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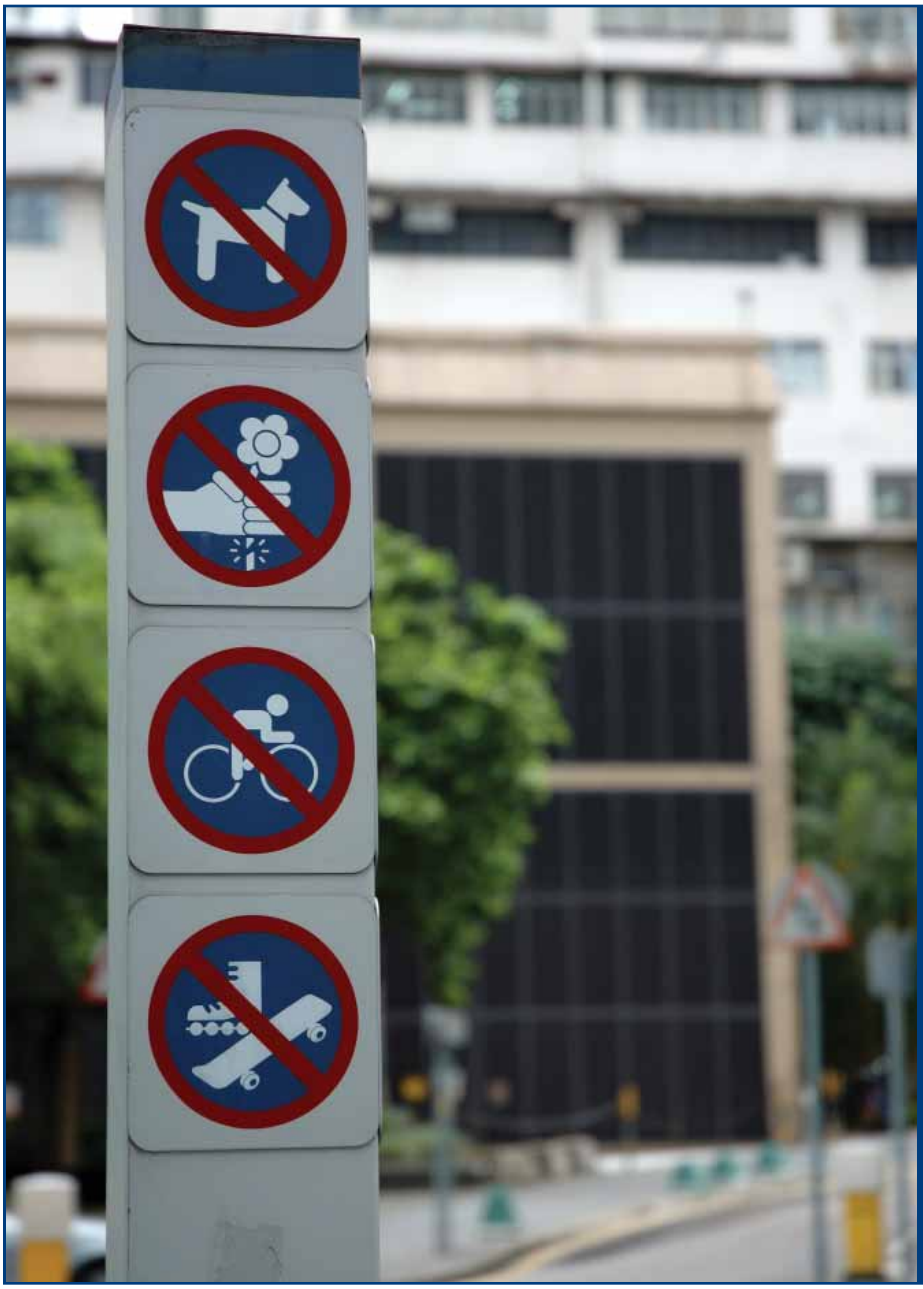
of the New York State Bar Association



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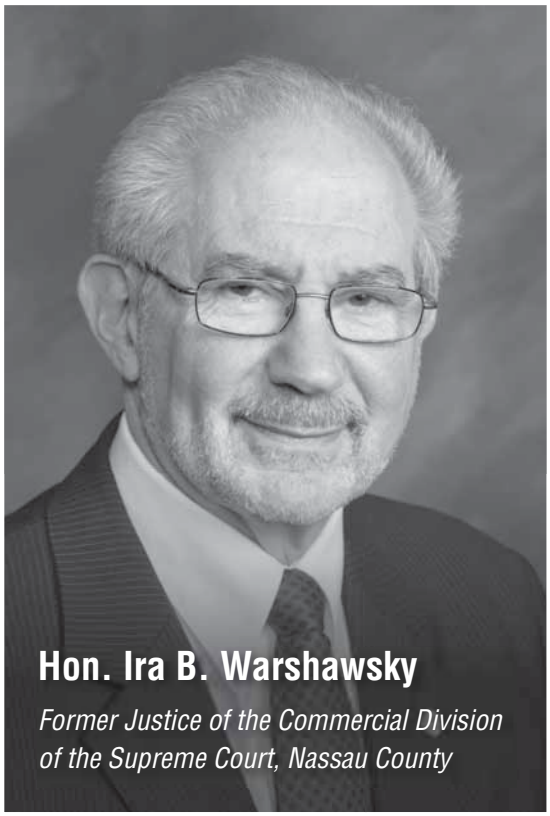
HON. IRA B. WARSHAWSKY

Former Supreme Court Justice of the state of New York, Nassau County, has joined NAM's New York Metro panel



Hon. Ira B. Warshawsky

Former Justice of the Commercial Division of the Supreme Court, Nassau County

Judge Warshawsky has been a distinguished member of the New York judiciary for the past 25 years. As a New York Supreme Court Justice in Nassau County's Commercial Division from 2002 through 2011, he presided over various high-stakes business claims and disputes, including business valuation proceedings, corporate and partnership disputes, class actions and complex commercial cases. Immediately prior to this appointment, Judge Warshawsky handled general litigation, including products liability, from 1998 to 2002. From 1987 to 1997, he sat in the Nassau County District Court presiding over a wide variety of matters.

According to the 2009/2010 New York Judge Reviews, Judge Warshawsky has been praised for keeping a "calm" demeanor, even during highly charged, high-profile cases. Lawyers interviewed described Judge Warshawsky as "one of the hardest working, intelligent, even-handed judges who has a very good sense of justice." He has been described as a "top-notch judge" who is known for encouraging settlement negotiations without being overly aggressive. One attorney stated, "Judge Warshawsky is one of the best judges I have ever appeared before in the nation."

Judge Warshawsky is available to hear cases in any of NAM's offices throughout the New York Metropolitan area.

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A Message from the Chair

It is my privilege and honor to serve as the twenty-fifth Chair of the Commercial and Federal Litigation Section. That calls for a celebration (of the Section's accomplishments, not my accession to the chairmanship), and the Section will celebrate its 25 years of existence on October 23, 2013, with a reception at the Stanley H. Kaplan Penthouse in the Samuel B. and David Rose Building in New York City. All Section members are invited.

Looking back at the 25 years of the Section's history (and I have been a member the entire time), I see that, among other things, the Section has played major roles in the formation of the Commercial Division, the elimination of occupational exemptions for jurors, the enactment of Local Rule 26.3 of the Rules of the United States District Courts for the Southern and Eastern Districts of New York providing for uniform definitions for discovery requests, and the promotion of civility in litigation resulting in the New York State Standards of Civility, which are now Appendix A to the Rules of Professional Conduct adopted by the Appellate Divisions effective April 1, 2009. We have taken the lead in promoting diversity and in mentoring young lawyers. We have also become one of the premier sources of policy proposals for the entire New York State Bar Association.

As I said at the Section's spring meeting on May 4, I have three themes for my year as Chair: continuation, communication, and celebration. I have already discussed the last; I will now turn to the other two.

Continuation

In June 2012, as the culmination of former Chair David Tennant's initiative, the Section adopted the report of its Faster-Cheaper-Smarter Working Group describing ways to reduce the time and cost of traditional commercial litigation, with some emphasis on alternative dispute resolution. Many of the same ideas re-surfaced in the Report and Recommendations to the Chief Judge of the State of New York of The Chief Judge's Task Force on Commercial Litigation in the 21st Century. Now, Chief Judge Jonathan Lippman has appointed a Commercial Division Advisory Council to implement those ideas. I expect the Section to support the efforts of the Advisory Council through its members on the Council (including my three immediate predecessors as Chair—Tracee Davis, David Tennant, and Jonathan Lupkin—and my successor, Paul Sarkozi, and through further proselytization of the ideas underlying the Section's commitment to faster, cheaper and smarter commercial litigation. We also will explore ways to support the New York International Arbitration Center created earlier this year.

The Section has long had a commitment to diversity. We have an annual networking program, Smooth Moves, Career Strategies for Attorneys of Color, which, under the leadership of previous Chair Tracee Davis, Carla Miller, and former Judge Barry Cozier, had its highest attendance (in excess of 250 persons) last spring. The Section also sponsors a minority law student summer fellowship with a Commercial Division justice. For the last two years, the Section has conducted the Theodore T. Jones Jr. Students of Color Moot Court Competition at the University of Buffalo Law School. I hope to continue and expand these initiatives.

This spring, the Section adopted a report outlining issues regarding third-party litigation funding and continued the dialog with a CLE panel at our spring meeting. I am encouraging the Section's Ethics and Professionalism Committee co-chaired by Jim Wicks and Tony Harwood to distill the learning and produce a report expressing a reasoned view of third-party litigation funding which can be adopted as the policy of the State Bar.

Last winter, the Section created one of the first bar association committees devoted to social media, co-chaired by Ignatius Grande and Mark Berman. The Social Media Committee has already instituted the Section's Twitter feed and has organized a CLE program on "How Social Media Is Changing the Practice of Law." I anticipate that the Committee will comment on proposed legislation and continue to educate the Section about the risks and benefits of using social media.

Last year, the Section formed a Committee on Commercial Jury Charges co-chaired by Judges Andrea Masley and Melissa Crane to comment upon and develop recommendations for pattern jury instructions to be considered by the New York State Official Committee on Pattern Jury Instructions. The Section submitted recommendations concerning piercing the corporate veil, bona fide and good faith purchasers for value, breach of fiduciary duty, aiding breach of fiduciary duty, breach of contractual warranty, and fraudulent inducement. I expect that the Committee will present further recommendations concerning pattern jury instructions relating to contract issues in the upcoming year.

The Section published version 2.0 of its Best Practices in E-Discovery in New York State and Federal Courts. At its April 5, 2013 meeting, the Executive Committee of the State Bar adopted it as the policy of the entire Association. It provides practical, concise advice and a reference for best practices in a rapidly evolving area of the law. We

now must make it available electronically and otherwise to as many judges and practitioners as feasible.

For two decades, the Section has commented upon proposed changes in the Federal Rules of Civil Procedure and Federal Rules of Evidence. The Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has just authorized the publication for comment of substantial revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, 37, and 84 of the Federal Rules of Civil Procedure proposed by the Advisory Committee on Federal Rules of Civil Procedure. I hope that the Section will provide comments on the proposals including controversial changes in the scope of discovery and the implementation of sanctions for preservation failures.

This past year's Chair, Tracee Davis, has been at the forefront of the State Bar's efforts to bring to Congress's attention the debilitating impact of sequestration on the ability of the third branch of the government, the federal judiciary, to fulfill its constitutional mandate and provide a forum where our commercial clients may resolve their disputes fairly and expeditiously. I will continue these efforts.

Communication

All these activities are less meaningful if Section members cannot learn about and participate in them. The key is communication. Thanks to the Social Media Committee, the Section now tweets. Our handle is: **@NYSBAComFed**. Our website at **www.nysba.org/ComFed** is scheduled to be re-launched in the fall of 2013. For Section members only, it includes archived and searchable editions of this publication, our Section's newsletter featuring articles about issues currently affecting our practice areas and updates on Section activities (published three times a year), and substantive case reviews from Loislaw LawWatch. For all visitors, it includes special reports, committee activities, and a calendar of events. It is my goal to provide information to Section members that will aid them in their daily practice of law and provide a tangible benefit for membership in the Section.

In sum, I see my role as Chair of the Commercial and Federal Litigation Section to facilitate the work of the outstanding Section committees through CLE, reports, and articles; to enable communications with our many Section members through traditional, electronic and social media; and to encourage new members and participation in the Section's many worthy activities.

Greg Arenson

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Presentation of the Stanley H. Fuld Award for Outstanding Contributions to Commercial Law and Litigation

Award Presenter: Honorable Robert A. Katzmann

Award Recipient: Honorable Jed S. Rakoff

MS. DAVIS: When I look around the room, I am in awe of the fact that we are in the midst of the greatest legal minds of our time. So as we move forward into the awards portion of our program, I hope and I know that you will be inspired.

The Commercial and Federal Litigation Section created the Stanley H. Fuld Award in honor of the late Chief Judge of the New York Court of Appeals, Stanley H. Fuld. He served in the Court of Appeals from 1946 to 1973 and he did it with distinction and honor.

So in recognition of Judge Fuld's accomplishments on the Court of Appeals, we present this award annually in recognition of the awardee's outstanding contributions to the development of commercial law and jurisprudence in the State of New York.

Now I have the distinct honor and pleasure to introduce the presenter of this year's Stanley Fuld award, a gifted and outstanding jurist, Honorable Robert Katzmann, a United States Circuit Judge for the United States Court of Appeals, Second Circuit, and soon to be the Chief Judge of the Second Circuit on September 1, 2013.

Judge Katzmann has made an enormous contribution in his own right to New York jurisprudence and to the development of commercial law. In fact, in addition to receiving countless other prestigious awards Judge Katzmann is a previous recipient of the Stanley Fuld award, which this Section presented to him in 2011.

Adding to the irony of it all, today's award recipient Judge Jed Rakoff presented that 2011 award on behalf of the Section to Judge Katzmann. So these two outstanding judges should be well rehearsed. Please join me in welcoming Second Circuit Judge and soon-to-be Chief Judge of the Second Circuit, Judge Robert Katzmann.

JUDGE KATZMANN: Thank you Tracee for that warm introduction and thank you for all that you do and all that your colleagues in this vitally important Section do. It is simply wonderful to be back at the Fuld Award luncheon in the presence of such a stellar gathering of the bar and in the presence of many judicial colleagues, including several illustrious Fuld Awardees. I see Sid Stein and I'm sure there are others here as well. Two years ago, on the great news from Jonathan Lupkin that I would be receiving the extraordinary honor of the Fuld Award, I felt so privileged that Judge Jed S. Rakoff agreed to introduce me. Such is my profound admiration for this truly brilliant judge, wonderful human being and friend. Today, I feel an equally deep sense of privilege to introduce Jed as he receives his well-deserved Fuld Award.

It was in the mid-1990s that I first encountered Jed Rakoff, who had been encouraged to apply for a district court judgeship by Judah Gribetz, the chair of Senator Moynihan's Advisory Judicial Selection Committee, of which I was a member. His credentials were dazzling, an AB with honors in English literature from Swarthmore College, a Master's Degree in Philosophy from Balliol College at Oxford University, and a JD with honors from Harvard Law School; a Third Circuit judicial clerkship; seven years in the United States Attorney's office, the last two as Chief of the Business and Securities Fraud Prosecutions Unit; several years in private practice, including partnerships at Mudge Rose and then Fried, Frank where he led both firms' criminal defense and civil RICO sections; a wide variety of publications where he established himself as a leading authority on securities laws, and laws of white collar crime and sentencing, as well as teaching at Columbia Law School. No wonder that Senator Moynihan would conclude that Jed Rakoff was a person of wide-ranging experience and substantial intellectual depth, who was ideally suited to the bench.

Now, it may very well be that Jed Rakoff is the most famous federal judge in this nation, perhaps tying with Sonia Sotomayor, acclaimed not just in legal journals but also in popular culture. The *Rolling Stone*'s Matt Taibbi observed that "Federal Judge Jed Rakoff is fast becoming a sort of legal hero of our time." In part, that prominence comes from the high profile cases before him. Let me suggest, however, that Jed's distinction comes from certain

enduring qualities to be found in any of his cases, indeed, in every case, not just the high profile ones. First, in the way that he runs his courtroom, writes his opinions and prepares his other writings, there is an appreciation that what judges do affects lives and interests, and that judges should express themselves in ways that are accessible to the citizenry. A Rakoff pronouncement, apart from its incisive analysis, is clear, forthright, lively and easy to understand. That understanding of law's reach, of the impact of the judge, manifests itself in Jed's service to the law off the bench, for example, as the only jurist in the Governance Board of the MacArthur Foundation Initiative on Law and Neuroscience.

Second, Jed brings to bear a keen intellect, thoroughly versed in the law with a practical understanding of the world we inhabit. Law, the legal practice, for him, is not an abstraction, but the pragmatic means by which disputes are resolved. That he has seen the law from the perspectives of a prosecutor, a defense lawyer and a judge gives him a matchless depth of experience and perspective and insight as he tries to ensure that the legal system works fairly and efficiently. That he is so much in demand to sit by designation in Courts of Appeals across the country is a testament to Judge Rakoff's widely acknowledged judicial abilities.

Third, there is always the sense in the courtroom that everyone is on the same playing field regardless of resources or status.

Fourth, part of his brilliance is to combine mental acuity, rigorous and careful attention to all sides of the argument, and penetrating analyses with a sensitive appreciation of the human condition. He is the very embodiment of the Scripture's entreaty: "Justice, justice, shalt thou pursue."

As Jed told the graduates of his alma mater, Swarthmore College, upon his receipt of an honorary degree: "Pretty soon, you'll be part of that world of social pressures, and as those pressures mount, you will be able to find a hundred good reasons to remain silent. But if freedom means anything to you, please don't be silent. After you have reached a considered judgment, please speak your mind whatever the cost. In so doing, you will fulfill your alma mater's ideals and win the gratitude of all of us who believe liberty is this nation's most precious, and most vulnerable, treasure." Of this it can be said Jed Rakoff has been true to his own counsel, he has not remained silent.

It is impossible to understand Jed without reference to his family. His amazing wife Ann, and his three wonderful daughters Ilana, Jenna and Keira, his gifted son-in-law Eric. A word about Ann, who with a doctorate in education, having raised a family, is now the tireless and just extraordinary executive director of the Corporate Law Center at Fordham Law School. I'm sure you are all familiar with the amazing programs that she puts together. It is hard to imagine Jed without Ann, who is his match, his companion, his polar star. And, I might add, his dance partner in nine-hour dance marathons. The happiness that Jed has enjoyed in his own life is something he wants everyone else to have. His is a life of active caring for others by the way that he lives his life, Jed is a model for all of us. Having shared a number of clerks with him I can attest to his positive, lasting, ongoing influence on their lives.

No tribute to Jed would be complete without mentioning Rakoff the witty lyricist, whose yearly holiday reviews are must viewing. His poetic verses are the highlights of any wedding he performs. Listen to these words from his "Opinion" rendered at Cardozo Law School in the case of Shylock versus Antonio: "Justice, besides, must be tempered with mercy just like New York must be kind to New Jersey. Mercy, like peaches, should never be strained. Mercy, like toilets, should always be drained."

To Jed Rakoff, poet, lyricist, extraordinary jurist and human being, I say, congratulations on this important and well-deserved award.

JUDGE RAKOFF: I'm really most grateful to Bob Katzmann for those hallucinatory remarks. I don't know what he's been smoking but I'll have what he's having. However, my wife will now come forward and give the rebuttal.

One of the reasons I feel so honored by Judge Katzmann's kind words is that he is truly one of the brightest stars on the federal bench. But I don't have to tell that to this audience because, as you heard, it was just two years ago that this Section gave the Fuld Award to Robert Katzmann. In presenting the award to Judge Katzmann at that time, I stated that "Bob Katzmann is well on his way to becoming one of the greatest judges of our time." I think you will agree with me that his many additional accomplishments in the succeeding two years have proven the accuracy of that prediction. And above all, he has solidified his role as the judicial champion of justice for immigrants. Judge Katzmann has the pretty significant role as the person who has really done more for the defense of immigrants in court than any other person in the United States.

The day we forget that we are a nation of immigrants is the day we will cease to be a beacon of light to the world. And so I hope you will join with me now in applauding Judge Katzmann for his marvelous efforts on immigrants' behalf.

It is customary on occasions like this for the recipient of the award to acknowledge and thank the many persons responsible for whatever the recipient may have accomplished. But if I were to thank all the people to whom I am truly indebted, we would be here past midnight. So,

with apologies to all the many mentors and friends that I am leaving out, I just wanted to first briefly thank my colleagues on the bench, for constantly inspiring me with their high standards; second, my law clerks, past and present, for their incredible ability to turn a sow's ear into a silk purse; and, most of all, my wife Ann, whose love and support are all I ever wanted and all I will ever need.

And, of course, I also want to express my deep gratitude to the members of this group, which is perhaps the most renowned Section of the New York State bar, the Commercial and Federal Litigation Section, for bestowing upon me the Stanley Fuld Award. I never knew Judge Fuld personally, but from what I read some of his former clerks like Jack Weinstein and Sid Stein have had to say about him, I get the sense that for Judge Fuld the rule of law was not some musty platitude, but a living, breathing essence. As Judge Fuld pointed out in opinion after opinion, it is the rule of law that makes us safe and makes us free. And so I want to honor Judge Fuld's memory by spending the next few minutes describing some modern-day judges who are defending the rule of law literally with their lives, and by that I mean the judges of Iraq.

One month ago, I had the privilege of spending a week in Baghdad. Not exactly April in Paris. I was part of a small group that was invited by the Iraqi courts to help train 15 Iraqi judges on the role of the judiciary in adjudicating international credit disputes.

By way of background, the Iraqi judiciary has created a special International Commercial Court with the exclusive jurisdiction over all commercial cases in which at least one of the parties is a foreign person or entity. The object is to assure foreign investors that, whatever the vicissitudes they may face in investing in Iraq they can be certain that any legal disputes that arise will be handled by a court that is expert, honest and thoroughly committed to the neutral application of the rule of law.

In 2011, its first year, the Iraqi International Commercial Court handled about 300 cases, and in 2012 it handled nearly 400 cases. I'm told that in at least one-third of those cases, the foreign entity prevailed. Moreover, I'm told that more than half the cases were brought by foreign entities, thereby simply increasing their filings more than one-third in the court's first year, and expressing their confidence in the court.

On a more personal level, I must tell you that I was very impressed with the intelligence and legal skills, both of the judges I met who were already on the Iraqi International Commercial Court, and those who, as part of this program, were being trained in the skills they would need to become part of the court.

All well and good. But why do I say the judges on this court, and other Iraqi courts, are literally defending the rule of law with their lives? Because in the last few years, no fewer than 49 Iraqi judges have been assassinated. Indeed, the second-ranking judge of the Iraqi International Commercial Court, Judge Jabbar Al-Lami, who is a vibrant and brilliant judge who was a key part of our training program, was attacked two years ago while leaving his compound. Thirteen bullets entered his body, mainly his head and chest. Six passed through, and the other seven remained lodged in his body. Miraculously, he survived, but even today one bullet remains in his head because it is too surgically dangerous to remove it. But there he is, his mind as sharp as ever, carrying out his judicial duties as if nothing had ever happened.

And then there is the Chief Justice of Iraq, Medhat al-Mamoud, whom I also had the pleasure of meeting. Despite very tight security, he has been the object of two assassination attempts by terrorists. These attacks were unsuccessful, but in 2006 his only son was killed in an assassination. And yet he too carries on as if nothing had happened. The only right word for these judges is "Heroic."

And who are the assassins? Occasionally, they are one of the litigants or their allies, who first try to bribe the judge, then threaten him, and, when all else fails, choose to murder him. But more commonly the assassins are members of the Al-Qaeda or other terrorist groups, who seek to destabilize and eliminate the branch of the Iraqi government that has shown the greatest degree of stability and neutrality, that is, the courts.

This is not to suggest that Iraqi courts are free of corruption or political influence. Under Saddam Hussein, the courts were filled with judges who were open to such influences and while some, though not all, of these judges were removed when Saddam Hussein was overthrown, the U.S. State Department has estimated that, even in the best circumstances, it will take a full generation before all such influences are entirely weeded out.

But there are significant signs that this process is underway. Indeed, the rule of law has a long history in Iraq. If we look back to Madison, or perhaps to Coke and Blackstone, as the fathers of our law, the Iraqi judges can, and do, look all the way back on occasion to Hammurabi and his Code, propounded in 2100 BC, the true origin of the rule of law, not just in their fertile crescent, but in the civilized world. In more recent centuries, what is now Iraq, but was then part of the Ottoman Empire, developed what is essentially a civil law system, with codes largely derived from French models, but modified in the 20th century, first by British law when Iraq was a British protectorate, then by Sharia law when Iraq was a constitutional monarchy, and then by Socialist law, when the Ba'athists were in power. It is a complicated system but, as I learned in meeting with Iraqi judges, it's one whose

basic principles would be recognizable to any Western judge.

Unfortunately, in recent decades, Iraq lost most of its professional class to 30 years of warfare, flight, and terrorism, a devastating depletion that is only slowly replenishing. Al Qaeda, in particular, has focused its attacks not only on judges, but also on lawyers, government officials and even physicians in an effort to destroy the very fabric of Iraqi society. But under the leadership of the Chief Justice, substantial efforts have been made to fill the part of this vacuum that affects the administration of justice, by appointing good new judges and passing good, new laws. According to the most recent report of Stuart Bowen, the U.S. Special Inspector General for Iraq Reconstruction, whereas in 2003 the judicial system was "in chaos, with facilities destroyed, personnel ill-equipped to carry out the mission, and corruption rampant," the combined efforts since then of Iraqi judges and U.S. support have "contributed to a reasonably well-functioning judicial system in Iraq."

And yet the outcome of such efforts remains very much in doubt. When the last U.S. troops left Iraq just about one year ago, President Obama declared that Iraq was now "sovereign, stable and self- reliant." This, it may be suggested, was more the politics of hope than a realistic appraisal of the situation. Iraq today is a troubled society, with large elements of instability, and an uncertain future. Violence aside, the internecine conflict among Shias, Sunnis, Kurds, and others continues unabated, its watchwords being suspicion and revenge.

But how can you put violence aside, when, literally, not a day passes without car-bombings and political assassinations throughout Iraq? If you think I exaggerate, please go to the American-and-British-based website called "Iraq body count," which reports each day's carnage. The day I arrived in Baghdad, 30 people were assassinated in Iraq. On the day I left, it was "only" 12 people. Overall, during 2012, there was an average of 18 bombings and 53 violent deaths per week in Iraq. How can a country of 31 million people expect to maintain stability, let alone attract foreign investment, in these situations, these conditions?

And yet, there are surprising, and welcome, signs of progress. By creating their own mini-"green zones," foreign oil firms such as BP, Exxon-Mobil, Occidental, and several Chinese firms have felt free to invest large sums in Iraqi oil production. The result is that, even though the great bulk of Iraq's vast oil wealth remains untapped, in 2012 more oil was exported from Iraq than from any other country in the world except Saudi Arabia. Overall, according to the World Bank, Iraqi GDP grew by 12 percent in 2012, fueling, in turn, a rapid expansion of the consumer sector. And the Kurdish provinces of Iraq, which are relatively more stable than others, have begun to attract foreign investment unrelated to oil.

It must be apparent that a necessary, if not sufficient, condition of a peaceful and prosperous future for Iraq lies in commercial development in general, and foreign investment in particular. A critical component of any such development is the rule of law. That is why the so-far-successful progress of the Iraqi International Commercial Court is such a promising step. And the further fact that it has been created by judges who, on a daily basis, put their lives on the line by just being judges, is worthy of respect, and awe.

While most of the credit goes to this courageous core of Iraqi judges, I would be remiss if I did not single out the efforts of the U.S. Government, including the Departments of Commerce, Justice and State, in supporting the Iraqi courts in everything from helping them build and secure courthouses and compounds to educating their judges in the niceties of modern international commercial law.

U.S. private enterprise, especially the banking industry, has also been helpful in such training. With us here today are four U.S. lawyers—well, one is still in law school—who have played particularly important roles in helping foster judicial training in Iraq. I would like to introduce them, and after I have read all four names and asked them to stand, I would ask you to give them the round of applause they richly deserve. They are, from the U.S. Department of Commerce, Adam Al-Sarraf, Hamada Zahawi, and Stephen Gardner, and from the Institute of International Banking Law and Practice, Ramsey Saleeby. These gentlemen represent America at its best.

There is one other organization with a particular expertise in international commercial litigation that, I expect, might be of service to the Iraqi judges in trying to make their International Commercial Court a model of legal progress. I refer, of course, to the Commercial and Federal Litigation Section of the New York State Bar Association. The members of the Section probably litigate more international commercial disputes than any other group of lawyers in the world. I hope this Section, through its outstanding leadership, will find ways to help meet the requests of the Iraqi courts for support and training. While the Iraqi courts are fiercely independent, they are not shy about requesting our help, and we should not be hesitant in giving it.

History strongly suggests that the rule of law fosters commercial development, and vice versa. In Iraq, brave Iraqi judges, by just going about their business of independently and neutrally interpreting the law, are laying the groundwork for a better tomorrow; but their efforts may not survive the perils of today. In this dicey situation, we all need to do what we can to help tip the balance, and, in that small way, enable these Iraqi heroes to simply be judges.

Thank you very much.

Representing Teen Victims of Online Pornographic Postings: Litigation Challenges and Strategies

By Russell Bogart

Teens can photograph their friends and transmit the images to others with unprecedented facility given the rise in the number of teens owning smart phones and similar digital devices. A teen's momentary lapse in judgment could result in an embarrassing image of the teen being recorded by others or disseminated to the teen's classmates. As reported in several studies, a significant percentage of teens have admitted to engaging in, or having been pressured to engage in, "sexting," or the sending or receiving of sexually explicit photographs of oneself or others via electronic mail or cell phone text.[1] To the horror of some teens, such a youthful indiscretion could result in the sexually explicit photograph of the teen being posted on pornographic websites without the teen's knowledge, even years after the photograph was first taken or transmitted. Even worse, the teen's name could be published on the website along with the sexually explicit photograph, thereby creating a seemingly indelible record of the teen's indiscretion on the World Wide Web to be discovered by any prospective academic institution, employer, or friend that happens to search for information about the teen.

A number of pornographic websites have profited by inducing young males to vindictively publish online sexually explicit photographs of their "ex-girlfriends." These websites generate advertising fees based on the number of visitors to the websites and by luring visitors into purchasing additional content available on the website. Some pornographic websites aggressively solicit young males to post sexually explicit photographs of their ex-girlfriends to obtain "revenge" against them—i.e, without their consent and even offer to pay for such "revenge" photographs.[2]

This article will outline the litigation challenges that counsel may confront when representing a teenager who was the victim of such pornographic online postings and the strategies that can be employed to overcome those challenges. In particular, this article will discuss the advantages and limitations to prosecuting civil claims against those responsible for posting the sexually explicit photographs online under 18 U.S.C. §2255—a federal statute providing a civil remedy to a person injured, when a minor,[3] as the result of conduct which violates federal laws criminalizing the production, possession or distribution of child pornography.[4] Further, this article will discuss the dilemma faced by civil counsel due to the pornographic photographs constituting contraband. Lastly, this article will address the common perception that victims of unwanted online pornographic postings are left with little recourse against the websites on which such photographs are posted due to the websites claiming immunity from tort liability under 47 U.S.C. §230 of the Communications Decency Act ("CDA"), titled "Protection for Private Blocking and Screening of Offensive Material."[5]

Overview of the Criminal Statutes Involved

An understanding of the criminal statutes implicated by the online posting of such pornographic photographs is necessary to representing a teen victim of such conduct for a number of reasons. First, the teen client undoubtedly will seek the lawyer's advice regarding the ability to prosecute criminal charges against those responsible for taking the photographs, disseminating them to others or posting them online. Secondly, the teen client might be "guilty of violating federal laws prohibiting the production and distribution of child pornography," if, for instance, she produced the photograph or transmitted it to her boyfriend.[6] Third, as discussed below, to evaluate ethical pitfalls arising from the sexually explicit photographs themselves, possibly constituting contraband, counsel will need to be familiar with the criminal laws prohibiting the possession and distribution of child pornography. Fourth, 18 U.S.C. § 2255 provides a federal civil remedy to victims of conduct prohibited by specified federal criminal child pornography and sexual exploitation statutes.

18 U.S.C. §2251, originally enacted as part of the Protection of Children Against Sexual Exploitation Act of 1977, subjects an individual to imprisonment for fifteen to thirty years who "employs, uses, persuades, induces, entices or coerces any minor to engage in" any "sexually explicit conduct for the purposes of producing any visual depiction of such conduct." §2251(a) contains no requirement that the producer of the child pornography know of the age of the subject of the photograph.[7] Prosecution under §2251 only requires that the visual depiction be produced using materials that have been transported in interstate commerce, such as through the use of video cameras or computer disks which traveled through interstate commerce, even absent evidence that the images were transmitted to others.[8] Parents who know that their children are involved in the production of child pornography and those who pander such images also face criminal liability under §2251. Moreover, 18 U.S.C. §2252 and 18 U.S.C. §2252A criminalize the distribution, transport, sale, receipt or possession of child pornography, including through the use of a computer.

Thus, the federal child pornography laws have a potentially broad reach, particularly when applied to a teen accused of producing the pornographic image. However,

federal prosecutors may decline to bring criminal charges where the subject of the photograph is slightly under the age of eighteen and the production of the photograph by a teenager was an isolated event. Further, criminal charges should not be filed if the photograph or video image does not depict "sexually explicit conduct" as defined in 18 U.S.C. §2256.[9] Moreover, defendants can raise a defense to a charge brought under 18 U.S.C. §2252(A) that the defendant lacked knowledge of the victim's age.[10]

18 U.S.C. §2261(A)(2)(A), a federal cyber stalking provision enacted as part of the Violence Against Women Act, also could be used to prosecute bloggers for posting sexually explicit photographs of a person, even absent the defendant's knowledge of the victim's age. §2261(A)(2)(A) criminalizes the actions of anyone who, with an intent to "harass…or cause substantial emotional distress to a person in another State" "uses the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress to that person."[11] §2261 could be used to prosecute, for instance, an individual who vindictively publishes on several websites sexually explicit photographs of an ex-girlfriend. Undeniably, the victim of such conduct will be extremely distressed, upon searching her name on the Internet, to discover numerous links to pornographic websites boasting their display of these scandalous images.

However, the ability of a victim to seek redress for unwanted online pornographic postings under §2261(A)(2)(A) is unclear. Significantly, a federal district court recently held that §2261(A)(2)(A) was unconstitutional as applied to a defendant accused of using blogs and Twitter to engage in conduct that caused substantial emotional distress to a political and religious leader whose qualifications were criticized in the expressions at issue.[12] §2261(A)(2)(A) also is limited in its ability to reach the vindictive posting of sexually explicit photographs as it does not punish conduct where the defendant and victim are present in the same state, even if the defendant uses an interactive computer service or other means of interstate commerce to engage in the harassment.

Prosecution under New York state law for the posting online of pornographic photographs of teens is also difficult.[13] For instance, the New York statute criminalizing the possession of child pornography requires the victim to be a person under the age of sixteen, as opposed to under the age of eighteen as provided for under the federal child pornography laws.[14] Moreover, the ability of prosecutors to punish the vindictive posting on the internet of pornographic photographs of another person under New York's aggravated harassment statute, N.Y. Penal Law §240.30, is questionable. Penal Law § 240.30 provides that a "person is guilty of aggravated harassment when, with intent to harass, annoy, threaten or alarm another person," the person "causes a communication to be initiated by mechanical or electronic means with another person… in a manner likely to cause annoyance or alarm." Several state and federal courts have ruled that a "criminal prohibition on communicating in an annoying or alarming way is facially unconstitutional."[15] Further, as Penal Law § 240.30 seems to require a direct communication between the defendant and the victim, a prosecution for the posting of sexually explicit photographs online cannot easily be shoehorned into the requirements of the aggravated harassment statute, as the victim might not even be aware of the posting until long after it was made.

The Photographs Constitute Contraband

Counsel representing the teen victim of online pornographic postings needs to pay special care to the photographs themselves constituting contraband.[16] Indeed, ethics charges and even criminal charges have been prosecuted against attorneys and expert witnesses for possessing child pornography in association with their litigation responsibilities.[17] Certainly, counsel does not want the client and expert computer forensics witnesses emailing the allegedly pornographic photographs to the lawyer in violation of 18 U.S.C. §2252A. The prohibition on the attorney possessing the photographs because the images constitute contraband creates a tension with the lawyer's duty in a civil case to preserve relevant evidence and to zealously investigate the client's case.

In a federal criminal proceeding, the pornographic images are required to remain in the custody of the court or the prosecution, and the defense counsel is not allowed to obtain copies of the photographs so long as the prosecution makes the material reasonably available to the defense counsel.[18] However, no provision of federal law specifies how the allegedly pornographic photographs are to be handled when a plaintiff brings civil claims under 18 U.S.C. §2255, or under common law tort theories, and the prosecutors have elected not to prosecute criminal charges due to their limited resources or in the exercise of their discretion.

18 U.S.C. §2252(c) instructs that it is an affirmative defense to the possession of child pornography if a person possesses less than three images of child pornography, and, without retaining the images, either destroys them or reports the photographs to law enforcement and allows law enforcement to access each such image. The ABA Standards for Criminal Justice: Defense Functions §4-4.6 also provides guidance on how to handle contraband. §4-4.6 advises that counsel can receive an item which constitutes contraband "for a reasonable period of time" if counsel, *inter alia*: "reasonably fears that return of the item to the source will result in the destruction of the item"; "intends to test, examine, inspect or use the item in any way as part of defense counsel's representation of the client"; or the item cannot be returned to its source.

In sum, there is no codified safe harbor for the possession or receipt of sexually explicit images by counsel

for the teen victim. At a minimum, counsel for the teen victim should report the sexually explicit images appearing on the Internet to the Cyber Tipline of the National Center for Missing and Exploited Children referenced in 18 U.S.C. §2258 and report the images to federal law enforcement. Further, if law enforcement declines to prosecute, counsel should ask the Court to escrow the images upon initiating a civil legal action.

Investigating and Filing Civil Claims

To be able to prosecute claims against the individuals responsible for pseudonymously posting the sexually explicit images on the Internet, the teen victim will need to identify the responsible bloggers.[19] Pursuant to CPLR §3102(c), New York courts have awarded pre-action discovery requiring Internet service providers to disclose the registrant information and IP address relating to bloggers alleged to have posted defamatory material based on the demonstration that the cause of action is meritorious and that the pre-action discovery requested is material and necessary to the ability to file the claim.[20]

The principal common law tort claims available under New York law to the teen victim of such postings is for the intentional infliction of emotional distress ("IIED"),[21] defamation,[22] and violations of New York Civil Rights Law §51.[23] While the posting of the sexually explicit photographs on websites constitutes "clearly outrageous" conduct "beyond the bounds usually tolerated by a decent society,"[24] an IIED claim might be unappealing to the victim as she would be required to place her treatment for emotional injuries at issue. Further, while the posting of the photographs on the websites could support a defamation claim,[25] such a claim will be untimely if the victim discovers the posting a year after it was made.[26] Also, a claim under Section 51 of the Civil Rights law cannot be pursued against bloggers who posted the photographs out of a personal animus as opposed to commercial purposes, and as discussed below, the websites on which the photographs were posted will claim immunity under §230 of the CDA.

18 U.S.C. §2255 provides a number of advantages over these common law claims *if* the plaintiff can show that when she was a minor, she was a victim of specified laws (e.g., 18 U.S.C. §§2251, 2252A)[27] and suffered a personal injury as the result of the violation regardless as to whether the injury occurred while she was a minor.[28] A criminal conviction of the defendant is not necessary to sustain the claim, and the elements of the underlying criminal statute only need to be proved by the civil burden of a preponderance of the evidence. A prevailing plaintiff under §2255 is entitled to recover her actual damages sustained and the cost of the suit, including a reasonable attorney's fee. As §2255 also provides that the prevailing plaintiff is entitled to $150,000 in presumed damages, the plaintiff can argue that the filing of her claim does not place her emotional treatment records at issue. §2255 also provides for a six-year statute of limitations. Lastly, one federal court has ruled that, even where the plaintiff was involved in the production of the pornographic image of herself, the *in pari delicto* doctrine is not available as an affirmative defense to claims brought for the dissemination of those photographs.[29]

Are the "Revenge" Websites Immune from Tort Liability Under 47 U.S.C.A. §230?

The ex-girlfriend revenge websites are hardly passive recipients of the posting of sexually explicit photographs of young women without their consent. Rather, these websites actively solicit the vengeful posting of sexually explicit photographs for financial gain even though the publication of such photographs is universally recognized to be tortious and in some states is criminal.[30] Some revenge websites pay for the photographs or offer financial incentives for the posting of the photographs on the websites. Other websites encourage their members (through offering membership discounts) to re-publish photographs displayed on their websites on other blogs with a "link-back" to the original website to increase traffic to the website. Some revenge websites also distribute to its members via email or twitter photographs of the most recent or popular victim.

Despite the active role that some websites play in encouraging the posting of such sexually explicit photographs of others, a victim of such unwanted postings will have a difficult time overcoming the immunity afforded under §230 of the CDA to websites, as "interactive computer service providers,"[31] for postings originated by third-parties. In enacting §230, Congress determined "not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing obscene or defamatory material written or prepared by others."[32] Rather, Section 230 instructs that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" (47 U.S.C. §230[c][1]). Section 230 also defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service" (47 U.S.C. §230[f][3]). Accordingly, §230 establishes that a website operator is "immune from state law liability if (1) it is a provider or user of an interactive computer service; (2) the complaint seeks to hold the defendant liable as a publisher or speaker; and (3) the action is based on information provided by another content provider."[33]

Thus, the revenge website's ability to claim immunity under §230 for photographs posted by third parties hinges on whether the website was "responsible, in whole or in part, for the creation or development" of the content within the meaning of §230(f)(3). Whether a website

also was acting as a "content provider" with respect to third-party postings might be difficult to ascertain in some cases since "the definition of 'content provider' is so elastic and no consensus has emerged concerning what constitutes 'development.'"[34] Many federal courts "have interpreted §230 to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service" based on Congress' policy determination to promote the development of the Internet with minimal federal regulation.[35]

However, some courts have questioned whether such broad immunity is inconsistent with the purpose and title of the statute: "to immunize the *removal* of user-generated content, not the *creation* of content."[36] Congress enacted §230 to overrule a New York state court decision which held that a financial services company had become the "publisher" of a defamatory message posted on a message board it operated because the financial services company had deleted some messages which were patently offensive.[37] In promulgating §230, Congress acted to remove disincentives for websites to remove plainly offensive material out of fear that the website will be deemed the publisher of content that the website failed to remove.[38]

To limit §230 immunity to its "proper scope," several federal circuit courts of appeals have "interpret[ed] the term development as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness."[39] According to these federal courts, "a service provider is responsible for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content."[40] Further, one federal court has equated "solicitation" of the unlawful content with its "development."[41]

In *Shiamili v. Real Estate Group of NY, Inc.*, the New York Court of Appeals declined to determine whether to adopt this "relatively broad view of 'development,'" as the claim there failed even "assuming that solicitation can constitute 'development.'"[42] In *Shiamili*, the New York Court of Appeals held that the operator of a blog dedicated to the New York City real estate industry was not deprived of §230 immunity by "implicitly encourag[ing] users to post negative comments about the New York City real estate industry."[43] *Shiamili* reaffirmed that "[c]reating an open forum for third parties to post content—including negative commentary—is at the core of what section 230 protects."[44]

Victims of unwanted online pornographic postings will still face a number of hurdles in claims filed against the websites on which such photographs were posted even if the New York courts ultimately endorse the solicitation standard for determining whether an interactive computer service developed unlawful content provided by third parties. To date, most claims against websites concerning the unwanted posting of photographs have been barred by §230 immunity, even if brought under 18 U.S.C. §2255.[45] Further, a website's conduct in tweeting or emailing photographs posted by third-parties to its members alone probably will not serve to deprive the website of its §230 immunity.[46] Websites, under a solicitation standard, also would retain their immunity for the performance of "a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content."[47]

Even under a solicitation standard, significant ambiguity remains as to how specific or strong the encouragement to third parties to post unlawful material needs to be to result in a loss of §230 immunity. A website's knowledge that third parties have posted illegal content combined with the website's profiting from soliciting online content generally does not constitute development of the unlawful material under §230.[48] Certainly, those sites that offer to pay for the revenge photographs face a strong prospect of a loss of §230 immunity under a solicitation standard.[49] Out of a concern that the solicitation exception will swallow the rule of §230 immunity for postings authored by third parties, courts routinely have rejected claims of implicit encouragement constituting development.

Conclusion

18 U.S.C. §2255 provides a potentially powerful vehicle for teen victims of online pornographic postings to obtain redress from those responsible for taking the sexually explicit photographs or disseminating them to others. Despite the robust immunity afforded to websites under §230 of the CDA, teen victims of online pornographic postings might be able to obtain a recovery against the pornographic websites depending on the facts and circumstances regarding the websites' role in the solicitation of the photographs.

Endnotes

1. According to a 2011 study conducted by MTV and the Associated Press on "Digital Abuse," fifteen percent of youths (14-24 years olds) have sent naked photos or videos of themselves and about 21% have received naked pictures or videos of others. *But see*, Finkelhor D., Lounsbury K, Mitchell KJ, *The True Prevalence of Sexting*, Crimes Against Children Research Center, April 2011 (criticizing the flawed use of terminology in studies reporting the prevalence of teen sexting); Finkelhor D., Lounsbury K, Mitchell KJ and Wolak J, *Prevalence and Characteristics of Youth Sexting: A National Study*, Crimes Against Children Research Center (while noting that the data suggests that "appearing in, creating or receiving sexual images is far from being a normative behavior for youth," that 7% of children ten to seventeen years in age said that they had received nude or nearly nude images of others). Based on either set of data, cases arising out of the online pornographic postings of teens should continue to plague the courts.
2. "Nightline," the news show televised by the American Broadcasting Company, featured a story on the "revenge" website

"IsAnyoneUp.com," which invited users to post sexually explicit photographs and video without the subject's permission, and attach to the posting a link to the subject's Facebook or Twitter account. The operator of this website bragged to "Nightline" that his response to cease-and-desist letters received from lawyers demanding the removal of certain photographs was to send the response "LOL." Shortly thereafter, this revenge website was sold to an anti-bullying website and removed. However, the persisting prevalence of such revenge websites can be verified by just searching in an Internet search engine with the words "ex-girlfriend" and "revenge."

3. 18 U.S.C. §2256 defines a "minor" as a person under the age of eighteen years old for the purpose of the federal child pornography laws discussed herein.

4. 18 U.S.C. §2255 provides that individuals can sue for personal injuries incurred in connection with violations of 18 U.S.C. §§2241(c), 2243, 2251, 2252, 2252A, 2260, 2421, 2422 or 2423.

5. Section 230 of the CDA was passed as part of the Telecommunications Act of 1996 (Pub. L. 104–104, 110 U.S. Stat. 56 [104th Cong., 2d Sess., Feb. 8, 1996]).

6. *Doe v. Peterson*, 784 F. Supp. 2d 831 (E.D. Mi. 2011) (The plaintiff, a 17 year old girl, took sexually explicit photographs of herself, and sent them through the internet to her 18 year old boyfriend in the army, only for the photographs to wind up in the hands of the wrong person).

7. *See U.S. v. Fletcher*, 634 F.3d 395, (7th Cir. 2011) (noting that while those statutes governing the receiving, distributing, or possessing of child pornography require as an element of a prosecution knowledge of the victim's age, Congress viewed the production of child pornography as distinguishable as "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain the victim's age").

8. *United States v. Maxwell*, 446 F.3d 1210 (11th Cir. 2006) (on remand from the United States Supreme Court, rejecting claim that conviction for the possession of child pornography violated the Commerce Clause as the disks containing the images were manufactured outside of the state); *United States v. Malloy*, 568 F.3d 166 (4th Cir. 2009) (pornography was produced using a video camera that had traveled through interstate commerce).

9. 18 U.S.C. §2256 provides very specific definitions of acts which constitute "sexually explicit conduct" for the purpose of the federal criminal child pornography laws. *See U.S. v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986); *Tilton v. Playboy Ent. Group, Inc.*, 554 F.3d 1371 (11th Cir. 2009) (affirming the dismissal of a claim brought under 18 U.S.C. §2256 because the photographs and video of a contestant who was seventeen years and ten months old participating in a spring break wet t-shirt contest did not constitute sexually explicit conduct within meaning of §2256).

10. Although beyond the scope of this article, there is significant "[j]udicial confusion over what exactly constitutes computer-based 'possession' and 'receipt,'" as well as "knowledge," within the meaning of §§2252 and 2252A. *See, e.g., United States v. Polizzi*, 549 F. Supp. 2d 308, 351 [E.D.N.Y., 2008], *vacated and remanded sub nom. United States v. Polouizzi*, 564 F3d 142 [2d Cir 2009].

11. In 2006, the scope of the statute was significantly expanded through an amendment. Beforehand, the statute required an intent "to kill or injure" or to place a person in another state in fear of serious bodily injury and the engagement in a course of conduct that places a person in reasonable fear of death or serious bodily injury. The 2006 amendment required only an intent to harass or cause substantial emotional distress and only required a showing of conduct that merely caused substantial emotional distress. Also, the 2006 amendment to the statute added through the use of an "interactive computer service" as a mechanism of causing an injury encompassed by the statute.

12. *U.S. v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011) (declining to reach the questions raised as to the facial invalidity of the statute as unconstitutionally vague and overbroad).

13. In *People v. Kent*, 19 N.Y.3d 290 (2012), the New York Court of Appeals affirmed a conviction for the possession of child pornography based on pornographic images downloaded and saved on a computer. The New York Court of Appeals also reversed the conviction of the defendant on several counts of "procuring" child pornography within the meaning of Penal Law §263.16. The procurement charges were based on the discovery of "cached files" showing the defendant had accessed websites displaying child pornography. The Court of Appeals explained that cached files are "images or portions of a Web page that are automatically stored when that page is visited and displayed on the computer screen; if the user visits the Web page again at a later date, the images are recalled from the cache rather than being pulled from the internet, allowing the page to load more quickly." *Id.* at 296. The Court of Appeals concluded that "regardless of a defendant's awareness of computer's cache function, the files stored in the cache may constitute evidence of images that were previously viewed; to possess those images, however, the defendant's conduct must exceed mere viewing to encompass more affirmative acts of control such as printing, downloading or saving." *Id.* at 301. In contrast, 18 U.S.C. §2252A encompasses the knowingly accessing with an intent to view the child pornography.

14. *See North v. Board of Examiners of Sex Offenders of State of N.Y.*, 8 N.Y.3d 745 (2007).

15. *People v. Pierre-Louis*, 927 N.Y.S.2d 592, 597 (Nassau Cty. July 25, 2011) (collecting cases finding the statute facially unconstitutional or unconstitutional as applied and then commenting that the "vagueness and overbreadth of this statute is readily apparent. It cries out to be reworked, and sharply limited, to those areas where speech should be circumscribed").

16. 18 U.S.C. §§2252 & 2252A criminalize the possession of child pornography.

17. *In re Olson*, 222 P.3d 632 (Mont. 2009) (the chief public defender was acquitted of disciplinary charges for his removal of alleged child pornography from defendant's home); *Boland v. Holder*, 2010 WL 3860996 (N.D. Ohio Sept. 30, 2010) (attorney, who also served as expert witness in child pornography cases, entered into a deferred prosecution agreement stemming from his downloading of child pornography); *U.S. v. Flynn*, 2010 WL 1459476 (S. Dakota March 19, 2010) (prosecution against attorney who accessed websites to advise clients).

18. 18 U.S.C.A. §3509(m).

19. Most pornographic websites will promptly remove the photograph upon being notified that the subject of the photograph was under the age of eighteen when photographed in light of the website's potential liability for failing to do so. *See, e.g.*, 18 U.S.C. §§2252 & 2258; *Doe v. Peterson*, *supra* note 6 (finding a question of fact as to the defendant website's liability for failing to promptly remove alleged child pornography after being notified of its presence on the website). Some websites might even voluntarily disclose the IP address or email address of the blogger who submitted the alleged child pornography in an effort to deflect liability away from the website. In such circumstances, a motion for pre-action discovery will still need to be served upon the Internet service provider to identify the owner of the email account. Sometimes the owner of a pseudonymous email address can be identified through commercial databases or computer forensics.

20. *See, e.g., Cohen v. Google, Inc.*, 887 N.Y.S.2d 424, 426 (N.Y. Sup. Ct. 2009).

21. The elements of a claim for IIED "are (i) extreme and outrageous conduct, (ii) an intent to cause—or disregard of a substantial probability of causing—severe emotional distress, (iii) a causal connection between the conduct and the injury, and (iv) the resultant severe emotional distress." *Lau v. S & M Enterprises*, 72 A.D.3d 497, 498, 898 N.Y.S.2d 42, 43 (N.Y. App. Div. 2010), *leave to appeal dismissed in part, denied in part*, 16 N.Y.3d 767, 944 N.E.2d 654 (2011).

22. To assert a cause of action for defamation, a plaintiff needs to allege the issuing of "a false statement, published without privilege or authorization to a third-party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se." *Dillon v. City of New York,* 261 A.D.2d 34, 38 (1st Dep't 1999). Statements can be defamatory if they "tend[ ] to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of [her] in the minds of a substantial number of the community." *Golub v. Enquirer/Star Group, Inc.*, 89 N.Y.2d 1074, 1076 (1997).

23. To state a claim under Civ. Rights Law §51, a plaintiff must satisfy four elements: (1) usage by defendant of plaintiff's name, portrait, or picture, (2) within the State of New York, (3) for purposes of advertising or trade, and (4) without plaintiff's written consent. *Molina v. Phoenix Sound, Inc.*, 297 A.D.2d 595, 597 (1st Dep't 2002).

24. *See, e.g., Taylor v. Franko*, 2011 WL 2118270 (D. Haw. May 2, 2011), *report and recommendation adopted*, 2011 WL 2115836 (D. Haw. May 26, 2011) (applying the same elements as under New York law to establish the intentional infliction of emotional distress tort).

25. *See, e.g., Cohen v. Google*, 25. Misc. 3d 945 (context in which sexually suggestive photographs were posted on website titled "Skanksnyc" constituted defamation per se); *Leser v. Penido*, 879 N.Y.S.2d 107 (1st Dep't 2009) (posting of a photograph of the plaintiff on a pornographic website in a manner to indicate that the plaintiff voluntarily consented to the posting constituted libel per se); *Pesent v. Liberation Publications*, 611 N.Y.S.2d 866 (1st Dep't 1994) (publishing of a photograph of a male model in a magazine advocating homosexuality, in the context in which the photographs appeared, constituted defamation per se); *Taylor v. Franko*, 2011 WL 2118270 (posting sexually explicit photographs without the plaintiff's consent on multiple adult websites was per se defamatory); *Ward v. Klein*, 10 Misc. 3d 648 (N.Y. Cty Nov. 2005) (the juxtaposition of the plaintiff's photograph alongside commentary about the sexual conquests of a rock-and-roll singer "could lead a reasonable viewer to conclude that plaintiff was a woman who would regularly make herself available to [the singer], at his beck and call, for casual sexual encounters").

26. *Young v. Suffolk County*, 705 F. Supp. 2d 183, 212 (E.D.N.Y. 2010) ("under the single publication rule, the fact that a story remains available online does not restart the statute of limitations"); *Firth v State*, 98 N.Y.2d 365, 367 (2002).

27. A violation by a website of 18 U.S.C. §2257, which requires producers of digital images of sexually explicit performers to keep records of the age of performers, does not give rise to a cause of action under §2255, or establish the website's knowledge that a particular "performer" depicted in a sexually explicit image was a minor. *See, Tilton*, 554 F.3d 1371; *Doe v. Peterson*, 784 F. Supp.2d 831.

28. *Tilton*, 554 F.3d at 1378 (affirming the dismissal of claim brought under 18 U.S.C. §2255, inter alia, because of the plaintiff's failure to satisfy "the scienter requirement found in sections 2252(a) and 2252A(a)" regarding "the sexually explicit nature of the material and to the age of the performer").

29. *Doe v. Peterson*, 784 F. Supp. 2d 831.

30. N.J. Stat. §2C:14-9 (c) provides that an "actor commits a crime in the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure."

31. 47 U.S.C. §230(f)(2) defines an "interactive computer service" as "any information service, system or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the internet." Websites are the most common form of interactive computer services. *Roommates.com*, 521 F.3d at 1162 n.6.

32. *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003).

33. *Shiamili v Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 286-87 (2011).

34. *Id.* at 289.

35. *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1326 (11th Cir. 2006).

36. *Fair Hous. Council of San Fernando Val. v. Roommates.Com, LLC*, 521 F.3d 1157, 1163-1164 (9th Cir. 2008) ("Indeed, the section is titled "Protection for good Samaritan blocking and screening of offensive material and, as the Seventh Circuit recently held, the substance of Section 230(c) can and should be interpreted consistent with its caption").

37. *Id.* at 1163.

38. *Id.*

39. *Id.* at 1367-1368.

40. *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009).

41. *Roommates.com*, 521 F.2d at 1166 ("Unlawful questions solicit (a.k.a. 'develop') unlawful answers").

42. *Shiamili*, 17 N.Y.3d at 290, 291.

43. *Id.*

44. *Id.*

45. Several federal courts have extended the immunity afforded under §230 to claims brought pursuant to 18 U.S.C. §2255. *See M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Mo. 2011); *Doe v. Bates*, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006). These cases also could have been resolved on the more narrow grounds that the allegations failed to set forth a claim that the website violated §2252A's knowledge and intent requirements.

46. *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) (holding that an electronic newsletter was entitled to §230 immunity).

47. *Shiamili*, 17 N.Y.3d at 289.

48. *Village Voice Media Holdings, LLC*, 809 F. Supp. 2d at 1050-1051.

49. *Accusearch*, 570 F.3d at 1192 (the website paid researchers to obtain information to be disseminated by the website in violation of the Telecommunications Act); *Hy Cite Corp. v badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005) (holding that allegations that the Defendants "solicit individuals to submit reports with the promise that individuals may ultimately be compensated for their reports…arguably could support a finding that Defendants are responsible…for the creation or development of information provided by individuals submitting Rip-off Reports in response to Defendants' solicitation").

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The Mysterious Disappearance of the Private Right of Action Under the Automatic Renewal Statutes

By Virginia K. Trunkes

Two obscure yet dispositive statutes will render an automatic renewal contract provision unenforceable if certain steps are not taken. These statutes are so arcane that apparently even some Bloomberg L.P. transactional lawyers have been unaware of them. Because of their potential impact on personal property leases and service contracts, practitioners should be guided accordingly. That said, following their recent appearance at the Court of Appeals, currently it is anyone's guess if the courts will find that the statutes permit a private cause of action when they are violated.

The *Ovitz* Lawsuit

The impetus for the lawsuit in *Ovitz v. Bloomberg L.P.*[1] was defendant's refusal to permit the plaintiff to terminate a lease for the rental of real-time financial information services equipment because of his failure to provide the notice as specified in the parties' contract. The contract provided that it "shall be automatically renewed for successive two-year periods" unless either the lessee or lessor terminated prior to renewal "by giving not less than 60 days' prior written notice to the other." The agreement commenced in June 2000 and—at least, the parties thought—continued to renew automatically for several two-year terms through September 15, 2008. At that time, plaintiff contacted defendant and advised that he "no longer wished to subscribe to (its) services, and wanted to terminate as of the end of the month." Defendant denied plaintiff's request on the ground that the agreement had recently renewed automatically until June 15, 2010. According to plaintiff's complaint, it was defendant's "standard policy not to give its subscribers any advance notice of the automatic renewal provisions or deadline."

The parties' dispute continued, with plaintiff giving written notice of his desire to terminate, and defendant sending invoices, with past-due amounts, and, later, termination fees. These exchanges induced plaintiff to commence a putative class action under, *inter alia*, General Obligations Law ("GOL") §§ 5-901 and 5-903. GOL § 5-901 involves leases of personal property and GOL § 5-903 involves contracts for service, maintenance or repair to or for any real or personal property. Both sections provide that, if such contract "states that the term thereof shall be deemed renewed for a specified additional period unless" the lessee / vendee gives notice of the intention to release the property or terminate the contract "at the expiration of such term," *it shall not be operative* unless the lessor or service provider, "at least fifteen days and not more than thirty days previous to the time specified for the furnishing of such notice to him, shall give… written notice, served personally or by mail, calling the attention of the [lessee / vendee] to the existence of such provision…." More simply, the lessor or service provider must remind its lessee / vendee of the renewal soon before the new term begins.

Following the commencement of the lawsuit, defendant, "as an accommodation," decided to waive the early termination and collection charges, and then moved to dismiss the complaint. Supreme Court dismissed many of the causes of action but sustained the GOL §§ 5-901 and 5-903 claims.[2] The court found an implied private right of action under those sections that "support[ed] a claim that the agreement was not properly renewed beyond the expiration date of the initial term, even if plaintiff accepted Bloomberg services."[3]

The Appellate Division reversed, agreeing that defendant's failure to comply with the mandates of §§ 5–901 and 5–903 did render its automatic renewal provision inoperative and unenforceable, but finding that such failure did not result in injury under those sections.[4] The Appellate Division reasoned that plaintiff failed to allege "that he paid for services he did not receive."[5] The Appellate Division also found that a private right of action was neither created nor fairly implied by the language in the automatic renewal statutes.[6]

The Court of Appeals affirmed the Appellate Division's order on the ground that plaintiff was not harmed for the reason cited by the Appellate Division, and also because he did not pay any termination fees. The Court of Appeals noted, however, that it was "[a]ssuming, without deciding," that an implied private right of action lies pursuant to those GOL sections.

No Private Right of Action?

That there exists a question as to who may bring a claim under GOL §§ 5-901 and 5-903 may be news to some. For more than fifty years since the statutes were created to "engage the variegated evil"[7] of "marrying" "unwary businessmen" to self-renewing maintenance or service-type contracts,[8] they have been invoked by private parties in a variety of cases. *See infra.* How is it that for fifty years private parties have litigated pursuant to statutes which may not necessarily permit a private cause of action?

A suggestion that a decades-old statute may not be accompanied by a private cause of action is not unique to the automatic renewal statutes, but rather presented itself

to the same Appellate Division in 2011. In fact, in *Rhodes v. Herz*,[9] the Appellate Division felt compelled to emphasize its "hold[ing], and *indeed not for the first time*, that article 11 [of the General Business Law] does not provide either an express or an implied private right of action against licensed or unlicensed employment agencies or their agents."[10] Similarly, for years litigants have continued to bring fraud claims under the Martin Act while the Appellate Divisions and the Court of Appeals have grappled with whether it contains such a private cause of action[11] and to what extent.[12]

What makes *Ovitz* unique, however, is the apparent length of time during which there have been few if any challenges to whether a private cause of action for damages has accompanied GOL §§ 5-901 and 5-903. Perhaps this is because in most cases the statutes have been used by the lessees and vendees as an affirmative defense to breach of contract claims asserted by the lessor / vendor.[13] In two reported cases where, in contrast, lessees brought suits for damages, the claims alleging a violation of the automatic renewal statute were dismissed on equitable grounds to prevent the lessees from recovering lease payments they made for the equipment during the periods of use subsequent to the termination of their leases where they knowingly and willingly continued to accept the benefit of the leased equipment.[14]

In another case, a vendee brought a putative class action for, *inter alia*, a declaration that an Internet domain name registrar's automatic renewals of the vendee's domain name registrations violated GOL § 5-903, but the court held that the statute was inapplicable because the services performed did not involve personal property.[15] Notably, in the one case in which a lessee did overcome a lessor's motion to dismiss its claim pursuant to GOL § 5-901, *Andin International Inc. v. Matrix Funding Corp.*,[16] the lessee had sought a declaratory judgment directing that the lease had ended and that lessee was not indebted to the lessor, and did not otherwise seek damages.

So where does *Ovitz* fit in? Unlike in the previous unsuccessful cases, by the beginning of the last "automatically-renewed term" at issue, the plaintiff outright refused to accept the benefit of the leased equipment. Additionally, the equipment was indisputedly personal property. Further, although the plaintiff alleged damages for, *inter alia*, impairment of his credit rating,[17] he sought the same type of declaratory relief as that sustained in *Andin International*. So why was his case dismissed at the pleading stage?

In a lone dissent, Judge Eugene F. Pigott, Jr. raised the same question. Noting that the Supreme Court had found that the threat to plaintiff's creditworthiness was sufficient to establish irreparable injury and that there was a "justiciable controversy," Judge Pigott determined that "the Appellate Division's dismissal went well beyond its function at this stage of the proceeding."[18] Judge Pigott emphasized that this was a declaratory judgment action and the court's duty was simply to determine whether defendant violated the automatic renewal statutes—which it indisputedly did. As such, Judge Pigott found that there was an "actual and live controversy" to warrant declaratory relief based on plaintiff's claim that the defendant's automatic renewal agreements are unenforceable, and that he and the members of the putative class are entitled to the injunctive relief sought.[19] This reasoning does sound similar to that of *Andin International* and is compelling, particularly where no prior cases have indicated a lack of a private cause of action for damages—or even for declaratory relief—pursuant to the automatic renewal statutes.

Thus, if a lessee / vendee can show damages based on the lessor's / vendor's violation of an automatic renewal statute, the extent to which a private right of action is available remains unclear. Consequently, an attorney bringing suit under one or both of these statutes—or defending against a private party who has asserted claims pursuant thereto—must consider the various requisite criteria for (1) whether the statute itself promulgates an express right of action; and (2) if not, whether one can nevertheless be implied.[20] For guidance in evaluating how the automatic renewal statutes fit within this analysis, the attorney should take heed of the Appellate Division's view at *Ovitz*.[21]

Application of the Automatic Renewal Statutes

Meanwhile, what types of lessors / vendors are covered by the automatic renewal statutes? Does my Internet anti-virus provider need to mail written notice of the renewal every year before it charges my credit card? Possibly: a computer software program may be considered "personal property," albeit, as indicated above, an Internet domain name is not considered personal property to which GOL § 5-903 would be applicable.[22]

Is my cooperative's coin-metered laundry machine vendor obligated to send such written notice? Yes.[23] On the other hand, a contract which permits a laundry machine vendor to rent space for its laundry equipment is a real property lease and is thus not covered under § 5-903.[24] In contrast, an agreement for the operation of a juke box in my favorite old-time diner is not considered a real property lease within § 5-901, and thus is covered.[25] Further, a typical consulting contract may not be governed by these sections if the services are for people, not for real or personal property.[26]

Thus, practitioners representing lessors of personal property and certain service, maintenance or repair providers need to be aware of these statutes and the potential need to implement a renewal notice system. It is not worth a company's resources to litigate over whether a lessee's / vendee's private cause of action for damages should be sustained, and, in any event, the automatic

renewal statutes remain intact as an affirmative defense against enforcement of a faulty "automatically renewed" contract.

Endnotes

1. 18 N.Y.3d 753, 944 N.Y.S.2d 725 (March 27, 2012).
2. *Ovitz v. Bloomberg, L.P.*, 2009 NY Slip Op. 32397(u) (Sup. Ct. NY Co., Oct. 7, 2009).
3. *Id.*
4. *Ovitz v. Bloomberg, L.P.*, 77 A.D.3d 515, 516, 909 N.Y.S.2d 710 (1st Dep't 2010).
5. *Id.*
6. *Id.*
7. *Telephone Secretarial Service v. Sherman*, 28 A.D.2d 1010, 1011, 284 N.Y.S.2d 384 (2d Dep't 1967).
8. *Feder v. Caliguira*, 8 N.Y.2d 400, 405, 208 N.Y.S.2d 970 (1960); *Prial v. Supreme Court Uniformed Officers Ass'n*, 91 Misc. 2d 115, 117, 397 N.Y.S.2d 528 (App. Term 1st Dep't 1977).
9. 84 A.D.3d 1, 920 N.Y.S.2d 11 (1st Dep't 2011).
10. *Id.* at *2 (emphasis added).
11. *See, e.g., Kramer v. W10Z/515 Real Estate Ltd. Partnership*, 44 A.D.3d 457, 458-59, 844 N.Y.S.2d 18 (1st Dep't 2007), *rev'd by Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236, 906 N.E.2d 1049, 879 N.Y.S.2d 17 (2009).
12. *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Management Inc.*, 18 N.Y.3d 341, 962 N.E.2d 765 (2011).
13. *See, e.g., Parimist Funding Corp. v. Suffolk Vascular Assoc., PLLC*, 62 A.D.3d 974, 975, 880 N.Y.S.2d 121 (2d Dep't 2009); *Protection Indus. Corp. v. DDB Needham Worldwide*, 306 A.D.2d 175, 175-76, 763 N.Y.S.2d 546 (1st Dep't 2003); *NYDIC/Westchester Mobile MRI Assoc. v. Lawrence Hosp.*, 242 A.D.2d 686, 688, 662 N.Y.S.2d 593 (2d Dep't 1997).
14. *See Ludl Electronics Products, Ltd. v. Wells Fargo Financial Leasing, Inc.*, 6 A.D.3d 397, 398, 775 N.Y.S.2d 59 (2d Dep't 2004); *Concourse Nursing Home v. Axiom Funding Group*, 279 A.D.2d 271, 719 N.Y.S.2d 19 (1st Dep't 2001).
15. *Wornow v. Register.Com, Inc.*, 8 A.D.3d 59, 59, 778 N.Y.S.2d 25 (1st Dep't 2004).
16. 194 Misc. 2d 719, 723, 756 N.Y.S.2d 724 (Sup. Ct. NY Co. 2003).
17. *Ovitz v. Bloomberg, L.P.*, 2009 NY Slip Op. 32397(u) (Sup. Ct. NY Co., Oct. 7, 2009).
18. 18 N.Y.3d at 762.
19. *Id.* at 762-73.
20. *Rhodes v. Herz*, 84 A.D.3d 1, 7, 920 N.Y.S.2d 11 (1st Dep't 2011); *Sheehy v. Big Flats Community Day*, 73 N.Y.2d 629, 633, 543 N.Y.S.2d 18 (1989).
21. 77 A.D.3d 515, 516, 909 N.Y.S.2d 710 (1st Dep't 2010).
22. *See Wornow, supra* note 15, 8 A.D.3d at 59-60.
23. *See Dime Laundry Service, Inc. v. 230 Apartments Corp.*, 120 Misc. 2d 399, 466 N.Y.S.2d 117 (Sup. Ct. NY Co. 1983).
24. *Coinmach Corp. v. Harton Associates*, 304 A.D.2d 705, 706, 758 N.Y.S.2d 388 (2d Dep't 2003).
25. *See Melodies, Inc. v. La Pierre*, 4 A.D.2d 982, 982, 167 N.Y.S.2d 703 (3d Dep't 1957); *see also Feder v. Caliguira*, 8 N.Y.2d 400, 405, 208 N.Y.S.2d 970 (1960).
26. *Donald Rubin v. Schwartz*, 160 A.D.2d 53, 559 N.Y.S.2d 307 (1st Dep't 1990).

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New York City Environmental Control Board's Denial of Due Process

By Sean Roman Strockyj

The Environmental Control Board (ECB) is one of the major administrative tribunals in New York City. The ECB holds hearings on Notices of Violations (tickets) issued for a multitude of infractions of New York City's laws and regulations.[1] Violation notices are issued by New York City agencies, including the Fire Department, N.Y.P.D. Traffic Enforcement, Sanitation, Parks & Recreation, as well as many others. Some common violations involve building code violations, public indecency, skateboarding where prohibited, inadequate rodent control, strolling with an unleashed dog, unruly noise, and having a dirty sidewalk.[2] The violations that the ECB asserts jurisdiction over are not crimes. If found guilty, a citizen will have to pay a fine and in certain cases, remedy the violation.

This article examines whether a New York City resident has the right to demand the presence of the government official who issued a Notice of Violation for the purpose of cross-examination in an administrative fact finding hearing. This article emphasizes that such a right clearly exists under precedents from New York's highest court as well as an explicit agency regulation applicable to ECB hearings. Despite the surplus of authority granting City residents the basic right of cross-examination, this article demonstrates how the ECB is consistently operating in violation of clearly established law to deny this right.

Environmental Control Board—General Overview

There are five ECB parts in New York City, one for each borough.[3] Each administrative hearing is heard before an Administrative Law Judge ("ALJ"), a New York state attorney with whom the city of New York has contracted.[4] If the aggrieved citizen is not successful before the ALJ,[5] he can appeal to the final level of administrative authority, the ECB Appeals Board.[6] Upon an appeal, ECB appeals attorneys review the case and prepare a proposed decision.[7] The record and a proposed decision are then reviewed by a panel of ECB members, who issue a decision on behalf of the entire board.[8] The agency that issues the violation will not be involved in the appeals process.[9] If a citizen receives an adverse decision by the Appeals Board, he must avail himself of Article 78 of the C.P.L.R. for New York State Supreme Court review.[10]

The Initial Hearing

The prospect of fighting violations in a New York City administrative tribunal often leads the aggrieved citizen to just pay the fine to avoid the attendant hassle.[11] If you have never been summoned to the ECB, it holds the reputation of providing a wonderful opportunity to make headway into that Tolstoy novel you may have always wanted to start.

Initially, a citizen responding to the allegations in a Notice of Violation will wait in a line and fill out an appearance form. The citizen will eventually be called into a hearing room, where the ALJ will start an audio tape recording and swear in the responding party.[12] The ALJ will often begin the hearing by asking if the citizen would like additional time to retain counsel. As opposed to many forums, citizens are permitted to hire non-lawyers to defend them before the ECB.[13] It is also common for the ALJ to ask whether the citizen will waive his rights to have the officer who issued the violation present. To avoid having to come back, many respondents will happily relinquish these opportunities.

Regulations Applicable to ECB Hearings

Proceedings before the ECB are civil and special rules apply to simplify the proceedings. The ECB's rules are contained in Chapter 3, §3-11 though §3-95 of Title 48 of the Rules of the City of New York (RCNY).[14] 48 RCNY §3-54(b) provides that "[r]elevant, material and reliable evidence shall be admitted without regard to the technical or formal rules or laws of evidence." Consequently, the admission of evidence is not governed by New York's Civil Practice Law & Rules.

To assist the government agency to establish its case against the citizen, §1401(d)(1)(b) of the New York City Charter and 48 RCNY §3-54 provides that, if sworn to, the Notice of Violation will be considered prima facie evidence of the statements alleged. Effectively, these decrees permit the government to satisfy its burden of proof[15] the initial time the citizen appears without requiring the presence and testimony of the issuing officer.[16] When a citizen, however, demands the presence of the issuing officer for the purpose of cross-examination, he has the overwhelming weight of authority in support of this position.

New York Authority on the Right to Cross-examination

The Court of Appeals

The Court of Appeals has long held that there is a limited right of cross-examination of adverse witnesses in administrative proceedings as a matter of procedural due process. A leading decision on this issue is *Hecht v. Monaghan*,[17] which involved the loss of a cab license due to withholding change from a passenger.[18] Here,

the Court of Appeals artfully described that the quasi-judicial tribunal adjudicating the matter was bound by "those fundamental principles of basic justice and fair play which underlie our entire system of jurisprudence."[19] Though the rules of evidence are understandably relaxed in administrative hearings, the Court went on to hold that no essential element of a fair trial can be dispensed with unless waived.[20] Specifically, the *Hecht* decision indicated that the party whose rights are being determined must be given the opportunity to cross-examine witnesses.[21] The *Hecht* decision recognized that cross-examination under oath serves the critical purposes of permitting the litigant the opportunity to expose false swearing and inaccuracies of witnesses in observation, recollection and narration.[22]

This right was upheld by the Court of Appeals in *Gordon v. Brown*,[23] when the court confirmed, "[w]e have as a matter of due process recognized a limited right to cross-examine witnesses in administrative proceedings."[24]

The limitation on cross-examination in the administrative forum is that the extent of a litigant's inquiry will rest in the discretion of the tribunal.[25] Simply stated, a party has the right to cross-examine adverse witnesses to a reasonable extent.[26] These holdings signify that the citizen maintains the right to hold the City to its burden of proof.

Rule of the City of New York §3-51(c)

The right to cross-examination is expressly codified in a New York City rule applicable to proceedings before the ECB. Specifically, 48 RCNY §3-51(c) provides that every party shall have the right of due notice, cross-examination, presentation of evidence, objections, motions, argument and all other rights to a fair hearing. This is the most direct source of authority on the issue of whether a citizen maintains the right to cross-examination in the administrative forum. Simply, the exact words of the statute grant the well-established right.

The State Administrative Procedure Act

Under §306 of the New York State Administrative Procedure Act, commonly referred to as SAPA, a party has the statutory right of cross-examination in administrative adjudicatory proceedings.[27] Though this New York State law is generally applicable to administrative boards where a member is appointed by the governor, which is not the case for the New York City Environmental Control Board, SAPA provides an obvious indication of New York State policy on whether the right of cross-examination is available in administrative hearings.[28]

Based on the aforementioned sources of authority, it is clear that the right to cross-examination in the administrative forum is highly respected in New York. Unfortunately for those New York City residents gritty enough to fight their ticket and take on City Hall, the ECB Appeals Board has consistently disregarded case law and interpreted the regulations applicable to hearings to deprive residents of their fundamental right to cross-examination.

ECB's Position on Whether the Issuing Officer Must Appear

In the ECB decisions addressing the right to cross-examination, which can be found on a website maintained by New York Law School,[29] the ECB Appeals Board frequently pronounces that "there is no absolute right for the presence of the issuing officer."[30] The ECB bases its rationale on the ALJ's discretion under 48 RCNY §3-52(b) to "avoid delay." However, §3-52 never indicates anything resembling a rule that a hearing can go forward without cross-examination. Instead, §3-52(b) provides that hearing officers shall have the duty to conduct fair hearings and "to take all necessary action to avoid delay in the disposition of proceedings." While the term "avoid delay" is used in a general way to promote agency efficiency, §3-52 should not be utilized as a magic talisman which can be brandished by the government to eliminate the right to cross-examination.

Analysis of ECB Appeals Board Decisions

When a citizen does not request the appearance of the issuing officer at the initial hearing before the ALJ, the ECB Appeals Board will not hesitate to hold it against the citizen. For example, in *NYC Dept of Buildings v. George Almadover*,[31] involving a home owner constructing illegal partitions to have additional rooms to rent, the ECB held that the issuing officer's presence was not required when at no time did respondent's attorney request a subpoena for the appearance of the officer.[32] However, when citizens have made a clear argument for the right, the ECB has released a plethora of decisions that have served to keep the issuing officer safely protected from having to substantiate his written allegations with testimony.

In *NYC Dept. of Buildings v. Voidislaver Congregation*,[33] the respondent offered a general denial to the charge of replacing a boiler without a permit and moved to require the presence of the issuing officer for the purpose of cross-examination under 48 RCNY §3-51(c). However, the ECB denied the Congregation's request to have the issuing officer come to the tribunal on the grounds that the respondent established no basis for the need of the officer.[34] This clearly expanded RCNY § 3-51(c) beyond its plain meaning.

In *NYC Dept of Env. Protection v. Great American Construction Corporation*,[35] the ECB took an equally antagonistic approach to the rights of the public. Here, a construction vehicle was ticketed for idling.[36] Initially, the violation was dismissed by an ALJ when the officer who issued the ticket failed to show up at the tribunal. However, the ECB reversed in an appeal by the Department

of Environmental Protection. The ECB held that it was erroneous for the ALJ to dismiss "the charge solely because of the IO's unavailability for testimony and cross-examination."[37] Consequently, the respondent was stuck with a $350 ticket despite having denied that its vehicles were assigned to any construction projects in the area of the citation.

A truly bewildering decision came in *NYC v. Re-elect Councilman Al Vann*,[38] where a re-election committee received a series of fines for posting handbills on public property.[39] At the initial hearing, the ALJ adjourned the case for the express purpose to allow the issuing officer to attend. Here, the respondent made the argument that he was "entitled to ask the IO what he saw." When the officer failed to appear on the date expressly scheduled for his testimony, the ALJ refused to dismiss the case. The ECB Appeals Board decided that the failure, even in the face of a direct order from the ALJ, was not problematic to the City's case.

The *Al Vann* decision primarily relied on *NYC Department of Buildings v. Mazzarino*. In that case, the ECB established a practice of adjourning cases for the issuing officer to appear, but not holding the issuing officer accountable for failing to show up.[40] In *Mazzarino*, the ECB permitted the notes and diagrams of the issuing officer to sustain the charge that respondents had turned a cellar into an apartment. The ECB found that this written material, not subject to any scrutiny, trumped the respondent's representation that the layout of the basement was completely different than as described by the issuing officer in the violation. Additionally, the citizen argued that the inspector never would have even been able to gain entry to the premises to make any visual observation on the day the violation was issued. However, the oral representations and denials of the homeowner were swept aside.

Another example is *NYC v. Edna Cruz*.[41] Here, a distributor of weight loss products was fined $2,995 for posting flyers on motor vehicles. Over the citizen's objection, the ALJ denied the right to have the issuing officer appear. On appeal the ECB went on to state that it "is within the sole discretion of the ALJ to determine whether or not the IOs presence is necessary."

When the administrative law judges in the *GACC* and *Mazzarino* cases initially dismissed the cases in favor of the citizens when the issuing officers were absent, the Appeals Board did not find it within the ALJ's discretion to determine whether the presence of the officer was necessary. Logically, the ECB Appeals Board would have deferred to the ALJ decisions to dismiss the cases if it were concerned with citizens' rights to cross-examination. Instead, it appears that the ECB has established a pattern of disregarding rules of basic fairness to support guilty findings.

It must be said that the ECB has been consistent. It denied the right to cross-examination in a case involving a $100 citation for having a dirty sidewalk, *NYC Dept of Sanitation v. Strockyj*,[42] and also when the fine was $25,000 in the above-referenced case of *NYC Department of Buildings v. Almadover*.

Conclusion

Where a citizen of the City of New York contests a violation before the ECB, the ECB should not be able to wipe out the right of cross-examination on the basis of a regulation that permits the ALJ to "avoid delay," contrary to the explicit rules applicable to hearings as well as the governing case law from the Court of Appeals.

Endnotes

1. *See* New York City's Website on the ECB, available at http://www.nyc.gov/html/ecb/html/home/home.shtml. The New York City Charter §1049-a provides the ECB with the authority to enforce City laws that protect health, safety, and a clean environment. To do this, the ECB makes various rules and appoints Administrative Law Judges to hold hearings. The Board also decides appeals. The ECB is not responsible for writing or serving tickets.
2. For example, a homeowner may be issued a $100-$300 dollar ticket in New York City by the Sanitation Department for failing to clean the sidewalk in front of his property at certain times. See N.Y.C. Admin. Code, §16-118(2). The author concedes that receiving such a violation in Queens County led to his interest in this subject matter.
3. Staten Island's ECB Part is only a part-time office.
4. An applicant needs three years of experience as an attorney in New York to be considered for a part-time position as an ALJ before the ECB. See NYC's website on the ECB, available at http://www.nyc.gov/html/ecb/html/about/who_alj.shtml.
5. The ALJ makes a "recommended order & decision" for the ECB. Under RCNY §3-57, a hearing officer's decision shall set forth findings of fact and conclusions of law, and the hearing officer's reasons for finding on all material issues. If the ALJ's decision is not appealed by either side, it automatically becomes adopted by the board.
6. *See* 48 RCNY §3-74. When exceptions have been filed, the board is to consider the entire matter on the basis of the record before it.
7. *See* NYC's website on the ECB, available at http://www.nyc.gov/html/ecb/html/respond/appeals.shtml.
8. *See* 48 RCNY §3-74. Usually a panel of three board members will decide an appeal. In rare cases, a larger panel will be used. The ECB has 13 members. Six are commissioners of City agencies. Six are citizens, four of which the City deems experts in the fields of water pollution control, business, real estate and noise. There are two general citizen representatives. The final person is the Chair. He or she is the Chief Administrative Law Judge at the Office of Administrative Trials and Hearings (OATH). The present Board Members are: Suzanne A. Beddoe, Chief Administrative Law Judge at OATH, who serves as the Chairperson; Robert LiMandri, Commissioner of the Department of Buildings, represented by Renaldo Hylton; Carter Strickland Jr., Commissioner of the Department of Environmental Protection, represented by Russell Pecunies, Esq.; Thomas Farley, MD, MPH, Commissioner of the Department of Health and Mental Hygiene, represented by Jorge Martinez, Esq.; Salvatore J. Cassano, Commissioner of the Fire Department, represented by Tayo Kurzman, Esq.; Raymond W. Kelly, Commissioner of the Police Department, represented by Lt. Daniel Albano; John J. Doherty, Commissioner of the Department of Sanitation, represented by Madelynn Liguori, Esq.; Elizabeth Knauer, Water Specialist; Robert Carver, Esq.,

Real Estate Specialist; Emily S. Lally, Noise Specialist; Thomas D. Shpetner, Business Specialist; Hon. Ernest J. Cavallo, General Representative; and Douglas Swann, Air Pollution Specialist. See NYC's Website on the ECB, available at http://www.nyc.gov/html/ecb/html/about/who.shtml.

9. *See* NYC's website on the ECB, available at http://www.nyc.gov/html/ecb/html/respond/appeals.shtml.

10. *See* CPLR Article §§7801-7806.

11. There is an illustrative Youtube video submitted by M. Ben Reich, showing what Mr. Reich advertised as "a regular Monday at the ECB" in Brooklyn. Available at http://www.youtube.com/user/benreich?feature=watch#p/a/u/1/d4_ugg1R1Xs or http://consultmbr.com/ecb.aspx. M. Ben Reich's website indicates that he provides consulting firm services for real estate businesses and advertises himself as a New York City DOB, HPD, FDNY, ECB and DOH violation dismissal service. Available at http://www.manta.com/c/mt8d5w4/m-ben-reich.

12. *See* NYC's website on the ECB available at http://www.nyc.gov/html/ecb/html/faq/faq.shtml. The Frequently Asked Questions section indicates, "[o]nce everyone is in the hearing room, the ALJ will turn on the recording device. This may be a tape recorder or a computer. The ALJ will introduce him or herself. He or she will explain how ECB hearings are conducted."

13. *See id.* at FAQ, "Do I Need a Lawyer."

14. A full printout of the regulations applicable to ECB hearing is available at http://www.nyc.gov/html/ecb/downloads/pdf/ECB_RULES.pdf. It is entitled, "Chapter 3 Enforcement Procedures Before the Environmental Control Board."

15. Under §3-54 of Title 48 of the RCNY, the applicable burden of proof is a preponderance of the credible evidence.

16. §3-54 of Title 48 of the RCNY provides that the sworn statements of the issuing officer set forth on the Notice of Violation constitute prima facie evidence of those facts.

17. 307 N.Y. 461, 470 (1954).

18. The cab driver allegedly gave change for $1, instead of for $5, on a fifty-five cent fare at 12:45 a.m. on May 10, 1952. *See id.* at 470.

19. *See id.* at 469.

20. *See id.* at 470. Other essential rights were held to include the right to be fully apprised of the claims of the opposing party and the evidence to be considered, the right to inspect documents, and the right to offer evidence in explanation or rebuttal.

21. *See id.* The *Hecht* decision relied on the earlier case of *Friedel v. Board of Regents*, 296 N.Y. 347, 352-53 (1947) (involving administrative disciplinary hearings against a physician for performing illegal abortions). In *Friedel*, the Court of Appeals announced "cross-examination of adverse witnesses is a matter of right in every trial of a disputed issue of fact." *See id.* at 352; *see also Matter of Heaney v. McGoldrick*, 286 N.Y. 38, 45 (1941) (granting petitioner right to cross-examination as to basis of conclusions of adverse investigators who wrote report in administrative proceeding where prevailing wages of firemen were fixed in accord with provisions of the Labor Law).

22. *See Hecht*, 307 N.Y. at 474.

23. 84 N.Y.2d 574, 578 (1994) (involving administrative hearing on charges against a police officer who tested positive for cocaine).

24. *Id.* at 578 (citing *Matter of McBarnette v. Sobol*, 83 N.Y.2d 333, 339 (1994)). In the *Gordon* decision, where the petitioner was able to cross-examine multiple adverse witnesses, the Court of Appeals held that, in assessing whether due process requires the production of the lab technicians who performed the drug test on petitioner's urine specimen for cross-examination, the hearing officer should consider the nature of the evidence, the potential utility of trial confrontation in the fact-finding process, and the burden of producing the witness. *See id.*

25. *See Matter of Friedel*, 296 N.Y. at 352.

26. *See id.* at 353. In a proceeding before the state Board for Professional Medical Conduct arising out of a physician's alleged sexual misconduct, it was determined that a hearing officer acted within his discretion in limiting cross-examination to matters such as a witness' marital status, sexual history, prior injuries, and legal proceedings. *See Gross v. De Buono*, 223 A.D.2d 789 (3d Dep't 1996).

27. N.Y. APA §306(1)&(3).

28. *See* N.Y. APA §100, Legislative Intentions §102, Definitions.

29. ECB Appellate Board decisions, along with many other New York City Agency decisions, can be found on a terrific website maintained by New York Law School at www.nyls.edu/centers/harlan_scholar_centers/center_for_new_york_city_law/cityadmin_library.

30. *See NYC v. Estatfanous*, ECB Appeal No. 1100772 (December 15, 2011); *NYC Dept of Buildings v. Voidislaver Congregation*, Appeal No. 1000013 (April 29, 2010); *NYC v. Tony & Marilyn Mazzarino* (ECB Panel No. 34818, August 3, 2004); *NYC v. Richard Rivera*, Appeal No. 1000125 (June 24, 2010); *NYC v. Greenlink Construction Corp.*, Appeal No. 35346 (March 29, 2007) (permitting ALJ to condition adjournment on waiving appearance of issuing officer).

31. *NYC Dept of Buildings v. George Almadover*, Appeal No. 1000679 (October 28, 2010).

32. The ECB also noted that the respondent did not show how cross-examination of the issuing officer would have helped refute petitioner's allegations even though respondent denied any knowledge of the tenants listed on the violation notice.

33. *NYC Dept. of Buildings v. Voidislaver Congregation*, Appeal No. 1000013 (April 29, 2010).

34. There should be absolutely no requirement that a citizen show how cross-examination would aid his case. As is often repeated, the tool of cross-examination has been called "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore, Evidence § 1367). Simply, at an initial administrative hearing, a person cannot question a piece of paper. Naturally, as the Court of Appeals in *Hecht* recognized, the utility of cross-examination lies in questioning the issuing officer about any notes he made, his memory and observations of the events referenced by the issuing officer on the ticket.

35. *NYC DEP v. GACC*, Appeal No. 41423 (March 30, 2006).

36. §24-163 of the New York City Administrative Code prohibits a motor vehicle from being stationary with its engine running for more than three minutes.

37. Consequently, the ECB has effectively set up a scheme where it can find against a citizen for the lack of a credible denial, but fails to put any responsibility on the issuing officer to present evidence and rebut any denial of a citizen.

38. *NYC v. Re-elect Councilman Al Vann*, 2009 Appeal No. 1000161 (Sep. 30, 2010).

39. Section 10-119 of the Administrative Code of the City of New York prohibits posting handbills on public property.

40. *NYC v. Tony & Marilyn Mazzarino*, ECB Appeal No. 34818 (August 3, 2004).

41. *NYC v. Edna Cruz*, Appeal No. 1100519 (September 22, 2011). Ms. Cruz was charged with 39 violations of Section 375(1)(b) of the New York State Vehicle and Traffic Law (VTL) for posting flyers on motor vehicles at $75 per violation.

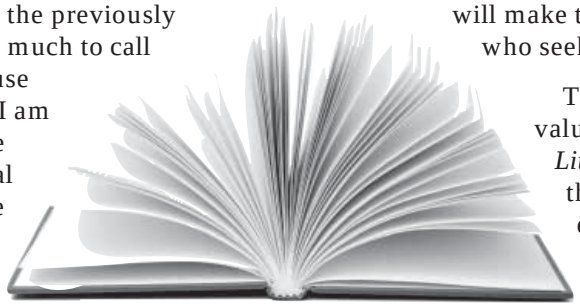
42. Appeal No. 0900404 (Dec. 3, 2009), reversed in a subsequent Article 78 proceeding, *Strockyj v. ECB*, 2010 N.Y. Misc LEXIS 6689; 2010 WL 5388465 (Trial Order). This is the case the author was involved in, as referenced in footnote 2.

Book Review

Business and Commercial Litigation in Federal Courts, Third Edition

Reviewed by Jack Auspitz

Spoiler alert: Every prior edition of *Business and Commercial Litigation in Federal Courts* has received stellar reviews and that isn't going to change for this review of the Third Edition. It is both bigger (eleven volumes totaling 12,742 pages) and better (34 new chapters and substantial revisions to the previously published chapters). It doesn't mean much to call this treatise the best in its class because there are no other treatises of which I am aware that deal with the broad scope of commercial litigation in the federal courts. But, in any event, this treatise stands as an outstanding work in its own right.



The set's quality is due, of course, to the quality of its authors, the effort they have put into their respective chapters, and the work of the editor. The editor in this case is Robert L. Haig, the Energizer Bunny of the legal world, constantly in motion prodding and aiding his authors. The Third Edition boasts chapters by 22 sitting federal judges. These chapters merit attention not so much because they are by sitting judges but because the authors are recognized experts in their subjects. The other 229 authors—229!—are nationally known litigators. The About The Authors section, itself 126 pages, may set the world's record for most repetition of words like "best lawyers," "chair," and "complex."

To take but one example of a new chapter, Thomas J. Moloney, Carmine D. Boccuzzi and Roger A. Cooper write on derivatives. Derivatives are a more than $600 trillion market, and litigation has been proliferating in the field, especially since the financial crisis of 2008. Yet there is surprisingly little literature dealing with how to litigate these complex contracts. In this chapter, the authors provide a detailed and clear guide to the such litigation, beginning with forum selection issues, then carefully explaining the standard ISDA Master Agreement (that governs many derivative contracts, then setting out various defenses, and finally discussing damages and settlement. As with all of the chapters, the authors provide checklists of claims, defenses, sources of proof and citations to model jury instructions which will make this chapter a valuable aid to those who seek to negotiate this dark terrain.

The checklists are a particularly valuable part of *Business and Commercial Litigation in Federal Courts*. Consider the chapter discussing discovery of electronically stored information by Hon. Shira Scheindlin and Jonathan M. Redgrave. The extensive checklists at the end of this chapter include a five-page outline of the steps one should take in identifying and interviewing employees who may have relevant emails including not only inquiring as to their Facebook, Twitter and LinkedIn accounts, but also things like "cloud computing (including SaaS / PaaS / IaaS)." Now, all I have to do is find an associate under the age of 12 who can tell me what SaaS / PaaS / IaaS are. But once I find that person, she should have no difficulty in conducting the discovery interview based on the Scheindlin / Redgrave checklist. Similarly, helpful checklists can be found at the end of each chapter in the treatise.

The checklists illustrate one other central fact about *Business and Commercial Litigation in Federal Courts*. It is a *practical* book, intended for practicing lawyers trying to get their brains around immediate and difficult problems. While I'm sure we all like to curl up by the fireside at night with the latest law review article on trans-border regulatory issues relating to breeding same sex chinchillas, what we need during the day is a straight-forward guide to coping with subjects we have to master right now. *Business and Commercial Litigation in Federal Courts* is the place to start.

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