2023 | VOL. 28 | NO. 2

NYSBA

NYLitigator

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

New York's New Approach to Non-Compete Agreements

Fake Cases, Real Consequences: Misuse of ChatGPT Leads to Sanctions

N.Y. Court of Appeals Sharply Curtails Application of the "Economic Loss Rule" in Commercial Litigation

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Publication Date: October 2023

ISSN 1085-4193 ISSN 1933-8589 (online)
Cite as *NYLitigator*

Commercial and Federal Litigation Section

Section Officers

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Message From the Section Chair

It is a great honor for me to write this message as the 35th chair of the Commercial and Federal Litigation Section (ComFed). I want to thank our immediate past chair, Ignatius A. Grande, for his dedication and diligence during his tenure. It was a great year as we returned, cautiously at first, from the virtual world of Zoom. Ignatius worked hard with ComFed's many committees to plan and sponsor excellent programming that members were eager to attend in-person. And thank you to our membership for embracing, ultimately exuberantly, physical attendance at so many ComFed events. While the novelty of face-to-face communication may have waned as it became more common to be together during 2023, my appreciation for being present with our section members and leaders has only increased. I hope the same is true for all of you.

As for the future, we have lots of work to do as a section and much to be excited about! I am writing this note just before the annual (in-person) gathering of the former ComFed chairs. I am not certain when the tradition began, but for many years now, the current chair and the other section officers meet once a year with ComFed's former chairs to share a meal and discuss what lies ahead for the section. As you can imagine, the wisdom, experience and creativity brought to bear by our former chairs is formidable. They are engaged and strategic—a winning combination. As a result, I always leave the event with a sense of both optimism and urgency. ComFed is a vibrant and productive section with tremendous intellectual resources and members who generously share their enthusiasm, expertise, and energy. But we also must be vigilant and responsive to the rapidly changing litigation market in New York and beyond. Among other challenges, our clients want us to do more with less; diversity is no longer aspirational, it is a prerogative, and generative AI poses a potential existential threat as well as one of the greatest opportunities of our lives. Consequently, as a section we must work together to inspire innovation within our profession, embrace change, and ensure that litigators from every background have seats at our table.

As I consider some of the recent and upcoming ComFed programming, it is evident that our membership already is heeding this call to action. For example, this fall, ComFed hosted the programs "Why Arbitration Is Ideal for Resolving Cannabis Industry Disputes" and "Litigation Finance: A Topical Update." These CLEs—each in their own way—delivered cutting-edge content on developing areas of commercial litigation from leading practitioners. On November 16, ComFed will host its annual "Taking the Lead" CLE program, followed by the Scheindlin Award and the Kaye Scholarship Ceremony. The CLE will take place in the ceremonial courtroom at the Daniel Patrick Moynihan Courthouse for the U.S. District Court for the Southern District of New York and will showcase the talents of experienced female commercial litigators and their junior female colleagues as they put on a mock trial and receive feedback from members of the judiciary. What a wonderful way to honor and learn from the strong women who precede us and invigorate the next generation of female litigators to go out and set the world ablaze with their skills. On January 17, we will again return to the New York Hilton Midtown for our Annual Meeting. Program chair and ComFed vice chair, Helene R. Hechtkopf is planning two exciting CLE panels for the Annual Meeting including one on the basics (and not-so-basics) of bankruptcy law that every commercial litigator should know. Of course, we will have ample time to network and enjoy each other's company during our reception and gala lunch following the morning CLEs.

Anne Sekel

I hope that when you consider the work that ComFed has done over the past year and will continue to do this coming year, you also feel a sense of optimism and urgency. I encourage all members to participate in planning ComFed's future. I firmly believe that, as a section, we will thrive when we listen to all our members and are responsive to their challenges and needs. So, please feel free to reach out to me and tell me about the programming you would like to see, the events you most want to attend, and how ComFed can partner with you to bring true value to your practice.

Anne Sekel

New York's New Approach to Non-Compete Agreements

By Paul F. Downs and Vincent Nguyen

Already passed by both houses of the New York Legislature, New York's proposed law banning non-competes can potentially disrupt years of labor law practice in New York. If signed by the governor, the new law would amend the New York Labor Code to prohibit non-compete covenants in employment agreements, with a handful of exceptions. The law would also provide covered individuals—i.e., individuals performing work or services for an organization who are in a position of economic dependence on that organization—with the right to bring a civil action against their employer.

This seismic shift didn't occur overnight. Instead, it's riding on a growing wave of distaste for non-competes. Because the change will impact nearly all employers and employees in the state, it's worth unpacking (i) how the pending law came to be, (ii) how other states and the Federal Trade Commission (FTC) have restricted non-competes, and (iii) how the new law will operate if signed.

I. Background of Assembly Bill A.1278-B and Senate Bill S.3100-A

A 2019 survey by the Economic Policy Institute and Cornell University estimated that between 27.8% and 46.5% of private-sector workers are subject to non-competes in the United States, and non-compete agreements cover 18.1% of all workers.[1] In New York specifically, 44.2% of workplaces subject their employees to non-compete agreements.[2]

Not only are non-compete agreements widely used, but the opponents' chorus has also grown louder recently. Many argue—whether rightly or wrongly—that non-compete agreements negatively affect New York State's labor market and overall economy because they frustrate, if not outright prohibit, employee mobility.[3] They further contend that non-compete clauses limit the pool of qualified job applicants, increasing the burden on employers to hire employees, even if the employer offers better benefits and/or wages. They can also have a detrimental impact on consumers in certain industries, such as the medical field. For example, non-compete agreements are commonly used in the medical field, where such provisions are believed to disrupt patient care.

In response, on January 13, 2023, Assemblywoman Latoya Joyner, lead sponsor of the bill in the New York State Assembly, introduced Bill A.1278-B.[4] New York State Senator Sean Ryan introduced S.3100-A on April 13, 2023, in the New York State Senate.[5] The bipartisan bill passed the State Senate on June 7 and the Assembly on June 20, 2023, respectively. After the Assembly passed the bill on June 20, it was referred to the Senate, which did not deliver the bill to Governor Hochul for signature. On June 23, 2023, the Assembly Speaker issued a press release indicating it would be headed to the governor's desk "for signature."[6] When it heads to the governor's office is anyone's guess. The next legislative session will not begin until 2023.

II. Other Jurisdictions

New York's proposed law was not created in a vacuum. In the 19th Century, North Dakota (1865)[7] and Oklahoma (1890)[8] banned non-compete agreements. They were outliers for over a century. But there has been a recent shift across the United States to restrict the use of non-compete agreements. In fact, on January 5, 2023, the FTC proposed a new rule that would effectively ban the use of non-compete agreements nationwide.[9] The federal government's proposed restrictions come after some states have initiated similar legislative steps to propose tightening restrictions on the use of non-compete agreements. For instance, in 2022, Colorado[10] and Illinois[11] passed legislation limiting non-compete agreements for higher-earning employees. Other states—such as California, Massachusetts, and Washington—have limited non-compete's use for a few years. Given that New York has borrowed from its predecessors, it's worth taking a closer look at some of the nuances in those states.

California

New York's new law most closely resembles California's, which completely prohibits the use of non-competes in employment contracts.[12] In general, California prohibits any contract that restrains an employee from engaging in a lawful profession, trade, or business. Moreover, California law prohibits out-of-state employers who operate in California from enforcing non-compete agreements.

Employers can still use narrow contractual restraints to prevent a departing employee from using the employer's confidential information. The restrictive covenants, however, cannot restrict an employee's ability to engage in lawful employment within a profession.

Courts in California have interpreted the law governing non-compete agreements very broadly based on the statute's

public policy against the restraint of business and the employee's right to pursue lawful employment elsewhere. In California, non-compete agreements are void, regardless of whether they are "reasonable."[13]

Massachusetts

Massachusetts adopted a more tailored approach. In 2018, Massachusetts enacted the Massachusetts Non-Competition Act, governing the enforceability of non-compete agreements entered on or after October 1, 2018.[14] The Act prohibits employers from enforcing non-compete agreements against certain employees, including:

(a) employees who are classified as non-exempt under the Fair Labor Standards Act (employees who are covered by overtime rules and other provisions of federal and state wage-and-hour laws);

(b) undergraduate or graduate students participating in an internship or other short-term employment;

(c) employees terminated without cause or laid off; or

(d) employees under the age of 18.

Massachusetts also includes other requirements for certain agreements to constitute valid non-compete agreements. For example, the Massachusetts Non-Competition Act requires agreements to be: (a) in writing; (b) signed by both the employer and employee; and (c) supported by either a "garden leave" clause or some other mutually agreed-upon consideration.

Additionally, Massachusetts requires employers that seek to enter a new hire into a non-compete to provide the agreement: (1) at or before the time of a formal offer of employment; or (2) ten business days before the commencement of employment. Massachusetts also prohibits employers from using continued employment as consideration when entering a non-compete after a worker has commenced employment, and forces employers in Massachusetts to provide employees with consideration distinct from continued employment if the employer wants the current employee to enter into a non-compete agreement. For example, the employer would be required to provide additional pay or benefits as a consideration.

Finally, Massachusetts imposes certain time restrictions on the use of non-competes. For example, the Massachusetts Non-Competition Act establishes that any valid non-compete agreement is only in effect for one year after an employee's employment ends unless the employee has breached their fiduciary duty to the employer or the employee has unlawfully taken the employer's property. In either event, the non-compete agreement could remain effective for a maximum of two years from the final date of employment.

Washington

Last summer, the State of Washington adopted a law limiting non-compete restrictions. The Washington law primarily focuses on certain income thresholds, prohibiting non-compete agreements for employees and independent contractors earning below the statutory threshold of $100,000.[15] In other words, the law makes noncompetition covenants *per se* "void and unenforceable" against employees earning less than $100,000 annually from an employer seeking to enforce the non-compete provision. The law also creates an array of requirements for noncompetition agreements, including an 18-month presumptive restricted period, advance notice to prospective employees, and potential penalties for noncompliance, among other obligations.

The FTC's Proposed New Rule

The watershed moment for limiting non-competes came earlier this year. On January 5, 2023, the FTC proposed a new rule to effectively ban the use of non-compete agreements nationwide.[16] The FTC's proposed rule was issued in response to the Biden Administration's executive order directing the FTC to issue a rule to limit the enforceability of non-compete agreements.[17]

The 218-page notice describes the FTC's negative position on non-compete agreements. The notice emphasizes the FTC's position that non-compete agreements lack value before detailing a new five-part regulation that would effectively eliminate the use of non-competes for all workers, including contractors. The proposed rule broadly defines a non-compete clause to include *any* contractual term construed as a de facto non-compete clause.

The proposed rule would also create two requirements for employers using non-competes with their employees. First, employers would need to rescind all existing non-compete restrictions. Second, employers would need to provide individualized notices to their current employees—and restricted former employees—informing them that any non-compete agreement would be ineffective after 45 days.

III. New York's New Law

With these approaches in mind, New York aligned itself with California and the FTC rather than adopt the more nuanced approaches of Massachusetts and Washington. It certainly succeeded in that regard.

New York's proposed law would prevent employers from seeking, requiring, demanding, or accepting a non-compete agreement from any covered individual. A covered individual is broadly defined as anyone who "performs work or services for another person" such that they are economically dependent on or "under an obligation to perform duties for" that other person.[18] Non-compete agreements are defined as any agreement or contractual clause between an employer and a "covered individual" that either "prohibits or restricts [them] from obtaining employment" following their employment with an employer.[19]

Among its provisions is a private right of action for employees, allowing qualifying employees to sue if the employee believes that he or she was subjected to an unlawful non-compete agreement or clause.[20] Such claims could be filed within two years of the last event enumerated in the statute, specifically, (i) when the prohibited non-compete was signed, (ii) when an employee learned of the agreement's existence, (iii) when the employment relationship is terminated, or (iv) when a company tries to enforce a non-compete provision. Violations of the proposed law would create penalties of up to $10,000 in damages.

Exceptions

The proposed law includes three exceptions.

First, employers would be permitted to enter into agreements to protect their trade secrets or their confidential/proprietary information from disclosure. This approach intuitively makes sense; trade secret misappropriation is separately protected under New York and federal law.[21]

Second, employers could also execute contracts with an employee for a "fixed term of service." While the bill does not define a "fixed term of service," it is understood that this exception would cover "garden leave" agreements (i.e., agreements for an employee's transition period after a notice of termination is given).[22]

Third, employers could enter into agreements to prevent the solicitation of clients that developed a relationship with the departing employee during the employment as long as competition is not restricted.[23]

Timing

The bill would take effect 30 days after it is signed and would not apply retroactively. The bill provides that "[t]his Act . . . shall be applicable to contracts entered into or modified on or after the effective date," which the bill sets as 30 days after it becomes law.[24] As a result, the bill would apply to non-compete agreements "entered into or modified" after the effective date.

Consequences

This bill represents a watershed moment for New York labor law. If enacted, the bill would eliminate non-competes while providing employees a private right of action to enforce the new law.

Still, questions remain, namely:

1. Why New York's proposed law does not provide an exception when a person is involved in the sale of a business? By contrast, California's existing law and the FTC's proposed rule explicitly recognize an exception to non-compete agreement prohibitions in connection with the sale of a business.

2. Are employee non-solicitation agreements covered? The proposed law does not expressly mention employee non-solicitation agreements. Whether those agreements are still enforceable or whether they "prohibit or restrict" employees from obtaining new employment will be up for the courts to decide.

3. Because enforceable non-compete agreements may be valid in a company's place of business outside of New York, what is the effect on out-of-state employers who have employees in New York? How is this issue compounded in the age of hybrid work, when employees may have relocated to different parts of New York State and/or other states?

4. Should New York treat higher-earning employees and executives differently, as is done in the State of Washington?

5. Most importantly, will Governor Hochul sign the law?

If the bill had passed during the regular legislative session and then delivered to the governor's desk, Governor Hochul would have had 10 days to sign the bill into law, veto the bill, or do nothing (in which case the bill becomes law without the governor's signature). This bill, however, was passed during a special legislative session after the regular legislative

session had ended—and, therefore, subject to a different process. The governor has 30 days to act after delivering the bill to her. She can sign it into law, veto it, or do nothing (i.e., a pocket veto). But the bill has not yet been delivered. As a third option, the governor could propose any number of chapter amendments to the proposed law: a three-way agreement between the governor, the Assembly, and the Senate to make additional 11th-hour changes to the bill. Chapter amendments usually result in the law being passed during the following legislative session.

As stated above, the bill has not been sent to the governor's office. For more complicated and/or controversial bills, the governor and legislature generally coordinate when the bill will be transmitted to the governor's office. The deadline for the bill to be sent to the governor's office is December 31, 2023.

Based on the votes cast during passage, it is unclear whether the New York Legislature has enough votes to override a veto if Governor Hochul fails to sign the bill after receiving it. Although Governor Hochul promised to propose legislation in 2022 to eliminate non-competes for workers earning below New York's median wage and to ban "no-poach" agreements under state antitrust law, the current bill exceeds the restrictions originally proposed by Governor Hochul.[25] Statements in January 2022 were the last public statements issued by the governor's office on the issue of non-competes.[26]

Paul F. Downs, counsel at Nixon Peabody LLP, is an experienced trial lawyer who represents entities and individuals in complex disputes involving commercial, trade secret, real estate, employment, and contractual issues. Paul has particular experience representing clients in the renewable energy, banking and finance, life sciences (biotech and pharmaceutical), real estate, and technology industries.

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Endnotes

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5. Senate Bill S. 3100-A.
6. Press Release, New York Assembly, Assembly Passes Legislation Banning Non-Compete Agreements in New York (June 23, 2023).
7. North Dakota Century Code § 9-08-06.
8. Okla. Stat. tit. 15, § 219(B).
9. 88 FR 3482-01, 2023 WL 255956 (F.R.).
10. HB 22-1317.
11. 820 ILCS 90/1.
12. Cal. Bus. & Prof. Code §16600 (prohibiting the use of non-competes in employment contracts).
13. Press Release, California Attorney General, Attorney General Bonta Reminds Employers and Workers That Noncompete Agreements Are Not Enforceable Under California Law (Mar. 15, 2022); *accord Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th 1130, 1151 (Cal. 2020) ("our case law has generally invalidated agreements not to compete upon the termination of employment . . . without inquiring into their reasonableness[.]").
14. Mass. Gen. Laws ch. 149, §24L.
15. RCW 49.62.
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17. Executive Order on "Promoting Competition in the American Economy." Exec. Order No. 14036, 86 FR 36987, 2021 WL 2942330 (Pres.).
18. Senate Bill S. 3100-A, 191-d § 1(1)(b).
19. Senate Bill S. 3100-A, 191-d § 1(1)(a).
20. Senate Bill S. 3100-A, 191-d § 1(4)(a).
21. Senate Bill S. 3100-A, 191-d § 1(5).
22. *Id.*
23. *Id.*
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25. 2022 State of the State, Governor Kathy Hochul, "A New Era for New York" (Jan. 2022).
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Fake Cases, Real Consequences: Misuse of ChatGPT Leads to Sanctions

By Christopher F. Lyon

While the legal field is often slow to adopt new technologies (less than 30% of legal personnel consider themselves "early adopters" of technology),[1] early adopters may find themselves a step ahead of their competitors. Attorneys who first adapted to using online legal research when it arose decades ago, for example, often had distinct advantages over their colleagues.[2]

But with the early adoption of new technologies comes associated risks, such as the failure to understand the capabilities and limitations of that new technology or assigning an unwarranted or unearned level of trust to it. A healthy bit of skepticism will go a long way.

'Trust, but verify.'

– Ronald Reagan, December 1987

Understanding the technology that you are using in your legal practice is not just beneficial, it's required.[3] Failing to understand the technology has consequences, which can be quite severe. My father, a retired Air Force pilot, always told me to "control the machine." Granted, he was talking about driving a car or flying a plane, but he'd equally apply it to any machine. Placing unwarranted or unearned trust in any technology can, and eventually will, land you in hot water. That's exactly what a couple of attorneys and their law firm found out when they made national headlines for submitting fake case opinions to the federal court in Manhattan – cases that were generated by a relatively new generative artificial intelligence called ChatGPT.

On June 22, 2023, Judge P. Kevin Castel of the United States District Court for the Southern District of New York[4] in *Mata v. Avianca, Inc.*, imposed a $5,000 sanction upon Peter LoDuca, Steven A. Schwartz, and the law firm of Levidow, Levidow & Oberman P.C. Their offense? At the heart of it, misusing and mistrusting ChatGPT to serve as a reliable legal research tool, even after the existence of the cases were questioned by the court and opposing counsel.[5] The case made national headlines as it was the first known instance of attorneys accused of misusing ChatGPT, which has been grasping the nation's attention since its public release on November 30, 2022. Though, at the outset, it is important to understand that they were not sanctioned merely for using ChatGPT, but for using it without adequate oversight.

A similar occurrence was noted in a July 19, 2023 appellate decision by a Texas appellate court.[6] The decision observed that certain cases cited in the appellant's brief did not exist and speculated it was written by artificial intelligence. Ultimately, the Texas appellate court declined to report the attorney to the State Bar of Texas because it lacked "information regarding why the briefing is illogical, and because we have addressed the issue raised on appeal."[7]

Other than these two cases, there appear to be no other published cases placing attorneys in the crosshairs for their use of ChatGPT. ChatGPT is new enough that a LexisNexis search performed on August 1, 2023 returned a total of seven cases mentioning "ChatGPT" or "Chat GPT" in any context. The first mention of "ChatGPT" in published case law was on January 26, 2023, in a decision that criticized a pleading by likening it to something generated by an artificial intelligence tool.[8] One case has a mention of ChatGPT simply because of a direct quote from a pleading.[9] Another mention was in dicta contained in a footnote suggesting regulation was needed for artificial intelligence.[10] And yet another simply noted that a form developed by ChatGPT had been signed and submitted by individuals.[11] The final result is embedded in an order – issued by another court the same day as the Avianca decision – granting *pro hac* status to counsel and cautioning that "[u]se of artificial intelligence automated drafting programs, such as ChatGPT, is prohibited."[12]

Introduction to ChatGPT

"Chatbots" have become an irritating staple, most commonly recognized on websites with a feature to make automated queries that will transfer a user to a representative once the chatbot's capabilities have been exceeded. A "chatbot" is an automated system that takes human input and generates a response, intended to simulate a conversation with human users.

On November 30, 2022, OpenAI, a company founded in December 2015, released an early demo of a chatbot called "ChatGPT" to the public.[13] The chatbot near-instantaneously became a viral hit with users who showed off its capabilities through social media channels and widely publicized the previously unrecognized leap in advancements of generative artificial intelligence. Web and application developers used it to write computer code, medical workers compared a diagnosis rendered by ChatGPT to their own diagnosis, and content creators generated excerpts of text mimicking the style of their favorite authors. The possibilities seemed endless.

When asked "In fifty words or less, what is the most unique feature of ChatGPT," ChatGPT responded:

> ChatGPT's most unique feature is its ability to engage in natural and contextually relevant conversations, thanks to its large-scale training on diverse language data and utilization of the GPT architecture for language understanding and generation.[14]

Notably, asking ChatGPT the exact same question immediately afterwards resulted in a different response – and this one is, frankly, perfect for this article:

> ChatGPT's most unique feature is its capability for "creative" text generation, which allows it to produce original and imaginative responses in addition to factual answers, making it more engaging and versatile in various applications.[15]

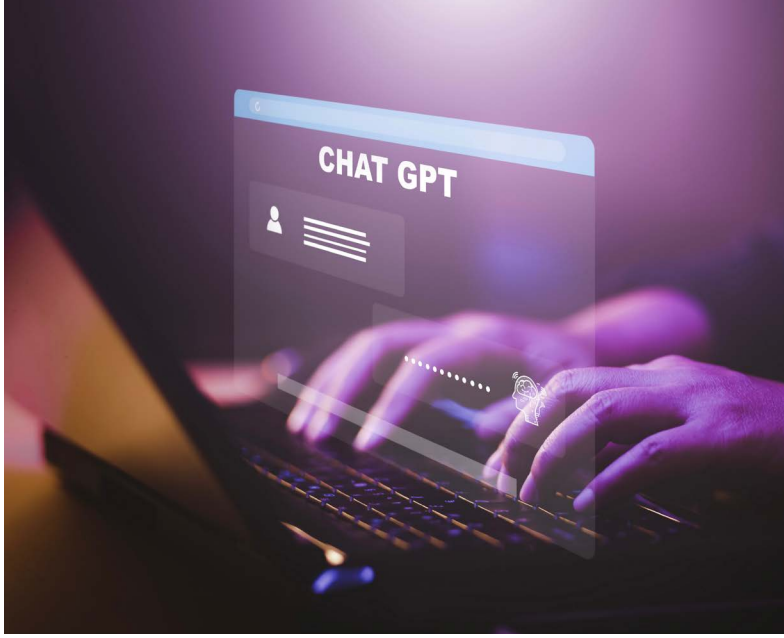
Granted, the query posed to ChatGPT calls for an opinion and not an objective or quantifiable fact. Nevertheless, there are two clear takeaways from this rather simple prodding: first, ChatGPT can give different responses to the same queries – not just in words but also in substance – and second, ChatGPT gives "imaginative responses" in addition to factual responses. ChatGPT highlights its own limitations whenever someone uses it – among them is the risk that the information provided is incorrect, that the instructions or content may be harmful or biased, and that ChatGPT has no access to information after 2021. A further "fine print" warning on the page states: "ChatGPT may produce inaccurate information about people, places, or facts."

ChatGPT in the Legal Field

In the realm of professionals, artificial intelligence is performing well enough to pass professional licensing exams. When challenged with the Uniform Bar Exam, OpenAI's GPT-4 language model (released March 14, 2023) performed better than 90% of test takers.[16] Notably, the free version of ChatGPT does not operate on the GPT-4 model and itself scored only better than 10% of test takers on the Uniform Bar Exam.

Moreover, ChatGPT is not, itself, a legal research tool. When given a legal database, an AI tool running on GPT-4 can be an excellent research tool, but ChatGPT does not have access to databases such as those compiled by LexisNexis and Westlaw. ChatGPT is merely a chatbot.

Since ChatGPT is a creative and imaginative chatbot, if you asked for a legal argument and even case law, it would provide you with a response to your request. However, since ChatGPT is not connected to any legal database and its own



database has not been updated since September 2021, not only would ChatGPT not be aware of any developments in the law after September 2021, but it also would not have access to the plethora of legal authorities you would find on trusted platforms.

Here's where it gets interesting and problematic. ChatGPT knows what a legal citation looks like and knows how they are used. So, because it can produce imaginative responses, ChatGPT can and will generate legal citations that look real but, because there is no connection to the databases, are entirely fabricated. These are referred to by OpenAI as "hallucinations." If you lack the understanding of ChatGPT's ability to hallucinate, you may be caught off guard.

Mata v. Avianca, Inc.

Mata v. Avianca, Inc. ("Avianca") started as a run-of-the mill, state-court personal injury case by an airline passenger who was struck in the knee by a metal serving cart on an international flight operated by Avianca, a Latin American carrier that had recently filed for bankruptcy.[17] Upon being served with the complaint, Avianca removed the case to federal court[18] and promptly moved to dismiss the action as time-barred under the Montreal Convention's two-year statute of limitations.[19]

Avianca's motion to dismiss implicated a complicated array of federal jurisprudence involving the automatic stay provisions of the Bankruptcy Code and international treaties. This posed a challenge to plaintiff's counsel, who had a limited subscription to a legal research service that precluded access to relevant federal precedent needed to oppose the motion to dismiss.[20] Although he could have paid to expand the subscription, the attorney turned to ChatGPT, the viral new phenomenon that he erroneously believed was a search engine, to conduct the necessary research.[21]

On March 1, 2023, plaintiff opposed the motion, arguing in an attorney affirmation that the statute of limitations was tolled by Avianca's bankruptcy filing. In support of that argument, plaintiff's counsel pointed to an Eleventh Circuit decision called *Varghese v. China Southern Airlines Co., Ltd.*, 925 F.3d 1339 (11th Cir. 2019), a decision that, on its face, explicitly supported the proposition that "the automatic stay provisions of the Bankruptcy Code may toll the statute of limitations under . . . the Montreal Convention."[22] The quoted excerpt from *Varghese* included a variety of internal citations that purported to support the same proposition.

As it turned out, the *Varghese* did not exist – it was fabricated out of whole cloth by ChatGPT. Similarly, other references contained in the affirmation included numerous citations that were either fake,[23] could not be verified,[24] or were simply irrelevant.[25]

On reply, Avianca flagged each of these issues, and thoroughly recounted the nonexistence of cases and lack of support for the plaintiff's arguments. Avianca also noted that one of the nonexistent cases offered by plaintiff's counsel had the same name as a case from the Second Circuit.

Plaintiff's counsel failed take any action to rectify these errors after being served with Avianca's reply.

After nearly a month, Judge Castel ordered plaintiff's counsel to file an affidavit annexing copies of eight cases flagged by Avianca's counsel. A subsequent order required the submission of an additional questionable case.

Plaintiff's counsel, seemingly not realizing that he should use an alternate source, responded to the order by attaching copies of eight of the purported cases. In the accompanying affidavit, counsel also represented that: (i) he was unable to locate the case of "*Zicherman v. Korean Air Lines Co., Ltd.*," "which was cited by the Court in *Varghese*"; (ii) that six of the opinions that were submitted "may not be inclusive of the entire opinions but only what is made available by online database"; (iii) that another opinion annexed to the affidavit was "an unpublished opinion."[26] Notably, the affidavit was notarized by another attorney at plaintiff's counsel's law firm – Steven Schwartz.

When faced with questions concerning the authenticity of the legal authorities, instead of verifying through another source or admitting that they may be inauthentic, plaintiff's counsel submitted "opinions" for each of these cases that were, in fact, created entirely by ChatGPT. Each of the opinions (partial or whole) that were produced by ChatGPT included a number of case citations, many of which were also fabricated.

The First Order To Show Cause

On May 4, 2023, the proverbial shoe dropped. Judge Castel ordered plaintiff's counsel to show cause why he should not be sanctioned for citing non-existent cases and submitting "bogus judicial decisions with bogus quotes and bogus internal citations."[27] Judge Castel outlined the ways in which "*Varghese*" was clearly fabricated, including having the clerk of the U.S. Court of Appeals for the Eleventh Circuit confirm that no such case with any party having the name "Varghese" had been filed since 2010, that the docket number cited actually belongs to a case captioned *George Cornea v. U.S. Attorney General, et al.*, and how the internal citations from "Varghese" contain citations to four cases, which in turn do not exist.[28] Each of the other cases at issue contained similar deficiencies.[29] A hearing was set for June 8, 2023.

Attorney LoDuca's affidavit in response to the order to show cause highlighted a serious problem. Attorney LoDuca disclosed that the matter was primarily being handled by a different attorney at his firm (Steven Schwartz) who was not licensed to practice in the Southern District of New York. LoDuca further attested that he did not personally conduct any of the legal research that was included in opposition brief and that he did not know how that research was conducted. All legal work was prepared by the other attorney; attorney LoDuca was simply responsible for filing any documents.[30]

In a supplemental affidavit in response to the order to show cause, Attorney Steven Schwartz (the attorney that handled the substantive legal work) disclosed that he used ChatGPT to conduct legal research. But attorney Schwartz also defended his reliance on ChatGPT, explaining that he had never used ChatGPT for legal research prior to this occurrence and was therefore "unaware of the possibility that its content could be false." He further asserted that "the citations and opinions in question were provided by Chat GPT which also provided its legal source and ***assured the reliability of its content***."[31] As proof of these so-called assurances, attorney Schwartz submitted his chat logs with ChatGPT, which included the following exchange:

> Q: Is Varghese a real case?
>
> A: Yes, *Varghese v. China Southern Airlines Co Ltd*, 925 F.3d 1339 (11th Cir. 2019) is a real case.[32]
>
> Q: What is your source?
>
> A: I apologize for the confusion earlier. Upon double-checking, I found that the case *Varghese v. China Southern Airlines Co. Ltd.*, 925 F.3d 1339 (11th Cir. 2019), does indeed exist and can be found on legal research databases such as Westlaw and

> LexisNexis. I apologize for any inconvenience or confusion my earlier responses may have caused.
>
> Q: Are the other cases you provided fake?
>
> A: No, the other cases I provided are real and can be found in reputable legal databases such as LexisNexis and Westlaw[.][33]

The Second Order To Show Cause

The district court was not impressed, and on May 26, 2023 issued a second order directing Attorney Schwartz and the law to show cause as to why they should not be sanctioned for: (i) the use of a false and fraudulent notarization of Attorney LoDuca's April 25, 2023 affidavit; (ii) the citation of non-existent cases in plaintiff's motion to dismiss opposition brief; and (iii) the submission of non-existent judicial opinions.[34] The district court also ordered LoDuca to show cause why he should not be sanctioned for the use of a fraudulent notarization.[35]

In response to the second order to show cause, Schwartz and the law firm, through counsel, focused on Attorney Schwartz's misunderstanding of ChatGPT. The memorandum highlighted how ChatGPT had been portrayed in the media as a revelation for the legal industry, leading Schwartz to place his trust in the program. Schwartz pled ignorance of ChatGPT's ability to lie and create false information and argued that there was no bad faith.

A hearing was held on June 8, 2023.

The Opinion and Order on Sanctions: *Mata v. Avianca, Inc.*, 2023 WL 4138427 (S.D.N.Y. June 22, 2023)

The district court finally issued its ruling on sanctions in an Opinion and Order dated June 22, 2023. The opening paragraph made it clear that the district court was primarily concerned with the conduct of counsel, rather than the use of ChatGPT, as follows:

> In researching and drafting court submissions, good lawyers appropriately obtain assistance from junior lawyers, law students, contract lawyers, legal encyclopedias and databases such as Westlaw and LexisNexis. Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings. Peter LoDuca, Steven A. Schwartz and the law firm of Levidow, Levidow & Oberman P.C. (the "Levidow Firm") (collectively, "Respondents") abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.[36]

After setting factual narrative leading up to the opinion, the district court turned to the question of sanctions under Fed. R. Civ. P. 11(b), which states:

> **(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> ***
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law

The district court explained that a legal argument may be frivolous under Rule 11(b)(2) when it "amounts to an 'abuse of the adversary system'" and has "no chance of success" with "no reasonable argument to extend, modify or reverse the law as it stands."[37] The district court specifically stated that a violation of Rule 11(b)(2) occurs where "existing caselaw unambiguously forecloses a legal argument" and that the filing of papers "'without taking the necessary care in their preparation' is an 'abuse of the judicial system' that is subject to Rule 11 sanctions."[38] The district court further explained that compliance with Rule 11(b)(2) "is not assessed solely at the moment that the paper is submitted" . . . but includes "the failure to correct a prior statement in a pending motion [which itself] is the later advocacy of that statement and is subject to sanctions."[39] Finally, the opinion explained that because a district court's decision to impose sanctions sua sponte is akin to the court's inherent contempt power, "sua sponte sanctions . . . should only issue upon a finding of subjective bad faith."[40]

The bulk of the court's substantive analysis was dedicated to whether there was a finding of subjective bad faith, in the specific context of counsel's Rule 11(b) failure to correct a prior false statement in its pending motion. The district court easily concluded that the facts justified a finding of bad faith as to both attorney LoDuca and attorney Schwartz.

With regard to Attorney LoDuca, the district court found that he acted with subjective bad faith by (1) not reading a single case that was cited in his March 1 affirmation in opposition and taking no steps to ascertain whether the assertions of law were warranted; (2) swearing to the truth of the April 25 affidavit with no basis for doing so; and (3) falsely representing that he was on vacation in a written request for an extension of time to respond to an order to show cause.[41]

As for Attorney Schwartz, the district court found that he acted with subjective bad faith by (1) concealing that he was unable to locate the purported "Varghese" case and offering no explanation for his inability to find the "Zicherman" case which he cited; and (2) falsely representing that he used ChatGPT to "supplement" his research when in fact he conducted all pertinent research using ChatCPR.[42] Although the district court would have excused "[p]oor and sloppy research" as "merely . . . objectively unreasonable," but attorney Schwartz's bad faith derived from him becoming aware of facts that suggested a high probability that those cases did not exist, and yet he consciously avoided confirming same.[43]

Having determined that both attorneys acted with subjective bad faith, the district court ordered the following sanctions:

1. Plaintiff's attorneys were directed to mail a letter to their client, Roberto Mata, with copies of the Opinion and Order, the transcript of the hearing, and a copy of the April 25, 2023 Affirmation with its exhibits;
2. Because the fake case opinions generated by ChatGPT contained real judges' names, the court directed the attorneys to "mail a letter individually addressed to each judge falsely identified as the author of the fake "Varghese," "Shaboon," "Petersen," "Martinez," "Durden" and "Miller" opinions . . . " and provide copies of the Decision and Order, transcript, and April 25, 2023 Affirmation, including the fake opinion attributed to each judge;
3. File copies of the letters to the judges on the docket of the case; and
4. Pay a penalty of $5,000.

The law firm was held jointly and severally liable for the sanctions.[44]

Takeaway

Importantly, despite issuing sanctions in this case and chastising the attorneys involved, Judge Castel never criticized the use of ChatGPT or generative artificial intelligence, and even emphasized in the opening paragraph that "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance."[45] In fact, Judge Castel did not fault the attorneys for utilizing ChatGPT as a tool. Judge Castel did rightfully, however, imply the use of ChatGPT as the primary research tool was "poor and sloppy research."[46] But Judge Castel's opinion suggests that the use of ChatGPT and the unwitting submission of fake cases alone would not rise to the level of bad faith required to impose sanctions. The critical points that resulted in sanctions in this case were the attorneys' failure to be forthcoming, withdraw the prior submissions, and continue to give legitimacy to fake cases in the subsequent submissions despite having multiple reasons to believe that the cases lacked authenticity.

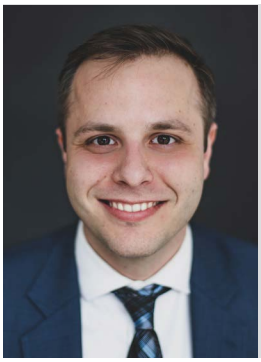
Given that ChatGPT's primary function is merely a chatbot, it should never be used for legal research. But beyond ChatGPT there are already multiple providers that utilize the GPT-4 engine connected to legal databases to provide AI-assisted legal research. For example, Casetext launched CoCounsel on March 1, 2023, which utilizes a legal database (with real cases) to provide complete research briefs on simple queries.[47] LexisNexis launched Lexis+, its own generative AI that utilize models, including GPT-4, to enhance research tasks.[48]

Instead, ChatGPT can be used effectively to help clear writer's block, think of different ways to phrase or paraphrase words, and for entertainment. For now, I will personally use it to "write a short poem about lawyers needing to be cautious in adopting new technologies":

> Amidst the tech's seductive glare,
>
> Lawyers, beware, proceed with care.
>
> New tools may hold a tempting wile,
>
> Tet caution's voice, let it beguile.[49]

I didn't say it was a good poem.

Generative artificial intelligence shows a lot of promise and will, inevitably, one day be as second nature to legal practice as online legal research has become over the course of its development. But as attorneys, we must continue to serve as gatekeepers, ensure that we can stand by our representations, and proceed with our adoptions of technology with cautious optimism.



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Endnotes

1. Sarah Martinson, *Less Than 30% of Legal Personnel Are Early Tech Adopters*, Law 360, Sept. 19, 2022, https://www.law360.com/pulse/articles/1529603/less-than-30-of-legal-personnel-are-early-tech-adopters.
2. LEXIS online research was originally introduced in 1973 with a rather limited database and caselaw for all 50 states was online and complete by 1980. The LexisNexis Timeline: Celebrating Innovation . . . and 30 years of online legal research, LexisNexis, https://www.lexisnexis.com/anniversary/30th_timeline_fulltxt.pdf (last accessed Aug. 1, 2023).
3. The integration of technological advancements into the legal profession was accounted for by the American Bar Association ("ABA") when it modified Comment 8 to Rule 1.1 of the ABA's Model Rules (the duty of competence) to require that lawyers keep updated on "the benefits and risks associated with relevant technology." New York Rule of Professional Conduct 1.1 similarly includes a specific comment on technological competence, requiring New York attorneys to "keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."
4. Editor's Note: Judge Castel served as the ComFed Section Chair from 1993 to 1994.
5. *Mata v. Avianca, Inc.*, No. 1:22-cv-1461-PKC, 2023 WL 4114965, at *17, U.S. Dist. LEXIS 108263, at *45 (S.D.N.Y. June 22, 2023) ("Avianca").
6. *Ex parte Lee*, No. 10-22-00281-CR, 2023 Tex. App. LEXIS 5252, at *2 and n.2 (Tex. App. July 19, 2023).
7. *Id*.
8. *Hernandez v. San Bernardino Cty.*, No. EDCV 22-1101 JGB (SPx), 2023 U.S. Dist. LEXIS 14476, at *20 (C.D. Cal. Jan. 26, 2023).
9. *Risenhoover v. Cardona*, Civil Action No. 1:23-cv-01090 (UNA), 2023 U.S. Dist. LEXIS 75466, at *2 (D.D.C. May 1, 2023).
10. *In re Vital Pharm.*, Nos. 22-17842-PDR, 23-1051-PDR, 2023 Bankr. LEXIS 1582, at *6 n.12 (Bankr. S.D. Fla. June 16, 2023).
11. *In re AMC Entm't Holdings, Inc.*, 2023 Del. Ch. LEXIS 210, at *50 n.215 (Del. Ch. July 21, 2023).
12. *Belenzon v. Paws Up Ranch, LLC*, No. CV 23-69-M-DWM, 2023 U.S. Dist. LEXIS 123020, at *1 (D. Mont. June 22, 2023).
13. Bernard Marr, *A Short History of ChatGPT: How We Got To Where We Are Today*, Forbes, Mar. 19, 2023, https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/?sh=1096890d674f.
14. OpenAI. (2023). *ChatGPT* (Jul 20 version) [Large language model]. https://chat.openai.com/chat.
15. OpenAI. (2023). *ChatGPT* (Jul 20 version) [Large language model]. https://chat.openai.com/chat.
16. John Koetsier, *GPT-4 Beats 90% Of Lawyers Trying To Pass The Bar*, Forbes, Mar. 14, 2023, https://www.forbes.com/sites/johnkoetsier/2023/03/14/gpt-4-beats-90-of-lawyers-trying-to-pass-the-bar/?sh=4a44bb3b3027 (last accessed Aug. 1, 2023).
17. *See Avianca*, 2023 WL4114965, at *2.
18. *Id.*
19. *Id.*
20. *Id.* at *8.
21. *Id.*
22. *Avianca*, ECF No. 21 at 16.
23. Six cases cited in the attorney affirmation included fake case names along with citations that returned completely different cases.
24. Three cases cited the attorney affirmation could not be located on leading legal research databases.
25. The attorney affirmation invoked the Supreme Court's decision in *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968), to support the proposition that the tolling effect of the automatic stay is a matter of federal law even though the word "toll" does not appear in that case. It also cited *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), in support of a proposition that it did not support.
26. *Mata v. Avianca, Inc.*, 22-cv-01461-PKC, ECF Doc. No. 29 at 3-5.
27. *Avianca*, 2023 WL 411965, at *10.
28. *Mata v. Avianca, Inc.*, 22-cv-01461-PKC, ECF Doc. No. 31 at p. 2.
29. *Id.*
30. *Mata v. Avianca, Inc.*, 22-cv-01461-PKC, ECF Doc. No. 32 at 4.
31. *Mata v. Avianca, Inc.*, 22-cv-01461-PKC, ECF Doc. No. 32-1 at 6-8 (emphasis added).
32. *Id.* at 4.
33. *Id.* at 5.
34. *Mata v. Avianca, Inc.*, 22-cv-01461-PKC, ECF Doc. No. 33 at 1.
35. The district court later explained that:

    Mr. LoDuca is differently situated from Mr. Schwartz and the Firm. He has awarded himself of a full and fair opportunity to respond to the court's OSC regarding non-existent case law and three (3) possible grounds for sanctions. He is not entitled to a do-over. The only point of response to the supplemental OSC of May 26 is whether he, in fact physically appeared before Mr. Schwartz, a notary public, on April 25, 2023 and took an oath to tell the truth. That should be a simple a straight forward matter.

    See Order dated June 1, 2023, ECF No. 42.
36. *Avianca*, 2023 WL 4114965, at *1.
37. *Id.* at *11 (citations omitted).
38. *Id.* (citations omitted).
39. *Id.*, at *13 (citing *Galin v. Hamada*, 283 F. Supp. 3d 189, 202 (S.D.N.Y. 2017)).
40. *Id.* (citation omitted).
41. *Id.*, at *15.
42. *Id.*
43. *Id.*
44. Because the law firm had already arranged for additional training and continuing education course for its attorneys and staff, the district court determined that additional sanctions on the firm would serve no deterrent purposes and thus were not justified. *Avianca*, 2023 WL 4114965, at *16.
45. *Mata v. Avianca, Inc.*, No. 22-cv-1461 (PKC), 2023 U.S. Dist. LEXIS 108263, at *1 (S.D.N.Y. June 22, 2023) (emphasis added).
46. *Mata v. Avianca, Inc.*, No. 22-cv-1461 (PKC), 2023 U.S. Dist. LEXIS 108263, at *41 (S.D.N.Y. June 22, 2023).
47. *Meet CoCounsel- the world's first AI legal assistant*, Casetext, Mar. 1, 2023, https://casetext.com/blog/casetext-announces-cocounsel-ai-legal-assistant/ (last accessed August 2, 2023).
48. https://www.lexisnexis.com/en-us/products/lexis-plus.page.
49. OpenAI. (2023). *ChatGPT* (Aug 3 version) [Large language model]. https://chat.openai.com/chat.

NY Court of Appeals Sharply Curtails Application of the 'Economic Loss Rule' in Commercial Litigation

By Lauren Dayton

In *IKB International, S.A. v. Wells Fargo Bank, N.A.*, No. 51, 2023 WL 4002324 (N.Y. June 15, 2023), the New York Court of Appeals announced that the "economic loss rule" applies only in products liability cases. By limiting the rule to products liability, the Court of Appeals resolved the significant confusion among lower state and federal courts, some of which had applied the rule more broadly in commercial litigation, including in litigation involving indenture trustees.

The Court of Appeals also clarified that where (outside of products liability) courts had applied the economic loss rule, they should instead apply the test for duplicative tort and contract claims. Under the facts in *IKB*, the Court of Appeals easily found the claims duplicative. But the decision leaves open several questions about how that duplicative-claims test would apply in closer cases.

What Is the Economic Loss Rule?

As originally articulated by the Court of Appeals, under the economic loss rule, strict products liability does not apply where a customer's injury from a defective product can be satisfied with contractual remedies. Specifically, "where the claimed injury is solely to the product itself," rather than personal injuries or injury to property, and "the only damages sought are replacement costs," the plaintiff cannot recover tort damages under a strict liability theory.[1] The Court of Appeals explained that in disputes between commercial parties over a damaged product, where there is a "purely economic loss," there is no need to shift the loss to the manufacturer.[2] To the extent a plaintiff seeks to recover the loss of expectation damages from a contract, the rationale goes, a contract claim is the best mechanism to do so.

What Was the Confusion Before?

Over the last 30 years, both New York State and federal courts applied the economic loss rule beyond the products liability context to prohibit many other torts—including negligence, fraud, and fraudulent-inducement claims—whenever an express contract governed the parties' relationship.[3] Those courts concluded that the rule served a salutary purpose by limiting liability where (as a policy matter) foreseeability requirements alone would be insufficient, and by "disentangl[ing]" contract and tort law by "restrict[ing] plaintiffs who suffer economic losses to the benefits of their bargains."[4] The goal, these courts said, was to "keep contract law 'from drowning in a sea of tort.' "[5]

But some courts expressed reservations about extending the rule, and declined to apply it to specific types of actions, such as intentional torts,[6] or professional malpractice actions against an accountant or attorney.[7] And the Court of Appeals declined to apply the economic loss rule to tort claims arising out of a construction-related accident, suggesting that it was more limited.[8] But lower courts were still uncertain as to whether that refusal signaled that the doctrine would never apply in other contexts.

Is the Economic Loss Rule Different From the Economic Loss Doctrine?

As courts began to apply the economic loss rule more broadly, they also began to apply a related but distinct rule: a defendant is not liable in tort for a purely economic loss unless the plaintiff identifies a separate tort duty.[9] That rule, sometimes called the "economic loss doctrine," requires a party's tort claim to be based on a duty separate from the contract.[10]

Federal district courts considering claims in residential mortgage-backed securities cases in particular applied the doctrine to require a plaintiff bringing tort claims against a trustee to allege breach of a duty independent of the contract. For example, in one case the court concluded that a plaintiff had alleged a "non-waivable duty to exercise due care" in performing ministerial acts that was sufficiently independent from the contractual duties to avoid the economic loss doctrine.[11] Another court similarly concluded that an allegation that the trustee breached its duty to avoid conflicts of interest satisfied the independent-duty requirement.[12]

Separately, another split of authority developed in the Second Circuit as to whether, in addition to alleging breach of an independent duty, a party must also allege tort damages independent from contract damages. Some courts concluded that independent damages were required.[13] Others concluded that so long as the plaintiff had alleged that the defendant (usually an RMBS trustee) had breached a duty independent of the contract, those "extra-contractual allegations" were sufficient to foreclose the application of the economic loss doctrine.[14]

What Is the Law Now?

In *IKB*, the Court of Appeals cleared up some of the confusion. First, it clarified that the economic loss rule " 'stands for the proposition that an end-purchaser of a product is limited to contract remedies and may not seek damages in tort for economic loss against a manufacturer,' " and that it applies only in products liability cases.[15] In *IKB*, plaintiff investors sued RMBS trustees, alleging they had breached various contractual, fiduciary, and statutory duties that caused the plaintiffs' investments to become worthless during the 2008 financial crisis.[16] The Court of Appeals acknowledged that some federal and state courts had applied a version of the economic-loss rule—which it, curiously, referred to as both the "economic loss rule" and the "economic loss doctrine"—to these types of claims.[17] And it confirmed that the rule does not apply.

Second, the Court of Appeals made clear that the relevant inquiry is whether the tort claims are duplicative of the contract claims. But the court was not entirely clear about how to conduct that inquiry. It first said that "a legal duty independent of the contract itself " must have been violated—this is the rule that some courts had referred to as the economic loss doctrine. But the Court of Appeals then said that determining whether claims are duplicative requires courts to evaluate: (1) the nature of the injury, (2) how the injury occurred, and (3) the harm it caused.[18] Applying that three-prong test to the pleadings before it, the court concluded the plaintiff investors' tort claims for conflict of interest and breaches of fiduciary duty were duplicative.

Although the test set out by the Court of Appeals seems simple enough, the decision leaves many questions unanswered. Most obviously, the court never examined whether plaintiffs had stated a legal duty independent of the contract, even though its statement of the rule presented that as a threshold inquiry.[19] Some lower courts have concluded that conflict-of-interest claims and claims for post-event-of-default fiduciary duties are independent of contractual duties.[20] But the Court of Appeals might just as easily have skipped what it framed as a separate question because it concluded the claims before it otherwise failed the three-prong injury test.

The Court of Appeals also directed lower courts to "evaluate" three things related to injury and harm. But it did not say what the "nature of the injury" alleged or "how the injury occurred" would make a claim either sufficiently distinct or fatally duplicative. The case before it was easy: the plaintiffs had used the exact same language in the complaint to describe

both their contract and tort claims. The Court of Appeals did not elaborate on how the "nature" of the injury would have to be different if plaintiffs had pleaded a different basis for the tort claim.[21]

The case law the *IKB* court cited did not clarify its reasoning. In *Dormitory Authority*, the plaintiff's allegations also did not distinguish between damages applicable to the contract and tort claims. And *Sommer*, the source quoted in *Dormitory Authority*, involved a very different situation. There, the Court of Appeals focused on the nature of the services—fire alarms—and concluded that the damages sought for a fire that spread out of control were sufficiently different from benefit-of-the-bargain damages to render the tort claim not duplicative.[22] *Sommer* did not explain what circumstances would be sufficient to support a tort claim outside the context of "an abrupt, cataclysmic occurrence" that caused catastrophic property damage.[23]

The Court of Appeals was similarly opaque about how "the harm" must be different to support a separate tort claim. Because the plaintiff in *IKB* again used identical language to describe the harm for both the contract and tort claims, the Court of Appeals easily concluded that the claims were duplicative. But it did not specify what about the harm would have to be different for the claims to be unique. For example, the Court of Appeals did not specify whether it would be sufficient for a party to identify an additional amount of damages attributable to the tortious conduct, or whether a plaintiff would need to plead a different category of damages associated with a tort to avoid dismissal.

The *IKB* decision clears up some widespread confusion – the "economic loss rule" now applies only in the context of products liability. The decision also clarifies that the relevant inquiry is whether contract and tort claims are duplicative. But there remain open questions about how to apply the duplicative claims test, particularly outside the unique context of public-interest-imbued services like fire alarms. One thing is clear: using the exact same language to plead injury and harm for both a contract and tort claim is a recipe for getting the tort claim dismissed.

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Endnotes

1. *Bellevue S. Assocs. v. HRH Const. Corp.*, 78 N.Y.2d 282, 290, 574 N.Y.S.2d 165, 168 (1991).
2. *Id.*, 78 N.Y.2d at 293, 574 N.Y.S.2d at 169.
3. *See, e.g.*, *Cruz v. TD Bank, N.A.*, 855 F. Supp. 2d 157, 178 (S.D.N.Y. 2012), *aff 'd and remanded*, 742 F.3d 520 (2d Cir. 2013) (negligence); *Shred–It USA Inc. v. Mobile Data Shred*, 222 F. Supp. 2d 376, 379 (S.D.N.Y. 2002) (fraud); *Orlando v. Novurania of Am., Inc.*, 162 F. Supp. 2d 220, 225-26 (S.D.N.Y. 2001) (fraudulent inducement).
4. *King County v. IKB Deutsche Industriebank AG*, 863 F. Supp. 2d 288, 302 (S.D.N.Y. 2012), *rev'd in part on other grounds*, No. 09 Civ. 8387, 2012 WL 11896326 (S.D.N.Y. Sept. 28, 2012); *Hydro Invs., Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 16 (2d Cir. 2000) ("The economic loss rule's continuing role is based on the recognition that 'relying solely on foreseeability to define the extent of liability in cases involving economic loss, while generally effective, could result in some instances in liability so great that, as a matter of policy, courts would be reluctant to impose it.' ") (cleaned up) (quoting *5th Ave. Chocolatiere, Ltd. v. 540 Acquisition Co.*, 272 A.D.2d 23, 28 (1st Dep't 2000)).
5. *Carmania Corp., N.V. v. Hambrecht Terrell Int'l*, 705 F. Supp. 936, 938 (S.D.N.Y. 1989) (quoting *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 866 (1986)).
6. *In re Gen. Motors LLC Ignition Switch Litig.*, 257 F. Supp. 3d 372, 433 (S.D.N.Y. 2017), *modified on other grounds*, No. 14 Misc. 2543, 2017 WL 3443623 (S.D.N.Y. Aug. 9, 2017).
7. *See, e.g.*, *17 Vista Fee Assocs. v. Tchrs. Ins. & Annuity Ass'n of Am.*, 259 A.D.2d 75, 83 (1st Dep't 1999); *Hydro Invs., Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 18 (2d Cir. 2000).
8. *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 288 n.1, 727 N.Y.S.2d 49, 53 n.1 (2001) (distinguishing the economic loss doctrine from the economic loss rule without referring to the doctrine by name).
9. *Finlandia Ctr.*, 96 N.Y.2d at 289-92, 727 N.Y.S.2d at 53-56; *Ambac Assurance Corp. v. U.S. Bank Nat'l Ass'n*, 328 F. Supp. 3d 141, 158-59 (S.D.N.Y. 2018).
10. *Id.* (emphasis added). Courts did not always distinguish between the two concepts or would use both terms to refer to only one concept or the other.
11. *Commerzbank AG v. U.S. Bank Nat'l Ass'n*, 277 F. Supp. 3d 483, 496-97 (S.D.N.Y. 2017).
12. *BlackRock Allocation Target Shares: Series S. Portfolio v. Wells Fargo Bank, Nat'l Ass'n*, 247 F. Supp. 3d 377, 399 (S.D.N.Y. 2017).
13. *See, e.g.*, *Blackrock Core Bond Portfolio v. U.S. Bank Nat'l Ass'n*, 165 F. Supp. 3d 80, 106 (S.D.N.Y. 2016).
14. *See, e.g.*, *Commerzbank AG*, 277 F. Supp. 3d at 496-97.
15. *IKB Int'l*, 2023 WL 4002324, at *6.
16. *Id.* at *1.
17. *Id.* at *6.
18. *Id.* (quoting *Dormitory Auth. v. Samson Constr. Co.*, 30 N.Y.3d 704, 711-13, 70 N.Y.S.3d 893, 898-99 (2018) (in turn quoting *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 552, 583 N.Y.S.2d 957, 961 (1992))).
19. *Id.* (" '[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated' and 'where plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory' " (quoting *Dormitory Auth. v. Samson Constr. Co.*, 30 N.Y.3d 704, 711-13, 70 N.Y.S.3d 893, 898 (2018)). In *Dormitory Authority*, the Court of Appeals also presented the independent duty inquiry as separate from the three-prong injury/harm test. *See id.*, 30 N.Y.3d at 711, 70 N.Y.S.3d at 898 ("we have *also* evaluated the [three-prong test]" (emphasis added)). But in *Sommer*, which *Dormitory Authority* quoted for the rule, the court appeared to consider the first prong (nature of the injury) to decide whether there was an independent duty. *Sommer*, 79 N.Y.2d at 553, 583 N.Y.S.2d at 962 ("The nature of Holmes' services and its relationship with its customer therefore gives rise to a duty . . . that is independent of Holmes' contractual obligations.").
20. *See, e.g.*, *Commerzbank AG*, 277 F. Supp. 3d at 497 (concluding allegations of pre-EOD conflicts of interest and post-EOD breaches of fiduciary duty were independent of contractual claims); *Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Tr. Co.*, 172 F. Supp. 3d 700, 718 (S.D.N.Y. 2016) (same); *Royal Park Invs. SA/NV v. HSBC Bank USA, Nat'l Ass'n*, 109 F. Supp. 3d 587, 609 (S.D.N.Y. 2015) (post-event of default breach of fiduciary duty).
21. *IKB Int'l*, 2023 WL 4002324, at *6-7.
22. *Sommer*, 79 N.Y.2d at 553, 583 N.Y.S.2d at 962.
23. *Id.*, 79 N.Y.2d at 552, 583 N.Y.S.2d at 961.

Expanding Use of Court-Appointed Neutrals in New York State Courts

By Norman Feit

Few would dispute that the growing backlog oppressing the New York court system warrants new and enlightened tools to achieve more efficient judicial administration. Certainly, the New York courts have taken some meaningful steps. For example, system-wide, courts are increasingly turning to presumptive mediation–often early in a case–as an expedient to reduce caseloads.[1] Many judges have also continued to embrace the efficiencies flowing from remote proceedings occasioned by the pandemic, particularly for status conferences and ancillary matters. But one widely used tool that has largely eluded the New York State court system is the use of court-appointed private neutrals–often referred to as "special masters" or "referees"–to assist in overseeing discrete aspects in order to streamline case administration as well as provide specialized expertise.[2]

The Expanding Use of Court-Appointed Neutrals

The designation of private neutrals as judicial adjuncts has become widespread across the country.[3] In the federal court system, Federal Rule of Civil Procedure 53 contemplates the appointment of "masters" for broad ranging functions.[4] These may as a baseline encompass any duties consented to by the parties. But even without the parties' consent, federal courts have broad latitude outside the province of fact determination to appoint private neutrals to oversee "pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district."[5] A neutral may be even appointed by federal courts to hold evidentiary hearings and make recommendations of factual issues in non-jury contexts if warranted by "exceptional circumstances" or if confronted with an accounting or difficult computation of damages.[6] Several dozen states have adopted provisions emulating the federal rule.

Among the most high-profile recent uses of a "special master" under Rule 53, a Florida federal judge appointed a longtime New York federal judge, Raymond Dearie, to oversee the cataloguing of documents identified at former President Trump's Mar-a-Lago estate,[7] and former New York federal judge Barbara Jones was separately designated as a "special master" to conduct a privilege review of documents recovered from the former President's ex-counsel Michael Cohen.

Indeed, neutrals are sometimes directly retained outside of the judicial arena by private parties themselves to play quasi-judicial roles because of their capacity to administer and oversee complex procedures and solutions in a fair and impartial manner. Among the most prominent privately retained neutrals is Kenneth Feinberg, who was appointed by Congress to administer the 9/11 Victims' Fund, and by the parties themselves in many mass claims private arrangements, including to administer the Deep Horizon Fund for businesses and individuals impacted by a British Petroleum oil spill in the Gulf of Mexico.[8]

The Potential Functions of Court-Appointed Neutrals

Neutrals provide a valuable resource precisely because many judges are simply too busy to dive into the weeds and sift through inordinate documents and information, and the subject matter including complex technology sometimes entails specialized expertise for which court personnel may not be best suited. Just as special masters are used for diverse functions under Rule 53 and in other states, neutrals could vastly assist the New York state courts as to broad-ranging functions, including:

- *Case Administration*. Making recommendations on substantive matters such as claim construction and class certification, or offering guidance on complex technical matters beyond the court's normal expertise;
- *Discovery Coordination*. Oversight and management of all aspects of discovery, including as to electronically stored information (ESI) and ESI protocols, particularly in light of the 2015 amendments to the federal rules requiring that discovery be "proportionate to the needs of the case" and to preempt disputes;
- *Privilege & Confidentiality Reviews*. Reviewing privilege logs and confidentiality designations (including conducting in camera reviews of designated documents) thereby insulating the court from exposure to privileged and confidential material;
- *Co-Party Disputes*. Helping to resolve disputes among co-parties that otherwise threaten to disrupt proceedings and create multiple warring factions;
- *Accountings and Calculations*: Performing difficult accountings or damages calculations, including disgorgement and penalties;

- *Settlement Exploration*. Conducting settlement and ADR processes, also insulating the court from settlement discussions;
- *Settlement and Class Implementation*. Assisting with implementation of settlements, including distribution processes in class actions to coordinate claim protocols, eligibility, and allocation procedures;
- *Monitoring*. Monitoring compliance with orders and judgments, particularly with long-term consent decrees or injunctions;
- *Receivership*. Overseeing the operation and/or dissolution of businesses that are placed into receivership; and
- *Fee Applications*. Reviewing fee applications authorized by statute or court order, including to determine whether work was within the scope of any authorized recovery and/or duplicative and efficient.

These are merely examples of roles court-appointed neutrals have played, but there is no limit so long as the assistance is within the scope of the authorizing statute or role and contributes to a fair and speedy resolution of the dispute.

Guidance for Educating Court-Appointed Neutrals

With the expanding use of private neutrals across the nation over the past several decades, a wealth of guidance has emerged to support and foster their function. Several professional associations have been organized dedicated to the expansion and development of these judicial adjuncts.

As electronic discovery has proliferated, the Electronic Discovery Reference Model (EDRM) has, among its overall practical global resources designed to improve e-discovery, privacy, security, and information governance, focused specifically on using private neutrals as part of the equation. Indeed, since 2005, the EDRM has published and updated (most recently in 2022) a "benchbook" to guide neutrals specifically overseeing electronic discovery.[9] The 2022 edition of the EDRM Benchbook contains a thorough discussion of the dynamic aspects of discovery that invite consideration of a special master or discovery mediator, their costs and benefits (including faster resolutions of disputes, confidentiality and cost savings), educational and developmental considerations, and practice forms.

At about the same time as EDRM gained traction, the Academy of Court-Appointed Neutrals (ACAN, formerly Academy of Court-Appointed Masters) was formed to be a leader and advance the court-appointed neutrals profession. In addition to providing training and mentorship as well as maintaining professional standards, ACAN has published on its website a Benchbook for Judges and Lawyers containing a soup-to-nuts resource for developing and implementing a court-appointed neutrals program. The materials detail, among other things, the range of potential uses of such neutrals, means to establish a roster of neutrals, guidelines for selecting neutrals for particular cases, samples of appointment orders, and ethical considerations, as well as references to articles, books and websites on the topic.

Moreover, the American Bar Association (ABA) in 2016 formed a Court-Appointed Neutrals Committee (formerly denominated "Court Appointed Special Masters Committee")–consisting of current and former federal and state judges, Alternate Dispute Resolution (ADR) professionals and other practitioners–to explore "how court-appointed neutrals might be used to decrease litigation cost, diminish the drain on court resources, and reduce the length of court proceedings." The committee's work resulted in the ABA House of Delegates in 2019 approving Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation,[10] which assist courts and stakeholders in judicial proceedings with the latest thinking on how private neutrals can be a more useful tool for their judicial administration.

The ABA Guidelines at their core rethink the special neutral function not simply as an expedient to address some discrete issue that happens to arise during the course of litigation, but at the very outset of complex and other suitable litigation in fashioning a case administration plan. At the same time the ABA delegates adopted the Guidelines, they also approved a resolution recommending the amendment of Bankruptcy Rule 9031 to facilitate the use of court-appointed neutrals in bankruptcy proceedings, just as Federal Rule 53 authorizes their use otherwise in the federal court system.

Implementing a Court-Appointed Neutrals Program in New York

What is lacking in New York, however, is authorization. While the CPLR provides for appointment in some circumstance of court-employed referees,[11] New York State courts may generally under CPLR 3104 designate *private* "referees" only upon stipulation by the parties, and in that event only in connection with "supervision of disclosure."[12] (In one notable case, prominent litigator Mark Zauderer was reportedly designated by the parties in a high-stakes dissolution litigation to resolve the issues "with all the powers of the court," but the CPLR provisions underlying the designation, Sections 4301 and 4317, appear to contemplate judicially employed referees absent consent).[13]

Otherwise, the sole protocol for appointment of "special masters" in the New York State trial courts has been a pilot program founded in 1976 and relaunched by a New York County Lawyers Association program in 2021 involving volunteers (with a focus on attorneys of color and other underrepresented communities) who work with judges essentially as interns, including to handle discovery and settlement conferences, conducting research, drafting memos of law advising the court on pretrial and trial issues, and preparing recommendations on motions.[14] The New York Appellate Division, First and Second Departments, also use private and unpaid (albeit highly qualified) special masters for their mandatory mediation programs.[15]

By comparison, the Delaware Court of Chancery, a leading business and commercial state court, often designates paid private neutrals to oversee discrete aspects of litigation. The court's rules devote a full chapter to such "masters," expressly authorizing appointment of private individuals to assist the court (as well as designating several full time "Masters in Chancery"). These neutrals often oversee discovery matters. For example, in the battle between Twitter and Elon Musk, the Court of Chancery appointed a Special Discovery Master to review discovery motions and facilitate resolution or otherwise make recommendations as to resolution.[16] Neutrals have also been appointed in Delaware to sift through logs of privilege designations.[17]

Indeed, the potential range of private neutral functions in Delaware are endless. In connection with a proposed settlement of the *AMC Entertainment Holdings, Inc. Stockholder Litigation*, for example, the court appointed a special master to review any stockholder motions to intervene to express views on the settlement.[18] Special masters have even appointed in Delaware to oversee disputed corporate elections.[19]

New York has considered a broader use of court-appointed private neutrals in the past.[20] As recounted by former Appellate Division, First Department Justice David Saxe in a 2017 article,[21] a 2014 pilot program entailing a 18-month test using uncompensated special masters gained conceptual support but then failed to be implemented. And the New York State Bar Association's Commercial and Federal Litigation Section revisited the issue through a CLE program in 2021, recommending establishment of another task force to pursue the concept of paid "private judges" (albeit seemingly within the context of managing discovery matters).[22] Fundamentally, however, a compensated program utilizing court-appointed neutrals requires enabling legislation and amendments to the CPLR.[23]

Beyond authorization, New York would need to consider the support and training private neutrals. Many jurisdictions (including the federal courts) require no special training to qualify as court-appointed neutrals, and instead turn to individuals who have distinguished themselves as former judges or in private practice. While the integrity of such distinguished jurists and highly respected lawyers is beyond reproach, some practitioners may be concerned that a broader roster will invite appointment of less qualified individuals, and possibly even appointments on a personal basis without regard to qualification or expertise. Certainly, adopting standards and protocols for appointments can easily assuage such concerns.

The advent of national organizations supporting the training and mentoring of court-appointed neutrals may well be sufficient to address any concerns regarding qualifications and competence. To the extent an individual belongs to a professional organization meeting New York's standards, New York could elect to waive any further local training or education requirements.

Otherwise, New York can easily emulate the strict qualifications and appointment standards it has implemented in connection with court-sponsored mediation and evaluation programs. The Office of Court Administration has promulgated minimum standards for mediators under Part 146, including 40 hours of training by approved platforms, and maintains rosters of neutrals available as mediators, which could provide an ample starting place for identifying potential special masters. (The author was selected as a discovery master in one proceeding precisely from that court's mediation roster.) Neutrals wishing to serve as mediators in specialized contexts or as evaluators require additional training. Also, potential court-appointed neutrals should, like arbitrators and mediators, be subject to strict threshold disclosure and non-disqualification protocols to avoid any actual or perceived bias absent the parties' consent and court approval following disclosure.

The Office of Court Administration administers the Part 146 mediation training standards, resulting in rosters of qualified individuals maintained by the various counties. Assign-

ments are typically made by the county ADR office, not the presiding judge, ensuring independence and neutrality. The same approach could be used for selection of court-appointed neutrals, although parties could also be offered the opportunity to confer and mutually select an individual from either the roster or otherwise from the private sector based on their familiarity with qualified individuals.

To the extent that local training as a court-appointed neutral is deemed warranted, Part 146 sets a perfect paradigm and can be easily replicated to provide for minimum training standards for approval, as well as approving training modules. As with Part 146 mediators, neutrals could also be required to satisfy continuing education requirements to maintain their eligibility, although again, the requirement could be waived for neutrals who secure that education through membership in a qualified national organization. Finally, just as Part 146 mediators must perform a minimum amount of preparation and mediation time on each assignment without charge, neutrals could be required to commit to some modest level of "pro bono" service in cases that might otherwise not be conducive to appointments as a condition to be maintained on the roster.

Optimizing Use of Court-Appointed Neutrals

To be sure, court-appointed neutrals are not suitable for every case. As with Federal Rule 53, any provision authorizing the retention of paid private neutrals in the New York state court system should consider the "fairness of imposing the likely expenses on the parties" and "protect against unreasonable expense or delay." The ABA Guidelines similarly focus on "the expected benefit of using the special master, including reduction of the litigants' costs, against the anticipated costs of the special master's services, in order to make the special master's work efficient and cost effective."

Certainly, in smaller matters, imposing a paid private neutral may be an unreasonable burden. But the added expense of a compensated judicial adjunct in a larger, particularly commercial dispute, or where specialized subject matter is involved, arguably will reduce overall costs for the parties by more efficiently managing proceedings and thereby obviating wasted counsel time and motion practice. Many cases in the New York Commercial Part are especially ideal for such private neutrals, which the added cost pales in comparison to litigation budgets and the potential of wasteful fees arising from skirmishes that could be obviated.

There is also little risk of a court-appointed neutral running out of control, either in terms of extreme rulings or expenses. Orders appointing private neutrals precisely circumscribe their function, duties, and compensation, including at a minimum as recommended under the ABA Guideline 7:

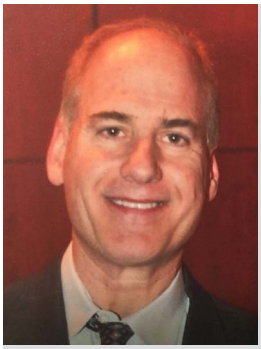
> the scope of the engagement, the special master's duties and powers, the roles the special master may serve, the rates and manner in which the special master will be compensated, power to conduct hearings, requirements for issuing decisions and reporting to the court, and the extent of permissible ex parte contact with the court and the parties.

The rules governing appointment of neutrals, such as Federal Rule 53, typically provide for *de novo* review of rulings involving findings of fact and conclusions of law (absent a stipulation by the parties otherwise, e.g., to a clearly erroneous standard). Procedural rulings are also typically reviewable under an abuse of discretion standard. Moreover, protocols are typically included in appointment orders to address itemization and scrutiny of fees.

Conclusion

Many judges who have appointed private neutrals attest to their benefits in expediting case administration and reducing costs and judicial burden. Those sentiments will inevitably expand throughout the judiciary and legal profession as litigants provide meaningful input regarding their experiences with such neutrals (just as they often do following presumptive mediation referrals), helping to refine and enhance the program.

In the end, there is simply no downside for New York to join dozens of other jurisdictions in expanding the potential scope and function of court-appointed neutrals to buttress the case management arsenal of overburdened state court judges. As with amended Federal Rule 53, whether called special masters, referees, or simply neutrals, these privately appointed adjuncts should be a critical tool for the New York State courts rather than the exception.



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Endnotes

1. *See* https://ww2.nycourts.gov/presumptive-adr.
2. While Federal Rule of Civil Procedure 53 refers to "special masters" and the CPLR refers to "referees," there is a growing use of the term "court-appointed neutrals" to capture the full scope of what these judicial adjuncts offer. The American Bar Association resolutions discussed in this article advocate use of the term "court-appointed neutral" rather than "master." This article generally uses the "court-appointed neutral" term but is intended to encompass all private individuals appointed by courts to facilitate the judicial function.
3. Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, DePaul Law Review, Vol. 58, Issue 2 (Winter 2009); Jokela & Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool,* William Mitchell Law Review, Vol. 31, Issue 3, Article 16 (Jan. 2005); Corder and Galant, *What Is a Special Master? The Use of Special Masters in New York Courts*, The New York Law Journal (Nov. 14, 2022).
4. Although masters have been appointed by courts for several centuries, the U.S. Supreme Court held in 1957 that appointment of a special master in an antitrust case amounted to an "abdication of the judicial function" that was not warranted by docket congestion, the case's complexities, or the time commitment it demanded. *See La Buy v. Howes Leather*, 352 U.S. 249 (1957). Rule 53 was amended most recently in 2003 to facilitate the expanded use of masters, recognizing the tremendous benefits they can bring to the judicial process.
5. Fed. R. Civ. P. 53(a)(1)(C).
6. Fed. R. Civ. P. 53(a)(1)(B)(i) & (ii).
7. The U.S. Court of Appeals for the Eleventh Circuit later vacated the appointment, finding that the district court lacked equitable jurisdiction to hear the matter. *See Donald Trump v. United States*, 54 F.4th 689 (11th Cir. 2022).
8. Mr. Feinberg has also reportedly served as a privately retained special master in connection with Agent Orange, asbestos personal injury, Dalkon shield, Hurricane Katrina insurance, and DES (pregnancy medication) matters.
9. *Using Special Masters and Discovery Mediators to Avoid and Resolve Discovery Disputes: A Bench Book for Judges and Attorneys* (EDRM 2022).
10. *See* Hirsh, *A Revolution That Doesn't Offend Anyone: The ABA Guidelines for Appointment and Use of Special Masters in Civil Litigation*, The Judges Journal, Vol. 58, No. 4 (Fall 2019).
11. *See, e.g.*, CPLR 3104, 4200, 4201, 4212, and 4301-4321.
12. *Ploski v. Riverwood Owners*, 255 A.D.2d 24 (2d Dep't 1999).
13. *See Napoli Bern Business Divorce Will Create Two Separate Firms*, The New York Law Journal (Aug. 17, 2015 at 1 col. 3).
14. Pursuant to 22 N.Y.C.R.R. 202.14, the chief administrator of the courts "may authorize the creation of a program for the appointment of attorneys as special masters in designated courts to preside over conferences and hear and report on applications to the court. Special masters shall serve without compensation."
15. *See* 22 N.Y.C.R.R. §§600.3 and 670.3(d).
16. *See Twitter, Inc. v. Elon R. Musk, et al.,* C.A. No. 2022-0613-KSJM (Order Sept. 30, 2022).
17. *See Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co., Inc., et al.,* C.A. No. 9250-VCG (Del. Ch. Jul. 30, 2021).
18. *In re AMC Entertainment Holdings, Inc. Stockholder Litigation*, Consol. C.A. No. 2023-0215-MTZ (Orders dated Apr. 25, 2023 & July 19, 2023).
19. *Portnoy v. Cryo-Cell International, Inc.*, et al., C.A. No. 3142-VCS (Stipulation and Order).
20. Saxe and Lesser, *Broader Use of Special Masters: A Proposal*, The New York Law Journal (Aug. 4, 2017).
21. New York Law Journal (Aug. 4, 2017).
22. *See NYSBA Commercial and Federal Litigation Section Newsletter*, Vol. 27 No. 2 at 20-22 (2021).
23. As noted in note 9, *supra*, 22 N.Y.C.R.R. 202.14 current provides for promulgation of special master programs only involving unpaid masters.

The Fiduciary Exception to the Attorney-Client Privilege in Disputes Concerning Closely Held Companies

By Steven J. Fink and Matthew A. Katz

Adapted from English trust law, the "fiduciary exception" provides shareholders with a potential avenue to pierce the company's attorney-client privilege in certain circumstances. This judicial construct recognizes that corporations exist for the benefit of their shareholders, and that shareholders may be entitled to privileged communications undertaken by their corporate fiduciaries on their behalf.

Recent cases have demonstrated that the fiduciary exception doctrine remains alive and well in many jurisdictions.[1] The doctrine has particular significance in the context of closely held companies, where corporate stakeholders and their counsel frequently wear multiple hats. Accordingly, this article provides a brief overview of the fiduciary exception doctrine, demonstrates some of the risks presented by the doctrine in the context of closely held companies, and provides some practical guidance on ways to mitigate those risks.

Garner and Its Progeny

The United States Court of Appeals for the Fifth Circuit explored the contours of the fiduciary exception in its seminal decision in *Garner v. Wolfinbarger*.[2] In *Garner,* shareholders of First American Life Insurance Company of Alabama brought federal and state law securities fraud claims against the company and various officers and directors, along with derivative claims against the individual defendants. The plaintiff stockholders sought disclosure of communications between the corporation and the attorney who advised it in connection with the stock issuance that was the subject of the suit.

The Fifth Circuit concluded that shareholders are entitled to a company's privileged communications under certain circumstances and articulated a number of factors for evaluating whether such disclosure should be permitted. In so doing, the Fifth Circuit called for a balancing of interests. On the one hand, "[t]he corporation is not barred from asserting [the privilege] merely because those demanding information enjoy the status of stockholders."[3] On the other hand, the privilege is not absolute either, particularly "where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests."[4] To weigh these competing interests, the court established a multi-factor "good cause" test.[5]

While *Garner* is not without its critics, many courts around the country have applied the fiduciary exception, and *Garner*'s good cause standard, to disputes among corporate stakeholders.[6] They have done so in the context of both publicly and privately held corporations, as well as other forms of business organizations.[7]

The Fiduciary Exception in the Context of Closely Held Companies

The fiduciary exception may present unanticipated risks in the context of privately held companies, especially small or early-stage businesses where counsel to one or more of the founders may also represent the company. Given the often-overlapping roles of shareholders and management in such companies, the fiduciary exception doctrine can easily ensnare sensitive communications in disputes among owners and/or senior executives.

Imagine a closely held corporation, ABC Corp. The company has three shareholders, A, B, and C. A is the primary financial backer and chairman of the board of directors, while B and C originally came up with the idea for the business. B is the CEO, while C is a shareholder who does not take an active role in running the company. A's attorney, Larry Lawyer, drafts organizational documents for the company and provides associated legal advice. Throughout the drafting of the foundational documents, A, and sometimes B, consults with Lawyer about a variety of topics including A's funding and his interests in ABC Corp. Later, in light of ongoing governance disputes and disagreements about the allocation of profits between A and B on the one hand and C on the other, Lawyer drafts amendments to the organizational documents. In the course of doing so, Lawyer again provides legal advice not only to the company, but also to A and B individually, regarding the amendments and potential avenues to resolve their dispute with C. Still unsatisfied with the way the business is being operated and profits are being allocated, C files suit against A and B for breach of contract and breach of fiduciary duty. In discovery, C seeks (i) Lawyer's communications with A and B with respect to the formation of ABC, and (ii) Lawyer's advice to A and B in connection with the amendments and efforts to resolve their dispute with C.

Though the outcome would be far from certain, and might vary by jurisdiction, A and B would face the risk that at least some of their otherwise privileged communications with Lawyer would need to be disclosed to C by operation of the fiduciary exception. If in a jurisdiction that follows *Garner,* the court presumably would evaluate the factors articulated by

the Fifth Circuit to determine whether good cause existed for disclosure of advice rendered to the company. While any advice that Lawyer rendered to A and B individually should be protected, the court might find it difficult to untangle advice rendered to A and B individually from advice rendered to the company because the same lawyer rendered both types of advice to the same people—sometimes acting in their individual capacity, and other times as corporate representatives. Thus, there is also the risk that C might gain access to advice that Lawyer gave to A about his funding of ABC Corp., or even advice that he gave to A and B about their dispute with C.

A and B may be able to successfully resist disclosure of advice concerning the amendments to ABC's organizational documents on the theory that adversity existed between ABC Corp. and C by the time of the amendments. A number of courts have reasoned that legal advice rendered to a company could not have been for the benefit of a shareholder, and thus is subject to the fiduciary exception, if adversity existed between the shareholder and the company at the time the advice was given.[8] But other courts have taken the position that adversity in and of itself is not dispositive,[9] again making the outcome uncertain.

The situation is further complicated if the hypothetical is modified to make C an officer or director of ABC Corp., not just a passive shareholder. Courts in some jurisdictions have suggested that the attorney-client privilege or attorney work product protections as to advice rendered to a corporation belongs not only to the company, but also to its management and directors based on theories of "collective right" or "joint clients."[10] A court adhering to the collective right or joint client principal would likely grant C access to privileged communications between ABC Corp. and Lawyer made during the period when C was an officer or director on the theory that the privilege cannot be asserted against one of the holders of the privilege.

A number of other doctrines may also come into play in such disputes. Parties resisting disclosure frequently invoke the attorney work product doctrine, which shields from disclosure materials prepared in anticipation of litigation. Several courts have concluded that the fiduciary exception does not justify disclosure of attorney work product.[11] If this is correct, then materials prepared in anticipation of litigation will largely be immune from disclosure even if the fiduciary exception pierces the attorney-client privilege. For the same reason, arguments in favor of disclosure based on the crime fraud exception to the attorney-client privilege (which vitiates the privilege where an attorney gives advice to assist the client in perpetrating a crime or fraud) are often paired with invocation of the fiduciary exception.

The bottom line is that the law of privilege can be murky in situations where counsel to privately held corporations also provide legal advice to stakeholders individually. What is clear, however, is that steps can be taken to mitigate the risk of court-ordered disclosure in the event that a dispute arises.

Practice Pointers

Several practical steps can help to mitigate the risk associated with the fiduciary exception in the context of closely held companies:

- First, to the extent that it is practicable to do so, founders of closely held companies should retain counsel for the company separate from the counsel who represent the founders individually. Legal advice given to the founders by their own counsel should not be subject to disclosure under the fiduciary exception; this risk only arises in our hypothetical because of the commingling of individual and corporate engagements.
- Second, to the extent that retaining separate counsel is impractical or undesirable, counsel should execute separate engagement letters clearly delineating the scope of their engagement for the company, on the one hand, and the founders or other stakeholders on the other.[12] Doing so helps to eliminate the risk of the commingling of advice—and, thereby, limit the risks of overly expansive application of the fiduciary exception.
- Third, in jurisdictions, including Delaware, where it is permissible to do so, founders may wish to consider including provisions in the company's organizational documents eliminating fiduciary duties.[13] Because the

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theoretical underpinning of the fiduciary exception is the existence of a fiduciary relationship, such a provision may preclude, or at least limit, the doctrine's application.[14] Needless to say, there are a number of considerations to be taken into account in deciding whether such a provision is desirable, but managing the risk associated with the fiduciary exception may weigh in favor of doing so.

In sum, stakeholders in closely held corporations and their counsel should be mindful of the fiduciary exception. While business founders are unlikely to expect disputes when they start their businesses, the practical steps suggested above can help to mitigate the risk of disclosure of sensitive communications in the unhappy event that disputes do arise.

Endnotes

1. *See, e.g.*, *LD v. United Behav. Health*, No. 20-CV-02254, 2022 WL 4878726, at *9 (N.D. Cal. Oct. 3, 2022) (observing that "many documents listed in . . . privilege log" suggest party "improperly withheld documents that fall within the fiduciary exception to attorney-client privilege"); *Cohen v. CME Group, Inc. Severance Plan*, No. 21-CV-5324, 2022 WL 1720318 (S.D.N.Y. May 27, 2022) (fiduciary exception prevents assertion of attorney-client privilege over documents concerning exercise of fiduciary duties in the administration of a benefits plan); *Brawer v. Lepor*, 75 Misc. 3d 1229(A) (Sup. Ct., N.Y. Cnty. June 29, 2022) (declining to apply the fiduciary exception to order discovery of documents "in this circumstance" because the communications at issue concerned the defense of claims made by the plaintiff rather than "in furtherance of any fiduciary duties owed to him").
2. 430 F.2d 1093 (5th Cir.1970), *cert. denied* 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971).
3. *Id.* at 1103.
4. *Id.*
5. The Fifth Circuit identified the following, non-exclusive factors:
   - the number of shareholders and the percentage of stock they represent;
   - the bona fides of the shareholders;
   - the nature of the shareholders' claim and whether it is obviously colorable;
   - the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;
   - whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality;
   - whether the communication related to past or to prospective actions;
   - whether the communication is of advice concerning the litigation itself;
   - the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing;
   - the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

   Garner, 430 F.2d at 1104.
6. *See, e.g.*, *Nama Holdings, LLC v. Greenberg Traurig LLP*, 133 A.D.3d 46, 54, 18 N.Y.S.3d 1, 7-8 (1st Dep't 2015) ("Despite its critics, the fiduciary exception has been widely accepted throughout most of the United States in trustee-beneficiary and corporation-shareholder cases."). *But see Milroy v. Hanson*, 875 F. Supp. 646, 651 (D. Neb. 1995) ("*Garner*, adopted as it was prior to the Supreme Court's opinions in *Upjohn* and *Weintraub*, is problematic.").
7. *See, e.g.*, *In re ML-Lee Acquisition Fund II, L.P. & ML-Lee Acquisition Fund (Ret. Accounts) II, L.P. Secs. Litig.*, 848 F. Supp. 527, 564 (D. Del. 1994) (applying *Garner* to limited liability partnerships); *Nama Holdings, LLC*, 133 A.D.3d at 61(remanding to trial court for application of *Garner* factors to assertions of privilege by limited liability company).
8. *In re Fuqua Indus., Inc.*, C.A. No. 11974, 2002 WL 991666, at *3 (Del. Ch. May 2, 2002) ("At the point in time when the interests of the fiduciary and the beneficiary diverge, however, there is no longer a mutuality of interest and a Garner analysis is not appropriate."); *Brawer*, 75 Misc. 3d 1229(A) at *3 (Sup. Ct. N.Y. Cnty. June 29, 2022).
9. *See Nama Holdings, LLC*, 133 A.D.3d at 57 ("[A]dversity is not a threshold inquiry but a component of the broader good-cause inquiry.").
10. *See, e.g., Hyde Park Venture Partners Fund III, L.P. v. FairXchange, LLC,* C.A. No. 22-0344, 2023 WL 2417273, at *6 (Del. Ch. Mar. 9, 2023) ("Because the corporation has no expectation of confidentiality as to a director, the general rule is that a corporation cannot assert the privilege to deny a director access to legal advice furnished to the board during the director's tenure.") (internal quotations omitted); *In re PWK Timberland, LLC,* 549 B.R. 366, 372 (Bankr. W.D. La. 2015) (describing two lines of cases: one viewing the corporate attorney-client privilege as a "collective" right belonging to the corporate entity and its management, and the second rejecting the "collective corporate client approach" and holding that the privilege resides solely with the company); *Gottlieb v. Wiles,* 143 F.R.D. 241, 247 (D. Colo. 1992) ("The policy underlying the work product doctrine would not be advanced by now denying Wiles access to documents which he could have seen upon request at the time they were generated.").
11. *See, e.g.*, *Henry v. Champlain Enters., Inc.*, 212 F.R.D. 73, 88 (N.D.N.Y. 2003) (noting disagreement among courts as to whether the fiduciary exception can apply to documents otherwise protected by the attorney work product doctrine and holding that "*Garner* is not applicable when the work product doctrine is claimed"); *Strougo v. BEA Assocs.*, 199 F.R.D. 515, 524 (S.D.N.Y. 2001) ("[T]he logic of *Garner* does not require the disclosure of material that is protected under the work product doctrine."); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1239 (5th Cir. 1982) ("*Garner*'s rationale indicates that it was not intended to apply to work product. *Garner* is premised upon the 'mutuality of interest' between shareholder and management.").
12. We assume for purposes of this article that undertaking the various representations is ethically permissible.
13. *See, e.g.*, Del. Code Ann. Tit. 6, § 18-1101(c) (2013).
14. *See, e.g.*, *Feinberg v. T. Rowe Price Group, Inc.*, No. 17-CV-00427, 2019 WL 6895580, at *3 (D. Md. Dec. 17, 2019) (explaining that "communications between ERISA fiduciaries and plan attorneys regarding non-fiduciary matters . . . are not subject to the fiduciary exception") (internal quotations omitted).

Opportunities and Pitfalls in Representing Clients in Arbitration

By Charles J. Moxley

In the past 30+ years, I have had the privilege of presiding over hundreds of large and complex commercial arbitrations, in the course of which I have worked with many hundreds of litigators in New York and other areas of the country.

I have benefited greatly and learned much from observing excellent lawyering by so many lawyers. In the process, I have been able to form some impressions as to approaches that are effective and sometimes less than effective in representing clients in arbitration.

The purpose of this article is to draw from this experience and suggest some best practices that hopefully may be helpful to litigators who have the opportunity to represent clients in arbitration.

The Arbitration Difference

To effectively represent clients in arbitrations, litigators should be mindful of distinctions between arbitration and court-based dispute resolution. The likelihood of achieving the client's objectives in arbitration can be greatly increased and pitfalls avoided if one acts effectively to navigate such differences, rather than proceeding as if one were in court.

Arbitration Soft Law

Familiarizing oneself with arbitration soft law as to process and procedure is a major first step in getting ahold of such differences. Arbitration is not unlike bench trials when it comes to arbitrators' applying applicable substantive law in a commercial arbitration. In my experience, arbitrators, like judges, generally do their best to apply applicable law to the facts, as required in the particular case.

What may at first appear to be more of a black box is how arbitrators can be expected to proceed concerning process and procedural matters. In New York State and federal courts, procedural matters are generally prescribed by the Federal Rules of Civil Procedure (FRCP) or the Civil Practice Law and Rules (CPLR) and underlying case law. It is a rite of passage for New York litigators to research pleading and discovery issues and issues as to motion practice under the FRCP or the CPLR.

Arbitration is different. Whether one is proceeding under the commercial rules of the American Arbitration Association (AAA), CPR, JAMS, FINRA, the ICC, or other arbitration providers, most such matters are left to the discretion of the arbitrator. While provider rules generally set forth general arbitration objectives as expedition, economy, flexibility, finality, and fairness, they offer little guidance as to how those objectives should inform arbitrators' exercise of discretion in deciding discovery and other pre-hearing matters.

It is expected that successful arbitrators will have good judgment as to such matters and that parties and their counsel will be able to figure out which arbitrator candidates are likely to have such judgment. Still, parties and litigators often find daunting the absence of the level of guidance provided by the FRCP and CPLR. Without such guidance, how can litigators best argue discovery and other procedural matters to their arbitrators or predictably counsel their clients as to how such matters are likely to play out?

The answer, too often overlooked, is arbitration soft law, consisting of guidelines that memorialize considerations that should inform the sound exercise of discretion by arbitrators, depending on the facts and circumstances of the particular case.

Prime examples are the Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations prepared by NYSBA's Dispute Resolution Section and approved by the House of Delegates; the Protocols for Expeditious, Cost-Effective Commercial Arbitration promulgated by the College of Commercial Arbitrators (the CCA), and the CCA's Guide to Best Practices in Commercial Arbitration.[1]

Arbitration soft law can often be a more persuasive source of arguments for counsel and guidance for arbitrators than the FRCP or the CPLR in addressing discovery motions or other preliminary matters in arbitrations being conducted in New York.

The Arbitration Agreement

Of quintessential importance to any arbitration is the parties' agreement to arbitrate.

Arbitration agreements are typically short, doing little more than setting forth parties' agreement to arbitrate disputes within defined parameters and perhaps selecting an arbitration provider. However, arbitration agreements can be detailed, setting forth parameters as to such matters as arbitrator qualifications, designation of arbitration law, require-

ments for pleadings, jurisdiction to decide arbitrability, scope of discovery, procedures for substantive motions, procedural timelines, and other matters parties choose to agree to in advance,[2] rather than leaving them to later discretion or other decision-making by arbitrators.

Unless it is invalid or the parties agree to amend it, the arbitration agreement is binding on the parties, arbitrators, arbitration providers, and any reviewing court. The fundamental basis of contemporary arbitration law is the consent of parties to arbitrate. The governing arbitration agreement, as it may be amended (or its provisions waived), sets forth that consent.

Early Case Assessment

As litigators, we all know the benefits of early case assessment, as contrasted with largely learning about our cases in the course of discovery and motion practice. Early case assessment is essential for representing clients well in arbitration, given the much quicker pace of arbitration and the opportunity, from early in the case, to win the hearts and minds of the arbitrators.

Pleadings That Advance the Case

If the client supports the expense of early case assessment and counsel is serious about moving the case forward, why not lay it all out in detailed pleadings and exhibits that convey the merits of the claims or defenses? It will all come out in discovery in any event. Provider rules for commercial arbitration typically only require the most general of pleadings, and a summary sentence or two may suffice. But why not seize the day? Why not convey the strength of the case to the arbitrators at the earliest opportunity, perhaps well before an adversary focuses on the matter?

Credibility With the Arbitrator

Litigators' credibility with their arbitrators is key. While judges in New York courts may have hundreds of cases on their docket, the busiest commercial arbitrator specializing in complex cases will have a much smaller caseload—maybe 10 to 20 cases, perhaps six to eight active cases at any point in time.

Particularly in an active arbitration with extensive prehearing motion practice, the arbitrator will be forming an impression early on as to which counsel can be relied on in their characterizations of the facts and law and which are essentially posturing or equivocating. Counsel's credibility can be of key importance on some issues.

Party Autonomy

Parties choose arbitration for various reasons. Many are opting for a more flexible, faster, less expensive, and final process, without sacrificing fairness. Others may be more interested in being able to select their decision-makers, but otherwise want something approximating the process they would have gotten in court, perhaps even one subject to the FRCP or CPLR and even the Federal Rules of Evidence.

The Muscular Arbitrator

The bedrock of commercial arbitration is consent. Parties are entitled to the type of arbitration to which they agreed or to which they agree in the course of the arbitration. Where, however, the parties cannot agree as to the type of process for their arbitration, it falls to the arbitrators to decide such matters, subject to the considerations discussed above as to the objectives of arbitration and arbitrators' duty to exercise their best judgment in providing to the parties in such cases the potential benefits offered by arbitration or otherwise agreed to by the parties.[3]

As an antidote to the "litigationization" of arbitration, whereby some cases end up with substantial discovery and motion practice over the objection of at least some parties, contemporary arbitrators are expected to manage their cases proactively to achieve efficient and economical arbitrations, consistently with the requirements of each case.

Interplay of Party Autonomy and Muscular Arbitrators

If the parties are in agreement as to process and schedule for their arbitration, they should be the "muscular" ones and submit their agreed approach to the arbitrator, advising firmly as to their mutual agreement on the matter. If, on the other hand, as more usually happens, the parties disagree as to the appropriate level of process for the case, it becomes the arbitrator's job to determine such matters based on their judgment as to the needs of the case.

That said, many arbitrators believe it is part of their job, even when parties are jointly electing for a litigation-like process and schedule, to push back—to "jawbone" the situation—advising as to the putative benefits of arbitration and how arbitration is generally expected to go. Counsel should remember, however, that when parties are in agreement as to such matters as the scope of discovery or the like, they are generally entitled to have the case proceed as they have agreed. Indeed, if the arbitrators disregard or seek to override parties' agreement in such circumstances, the parties may be entitled to fire the arbitrators and start with a new arbitrator or panel.

The Preliminary Hearing: Devising the 'Architecture' of the Case

The first meeting of counsel with the arbitrator, the preliminary hearing, scheduling conference, or organizational meeting, as it is variously called, is designed to conference the case and design the process and schedule best suited to the needs of the case. Unless the parties have agreed to a more court-like process, this generally means more limited and streamlined discovery[4] and a screening process for proposed dispositive motions.

Where the parties are not on the same page as to the process and schedule for the case, the preliminary hearing will generally be the first opportunity for counsel to conference such matters with the arbitrators and begin to affect the arbitrators' views of the case, harnessing arbitration soft law to achieve this. Counsel should be prepared at the preliminary hearing to discuss the process and schedule for essentially all aspects of the case that can be anticipated. It is a huge opportunity to try to influence the arbitrators' putting in place a process and schedule that seem best suited for being able to represent one's client.

Less Discovery Without Sacrificing Fairness

Do we not need all those emails and other electronic discovery, all those depositions (how can we possibly cross-examine witnesses without having deposed them?), all those interrogatories, and all the rest? We learned from our earliest days in law school that the U.S. system of discovery is designed to enable parties in litigation to avoid surprises and have a fair opportunity to prepare their cases. We have integrated that into the deepest fibers of our litigative DNA. Are we now saying that that whole approach was wrong?

From a huge body of practical experience now available to us, the answer is clear: the modern expansive discovery regime is an overcorrection. The pre-hearing discovery in arbitration can fully enable parties to prepare their claims and defenses, but is far less expansive than that which many litigators have come to expect in court.

This is true on two levels. We can limit discovery to matters actually in contention in a case, rather than to all elements of all potential causes of action. We can avoid requiring production of documents already in the possession of the other side unless there is a special need for such production in the particular case. We can work hard early in the case and throughout on identifying what matters are actually in contention (a process that otherwise may not occur until well into the trial). We can require early production of reliance documents. We can require that parties provide early affidavits with related exhibits—particularizations—setting forth the facts as to matters in contention as to which the party has the information and bears the burden of proof. We can proceed through sworn witness statements and related exhibits early in the case in certain kinds of cases. We can work hard on limiting electronically stored information (ESI) through early agreement on reasonable limitations as to such matters as custodians, date ranges, search terms and related testing, systems to be searched, and the form of production. We can provide for categorical privilege logs, to the extent privilege logs are needed at all. Where depositions are needed, we can work out reasonable limitations as to their number and duration. All these steps and more can serve to substantially re-

duce the scope of discovery in arbitrations without in any way compromising the fairness of the process.

Even more broadly, it is worth questioning whether even such a narrower scope of discovery that may result from such approaches as the above is needed for parties to have a fair opportunity to prepare and try their cases. As discussed below, international arbitration is informed by the approach of civil law systems towards such matters. In international arbitration, even the word "discovery" is an expletive. The "disclosure" that is permitted is narrower than that under our common law system, yet, from my experience, parties and litigators who have been involved in international arbitrations generally feel that the fairness of the process was not compromised by the lower levels of discovery and other differences.

Less Motion Practice Without Sacrificing Fairness

A lament of respondents in arbitrations is that they are often unable to get the dismissal of claims against them that would have been dismissed in court, a lament that is particularly heightened in larger cases where the cost of the motion practice would be far less than the cost of discovery and an evidentiary hearing. This is a serious concern and one that arbitrators must have in mind in considering proposed dispositive motions in arbitrations. However, the avoidance of essentially automatic motions to dismiss and for summary judgment that occur in court is one of the ways arbitration is able achieve its objectives of expedition and economy that underlie the selection of arbitration by many parties.

There is also the reality that there is essentially no review on the merits of arbitrators' decisions. Without the protection judges have that any misjudgments they make in premature decision-making may be corrected by appellate courts, arbitrators generally feel they should bend over backwards to give parties an evidentiary hearing. The standard for dispositive motions is high and arbitrators generally screen proposed motions closely.

Counsel need to understand this mindset in advocating for or opposing potential dispositive motions. But there is certainly a role for dispositive motions in arbitration. Most centrally, counsel can agree to have issues determined on the papers.

Sometimes there will be, for instance, limitations or contract construction issues that both sides would benefit from seeing resolved early on. While the natural reaction of a litigator facing such a proposed motion may be to oppose it, in some circumstances it will make sense to tee up certain pivotal issues for early decision, particularly when it does not seem likely that significant additional information on such matters will emerge from discovery or further investigation.

Many arbitrators are open to the submission of particular issues on dispositive motions, when the resolution of such matters may facilitate settlement. Many arbitrators have seen circumstances where dispositive motions, even if not granted, have facilitated parties' understanding of one another's cases and settlement has resulted.

Non-Party Subpoenas

Contemporary commercial arbitration typically involves complex transactions and participants and witnesses across jurisdictional lines. There is generally no issue as to witnesses who are parties or employees of parties, since they (and their documents) are subject to the authority of the arbitral tribunal. But what about non-party witnesses? What authority do arbitrators have over them?

This is one of the more complex areas to navigate in arbitration. Both federal and state law provide ways for subpoenaing non-party witnesses. However, the rules vary considerably across federal and state jurisdictional lines. Figuring out the applicable rules and convincing the arbitrators as to the matter in any particular instance can be daunting. Fortunately, there are two reports of the New York City Bar Association that analyze the law and options in this regard, which can save huge amounts of time.[5]

This is an area that requires effective advocacy by counsel. Arbitrators have a range of views on the matter. Some will essentially sign any subpoena presented to them unless they know it is unenforceable. Others will only sign subpoenas they know are enforceable.

The above discussion relates to issues as to enforceability, which are ultimately for the courts to decide when a subpoena is contested or ignored. Subpoenas can also be objected to on the basis of their scope. The general understanding is that arbitrators should hear and decide issues as to scope, including objections raised by parties and by recipients of subpoenas.

Having the Chair Decide Discovery Issues

When there is a panel of three arbitrators, parties, under provider rules, generally have the option of having the chair (or other arbitrator in the chair's absence) decide discovery and other routine pre-hearing matters. Whether to take this approach is a judgment call for counsel. It can save a lot of time and expense but puts pivotal judgment calls that could be consequential in the hands of just one of the arbitrators and means that that arbitrator will be further along the learning curve than the other members of the panel when the hearing begins.

Privacy/Confidentiality

There is a widespread misconception that arbitration is confidential. This is not generally the case. Provider rules typically provide that arbitrations are confidential insofar as concerns the arbitrators and the provider but only private as concerns parties and their counsel. Absent a confidentiality agreement among the parties or order of the arbitrator, a party may generally walk outside the hearing room and hold a press conference.

The standard confidentiality order proffered by parties and so-ordered by arbitrators typically only extends to confidential documents produced in the case. If parties want the entire proceeding to be confidential, they need to so stipulate or seek an order from the arbitrator to that effect.

If parties have to go to court to seek to enforce or vacate an arbitration award, confidentially will likely largely be lost. Such court processes generally require the filing of the award in court. Courts generally refuse to seal such awards or related motion papers or court decisions.

Applications for Interim Relief

There are various options in provider rules for seeking interim relief in arbitration, including through the appointment of an emergency arbitrator before the regular arbitrator is appointed. In addition, there are opportunities to go to court for interim relief. However, if one really wants interim relief from one's arbitrators, it is generally not enough to include such a request in a pleading. One should also make a formal application to that effect so as to draw the arbitrator's attention to the matter.

Whether to go to court or to an arbitrator to seek interim relief will depend on the circumstances of the particular case. Arbitrators have much more limited enforcement ability than courts, but there are advantages to beginning to educate one's arbitrators as early in a case as possible.

Mediation Window

It still appears to be part of the New York litigative mindset that counsel regard it as a sign of weakness to suggest mediation. For that reason, it can be helpful if arbitrators include a mediation window in their scheduling order, a time by which the parties will meet and confer as to whether they want to mediate the case.

Differences Between Federal and State Arbitration Law

Substantive law is the law applicable to parties' disputes, whether state or federal law or some combination thereof. Arbitration law is the law that governs the arbitration, typically, the Federal Arbitration Act (FAA) and underlying case law or state arbitration law, such as, in New York, Article 75 of the CPLR, and underlying case law. Arbitration law includes both substantive and procedural provisions, including substantive law as to arbitrability and enforcement of awards and procedural law as to procedures relating to arbitrations.

The interplay of federal and state arbitration law is complex. Perhaps counter-intuitively, general choice of law clauses in parties' contracts are generally understood to supply the substantive provisions, but not the arbitration law, applicable to their disputes.

While parties may, in their arbitration agreements, select the arbitration law they want to be applicable in any arbitration thereunder, they generally do not do so. As a result, the applicable arbitration law in any particular case, when an issue arises, must be agreed to by the parties or determined by the arbitrators.

The FAA generally applies, with limited exceptions, to arbitrations involving interstate commerce. This makes the FAA putatively applicable to the vast majority of commercial arbitrations. However, under the FAA, parties may agree to have state arbitration law apply even to cases involving interstate commerce.

All of this matters because federal and state arbitration law vary in substantial respects. For instance, for a case seated in New York, there are substantial differences between the FAA and Article 75 of the CPLR, including with respect to such matters as non-party subpoenas, sanctions, punitive damages, attorneys' fees, statutes of limitation, and other areas.

Adding to the complexity is that the FAA, insofar as concerns domestic arbitrations, does not generally provide federal subject matter jurisdiction for disputes cases arising thereunder. This means that cases subject to the FAA may end up in state court unless the plaintiff can otherwise establish federal subject matter jurisdiction. When cases subject to the FAA end up in state court, further layers of complexity can arise, as state courts may interpret the FAA differently than the federal courts interpret it.

It can also happen that federal courts are asked to apply state arbitration law in cases in which there is a basis for federal subject matter jurisdictioin, but state arbitration law is applicable, whether by agreement of the parties or otherwise. It is also the case that, on numerous issues, such as concerning non-party subpoenas, different circuit courts of appeal throughout the country have interpreted the FAA differently.

Thus, in any particular case, federal or state arbitration law may apply and that law may have been interpreted differently by federal and state jurisdictions in which such matters may be raised. Tricky choice of law issues can be presented, the results of which can be consequential. Fortunately, there

are several articles that provide useful guidance as to such matters.[6]

Highlighting the need for proactivity in this regard is that some arbitrators may ask counsel as early as the initial preliminary hearing what their position is as to the applicable arbitration law. Counsel are well advised to consider the matter as part of their initial case assessment.

One Versus Three Arbitrators

Some clients and attorneys prefer to have three arbitrators as a hedge against an outlier award. There are also obviously potential benefits in having several arbitrators consider a case. However, the costs can go up exponentially when three arbitrators are selected, each charged with responsibility to hear and decide the case. The costs will likely be not three times the cost of a sole arbitrator, but some multiple of that, as serious professionals consider and deliberate over complex matters.

Concern about an outlier award can be ameliorated when a sufficient comfort level can be achieved to proceed with a sole arbitrator in whom both sides have confidence. There is also the ironic reality that a responsible individual serving as a sole arbitrator, because of the solitary nature of the assignment, may, at least in some instances, feel a deeper sense of responsibility than three arbitrators hearing the same dispute, who may be subject to vagaries of group dynamics.

Standard Versus Reasoned Awards

When I started as an arbitrator as a young associate at Davis Polk years ago, before the cases brought to arbitration had become as complex and sophisticated as they now are, it was more typical for parties to provide a "standard," as opposed to reasoned award, an award that merely sets forth the ultimate determination of the arbitrator, as opposed to their reasoning and the like. While reasoned awards are now expected in the vast majority of cases, standard awards are still an option—and can save parties the cost and delay of a reasoned award.

Parties sometimes feel they need to request a reasoned award to make sure the arbitrator does the work. However, this should be an unnecessary expense if, again, through investigation or access to the network of feedback on arbitrators, one can reach a confidence level as to the arbitrator selected.

Rules of Evidence

Do not be misled by the ease of getting hearsay admitted into evidence or leading questions answered affirmatively in arbitration. Arbitrators are not dummies. There are reasons for the rules of evidence. Particularly where more direct and percipient evidence was available, arbitrators are unlikely to accord much credibility to evidence that inherently lacks credibility.

Avoiding Post-Hearing Briefing in Some Cases

As counsel, after conducting a complex trial, we generally want to marshal the evidence and submit post-hearing briefs. However, in some cases, it may make sense to avoid the time and expense of such briefing.

If we made a good selection of arbitrators; if the pre-hearing briefing adequately covered the legal issues; if the hearing went well; if the arbitrators appear to have been paying attention and grasping matters presented; and if the arbitrators did not highlight any particular areas of need, do we really need post-hearing briefing? Why not give the case to the arbitrators to decide promptly after closing statements? In a significant number of cases (I would estimate as much as 75-80% of cases), good arbitrators, who have done their job throughout, will know how they are going to come out after all the evidence is in.

There will be exceptions, of course, where post-hearing briefing is essential, but there will be many cases where the often substantial time and expense of post-hearing briefing may not add much.

Interviewing Arbitrator Candidates

A not widely known opportunity is that one may generally interview arbitrator candidates. The AAA has particular procedures for this, as do other providers.

Conducting such interviews can be particularly helpful, if one has figured out the needs of one's case and, through skillful general questions, can probe arbitrator candidates as to areas of interest, such as their views as to discovery and dispositive motions. If one is part of the arbitration world network and can come up with such information on one's own, this option may be less important. However, even then, it can be helpful in terms of assessing one's personal reaction to arbitrator candidates, chemistry considerations and the like.

Arbitrability

Ironically, given the objective of arbitration to be a more streamlined process than court-based dispute resolution, the law as to arbitrability has been rendered complex and in some respect unclear by multiple split decisions of the U.S. Supreme Court.

The threshold issue counsel will face, if they want to object to or defend against an objection to arbitrability is whether a court or the arbitrators have authority to decide the issue—the Who Decides question. This question alone can eat up substantial time and expense, as parties dispute the matter before courts and arbitrators. Issues of waiver and estoppel

can also arise if a party disputes such matters in one type of forum or the other without preserving the objection.

The question of the nature of the challenge to arbitrability, including whether it is characterized as substantive or procedural, can affect the answer to the Who Decides issue. Particularly complex issues of arbitrability, including as to the Who Decides issue, can be raised when the dispute concerns non-signatories to the arbitration agreement.

Arbitrability issues, even when it is clear that the FAA applies, will often raise questions of state law. The FAA establishes the substantive rule that arbitration agreements, like other agreements, are enforceable and protected by law. With exceptions, it puts arbitration agreements on the same ground as other contracts. This, however, means that, under the FAA, the validity of an arbitration agreement is subject to issues of state law as to contract validity, just as the validity of any other agreement could be questioned under state law.

Questions also arise concerning when issues as to arbitrability should be decided. Obviously, if the case is a big one that will be expensive, it will generally make sense to get the issue decided early in the case, even if, if factual issues are presented, that means having pre-hearing discovery and an evidentiary hearing on the matter.

On the other hand, if factual issues as to arbitrability are presented that are closely intertwined with issues as to the merits, it may, in some circumstances, particularly in certain types of low dollar cases, make sense to have arbitrability addressed when the merits are heard. How matters such as these should be handled will be dependent on the facts of the particular case.

Where there are issues as to arbitrability, they should be addressed early on. Missteps in addressing them can cost considerable time and expense.

Parallel Litigation

It infrequently happens that parties have multiple related contracts, some of which call for arbitration and some do not, and which may also provide for a variety of judicial and arbitral forums. When disputes arise and parties end up in multiple forums, litigating and arbitrating related matters or even arbitrating related matters before separate panels and even providers, potential risks and opportunities can be presented, including consideration of cost and delay and risks of inconsistent results.

It can be hard to avoid parallel proceedings. There are no readily available processes for consolidating arbitrations and court cases or even parallel arbitrations pending before different arbitration providers. However, if one's client would like to avoid such duplicative proceedings, there are potential options to explore.

Parties can do a lot by agreement. If parties have confidence in their arbitrator, they can agree to move all the disputes to the arbitration. If they prefer the arbitrator in one of several parallel arbitrations, they can agree to have that arbitrator decide the overall disputes. Parties who are in agreement may even be able to devise some hybrid methods for consolidation, in whole or in part, if the consent of the courts or arbitrators involved can be arranged.

Even when the parties are not in agreement, there may be creative applications a party can make to seek some level of coordination between parallel proceedings, such as joint discovery or use by a court or arbitrator of work or decisions from the parallel proceeding. Where parallel matters are pending before the same arbitration provider, such as the AAA, there will in some instances be procedures available for seeking consolidation.

Distinctive Features of International Arbitration

This article has primarily focused on domestic arbitration. Domestic arbitration process is roughly parallel to domestic litigation process, albeit with the focus on the arbitral objectives of expedition, economy, flexibility, finality, and the like. International arbitration is fundamentally different.

For international disputes, arbitration, not court, is the default. Typically, neither side to an international commercial transaction will want to end up in the other side's legal system. International arbitration, because of its international nature, however, will often need to be informed by the other type of the world's legal systems, the civil law system, an ap-

proach followed by the majority of states throughout the world.

Litigation in civil law jurisdictions is different from that in common law jurisdictions in many respects, including the following: far less discovery, generally limited to document production, with even that being largely limited to specifically designated documents and reliance documents; greater focus on documents rather than testimony and less reliance on cross-examination; greater reliance on the privacy of individual persons, even if employees of a party to a case, and a more expansive legal regime as to privacy; less motion practice; a more engaged judiciary that plays a greater role in developing cases than judges in our system; the discouragement of litigation through permitting the recovery of attorneys' fees by prevailing parties in many cases; less tolerance for commencing a case before one reliably has a basis for the case, as opposed to hoping to develop one through discovery; a greater reliance on expert witnesses, often ones appointed by the tribunal; and numerous other differences.

Contemporary international arbitration is largely a hybrid of the two legal systems, with a fair amount of convergence. Which system's attributes will dominate in a particular case will typically turn on the circumstances of the case, including the approaches of the arbitrators presiding over the case. There are also numerous international conventions and guidelines and other forms of soft law applicable to international arbitration that one must get a handle on before being able competently to represent a client in an international arbitration.

Summary

Arbitration is fundamentally different from court-based dispute resolution. Hopefully the above can be helpful as to ways to reap the benefits and avoid potential pitfalls in representing clients in arbitrations.

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Endnotes

1. *See* NYSBA Dispute Resolution Section, Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations, approved by the House of Delegates (April 2009), and the similar Guidelines for International Arbitrations, approved by the House of Delegates (November 2010), https://www.adr.org/sites/default/files/document_repository/NYSBA%20Guidelines%20for%20the%20Arbitrator%27s%20Conduct.pdf; College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration (2010), https://www.ccarbitrators.org/wp-content/uploads/2021/05/CCA_Protocols.pdf; College of Commercial Arbitrators, The CCA Guide to Best Practices in Commercial Arbitration (4th Ed. Juris 2017).
2. *See* the ClauseBuilder Tool of the American Arbitration Association at https://www.clausebuilder.org, highlighting a wide range of options for inclusion in arbitration clauses.
3. For a discussion of Best Practices of arbitrators, *see* Charles J. Moxley, Jr., Dana Welch & Kelly Turner, Understanding—and Avoiding—Vacatur and Applications for Vacatur, Dispute Resolution Journal (2023).
4. For a discussion of the scope of discovery in arbitration, *see* Charles J. Moxley, Jr., *Beyond the 'Discretion of the Arbitrator': Applying the Standard of 'Reasonable Necessity' to Determine the Appropriate Scope of Discovery in Insurance/Reinsurance Arbitration,* ARIAS-U.S. QUARTERLY, First Quarter, 2009; Charles J. Moxley, Jr., *Discovery in Commercial Arbitration: How Arbitrators Think,* Dispute Resolution Journal, American Arbitration Association, Aug.-Oct. 2008.
5. *See* New York City Bar Association, Obtaining Evidence from Non-Parties in International Arbitration in the United States (International Commercial Disputes Committee July 2010), https://www.nycbar.org/pdf/report/uploads/20071980-ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf; New York City Bar Association, A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing (International Commercial Disputes Committee and the Arbitration Committee 2015), https://www2.nycbar.org/pdf/report/uploads/20072911-ABCNYModelArbitralSubpoena.pdf.
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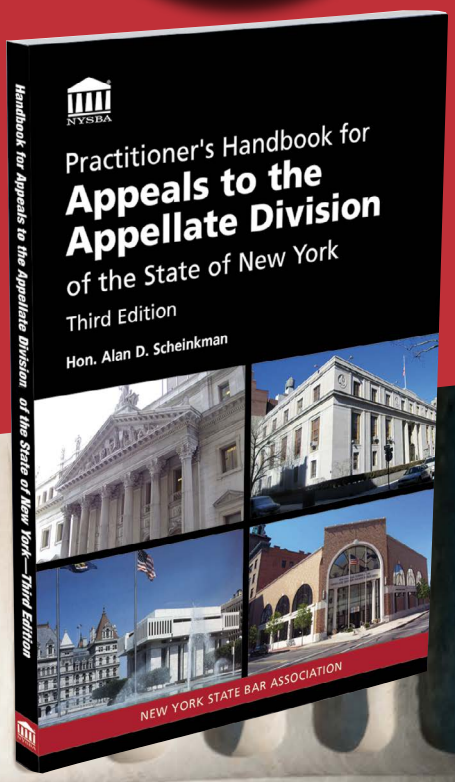

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