n.11 (11th Cir. 2004); *Stein v. Pac. Bell*, No. 04-16043, 2006 WL 751812, at *2 (9th Cir. February 14, 2006). *See generally Trinko*, 540 U.S. at 412-13.

145. *See Covad Comm. Co. v. Bellsouth Corp.*, 374 F.3d 1044, 1051 (11th Cir. 2004) (upholding a monopoly leveraging claim that was tied to allegations of anti-competitive price squeeze); *A.I.B. Express, Inc., v. FedEx Corp.*, 358 F. Supp. 2d 239, 251 (S.D.N.Y. 2004) (upholding monopoly leveraging claim based on a finding that plaintiff adequately alleged a dangerous probability that FedEx would monopolize the second market, as well as based on a finding that FedEx had a duty to deal with plaintiff); *Z-Tel Comm., Inc. v. SBC Comm., Inc.*, 331 F. Supp. 2d 513, 543 (E.D. Tex. 2004) (upholding monopoly leveraging claim where plaintiff pled cognizable anti-competitive conduct and that defendant had sufficient power in the second market).

146. No. C04-4203 CW, 2005 WL 528323 (N.D. Cal. Mar. 2, 2005).

147. *Id.* at *1.

148. *Id.*

149. *Id*.

150. *Id*.

151. *Id*.

152. *Id*.

153. *Id*. at 2.

154. *Id.* at 3.

155. 378 F. Supp. 2d 850 (N.D. Ill. 2005), *aff'd*, 457 F.3d 608 (7th Cir. 2006).

156. *Id.*

157. 203 F.3d 1322 (Fed. Cir. 2000).

158. *Serv. Employees Int'l Union Health & Welfare Fund v. Abbott Laboratories*, No. C04-4203 CW, 2005 WL 528323, at *2 (N.D. Cal. Mar. 2, 2005).

159. 302 F. Supp. 2d 1358 (S.D. Fla. 2004).

160. No. CV-03-707, 2004 WL 2475284 (Super. Ct. Maine Oct. 20, 2004).

161. For example, in an ABA telephonic seminar on *Trinko*, Herbert Hovenkamp summarily critiqued Stevens's opinion, stating, "this was a consumer case. It was a case, which, if the facts were true, would have alleged higher prices, or reduced product quality in the market, and that would be a traditional case for standing." "*When You Don't Know What to Do, Walk Fast and Look Worried"* (Dilbert 2003), *available at* http://www.abanet.org/antitrust/at-source/04/07/July04-Teleconf7=23.pdf.

162. Andrew I. Gavil, *Symposium: Integrating New Economic Learning with Antitrust Doctrine: Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 Antitrust L.J. 3, n. 151 (2004).

163. *Id.* at 39.

164. *Id*.

165. *Id*.

166. *Id* at 3, n. 151.

167. 302 F. Supp. 2d 1358.

168. *Id*. at 1361.

169. *Id*.

170. *Id.*

171. *Id.* at 1368.

172. *Id*. at 1368-69 (citing *Trinko*, 540 U.S. at 417).

173. *Id*. at 1369.

174. 2004 WL 2475284 (Maine Super., October 20, 2004).

175. 459 U.S. 519 (1983).

176. *Knowles,* 2004 WL 2475284, at **4-5.

177. *Associated Gen. Contractors*, 459 U.S. at 541-44.

178. *Knowles,* 2004 WL 2475284, at *1.

179. *Id*. at *2.

180. *Id*. at **3-9.

181. *Id.* at *3, *6; *Trinko,* 540 U.S. at 405, 417-18.

182. *Knowles,* 2004 WL 2475284, at *2.

183. *Trinko,* 540 U.S. at 416-418; *Levine,* 302 F. Supp. 2d at 1368-69.

184. *See MetroNet Servs. Corp*, 383 F.3d at 1131-1133; *Asap Paging Inc., v. Centurytel of San Marcos Inc.*, 137 F. Appx. 694, 698 (5th Cir. 2005).

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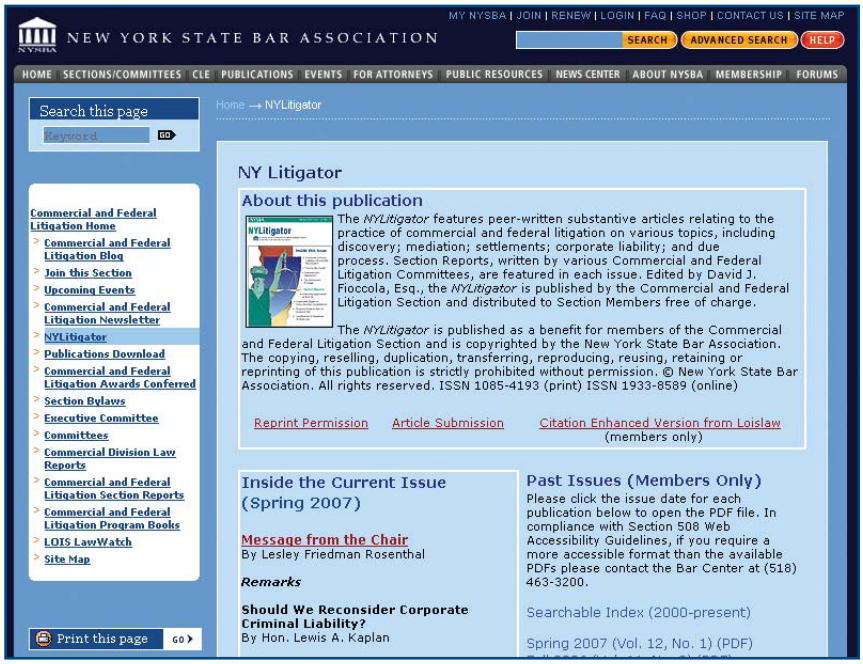

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