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Commercial and Federal Litigation Section Newsletter

A publication of the Commercial and Federal Litigation Section
of the New York State Bar Association

A Message from the Chair

Vincent J. Syracuse

Our Section has always prided itself on the excellent work of the many talented people who contribute their time to our numerous activities. I am happy to report that this tradition of service has continued this year and that we have many important projects in the pipeline.

The activities that we are planning this year include our Annual Meeting at The Hilton Hotel on January 27, 2010. Section Vice-Chair David H. Tennant of Nixon Peabody LLP in Rochester is planning what promises to be an outstanding meeting that will feature a two-part CLE program followed by our annual luncheon and the presentation of the Stanley H. Fuld Award. The two CLE programs will present engaging speakers who will address topics of interest to commercial litigators: one panel will discuss federal and state appellate practice and procedure from the inside and the other will examine how lawyers can capitalize on new opportunities in today's (and tomorrow's) economy.

I also want to mention our highly successful Smooth Moves program, which will be in its fourth year in 2010. The Smooth Moves 4 program will feature a CLE program that is being developed by our Section's Diversity Committee, chaired by Tracee E. Davis of Zeichner Ellman & Krause LLP. The CLE will be followed by a reception and the presentation of the George Bundy Smith Pioneer Award for legal excellence, community commitment, and mentoring. The winner of the Section's 2010 Minority Fellowship, which is offered to a minority law student enrolled in a law school in the State of New York, will also be announced at the reception. The winner will work during the summer of 2010 in the Chambers of the Honorable Bernard J. Fried, Justice of the Commercial Division of the Supreme Court of the State of New York, New York County.

Serving as Section Chair gives me the opportunity to represent the Section and voice our opinions. On July 29, 2009, I represented the Section and the New York State Bar Association at a hearing in the United States District Court for the Southern District of New York on the Southern District's policy on the use of cell phones, PDAs, and laptops in its courthouses. I was one of seven speakers at the hearing and was able to express the Section's support for a change in the rules that would eliminate the ban on such electronic devices.

Inside

NYSBA

Perhaps the best part of the job is my work with our 30 active committees. Our committees are our Section's greatest asset and there is no way that I can adequately express my appreciation to the many people who chair or serve as committee members and make our Section so successful. Our committees are at work on several projects and reports that will be presented to the Section's Executive Committee this year, including the following:

- The Antitrust Committee, chaired by Jay L. Hines and Hollis L. Salzman, both of Labaton Sucharow LLP, is in the final stage of a draft report that will identify several features of New York's antitrust law, developed under the Donnelly Act, which differ from federal law. The report will consider such areas as (1) the requirement of plurality of action for a restraint violation, (2) treatment of group boycotts, (3) treatment of restraints by professionals, (4) the state action doctrine, (5) application to mergers and acquisitions, and (6) the availability of the class action mechanism.
- The Appellate Practice Committee, chaired by David H. Tennant of Nixon Peabody LLP and Melissa A. Crane of the Appellate Division, First Department, is in the process of reviewing proposed changes in the rules of practice for the United States Court of Appeals for the Second Circuit.
- The Committee on the Commercial Division, chaired by Paul D. Sarkozi of Tannenbaum Helpern Syracuse & Hirschtritt LLP and Mitchell J. Katz of Menter, Rudin & Trivelpiece PC in Syracuse, is working on several projects. The committee sponsored a Bench-Bar Forum in conjunction with the Nassau County Bar Association on October 26, 2009 with Commercial Division justices from Nassau and Suffolk counties. The committee is also reviewing rules and training for court-appointed receivers and is preparing a report on its findings. Also in the works is a compilation of Individual Part Rules for all of the Commercial Division justices statewide and a comparison of procedures and rules for sealing documents in the Commercial Division, Delaware, and federal courts.
- The Electronic Discovery Committee, chaired by Constance M. Boland of Nixon Peabody LLP and Adam I. Cohen of FTI Consulting, Inc., working in collaboration with the Civil Practice Law and Rules Committee, chaired by James Michael Bergin of Morrison & Foerster LLP and Thomas C. Bivona of Milbank Tweed Hadley McCloy LLP, is examining various proposed amendments to the CPLR regarding electronic discovery.
- The Committee on Evidence, chaired by Lauren J. Wachtler of Mitchell Silberberg & Knupp LLP and Michael Gerard of Morrison & Foerster LLP, is preparing a report to the Executive Committee that will address whether a model rules of evidence should be adopted for use in the Commercial Division of the Supreme Court of the State of New York, and perhaps ultimately in all of the New York courts.
- The Federal Practice Committee, chaired by Gregory K. Arenson of Kaplan Fox & Kilsheimer LLP, is part of a task force that is considering the consequences of the Supreme Court's *Twombly* decision on pleading requirements and proposed legislation.
- The Immigration Litigation Committee, chaired by Clarence Smith, Jr. and Michael D. Patrick of Fragomen, Del Rey, Bernsen & Loewy LLP, is in the process of preparing a report on the continuing impact of immigration cases in the Second Circuit Court of Appeals, with an eye toward activity since 2004. The Committee's goal is to update the depth of the immigration overload, review how mitigation measures have worked to date, and propose some additional possible actions.
- The State Court Counsel Committee, chaired by Deborah E. Edelman and Janel Alania, has presented several CLE programs, including programs on electronic discovery and negotiation and settlement skills.

As I am sure you will agree, our committees are all working on many great projects. Our committees and committee chairs are listed at the end of this *Newsletter*, and I am certain that you will find a committee in your practice area. You can join one or more of our committees by visiting our Section's Web page at www.nysba.org/comfed or by contacting me at syracuse@thshlaw.com.

I thank all of you for your support of the Section and its activities and look forward to seeing you at future events.

Vincent J. Syracuse

An Introduction to the Commercial Division Web Site

By Jeremy Feinberg and Nancy Lucadamo

Do you need information about a Commercial Division Justice or court rules in a hurry? Are you seeking past precedents from the Justices of the Division on a particular complex commercial litigation issue? The resource you need for each of these questions may be right in front of you with a few clicks of your computer's mouse or on your mobile phone, and it's absolutely free: The New York State Supreme Court Commercial Division Web site, www.nycourts.gov/courts/comdiv (last visited September 29, 2009).

"The Web site allows court users easy access and immediate updates to the Commercial Division Justices' court rules and procedures and other key information necessary to effectively and efficiently practice there."

This article provides an overview of the Web site, which the Office of Court Administration (OCA) revamped and relaunched in mid-2007, with assistance from members of the NYSBA Commercial and Federal Litigation Section. The Web site allows court users easy access and immediate updates to the Commercial Division Justices' court rules and procedures and other key information necessary to effectively and efficiently practice there.

The main landing page for the Web site shows pictures of the courthouses for each jurisdiction in which a Justice of the Commercial Division sits. Clicking on any of these pictures will take a visitor to the applicable jurisdiction's Commercial Division page. These pages contain judicial biographies; part and chambers information; and court operational information, typically updated within two business days of a change request.[1] Each page also displays a drop-down list of all counties and judicial districts in which a Commercial Division is located for easy navigation across the state.

Some jurisdictions' Web pages also contain links to additional information specific to that Commercial Division court. The Seventh and Eighth Judicial Districts have links to recent decisions of interest that the court has selected for presentation. Some jurisdictions, including New York, Nassau, Suffolk, and Westchester counties, also have links to information about their Alternate Dispute Resolution (ADR) programs, including protocols and lists of local ADR Neutrals.

There are other special features on the Web site, providing general useful information about the Commercial Division as a whole:

- The "What's New" page provides attorneys and court users with the latest news and updates about the Commercial Division, including Administrative Orders, new Justices, and Web site changes;
- The ''History'' page summarizes the growth and development of the Commercial Division since 1993 and links to a chart reflecting the names of every jurist who has served in the Commercial Division since it began operations in 1995; and
- The "Publications" page links to the Commercial Division Law Report (discussed below) and to catalogues, reports, and handout materials from key Commercial Division events. Current highlights include (i) handouts from a 2008 Bench-Bar CLE program hosted by the Commercial Division, New York County, (ii) the 2006 ''Report to the Chief Judge on the Commercial Division Focus Groups'' detailing statewide efforts to gather information on the success of and ways to improve the Commercial Division, and (iii) the program from the November 2005 Celebration of the Commercial Division's 10th Anniversary.[2]

The Commercial Division Law Report, available from the "Publications" link on the Web site, summarizes and links to the full text of leading Commercial Division opinions. Justices of the Division have selected each opinion based on its significance and utility for the practicing Bar. The Commercial Division Law Report page now contains a Google-powered search engine, together with search tips. A practitioner needing to access (for instance) decisions involving piercing the corporate veil issued by Justice Fisher in the Seventh Judicial District could run a search and find any such decisions available in the Law Report.

The Web site also contains a link to the Statewide Rules, sometimes referred to as the Uniform Commercial

Division Rules. This link takes the user to 22 N.Y.C.R.R. § 202.70 (Rules of the Commercial Division of the Supreme Court), including both the guidelines for case selection to the Commercial Division and the rules governing practice within those courts. To the extent that individual judges or jurisdictions have supplemented the rules with individual or local practices, those can be found on the individual pages described above.

"Those who have thoughts about generally improving the Commercial Division can e-mail the Statewide Special Counsel for the Commercial Division through the Web site as well."

Finally, the Web site provides multiple ways to contact those responsible for administering the Web site and working to improve the Commercial Division generally. To share questions or comments about the Web site, either click on the appropriate link on the ''Contact Us'' page or send an e-mail directly to comdiv@courts.state.ny.us. Those who have thoughts about generally improving the Commercial Division can e-mail the Statewide Special Counsel for the Commercial Division through the Web site as well.

Endnotes

1. Readers who become aware of any changes to (or inaccuracies involving) material on the Web site should contact the authors at jfeinber@courts.state.ny.us or nlucadam@courts.state.ny.us, and appropriate updates will follow.
2. Speakers' comments, along with other Commercial Division-related material, are reprinted in this January 2006 publication.

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NYLitigator Invites Submissions

The *NYLitigator* welcomes submissions on topics of interest to members of the Section. An article in *NYLitigator* is a great way to get your name out in the legal community and advertise your knowledge. Our authors are respected statewide for their legal expertise in such areas as ADR, settlements, depositions, discovery, and corporate liability. MCLE credit may also be earned for legal-based writing directed to an attorney audience upon application to the CLE Board.

If you have written an article and would like to have it considered for publication in the *NYLitigator*, please send it in electronic document format (pdfs are NOT acceptable), along with biographical information to its Editor:

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Authors' Guidelines are available on the Section's Web site: www.nysba.org\comfed.

www.nysba.org/NYLitigator

Practice Points for Forum Selection Clauses

By Michael S. Oberman

Introduction

As commercial litigators, we often must deal with the unexpected, the unknown and the unavoidable—be it surprising evidence, a new area of technology, or a line of cases to be distinguished. We act with thorough preparation and advance planning whenever possible in facing such challenges in litigation. But we can also help our clients enhance the likelihood of a favorable outcome of a litigation and avoid litigating over unnecessary issues by what we do in advance of litigation. The purpose of this article is to suggest ways of drafting forum selection clauses in order to increase the chance of your client's action being litigated in a preferred court and to minimize the chance of an unexpected change in venue. Specifically, this article will focus on clearly stating whether a clause is permissive or mandatory, in which court or courts the action may be brought, and what claims are covered by the clause.

General Principles

A forum selection clause is simply a contract provision that designates by mutual agreement a specific forum for litigation, most typically by providing a particular location and sometimes a particular court in that location.[1] In 1972, the Supreme Court held in *M/S Bremen v. Zapata Off–Shore Co.*[2] that a "forum [selection] clause should control absent a strong showing that it should be set aside."[3] To overcome the clause, the resisting party must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[4]

Forum selection clauses are subject to the general rules for contract interpretation, most basically that the intent of the parties, as reflected in the language employed, is to be enforced.[5] Courts generally differentiate between two types of forum selection clauses that determine whether parties are "*required* to bring any dispute to the designated forum or simply *permitted* to do so."[6] "A so-called permissive forum clause only confers jurisdiction in the designated forum, but does not deny plaintiff his choice of forum, if jurisdiction there is otherwise appropriate."[7] "Alternatively, contracting parties may intend to agree in advance on a forum where any and all of their disputes *must* be brought" and such a "mandatory forum clause is entitled to the *Bremen* presumption of enforceability."[8]

Whether mandatory or permissive, a forum selection clause can have the effect of establishing venue in a district that would not otherwise be available under the applicable venue statute; in effect, it is an advance waiver of any objections to venue in the designated forum.[9] A mandatory clause has its greatest impact when a foreign or a U.S. state court is designated as the exclusive venue. When a foreign venue is designated, any action brought in a state or federal court in the U.S. is subject to dismissal (unless a reason for not enforcing the forum selection clause is established).[10] When a state court venue is designated, an action brought in a federal district court should similarly be dismissed (or, if a removed action, remanded).[11]

In contrast, the distinction between mandatory and permissive clauses—while still important—has less impact when a federal forum is designated because an action filed in the designated district may be subject to a transfer motion. The Supreme Court held in *Stewart Org., Inc. v. Ricoh Corp.*[12] that even a mandatory forum selection clause is not dispositive of a transfer motion under 28 U.S.C. § 1404(a).[13] While the presence of such a clause will be a "significant factor that figures centrally in the district court's calculus" of case-specific transfer factors,[14] district courts must also weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of "the interest of justice."[15] In the weighing of the transfer factors, lower federal courts have treated a valid forum selection clause as a waiver of the right to claim that the designated forum is inconvenient,[16] and have only rarely declined to enforce a mandatory clause.[17]

Most federal courts construe the language, and determine the validity, of forum selection clauses based on federal common law, not state law, even in diversity cases.[18] Where a clause is valid, courts tend to reject attempts to plead around the scope of the clause—for example, by asserting tort, rather than contract, claims; tort claims related to the contractual relationship, unless expressly excluded, will generally come within the clause.[19]

Designating the Type of Clause

Attorneys who are aware of the distinction between mandatory and permissive clauses should be able to employ the appropriate language to create the type of clause they intend to include in the contract. By now, many courts have held that inclusion of the word "exclusive" in a forum selection clause or of the phrase "shall be" connotes a mandatory clause, while use of the word "may" connotes a permissive clause.[20] The intent of the parties can be emphasized by using "Mandatory Forum Selection" or "Permissive Forum Selection" as the heading for the forum selection clause.[21]

Designating the Court

It is common to see in contracts drafted by attorneys in Manhattan the designation of "any court of competent jurisdiction located in the County and State of New York." Because New York County has within it both state courts of primary jurisdiction and the main courthouse of the Southern District of New York, this formulation should allow a plaintiff to select a state forum or, if subject matter jurisdiction otherwise exists (because it cannot be created by a contract clause), the federal court. Litigated issues can—and do—arise where the parties refer to other counties without considering what courthouses are physically located in that county when the contract is made and without correctly predicting what courthouses might be located in that county when an action is commenced.

Two cases presenting such issues made it all the way up to the Second and Fifth Circuits within the past year, a cautionary message about the need for care in drafting. In *Yakin v. Tyler Hill Corp.*,[22] the parties entered into a summer camp contract in 1999 which contained this clause: "It is agreed that the venue and place of trial of any dispute . . . shall be in Nassau County, New York." Yakin commenced an action in May 2007 in Supreme Court, Nassau County for injuries allegedly sustained in 1999, and Tyler Hill removed the action to the Eastern District of New York. At the time the contract was made and the injury sustained, there was a federal courthouse for the Eastern District located in Uniondale, Nassau County. However, by the date the action was commenced, the Uniondale courthouse had closed with the opening of the new courthouse for the Eastern District in Central Islip, Suffolk County (to which the *Yakin* action was removed). On Yakin's motion to remand, the district court held that the clause was ambiguous as to whether an action could be brought in either state or federal court and – construing it in favor of the non-drafter (Yakin)—remanded the action to state court. The Second Circuit, in a published opinion (rather than summary order), affirmed on different grounds. The circuit court first found no ambiguity in the clause, concluding as a matter of law that a "reasonable person . . . would necessarily conclude that the parties intended that litigation take place in an appropriate venue in Nassau County and that this commitment was not conditioned on the existence of a federal courthouse in that county."[23] The court reasoned that a "forum selection clause may bind parties to either a specific jurisdiction or, as here, a specific venue."[24] The court then held: "Given that the forum selection clause contains only obligatory venue language, we will effectuate the parties' commitment to trial in Nassau County. Had there been a federal court in Nassau County at the time of this litigation, remand would have been improper."[25] The court further observed that "no reasonable reading of the clause permits the interpretation that the parties agreed to trial in Suffolk County or Brooklyn because those courthouses were within the Eastern District of New York, which spans an area including Nassau County."[26] In words seemingly custom-tailored for quotation in this article, the court concluded: "Had the parties intended to provide for that result, they could, of course, have drafted a different forum selection clause that communicated that intent."[27]

In *Alliance Health Group, LLC v. Bridging Health Options, LLC*,[28] a contract for computer programming services made in 2003 included a clause providing that "exclusive venue for any litigation related hereto shall occur in Harrison County, Mississippi."[29] An action was brought in 2006 in the federal court for the Southern District of Mississippi, Southern Division, at which time a courthouse for that division was located in Harrison County. The Fifth Circuit affirmed the denial of a motion to dismiss the action for improper venue, finding that the language "venue shall occur in Harrison County, Mississippi" permitted an action to be brought in either a state court or federal court located in Harrison County.[30] The court distinguished prior district court decisions as well as one of its own unpublished decisions that had held an action could not be brought in a federal court whose district included the specified county but whose courthouse was not physically located in the specified county. The court also distinguished another of its earlier decisions that had held that a clause specifying "[t]he Courts of Texas, U.S.A." excluded federal district courts which "may be *in* Texas, but . . . they are not *of* Texas."[31] The court concluded that "it can hardly be said that a reference to 'county' clearly suggests the Harrison County Circuit Court rather than the United States District Court when it has a courthouse in, and jurisdiction over, Harrison County."[32] Finally, the court reported finding no precedent construing the words "shall occur in," leading to its holding that "the use of the phrase "occur in" suggests "a general lack of specificity" and not "an intent to limit venue to a single tribunal."[33] The Fifth Circuit—like the Second Circuit—ended its opinion with language suitable for this article: "Obviously, had the parties intended . . . to limit venue to the state courts located in Harrison County, they easily could have eliminated any question in that regard by writing the forum-selection clause differently."[34]

Designating Claims

It is common to see forum selection clauses that apply to "any and all claims arising from this Agreement." Two very recent Second Circuit cases teach us that a broader formulation should be employed if parties wish to increase the likelihood that the forum selection clause will be applied to statutory claims that result from their relationship.

In *Phillips v. Audio Active Ltd.*, decided in 2007,[35] a recording contract between a musician and a music company contained a forum selection clause providing that "any legal proceedings that may arise out of [the contract] are to be brought in England."[36] Phillips brought suit in the Southern District of New York alleging both breach of

the agreement and violation of the U.S. Copyright Act.[37] The district court, finding the forum selection clause to be mandatory, dismissed the action. The Second Circuit affirmed the dismissal of the contract claim, but reversed on the copyright claims—even though, as a result, the parties would end up litigating the contract claim in England and the copyright claims in New York.

Using federal law, *Phillips* construed the words "arise out of" to mean "to originate from a specified source,"[38] and stated that "[w]e do not understand the words 'arise out of' as encompassing all claims that have some possible relationship with the contract, including claims that may only 'relate to,' be 'associated with,' or 'arise in connection with' the contract."[39] The court "examine[d] the substance of Phillips' claims as they relate to the precise language of the clause" because the court "cannot presume that the parties intended to exclude all statutory claims, or even all copyright claims, from the forum selection clause."[40] The court ultimately held that the copyright claim did not originate from the recording contract, such that the forum selection clause was inapplicable to the copyright claims.[41]

In July 2009, the Second Circuit reversed a dismissal for improper venue in *Altvater Gessler-J.A. Baczewski International (USA) Inc. v. Sobieski Destylarnia S.A.*[42] The court held that a forum selection clause providing for claims "resulting from" a licensing agreement to be venued in Poland did not apply to claims of trademark infringement and unfair competition that could be stated without reference to the agreement. Plaintiff / licensor had licensed a licensee to use a proprietary recipe to make a liquor called Krupnik; after the expiration of the license, a successor to licensee started to make Krupnik using the proprietary recipe and distributed Krupnik (using that name) in the U.S. When a corporation clearly related to the licensor sued that successor for trademark infringement, unfair competition, and other related claims in the Southern District of New York, the district court enforced the forum selection clause and dismissed the action for improper venue.[43] Citing *Phillips*, the Second Circuit said that the phrase "resulting from" was very similar in meaning to the phrase "arise out of" and held that claims not originating from the agreement were not covered by the forum selection clause.[44]

Conclusion

These recent cases illustrate how reformulation of stock forum selection clauses is needed to avoid unnecessary litigation over the scope of a forum selection clause and to lessen the chance of an untoward result. Designation of a clause as mandatory or permissive is not difficult; the intent of the parties just must be clear. Similarly, the designation of a locale can expressly state the option to sue in federal court, even if a federal courthouse is not located in the county specified in a clause, by adding a phrase like "in a federal or state court in or for [name] County, [State], including the federal district court having jurisdiction for such county." And the designation of claims can be drafted broadly, to attempt to draw in all claims that might arise between the parties, by providing: "any claim of whatever character arising under this Agreement or under any statute or common law relating in any way, directly or indirectly, to the subject matter of this Agreement or to the dealings between the parties during the term of this Agreement."

Endnotes

1. *See generally* Gary P. Naftalis & Michael S. Oberman, *Venue, Forum Selection and Transfer, in* R. Haig, Business and Commercial Litigation in Federal Courts, Ch. 3 (2d ed. 2005).
2. 407 U.S. 1 (1972).
3. 407 U.S. at 15.
4. *Id.* This article focuses on federal court decisions, but the practice points are applicable to actions brought in New York State courts. *See generally* T. Barry Kingham, *Enforcement of Forum Selection and Arbitration Clauses, in* R. Haig, Commercial Litigation in New York State Courts, Ch. 11 (2d. ed. 2005).
5. *See Phillips v. Audio Active Ltd.*, 494 F.3d 378, 386–87 (2d Cir. 2007).
6. *Id.* at 383 (emphasis in original).
7. *Id.* at 386.
8. *Id.* (emphasis added).
9. *See Falconwood Fin. Corp. v. Griffin*, 838 F. Supp. 836, 839 (S.D.N.Y.1993) ("[T]he forum selection clause guarantees that this action shall not be dismissed for improper venue.").
10. *See Phillips*, 494 F.3d at 393. *See also Aguas Lenders Recovery Group LLC v. Suez, S.A.*, 2009 WL 3403172, at *3 (2d Cir. Oct. 23, 2009) (observing that the combination of a permissive forum selection clause and a waiver of any claims of *forum non conveniens* "amounts to a mandatory forum selection clause at least where the plaintiff chooses the designated forum").
11. *See Yakin v. Tyler Hill Corp.*, 566 F.3d 72, 76-77 (2d Cir. 2009) (affirming remand of an action based on mandatory forum selection clause); *Rainforest Café, Inc. v. EklecCo., L.L.C.*, 340 F.3d 544, 545 (8th Cir. 2003) (affirming dismissal of an action based on forum selection clause specifying that any action "shall be brought in the New York Supreme Court, Onondaga County").
12. 487 U.S. 22 (1988).
13. *Id.* at 31.
14. *Id.* at 29.
15. *Id.* at 30.
16. *See Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 727 n.5 (8th Cir. 2001) (holding that "a forum selection clause may be viewed as a waiver of a defendant's right to object to venue").
17. *See Weiss v. Columbia Pictures Television, Inc.*, 801 F. Supp. 1276, 1278 (S.D.N.Y. 1992) ("[O]nce a mandatory choice of forum clause is deemed valid, the burden shifts to the plaintiff to demonstrate exceptional facts explaining why he should be relieved from his contractual duty.").
18. *See Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (holding that "[questions] of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature").
19. *See, e.g., Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983) ("We agree with those courts which have held that where the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability should not prevent enforcement of such a bargain.").
20. *See, e.g., Falconwood Fin. Corp.*, 838 F. Supp. at 838 n.1 (treating as mandatory the following clause: "The parties hereby agree that

the exclusive venue for suit with respect to this Agreement shall be the courts of the State of New York or the federal courts of the Southern District of New York . . ."); *ASM Communications Inc. v. Allen*, 656 F. Supp. 838, 839 (S.D.N.Y.1987) (finding that the "word 'shall' signifies a command. The word 'may' is permissive.").

21. Naftalis & Oberman, *supra* note 1, at §§ 3:56–3:57 (forms of mandatory and permissive clauses).
22. 566 F.3d 72, 74 (2d. Cir. 2009).
23. *Id.* at 76.
24. *Id.*
25. *Id. See also Eklecco Newco, LLC v. Gloria Jean's Gourmet Coffees Corp.*, No. 5:08-CV-00861 (NPM / GHL), 2009 WL 2185405, at *3 (N.D.N.Y. July 17, 2009) (denying remand motion where forum selection clause specified, in part, that '"any dispute . . . shall be brought in . . . Syracuse, New York," and the action had been removed to a federal courthouse located in Syracuse (citation omitted)).
26. 566 F.3d at 76.
27. *Id.* at 76–77.
28. 553 F.3d 397 (5th Cir. 2008).
29. *Id.* at 398 (emphasis omitted).
30. *Id.* at 400. The appeal from the denial of the motion to dismiss was brought on certification of the district court's ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Id.* at 398.
31. *Id.* at 400 (emphasis in original).
32. *Id.* at 401. The Fifth Circuit declined to follow the Tenth Circuit's opinion in *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318 (10th Cir. 1997), which held that a clause specifying that "venue shall lie in the County of El Paso" allowed for venue only in the state court located in El Paso and excluded a federal court located in El Paso because "[f]or federal court purposes, venue is not stated in terms of 'counties'" but "in terms of 'judicial districts.'" *Alliance Health Group, LLC*, 553 F.3d at 321. The Fifth Circuit observed that federal districts and divisions were defined within 28 U.S.C. § 104(b)(4) "by specific reference to the counties they encompass" and that "Mississippi state courts are not simply defined by County." 553 F.3d at 401.
33. *Id.* at 401–02.
34. *Id.* at 402.
35. 494 F.3d 378 (2d Cir. 2007).
36. *Id.* at 382.
37. 17 U.S.C. §§ 101 *et seq.*
38. 494 F.3d at 389 (quoting Webster's Third New International Dictionary 117 (1981)).
39. *Id.* (declining to follow *Omron Healthcare, Inc. v. Maclaren Exps. Ltd.*, 28 F.3d 600 (7th Cir. 1994), and stating that the construction of a forum selection is not governed by decisions construing arbitration clauses under the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*).
40. *Phillips*, 494 F.3d at 389.
41. *Id.* at 391.
42. 572 F.3d 86, 91 (2d Cir. 2009).
43. *Gessler v. Sobieski Destylarnia S.A.*, No. 06cv6510 (HB), 2007 WL 1295671 (S.D.N.Y. May 3, 2007).
44. 572 F.3d at 391–92.

Michael S. Oberman is a litigation partner of Kramer Levin Naftalis & Frankel LLP and heads up the firm's ADR Practice Group. He has litigated over 35 years a wide variety of complex civil and copyright cases at the trial and appellate levels and in arbitration and has also served as both an arbitrator and a mediator. Mr. Oberman has been a member of the Executive Committee of the Commercial and Federal Litigation Section of the New York State Bar Association since the Section's formation and was the Section's Delegate to the House of Delegates from 1989-91. He served as a member of Chief Judge Kaye's Commercial Courts Task Force, which created the Commercial Division of the New York Supreme Court.

NEW YORK STATE BAR ASSOCIATION

Annual Meeting location has been *moved—*

Hilton New York
1335 Avenue of the Americas
New York City

January 25-30, 2010

NYSBA

COMMERCIAL AND FEDERAL LITIGATION SECTION ANNUAL MEETING
WEDNESDAY, JANUARY 27, 2010

Practice Warning: When Serving Papers by Mail in New York State Litigation, Always Mail Them from Within New York State

By Mark Davies

In a troubling and erroneous decision, *M Entertainment, Inc. v. Leydier*,[1] the Appellate Division, First Department, held that, where a notice of appeal is served by mail and the notice is dropped in a mailbox outside New York State, the service is jurisdictionally defective. The notice of appeal has not been served at all, and the right to appeal is thus lost. Although as this issue of the *Newsletter* was going to press the Court of Appeals reversed the Appellate Division, it did so on a narrow ground affecting only appeals, thus leaving the underlying Appellate Decision otherwise intact. Specifically, the Court of Appeals held that, since the notice of appeal was timely filed, CPLR 5520(a) authorized the court to determine whether to exercise its discretion to grant an extension of time to cure the omission as to service. The Court of Appeals did not decide whether mailing from outside the state rendered the service jurisdictionally defective or merely late.

"What the Appellate Division ignored (and the Court of Appeals failed to address) in its reading of the statute and the Court of Appeals precedents are the text and purpose of CPLR 2103(b)(2), the state statute governing service of interlocutory papers by mail in state court actions."

The Appellate Division based its erroneous conclusion on the language of CPLR 2103(f)(1) and on two extremely terse Court of Appeals decisions, *National Organization for Women v. Metropolitan Life Ins. Co.*[2] and *Cipriani v. Green*.[3] CPLR 2103(f)(1) defines "mailing" as

> the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service *within the state* … (emphasis added).

The *N.O.W*. case stated in its entirety:

> Motion for leave to appeal dismissed as untimely. Service was not completed within the meaning of CPLR 2103(b)(2) by the mailing in Washington, D.C. The statute provides for mailing "within the state."

Cipriani v. Green repeated *N.O.W.* word for word, except for the location of mailing:

> Motion for leave to appeal dismissed as untimely. Service was not completed within the meaning of CPLR 2103 by the mailing in Nevada. The statute provides for mailing "within the state."

The Court of Appeals noted that in both cases the notice of appeal was neither timely filed nor timely served, prohibiting the Court from invoking its discretionary authority under CPLR 5520(a). What the Appellate Division ignored (and the Court of Appeals failed to address) in its reading of the statute and the Court of Appeals precedents are the text and purpose of CPLR 2103(b)(2), the state statute governing service of interlocutory papers by mail in state court actions. CPLR 2103(b)(2) provides that service of interlocutory papers may be made upon an attorney:

> by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at that attorney's last known address; *service by mail shall be complete upon mailing*; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period … (emphasis added).

As the dissent in *Leydier* in the Appellate Division points out, mailing within the state in accordance with CPLR 2103(b)(2) creates a presumption of proper mailing to the recipient. Accordingly,

> [t]he rationale behind the presumption is that "the failure of the mails is not to be ascribed to the parties." Service is "complete" (CPLR 2103(b)(2)) even if the papers are not received in a timely fashion or not received at all. Thus, what is forfeited by a party failing to effect service in accordance with the statute is the "presumption of proper mailing to

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the addressee," requiring the party to establish actual receipt of the papers.[4]

In other words, the Appellate Division in *Leydier* should have held that mailing an interlocutory paper from outside New York State means that service is complete only when the paper is received (not when it is mailed), that the risk of non-receipt rests upon the mailer (not upon the recipient), and that a denial of receipt will require the mailer to prove that the paper was in fact received, but that merely mailing the paper from outside the state does not by itself render the service jurisdictionally defective. However, neither the Appellate Division nor the Court of Appeals in *Leydier* held that. Thus, a word to the wise: *When serving interlocutory papers by mail in New York State litigation, always mail them from within New York State.*

Endnotes

1. 62 A.D.2d 627, 880 N.Y.S.2d 40 (1st Dep't 2009), *rev'd*, __ N.Y.3d __, 2009 WL 3425316, 2009 N.Y. Slip Op. 07671.
2. 70 N.Y.2d 939, 524 N.Y.S.2d 672 (1988).
3. 96 N.Y.2d 821, 729 N.Y.S.2d 431 (2001).
4. 62 A.D.2d at 630–631, 880 N.Y.S.2d at 44 (citations omitted) (dissent).

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CPLR Amendments: 2009 Legislative Session
(Chapters 1-14, 16-493)

CPLR §	Chapter (§)	Change	Eff. Date
105(s-1)	103	Extends sunset until June 30, 2014	7/11/09
304	416(2)	See note (1)	9/1/09
312-a(d)	222	Eliminates military serial numbers from acknowledgement of receipt	7/14/09
1101(f)	56, U(17)	Extends sunset until Sept. 1, 2011	4/7/09
2103(b)(7)	416(1)	Authorizes adoption of court rule permitting service of interlocutory papers by e-mail without recipient's consent; see also note (1)	9/1/09
5205(l), (o)	24(1), 24(2)	Eliminates exemptions in CPLR 5205(l)-(n) where NYS or a municipality is the judgment creditor or where debt is for child support or maintenance	5/4/09
5222(k)	24(3)	Eliminates exemptions in CPLR 5222(h)-(j) where NYS or a municipality is the judgment creditor or where debt is for child support or maintenance	5/4/09
5222-a(a), b)(1), (b)(2), (c)(1), (c)(4)	24(4), 24(5), 24(6)	Eliminates support collection units	5/4/09
5222-a(i)	24(7)	Provides that CPLR 5222-a does not apply where NYS or a municipality is the judgment creditor or where debt is for child support or maintenance	5/4/09
5230(a)	24(8)	Exempts execution notices where NYS or a municipality is the judgment creditor or where debt is for child support or maintenance	5/4/09
5232(e)	24(9)	Adds to preservation clause restraint, removal, and execution required to enforce a child support or maintenance obligation	5/4/09
5232(h)	24(10)	Eliminates exemptions in CPLR 5232(e)-(g) where NYS or a municipality is the judgment creditor or where debt is for child support or maintenance	5/4/09
5241(b)(2)(i)	215(11)	Corrects cross-references to Fam. Ct. Act and Dom. Rel. Law	10/9/09
5241(h)	215(12)	Modifies priority of deductions	10/9/09
8007	450(1)	Adds Richmond County to exclusions from prescribed publishing rates	9/16/09
8012(b)(4)	381	Adds issuance of property executions	8/5/08

Notes: (1) 2009 NY Laws Ch. 416, § 2, effective Sept. 1, 2009, authorizes the Chief Administrator to promulgate rules permitting the use of fax and e-mail in Supreme Court, the New York City Civil Court, surrogate's courts, and the Court of Claims for commencement of actions and proceedings and for the filing and service of interlocutory papers. The Chief Administrator may also eliminate the requirement of parties' consent to such filing and service in certain types of cases in Supreme Court in certain counties, although this authorization expires Sept. 1, 2012.

2009 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(N.Y. Orders 1-20 of 2009)

22 N.Y.C.R.R. §	Court	Subject (Change)
202.12(c)(3)	Sup.	Adds establishment of method and scope of electronic discovery to matters to be considered at preliminary conference
202.12(l)	Sup.	Deletes proviso that requests for CPLR 3407 preliminary conferences need not be accompanied by § 202.12(a) good faith affirmations
202.16-a	Sup.	Adds provisions on automatic orders in matrimonial actions
202.70(a)	Sup.	Increases monetary threshold of Commercial Division in New York County to $150,000 and in Nassau County to $100,000
Parts 691, 700	2d Dep't	Changes cross-references from Code of Professional Responsibility to Rules of Professional Conduct
700.4	2d Dep't	Gender-neutralizes the rule on Obligations of Attorneys
Part 1200	All	Replaces Code of Professional Responsibility with Rules of Professional Conduct

Note that the court rules published on the Office of Court Administration's Web site include up-to-date amendments to those rules: http://www.nycourts.gov/rules/trialcourts/index.shtml.

Save the Dates

January 27, 2010
Commercial and Federal Litigation Section
Annual Meeting
Hilton New York • New York City

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May 21–23, 2010
Commercial and Federal Litigation Section
Spring Meeting
The Sagamore Resort • Lake George , NY

Notes of the Section's Executive Committee Meetings

June 9, 2009

Guest speaker the Hon. Stephen G. Crane, JAMS, and former New York County Commercial Division Justice and Appellate Division, Second Department, Justice, spoke to the Section about the history of the Commercial Division.

The Committee on the Commercial Division is working on a report compiling the rules of the Commercial Division judges. The Executive Committee discussed reports by the Section's Committee on the CPLR on proposed revisions to CPLR 3211(i) and 7503 and approved the proposed revisions. The Executive Committee also discussed plans for the 2010 Annual and Spring Meetings, upcoming CLE programs, the Caren Aronowitz Unity in Diversity Program, and a Report of the NYSBA's Task Force on the State of Our Courthouses.

July 14, 2009

Guest speaker the Hon. Ann Pfau, Commercial Division Judge, Kings County, and Chief Administrative Judge of the State of New York, spoke about important issues facing the courts, including budget, operational needs of the trial courts, streamlining operations, and restructuring the civil and criminal judicial systems to improve the efficient use of resources.

The Committee on Appellate Practice reported on initiatives relating to pro bono appeals in state courts, the encouragement of e-filing in the Appellate Division, and the growing use of non-argument calendars by courts. The Committee on the Commercial Division spoke on proposed reports focusing on criteria for identifying new Commercial Division judges and providing feedback on the Uniform Rules. The Committee on Evidence spoke on an upcoming report on a proposed evidence code for New York. The Committee on Immigration Litigation discussed a proposed report on the state of immigration and non-immigration appeals in the Second Circuit.

Sept. 15, 2009

Guest speaker the Hon. Reena Raggi, United States Circuit Judge, Court of Appeals for the Second Circuit, spoke on the Standing Committee on Federal Rules, in particular its focus on privacy concerns raised by various acts and rules, such as the E-Government Act. The Executive Committee discussed the Annual and Spring meetings for 2010, a hearing on the Southern District's policy on the use of cell phones, PDAs, and laptops in its courthouses, and CLE programs offered by the Committee on State Court Counsel.

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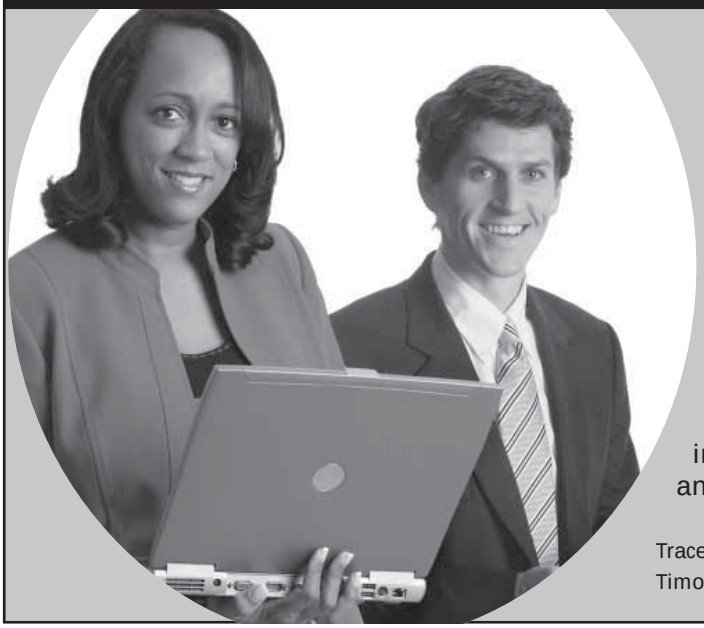

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