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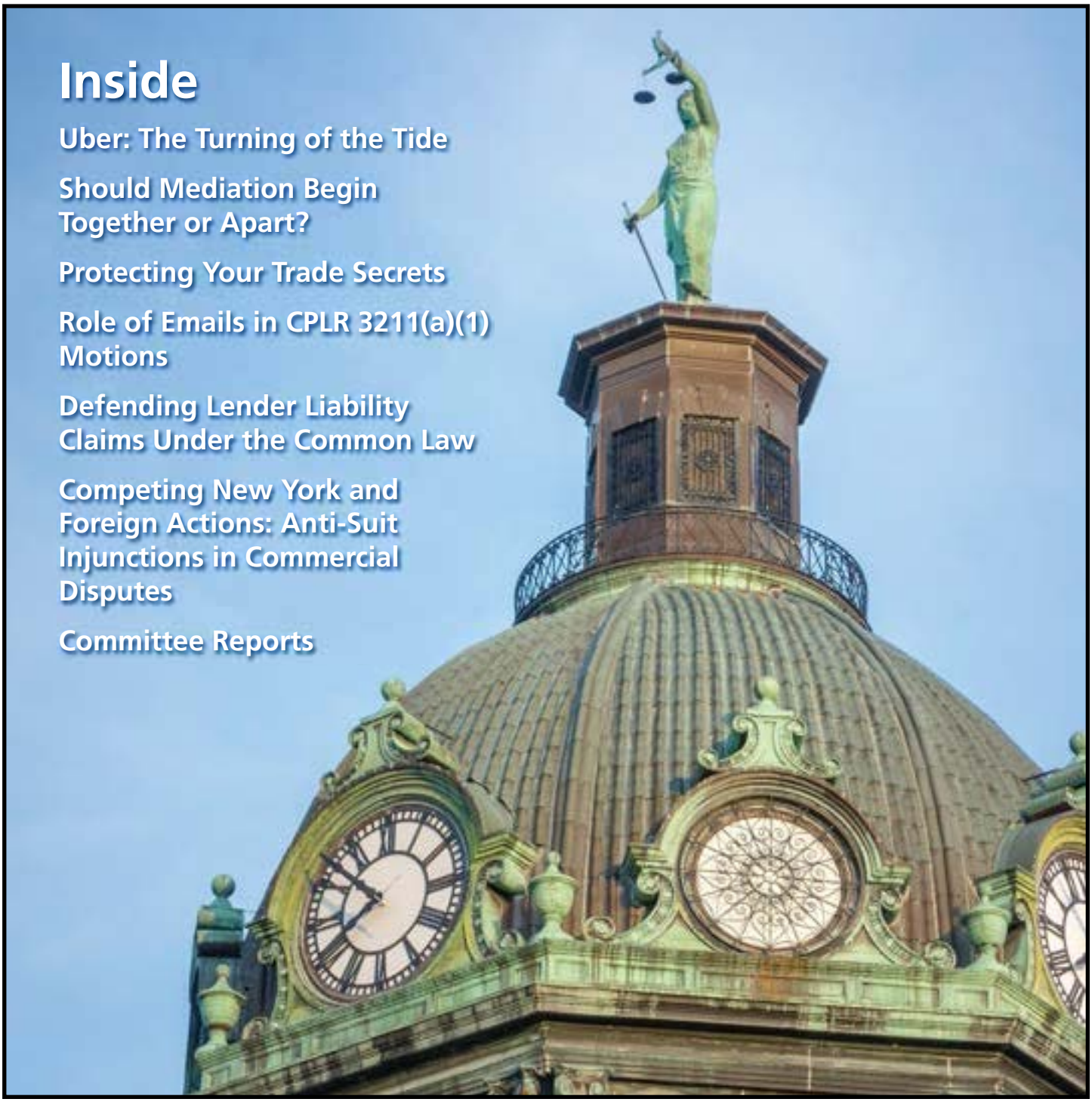

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Message from the Chair
COMFED—The Intersection of the Federal and State Judiciary

This year the Commercial and Federal Litigation Section celebrates the intersection of the federal and state courts. We have brought new meaning to the Section's name of being the *go to* bar group representing "Commercial and Federal" litigators by melding both the federal and state judiciaries into our programing.

This year, the Section created a new annual award, the first in a decade, called the *Shira A. Scheindlin Award for Excellence in the Courtroom*. The award is named after retired United States District Judge and former Chair of the Section, Shira A. Scheindlin, to honor a woman who has distinguished herself in either state or federal court and who has been actively involved in mentoring attorneys. The award was conferred in the Ceremonial Courtroom at the Southern District of New York and the audience heard remarks from New York State Court of Appeals Chief Judge Janet DiFiore, Second Circuit Judge Denny Chin, Southern District Chief Judge Colleen McMahon and Eastern District Chief Judge Dora Irizarry. During that same event, the Section presented to five young women attorneys scholarships named after New York's former Chief Judge called the *Judith S. Kaye Commercial and Federal Litigation Scholarship*.

Further, to celebrate the 125th anniversary of the United States Court of Appeals for the Second Circuit, New York Chief Judge DiFiore presented the Section's 2017 Stanley H. Fuld Award to the Second Circuit. Second Circuit Chief Judge Robert A. Katzmann accepted the award on behalf of the Second Circuit in recognition of the Circuit's outstanding contributions to the development of commercial law and jurisprudence in New York State. The Second Circuit was the ideal choice for the Fuld Award as its thoughtful and insightful opinions have advanced commercial law in New York and have provided guidance to business and litigators regarding the legal standards under which businesses operate in our State. The Annual Meeting's CLEs included judges from both state and federal courts, including Second Circuit Judge Rosemary S. Pooler and Commercial Division Justices O. Peter Sherwood and Timothy S. Driscoll.

In furtherance of celebrating the Second Circuit's anniversary, the Section hosted a reception at the Thurgood Marshall United States Courthouse, the evening before its Annual Meeting, where young attorneys had the opportunity to meet the judges. Approximately 100 people attended the event, including federal and state court judges from around the state.

The Section will work with the Second Circuit and the New York Courts Historical Society to develop a program that will look at the historical link between the New York State Court of Appeals and the Second Circuit through the prism of commercial law in which both courts have been leaders. Concepts for this program are under development and may include cases where the Second Circuit certified questions of New York law to the New York Court of Appeals on commercial issues.

The Section has traveled and will travel throughout the State for its monthly meetings, some of which have been held for the first time in various federal courthouses. In December, we traveled to Syracuse to hear United States District Judge Brenda R. Sannes speak; in January, Karen Greve Milton, the Second Circuit Executive spoke to our Executive Committee; and then, in February, we traveled to the Charles L. Brieant Jr. Federal Building and Courthouse in Westchester to hear United States District Judge Cathy Seibel.

The Section's upcoming *Legal Ethics in the Digital Age* CLE; its all-day CLE program entitled *Cross-Fertilization of Best Practices Recommendations by ComFed and the DR Section for Improving Dispute Resolution in the Courts and in Arbitration*; and its biennial *Commercial Litigation Academy* will each feature on their panels many sitting and retired federal and state judges.

The Section this spring will further its true significance within the state and federal bars in New York, and around the country, as it will be coming out with its long anticipated updates to its acclaimed *Social Media Legal Ethics Guidelines* and *Best Practices in EDiscovery in New York State and Federal Courts*.

The Section looks forward to continuing this wonderful conjoining of the state and federal judiciaries in our programming for the years to come.

Mark A. Berman

Uber: The Turning of the Tide

By Thomas A. Dickerson and Sylvia O. Hinds-Radix

The juggernaut, Uber Technologies, Inc., may have reached the end of its worldwide efforts to dominate new transportation markets with its unique and popular ride-hailing app.[1] Although Uber has met opposition in the past in both the marketplace[2] and in court, particularly in California,[3] new developments in China and in New York City may have brought Uber's nearly unstoppable advance to a halt.

Uber Surrenders In China

It is fair to state that Uber and its co-founder, Travis Kalanick, wanted very much to succeed in China. "Despite intense local competition, the market was one of Uber's largest by total number of rides. A Chinese operation was the personal project of...Kalanick, who traveled regularly to the country and gave speeches that borrowed the jargon of Chinese Communist Party officials. His interest was backed up by billions of dollars in investment."[4] But Uber, "known globally for competing ruthlessly against all comers,"[5] waived the white flag and surrendered by selling Uber China to Didi Chuxing, its toughest rival.[6] Uber thereby joins other American economic armadas such as Facebook, Google and Amazon that have sailed to China on their quest for "world domination," only to eventually withdraw. "Like an imperial armada rolling out from North America's West Coast, these companies would try to establish beachheads on every other continent. But when American giants tried to enter the waters of China, the world's largest Internet market, the armada invariably ran aground."[7]

Price-Fixing Conspiracy

Uber is very popular in New York City and elsewhere,[8] having captured a significant portion of the taxis, cars for hire and mobile-app-generated ride-share services markets.[9] However, a recently filed lawsuit, *Meyer v. Kalanick*,[10] presently before federal Judge Jed Rakoff of the Southern District of New York, alleges that Travis Kalanick and Uber are stifling price competition amongst Uber drivers to the detriment of Uber riders in violation of Section 1 of the Sherman Antitrust Act and New York's antitrust statute, General Business Law 340 (Donnelly Act), which presents a real challenge to Uber.

The Uber Algorithm

In a technologically modern variation of resale price maintenance, the court noted in denying defendants' motion to dismiss[11] [and sustaining the causes of action based upon both horizontal and vertical price restraints] that drivers using the Uber app do not compete on price and cannot negotiate fares with drivers for rides. Instead, drivers charge the fares set by the Uber algorithm. Though Uber claims to allow drivers to depart downward from the fare set by the algorithm, there is no practical mechanism by which drivers can do so. The court also noted that "Plaintiff alleges that the drivers have a 'common motive to conspire' because adhering to Uber's pricing algorithm can yield supra-competitive prices...and that if the drivers were acting independently instead of in concert, 'some significant portion' would not agree to follow the Uber pricing algorithm."

Remember Ralph Nader?

Defendants, evidently, attempted to discover information with which to discredit the Plaintiff, Spencer Meyer and his attorney. This effort, reminiscent of General Motors' attempt to discredit Ralph Nader after the publication of his bestselling book, *Unsafe at Any Speed*, in 1965,[12] backfired and led to Judge Rakoff's order enjoining defendants, Uber and Kalanick, from using any information gathered by the private investigator they hired, in any manner whatsoever. "It is a sad day when, in response to the filing of a commercial lawsuit, a corporate defendant feels compelled to hire unlicensed private investigators to conduct secret personal background investigations of both the plaintiff and his counsel. It is sadder yet when these investigators flagrantly lie to friends and acquaintances of the Plaintiff and his counsel in an (ultimately unsuccessful) attempt to obtain derogatory information about them."[13]

Uber's Arbitration Clauses

In response to several class action lawsuits filed against it, Uber has sought to enforce mandatory arbitration clauses and class action waivers appearing in its driver agreements.[14] Such clauses have become quite common in consumer and employee contracts since the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*[15] and in subsequent decisions.[16] Initially Uber's efforts were rejected by federal Judge Edward M. Chen of the Northern District of California in *Mohamed v. Uber Technologies, Inc.*[17] and *Gillette v. Uber Technologies, Inc.*,[18] finding unenforceable Uber's earlier version of its mandatory arbitration clause. However, after some modifications by Uber, a new driver agreement containing a

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mandatory arbitration clause was approved by federal Judge James S. Moody of the Middle District of Florida in *Suarez v. Uber Technologies, Inc*.[19] and by federal Judge Marvin J. Garbis of the District of Maryland in *Varon v. Uber Technologies, Inc.*[20]

Internet Arbitration Clauses

One of the more ominous developments for e-commerce consumers and employees agreeing to be hired through the Internet involves the increasing enforcement by the courts of onerous contractual terms and conditions, such as mandatory arbitration, forum selection and choice of law clauses, class action waivers and liability disclaimers, often lurking in hyperlinks.[21] As noted by Judge Rakoff, "Since the late eighteenth century, the Constitution of the United States (has) guaranteed U.S. citizens the right to a jury trial. This most precious and fundamental right can be waived only if the waiver is knowing and voluntary.... But in the world of the Internet, ordinary consumers are deemed to have regularly waived this right, and, indeed, to have given up their access to the courts altogether, because they supposedly agreed to lengthy 'terms and conditions' that they had no realistic power to negotiate or contest and often were not even aware of. This liberal fiction is sometimes justified, at least where mandatory arbitration is concerned, by reference to the 'liberal federal policy favoring arbitration.'"[22]

"One of the more ominous developments for e-commerce consumers and employees agreeing to be hired through the Internet involves the increasing enforcement by the Courts of onerous contractual terms and conditions, such as mandatory arbitration, forum selection and choice of law clauses, class action waivers and liability disclaimers, often lurking in hyper-links."

Inadequate Notice

Relying upon California law and applying the reasoning of then-Circuit Judge Sonia Sotomayor writing for the majority in *Sprect v. Netscape Communications Corp*.,[23] Judge Rakoff stated, "Applying (California) law, the Sprect court found that certain plaintiffs had not assented to a license agreement containing a mandatory arbitration clause because adequate notice and assent were not present on the facts of that case." After carefully reviewing cases analyzing "clickwrap" and "browserwrap" agreements, Judge Rakoff distinguished *Mohamed v. Uber*[24] and *Cullinane v. Uber*[25] and held that "Plaintiff Meyer did not have '[r]easonably conspicuous notice' of Uber's User Agreement, including its arbitration clause or evince 'unambiguous manifestation of assent to those terms.'"

Endnotes

1. *See* Dickerson & Hinds-Radix, *Apartments and Car Sharing: A Disruptive Internet Revolution*, N.Y.L.J. (August 12, 2014); Dickerson & Cohen, *Taxis and Ride-Sharing: Meeting New York City's Car Service Needs*, N.Y.L.J. (7/30/2015); Dickerson & Hinds-Radix, *Airbnb and Uber: From Revolution to Institution*, N.Y.L.J. (4/22/2016).
2. In some cities Uber has been banned. For example, Uber is banned in St. Louis, Missouri. As a result Uber filed an "antitrust lawsuit [Wallen v. St. Louis Metropolitan Taxicab Commission (E.D. Mo. 2015)] against the St. Louis Metropolitan Taxicab Commission (MTC)...alleging defendants conduct constitutes an illegal combination in violation of Section 1 of the Sherman Antitrust Act"[Goldfein & Keyte, *Uber Seeks Antitrust Scrutiny of Taxicab Commission*, N.Y.L.J. (11/10/2015)]. In other cities Uber is tolerated but subjected to an occasional riot. See Steinmetz, Violent massive street fighting in Jakarta over Uber and Grab taxi services, www.eturbonews.com (3/22/2016); Nairobi's taxi drivers turn to violence to halt Uber, www.eturbonews.com (1/28/2016).
3. *See e.g., O'Connor v. Uber Technologies, Inc*., 2015 WL 5138097 (N.D. Cal. 2015) (Uber drivers presumptive employees; class certification granted); *Ehret v. Uber Technologies, Inc*., 2015 WL 7759464 (N.D. Cal. 2015) (withholding gratuities; class certification granted); *Philliben v. Uber Technologies, Inc*., Case No. 3-14-cv-05615-JST, Stipulation of Settlement (N.D. Cal.) (safe ride fees class action proposed settlement of $28.5 million); Cotter v. Lyft, Inc., Case No. 13-cv-04065-VC (N.D. Cal.) (drivers claim they are employees; rejection of proposed $12.25 settlement); (add Uber DAs settlement proposal); and Kendall, Uber Settles Suit Over Airport Fees, www.therecorder.com (11/20/2015) (proposed $1,785,913 settlement to "reimburse riders for 'airport fee tolls'").
4. Mozur & Issac, Uber to Sell to Rival Didi Chuxing and Create New Business In China, www.nytimes.com (8/1/2016).
5. *Id*.
6. *Id*.
7. Manjoo, Even Uber Couldn't Bridge the China Divide, www.nytimes.com (8/1/2016).
8. *See Meyer v. Kalanick*, 2016 WL 1266801 (S.D.N.Y. 2016) ("Plaintiff alleges that Uber competes in the 'relatively new mobile app-generated ride-share service market' of which Uber has an approximately 80 percent market share...Lyft has only a 20 percent market share...Although, plaintiff contends, neither taxis nor traditional cars for hire are reasonable substitutes for mobile app-generated ride-share service, Uber's own experts have suggested that in certain cities in the U.S., Uber captures 50 percent to 70 percent of business customers in the combined market of taxis, cars for hire and mobile-app generated ride-share services".
9. *See* Joshi, *Taxis: Yellow, Green and Black: Competition & Evolution*, City Law, New York Law School, Vol. 21, No. 3 (May/June

2015). There are many ride-hailing companies in New York City including "Uber, Lyft, Gett, Hailo, Curb, Way2Ride, Ride Ling, Bandwagon."

10. *Meyer v. Travis Kalanick And Uber Technologies, Inc*., 2016 WL 4073071 (S.D.N.Y. 2016).
11. Id. *See also*; Dickerson & Hinds-Radix, *Airbnb and Uber: From Revolution to Institution*, N.Y.L.J. (4/22/2016).
12. *See* http://en/wikipedia.org/wiki/Ralph_Nader ("The book became an immediate bestseller but also prompted a vicious backlash from General Motors (GM) who attempted to discredit Nader by tapping his phone in an attempt to uncover salacious information and, when that failed, hiring prostitutes in an attempt to catch him a compromising situation...GM CEO James Roche who admitted, when placed under oath, that the company had hired a private detective agency to investigate Nader").
13. *Meyer v. Travis Kalanick and Uber Technologies, Inc*., 2016 WL 3981369 (S.D.N.Y. 2016).
14. *See* Godoy, Uber Driver Contract Row Raises Consent Issues, Judge Says, www.law360.com (8/2/2016) ("A Brooklyn federal judge overseeing two proposed class actions by drivers claiming Uber is skirting labor laws questioned Tuesday whether frequently requiring drivers to agree to new contracts could undermine their consent to the agreements. U.S. District Judge Nicholas G. Garafis heard arguments on motions by (Uber) to dismiss the suits and compel the drivers to enter arbitration"). The cases are *Ogunmokun v. Uber*, Case Co: 1:15-cv-06143 (E.D.N.Y.) and *Ortega v. Uber*, Case No: 1:15-cv-07387 (E.D.N.Y.).
15. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).
16. *See* Dickerson & Chambers, *Challenging 'Concepcion' in New York State Courts*, N.Y.L.J. (December 29, 2015).
17. *Mohamed v. Uber Technologies, Inc*., 109 F.Supp.3d 1185 (N.D. Cal. 2015).
18. *Id*.
19. *Suarez v. Uber Technologies, Inc*., 2016 WL 2348706 (M.D. Fla. 2016).
20. *Varon v. Uber Technologies, Inc.*, 2016 WL 1752835 (D. Md. 2016), reconsideration denied 2016 WL 3917213 (D. Md. 2016).
21. *See* Dickerson & Berman, C*onsumers' Loss of Rights in the Internet Age*, NYSBA Journal (October 2014).
22. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).
23. *Sprect v. Netscape Communications Corp*., 306 F.3d 17, 35 (2d Cir. 2002)("[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestations of assent to those terms by customers are essential if electronic bargaining is to have integrity and credibility"). *See also Berkson v. GOGO LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015).
24. *Mohamed*, 109 F. Supp. 3d 1185
25. *Cullinane v. Uber Technologies, Inc*., 2016 WL 3751652 (D. Mass. 2016).

Should Mediation Begin Together or Apart?

By Richard S. Weil

Mediation, at its best, involves negotiating collaboratively. When the goal is not "winning," but getting the other side to say "yes," litigators become problem-solvers rather than warriors. And, parties are empowered to explore solutions rather than perceiving themselves as victims.

The traditional mediation model promotes this approach by starting with a joint session in which the mediator welcomes the participants, introduces people, all of whom may not have met each other, explains the process, and answers questions. Each side then makes an opening statement, sometimes followed by time for the participants to question and respond to each other before breaking into separate meetings.

But in the past several years, some mediators, litigators and parties have questioned this model. They may have experienced joint sessions that became adversarial or devolved into attacks on the character and veracity of the opponent. They may have witnessed opposing lawyers blow up a mediation by putting on a show for their clients or trying to intimidate the adversary. Or they may believe that each side understands the other's position, so "let's talk money!" These attorneys, and sometimes even mediators, prefer to skip the joint session and start the process with separate meetings.

So, which is the most effective way of beginning the process? I am aware of no statistics that answer this question, but in my experience, starting with a joint, substantive session has substantial benefits:

- It allows the mediator to set a cooperative, positive tone and begin establishing rapport and trust, which are key factors in the success of a mediation.
- It permits counsel and party representatives to speak directly to decision-makers on the other side about their view of the case, and what is important to them. It may be their only opportunity to do so.
- It may be a client's only opportunity to tell his or her story, giving him or her a "day in court," and an opportunity to vent that may increase the chances of settlement by giving him or her a role in the process.
- Exposing litigants who are entrenched in their point of view to the other side's evidence and arguments may get them thinking that they are not as right as they thought. Experiencing a fundamental change in their evaluation of the case is a major factor in parties achieving resolution.
- Similarly, by listening attentively with an open mind, participants may get ideas for accommodating each other's needs and interests while achieving an acceptable outcome for themselves.
- It allows each side to size up the other's lawyers, potential witnesses and, sometimes, experts and gauge how effective they would be at trial.
- It provides parties an opportunity to observe the mediator's competence, trustworthiness, and impartiality.
- If significant discovery has not occurred, it allows the parties to exchange key information.
- It permits participants to demonstrate their interest in settlement.
- It encourages a dialogue that may lead to finding common ground.
- In appropriate cases, it is an opportunity for a party to apologize, empathize, or express regret, which can help open the door to settlement.

But, while substantive joint sessions have significant benefits, they may be counter-productive for some personalities and issues. Before the mediation, counsel and the mediator should discuss the best way to structure the proceeding. If counsel believe that opening statements and discussions would be unproductive or counter-productive, most mediators will concur: mediation works best when participants have a voice in fitting the process to their particular case.

Richard S. Weil mediates business and employment disputes in his private practice and for the Second Circuit, the Southern District of New York, the New York Supreme Court, First Department, Appellate Division, and the New York Supreme Court Commercial Division. For more information, see weilmediation.com.

Protecting Your Trade Secrets

By Richard M. Reice

Trade secrets have been part of commerce since the dawn of civilization; the secrets of the alchemist, the special know-how of the artisan. Any sizable business enterprise will own thousands of them. They can range from a company's mailing list, personal employee information, pricing margins, financial data, trading algorithms, to future product designs. Think of trade secrets as the secret ingredients that make an enterprise competitive in the marketplace that the competition does not know, but would like to, either because they lack the know-how to create them, or having them would allow them to engage in unfair competition by saving them the time and expense of self-generating the material.

Only when we can identify what constitutes trade secrets can we take steps to protect them. In a definition consistent with most state law, the recently enacted federal Defend Trade Secrets Act (DTSA) describes a trade secret as:

> [I]nformation, including a formula, pattern, compilation, program device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use: and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[1]

Trade secrets cannot be otherwise available to the public or revealed by reverse engineering. An owner of a trade secret must also take "reasonable steps" to keep the information secret. What is "reasonable" may depend on the nature of the secret and the workplace. Evidence of "secrecy" can include a confidentiality policy in an employee handbook or a requirement that people with access to the trade secrets sign a specific confidentiality agreement. Requiring passcodes to access company data and computer systems, keeping hard-copy confidential information under lock and key, limiting access to R&D labs, manufacturing facilities, etc., all amount to evidence of an intent to protect confidential information from unauthorized dissemination.

"Economic value" means more than the fact that the information or material can be sold. Value can be discerned from the fact that it *cost* money to generate the trade secret and that the acquirer will *save* time and money by simply acquiring the material illegally as opposed to spending the time and resources to generate it in-house, even if it has the capacity to do so in terms of talent and funds.

"Peabody v. Norfolk remains the foundation of American trade secret law. Today, the owners of trade secrets have several avenues to protect themselves against the misuse of their confidential information."

In 1868, three years after the end of the Civil War, the Massachusetts Supreme Court established "modern" trade secret law in *Peabody v. Norfolk* when it ruled that "information" and "invention" could be *property,* subject to the protection of the law.[2] After inventing a new process and machine for making "gunny cloth from jute butts,"[3] Francis Peabody built a factory and hired Norfolk as a machinist under a written contract that obligated him to keep Peabody's new process secret. [4] But, Norfolk soon left Peabody's employ and used Peabody's invention to build a competing factory.[5] Peabody sought an injunction and prevailed. In its seminal decision, the Court found that "it is the policy of the law . . . to encourage and protect invention and commercial enterprise . . . If a man establishes a business and makes it valuable by his skill and attention; the good will of that business is recognized by the law as property."[6]

Peabody v. Norfolk remains the foundation of American trade secret law. Today, the owners of trade secrets have several avenues to protect themselves against the misuse of their confidential information. Filing a legal

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action to obtain injunctive relief to preclude the use and dissemination of misappropriated confidential information, court-ordered seizure of stolen secrets and materials, money damages, and in some cases, recoupment of attorney fees are all viable remedies.

An essential tool for protecting trade secrets is identifying, by broad category, what constitutes a trade secret. This can be communicated via employee confidentiality agreements and employee handbooks, as can be the obligation of employees or others not to disclose such information and the consequences in case of breach.[7]

Should there be an actual or threatened misappropriation of a trade secret, the normal course is to seek emergency injunctive relief, bringing suit for breach of contract (the confidentiality agreement) and/or in tort for misappropriation, conversion (civil equivalent of theft), and unfair competition. These sorts of actions are common and the judges of the district courts and the various commercial divisions are well aware of the applicable case.

The DTSA, signed into law in May 2016, federalizes what were primarily state law causes of action. It allows employers to file a civil suit in federal court for theft of trade secrets and obtain injunctive relief against the misuse of those secrets, as well as damages and attorney fees. In extraordinary circumstances, there is provision for a court to order the ex-parte seizure of misappropriated trade secrets by U.S. Marshals to prevent their propagation or dissemination. In the first DTSA case filed in the U.S. that resulted in the seizure of stolen trade secrets, this author and his firm obtained a court order directing the marshals to seize from the apartment of the defendant/employee computer files containing thousands of customer contacts and deal-related documents misappropriated from a New York-based real estate finance firm.

On the state level, breaches of contract and business tort lawsuits are regularly filed as a result of misappropriation. Creating consistency among the various states, the Uniform Trade Secrets Act, passed by every state except New York and Massachusetts, provides for injunctive relief to prevent an "actual or threatened misappropriation" and up to double damages for the "willful and malicious misappropriation of trade secrets" and the recoupment of attorney fees for the prevailing party. While much restrictive covenant litigation for breach of non-competition and non-solicitation of customer contract cases will continue to be litigated primarily in the state courts, trade secret litigation will likely see a significant shift to the federal courts in the future.

Owners of trade secrets should put in place policies and agreements to protect those secrets and to have a plan of action in place to be able to rapidly respond in cases of misappropriation. Luckily, modern trade secret law has grown quite sophisticated and gives trade secret owners appropriate legal redress.

Endnotes

1. Uniform Trade Secrets Act, 18 U.S.C. § 1839 (3).
2. 98 Mass. 452, 458 (1868).
3. In other words, weaving burlap from the fibers of the jute plant.
4. *See id.* at 457.
5. *See id*.
6. Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 Cal. L. Rev 241, 253 (1998) (citing *Peabody* 98 Mass. 452, 457 (1868)).
7. A typical agreement may define confidential information as: inventions, ideas, improvements, discoveries, processes, data, programs, know-how, technical and business information relating to proprietary ideas and inventions, research and development plans and new products and services, test data, computer code and algorithms, company and customer supplied passwords, patentable ideas, drawings and/or illustrations, existing and/or contemplated products and services, research and development, production, finances and financial projections, algorithms, other software, customers, clients, marketing strategies, current or future business plans and models, information about employees, customers, consultants, contractors, and others with business relationships, regardless of whether such information is designated as "Confidential Information" at the time of its disclosure.

Defending Lender Liability Claims Under the Common Law

By Daniel B. Moar

While the Great Recession officially ended years ago, enduring roller coaster economic conditions mean that lenders continue to face many legal claims from borrowers looking to compromise or erase debts. Lender liability claims frequently increase where volatile economic conditions lead to a rise in borrower defaults and less willingness by lenders to offer additional credit. Often the borrowers have failed to pay back loans and use litigation to claim that the lender was really to blame for a default. While lender liability claims frequently are unsuccessful, lenders can incur substantial defense costs and face business disruption.

Lender liability suits generally involve claims that lenders either (a) failed to provide or fund a loan; (b) caused the project subject to the loan to fail; or (c) failed to perform in accordance with loan documents or the covenant of good faith and fair dealing. Borrowers assert a variety of common law claims including for breach of contract, breach of fiduciary duty, tortious interference, and "control" liability. This article explains the basics of each of these claims and steps that lenders can take to minimize the likelihood of litigation and liability.

Breach of Contract

Borrowers frequently assert liability against lenders based on breach of a loan agreement. Some of the more common claims are that the lender failed to honor a loan commitment letter, failed to extend a loan, failed to honor an alleged modification to a loan agreement, or failed to comply with the written requirements of a loan agreement.

In one recent case, for example, a borrower sued a lender for failure to advance funds to be used on a construction project.[1] The loan agreement, however, gave the lender discretion to determine when to make loan disbursements. The court granted summary judgment to the lender in reliance on the express language in the agreement explicitly granting the lender discretion.[2]

Where the terms of the loan agreement lack such clarity, courts have come to different outcomes. For example, in another case, a borrower brought suit claiming that a bank had improperly refused to provide financing that it had promised. The borrower had a pre-existing $16,100,000 loan with the bank and alleged that, upon execution of this loan, a bank officer had promised to provide at least $39 million in further financing to be used to develop a residential housing complex.[3] The borrower alleged that in reliance on this promise it continued to spend millions of dollars from its own pocket to develop the housing complex and that it was injured when the borrower refused to provide the additional financing. The court found that this alleged reliance was sufficient for the borrower to pursue a claim for breach of contract against the bank.[4]

Even where there is no claim of breach of the explicit requirements of a loan agreement, borrowers may nonetheless allege that a lender's conduct constitutes a breach of the implied covenant of good faith and fair dealing. Under the implied covenant, neither party to the agreement may take actions that, while not expressly proscribed by the agreement, in effect defeat the ability of the other party from receiving the benefit of the agreement.[5]

A lender is generally not liable for breach of the implied covenant where the lender's alleged "breach" is allowed by the express terms of the loan agreement.[6] "Put simply, a party does not breach an agreement by behaving as the instrument permitted."[7] For example, where a loan arrangement granted the lender discretion on how much money to advance to the borrower, the lender was not liable for breach of the implied covenant when it declined to advance the maximum amount allowed.[8] Similarly, where a loan agreement granted a lender discretion as to whether to make additional loans, the lender is not required to do so because "[t]he implied covenant of good faith and fair dealing will not impose an obligation that would be inconsistent with the terms of the contract."[9] Moreover, where a lender refuses to discuss a loan modification with a defaulted borrower and instead brings a legal action to collect on the debt, the decision not to consider a modification does not amount to a breach of the covenant of good faith and fair dealing.[10]

Breach of Fiduciary Duty

A lender-borrower relationship does not ordinarily impose fiduciary obligations upon the lender.[11] However, where a lender steps beyond the typical lending relationship this can create fiduciary liabilities, such as where the bank acts as a financial advisor to the borrower.[12]

To establish a fiduciary duty, courts consider the following factors: the nature of the relationship between the parties, whether the alleged fiduciary appeared to have a unique or special expertise, whether the alleged fiduciary was aware of the use to which information would be put, and the purpose for which the information was supplied.[13] A fiduciary relationship does not generally arise when unrelated entities engage in commercial transac-

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tions with one another, even if one party has disparate economic power, because these relationships are viewed by courts as straightforward arm's-length relationships.[14] A fiduciary relationship is not necessarily created even when a contract provision imposes confidential or non-disclosure obligations on the parties.[15]

Courts commonly recognize a fiduciary relationship where a lender exercises control over an escrow account on behalf of the debtor.[16] This fiduciary relationship, however, is narrowly tailored to claims based on the lender's control over the escrow account, i.e., a lender can face liability if it makes unnecessary payments under the escrow account.[17] The lender's obligations with respect to an escrow account do not create an all-encompassing fiduciary duty on all aspects of the lender-borrower relationship.[18]

A fiduciary relationship generally arises when one party places confidence in another, resulting in the latter party exercising superiority and influence over the former.[19] A lender may owe a fiduciary duty to a borrower if the lender gains substantial control over the borrower's business affairs.[20] Control over the borrower is demonstrated when there is evidence that the lender ran the actual day-to-day management and operations of the borrower or had the ability to compel the borrower to engage in unusual transactions.[21]

Control Liability

Lenders can also face liability to third parties when they exercise such overwhelming control over a borrower's day-to-day operations that the lender effectively is considered to act as the borrower.[22] Additionally, when a lender exercises day-to-day control over the borrower, this can lead to allegations of a fiduciary relationship whereby the lender becomes liable for the borrower's failure. Finally, if a lender uses its control over a borrower as a means to preferentially repay the loan at the expense of the borrower's other existing debts, the other creditors of the borrower can assert claims against the lender.[23]

This does not mean a lender can take no action to try to seek repayment on a loan. Indeed, to establish liability under a control theory requires "a strong showing that the creditor assumed actual, participatory and total control of the debtor."[24] A lender can legitimately act to safeguard its own interests by using leverage to "recoup the most amount of money possible" and to monitor the borrower without being liable under a control theory.[25] Control liability generally requires "complete domination" of the borrower by the creditor—"[s]uggestions by a major lender for a defaulted debtor even when coupled with a threat of the exercise of its legal rights if the debtor does not comply, are both commonplace and completely proper."[26]

Negligent Misrepresentation

In New York, a lender may be liable for negligent misrepresentation where it has a special relationship with the borrower. For example, in *Fleet Bank v. Pine Knoll Corp.*, the lender acknowledged at a deposition that many of its small business customers lacked significant financial knowledge and instead relied on the advice of bank relationship managers assigned to oversee the loans.[27] The specific loans at issue were part of a two-phase loan to be used to finance the purchase, renovation, and operation of resort property. The borrower could not perform the necessary tasks without receiving both phases of funding. While documentation existed establishing entitlement to the first round of funding, none established that the borrower would receive the second round of funding. The borrower, however, alleged that the lender's relationship managers repeatedly promised that the second round of funding was forthcoming and encouraged the borrower's principal to use personal assets to pay for necessary debts until the second rounding of funding was provided.[28] When the second round of funding was not provided, the project fell apart. The court found the facts alleged by the borrower were sufficient for its negligent misrepresentation claim against the bank to survive summary judgment.[29]

The requirements for a negligent misrepresentation claim, however, differ in other jurisdictions. For example, in New Jersey, courts have rejected a requirement of a special relationship to plead negligent misrepresentation.[30] Instead"[t]o prevail on a claim for negligent misrepresentation, a plaintiff must prove: (1) defendant negligently made a false communication of material fact; (2) that plaintiff justifiably relied upon the misrepresentation and (3) the reliance resulted in an ascertainable loss or injury."[31]

Tortious Interference

A claim of tortious interference with a contract generally involves one of two sets of facts. First, borrowers can pursue a tortious interference claim where a lender induces a third party contracting with the borrower to breach that contract. Second, borrowers can allege tortious interference where the lender prevents the borrower from complying with a contract between the borrower and a third party. In either instance, lenders can generally avoid liability if they show a bona fide exercise of rights set forth in the loan agreement.

To prove tortious interference with contract, a borrower must show the following elements: (1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages resulting therefrom.[32] The New York Court of Appeals has noted that "procuring the breach of a contract in the exercise of equal or superior rights is acting

with just cause or excuse and is a justification for what would otherwise be an actionable wrong."[33] As such, under New York law, a lender's economic interest can be utilized as a defense to a cause of action for tortious interference with a contract, unless there is a showing of malice or illegality.[34]

Minimizing Lender Liability Claims Before the Lending Relationship

When lenders are in preliminary discussions with prospective borrowers regarding the possibility of providing a loan, lenders should clearly and expressly note in writing that a loan commitment letter or other preliminary document is subject to a definitive loan agreement. By doing so, lenders can reduce the likelihood that a borrower can claim that a preliminary agreement was in fact binding and that the lender should face liability for failure to abide by the preliminary agreement.

All final loan agreements should contain provisions prohibiting oral modifications. Additionally, any amendments to existing loan agreements should also include no oral modification language.

Lenders should also seek a personal guaranty on a loan whenever practical. A personal guaranty provides a second source to seek repayment. In addition, a personal guaranty can waive defenses and counterclaims that might be asserted by the borrower and thereby allow the lender to pursue repayment from the guarantor with a reduced risk of extensive litigation.[35] Clauses imposing an absolute and unconditional repayment obligation with waiver of defenses are commonly called "hell or high water" clauses and are generally enforceable.[36]

Similarly, lenders should seek a waiver of claims of a fiduciary relationship. While lenders are generally not found to owe fiduciary duties, exceptions can arise. Lenders can avoid the need for even litigating the existence of a fiduciary relationship through a waiver because "agreements to waive claims of a fiduciary relationship are permissible under New York law."[37]

After Lending Is Provided

A lender that has already extended a loan or line of credit should avoid making unexpected sudden moves whenever possible. This is particularly true when there is a lengthy relationship between the lender and the borrower under which a course of dealing can be seen where the lender does not demand literal compliance with the loan agreement, such as by routinely accepting late payments. In such circumstances, even if the loan agreement technically allows a lender to immediately end financing without notice to the borrower, the lender faces a substantial risk of a lender liability suit by doing so.[38] Borrowers will claim reliance on the financing arrangement and will bring lender liability claims that, even if meritless, can be costly and time-consuming to defend. Thus, it is generally in the best interest of the lender to provide advance notice and documentation of any change to the lending relationship and allow a borrower to seek outside replacement financing even if the loan arrangement does not require this.

Where a borrower is clearly in a distressed state, a lender can monitor the borrower or provide unbiased information. When a lender begins to dictate that the borrower take certain actions, however, this can lead to allegations that the lender "controls" the borrower's business and is responsible for its failures or that the lender is acting in a fiduciary role to the borrower. While the line between permissible participation and undue control can be blurry and is extremely fact specific, a lender should avoid taking steps that can be construed as amounting to day-to-day control of the borrower's operations because that may lead to lender liability claims.

Workouts

When a lender is considering entering into a "workout," which modifies the terms of a loan, the final decision as to the terms of a workout should generally be made by someone other than the original loan officer on the file. The initial loan officer obviously can contribute valuable background and input, but he or she may not be in the best position to give the loan an objective analysis. Additionally, in the event of lender liability claims, where the original loan officer also handles a later workout, the borrower can paint the loan officer as self-interested and the workout as an attempt by the loan officer to avoid being perceived internally as non-performing. Accordingly, lenders should consider employing separate specialized workout officers who are in a better position to make unbiased decisions on modifications.

A lender should also confirm all material discussions regarding a workout in writing. Such writings minimize the likelihood the borrower can either claim the lender agreed to waive its claims or agreed to a modification at odds with the actual discussion.

When workouts are sought, lenders should also obtain personal guaranties to support the modified agreement. The guaranties should expressly state that they are being given to support waiver of an existing default so that there can be no later dispute that the guaranty was provided without consideration.

Lenders will sometime face lender liability claims even after modifying the loan arrangement via a workout. Frequently lenders will agree to workouts to extend the time for a borrower to repay a loan or modify the loan terms to avoid the need to pursue a lawsuit against a borrower. Unfortunately, lenders infrequently fail to recognize the need to request a release from a borrower in exchange for agreeing to a workout.

When lenders engage in discussions with a borrower to modify a loan, part of the discussion should be a request from the lender for a release from the borrower as

to any then existing claims. By obtaining a release, the lender can generally easily avoid litigation for any claims pre-dating the workout.[39]

Internal Documentation

During discovery, lenders will often have to produce internal correspondence relating to a defaulted account. Employees of the lender will rarely put the same level of thought into internal email as they would to a physical letter. Instead, internal emails will sometimes reflect derogatory comments about the borrower or incorrect assumptions about the terms of a loan arrangement. Borrowers can then misuse such internal emails as supporting claims of bad faith or as evidence that the lender agreed to an oral modification.

A lender should always assume that any internal correspondence might be one day put before a jury. Accordingly, internal correspondence should be based on objective information and should avoid editorializing or stating anything that could cast the lender in a bad light.

Lenders can minimize the possibility of this by limiting email discussions about accounts and providing proper training to employees as to the use of email. Additionally, lenders can and should ensure that employees are aware that emails will be used in litigation and that employees should avoid unnecessary or uninformed commentary about lending arrangements.

After Litigation Begins

No matter how careful a lender is in structuring and administering loans, most lenders will face lender liability claims. Often, these claims will have little or no merit and will be asserted by borrowers primarily in an attempt to delay the lender from pursuing its rights to proceed against a defaulting borrower. While such litigation gamesmanship is unfortunate, lenders can take several steps to ensure that litigation proceeds as quickly as possible to a resolution.

During discovery a lender may benefit if it discovers that the borrower made misrepresentations in the initial loan application. For example, in one foreclosure action, the borrower had misrepresented his income in the initial loan application.[40] When the borrower alleged lender liability claims based on the lender's issuance of the loan without investigating the borrower's misrepresentation of income, the court concluded that not only was the lender not liable for failure to investigate, but that the borrower's misrepresentation amounted to "unclean hands" depriving the borrower from seeking equitable relief.[41]

A lender should also consider a borrower's likely intentions in engaging in discovery. For example, where a borrower serves a mammoth amount of discovery on a lender, the lender may want to ignore the natural response of serving large discovery demands on the borrower as a tit-for-tat. Many times, the borrower is just using discovery in support of its purported lender liability claims as a delay tactic and a lender actually plays right into the borrower's hand by also serving expansive discovery demands.

Where a lender can get past litigation, significant care should be put into drafting settlement agreements. With a settlement requiring the borrower to make payments over time, the lender should request a confession of judgment be signed by the debtor. A confession of judgment is a written acknowledgement by the debtor of the amount due. As part of a settlement agreement, a lender can agree to hold a confession of judgment in escrow and not enter it so long as the borrower makes the payments required under the settlement agreement. Thus, the confession of judgment can provide a strong incentive to a debtor to maintain payments required under a settlement agreement to avoid the entry of the confession of judgment.

Conclusion

Lenders will continue to face an increase in lender liability claims originating in the Great Recession because of delays in commencing suit and delays in ongoing litigation. Additionally, economic volatility will ensure that such claims are an enduring reality for lenders. Notwithstanding this, lenders can take steps to be proactive in minimizing the number of lender liability claims they face and reducing the likelihood of adverse judgments.

Endnotes

1. *Lefkara Grp., LLC v. First Am. Int'l Bank*, 2016 N.Y. Misc. LEXIS 1609 (Sup. Ct., N.Y. Co. Apr. 26, 2016).
2. *Id.* at *17.
3. *Cherry Hill Partners at Vill. Place, L.L.C. v. Wachovia Bank*, 2011 U.S. Dist. LEXIS 70678, at *2-*4 (D.N.J. June 30, 2011).
4. The Court found that the alleged reliance satisfied the promissory estoppel exception to the New Jersey statute of frauds that required agreements to lend money in excess of $100,000 to be in writing. *Id.* at *10-*15. Notwithstanding this decision, borrowers often fail with claims premised on reliance on oral promises because "a borrower may not properly claim to have reasonably relied on representations that are plainly at odds with the loan documents governing the terms of the loan." *Wells Fargo Bank, N.A. v. Arthur*, 2016 N.Y. Misc. LEXIS 643, at *15 (Sup. Ct., Suffolk Co. Feb. 1, 2016).
5. *See, e.g., Fillmore East BS Fin. Subsidiary LLC v. Capmark Bank*, 552 Fed. App'x 13, 16 (2d Cir. 2014); *Cherry Hill Partners at Vill. Place, L.L.C.*, 2011 U.S. Dist. LEXIS 70678, at *17; *Dime Bank Loan Serv. Corp. v. Walter*, 2012 Conn. Super. LEXIS 2124, at *15 (Conn. Super. Ct. Aug. 22, 2012).
6. *Bank of Am., N.A. v. Westheimer*, 2014 U.S. Dist. LEXIS 25642, at *11 (D.N.J. Feb. 28, 2014); *Cherry Hill Partners at Vill. Place, L.L.C.*, 2011 U.S. Dist. LEXIS 70678, at *18; *New Century Bank v. 1265 Indus. Blvd., LLC*, 2016 Pa. Super. Unpub. LEXIS 2875, at *11 (Pa. Super. Ct. Aug. 10, 2016); *Dime Bank Loan Serv. Corp.*, 2012 Conn. Super. LEXIS 2124, at *16.
7. *In re Lehman Bros. Holdings v. JPMorgan Chase Bank, N.A.*, 541 B.R. 551, 570 (S.D.N.Y. 2015).
8. *1855 East Tremont Corp. v. Collado Holdings LLC*, 102 A.D.3d 567, 961 N.Y.S. 2d 25 (1st Dep't 2013).
9. *Better Homes Depot Inc. v. New York Community Bank*, 2011 N.Y. Misc. LEXIS 2402, at *12 (Sup. Ct., Nassau Co. May 13, 2011).

10. *See Devash LLC v. German Am. Capital Corp.*, 104 A.D.3d 71, 78, 959 N.Y.S. 2d 10, 14 (1st Dep't 2013); *New Century Bank*, 2016 Pa. Super. Unpub. LEXIS 2875, at *11; *Wells Fargo Bank, N.A. v. Riverview East Windsor, LLC*, 2010 Conn. Super. LEXIS 3307, at *14 (Conn. Super. Ct. Dec. 22, 2010).

11. *See Zap v. Mortgage Elec. Registration Sys.*, 2016 U.S. Dist. LEXIS 150988, at *19 (N.D.N.Y. Nov. 1, 2016); *Cole v. Wells Fargo Bank, N.A.*, 2016 U.S. Dist. LEXIS 42156, at *13 (D. N.J. Mar. 30, 2016); *Larobina v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 41992 (D. Conn. Mar. 27, 2012).

12. *Dime Bank Loan Serv. Corp.*, 2012 Conn. Super. LEXIS 2124, at *21.

13. *Muller-Paisner v. TIAA*, 881 F. Supp.2d 579, 593-94 (S.D.N.Y. 2012); *see also Ballard v. Hartford Life Ins. Co.*, 2011 Conn. Super. LEXIS 81, at *7 (Conn. Super. Ct. Jan. 18, 2011) ("The essential elements to pleading a cause of action for breach of fiduciary duty under Connecticut law are: (1) That a fiduciary relationship existed which gave rise to (a) a duty of loyalty on the part of the defendant to the plaintiff, (b) an obligation on the part of the defendant to act in the best interests of the plaintiff, and (c) an obligation on the part of the defendant to act in good faith in any matter, relating to the plaintiff; (2) That the defendant advanced his or her own interests to the detriment of the plaintiff; (3) That the plaintiff sustained damages; [and] that the damages were proximately caused by the fiduciary's breach of his or her fiduciary duty.").

14. *Gate Technologies v. Delphix Capital Markets*, 2013 U.S. Dist. LEXIS 95368, at *21 (S.D.N.Y. 2013).

15. *Stadt v. Fox News Network, LLC*, 719 F. Supp. 2d 312, 323 (S.D.N.Y. 2010).

16. *In re Bh Sutton Mezz LLC*, 2016 Bankr. LEXIS 4113, at *80-*81 (Bankr. S.D.N.Y. Dec. 1, 2016); *Binder v. Weststar Mortg., Inc.*, 2016 U.S. Dist. LEXIS 90620, at *65 (E.D. Pa. July 13, 2016).

17. *Dolan v. Select Portfolio Servicing*, 2016 U.S. Dist. LEXIS 81107, at *23 n.14, *26 (E.D.N.Y. June 22, 2016).

18. *In re Bh Sutton Mezz LLC*, 2016 Bankr. LEXIS 4113, at *82 ("[C]ourts have consistently rejected. . . . attempt[s] to impose a heightened obligation on all aspects of the debtor-creditor relationship simply because the mortgagee makes payments from an escrow account on behalf of the mortgagor.").

19. *Dolan*, 2016 U.S. Dist. LEXIS 81107, at *20-*21 ("a fiduciary duty may exist in a lender-borrower relationship, but only upon a showing that the lender 'enjoyed an *unusual* advantage resulting from the confidence that [the borrower] placed in [the lender], or [a] showing that [the lender] assumed control and responsibility *outside the terms provided for in the contract'* between the parties"); *Bohm v. Commerce Union Bank of Tennessee*, 794 F.Supp. 158, 164 (W.D.Pa. 1992).

20. *Bohm*, 794 F.Supp. at 164.

21. *Id.*

22. *See, e.g., McFadden, Inc. v. Baltimore Contractors, Inc.*, 609 F. Supp. 1102, 1105 (E.D. Pa. 1985) (*citing Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1105 (5th Cir. 1973)); *see also National Westminster Bank USA v. Century Health Care Corp.*, 885 F. Supp. 601, 603 (S.D.N.Y. 1995) ("Lender liability is predicated on an unmistakable showing that the subservient corporation in reality has no separate, independent existence of its own and was being used for the purposes of the dominant corporation.").

23. *See People's United Bank v. Wetherhill Assocs.*, 2011 Conn. Super. LEXIS 43, at *24-*25 (Conn. Super. Ct. Jan. 4, 2011).

24. *In re Bh Sutton Mezz, LLC*, 2016 Bankr. LEXIS 4113, at *51 (Bankr. S.D.N.Y. Dec. 1, 2016).

25. *See Cossof v. Rodman* (*In re W.R. Grant Co.*), 699 F.2d 599, 610 (2d Cir. 1983).

26. *Industrial Tech. Ventures v. Pleasant T. Rowland Revocable Tr.*, 2015 U.S. Dist. LEXIS, at *29 (W.D.N.Y. Apr. 28, 2015).

27. 290 A.D.2d 792, 796, 736 N.Y.S.2d 737, 741 (3d Dep't 2002).

28. *Id.* at 793.

29. *Id.* at 796.

30. *Prudential Ins. Co. of Am. v. Goldman, Sachs & Co.*, 2013 U.S. Dist. LEXIS 50788, at *28 (D. N.J. Apr. 9, 2013) (holding that in New Jersey "the 'special relationship' element does not exist"). New Jersey courts have not been consistent on this issue, however. One recent decision stated that a special relationship is an element in a negligent misrepresentation claim. *See Cevdet Aksut Ve Ogullari Koll. Sti. v. Cavusoglu*, 2015 U.S. Dist. LEXIS 90859, at *24 (D. N.J. July 14, 2015).

31. *Bank of Am., N.A. v. Westheimer*, 2014 U.S. Dist. LEXIS 25642, at *21.

32. *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 424, 688 N.E.2d 1370, 646 N.Y.S.2d 76 (1996); *Deutsch v. Backus Corp.*, 2012 Conn. Super. LEXIS 1165 at *19 (Conn. Super. Ct. May 2, 2012).

33. *Felsen v. Sol Café Mfg. Corp.*, 24 N.Y.2d 682, 687, 301 N.Y.S.2d 610, 613 (1969).

34. *Foster v. Churchill*, 87 N.Y.S.2d 744, 750, 642 N.Y.S.2d 583, 586 (1996).

35. *See Sterling Nat'l Bank v. Biaggi*, 47 A.D.3d 436, 437, 849 N.Y.S.2d 521, 522 (1st Dep't 2008); *Gerber Finance Inc. v. Mango Sedans LLC*, 2015 N.Y. Misc. LEXIS 708, at *6 (Sup. Ct., N.Y. Co. Mar. 11, 2015).

36. *In re Lehman Bros. Holdings*, 541 B.R. at 571 ("A recent Second Circuit opinion 'confirm[ed] that, under New York Law, hell or high water clauses are enforceable' against 'sophisticated parties.' Moreover, New York courts have generally enforced these clauses, provided that their terms clearly waive the challenged defense. In fact, New York courts have specifically found that a 'hell or high water' clause may bar claims of lack of consideration and authority."); *see also Taib Bank, B.S.C.(c) v. West End Equity I, Ltd.*, 2016 N.Y. Misc. LEXIS 475, at *17 (Sup. Ct., N.Y. Co. Feb. 16, 2016) (rejecting claim for fraudulent inducement because of an absolute and unconditional guaranty clause).

37. *In re BH Sutton Mezz LLC*, 2016 Bankr. LEXIS 4113, at *59.

38. For example, in *Liberty Bank v. New London Ltd. P'Ship*, the court found a triable issue as to whether the bank should be estopped from pursuing a mortgage foreclosure action because the bank's "consistent pattern of accepting late payments without protest, combined with the surrounding circumstances, provides evidence of conduct that may have induced the [borrowers] to believe in the existence of certain facts, i.e., that the [bank] would continue its collection of the debt in accordance with established past practice. In other words, based on the course of the relationship, the [borrowers] may have reasonably been led to believe that, absent some type of notice to the contrary, the [bank] would continue to be satisfied with accepting a late payment along with a late fee." 2007 Conn. Super. LEXIS 1065, at *15 (Conn. Super. Ct. May 1, 2007).

    The Second Circuit, however, rejected a claim that a bank was obligated to continue granting further extensions of credit where the borrower had received numerous prior extensions even though the borrower had repeatedly put its account into overdraft status. *See Fasolino Foods Co. v. Banca Nazionale Del Lavoro*, 961 F.2d 1052, 1057 (2d Cir. 1992) ("a rule that banks may not issue letters of credit to a defaulting borrower without obligating themselves to issue yet more letters in the future would help the borrower in this case but would work to the detriment of future borrowers. Such a rule would disable banks from ending risky financing relationships and cutting their losses, causing the banks either to charge greater interest to compensate for the greater risk or to be more selective in initiating financing relationships, or both.").

39. Lenders will need to verify with counsel that a release is enforceable for the specific loan subject to the workout.

40. *Deutsche Bank Nat'l Trust Co. v. Prather*, 2011 Conn. Super. LEXIS 2155 (Conn. Super. Ct. Aug. 4, 2011).

41. *Id.* at *13.

"I Show You Exhibit E for Identification"

Differing Approaches for Authentication of Electronic Evidence at Trial

By Michael L. Fox, B.A., J.D.

Unless one handwrites information on a piece of paper, and thereafter shreds, burns or otherwise discards the paper without it coming near a computer, scanner or smartphone camera, almost nothing in our world exists without some analog in electronic storage. Such is our ever-evolving, ever-more-technological world. The numbers of documents, emails, text messages, websites, photographs and social media posts, and blog articles are beyond legion. Of course, the world of litigation, as a microcosm of our society, is heavily focused these days on the discovery of electronically stored materials as information supportive of claims or defenses in a litigation. Consequently, that electronically stored information and documentation, once it is disclosed through the discovery process, and evaluated by attorneys and their experts, then becomes the subject of that next hurdle in litigation—the proffer of evidence at trial. That is the subject of this article—and, particularly, the issue of authentication of that electronically stored information when proffered as evidence in a courtroom.

There is not one, uniform standard across our great nation. In fact, from state to state, the courts have disagreed regarding what factors and methods to apply when parties seek to authenticate electronically stored or retrieved evidence. The federal system may resolve the problem with a specific rule change in 2017.

First, a distinction should be made: we are speaking here about the *authentication* of proffered evidence, and not necessarily its *admissibility*. As experienced litigators are well aware, just because a piece of proffered evidence can be authenticated does not mean that the evidence has overcome all hurdles to admissibility. Often the material must overcome a second evidentiary burden, such as relevance or hearsay. The court is ultimately the gatekeeper.[1]

Furthermore, courts certainly cannot take judicial notice of websites and the content of most private webpages.[2] After all, courts and commentators alike have recognized the possibilities and dangers in the fact that anyone can create a fake profile on social media, or a fake website, thus endangering the trustworthiness of trial evidence if care is not taken with authentication.[3]

So, now let us discuss the standards for authentication applied in several states, through some seminal cases on this topic to date. A three-method proposal was set forth in the case of *Griffin v. State*, in Maryland.[4] In *Griffin*, the trial court permitted the admission of selected printouts from a MySpace page, as evidence in a criminal prosecution. On appeal, the Court of Appeals reversed the conviction, holding that the MySpace printout, utilized to show that a key witness had been threatened, was not properly authenticated. A new trial was ordered. The Court stated:

> A number of authentication opportunities come to mind…. The first, and perhaps most obvious method would be to ask the purported creator if she indeed created the profile and also if she added the posting in question, i.e. "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be."… The second option may be to search the computer of the person who allegedly created the profile and posting and examine the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question…. A third method may be to obtain information directly from the social networking website that links the establishment of the profile to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it.[5]

As to the third method, the Maryland Court cited to a decision of the Third Department of the New York State Supreme Court, Appellate Division, in *People v. Clevenstine*.[6]

Four years later, in *Sublet v. State*,[7] the Maryland Court of Appeals consolidated three cases, and both "eludicat[ed] and implement[ed] [its] opinion in *Griffin*."[8] Holding that one trial court did not err in excluding admission of pages from a Facebook conversation, that the second trial court did not err in admitting "direct messages" and "tweets" into evidence, and that the third trial court did not err in admitting Facebook messages authored by the defendant, the *Sublet* Court stated: "We shall hold that, in order to authenticate evidence derived from a social networking

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website, the trial judge must determine that there is proof from which a reasonable juror could find that the evidence is what the proponent claims it to be."[9]

The courts of other states disagree with regard to the Maryland methods for authentication. In a December 20, 2016 decision, the Appellate Division in New Jersey held that the three methods of authentication proposed by the *Griffin* court were too strict, and that they were not the only methods available for application.[10] "[T]he rules of evidence already in place for determining authenticity are at least generally 'adequate to the task.'"[11]

The Louisiana Fourth Circuit Court of Appeal, in a 2016 opinion, reversed a trial court decision that denied a defense motion to exclude evidence in a criminal case in the form of Facebook posts offered by the New Orleans police department—posts allegedly made by the defendant.[12] The appellate court held: "Finding the State failed to present any evidence at all to authenticate the purported social media evidence it wishes to introduce at trial, we find the trial court abused its discretion in ruling the evidence admissible…. [W]e remand the matter to the trial court for an evidentiary hearing—outside the presence of the jury—in order for the State to present evidence pursuant to La. C.E. art. 901 to demonstrate the authenticity of the social media posts and for the trial court to rule on their admissibility at trial."[13] The Louisiana Court continued, "[a]ccordingly, we find the proper inquiry is whether the proponent has 'adduced sufficient evidence to support a finding that the proffered evidence is what it is claimed to be....'"[14] Proffered evidence needs at least circumstantial indicia of authenticity, and in *Smith* because the prosecution did not have the option of presenting the testimony of the alleged creator (the defendant), and therefore direct indicia of authenticity, it needed to present the circumstantial indicia of authenticity. That could include testimony of others, such as forensics, or utilizing other information and identifying characteristics within the posts to authenticate the creator. Software can assist such an endeavor.

In the New York case of *People v. Agudelo*,[15] in 2012, the First Department of the Appellate Division declined to extend and distinguished the Third Department's decision in *People v. Clevenstine*.[16] The First Department, in affirming a conviction, held that the victim in the case could testify about text messages exchanged with the defendant that were cut and pasted into a document, because the victim was a party to the conversation, and she was corroborated by a detective who had seen the messages on the victim's phone. The *Agudelo* court cited to an earlier decision of the U.S. Court of Appeals for the Second Circuit,[17] where it was similarly held that authenticity can be shown through the testimony of a participant to a conversation that the document depicting a cut-and-paste of messages is a fair and accurate representation of the conversation. This method of authentication requires a witness with knowledge that the matter is what it is claimed to be—a permutation of the first method outlined by the *Griffin* Court in Maryland. Think along the lines of a witness who authenticates photographs at trial.

More recently, in a December 2016 decision from the Third Department, *In re Colby II (In re. Sheba II)*,[18] that court reversed a Family Court order that had terminated parental rights on the basis of neglect and abandonment. The respondent parent facing loss of rights had proffered Facebook messages in opposition to the petitioner's application, but the Family Court held that a proper foundation was not laid for the proffered messages. The Third Department disagreed:

> Respondent's principal contention on appeal is that Family Court erred in its rulings that no proper foundation had been established for the admission of proof that she had communicated with the subject child by Facebook messenger using her adult son's account. The parties stipulated that the child did have contact with respondent through Facebook, and, specifically, that the child was the sender of Facebook messages transmitted under his name. Although the parties so stipulated, Family Court erred in finding that respondent failed to establish a foundation for the proffered document through her testimony and in precluding her testimony regarding the frequency of her communications with the child via Facebook. A recorded conversation—such as a printed copy of the content of a set of cell phone instant messages—may be authenticated through, among other methods, the "testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered"… Notably, "[t]he credibility of the authenticating witness and any motive she [or he] may have had to alter the evidence go to the weight to be accorded this evidence, rather than its admissibility." … Respondent testified that she was present when her counsel printed the Facebook messages at his office, and that she reviewed the entire document to ensure that it was a full and complete copy. The aforementioned stipulation and respondent's testimony, when combined with her adult son's testimony confirming that he had provided respondent with his account information, password and permission to use the account for communication with the child, constituted a sufficient foundation for the admission into evidence of the printed messages and her related testimony. By erroneously precluding this proffered evidence, Family Court deprived respondent of her due process right to a full and fair opportunity to be heard…. Accordingly, we reverse the order and remit the matter for a further

> fact-finding hearing at which the printed Facebook messages are to be admitted into evidence and respondent permitted to testify as to, and be cross-examined on, the nature and extent of her Facebook communications with the child and any other issues related thereto.[19]

It should be noted that in addition to resolving the issue of authentication, the *Colby* court went a step further, and held that the proffered messages were to be admitted into evidence by the trial court—determining not only authenticity, but also implicitly finding that there was relevancy and an exception to the hearsay rule.[20]

Finally, in the federal system, one seminal case, especially for Second Circuit litigators and litigants, is *U.S. v. Vayner*.[21] In *Vayner*, the Circuit reversed a conviction because, in its eyes, the Government's use of a social media account as evidence against the defendant ran afoul of the evidence rules, and the authentication of the proffered material was not sufficient. The Circuit held that if the Government had introduced a flyer found on the street, the Government would have had to connect the defendant to that flyer. However, with regard to the social media account utilized as evidence in the criminal prosecution at issue, the Circuit found that the trial judge had permitted use of the evidence without a showing that the defendant created, used or controlled the content of the pages.[22]

"In Vayner, *the Circuit reversed a conviction because, in its eyes, the Government's use of a social media account as evidence against the defendant ran afoul of the evidence rules, and the authentication of the proffered material was not sufficient."*

In 2015, however, *U.S. v. Ulbricht*[23] distinguished and declined to extend *Vayner*. In *Ulbricht*, the defendant moved, pre-trial, to preclude certain exhibits as insufficiently authenticated under *Vayner* and Federal Rule of Evidence 901. The exhibits at issue included screenshots of websites, and forum posts, private Internet messages and chats, and files from the defendant's computer. The District Court held that:

> *Vayner* is not a blanket prohibition on the admissibility of electronic communications…. As the Second Circuit observed, "[e]vidence may be authenticated in many ways" and "the 'type and quantum' of evidence necessary to authenticate a web page will always depend on context"…. *The Second Circuit also expressed skepticism that authentication of evidence derived from the Internet required "greater scrutiny" than authentication of any other record*…. Whether the Government can meet Rule 901's authentication standard with respect to the challenged exhibits is a question best answered at trial. There simply is no basis to prejudge the Government's ability to meet that standard.[24]

The emphasized text in the above quoted language also serves to highlight that federal courts appear to share some of the skepticism of the New Jersey court in *Hannah—i.e.,* that the Maryland methods are too strict, and that present rules and methods already utilized for non-electronic evidence may suffice for authentication of electronic evidence.

Litigators, especially those who practice in the federal courts, should be aware that there is a proposed amendment to the Federal Rules of Evidence: Proposed Rule 902(14). Should Congress take no action, it would go into effect on December 1, 2017. The new rule creates a process whereby electronically stored information that is copied from an electronic device, storage medium or file, may be authenticated by digital identification, accompanied by a certification of a qualified person complying with F.R.E. 902(11) and 902(12).[25] Of course, the opposing party may still object at trial on other evidentiary grounds, including again hearsay or relevance. However, the proposed Rule, at the federal level, would address any uncertainty as to the standard to be applied when courts and attorneys are first looking to authenticate proffered electronically stored and retrieved information during trial. It would also alleviate the need to call authentication witnesses for electronic evidence at trial in most cases. As the Advisory Committee states in the *Committee Note* to the proposed rule:

> Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This

> amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.
>
> A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.
>
> …
>
> The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant. …[26]

Clearly there is no one-size-fits-all method for authentication of electronically created, stored and retrieved material for use as evidence during trial. Several reasonable, workable and reliable methods have been set forth by the courts of multiple states, by the federal courts, and possibly, by the end of 2017, by a new addition to the Federal Rules of Evidence. The choice of method to apply will, as with most trial rules, be jurisdiction-specific. If a jurisdiction does not yet have a settled method for authentication of electronic evidence, though, there are a number to choose from—either by stipulation, or as the result of motion practice.

Endnotes

1. *See, generally*, *U.S. v. Vayner*, 769 F.3d 125 (2d Cir. 2014); *U.S. v. Ulbricht*, 79 F. Supp. 3d 466 (S.D.N.Y. 2015); *Sublet v. State*, 442 Md. 632, 113 A.3d 695 (Md. Ct. Apps. 2015); *Walker v. State*, No. 1030, 2015 WL 8579806, at *5 (Md. Ct. Spec. Apps. Dec. 11, 2015); *People v. Hernandez*, 31 Misc.3d 208, 915 N.Y.S.2d 824 (Rochester City Court 2011); Fed. R. Evid. 401, 402, 801-803, 901-902; N.Y. CPLR 4518.
2. *See McGown v. Silverman & Borenstein, PLLC*, Case No. 13-cv-748-RGA/MPT, 2014 U.S. Dist. LEXIS 12823 (D. Del. Feb. 3, 2014); *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2010). *See* Michael J. Hutter, *Judicial Notice of Website Information*, N.Y.L.J. at 3, 9 (June 2, 2016) ("In deciding whether to take judicial notice of a fact found in a given website, it is important to keep in mind that a court is necessarily seeking to determine whether that fact is not subject to reasonable dispute because of the unquestioned accuracy of its source, the website").
3. *See Griffin v. State*, 419 Md. 343, 354, 19 A.3d 415, 421-422 (Md. Ct. Apps. 2011) (citing *U.S. v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009)); *Sublet v. State*, 442 Md. at 662-63, 113 A.3d at 713; Jeffrey Cole, *The Brave New World of Internet Evidence*, ABA Litigation Journal Vol. 42, No. 4, at 37, 39 (Summer 2016) (citing Gregory P. Joseph, *What Every Judge and Lawyer Needs to Know About Electronic Evidence*, 99 Judicature 49, 51 (2015)).
4. 419 Md. 343, 19 A.3d 415 (Md. Ct. Apps. 2011). In Maryland, as in New York, the Court of Appeals is the highest Court in the State.
5. *Griffin*, 419 Md. at 363-64, 19 A.3d at 427-28 (citations omitted).
6. 68 A.D.3d 1448 (3d Dep't 2009).
7. 442 Md. 632, 113 A.3d 695 (Md. Ct. Apps. 2015).
8. *Id.* at 637, 697.
9. *Id.* at 638, 698. *See also Walker v. State*, No. 1030, 2015 WL 8579806, at *6 (Md. Ct. Spec. Apps. Dec. 11, 2015)

   > Appellant relies on the holding in *Sublet* that 'when a witness denies having personal knowledge of the creation of the item to be authenticated, that denial necessarily undercuts the notion of authenticity.'… In *Sublet*, however, the purported author of an electronic communication denied authoring a particular writing on social media, though she admitted writing previous posts on the same account…. In the present case, however, there is no denial of authorship that must be overcome by evidence, as Appellant did not testify at trial.

10. *State v. Hannah*, --- A.3d ---, 2016 WL 7368984, at *3-*4 (N.J. App. Div. Dec. 20, 2016).
11. *Id.* (citations omitted).
12. *State v. Smith*, 192 So.3d 836 (La. Ct. App. 4th Cir. 2016).
13. *Id.* at 837.
14. *Id.* at 842 (citing *Sublet*, 113 A.3d at 717 (quoting [*U.S. v.] Vayner*, 769 F.3d [125] at 131 [(2d Cir. 2014)]).
15. 96 A.D.3d 611 (1st Dep't 2012).
16. 891 N.Y.S.2d 511 (3d Dep't 2009).
17. *U.S. v. Gagliardi*, 506 F.3d 140 (2d Cir. 2007).
18. --- N.Y.S.3d ---, 2016 WL 7234786 (3d Dep't Dec. 15, 2016).
19. *Id.*, 2016 WL 7234786, at *1-*2 (citing, *inter alia*, *People v. Agudelo*, 96 A.D.3d at 611; *People v. Green*, 107 A.D.3d 915, 916-917 (2d Dep't 2013)).
20. N.Y. CPLR 4518(a) also specifically addresses electronic records, as follows in pertinent part:

    > An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility.

21. 769 F.3d 125 (2d Cir. 2014).
22. *Id.*
23. *U.S. v. Ulbricht*, 79 F. Supp. 3d 466 (S.D.N.Y. 2015).
24. *Id.* at 488 (citations omitted) (emphasis added).
25. *See Report of Advisory Committee on Rules of Evidence*, Judicial Conference of the United States, October 21, 2016 (Tab 3), *available at* http://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf (last visited Jan. 10, 2017).
26. *Id.*

Role of Emails in CPLR 3211(a)(1) Motions

By Bruce H. Lederman

At a time in history where substantial aspects of any dispute are evidenced by email exchanges, the question of whether emails are "documentary evidence" for purposes of a CPLR 3211(a)(1) motions takes on ever increasing importance. The Court of Appeals has never directly answered the question of whether emails can be considered documentary evidence under CPLR 3211(a)(1). The Appellate Division in both the First and Second Departments have in a number of cases permitted dismissal of cases pursuant to blanket prohibition on the use of emails. The First Department has recently stated, very clearly, that there is no blanket prohibition on the use of emails in proper cases. On the other hand, the Second Department, while allowing dismissal of complaints based upon emails in a few cases, has repeatedly used language suggesting that emails may not be documentary evidence for purposes of CPLR 3211(a)(1) motions. The Third and Fourth Departments have not issued guidance on the issue of using emails on 3211(a)(1) motions.

This article will explore the history of CPLR 3211(a)(1) motions as well as highlighting recent discussions by the Appellate Division on the use of emails for purposes of CPLR 3211(a)(1) motions. Finally, this article will offer some insights into strategic issues surrounding the decision to make pre-answer motions to dismiss.

The Statutory Text and Its History

CPLR 3211 provides in pertinent part:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 1. a defense is founded upon documentary evidence; or
>
> 2. the court has not jurisdiction of the subject matter of the cause of action; or
>
> 3. the party asserting the cause of action has not legal capacity to sue; or
>
> 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
>
> 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
>
> 6. with respect to a counterclaim, it may not properly be interposed in the action; or
>
> 7. the pleading fails to state a cause of action; or
>
> 8. the court has not jurisdiction of the person of the defendant; or
>
> 9. the court has not jurisdiction in an action where service was made under section 314 or 315; or
>
> 10. the court should not proceed in the absence of a person who should be a party.
>
> 11. the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law […]
>
> (b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.
>
> (c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

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The most cited Court of Appeals decision on the standards for determining a motion to dismiss under CPLR 3211(a)(1) is likely *Leon v. Martinez*.[1] Westlaw reports over 14,000 citations to the case. *Leon* does not specifically discuss emails and was decided before emails were so widely used as they are now.

However, the following statement about the standards for CPRL 3211(a)(1) is often invoked by trial judges and remains crucial to understanding the relevant issues:

> Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.[2]

In 2010, in a case which also does not specifically involve emails, the Appellate Division, Second Department, provided an informative discussion of the history of CPLR 3211(a)(1) as follows:

> CPLR 3211, including subdivision (a)(1), appears to have had its genesis in the 1957 First Preliminary Report of the Advisory Committee on Practice and Procedure (1st Rep. Leg. Doc. [1957] No. 6[b] [hereinafter the Report]). According to that Report, the purpose of CPLR 3211(a)(5) was to cover the most common affirmative defenses founded upon documentary evidence, specifically, estoppel, arbitration and award, and discharge in bankruptcy, whereas 3211(a)(1) was enacted to "cover all others that may arise, as for example, a written modification or any defense based on the terms of a written contract". To some extent, "documentary evidence" is a "fuzzy" term, and what is documentary evidence for one purpose, might not be documentary evidence for another.
>
> As Professor Siegel has noted in his Commentary to CPLR 3211, there is "a paucity of case law" as to what is considered "'documentary' under [CPLR 3211(a)(1)]." From the cases that exist, it is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are "essentially undeniable," would qualify as "documentary evidence" in the proper case.[3]

In *Fontanetta*, relying primarily upon Professor Siegel's practice commentaries to the CPLR, the Appellate Division, Second Department, stated that "'documentary,' evidence must be unambiguous and of undisputed authenticity."[4]

Emails should be capable of easy authentication to the extent they are electronically stored, and to the extent the recipient can confirm or deny receipt, and dispute any changes or alterations from the received email. If clients are anticipating litigation, it may be worthwhile advising them to send emails with "requests for delivery receipt" confirmation if there is any thought that emails will be used in litigation.

With this background, the following are recent discussions by the Appellate Divisions of the role of emails in 3211(a)(1) motions.

Recent Appellate Division Decisions Confirming That Emails Can Be considered Documentary Evidence

The First Department has recently specifically held that emails may be considered documentary evidence, although cases often find that emails in particular cases do not meet the standards for establishing entitlement to judgment as a matter of law.

In 2015, in the case *Kolchins v. Evolution Markets, Inc.*,[5] the First Department stated:

> Preliminarily, we reject Supreme Court's conclusion that correspondence such as the emails here do not suffice as documentary evidence for purposes of CPLR 3211(a)(1). This Court has consistently held otherwise. For example, in *Schutty v. Speiser Krause P.C.*, 86 A.D.3d 484, 484–485, 928 N.Y.S.2d 4 (1st Dept. 2011), this Court found drafts of an agreement and correspondence sufficient for purposes of establishing a defense under the statute. Similarly, in *Langer v. Dadabhoy,* 44 A.D.3d 425, 426, 843 N.Y.S.2d 262 (1st Dept. 2007), *lv. denied* 10 N.Y.3d 712, 861 N.Y.S.2d 272, 891 N.E.2d 307 (2008), this Court found "documentary evidence in the form of emails" to be sufficient to carry the day for a defendant on a CPLR 3211(a)(1) motion. Likewise, in *WFB Telecom. v. NYNEX Corp.*, 188 A.D.2d 257, 259, 590 N.Y.S.2d 460 (1st Dept. 1992), *lv. denied* 81 N.Y.2d 709, 599 N.Y.S.2d 804, 616 N.E.2d 159 (1993), this Court granted a CPLR 3211(a)(1) motion on the basis of a letter from the plaintiff's counsel that contradicted the complaint. Therefore, there is no blanket rule by which email is to be excluded from consideration as documentary evidence under the statute.[6]

In 2016, the First Department again stated:

> Emails can suffice as documentary evidence for purposes of CPLR 3211(a)(1); however, the emails, factual affidavits, and contract in this case do not constitute documentary evidence within the meaning of the statute.[7]

The law is less clear in the Second Department where the Court, in *Anderson v. Armentano*,[8] recently stated:

> To qualify as documentary evidence, the evidence must be unambiguous and of undisputed authenticity […] [J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case […] Affidavits and letters were not the types of documents contemplated by the Legislature when it enacted this provision.[9]

The Second Department has made similar statements in a number of other cases listed below, where the Second Department concluded that a defendant's proffering of emails of similar correspondence (i.e., text messages) was insufficient to qualify as documentary evidence for purposes of a 3211(a)(1) motion to dismiss.

- In *Eisner v. Cusumano Const., Inc.*,[10] the court stated that the affidavits and text messages relied upon by the Supreme Court in concluding that the plaintiff failed to comply with the alleged condition precedent were not "essentially undeniable," and did not constitute documentary evidence.
- In *JBGR, LLC v. Chicago Title Ins. Co.*,[11] the court stated that the defendant proffered emails, correspondence, and affidavits in support of its contention that, pursuant to Section 5 of the title insurance policy, the plaintiffs' failure to provide requested information regarding their claim terminated its obligation to cover the defects in the title. Therefore, the Court concluded that defendant failed to present any documentary evidence establishing a defense to the complaint.
- In *Attias v. Costiera*,[12] the Court stated that the affidavits submitted by the defendants, their attorney's affirmation, and the correspondence that was submitted in support of the defendants' motion did not constitute documentary evidence within the meaning of CPLR 3211(a)(1), and should not have been relied upon by the Supreme Court in directing the dismissal of the complaint pursuant to CPLR 3211(a)(1).
- In *Louzoun v. Kroll Moss and Kroll, LLP*,[13] the court stated that the plaintiff's email did not conclusively contradict the allegation in the complaint.
- In *Cives Corp. v. George A. Fuller Co., Inc.*,[14] the court stated that the letters and emails did not constitute "documentary evidence" under CPLR 3211(a)(1) and, thus, should not have been considered by the Supreme Court.

However, there does not appear to be a blanket rule in the Second Department against the use of emails in 3211(a)(1) motions inasmuch as a dismissal of a case based, in part, upon emails was just affirmed in *42nd Avenue Commons, LLC v. Barracuda, LLC*.[15] In that case, the Second Department affirmed a decision dismissing a claim to purchase property based upon emails, as follows:

> The defendant proffered sufficient documentary evidence that the defendant, as seller, never executed the contract of sale [...] The plaintiff's evidence, submitted in opposition, that emails were exchanged between the parties' attorneys, which emails purportedly reflected the parties' agreement to the material terms of the proposed contract for the sale of real property, was insufficient to establish that the statute of frauds was satisfied (*see* General Obligations Law § 5–703[2]). "[A]n agent may only bind a party to a real estate contract if authorized to do so in writing. The unwritten apparent authority of an agent is insufficient to satisfy the statute of frauds" … Here, even if it were found that the defendant's attorney subscribed the subject emails, there was no allegation in the complaint, and there was no evidence, that the defendant's attorney had been authorized in writing to bind the defendant to the contract of sale […] Further, *the emails exchanged by the parties' attorneys established that the parties did not intend to be bound until the signing of a formal contract of sale*.[16]

In *Pinnacle Realty of New York, LLC v. 255 Butler, LLC*,[17] the Second Department reversed the denial of summary judgment in a case for a brokerage commission, stating:

> In the parties' submissions, *which included printouts of emails and drafts of contracts*, established that the defendants and the prospective purchaser did not come to a meeting of the minds as to the essential terms.[18]

In *Leist v. Tugendhaft*,[19] the Second Department affirmed dismissal of an action for specific performance based upon consideration of an email which attached an unsigned contract.

> Assuming, arguendo, that an e-mail is sufficient to comply with the statute of

> frauds with respect to contracts for the conveyance of real property …, the document in issue here nevertheless is clearly inadequate, since it was not subscribed, even electronically, by the defendants who are the parties to be charged, or by anyone purporting to act in their behalf ….
>
> The fact *that the listing agent was identified as the sender in the e-mail to which the attachment was made does not satisfy the subscription requirement*. At best, the e-mail was the equivalent of a cover letter to a proposed contract, the signing of which is insufficient to satisfy the subscription requirement […][20]

Thus, while it seems that the Second Department is more reluctant than the First Department to consider emails as sufficient in many situations to justify dismissal under CPLR 3211(a)(1), it does not appear that there is any *per se* rule prohibiting use of emails in a proper case.

> ternet service would have been able to access defendant's "Evaluation Matrix," which described the precise weight to be accorded to the various qualifications used in determining which service providers would be allowed to participate in P3. Notably, this scoring matrix plainly indicated that a potential service provider's willingness to offset the employer's administrative fee accounted for 50% of the provider's overall score. Such proof, coupled with the additional materials tendered by defendant, including a transcript of a webinar conducted in December 2011,[2] more than supports Supreme Court's finding that defendant "extensively and conspicuously" disclosed the payment structure of P3 to its clients, thereby refuting any assertion that defendant engaged in deceptive practices.[22]

While this case may not directly address emails, the court's willingness to consider websites for purposes of CPLR 3211(a)(1) motions may signal a willingness to consider emails in appropriate circumstances.

"An alternative procedural mechanism is to simultaneously answer the complaint and then move for summary judgment under CPLR 3212."

In the Third Department, there appears to be fewer cases addressing the issue. In one case of note,[21] the Third Department affirmed the dismissal of a complaint, relying upon affidavits which provided links to websites establishing the disclosure which was allegedly not provided:

> We reach a similar conclusion with respect to Supreme Court's alternative ground for dismissal. Dismissal of a complaint under CPLR 3211(a)(1) is appropriate "where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Although plaintiff alleged that defendant failed to conspicuously disclose that any service provider participating in P3 had to pay certain administration fees in order to be designated as a "preferred" provider, such allegation is plainly refuted by the documentary evidence contained in the record, including the very materials tendered by plaintiff. Without belaboring the point, the record reflects that by reviewing the contents of defendant's website and following the hyperlinks contained therein […] anyone with In-

In *Ganje v. Yusuf*,[23] the Third Department held:

> A motion to dismiss pursuant to CPLR 3211(a)(1) is properly granted where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. Materials that clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable. To that end, an attorney's affidavit may serve as a vehicle for the submission of documentary evidence.[24]

Research has not revealed any on-point authority in the Fourth Department.

The foregoing cases illustrate that situations in which emails may be particularly useful in obtaining dismissals pursuant to CPLR 3211(a)(1) may involve cases questioning whether contracts actually exist or not, including brokerage cases and specific performance cases.

Practice Pointers and Conclusions

CPLR 3211(a)(1) motions provide a mechanism to have the Court address the merits of certain defenses at the very outset of a case, before any discovery. For that reason, it is sometimes desirable to test the sufficiency of a complaint at the outset of a case and sometimes emails will be particularly useful in establishing a defense.

An alternative procedural mechanism is to simultaneously answer the complaint and then move for summary judgment under CPLR 3212. On such a motion, there should not be any real problem submitting emails along with an affidavit properly authenticating them. However, some judges apply an unwritten rule only allowing a single summary judgment motion. If a case is before a judge applying such a single summary judgment rule, one risks a situation that the motion is denied because of need for discovery and the judge will later not allow another summary judgment motion after the conclusion of discovery.

A useful practice pointer is to make motions to dismiss, which involve emails under CPLR 3211(a)(1) and alternatively under CPLR 3211(a)(7). The latter is a motion to dismiss for failure to state a cause of action (sometimes historically called a demurrer).

CPLR 3211(c) provides:

> Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

Since emails could unquestionably be considered as evidence on a summary judgment motion, arguably, the emails could be considered as part of a CPLR 3211(a)(7) motion. If any issue is raised by either an adversary or the court as to the propriety of considering emails in such circumstances, a request can and perhaps should be made for the court to treat the motion as one for summary judgment.

For the reasons set forth above, it seems clear that there is no blanket prohibition on use of emails in CPLR 3211(a)(1) motions. However, the Second Department has recently held that emails are not sufficient documentary evidence justifying dismissal of a complaint, in contrast to the First Department. The Third and Fourth Departments have not materially weighed in on this issue. Given somewhat of a split in authority (if not general approach) between the First and Second Departments, it would be useful if, in an appropriate case, the Court of Appeals directly addressed the issue.

Given the large number of controversies today where emails document what was transpiring in "real time," it is worthwhile understanding how and when emails can be used in connection with motions to dismiss.

Endnotes

1. 614 N.Y.S.2d 972, 84 N.Y.2d 83 (1994).
2. *See also Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002) (documents must "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"); *Held v. Kaufman*, 91 N.Y.2d 425, 430-431, 671 N.Y.S.2d 429, 430 (1998) (it is settled law that a CPLR 3211 dismissal may be granted where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law").
3. *Fontanetta v. Doe*, 898 N.Y.S.2d 569, 574, 73 A.D.3d 78, 84-85 (2d Dept. 2010) (internal citations omitted).
4. *Fontanetta*, 73 A.D.3d at 86.
5. 8 N.Y.S.3d 1, 128 A.D.3d 47 (1st Dep't 2015)
6. *Id.* at 8-9 (emphasis added).
7. *Calpo-Rivera v. Siroka*, __ A.D.3d ___ 42 N.Y.S.3d 19, 20 (1st Dept. 2016); *accord Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 992 N.Y.S.2d 7, 11, 120 A.D.3d 436, 439 (1st Dept. 2014) (the emails in question fail to definitely refute plaintiffs' claim that the parties had reached an oral joint venture agreement, dismissal at this stage is not warranted).
8. 33 N.Y.S.3d 294, 139 A.D.3d 769 (2d Dept. 2016).
9. *Anderson*, 33 N.Y.S.3d at 296 (internal citations and quotations omitted).
10. 18 N.Y.S.3d 683, 685, 132 A.D.3d 940, 942 (2d Dept. 2015) (internal quotations omitted).
11. 11 N.Y.S.3d 83, 86-87, 128 A.D.3d 900, 903-04 (2d Dept. 2015).
12. 993 N.Y.S.2d 59, 62, 120 A.D.3d 1281, 1283 (2d Dept. 2014).
13. 979 N.Y.S.2d 94, 96, 113 A.D.3d 600, 601 (2d Dept. 2014).
14. 948 N.Y.S.2d 658, 660, 97 A.D.3d 713, 714 (2d Dept. 2012).
15. 35 N.Y.S.3d 366, 140 A.D.3d 1012 (2d Dept. 2016).
16. *42nd Avenue Commons*, 35 N.Y.S.3d at 367-68 (emphasis added) (internal citations omitted).
17. 5 N.Y.S.3d 173, 125 A.D.3d 952 (2d Dept. 2015).
18. *Pinnacle Realty*, 5 N.Y.S.3d at 175 (emphasis added).
19. 882 N.Y.S.2d 521, 64 A.D.3d 687 (2d Dept. 2009).
20. *Id.* at 522-23 (emphasis added) (internal citations omitted).
21. *Benetech, Inc. v. Omni Financial Group, Inc.*, 984 N.Y.S.2d 186, 116 A.D.3d 1190 (3d Dept. 2014).
22. *Benetech*, 984 N.Y.S.2d at 189 (internal citations omitted).
23. 19 N.Y.S.3d 355, 133 A.D.3d 954 (3d Dept. 2015).
24. *Ganje*, 19 N.Y.S.3d at 357 (internal citations and quotations omitted). The decision does not specify what documentary evidence actually justified dismissal, but the statement that an attorney's affidavit is a proper vehicle for submitting documentary evidence is noteworthy.

Competing New York and Foreign Actions: Anti-Suit Injunctions in Commercial Disputes

By Benjamin R. Nagin and Richard J. Widmann

New York state and federal courts frequently are called upon to decide cases that have cross-border aspects, whether with respect to the parties involved, the goods or services at issue, or both. In many of these actions, courts may be faced with competing parallel actions in New York and in a foreign jurisdiction. In this regard, there is no doubt that state and federal courts have the power to enjoin persons subject to their jurisdiction from proceeding in the foreign litigation. However, because such orders effectively restrict the jurisdiction of the court of a foreign sovereign, anti-suit injunctions should be granted "sparingly" and with "care and great restraint."[1] These concerns regarding the careful use of anti-suit injunctions reflect principles of international comity[2] and the presumption that "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other."[3] Nevertheless, as discussed below, notions of comity have less importance once a judgment is rendered or there is some significant threat to the jurisdiction of the New York court or the integrity of its orders.

In New York state courts, "[a]n injunction may be issued 'where it can be shown that the suit sought to be restrained is not brought in good faith, or that it was brought for the purpose of vexing, annoying or harassing the party seeking the injunction.'"[4] Indeed, courts in New York have "long recognized the propriety and importance of issuing anti-suit injunctions where a parallel action in a foreign court is being prosecuted in contravention of a New York forum selection clause and where such parallel action undermines the integrity of the court's judgments."[5] In addition to addressing these factors, some courts also have considered whether motions for anti-suit injunctions meet the general test for the issuance of a preliminary injunction.[6]

For example, in *Indosuez Int'l Fin., B.V. v. Nat'l Reserve Bank*, the Appellate Division, First Department, affirmed an award of summary judgment relating to the parties' currency exchange agreement and a permanent anti-suit injunction against the defendants' pursuit of litigation in a Russian court.[7] The Appellate Division first explained that, in light of prior rulings enforcing the parties' New York choice of forum and law provisions, "neither Russian law nor a Russian forum would be appropriately utilized in litigating the parties' underlying dispute."[8] As a result, "comity was not implicated" because the foreign court had no "legitimate prerogatives" to the dispute. Perhaps most fundamentally, the Appellate Division explained that "once there was a New York judgment on the merits, the courts of this State were entitled to protect it."[9]

Similarly, in *GE Oil & Gas, Inc. v. Turbine Generation Servs., LLC*,[10] the Supreme Court, Commercial Division (Justice Kornreich), faced competing actions in New York and Louisiana state courts (notwithstanding a New York forum selection provision). The New York court granted summary judgment in favor of the plaintiff on its breach of contract claims but stayed entry of judgment in light of defendants' counterclaims (which could have resulted in an offset to the judgment). Given the ongoing litigation in New York, the court initially enjoined defendants only from seeking an injunction in Louisiana that would preclude plaintiff from further prosecuting its action in New York.[11] Notwithstanding this focused anti-suit injunction and the decision on summary judgment, defendants subsequently sought an order in Louisiana that would (i) undermine Justice Kornreich's decision on summary judgment and (ii) preclude plaintiff from proceeding further in New York. Faced with such a collateral attack on her prior judgment and order, the court found that not only were defendants now violating the forum selection provision but "evinc[ing] an utter disregard for [the] court's authority."[12] This, Justice Kornreich found, easily satisfied the standard in New York state court for granting an anti-suit injunction.[13]

The Commercial Division (Justice Scarpulla) again addressed an application for an anti-suit injunction in *Madden Int'l, Ltd. v. Lew Footwear Holdings Pty Ltd.*[14] As the court recognized, the issue was "particularly thorny" because an Australian court had declared that its laws could trump the parties' prior agreement to apply New York law and have their dispute decided by a New York court.[15] The court started with the familiar three-pronged inquiry for preliminary injunctions: the movant's showing of a probability of success on the merits, the danger of irreparable harm in the absence of an injunction, and a balance of the equities in favor of the movant. The irreparable injury to Madden as the plaintiff was "obvious," in that prosecution of the Australian action would undo the bargained-for agreement to have a New York court apply New York law to any dispute, as well as expose Madden "to potentially unforeseen liability under a foreign statute to which it *did not agree to be bound*."[16] While neither party made a clear showing on likelihood of success, the

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court found that the balance of the equities favored Madden in that "Lew, a sophisticated business entity, freely agreed to be bound by New York law in its dealings with Madden, and to resolve any differences in the New York courts."[17] The court continued that "[r]ather than stand by this contractual commitment, Lew has purposefully flouted it, and sued in a foreign jurisdiction for damages not recoverable in New York."[18] Finally, the court declined to extend comity to the foreign proceedings in light of "New York's strong public policy" of enforcing choice of law and forum provisions of sophisticated business entities and the defendant's "purposeful disregard of its contractual obligations in favor of an unsanctioned suit in its home country."[19]

Not surprisingly, federal district courts in the Second Circuit also regularly confront competing U.S. and foreign actions and related applications for anti-suit injunctions. Under Second Circuit law, an anti-suit injunction requires that "(1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined."[20] Once these threshold requirements are met, "courts weigh five additional factors: (1) the threat to the enjoining court's jurisdiction posed by the foreign action; (2) the potential frustration of strong public policies in the enjoining forum; (3) the vexatiousness of the foreign litigation; (4) the possibility of delay, inconvenience, expense, inconsistency, or a race to judgment; and (5) other equitable considerations."[21] "While all of the discretionary factors must be considered, the first two factors—whether the foreign action threatens the enjoining forum's jurisdiction or its strong public policies—are given greater weight."[22] Principles of comity "counsel that injunctions restraining foreign litigation be 'used sparingly' and 'granted only with care and great restraint.'"[23]

For example, in *Eastman Kodak Co. v. Asia Optical Co.*,[24] Kodak won a judgment from the United States District Court (Judge Cote) arising out of the defendant's breach of a patent licensing agreement. After paying the judgment in part, the defendant filed an action for damages in China seeking reimbursement for the amounts paid on the United States judgment. Plaintiff then moved for an anti-suit injunction. Judge Cote rejected defendant's argument that the parties and issues in the competing actions must be "identical," noting that the threshold requirements are met if the parties are "sufficiently similar" and if the legal question at issue in China—whether the defendant should pay the amounts due under the judgment—was resolved in the United States action.[25] Finally, in considering the additional discretionary factors, Judge Cote reasoned that the foreign litigation challenging the United States judgment "implicate[d] important policies of this jurisdiction favoring finality and disfavoring forum shopping."[26]

The importance of finality in the U.S. judicial system also figured prominently in Judge Nathan's decision in *Bank Leumi USA v. Ehrlich*.[27] There, the plaintiff bank (BLUSA) filed a declaratory judgment action in the Southern District of New York for a judgment that it was not liable for defendants' losses on certain bonds. The defendants subsequently filed a suit in Uruguay based on the same losses and the two actions proceeded on "parallel tracks."[28] After judgment was granted by Judge Nathan, BLUSA moved for an anti-suit injunction. The court first examined the two threshold *China Trade* factors. While there were additional parties in both the United States and Uruguayan actions, the court found that the first factor—that the parties be the same in the two actions—was satisfied based on BLUSA's representation that it sought to enjoin only those plaintiffs that were defendants in the U.S. action.[29] As to the second factor—that resolution of the case before the enjoining court must be dispositive of the foreign suit—Judge Nathan concluded that "[e]ach basis for Defendants' requested relief in the Uruguayan Action would . . . conflict with at least part of this Court's judgment."[30] Moreover, it was insufficient, the court found, for defendants simply to "allud[e] in general terms to the possibility that the declaratory judgment this Court issued might not cover a claim arising under Uruguay's civil law system."[31] The court next considered the discretionary *China Trade* factors, reasoning that the policies of enforcing forum selection provisions and protecting federal judgments amply supported a decision to issue an injunction.[32]

As described above, in considering applications for anti-suit injunctions, New York state and federal courts are mindful of notions of "comity" and therefore carefully review the purpose and status of the parallel foreign action at issue. In this regard, recent decisions confirm that while parallel litigation in the United States and in foreign jurisdictions typically may proceed simultaneously, once litigants in the foreign action seek to attack the U.S. court's authority or undo the effect of a final judgment, New York state and federal courts express much less hesitation in granting anti-suit injunctions.

Endnotes

1. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987); *see also Indosuez Int'l Fin., B.V. v. Nat'l Reserve Bank*, 304 A.D.2d 429, 758 N.Y.S.2d 308 (1st Dep't 2003); *In re Cohen*, 5 Misc.3d 869, 874, 786 N.Y.S.2d 716, 720, (Surrogate Ct., Kings Co. 2004) ("Restraint of a foreign proceeding is such extraordinary relief that it should be granted only in exceptional circumstances.").
2. *Madden Int'l, Ltd. v. Lew Footwear Holdings Pty Ltd.*, No. 650209/2015, 2016 N.Y. Misc. WL 237637 at *5 (N.Y. Sup. Ct. Jan. 15, 2016) ("Whatever its precise contours, international comity is clearly concerned with maintaining amicable working relationships between nations, a shorthand for good neighborliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.") (quoting *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005)), *aff'd*, 143 A.D.3d 418, 38 N.Y.S.3d 178 (1st Dep't 2016).
3. *MasterCard Int'l, Inc. v. Argencard Sociedad Anonima*, No. 01 CIV. 3027(JGK), 2002 U.S. Dist. WL 432379, at *9 (S.D.N.Y. March 20, 2002) (declining to enjoin defendant from pursuing parallel action in Argentina); *see also Sebastian Holdings Inc. v. Deutsche Bank AG.*, 78 A.D.3d 446, 446-47, 912 N.Y.S.2d 13, 14 (1st Dep't

2010) (declining to enjoin party from pursuing parallel action in England).

4. *IRB-Brasil Resseguros S.A. v. Portobello Int'l Ltd.*, 59 A.D.3d 366, 366-67, 874 N.Y.S.2d 79, 80 (1st Dep't 2009) (quoting *Paramount Pictures v. Blumenthal*, 256 A.D. 756, 759, 11 N.Y.S.2d 768, 771 (1st Dep't 1939)).
5. *Oil & Gas, Inc. v. Turbine Generation Servs., LLC.*, No. 652296/2015, 2016 N.Y. Misc. WL 3043808, at *3 (N.Y. Sup. Ct. May 27, 2016).
6. *See, e.g.*, *Gliklad v. Cherney*, 97 A.D.3d 401, 402, 948 N.Y.S.2d 48, 50 (1st Dep't 2012) (reviewing three-part preliminary injunction test in affirming trial court's grant of "plaintiff's motion for a preliminary injunction barring defendant from prosecuting the action he had commenced in Israel over the same promissory note at issue in the instant litigation"); *Madden Int'l, Ltd. v. Lew Footwear Holdings Pty Ltd.*, No. 650209/2015, 2016 N.Y. Misc. WL 237637 at *5 (N.Y. Sup. Ct. Jan. 15, 2016) ("I start with the well-established three pronged inquiry on a motion for a preliminary injunction: '[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.'") (quoting *Nobu Next Door, LLC. v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840, 800 N.Y.S.2d 48, 49 (2005)), *aff'd*, 143 A.D.3d 418, 38 N.Y.S.3d 178 (1st Dep't 2016).
7. 304 A.D.2d 429, 758 N.Y.S.2d 308 (1st Dep't 2003).
8. *Indosuez Int'l Fin.*, 304 A.D.2d at 431, 758 N.Y.S.2d at 310.
9. *Id.*
10. No. 652296/2015, 2016 N.Y. Misc. WL 3043808 (N.Y. Sup. Ct. May 27, 2016).
11. *Id.* at *5.
12. *GE Oil & Gas*, 2016 WL 3043808, at *13.
13. *Id.* at *12.
14. No. 650209/2015, 2016 N.Y. Misc. WL 237637 (N.Y. Sup. Ct. Jan. 15, 2016).
15. *Id.* at *5.
16. *Id.* at *6 (emphasis in original).
17. *Madden Int'l, Ltd.*, 2016 WL 237637, at *6.
18. *Id.*
19. *Id.* at *7.
20. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987); *see also Paramedics Electromedicina Comercial LTDA. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652 (2d Cir. 2004).
21. *Eastman Kodak Co. v. Asia Optical Co.*, 118 F. Supp. 3d 581, 586 (S.D.N.Y. 2015).
22. *Id.* at 587.
23. *Paramedics*, 369 F.3d at 652 (quoting *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987)).
24. 118 F. Supp. 3d 581 (S.D.N.Y. 2015).
25. *Id.* at 587-88.
26. *Id.* at 589.
27. No. 12-cv-4423(AJN), 2015 U.S. Dist. WL 12591663 (S.D.N.Y. Sept. 23, 2015).
28. *Bank Leumi*, 2015 WL 12591663, at *1.
29. *Id.* at *4.
30. *Id.* at *5.
31. *Id.*
32. *Id.* at *5-7; *see also MasterCard Int'l, Inc. v. Federation Internationale de Football Ass'n*, No. 06-Civ-3036(LAP), 2007 U.S. Dist. WL 631312, at *8 (S.D.N.Y. Feb. 28, 2007) (defendant's "post-judgment pursuit in the arbitral forum [in Switzerland] of a result opposite to that obtained in this Court is a paradigm of bad faith forum shopping").

Practical Considerations for Use of FRCP 68 Offer of Judgment

By Tamar Wise and Alanna Miller

Under Federal Rule of Civil Procedure 68, titled, "Offer of Judgment," a defendant can make an offer of judgment to the plaintiff up to 14 days before trial.[1] If the plaintiff accepts the offer within 14 days of being served, the clerk must enter the judgment.[2] However, if the plaintiff rejects the offer, and receives a less favorable judgment at trial, the plaintiff "must pay the costs incurred after the offer was made."[3] FRCP 68 defines "costs" as those costs the plaintiff would have recovered from the cause of action in addition to the defendant's post-offer costs.

Despite the seemingly powerful remedy a Rule 68 offer can provide, defense counsel do not routinely take advantage of this Rule as a litigation tactic. At first glance, this fee-shifting device seems enticing and a great way for courts to encourage settlement. However, Rule 68 has received much criticism because it does not adequately define how to best structure an offer and which expenses constitute costs. As a result, the case law on the subject is murky and practitioners shy away from using this Rule when planning their litigation strategy. This article will examine the question of "costs" under Rule 68 in an attempt to outline for practitioners how they may try to use it properly.

"Costs" Generally Under Rule 68

While Rule 68 itself does not define costs, it adopts the definition provided in 28 U.S.C. § 1920, the federal taxation-of-costs statute.[4] Such costs include:[5]

1. Fees of the clerk and marshal;
2. Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
3. Fees and disbursements for printing and witnesses;
4. Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
5. Docket fees under section 1923 of [title 28];
6. Compensation of court-appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of [title 28].

Offers of judgment are construed literally and in accordance with fundamental contract interpretation principles.[6] To qualify as a valid offer of judgment, an offer is not required to specify or refer to the costs allowed under the statute. A court will instead read in the allowance of costs incurred.[7] Notably, attorney fees are not included in this definition of costs.[8] A significant portion of litigation surrounding Rule 68 involves attorneys' fees because the potential recovery of such fees can be an influential factor when a plaintiff is considering whether he or she should accept an offer of judgment.

Plaintiff's Statutorily Entitled Attorney fees as "Costs"

Under the proper circumstances, Rule 68 may preclude a plaintiff from recovering statutorily entitled attorney fees where the judgment recovered by the plaintiff is less than the defendant's Rule 68 offer. In *Marek v. Chesny*,[9] the Supreme Court considered plaintiff's attorney fees as post-offer costs where the plaintiff recovered less than the defendant's offer of judgment. The plaintiff, pursuing a claim under Section 1983, would have been entitled to an award of its attorney fees under the fee shifting provision of 42 U.S.C. § 1988.[10] The defendant argued that the plaintiff should be barred from recovering such fees because the plaintiff's trial award was less than the plaintiff would have recovered if the plaintiff accepted defendant's offer of judgment. The court held for the defendant: "[t]he most reasonable inference is that the term 'costs' . . . was intended to refer to all costs properly awardable under the relevant substantive statute or other authority."[11] As such, the court reasoned that "all costs properly awardable in an action are to be considered within the scope of Rule 68 'costs.'"[12] The court therefore held that the plaintiff was barred from recovering its statutory attorneys' fees pursuant to § 1988 because it failed to accept defendant's more favorable Rule 68 offer of judgment.

Since *Marek*, case law has developed to distinguish statutes that include plaintiff's attorney fees as costs, such as § 1988, and those that do not. Courts have held that if a statute pertinent to the claim does not define attorneys' fees as part of the party's "costs," a prevailing plaintiff's attorney fees will not be barred by Rule 68, if applicable, and are therefore still recoverable under the relevant statute.[13] For example, in *Fegley v. Higgins*, the Sixth Circuit held that the plaintiff could still recover attorney fees despite recovering a lesser amount at trial than defendant's offer of judgment, reasoning that the statute at issue, the Fair Labor Standards Act, did not include such fees as

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"costs." Thus, the plaintiff could recover such post-offer fees incurred as a separate claim under the relevant statute, as long as such fees were "reasonable."

Therefore, in circumstances such as those in *Fegley* where a statute does not include legal fees as costs, courts have considered a rejected offer of judgment when determining a plaintiff's reward for "reasonable" attorney fees. For example, in *Haworth v. Nev.*,[14] the Ninth Circuit agreed that the plaintiff should theoretically recover post-offer attorney fees where the statute did not define them as "costs." However, the court ultimately vacated the actual award of attorney fees, finding that "the district court should have taken into consideration the reasonableness of the plaintiffs proceedings to trial and recovering approximately $240,000 less" than the defendant's offer to settle.[15]

Defendants defending against claims under statutes with "prevailing party" provisions may therefore carry particularly weighty leverage in the form of the Rule 68 offer of judgment and plaintiffs pursuing cases under these statutes need to be particularly thoughtful in evaluating Rule 68 offers of judgment lest they lose the value of the attorney fees they hoped to recover. At the very least, even if such fees are recoverable by a plaintiff ultimately, Rule 68 offers may have some influence on the extent of plaintiff's recovery of certain statutorily entitled attorney fees.

Defendant's Statutorily Entitled Attorne Fees as "Costs"

Marek discussed whether a plaintiff can recover attorney fees incurred after a Rule 68 offer is made. The Supreme Court did not discuss whether the defendant offeror is entitled to recover its attorney fees incurred after making the offer. However, the Second Circuit Court of Appeals has held that such fees cannot be rewarded to a "prevailing" defendant. This reasoning was more fully explained by the district court in in *Jolly v. Coughlin*,[16] where the court held the defendant could not recover attorney fees as costs even if the plaintiff did not recover more than the Rule 68 offer at trial, for two reasons: (1) a defendant cannot recover costs pursuant to Rule 68 unless the plaintiff obtains a favorable judgment, but statutes limit recovery of attorney fees only to the prevailing party, and (2) the limited circumstances where a prevailing defendant could recover fees require that the action was "frivolous, unreasonable, or groundless."[17] As such, defendants will likely never be able to seek an award of attorney fees even when a plaintiff obtains a lesser judgment than a defendant's Rule 68 offer.[18]

Notably, under New York state procedure, there is some authority for holding a plaintiff responsible for defendant's attorney fees where an offer of judgment was not accepted.[19] The potential availability of this type of remedy should be one factor practitioners consider in deciding whether to file—or contest a filing—in state or federal court.

Prejudgment Interest as "Costs"

Generally, under CPLR 5001, courts can award predjugment interest in breach of performance of contract cases, or when an "act or omission depriv[ed] or otherwise interfer[ed] with title to, or possessions or enjoyment of, property, except that in an action of equitable nature."[20] Such pre-judgment interest is computed from the "earliest ascertainable date the cause of action existed" and continues to accrue until judgment.[21] In cases where pre-judgment interest is applicable, New York courts apply a default interest rate of 9%.[22]

"It is unclear whether a defendant must include prejudgment interest in its FRCP 68 offer. Indeed, 28 U.S.C. § 1920 does not define prejudgment interest as a 'cost.'"

It is unclear whether a defendant must include prejudgment interest in its FRCP 68 offer. Indeed, 28 U.S.C. § 1920 does not define prejudgment interest as a "cost."[23] To err on the side of caution, practitioners often include prejudgment interest in Rule 68 offers, though often without assigning a specific amount to cover the prejudgment interest a plaintiff may recover. Instead, practitioners have referred in their Rule 68 offer to the federal or the otherwise applicable prejudgment interest rate, *i.e.*, the amount being offered as judgment "plus applicable prejudgment interest."[24]

Notably, there is also some authority that a Rule 68 offer of judgment stops prejudgment interest from running. For example, in *Quintel v. Citibank*,[25] the district court chose to stop the running of statutory interest in a legal malpractice case by applying CPLR 3219[26] and estoppel principles after a plaintiff rejected a Rule 68 offer of judgment from the attorney.[27] The Court reasoned that prejudgment interest is generally awarded to a plaintiff to compensate a plaintiff for his or her inability to utilize the money at issue.[28] The court held, as of the date of the offer, the plaintiff would have been able to utilize the money at issue; therefore, the defendant should not be punished to pay prejudgment interest simply because the plaintiff rejected his offer.[29]

Conclusion

While the parameters of what is encompassed under Rule 68 offers of judgment is still in flux in New York, practitioners should be mindful of certain guidelines in drafting or evaluating such offers. First, the statutory claim being litigated is very important. Plaintiffs suing under certain statutes may lose the ability to recover highly valuable attorney fees. Second, the forum can be determinative. Defendants in federal court will likely not be able to recover their attorney fees, even if their Rule 68 offer was otherwise "successful." However, this may not be the case in analogous state court proceedings. And third, the practitioners should not forget about prejudgment interest. Such interest may still be part of a plaintiff's ultimate recovery and may get in the way of a Rule 68 offer being deemed "more favorable" than the ultimate recovery.

Endnotes

1. *See* Fed. R. Civ. P. 68(a).
2. *See id.*
3. *Id.* at (d).
4. *See* 91 Minn. L. Rev. 865, 875 (2007) (citing 28 U.S.C. § 1920 (2000)).
5. 28 U.S.C. § 1920 (2000).
6. *See Foster v. Kings Park Cent. Sch. Dist.*, 174 F.R.D. 19, 23 (E.D.N.Y. 1997).
7. *See id.*
8. *See id*.
9. *Supra* n. 1.
10. *See id*. at 4.
11. *Id*. at 9.
12. *Id*.
13. *See Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir. 1994).
14. 56 F.3d 1048 (9th Cir. 1995).
15. *Id.* at 1052-53 (holding "[i]n determining what fee is reasonable in this circumstance, the district court must take into consideration the amount of the Rule 68 offer, the stage of the litigation at which the offer was made, what services were rendered thereafter, the amount obtained by judgment, and whether it was reasonable to continue litigating the case after the Rule 68 offer was made."); *Compare Drewery v. Mervyns Dep't Store*, 2008 U.S. Dist. LEXIS 9161 (W.D. Wash., Jan. 25, 2008) (rejecting application of rule 68 altogether because the plaintiff lost in entirety).
16. No. 92 CIV. 9026 (JGK), 1999 WL 20895 (S.D.N.Y. Jan. 19, 1999).
17. *Id.* at 12 (internal quotations omitted).
18. *See also Shepherd v. Law Offices of Cohen & Slamowitz, LLP*, 668 F. Supp. 2d 579 (S.D.N.Y. 2009) (holding, not only that defendant was entitled to costs, and that the plaintiff was not liable "for one dime of defendant's attorneys' fees based on [the plaintiff's] refusal to accept the Rule 68 offer of judgment" but also awarding the plaintiff attorneys' fees to sanction defendant's frivolous motion for such fees).
19. *Abreu v. Barkin & Assoc. Realty, Inc.*, 115 A.D.3d 624 (1st Dep't 2014); *Saul v. Cahan*. 2016 N.Y. Slip Op. 50295(U).
20. CPLR 5001(a).
21. *Id.* at (b).
22. *See* CPLR 5004.
23. This is in contrast to attorney fees discussed previously.
24. *See e.g.*, Rule 68 Offer of Judgment at 47, *Shepherd v. Cohen & Slamowitz, LLP*, No. 1:08-cv-06199 (S.D.N.Y. Dec. 10, 2009) ("This $10,000.00 figure includes all amounts that might otherwise be recovered by Plaintiff for any pre-judgment interest, penalties and damages of any nature..."); Rule 68 Offer of Judgment at 531-1, *Schoolcraft v. The City of N.Y. et al,* No. 1:10-cv-06005-RWS (S.D.N.Y. Sept. 29, 2015) ("for the total sum of $600,000.00, in addition to back pay . . . [t]he back pay shall include . . . prejudgment interest on backpay at the applicable federal rate."); Rule 68 Offer of Judgment at 263-1, *Nat'l Credit Union Admin. Bd. v. UBS Sec., LLC*, No. 1:13-cv-06731 (S.D.N.Y. Sept. 23, 2013) ("Plaintiff shall recover $33,014,285 from Defendant, plus prejudgment interest calculated at the appropriate rate and methodology as determined by the Court.").
25. 606 F.Supp. 898 (S.D.N.Y. 1985).
26. *See* Douglas J. Pepe, *Stopping the Clock on Prejudgment Interest in Contract Disputes*, New York Law Journal, Apr. 21, 2014.
27. *See* 606 F.Supp. 898 at 914.
28. *See id.* at 915.
29. *See id*.

The *Ambac* Decision and the Future of the Common Interest Privilege Under New York Law

By Maryann C. Stallone, Amanda M. Leone and Richard W. Trotter

Commercial lawyers and their clients now need to be more vigilant when sharing privileged communications with third parties in business or transactional settings where there is no reasonably anticipated or pending litigation. In June 2016, the New York Court of Appeals issued an important decision narrowing the scope of New York's common interest doctrine, an exception to the traditional rule that a third party's exposure to attorney-client communications voids the attorney-client privilege.

The common interest privilege, as it is also called, is designed to preserve the privileged status of attorney-client communications shared with others who have a common legal interest with the client. In modern legal practice, the doctrine has often been applied in commercial transactions, such as mergers and acquisitions, to enable individuals and entities with aligning interests to coordinate their positions without waiving the privileged status of their communications with counsel. In several state and federal jurisdictions across the country and in the Restatement (Third) of the Law Governing Lawyers, a "common legal interest" and "communication in furtherance of that interest" between the client and third party are the doctrine's only prerequisites. Until June of last year, the elements of the privilege under New York law were unclear; while the Appellate Division, Second Department and other New York trial courts also imposed a litigation requirement for the privilege to apply—i.e., that there be a pending or reasonably anticipated litigation—the First Department rejected the litigation requirement and adopted the same standard applied by many federal jurisdictions and the Restatement.[1] In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*,[2] the New York Court of Appeals eliminated the ambiguity under New York law, holding there must be a pending or reasonably anticipated litigation for the common interest doctrine to apply.

While *Ambac II's* first anniversary is quickly approaching, transactional lawyers and litigators continue to grapple with the uncertainty left in its wake. This article will discuss the history and evolution of the attorney-client privilege and common interest doctrine, the practical implications of the *Ambac II* decision and the growing interest in and possibility of the New York legislature codifying and modifying the common interest privilege to cover non-litigation, commercial transactions.

The Origins of the Attorney-Client Privilege and Common Interest Privilege

The origins of the attorney-client privilege date back to English common law, where it was considered an essential tool to facilitate open and honest dialogue between lawyers and their clients. Armed with the assurance that their communications with counsel would remain confidential, the privilege allowed clients to freely converse with their attorneys without fear of retribution, and, in theory, the clients would share more information than they would without the privilege. This open channel of communication ensured that the attorney was able to provide the best quality legal services to the client and that the client's rights were properly protected. Like most common law concepts, the attorney-client privilege eventually migrated to the United States and first emerged in American jurisprudence in the Nineteenth Century.[3] In 1888, the United States Supreme Court formally recognized the attorney-client privilege in *Hunt v. Blackburn*,[4] and later reaffirmed the privilege and its purposes of encouraging the free flow of information between client and attorney and enhancing the quality of legal advice in *Upjohn Co. v. United States*.[5] It remains one of the oldest and most revered evidentiary privileges in

"Despite its critical role in the facilitation of sound legal representation, the attorney-client privilege runs contrary to the prevailing preference in American law for openness through liberal discovery."

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American law and is recognized by all state and federal courts in the United States.

Despite its critical role in the facilitation of sound legal representation, the attorney-client privilege runs contrary to the prevailing preference in American law for openness through liberal discovery. As a result, courts generally construe the privilege narrowly in order to safeguard the public's interest in "the truth-finding process."[6] To that end, the presence of a third party or the disclosure of an otherwise privileged communication to a third party after the fact generally results in the waiver of the privilege.

Since the attorney-client privilege's formal debut in *Hunt v. Blackburn*, however, a handful of exceptions to this general "waiver" rule have emerged. One such exception is known as the joint defense privilege, which applies when co-defendants and their counsel in a single or related litigations engage in communications concerning a joint defense strategy. This concept actually predates the United States Supreme Court's first recognition of the attorney-client privilege in *Hunt*. Indeed, about a decade earlier, in *Chahoon v. Commonweath*,[7] the Virginia Supreme Court held that a criminal defendant did not waive the attorney-client privilege by sharing confidential information with his co-defendants' attorneys. In the court's view, there was no meaningful difference between three defendants being represented by a single attorney and three defendants being represented by separate attorneys: "[T]he counsel of each was in effect the counsel of all."[8] The court concluded that extending confidentiality to communications among co-defendants with a common defense strategy advanced the two overarching goals of the attorney-client privilege—fostering open communication and enhancing the quality of legal counsel.[9]

Slowly but surely, the joint defense privilege crept into the civil arena. In 1942, in *Schmitt v. Emery*, the Minnesota Supreme Court applied the same principles employed by the Virginia Supreme Court nearly seven decades earlier in *Chahoon* and held that co-defendants in a personal injury case did not waive the attorney-client privilege by openly discussing the details of the case in the presence of each other's lawyers.[10] The court reasoned that the privilege should apply because the attorneys were "engaged in maintaining substantially the same cause on behalf of other parties in the same litigation."[11]

A descendant of the joint defense privilege, the common interest doctrine developed as yet another exception to the traditional rule that the presence of a third party waives the attorney-client privilege and effectively extended the reach of the joint defense privilege.[12] While the joint defense privilege applied to disclosures made among co-parties and their lawyers on the same side of a pending litigation, the common interest doctrine was intended to apply to confidential disclosures made to third parties, which are represented by separate counsel and share any common legal interest (litigation or transaction) with the client when those disclosures are made in furtherance of that common legal interest.[13] Indeed, the common interest privilege is broadly defined in the Restatement (Third) of the Law Governing Lawyers:

> If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privilege . . . . that relates to the matter is privileged as against third persons.[14]

As the doctrine's recognition grew in the second half of the 20th Century, many state and federal courts adopted the expansive view of the common interest privilege set forth in the Restatement and applied the privilege in litigation and non-litigation settings.[15] Under this expansive approach of the common interest doctrine, not only could co-defendants and co-plaintiffs share legal strategies amongst themselves without waiving the privilege, a corporation interested into acquiring another could review otherwise privileged communications and strategies of a target corporation when both corporations had a "common interest" in merging, without risking waiver of the attorney-client privilege and disclosure.

New York, however, did not immediately embrace the common interest doctrine with such open arms, and declined to adopt the Restatement's definition. The first time the New York Court of Appeals even addressed the common interest privilege was in *People v. Osario*, when it refused to extend the common interest privilege protection to communications between an attorney and two separately represented co-defendants where one co-defendant was acting as the other's language interpreter.[16] While this appeared to be a significant departure from the principles established by the courts in *Chahoon* and *Kovel*, the critical difference in *Osario*, according to the Court of Appeals, was that the interpreter's exposure to the confidential dialogue between his co-defendant and the co-defendant's attorney was *unrelated* to his own defense. As a result, the Court ruled that there was no common interest, and the communication was not privileged.[17]

Even as New York courts began to apply the common interest privilege in the civil context following *Osario*, they proceeded cautiously and applied the privilege as a narrow exception to the traditional rule of waiver of the attorney-client privilege. One way the New York courts limited the scope of the common interest privilege was to require that any shared interest between clients be "identical" (or nearly identical) as opposed to merely similar.[18] In addition, many New York courts imposed a "litigation requirement" to the doctrine, providing that parties must face pending or reasonably anticipated litigation for the privilege to apply to communications made in furtherance of a common legal interest.[19]

The First Department Changes Course and Adopts a Broader Application of the Common Interest Privilege

In 2014, in a unanimous decision, the Appellate Division, First Department, in *Ambac I* broke with the rulings of the Second Department and other New York State trial courts and eliminated the litigation requirement to application of the common interest privilege.

Ambac I concerned a merger transaction between Bank of America ("BoA") and Countrywide Home Loans ("Countrywide") wherein Countrywide merged into a wholly owned subsidiary of BoA in 2008. As part of the transaction, the parties entered into a merger agreement and written common interest agreement to facilitate their negotiations on various pre-closing aspects of the deal, and exchanged certain privileged communications relating to their pre-closing obligations.

In 2010, when some residential mortgage-backed securities issued by Countrywide and insured by Ambac failed, Ambac filed suit against Countrywide, which it claimed had fraudulently misrepresented the quality of the mortgage loans, and against BoA, as Countrywide's successor-in-interest following the merger. During discovery, Ambac sought the disclosure of the "pre-closing communications" between Countrywide and BoA, which BoA and Countrywide refused to produce on the grounds that they were protected by the common interest privilege. Ambac, in turn, argued that the voluntary sharing of such privileged communications before the closing of the merger waived any attorney-client privilege because BoA's and Countrywide's common legal interest did not relate to any pending or reasonably anticipated litigation. On Ambac's motion to compel, a special referee held that, despite the parties' written common interest agreement, the common interest privilege did not protect the parties' communications because at the time the communications occurred, there was no litigation pending or reasonably anticipated. BoA then moved to vacate the special referee's order, but the trial court denied the motion.

On appeal, the First Department reversed the trial court's decision, and held that the common interest privilege could apply to pre-closing communications regardless of the presence of a pending or reasonably anticipated litigation.[20] While the court cited several factors that influenced its decision, perhaps most persuasive was the court's observation that the attorney-client privilege—in which the common interest privilege has its roots—can be invoked in both litigation and non-litigation contexts.[21] In fact, "advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of conduct."[22] The court reasoned that highly regulated businesses like BoA and Countrywide routinely consult with counsel to navigate "the vast and complicated array of regulatory legislation" even in the absence of litigation.[23] In addition, the court recognized that the Restatement's version of the common interest privilege lacks a litigation requirement.[24] Moreover, the court cited to a series of federal decisions which, as the First Department put it, had "overwhelmingly rejected a litigation requirement," and to Delaware law which codified the common interest exception so as to apply to non-litigation circumstances.[25] Finally, the court rejected the line of New York cases that required the litigation element, stating that such an element did not adequately address the situation at issue—where two entities had entered into a merger agreement and common interest agreement and required the shared advice of counsel to "navigate the complex legal and regulatory process involved in the transaction."[26]

This decision caused a split between the First and Second Departments of the Appellate Division, which ultimately landed the issue before the New York Court of Appeals.

The Court of Appeals Restores the "Litigation Requirement"

In June 2016, the New York Court of Appeals reversed the First Department's holding in *Ambac I* and, in a lengthy 4-2 decision, held that the common interest privilege only applies if a pending or reasonably anticipated litigation exists at the time of the communication.[27] Tracing the lineage of the common interest privilege to its origins in criminal law, and concluding that the removal of the litigation requirement increased the risk of abuse, the Court of Appeals reinstated the order of the trial court, which held that communications made outside the context of a pending or anticipated litigation were not privileged.

In rejecting the more expansive application of the common interest privilege, the Court of Appeals reasoned that it should be limited to "situations where the benefit and the necessity of shared communications are at their highest, and the potential for misuse is minimal."[28] For example, when litigation is pending or imminent, "the threat of mandatory disclosure may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate legal strategy."[29] By contrast, the Court reasoned that "the same cannot be said of clients who share a common legal interest in a commercial transaction" in that they have an incentive to close the transaction and, moreover, because there is a "greater danger that the underlying communications will be for a commercial purpose rather than for securing legal advice."[30]

The Court of Appeals also rejected BoA's argument that the failure to adopt the broader interpretation of the common interest privilege would have adverse policy consequences for the State of New York. Specifically, the Court disagreed with BoA's assertion that companies would conduct their transactions in other jurisdictions because of New York's narrow common interest privilege. "There is no evidence," the Court opined, "that mergers, licensing agreements and other complex commercial transactions have not occurred in New York because of our State's liti-

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Above, attendees listen during the Annual Meeting program. Above right, David Tennant, former chair. Below, Prof. Ellen Yaroshefsky. Bottom left, Tracee Davis, former chair. Bottom right, Danielle Caroline Lesser, speaker.

Above left, Hon. Timothy Driscoll, speaker. Above right, Section Chairman Mark A. Berman. At right, Michael Ross, speaker. Below left, Vincent Syracuse, speaker and Hon. Thomas A. Dickerson. Below right, David Stein.

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The *Ambac* Decision ...

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gation limitation on the common interest doctrine; nor is there evidence that corporate clients will cease complying with the law."[31] As an additional reason for rejecting the expansion of the common interest privilege, the Court stated that a broader exception "could result in the loss of evidence of a wide range of communications between parties who assert common legal interests but who really have only non-legal or exclusively business interests to protect."[32] The Court of Appeals ultimately concluded that the policy reasons for keeping a litigation requirement on the common interest doctrine outweighed any purported justification for doing away with it, but nevertheless acknowledged that the "legislature is free. . . to expand the common interest exception as other state legislatures have done (*see e.g.* Del. Rules Evid. rule 502 [b])."[33]

The Implications of Ambac and a Potential Legislative Modification

In light of the Court of Appeal's ruling in *Ambac II,* parties to commercial transactions and their lawyers, particularly in mergers and acquisitions, should be wary of sharing privileged communications and work product with third parties or their attorneys in the absence of pending or reasonably anticipated litigation even if those communications concern a common legal interest. A few options parties may consider under these circumstances are to (1) avoid sharing confidential and privileged preclosing information altogether to circumvent the discovery risk; (2) obtain special joint counsel to represent both the parties in such transactions through which privileged information can be exchanged and shielded from disclosure;[34] or (3) separate legal communications from business communications, and share due diligence on a transaction that arguably relates to reasonably anticipated litigation while redacting or segregating out non-litigation business communications during the due diligence or negotiation process.

The implication of the first option is that parties to commercial transactions may ultimately provide incomplete or inaccurate public disclosure during the due diligence stage, thereby creating a greater risk of potential litigation and liability. Judge Jenny Rivera recognized this risk in her dissent in *Ambac II,* stating that, "Given that the attorney-client privilege has no litigation requirement and the reality that ***clients often seek legal advice specifically to comply with legal and regulatory mandates and avoid litigation or liability***, the privilege should apply to private client-attorney communications exchanged during the course of a transformative business enterprise, in which the parties commit to collaboration and exchange of client information to obtain legal advice aimed at compliance with transaction-related statutory and regulatory mandates."[35] The Appellate Division, First Department, in *Ambac I* similarly raised these concerns, opining that "imposing a litigation requirement. . .discourages parties with a shared legal interest, such as the signed merger agreement here, from seeking and sharing that advice, and would inevitably result instead in the onset of regulatory or private litigation because of the parties' lack of sound guidance from counsel. This outcome would make poor legal as well as poor business policy."[36]

Although the New York Court of Appeals insisted in *Ambac II* that New York's litigation requirement would not deter commercial transactions from taking place in the state, many practitioners and legal commentators remain unconvinced and are putting pressure on the New York legislature to craft a common interest privilege exception that continues to maintain New York's status as a commercially viable and desirable venue for sound business practices. To that end, both the dissent in *Ambac II* and some practitioners have recommended that the New York legislature adopt a narrow expansion to the common interest doctrine to cover communications made in commercial transactions in furtherance of or related to compliance with statutory or regulatory requirements.[37] Judge Rivera's dissent in *Ambac II* specifically advocated for such an approach, noting that:

> [W]here parties to a merger agreement have a common legal interest in the successful completion of the merger, the privilege should apply to communications exchanged to comply with legal and regulatory requirements related to consummation of the merger. This application of the privilege functions as a narrowly crafted exception to third-party waivers in the merger context, and is justified because signatories to a pre-merger agreement are bound with a common interest in completion of the merger.[38]

Judge Rivera further noted that this approach "would maximize the quality of disclosure necessary for accurate and competent representation leading to compliance with regulatory and legal mandates" and would encourage "parties committed to a merger to disclose confidential information to avoid submission of incomplete or noncompliant documents."[39] In other words, without some legislative expansion, some practitioners and commentators believe that the majority's opinion in *Ambac II* may have a chilling effect on the quality and quantity of disclosure made by parties in commercial transactions to their counterparties, investors and regulators.[40]

Perhaps anticipating some backlash from the transactional bar, the Court of Appeals expressly raised the prospect of New York following in Delaware's footsteps and codifying a more expansive common interest privilege.[41]

Delaware, like New York, has a favorable corporate regulatory landscape, making the state a perennial favorite for jurisdictional clauses and choice of law provisions in commercial agreements. Recognizing the value that the common interest doctrine adds to the complex legal and regulatory processes involved in corporate transactions, Delaware codified the common interest privilege specifically to ensure its applicability in non-litigation, commercial settings.[42]

With increasing pressure from the transactional bar, it appears likely that the New York legislature may be compelled to codify a non-litigation version of the common interest privilege to supersede *Ambac II* in the near future, similar to what Delaware has done. All this remains to be seen as clients, attorneys and the courts continue to navigate the landscape of the common interest doctrine in the coming months and years.

Conclusion

Absent some legislative modification, the New York Court of Appeals in *Ambac II* made clear that the common interest doctrine applies under New York law only if the following three elements are met: (1) the parties share a common interest; (2) the communications are made in furtherance of the common legal interest; and (3) the communications relate to a pending or reasonably anticipated litigation.

Endnotes

1. *See Assur. Corp. v. Countrywide Home Loans, Inc.*, 124 A.D.3d 129, 135-36 (1st Dep't 2014) ("*Ambac I*").
2. 27 N.Y.3d 616 (2016) ("*Ambac II*").
3. *See, e.g.*, *Hunt v. Blackburn*, 128 U.S. 470 (1888); *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871).
4. 128 U.S. 470 (1888).
5. 449 U.S. 383, 390 (1981). *See* Matthew D. LaBrie, *The Common Interest Privilege*, ABA Section of Litigation (Sep. 30, 2014).
6. *In re Jacqueline F.*, 47 N.Y.2d 215, 219 (1979).
7. 62 Va. (21 Gratt.) 822, 841-42 (1871).
8. *Id*. at 841.
9. *Id.* at 841-42.
10. 2 N.W.2d 413 (Minn. 1942).
11. *Id*. at 417. Another exception to the general third-party waiver rule is known as the *Kovel* privilege. In *United States v. Kovel*, the United States Court of Appeals for the Second Circuit held that the work-product of an accountant was protected by the attorney-client privilege where the accountant had specifically been retained by the attorney in response to criminal tax charges brought against the client. 296 F.2d 918 (2d Cir. 1961). The Second Circuit compared the role of the accountant to an interpreter facilitating communications between a lawyer and a non-English speaking client, and stated that the accountant's work was essential for "effective consultation" and analysis of the client's legal position. Therefore, communications by and between agents of an attorney or client related to the underlying legal representation where the agent has been retained to assist the attorney in providing legal advice are generally afforded privileged status.
12. *See* LaBrie, *The Common Interest Privilege*, ABA Section of Litigation, at 2-3.
13. *See* Restatement (Third) of the Law of Governing Lawyers § 76.
14. *Id*.
15. *See, e.g.*, *U.S. v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *U.S. v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987); *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390–1391 (Fed. Cir. 1996); *In re Teleglobe Comm'ns,* 493 F.3d 345, 364 (3d Cir. 2007); *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir.2007); *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs.*, 870 N.E.2d 1105, 1110, 1112 (Mass. 2007) and *3Com Corp. v. Diamond II Holdings, Inc.*, No. 3933–VCN, 2010 WL 2280734, at *6-8 (Del. Ch. May 31, 2010) (adopting narrower scope than the Restatement, but not requiring a litigation element).
16. 75 N.Y.2d 80 (1989).
17. *Id*. at 85.
18. *Hyatt v. State of Cal. Franchise Tax Bd.*, 105 A.D.3d 186, 205 (2d Dep't 2013).
19. *See, e.g., Hyatt*, 105 A.D.3d at 205; *Hudson Val. Mar., Inc. v. Town of Cortlandt*, 30 A.D.3d 377, 378 (2d Dep't 2006); *Stenovich v. Wachtell, Lipton, Rosen & Katz,* 195 Misc. 2d 99, 108 (Sup. Ct. NY County 2003); *Yemini v. Goldberg*, 12 Misc. 3d 1114 (Sup. Ct. Nassau County 2006); *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's, London*, 176 Misc.2d 605, 611-12 (Sup.Ct. N.Y. County 1998), *aff'd*, 263 A.D.2d 367 (1st Dep't 1999).
20. *Ambac I*, 124 A.D.3d at 331.
21. *Id*. at 333.
22. *Id*.
23. *Id*. (quoting *Upjohn Co.*, 449 U.S. at 392).
24. *Id*.
25. *Id.* at 333-34.
26. *Id*. at 334-35.
27. *Ambac II,* 27 N.Y.3d at 616.
28. *Id*. at 627.
29. *Id*. at 628.
30. *Id*. at 629.
31. *Id*. at 628.
32. *Id*. at 629.
33. *Id*. at 631, and n.6.
34. The *Ambac II* decision expressly acknowledges that communications among parties represented by the same attorney in merger transactions would be protected from disclosure by the common interest doctrine, because joint clients "indisputably share a complete alignment of interests" and that "all joint communications will be in furtherance of that joint representation." *Ambac II,* 27 N.Y.3d at 630-31.
35. *Ambac II,* 27 N.Y.3d at 633.
36. *Ambac I*, 124 A.D.3d at 137.
37. *See* Ambac II, 27 N.Y.3d 637; *see also* Steward D. Aaron, Joshua Berick & Christian D. Cheslak, *Preserving Attorney-Client Privilege in M&A Transactions*, New York Law Journal (Aug. 8, 2016).
38. *Ambac II*, 27 N.Y.3d 637.
39. The U.S. Chamber of Commerce and the Association of Corporate Counsel submitted an amicus brief in the Court of Appeals arguing that "limiting the common-interest privilege to situation of anticipated litigation will discourage businesses from obtaining and sharing legal advice that enables them to comply with the law."
40. *See* Aaron, *Preserving Attorney-Client Privilege in M&A Transactions, supra*.
41. *Ambac II*, 27 N.Y.3d at 632, n. 6.
42. Del. Rule of Evidence 502(b).

The Judiciary Article of the New York State Constitution—Opportunities to Restructure and Modernize the New York Courts

Report of the Commercial and Federal Litigation Section of the New York State Bar Association Concerning the Report and Recommendations of the New York State Bar Association Committee on the New York State Constitution
January 10, 2017

The Commercial and Federal Litigation Section (the "Section") of the New York State Bar Association ("NYSBA") is pleased to provide its views on the Report and Recommendations of the NYSBA Committee on the New York State Constitution concerning the Judiciary Article of the New York State Constitution—Opportunities to Restructure and Modernize the New York Courts as it specifically relates to commercial disputes (the "Report"), and recommends the Report's adoption.

The Section believes that if a Constitutional Convention seeking to amend our New York State Constitution is held it would offer significant opportunities to consider changes to the Judiciary Article that would greatly improve efficiencies in the administration of commercial disputes, thus helping commercial litigators provide "faster, cheaper and smarter" legal services to their business clients.

The Section takes no position as to whether a Constitutional Convention should be held, but if one is convened, the Section is generally in favor of reasonable and realizable changes to the Judiciary Article that would help achieve these goals relating to commercial disputes.

Of note are the following non-exclusive items of interest specifically relating to commercial disputes:

1. The caseload of the New York State Appellate Division, Second Department, is anathema to the efficient and timely disposition of cases before that Court, including commercial cases. Currently, cases frequently take in excess of one year from the date of perfection to be decided, which means that often in commercial disputes which are time-sensitive, the trial decision is the court of "last resort." Compounding this problem is the inability of the Court to provide sufficient time to hear extended argument on all of its complex commercial disputes. New York State cannot lay claim to being "the" jurisdiction for the resolution of commercial disputes if the appellate process, especially in the Second Department, is not properly dealt with. Without taking a position as to the creation of a "Fifth Department," the Section is in support of initiatives that would seek to relieve the above issues concerning the Second Department.

2. The cap on the number of Supreme Court justices provided by Article VI §6(d) of the New York Constitution similarly, unfortunately, imposes too heavy a burden on the dockets of our courts, especially within the First and Second Departments. Specifically, to address the increasing number of commercial cases within the New York County Commercial Division, the amount in controversy recently has been raised to $500,000. However, if the number of complex commercial cases continues to rise, without adding additional judges, access to this court will need to be further limited by another increase in the jurisdictional limit. This, however, would deny significant commercial disputes with a lower amount in controversy access to the New York County Commercial Division. Although the use of "acting" Supreme Court justices has provided some relief, there is value in strongly considering a change to the Article that would allow the Legislature to increase the number of justices (whether by removal of the constitutional cap or an adjustment to it) needed to dispense justice properly within (and, of course, without) the Commercial Divisions.

3. The Section believes that there is also value in the opportunity to evaluate the process by which the Judiciary Budget is debated among the three branches of our State Government, and ultimately decided by the Legislative and Executive branches. The Judiciary needs to receive sufficient funds to provide the level of service necessary to address litigation in the 21st century, noting that business clients and the legal service providers that serve them within the State of New York generate significant revenues, and the court system is an important component of that "ecosystem." As a coordinate branch of State government, the Judiciary should not continue to be relegated to "second class" status in determining its budget. Many business clients have options where to litigate their disputes and their decision-making should be determined by legal principles, not by the inadequacy of court facilities, technology and the availability and work load of members of the Judiciary. Business disputes that could be resolved

in New York State that are brought in other jurisdictions result in a direct loss of revenues to the New York State Budget and damage our State economy.

The Section limits its specific comments to the above three areas, which significantly impact continuing efforts to enhance and advance the administration of commercial disputes in New York State, but notes that the Report discusses other issues important to the functioning of New York's judicial branch, including the process of Appellate Division justice selection, mandatory retirement age of Judges of the New York State Court of Appeals and Justices of the Supreme Court, and reforms to the Commission on Judicial Conduct.

Proposed Diversity and Inclusion and Elimination of Bias CLE Requirement for New York State Attorneys

Report of the Commercial and Federal Litigation Section of the New York State Bar Association Concerning the Report of the NYSBA Committee on Continuing Legal Education
December 6, 2016

Report of the Section as recommended by the Diversity Committee Working Group

I. Introduction and Summary of the Proposal

At the November 5, 2016 NYSBA House of Delegates meeting, the Committee on Continuing Legal Education ("CLE Committee") proposed that the Bar adopt a mandatory diversity and inclusion and elimination of bias ("D&I") CLE requirement for all attorneys admitted in New York. The CLE Committee's proposal is not without precedent, and is modeled on the unanimously approved resolution supported by the American Bar Association's House of Delegates at its mid-year meeting in February 2016. Similarly, California and Minnesota both have adopted mandatory D&I CLE requirements.

The genesis of this proposal in New York—as well as in other jurisdictions—is the fact that issues surrounding race, ethnicity, religion, national origin, gender, sexual orientation, disability discrimination, etc., remain critically important in our society. Similarly, lack of access to legal representation by traditionally disadvantaged groups and the continuing underrepresentation of women and minorities within the highest ranks of the profession continue to present challenges for the legal community as a whole.

As set forth in the attached detailed Report of the NYSBA CLE Committee ("Report"), one of the key drivers of the recommendation is NYSBA's core belief that increasing diversity and inclusion—as well as the elimination of bias—within the profession is essential for legal practitioners to be able to respond effectively to our society's rapidly changing demographics. The proposal is also aimed at increasing lawyers' core competencies by educating them to not only better serve an increasingly more diverse client base, but also to continue to work on the forefront of the social justice issues for which the profession traditionally has fought for over half a century. (See Report, at 3, describing the four basic values of professional responsibility; including, *inter alia*, "striving to promote justice, fairness and morality").

Accordingly, the CLE Committee's specific recommendation is that all accredited CLE providers within the state "be encouraged to create a wide range of programs for all practice areas that incorporate diversity and inclusion, which would include the elimination of bias—whether dealing with other attorneys, clients, courts or anyone else in the legal system." Moreover, the CLE Committee proposes that "one (1) or two (2) credit hours of D&I CLE be required for the biennial reporting period." Importantly, the new credit hour requirement would be a standalone or "floating" requirement, but not add to the current requirements of thirty-two (32) credit hours for new attorneys, or twenty-four (24) hours for experienced attorneys.

II. Recommendation to Adopt CLE Committee's D&I Requirement

The Commercial and Federal Litigation Section recommends the adoption of the CLE Committee's Report. NYSBA's adoption of the new CLE requirements would be entirely consistent with the Bar's longstanding positions on D&I generally, and would align New York with the ABA on the issue, along with the other states that already have adopted such CLE requirements. The Section also emphasizes that support of the CLE Committee's recommendation would further augment the Section's stated commitment to increasing diversity within the profession, and the field of litigation in particular, that it started over a decade ago with its annual Smooth Moves CLE program and awards presentation, and the Commercial Division 1L Minority Fellowship.

Other than the fact that it would now become part of each attorney's mandatory CLE requirement, we further note that fulfilling the requirement should not be onerous, since there are currently numerous CLE programs on D&I topics offered by several of the New York-based bar associations, including NYSBA itself, the Bar of the City of New York, and the New York County Bar Association, as well as private CLE providers. (For example, one notable, upcoming CLE course offering by the City Bar that likely

would satisfy the proposed D&I requirement, and also enhance competency within the profession is entitled *Assisting Victims of Hate Crimes and Bias and Representing Peaceful Protesters*). In addition, one significant advantage of the proposal is that, while it imposes a mandatory D&I requirement, it does not increase the current biennial hourly CLE requirements and could easily be melded into existing requirements much like the mandatory ethics CLE credits. Accordingly, the actual requirement is nominal, as it presumably would entail completion of only a single CLE course over the biennial period.

We recognize that the proposal is not without some measure of controversy concerning how and in what manner diversity and inclusion would be defined. To address this potential issue, the Section would like to see the CLE Committee provide further clarification in two areas. Specifically, the proposal could be clearer regarding the language within a CLE course description that a provider would need to use in order to determine whether the credit has been satisfied—*i.e.*, currently, there exists a clear understanding of what it means to satisfy the Ethics credit requirement, but unless providers are given clear guidelines of what to include in a course description—as well as substance, of course—to make clear that the D&I requirement is met, then some confusion could ensue. Further, the Section also recommends that the CLE Committee clearly decide the precise requirement, instead of the current statement of "one (1) or two (2) credit hours."

In sum, the Section believes that the overall value to the New York legal profession of the CLE Committee's proposal outweighs any nominal burden, particularly if the D&I CLE requirement can be satisfied through the myriad course offerings currently in existence, and within the current mandatory biennial hours framework.

Opinions expressed herein are those of the Commercial & Federal Litigation Section or of the New York State Bar Association unless and until they have been adopted by the Section's Executive Committee or NYSBA's House of Delegates.

NEW YORK STATE BAR ASSOCIATION

☐ I am a Section member — please consider me for appointment to committees marked.

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Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:
MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

JOIN A COMMITTEE

Rewarding Opportunities for Professional Growth

Committees serve as the laboratory for much of the Section's greatest work: reports, comments on pending legislation or rule changes, continuing education of the bench and bar, and receptions with leading figures in a practice area or in the judiciary.

Commercial and Federal Litigation Committees

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

___ Antitrust (FED1300)
___ Appellate Practice (FED1400)
___ Alternative Dispute Resolution (FED1200)
___ Civil Practice Law and Rules (FED1900)
___ Civil Prosecution (FED2000)
___ Commercial Division (FED5200)
___ Commercial Division Law Report (FED6700)
___ Commercial Jury Charges (FED7700)
___ Continuing Legal Education (FED1020)
___ Corporate Litigation Counsel (FED6600)
___ Creditors' Rights and Banking Litigation (FED2700)
___ Diversity (FED6100)
___ Electronic Discovery (FED6400)
___ Employment and Labor Relations (FED3000)
___ Ethics and Professionalism (FED4300)
___ Federal Judiciary (FED3200)
___ Federal Procedure (FED3300)
___ Hedge Fund and Capital Markets Litigation (FED7600)
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___ Mentoring (FED7300)
___ Securities Litigation and Arbitration (FED4600)
___ Social Media (FED7500)
___ State Court Counsel (FED5700)
___ State Judiciary (FED4700)
___ White Collar Criminal Litigation (FED6800)

Pilot ADR Project

Report of the Civil Practice Law and Rules Committee of the Commercial and Federal Litigation Section of the New York State Bar Association
November 16, 2016

The Civil Practice Law and Rules Committee (the "Committee") of the Commercial and Federal Litigation Section of the New York State Bar Association is pleased to submit these comments in response to the proposal by Honorable Peter H. Moulton, Administrative Judge for Civil Matters, First Judicial Department, dated October 6, 2016, proposing a new pilot ADR project (the "Proposal").

I. EXECUTIVE SUMMARY

The Committee recommends supporting the new pilot ADR project, which would provide for mandatory mediation of certain breach of contract cases with an amount in controversy of less than $500,000. The Committee believes that mediation of these cases is in the interest of judicial economy.

II. SUMMARY OF PROPOSAL

The Proposal describes a proposed new program that would require counsel to file an ADR Initiation Form at the preliminary conference in breach of contract cases that do not meet the requirements to be filed in the Commercial Division. Under the rule, each case would be entitled to four hours of mediation at no charge to the parties. The proposed mediation would not stay discovery.

III. RESPONSE AND SUGGESTIONS

The Committee feels that the proposed "unreasonable hardship and burden" ground for a party to seek an application for exemption from mandatory mediation under the proposed rule is quite high. As an alternative, we suggest parties should be able to opt out by agreement between or among themselves, subject to court approval, that the case is not suitable for mediation. We believe this is sufficient basis for opting out of mediation because as long as the default is "opt in," parties will have to justify to the court why they are agreeing to opt out, which would encourage parties to proceed with the default mandatory mediation. We believe that the "unreasonable hardship and burden" standard for opting out is not appropriate, because as practitioners know, there are some cases that are simply not amenable to mediation no matter how low the burden of attending a mediation is, and parties should not be forced to expend resources to prepare for and attend a mediation in those situations.

Regarding the Order of Reference, not providing for a stay of proceedings in the litigation, we suggest that there be a partial stay; i.e., limiting discovery to only that which is needed for mediation. Parties would be required to share information and documents that would assist each other and limit the mediator in conducting a realistic assessment of the value of the dispute. Without a limited stay of proceedings, client funds would still be spent on discovery, with some of the costs shifted to an earlier stage in aid of mediation. The Committee would recommend that the rule require that the preliminary conference order also direct what documents must be produced at a date sufficiently in advance of the mediation, and order that the mediation take place within a certain timeframe, after which the discovery stay would be lifted. This would encourage the parties to mediate swiftly, without delay.

The lesson learned from the recently ended Pilot Project of automatic referral of one-in-five Commercial Division cases to mandatory mediation appears to be that every case may not be a candidate for mediation. To the extent that the Commercial Division ADR Program panel of experienced mediators is underutilized, your proposal would make optimal use of these neutrals.

The Committee agrees with the suggestion of the Dispute Resolution Section's Committee on ADR in the Courts that parties be given the opportunity to choose their mediator, for the reasons stated in the letter by Mr. Hochman dated October 24, 2016. Not only would that have the likely effect of increasing the percentage of cases settled, but it would also reduce the burdens on the courts.

New Business and Announcements

Section Chair Mark Berman described reports from the EDiscovery, Social Media and Commercial Division Committees, which are expected to be submitted in the upcoming months. Additionally, two upcoming CLEs by the eDiscovery Committee will be a Best Practices CLE that will focus on the Committee's soon to be issued third version of its Best Practices Report and a webinar in February directed to smaller firms with smaller ediscovery projects.

The meeting adjourned at approximately 7:40 p.m.

Proposed Amendment to Rule 20 of the Rules of the Commercial Division Regarding Applications for Temporary Restraining Orders

Report by the Commercial and Federal Litigation Section of the New York State Bar Association
November 28, 2016

The Commercial and Federal Litigation Section of the New York State Bar Association ("Section") is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated November 1, 2016 ("Memorandum"), proposing an amendment to Rule 20 of the Rules of the Commercial Division, 22 NYCRR § 202.7[g], to require litigants seeking Temporary Restraining Orders to provide advance copies of all papers supporting each application to their adversaries (the "Proposal"). The Proposal is attached as Exhibit A.

I. Executive Summary

The Section agrees with the Subcommittee on Procedural Rules to Promote Efficient Case Resolution of the Commercial Division Advisory Council (the "Advisory Council") that the first sentence of Rule 20 requires amendment to clarify that the failure to give notice, in the absence of "significant prejudice," will only prevent the issuance of an ex parte application for a Temporary Restraining Order ("TRO").

The Section further agrees with the Advisory Council that the second sentence of Rule 20 should be amended to clarify the scope of the notice required to be given to adversaries in advance of an application for a TRO. However, the Section believes that the amendment suggested by the Advisory Council does not remedy all of the concerns identified by the Advisory Council, particularly the issue of the timing of such notice.

II. Summary of Proposal

The Proposal seeks to revise Rule 20 in two respects: 1) to correct the first sentence of Rule 20, which currently "suggests that a TRO will not be issued unless there will be prejudice by giving notice, which is not what is intended" (Memorandum, Ex. A at 3); and 2) to amend the second sentence of Rule 20, which as currently drafted requires "notice to the opposing parties sufficient to permit them an opportunity to appear and contest the application[,]" but is "silent on whether the moving party must provide copies of papers in support of its TRO at the time that notice is provided" (Memorandum, Ex. A at 2). Specifically, the Advisory Council proposes that Rule 20 of the Rules of the Commercial Division be amended to include the following new text identified in bold/italic font:

> "Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued **ex parte**. The applicant must give notice, **including copies of all supporting papers,** to the opposing parties sufficient to permit them an opportunity to appear and contest the applications."

The motivation for the amendment to the first sentence of Rule 20 is self-evident, to correct the suggestion that a TRO will not issue in the absence of evidence that a party will be prejudiced by giving notice, which suggests that a TRO will not issue when sufficient notice is given to opposing parties.

The motivation for the amendment to the second sentence of Rule 20 is described as an effort to provide "meaningful" and "adequate notice" that would allow an opposing party the ability to oppose an application for a TRO effectively. The Advisory Council "recognize[d] that there may be circumstances where it is impracticable for a moving party to provide supporting papers to its adversary prior to submitting them to Commercial Division Motion Support Office due to time exigencies," but stated its belief "that the moving papers should be provided to the opposing party *prior* to the time that they are submitted to the assigned Judge" (Memorandum, Ex. A at 2).

III. Response and Suggestions to Further the Goals of the Proposal

The necessity of amendment to the first sentence of Rule 20 is self-evident, and the Section supports the Proposal as drafted.

The Section further agrees that the second sentence of Rule 20 is ambiguous as to the scope of the notice required to be given to adversaries to permit them an opportunity to effectively appear and contest an application for a TRO. Therefore, the Section supports the amendment of the second sentence of Rule 20 to address the scope of notice, requiring that such notice include copies of all supporting papers.

However, the Section also agrees that the timing of such notice is an important consideration that is not adequately addressed in Rule 20 as drafted, or in the

amendment proposed by the Advisory Council. The Advisory Council identified the need, in the absence of a showing of "significant prejudice by reason of giving notice," for the papers in support of an application for a TRO to be provided "*prior* to the time that they are submitted to the assigned Judge" (Memorandum, Ex. A at 2). The amendment as proposed by the Advisory Council is ambiguous, requiring only that the supporting papers be provided "to the opposing parties sufficient to permit them an opportunity to appear and contest the application" (Memorandum, Ex. A at 3).

The Section therefore proposes that the second sentence of Rule 20 be amended to reflect this additional timing consideration identified by the Advisory Council, in order to be consistent with the language of the proposal that would provide for review of supporting papers

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MEMORANDUM

November 1, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on a Proposed Amendment of the Rules of the Commercial Division Relating to Applications for Temporary Restraining Orders

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The Administrative Board of the Courts is seeking public comment on a proposed amendment of Rule 20 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 20 ["Temporary Restraining Orders"]) proffered by the Commercial Division Advisory Council, to require advocates seeking temporary restraining orders to provide adversaries with advance copies of papers supporting the application. The proposed amendment is as follows:

> Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued ***ex parte***. The applicant must give notice**, including copies of all supporting papers,** to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

As set forth in the Council's supporting memorandum (Exh. A), the proposal is designed to make clear that, under current practice in the Commercial Division – and in the absence of a showing of significant prejudice – the "opportunity to appear and contest the application" for a TRO should include the chance to review supporting papers before they are submitted to the assigned judge.

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Persons wishing to comment on the proposed amendment should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than January 10, 2017.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

before they are submitted to the assigned judge, as follows:

> "The applicant must give notice, **including copies of all supporting papers,** to the opposing parties **prior to the time that such supporting papers are submitted to the court of clerk** ~~sufficient to permit them an opportunity to appear and contest the application~~."

The Section feels that this proposed amendment encompasses both of the concerns identified by the Advisory Council, scope of notice and timing. However, the Section would recommend endorsing the amendment to the second sentence of Rule 20 as proposed by the Advisory Council, even without additional language related to the timing of such notice.

EXHIBIT A Below left and right

Memorandum

To: Commercial Division Advisory Council

From: Subcommittee on Procedural Rules to Promote Efficient Case Resolution

Date: August 10, 2016

Re: Proposed Amendments to Rule 20 of the Commercial Division Rules

INTRODUCTION

The Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the "Subcommittee") has given consideration to amendments to Rule 20 of the Commercial Division Rules, which is the rule regarding temporary restraining orders ("TROs") in the Commercial Division. This memorandum provides background on TRO motion practice. It then sets forth a proposed amendment for consideration by the Council that would impose a requirement that papers in support of the TRO be served on the opposing party before the papers are presented to the assigned Justice. In addition, a minor amendment is proposed to make a correction to the first sentence of the rule.

TEMPORARY RESTRAINING ORDERS IN NEW YORK STATE COURT

The New York Civil Practice Law and Rules permit TROs to be issued without notice to the opposing party. CPLR § 6313(a) ("If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice."). Historically, New York courts would grant TROs without notice, such that the first time a party restrained even learned of a pending lawsuit and the relief granted was when it was served with the TRO that already had been entered by the Court. "Unlike the former general practice under the CPLR, whereby [TROs] were usually obtained *ex parte*," the modern practice, and the practice adopted in the Commercial Division, is for notice to be provided to the opposing party prior to issuance of a TRO, unless prejudice can be shown by the provision of such notice. Brian M. Cogan & Alan M. Klinger, 4 *N.Y. Prac., Com. Litig. in New York State Courts* § 35:24 (Robert L. Haig ed., 4th ed. 2015). Commercial Division Rule 20 currently provides as follows: "Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not

be issued. The applicant must give notice to the opposing parties sufficient to permit them an opportunity to appear and contest the application."[1]

Rule 20, however, is silent on whether the moving party must provide copies of papers in support of its TRO at the time that notice is provided. To oppose a TRO effectively, a party must be given adequate notice. Oftentimes notice is only meaningful if the opposing party is provided the underlying papers describing the basis for seeking a TRO. While the Subcommittee recognizes that there may be circumstances where it is impracticable for a moving party to provide supporting papers to its adversary prior to submitting them to Commercial Division Motion Support Office due to time exigencies, the Subcommittee believes that the moving papers should be provided to the opposing party *prior* to the time that they are submitted to the assigned Justice.

The Individual Rules of Commercial Division Justice Kornreich contain a requirement that opposing counsel be provided with copies of motion papers in support of a TRO:

> ... Absent good cause (e.g., where ex parte relief is absolutely necessary), the court will not sign an ex parte order to show cause, regardless of whether a TRO is sought, unless opposing counsel is notified beforehand and provided a copy of the papers. Compliance with the requirement must be confirmed in an attorney affirmation accompanied by proof (e.g., mail to opposing counsel). ... (emphasis supplied)

Similarly, in the U.S. District Court for the Southern District of New York, the individual rules of Judge Laura Taylor Swain provide that papers in support of a TRO must be supplied to the opposing party prior to presenting them to the Court. Her individual rule provides:

> Unless application for ex parte temporary injunctive relief is made in accordance with Fed. R. Civ. P. 65(b)(1), the applicant must provide a copy of the proposed Order to Show Cause and all supporting papers to the opposing

[1] Similarly, the Uniform Civil Rules for the Supreme Court and the County Court contains notice requirements: "Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application." 22 NYCRR § 202.7(f).

party before presenting the application to Chambers.
(emphasis supplied)

In addition, a minor correction to the first sentence of the rule is proposed. The first sentence presently states that "[u]nless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued." Thus, as written, the rule suggests that a TRO will not be issued unless there will be prejudice by giving notice, which is not what is intended. Thus, the subcommittee proposes that the words "*ex parte*" be added to the end of the sentence.

PROPOSED AMENDMENTS

Given this background, the following are proposed amendments to Commercial Division Rule 20 for the Council to consider:

> Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued ***ex parte***. The applicant must give notice**, including copies of all supporting papers,** to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

Proposed Amendment to Rule 6 of the Commercial Division to Permit the Court to Require Hyperlinking in Electronically-Filed Documents

A Report by the Commercial and Federation Litigation Section of the New York State Bar Association
November 28, 2016

The Commercial and Federal Litigation Section of the New York State Bar Association ("***Section***") is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated October 6, 2016 ("***Memorandum***"), proposing an amendment to Rule 6 of the Commercial Division Rules, to include a second paragraph that explicitly grants Justices of the Commercial Division the discretion to require bookmarking and/or hyperlinking in electronically-filed documents, by individual part rule or individual case directive (the "***Proposal***"). The Proposal is attached as Exhibit A.

I. Executive Summary

The Section agrees with the Use of Technology in Commercial Division Subcommittee of the Commercial Division Advisory Council (the "Advisory Council") that bookmarks and hyperlinking may advance the goal of convenience and efficiency. However, the Section also believes that bookmarks and hyperlinking will only be beneficial to judges and clerks that desire to utilize such conveniences, and that the costs of employing these new techniques may, in some cases, outweigh the benefits. Therefore, the Section also agrees with the Advisory Council that judges should be provided the discretion to require the use of bookmarks and hyperlinking, both on an individual part basis and a case by case basis.

II. Summary of Proposal

Relying upon the results of the 2014 pilot program implemented with several Commercial Division Justices, the Proposal seeks to revise Rule 6 of the Commercial Division Rules, 22 NYCRR § 202.70[g], by including therein a paragraph that would provide express authority to Commercial Division Justices to implement an individual part rule, or to order by individual case directive, that parties employ the use of bookmarks and/or hyperlinks in electronically filed documents. Specifically, the Council proposes that Rule 6 of the Commercial Division Rules be amended to include a second paragraph that states:

> "The Court may, by individual part rule or by a case by case directive, require the parties to electronically file documents with hyperlinks, an electronic functionality permitting the reader, by clicking on the name of a cited authority, to be immediately connected or 'linked' to a copy of the authority. A hyperlinked document may contain hyperlinks only to: (i) other portions of the same document; (ii) other documents filed in the NYSEF system; (iii) a government website (xxx.gov) location on the Internet, which website contains a source document for a citation or an official record; and (iv) statutes, rules, regulations and court decisions. As a hyperlink is not considered part of the evidentiary record, the underlying hyperlinked documents must also be separately filed. Hyperlinks may not be used to refer to sealed or restricted documents. Hyperlinks to cited authority may not replace standard citation format. Appropriate references/citations to authority/record in accordance with applicable rules is required in addition to the hyperlink. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the pleadings. The Court is not responsible for the functionality of hyperlinks."

The Advisory Council described the motivation for this Proposal as, (1) to promote "convenience and efficiency" in "the preparation of responsive pleadings, bench memoranda and decision" by permitting judges, clerks and litigants the ability to move effortlessly between affirmations, affidavits, docket entries, cases, statutes and other legal authorities (Memorandum, Ex. A at 1, 2); (2) to "maintain New York's preeminence in commercial litigation" (Memorandum, Ex. A. at 1); and (3) to "reap the benefits of these readily available technologies that increase the efficiency of litigation in an electronic environment" (Memorandum, Ex. A at 1). The Advisory Council has cited to a number of courts, both state and federal, that have implemented rules or administrative procedures that permit optional hyperlinking (*see* Memorandum, Ex. A at 1-2), including reference to a Second Circuit case in which the use of hyperlinks to relevant sections of the appellate record was

considered "useful" (*see* Memorandum, Ex. A at 2, citing *Phansalkar v Anderson, Weinroth & Co., L.P.*, 356 F.3d 188, 190 [2004]), as well as evidence of the use of hyperlinking in court decisions (*see* Memorandum, Ex. A at 2).

The Advisory Council also notes that the time is ripe for implementing these readily available technologies, noting that, "[i]n August of 2015, the Governor signed into law legislation that is moving all courts in the State toward electronic filing[,]" and "electronic filing of appeals is inevitable" (Memorandum, Ex. A at 1).

III. Response and Suggestions to Further the Goals of the Proposal

The Section agrees with the Advisory Council that the use of bookmarks and hyperlinking will achieve the goal of convenience and efficiency by providing judges, clerks and litigants "immediate access to the target section, reference or document" (Memorandum, Ex. A at 1). The Section is also sensitive to the uneasiness and apprehension that such a rule will cause some practitioners, primarily those in small law firms with limited resources and/or those who may not consider themselves to be technologically savvy. However, like with the implementation of electronic filing, this sensitivity can be alleviated with a well thought out plan to educate practitioners of the case with which bookmarks and hyperlinking may be employed with commonly used software and utilities.

However, the Section also believes that bookmarks and hyperlinking will only be beneficial to judges and clerks that desire to utilize such conveniences, and agrees with the Advisory Council that the "costs associated with achieving these benefits" supports the conclusion "that not all cases before the Commercial Division will benefit from the use of hyperlinking" (Memorandum, Ex. A at 3). Therefore, the Section also agrees with the Advisory Council that judges should be provided the discretion to require the use of bookmarks and hyperlinking, both on an individual part basis and a case by case basis.

Accordingly, the Section recommends that the Proposal be adopted as drafted.

EXHIBIT A

MEMORANDUM

October 6, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on a Proposed Amendment to Rule 6 of the Rules of the Commercial Division to Permit the Court to Require Hyperlinking in Electronically-Filed Documents

The Administrative Board of the Courts is seeking public comment on a proposed amendment to Rule 6 of the Rules of the Commercial Division (22 NYCRR §202.70[g]). Rule 6 [illegible] proffered by the Unified Court System's Commercial Division Advisory Council. In brief, the proposal calls for the addition of a new paragraph to the rule explicitly [illegible] to require, pursuant to individual part rule or individual case directive, that parties employ hyperlinks in electronically filed documents. The Council's memorandum supporting this proposal (Exh. A) notes that the functionality of hyperlinks – which permit readers to move quickly to different sections of a document, or to cited materials and sources over the internet – will bring a convenience and efficiency appropriate to maintain New York's preeminence in commercial practice. The Council's proposal would limit use of hyperlinks to references to other portions of the filed document, other NYSCEF filings, government websites, and "statutes, rules, regulations and court decisions." Further, it would require separate filing of the underlying hyperlinked documents for inclusion in the evidentiary record, preclude references to sealed or restricted documents; maintain standard citation formats; and require leave of the Court for use with audio or visual files.

The text of the proposed rule is as follows:

"(b) The Court may, by individual part rule or by a case by case directive, require the parties to electronically file documents with hyperlinks, an electronic functionality permitting the reader, by clicking on the name of a cited authority, to be immediately connected or "linked" to a copy of the authority. A hyperlinked document may contain hyperlinks only to (i) other portions of the same document, (ii) other documents filed in the NYSCEF system, or (iii) a government website (.xxx.gov) location on the Internet, such website contains a source document for a citation or an official record, said documents, rules, regulations and court decisions. As a hyperlink is not considered part of the evidentiary record, to be considered as part of the evidentiary record, the underlying hyperlinked documents must also be separately filed. Hyperlinks may not be used to refer to sealed or restricted documents. Hyperlinks to cited authority may not replace standard citation format. Appropriate references, citations or authority located in accordance with applicable rules are required in addition to the hyperlink. Hyperlinks to internet sites may change or disappear. A motion must be filed and granted seeking permission to hyperlink to an inaccessible or stale file before such links may be included in the pleadings. The Court is not responsible for the inaccessibility of hyperlinks."

Persons wishing to comment on the proposed rule should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than December 5, 2016.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Use of Technology in Commercial Division Subcommittee

DATE: August 24, 2016

RE: Proposed Rule on Hyperlinking in the Commercial Division

The Technology Committee first reported in June 2015 on the desirability of the use of bookmarking and hyperlinking as tools to increase the efficiency of addressing the typically document intensive nature of commercial litigation before the Commercial Division. This was not a new issue then as the OCA had, in 2014, implemented a pilot program in the Commercial Division with several Commercial Division Justices. Because the technology is genuinely useful, the Committee undertook to test the use of hyperlinking within NYSECF the testing was successful and the technology was easy to use

Bookmarks and hyperlinks provide the reader with immediate access to the target section, reference or document. The convenience and efficiency promised by the effective use of bookmarks and hyperlinks is obvious; the time and energy needed to find a physical copy of the target section, reference or document is reduced to the click of a mouse. When deployed with software that allows the reader to annotate pdfs using "notes," highlighting, text selection and comment bubbles, bookmarks and hyperlinks make the preparation of responsive pleadings, bench memoranda and decisions much more efficient.

In August 2015, the Governor signed into law legislation that is moving all courts in the State toward electronic filing. The electronic filing of appeals is inevitable. The move toward a completely electronic docket is being undertaken because it is more efficient. To maintain New York's preeminence in commercial litigation, the Committee believes that commercial cases should reap the benefits of these readily avai able technologies that increase the efficiency of litigation in an electronic environment (The First Department requires the submission of a CD in addition to the traditional paper appeal documents. The Second Circuit requires electronic filing.)

Optional hyperlinking is found in the rules or administrative procedures of many federal courts, including the following - First Circuit Court of Appeals, District of Massachusetts, District of New Hampshire, Second Circuit Court of Appeals, Third Circuit Court of Appeals Western District of Pennsylvania, District Court of Virgin

Islands, Fourth Circuit Court of Appeals, District of Maryland, Eastern and Middle Districts of North Carolina.

The benefits of hyperlinking have not gone unnoticed in courts where the technology has been used. In a 2004 decision in Phansalkar v. Andersen, Weinroth & Co., L.P., the Second Circuit, noted the use of hyperlinks to relevant sections of the appellate record, and found them to be "more versatile" and "more useful." 356 F.3d 188, 190 (2d Cir. 2004). Similarly, there are courts that have used hyperlinks in decisions to cite to documents filed in the case. See, e.g., Carter v. Allied Ins., 2008 WL 2228851 at *1 n.1 (D. Neb. 2008); Tracy Broadcasting Corp. v. Spectrum Scan, LLC, 2008 WL 2079917, at *1 n.1 (D. Neb. 2008); AWG Leasing Trust v. U.S., 592 F Supp. 2d 953,957 n.1 (N.D. Ohio 2008).

The United State Supreme Court used a hyperlink in its decision in Scott v. Harris, 550 U.S. 372, 378 n.5 (2007). The Court accepted a hyperlink brief in the case of Harris Trust and Savings Bank v. Solomon Smith Barney Inc., 530 U.S. 238 (2000)

Recommendations on Hyperlinking

As noted above, hyperlinking is helpful to judges, clerks and litigants. Affirmations and affidavits may contain dozens upon dozens of exhibits. Likewise, briefs may contain dozens upon dozens of references to docket entries, cases, statutes and other legal authorities. Moving effortlessly among these documents electronically from a memorandum of law for example, is very desirable and efficient.

There are two ways to hyperlink. First, documents may be self-contained and static. As explained in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, in such documents,

> PDF-A files of the texts of cited cases, statutes, and other legal authorities shall be aggregated as attachments to the text of the brief in PDF-A format and copies of exhibits shall be aggregated to the affirmation or affidavit to which they are annexed in the same format. Links in such a brief shall be to the full text of a case or law review article, the relevant section of a statute or rule cited, and, if the authority is a treatise or other lengthy work, the full text of the relevant portion thereof.

Id. This can result in a filing being hundreds of pages long.

Alternatively, "links may be inserted to authorities on Westlaw and websites of state or Federal courts" and "may also be made to other documents filed with NYSCEF." Id. This can be accomplished by selecting "Insert" in Microsoft Word" and then selecting "Hyperlink," and then adding the URL of the docket entry, case cite in Westlaw or Lexis, or other website in the "Address" field. When a judge, clerk or litigant clicks on a

hyperlinked Westlaw or Lexis citation, they will be taken to the case after being prompted for their log-in details.

The benefits of hyperlinking are obvious. Inasmuch as there are costs associated with achieving these benefits, the Committee concluded that the Court and parties may conclude that not all cases before the Commercial Division will benefit from the use of hyperlinking. Accordingly the Committee believes that while a Commercial Division Rule is desirable as the next step beyond the Pilot Program, each Justice should have the discretion to require the use of these technologies.

Accordingly, the Subcommittee recommends that Rule 6 of the Commercial Division Rules also be amended to include a second paragraph stating as follows:

> The Court may, by individual part rule or by a case by case directive, require the parties to electronically file documents with hyperlinks, an electronic functionality permitting the reader, by clicking on the name of a cited authority, to be immediately connected or "linked" to a copy of the authority. A hyperlinked document may contain hyperlinks only to: (i) other portions of the same document; (ii) other documents filed in the NYSECF system; (iii) a government website (xxx.gov) location on the Internet, which website contains a source document for a citation or an official record; and (iv) statutes, rules, regulations and court decisions. As a hyperlink is not considered part of the evidentiary record, to be considered as part of the evidentiary record, the underlying hyperlinked documents must also be separately filed. Hyperlinks may not be used to refer to sealed or restricted documents. Hyperlinks to cited authority may not replace standard citation format. Appropriate references/citations to authority/record in accordance with applicable rules is required in addition to the hyperlink. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the pleadings. The Court is not responsible for the functionality of hyperlinks.

As should be clear from the language of the proposed rule on hyperlinking, it is not mandatory and grants discretion to Commercial Division justices to require hyperlinking where appropriate.

To address security concerns raised by the court system regarding unfettered hyperlinking to the Internet at large, the proposed rule limits Internet hyperlinking to government websites, statutes, rules, regulations and court decisions.

The Subcommittee requests that the Advisory Council vote on the proposed amendment to Rule 6 at the Council's September 15, 2016 meeting.

Proposed Amendment to Rule 26 of the Rules of the Commercial Division Addressing the Limitation of Total Hours of Trial

A Report of the Commercial and Federal Litigation Section
of the New York State Bar Association
December 15, 2016

The Commercial and Federal Litigation Section of the New York State Bar Association ("**Section**") is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated October 18, 2016 ("**Memorandum**"), proposing an amendment to Rule 26 of the Rules of the Commercial Division, to address the authority of the court to set trial time limitations in Commercial Division matters (the "**Proposal**"). The Proposal is attached as Exhibit A.

I. Executive Summary

The Section recommends adoption of the proposed amendment to Rule 26, which would expressly authorize Commercial Division Justices, in their discretion, to impose trial time limitations upon different phases of trial, as such amendment will promote shorter, more efficient trials.

II. Summary of Proposal

The Proposal seeks to revise Rule 26 of the Rules of the Commercial Division, 22 NYCRR § 202.70(g), to expressly authorize the Commercial Division Justices to impose time limitations on the parties' respective cases and/or different claims and defenses presented at trial, which time limitations have long been authorized and upheld on appeal by state and federal courts both in New York and around the United States. Specifically, the Advisory Council proposes that Rule 26 of the Rules of the Commercial Division be amended as follows:

> "Rule 26. ~~Estimated~~ Length of Trial. At least ten days prior to trial or such other time as the court may set, the parties, after considering the expected testimony of and, if necessary, consulting with their witnesses, shall furnish the court with a realistic estimate of the length of the trial. ***If requested by the Court, the estimate shall also contain a request by each party for the total number of hours which each party believes will be necessary for its direct examination, cross examination, redirect examination, and argument during the trial. The court may rule on the total number of trial hours which the court will permit for each party. The court in its discretion may extend the total number of trial hours.***"

In support of the Proposal, the Advisory Council notes that "Judges would be free to use or not to use the new procedure" (Memorandum, Ex. A at 2), and cites Civil Practice Law and Rules 4011 and case precedent that have long supported a judge's right to impose time limits on different phases of trial (id.), "in order

to achieve a speedy and unprejudiced disposition of matters"(CPLR 4011). The Advisory Council identifies several "beneficial impacts on litigation" that may be fostered by imposing time limitations, including that it 1) will "allow the court to better plan its own docket"; 2) "requires counsel to focus on their theories of the case in advance, and consider how to best structure the case within the established limitations"; 3) "can help minimize repetition, thereby mitigating the costs associated with an unduly lengthy trial"; and 4) "may enable jurors to better focus on the streamlined presentation, and facilitate the selection of a jury with a better understanding of the established length of the trial" (Memorandum, Ex. A at 2-3). The Advisory Council identifies case precedent that supports the imposition of reasonable time limitations in the Second Circuit, Southern District of New York and other state and federal district and circuit courts throughout the United States (see Memorandum, Ex. A thereto at 3-6).

However, the Advisory Council cautions that the "a court must be mindful of allowing litigants a full and fair opportunity to establish their cases and defenses, and must maintain the flexibility to adapt to the circumstances ultimately presented" (Memorandum, Ex. A at 3).

III. Response and Suggestions to Further the Goals of the Proposal

The Section agrees with the Advisory Council that long-standing case precedent has permitted the imposition of time limitations on the parties' respective cases or different claims and defenses presented at trial, and that such time limitations will promote shorter, more efficient trials, which the Section agrees are desirable goals. However, the Section also recognizes the need for litigants to be provided a full and fair opportunity to establish their case and/or defenses, as cautioned by the Advisory Council.

The Section is also aware of the position of some defense counsel that the discretion afforded to Commercial Division Justices may create an imbalance between the time permitted for a plaintiff's case and the time permitted for a defendant's case, particularly when extensions are granted late in trial. The issue is a matter of an imbalance created by limiting the time allowed for defendant's cross-examination of plaintiff's witnesses, but allowing extensions on defendant's case. While defendants (and plaintiffs) receive the benefit of the late-in-trial extension of time, some defense counsel suggest that there may be the occasion that a defendant may have preferred to have that additional time spent on cross-examination of plaintiff's witnesses, an opportunity that has since passed.

However, the Section feels that the benefits afforded by the discretion given to Commercial Division Justices by the proposed amendment to Rule 26 outweigh the likelihood of prejudice, and appellate oversight of such time limitations is sufficient to curtail any abuse of that discretion and to minimize any concern that a litigant may be denied a full and fair opportunity to present their case or defense.

Although a new rule may not be necessary to further define the Court's discretion and authority to impose such time limitations, the Section concludes that the benefit to practitioners, corporate counsel, clients, and judges of having a rule explicitly describing that authority substantially outweighs not having such a rule.

Accordingly, the Section recommends that the Proposal be adopted. ***(See exhibit A on following pages.)***

EXHIBIT A

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

October 18, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment of Rule 26 of the Rules of the Commercial Division Addressing the Limitation of Total Hours of Trial

The Administrative Board of the Courts is seeking public comment on a proposed amendment of Rule 26 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 26 ["Estimated Length of Trial"]) to articulate the power of the court to require estimates of, and to limit, the total number of hours of trial of Commercial Division matters. Proffered by the Unified Court System's Commercial Division Advisory Council, the text of the proposed amendment is as follows (new matter in bolded underline):

> Rule 26. ~~Estimated~~ Length of Trial. At least ten days prior to trial or such other time as the court may set, the parties, after considering the expected testimony of and, if necessary, consulting with their witnesses, shall furnish the court with a realistic estimate of the length of the trial. **If requested by the Court, the estimate shall also contain a request by each party for the total number of hours which each party believes will be necessary for its direct examination, cross examination, redirect examination, and argument during the trial. The court may rule on the total number of trial hours which the court will permit for each party. The court in its discretion may extend the total number of trial hours.**

As described by the Council in a memorandum supporting the proposal (Exh. A), this language is designed to make clear the power of the court to set trial time limitations – a practice which, it notes, is increasingly common in courts around the country. According to the Council, the setting of such *limits has had the laudatory consequence* of paring attorney arguments and examinations to essentials, increasing efficiency, and controlling the costs of trial (Exh. A, p. 6). Under the proposed amendment, use of this practice would remain at the discretion of the trial judge.

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Persons wishing to comment on the proposed amendment should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than December 20, 2016.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution ("Subcommittee")

DATE: September 15, 2016

RE: **Proposed Amendment to Rule 26 of the Commercial Division Rules Regarding Time Limitations for Trial**

Rule 26 currently provides:

"Estimated Length of Trial. At least 10 days prior to trial or such other time as the court may set, the parties, after considering the expected testimony of and, if necessary, consulting with their witnesses, shall furnish the court with a realistic estimate of the length of the trial."

The proposed amendment would consist of adding the following text at the end of Rule 26 of the Commercial Division Rules:

"If requested by the court, the estimate shall also contain a request by each party for the total number of hours which each party believes will be necessary for its direct examination, cross examination, redirect examination, and argument during the trial. The court may rule on the total number of trial hours which the court will permit for each party. The court in its discretion may extend the total number of trial hours." As part of the amendment, the word "Estimated" would be deleted from the heading of Rule 26. The reference to trial hours permitted by the court refers to the total time allotted each side for

their trial presentation, not specific and separate time limitations designated for each aspect of the trial.

The new Rule 26 would thus read as follows:

"Length of Trial. At least 10 days prior to trial or such other time as the court may set, the parties, after considering the expected testimony of and, if necessary, consulting with their witnesses, shall furnish the court with a realistic estimate of the length of the trial. If requested by the Court, the estimate shall also contain a request by each party for the total number of hours which each party believes will be necessary for its direct examination, cross examination, redirect examination, and argument during the trial. The court may rule on the total number of trial hours which the court will permit for each party. The court in its discretion may extend the total number of trial hours."

Under this new Rule, Judges would be free to use or not to use the new procedure. If the court does not request the parties to specify the number of hours each party needs to present its case, there will be no change to the current practice. This new rule would not require judges to use time limits if they don't want to. CPLR 4011 (Sequence of Trial) provides authority for the Court to set trial time limitations. *See In the Matter of Seymour*, 267 A.D.2d 1053 (4th Dep't 1999) ("[T]he length of closing arguments is a matter resting within the sole discretion of the trial court (*see generally*, ... CPLR 4011), and the court did not abuse its discretion in limiting the summation of each party to five minutes.").

Imposing time limits can, in the appropriate circumstances, have beneficial impacts on litigation. Not only does it allow the court to better plan its own docket, but it also requires counsel to focus on their theories of the case in advance, and consider how to best structure the case within the established limitations. Such an approach can help minimize repetition, thereby mitigating the costs associated with an unduly lengthy trial. It also may enable jurors to better focus on the streamlined presentation, and facilitate the

selection of a jury with a better understanding of the established length of the trial. Of course, in establishing limitations, a court must be mindful of allowing litigants a full and fair opportunity to establish their cases and defenses, and must maintain the flexibility to adapt to the circumstances ultimately presented.

An increasing number of courts are requiring time limits for trial. In the Southern District of New York, for example, "'there is a long line of cases making clear the authority of district judges to impose reasonable time limitations on trials.'" *Lessoff v. Metro-North Commuter R.R.*, No. 11 Civ. 09649 (LGS), 2014 WL 1395022, at *8 (S.D.N.Y. Apr. 10, 2014) (citation omitted); *accord Lidle v. Cirrus Design Corp.*, 278 F.R.D. 325, 331 (S.D.N.Y.2011), *aff'd*, 505 F. App'x 72 (2d Cir. 2012); *Friedline v. N.Y.C. Dep't of Educ.*, No. 06 Civ. 1856(JSR), 2009 WL 37828, at *2 (S.D.N.Y. Jan. 5, 2009), *aff'd sub nom. Cruz v. N.Y.C. Dep't of Educ.*, 376 F. App'x 82 (2d Cir. 2010); *Latino Officers Ass'n, Inc. v. City of New York*, No. 99 Civ. 9568, 2003 WL 22300158, at *2 (S.D.N.Y. Oct. 8, 2003).

Decisions from other Circuits have likewise recognized the right of courts to impose time limitations. *See, e.g., Walter Int'l Prods., Inc. v. Salinas*, 650 F.3d 1402, 1408 (11th Cir. 2011) (finding that the district court's time limitation on trial was not an abuse of discretion where the court was not inflexible and granted additional time when one party exceeded its allotted time); *Thanedar v. Time Warner, Inc.*, 352 F. App'x 891, 896 (5th Cir. 2009) (finding that the district court's time limitation on trial was not plainly erroneous where the court considered each party's estimate of time needed and offered suggestions on how to preserve time); *Life Plus Int'l v. Brown*, 317 F.3d 799, 807 (8th Cir. 2003) ("Trial courts are permitted to impose reasonable time limits on the

presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence."); *Sparshott v. Feld Entm't, Inc.*, 311 F.3d 425, 433 (D.C. Cir. 2002) ("The district court's decisions on how to structure time limits are reviewable only for abuse of discretion."); *Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001) (noting that the Ninth Circuit allows time limits to "'prevent undue delay, waste of time, or needless presentation of cumulative evidence'" (quoting *Amarel v. Connell*, 102 F.3d 1494, 1513 (9th Cir. 1996))); *Amarel v. Connell*, 102 F.3d 1494, 1514-15 (9th Cir. 1996) ("The case law makes clear that where a district court has set reasonable time limits and has shown flexibility in applying them, that court does not abuse its discretion. Moreover, to overturn a jury verdict based on a party's failure to use its limited time for witness cross-examination would be to invite parties to exhaust their time limits without completing cross-examination, then appeal on due process grounds."); *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir. 1994) ("In the management of its docket, the court has an inherent right to place reasonable limitations on the time allotted to any given trial."); *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 442 (1st Cir. 1991) ("District courts may impose reasonable time limits on the presentation of evidence."); *Flaminio v. Honda Motor Co., Ltd.*, 733 F.2d 463, 473 (7th Cir. 1984) (noting that "in this era of crowded district court dockets federal district judges not only may but must exercise strict control over the length of trials, and are therefore entirely within their rights in setting reasonable deadlines in advance and holding the parties to them").[1]

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[1] *See also Tersigni v. Wyeth-Ayerst Pharm., Inc.*, No. 11-0466-RGS, 2014 WL 793983, at *1-2 (D. Mass. Feb. 28, 2014) (rejecting party's objection to imposition of time limit and imposing 18 hour limit on each party's presentation of case); *Lentz v. Cincinnati Ins. Co.*, No. 1:03CV599, 2006 WL 2860974, at *1 (S.D. Ohio 2006) (finding that 12 hours allotted to both the plaintiff and the defendant

"Moreover, in order to prevail on a claim that a time limit was too short, a party must have come forward with an offer of proof showing how its presentation would be curtailed by it and must demonstrate prejudice." *Evans v. Port Auth. of N.Y. & N.J.*, 246 F. Supp. 2d 343, 351 (S.D.N.Y. 2003) (collecting cases); *see also Cruz v. N.Y.C. Dep't of Educ.*, 376 F. App'x 82, 84 (2d Cir. 2010) (trial court acted within its discretion in limiting certain witnesses' testimony to two hours, after plaintiff's counsel had repeatedly underestimated length of witness testimony and engaged in prolonged examination; record did not reflect that time limit had "hampered [plaintiff's] ability to present her case" or "affected her substantial rights"); *Cedar Hill Hardware & Const. Supply, Inc. v. Ins. Corp. of Hannover*, 563 F.3d 329, 353 (8th Cir. 2009) (concluding that trial court had not abused its discretion in setting time limits because "the district court imposed time limits late in the trial after gaining a clear picture of the attorneys' methods and habits in their use of time"); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 282 (5th Cir. 2008) ("But even if the strict time limits amounted to an abuse of discretion, the district court's error is presumed harmless until shown to be prejudicial."); *Pierce v. Cty. of Orange*, 526 F.3d 1190, 1200 (9th Cir. 2008) (affirming district court's limit of trial to six days, holding that the plaintiffs did not show that there was "harm incurred as a result" of the time limit (citation omitted)); *Akouri v. State of Florida Dept. of Transp.*, 408 F.3d 1338, 1346 (11th Cir. 2005) (upholding time restrictions because plaintiff "failed to adduce any evidence that the court acted inflexibly or unreasonably with respect to [the] time restrictions"); *Life Plus Int'l*, 317 F.3d at 807 (noting that a party seeking to challenge a

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was reasonable in "a relatively simple employment case"); *Lareau v. Page*, 840 F. Supp. 920, 932 (D. Mass. 1993), *aff'd*, 39 F.3d 384 (1st Cir. 1994) (noting that time limits "are an extraordinarily valuable focusing mechanism which promote cleaner trials directed to the matters genuinely in dispute").

time limit "must lodge a timely objection to the time limits and must make a proffer of evidence that was excluded for lack of sufficient time"); *Evans*, 246 F. Supp. 2d at 351 ("[I]n order to prevail on a claim that a time limit was too short, a party must have come forward with an offer of proof showing how its presentation would be curtailed by it and must demonstrate prejudice.").

State courts also have recognized the right of courts to require trial time limitations. *See California Crane Sch., Inc. v. Nat'l Comm'n for Certification of Crane Operators*, 171 Cal. Rptr. 3d 752, 757-58 (Ct. App. 2014); *In re Z.C.J. Jr.*, No. 04-12-00010-CV, 2012 WL 3597209, at *3 (Tex. App. Aug. 22, 2012); *In re Kister*, 955 N.E.2d 1029, 1050 (Ohio Ct. App. 2011).

A number of commentators have set forth the benefits of time limitations for trial:

Imposing trial limitations avoids protracted trials which delay justice for other litigants who must wait for the lengthy trial to end. Time limitations allow a larger number of trials to occur more frequently. *See, generally* Andrew S. Kaufman, *Justice Delayed: An Argument for Time Limits at Trial*, N.Y.L.J., April 14, 2015; Stephen D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 Rev. Litig. 431 (2013).

Time limits arguably assist lawyers in at least three ways: "improving presentations, controlling costs, and increasing the likelihood of victory." It has been noted time limitations have been imposed "on some of the largest trials ever." Lawyers are forced to pare down their openings and closings to their essentials, time spent on witness examinations will be reduced, and time limits discourage objections. *See* David

Bissinger & Erica Harris, *Working on the Clock: The Advantage of Timed Trials*, Tex. Law, April 2, 2012.

Judges will have discretion under proposed Rule 26 whether to require any time limitations. As noted above, the court may, but is not required, to set the number of hours permitted by each party at trial. In their discretion, under new Rule 26, Judges may also extend the time allowed to each side. Lawyers will be forced to be more efficient and plan their case with greater specificity. They will focus on the most important facts and arguments to present to the jury.

This rule allows the court the express option to fix the time periods for trial presentation after reviewing the parties' submissions if it determines the case is best tried with set time limits.

The benefits to requiring submission by each side of their estimated trial time outweigh the negatives as shown by experience. If proper thought is given to the time requested and to the limits ordered by the court, the end result will be better for the jury, the litigants, the attorneys, and the courts.

RECOMMENDATION

For the reasons set forth above, the Subcommittee recommends that the Council support the Proposed Rule and its incorporation into the Statewide Rules of the Commercial Division.

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