THE COMMERCIAL DIVISION LAW REPORT

A report on leading decisions issued by the Justices of the Commercial Division of the Supreme Court of the State of New York

Hon. Jonathan Lippman
Chief Judge of the State of New York

Hon. Ann Pfau
Chief Administrative Judge of the State of New York

VOLUME 12, NUMBER 4 FEBRUARY 2010

Art buyer and seller: art auction house and art consignor; art dealer; fiduciary duty, arm's length business transaction. Plaintiff had paid defendants $118,000 for a painting by John Wesley. Individual defendant had sold the Wesley to a third party and offered plaintiff, instead of money back, a $200,000 credit toward a Julian Schnabel painting. Defendant had allegedly represented the Schnabel as worth $500,000 but promised to sell it to plaintiff for a total of $380,000. After advancing $90,000 toward the Schnabel plaintiff had discovered that its market value was at best $110,000. Plaintiff sued for a return of her money based on fraud and related causes of action. Defendant moved to dismiss the complaint. In opposing the motion and to support her fraud claim, plaintiff alleged that defendant had misrepresented the Schnabel as worth $500,000 when she knew it was worth much less. Plaintiff submitted defendant's e-mail messages that stated, among other things, that plaintiff was "getting beyond a good deal," and that defendant had talked to Schnabel to "get the lowest price possible." Plaintiff also submitted defendant's invoice for the Schnabel listing a $500,000 price minus discount. Plaintiff relied on Cristallina S.A. v Christie, Manson & Woods, (117 AD2d 284, 294 [1st Dept. 1986]) in which the Appellate Division said that an agent at an auction house "merely expressing an opinion" still had an obligation to render the opinion truthfully. However, that obligation flowed in part from the fiduciary relationship between art auction consignors and consignees, not present in this case, the court said. Plaintiff did not allege that she had tried to ascertain the Schnabel's value before agreeing to buy it and the court found that her blind reliance on defendant's alleged statements in the context of an arm's length transaction was not reasonable as a matter of law. The fraud claim was dismissed. Plaintiff pointed to cases from other jurisdictions for authority that art dealers could be liable for negligent misrepresentation. But the court explained that New York courts have ruled, for example, that Sotheby's could not be liable for negligence unless plaintiff had hired or paid it for an appraisal, and have distinguished auctioneers and art appraisers from lawyers and engineers, who might have special relationships of trust with their clients by virtue of their special expertise. Here, the court found, plaintiff alleged nothing more than a relationship of art buyer to art seller, which did not rise to the level of a special relationship. The claim was dismissed, as was one for promissory estoppel. To the extent that any alleged promises were not fulfilled, the court found, again, that plaintiff could not reasonably have relied on statements regarding the Schnabel's value when she had made no effort to independently appraise it. Plaintiff's unjust enrichment claim, the court said, could have

This Issue Covers Decisions From:

OCTOBER—DECEMBER 2009

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been sustained under dissenting opinions in Mandarin Trading Ltd. v Wildenstein, (65 AD3d 448 [1st Dept. 2009]) which involved an inflated appraisal of a Gauguin. There, one dissent stated that plaintiff was entitled to a chance to show that defendants had been unjustly enriched to the extent that the painting's appraised value had been inflated; another that plaintiff, with allegations that defendant had actually had an interest in the Gauguin, knew that an unwitting buyer would rely on his inflated appraisal, and profited unjustly, had sufficiently stated a claim. However, under the binding majority opinion, plaintiff here was not entitled to rely on defendant's representation. Nor had plaintiff here shown that defendants' enrichment was unjust, especially because she could have, but had not, gotten her own appraisal. Seung v. Fortune Cookie Projects, Index No. 600537/2009, 10/16/09 (Bransten, J.).

Attachment; provisional remedies; CPLR § 6201 et seq.; CPLR § 7501 et seq. Foreign corporation's motion to confirm attachment of New York-based asset owed to respondent as debt was granted, notwithstanding the lack of any connection with New York by way of either subject matter or personal jurisdiction. Petitioner, a Japan-based company, and respondent, an India-based company, entered into a contract by which petitioner was to supply telecommunications equipment and respondent was to make payments for that equipment into an escrow fund in India. Respondent failed to make payments, triggering an arbitration held in Singapore pursuant to the contract. Petitioner attached an account receivable from an unrelated party—a debt owed to respondent by a New York domiciliary—and moved to confirm that attachment. First, the court resolved an equal protection issue arising from the standard by which a non-domiciliary may obtain an order of attachment in aid of arbitration. CPLR 7502, as amended in 2005, permits a non-domiciliary to obtain an order of attachment in aid of arbitration if the award would be rendered ineffectual absent such relief. CPLR 6201 (3), however, requires domiciliaries to demonstrate that the defendant has the intent to "defraud creditors or frustrate the enforcement of a judgment" before attachment is proper. The court observed that in most cases the proof required by CPLR 7502 (c) is, as a practical matter, similar to that required by CPLR 6201 (3). It ruled that in this case petitioner had met the requirements of both statutes. Second, the court held that although it lacked personal jurisdiction over the respondent, it could still grant an order of attachment over property within its jurisdiction for security purposes. While the court agreed that it could not, without such personal jurisdiction, adjudicate the underlying dispute, it was empowered to attach an asset within its jurisdiction, such as the debt owed to respondent by a New York domiciliary.The court, therefore, confirmed petitioner's attachment against the debt owed to respondent by a New York domiciliary in connection with the parties' foreign arbitration. Sojitz Corp. v. Prithvi Information Solutions Ltd., Index No. 602511/2009, 12/2/09 (Yates, J.).

Class Action;CPLR 901; CPLR 902; Transportation Corporations Law § 27; General Business Law § 349; CPLR

THE LAW REPORT
is published
four times per year by
the Commercial Division of the
Supreme Court of the
State of New York

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The Commercial Division acknowledges with gratitude the assistance provided by the Commercial and Federal Litigation Section of the New York State Bar Association in the publication of *The Law Report*

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3025. Defendant and its corporate predecessors provide telephone service in New York City. In order to service high-density neighborhoods, where buildings are attached and access to the street is limited, defendant had extended telephone lines from the public way or street to individual homes and businesses by implementing an "inside block architecture." Defendant placed terminal boxes on the rear walls of privately owned buildings, then strung telephone cable from one host building's terminal box to the next terminal box, circumnavigating the interior of the block through rear yards until the "inside plant" network circuit for that particular block was complete. Plaintiffs, as owners of real property encumbered by a rear wall terminal, commenced a prospective class action on behalf of themselves and the owners of other properties encumbered,allegedly without permission or compensation, by defendants' equipment. Plaintiffs sought declaratory and injunctive relief and monetary damages for trespass, compensation under Transportation Corporations Law § 27, and damages for deceptive business practices under General Business Law § 349. The court rejected plaintiffs' request for class certification. Plaintiffs failed to satisfy the requirements for class certification pursuant to CPLR 901 (a) because: (1) the class size, potentially numbering between 16,000 and 30,000 rear-wall terminals and involving different forms of permission granted by the various property owners, was unmanageable; (2) oral communications by defendants' individual field agents had induced particular property owners to grant gratis permission to install the terminal boxes, requiring individualized proof for each class member that would overwhelm any questions common to the class; (3) evidence presented by defendants in opposition to the motion to certify the class presented serious questions as to plaintiffs' standing and precluded typicality; (4) plaintiffs' counsel was a family member, casting doubt on plaintiffs' independence and ability to protect the interests of the class; and (5) a class action was not the superior method of litigation because compensation to the prospective class members would be negligible in light of the expense of litigation. Plaintiffs also failed to qualify for class certification under CPLR § 902 because there was evidence that some property owners did not wish to encumber their property by granting defendants permanent permission to access their property, so the class members' desired relief could vary significantly from plaintiffs' demands. Determining the composition of the class and addressing the claims on the merits would require property-by-property inquiries for tens of thousands of properties, which would make the class utterly unmanageable. A motion by plaintiffs for leave to amend their first amended complaint pursuant to CPLR 3025(b), to replace their trespass cause of action with an action for unjust enrichment, was denied because the court already had ruled the two claims were duplicative and repeated arguments contained in an earlier motion to reargue. Corsello v. Verizon New York, Inc., Index No. 39610/2007, 11/5/09 (Demarest, J.).**

Contracts; construction contracts; no damage for delay clause; constructive acceleration. Plaintiff construction company and defendant transportation authority had entered into a contract relating to runway construction and other work at the Buffalo Niagara International Airport. When the original schedule for the project could not be met, the parties had executed a change order extending the project completion date for approximately one year. Plaintiff subsequently requested an additional extension of time, but defendant denied the request. Plaintiff alleged that, as a result, it had to "constructively accelerate" work and suffered "acceleration" damages in the amount of approximately $3 million. Defendant moved to dismiss plaintiff's claims to recover these so-called "acceleration" damages. The court granted the motion but gave plaintiff leave to re-plead. The court rejected defendant's argument that plaintiff's claim for damages was barred by the parties' change order, explaining that the acts giving rise to plaintiff's claim had occurred after the execution of the order. The court next turned to the contract that defendant claimed explicitly precluded plaintiff from recovering "additional costs for delay, inefficiency or interferences." The court disagreed with plaintiff's assertion that this "no damage for delay" clause was inapplicable because its claim for "constructive acceleration" was distinguishable from a claim for "delay" damages. Instead, the court noted that the New York Court of Appeals had characterized the kind of "acceleration" damages sought by plaintiff as "delay" damages, which would be subject to a "no damage for delay" clause in a construction contract. The court, therefore, granted defendant's motion to dismiss but gave plaintiff the opportunity to re-plead its claim for damages in a manner that would not be barred by the parties' contract. DiPizio Construction Company, Inc. v. Niagara Frontier Transportation Authority, Index No. 1203/2009, 12/18/09 (Curran, J.).**

Contracts; factoring agreements; chargebacks. Attorneys' fees. Pursuant to a factoring agreement, defendant had purchased certain accounts receivable from the plaintiff, a manufacturer of apparel. Plaintiff sued to recover allegedly improper "chargebacks," claiming that defendant had breached the covenant of good faith and fair dealing by, among other things, fabricating disputes with plaintiff's customers in order to justify the chargebacks. Defendant moved for summary judgment dismissing plaintiff's claim, and also moved for an order awarding it judgment on its counterclaim for damages and attorneys' fees. The court found no evidence to support plaintiff's contention that defendant had breached the covenant of good faith and fair dealing. As a result, the court granted defendant's motion for summary judgment with respect to this claim. The court also granted defendant's motion for summary judgment with respect to its counterclaim, in which it sought to recover approximately $100,000 in overdue payments. The court noted that defendant had notified plaintiff of the amounts outstanding, and plaintiff never had provided a written objection to the notices as required under the parties' factoring agreement. Accordingly, the court found that plaintiff had waived any contractual right to object to defendant's claim. Finally, the court granted defendant's motion for summary judgment on its claim for attorneys' fees, finding that the parties' factoring agreement expressly authorized the recovery of attorneys' fees in any action to enforce the agreement. The court referred the case to a referee to report on the amount of any award of attorneys' fees. Silvermark Corp. v. Rosenthal & Rosenthal Inc., Index No. 602026/2007, 10/13/09 (Kapnick, J.).

Contracts; indenture agreements; standing to sue. Res judicata; collateral estoppel. Statute of limitations; installment contract. Plaintiff, a corporation that held a beneficial interest in a bank note, sued the defendant borrower for breach of contract, alleging that the defendant had failed to make required payments of principal and interest under the note. Defendant moved to dismiss on the grounds that (1) the action was barred by the doctrines of collateral estoppel and res judicata; (2) plaintiff lacked standing to sue. Defendant also argued that any claim to recover payments that were due more than six years prior to the filing of the action was barred by the statute of limitations. The court rejected defendant's collateral estoppel/res judicata argument. Even though the Appellate Division, in a decision in an earlier lawsuit between the parties, previously had held that only the registered holder had standing to sue on the note, the court explained that the registered holder of the note had since provided plaintiff with a proxy to sue. Since the Appellate Division never had addressed whether the proxy conferred standing on plaintiff, the court held that plaintiff's claims were not barred by the doctrines of collateral estoppel or res judicata. The court also rejected defendant's separate challenge to plaintiff's standing to sue pursuant to the proxy, finding that the indenture agreement explicitly permitted the registered holder of the note to "grant proxies and otherwise authorize any Person . . . to take any action that Holder is entitled to take." Finally, the court agreed with defendant's argument that plaintiff was not entitled to recover payments due more than six years before suit was filed. It rejected plaintiff's contention that the indenture agreement created a continuing obligation to make interest payments until the maturity of the note. To accept plaintiff's position, the court held, would run counter to well-settled law that when a contract provides for the payment of money in installments, the statute of limitations runs on each installment from the date it becomes due. Springwell Navigation Corp. v. Sanluis Corp., S.A., Index No. 600600/2009, 12/15/09 (Kapnick, J.).

Contracts; interpretation; duty to arbitrate. Defendant's motion to compel arbitration of employment-related dispute was granted. Defendant received funds pursuant to a bonus retention program created by plaintiff's sister company, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPFS"). The bonus retention program allowed MLPFS employees to take out loans on favorable terms as incentive to stay with MLPFS following its merger with Bank of America. Plaintiff Merrill Lynch International Financial, Inc. ("MLIFI") was later substituted for MLPFS on the loan to defendant. When defendant resigned his position with MLPFS, MLIFI filed a motion for summary judgment in lieu of a complaint, seeking to recover unpaid amounts owed on the promissory note. Defendant moved to compel MLIFI to arbitrate the dispute pursuant to FINRA rules. MLIFI responded that it was not subject to mandatory arbitration under FINRA rules because it is not a FINRA member. While noting that it could not determine whether MLIFI had been substituted for MLPFS as the counter-party before or after defendant signed the note, the court held that in either situation, MLIFI was required to arbitrate its dispute with defendant. First, had MLIFI been substituted as a party after defendant signed the promissory note, the agreement to which defendant believed he would continue to be a party would be enforced (requiring arbitration of the dispute because defendant's former employer was a member of FINRA). Alternatively, had the substitution occurred before defendant signed the note, MLPFS would be able to avoid compulsory arbitration by simply inserting a non-FINRA member in its place. Finding that such a result would be a clear violation of public policy, the court granted defendant's motion to compel arbitration. Merrill Lynch International Finance, Inc. v. Gutkin, Index No. 601176/2009, 12/17/09 (Fried, J.).

Contracts; lease interpretation; frustration of purpose doctrine; unanticipated events; effect of bankruptcy; reasonably foreseeable risk. Plaintiff sought a declaratory judgment that it was relieved from making lease payments on two leases it had entered into, as lessee, with defendant, as lessor, for railroad tank cars. Defendant moved to dismiss the complaint pursuant to CPLR 3211. Plaintiff claimed it had leased the tank cars to transport ethanol from two ethanol producing facilities, each of which subsequently went bankrupt and closed. Plaintiff alleged that the bankruptcies and closures were unanticipated events, sufficient for plaintiff to avoid its obligations because the purpose of its tank car leases had now been frustrated. Defendant argued (1) that this was not a justiciable controversy because with plaintiff still making its lease payments declaratory relief was premature since the breach of contract had not occurred yet; (2) in any event, the frustration of purpose doctrine was inapplicable because the parties had not agreed to make the leases contingent on serving any particular ethanol facilities and defendant did not understand that to be the basis of its agreement with plaintiff; (3) the bankruptcy of the ethanol producers was a reasonably foreseeable risk that plaintiff could have shifted to defendant by negotiated agreement between the parties, which it did not do. The court held that since plaintiff sought to avoid injury based on its allegation that the underlying purpose of the contract as it was understood by the parties had been frustrated, a declaratory judgment was a proper vehicle for bringing this dispute before the court. The court next analyzed the frustration of purpose doctrine and found that New York law limits it to instances where a virtually cataclysmic, unforeseeable event renders the contract valueless to one party. Following this analysis, the court held that the severe economic downturn of the ethanol industry and consequent bankruptcy of the third-party ethanol facilities were not the types of unforeseeable cataclysmic events recognized by New York's frustration of purpose doctrine. The court further held that plaintiff lessee could have addressed this possibility in its lease agreement by negotiating a suitable risk shifting provision. Therefore, the court required plaintiff to continue making lease payments even though the lessee's two third-party suppliers of ethanol had filed for bankruptcy and ceased operating. Noble Americas Corp. v. CIT Group/Equipment Financing, Inc., Index No. 602269/2009, 12/04/09 (Schweitzer, J.).

Contracts; management contracts; Statute of Frauds; part performance exception; quantum meruit; General Business Law § 172. Plaintiff company, which managed the defendants' band, asserted claims for breach of contract and quantum meruit, alleging that defendants had failed to pay certain commissions and income that were due under an oral management contract between the parties. Defendants moved to dismiss based on the Statute of Frauds. The court denied the motion. The court held that there were e-mails, checks, and other documents that, when considered together with other evidence that might be uncovered during discovery, might provide sufficient proof that a contract was entered into so as to satisfy the statute's writing requirement. The court held that discovery also might show that the part performance exception to the Statute of Frauds applied since plaintiff alleged in the complaint that defendants had paid a 15% commission for several years. Moreover, the court noted that plaintiff's quantum meruit claim provided an alternative basis for recovery even if plaintiff ultimately was unable to establish the existence of an enforceable agreement. Defendants also argued that plaintiff's complaint should be dismissed because plaintiff allegedly performed services as a theatrical employment agency without a proper license in violation of General Business Law § 172. The court rejected this argument based on plaintiff's allegations that it was acting not as a theatrical employment agency but, rather, as defendants' manager. The court explained that General Business Law § 172 does not apply to management companies where the management business only incidentally involves seeking employment for performers. Esther Creative Group, LLC v. Gabel, Index No. 112902/2008, 10/7/09 (Bransten, J.).

Discovery; electronic; spoliation. Manual e-mail deletion policy. Litigation hold; gross negligence; adverse inference. Willfulness; repetitive failure to comply. Sanctions. Suit involved a condominium duplex with an alleged water infiltration problem. Plaintiffs sought to strike the pleadings of realtor defendants, entity and individuals, or alternatively to compel them to produce e-mails, attachments, and hard drives. In court defendants' counsel had repeatedly stated that all relevant materials had been produced, then conceded omission of an e-mail concerning water-related repairs. Defendants were then ordered to produce their hard drives, not limited to office computers, to a data recovery expert. After plaintiffs brought an OSC defendants' counsel had produced, in open court, two hard drives and firmly indicated that the drives contained everything on the entity's server with regard to individual defendants and that there were no other devices to be produced. However, the expert examining the drives reported that they did not contain test e-mails plaintiffs had provided**.** Plaintiffs' review of 33,000 pages of Outlook files the expert had extracted based on a keyword list ound none relevant. A hearing was scheduled to look into the test e-mails' absence and at this point realtor defendant's IT director submitted a new affidavit. For the first time it disclosed defendant's policy of manual e-mail deletion; individual defendants were obliged to delete e-mails, at their discretion, to stay within their allotment of 200 megabytes e-mail server space. Individual defendants submitted affidavits indicating for the first time that certain e-mails not produced had been sent from their home computers or a BlackBerry programmed so that the messages apparently came from an office computer. At the hearing the IT director testified that he was responsible for implementing defendant realtor's document retention policy; nevertheless he never had spoken with individual defendants about how they handled e-mails even though they remained obligated to delete messages to use the system. He also did not know what electronic devices individual defendants used for business communications. He had not told anyone that relevant e-mails might be being deleted and no one had told him to check, nor had he had reviewed the two hard drives previously produced in court to check if they contained e-mails already produced in hard copy. The IT director also for the first time testified as to the existence of certain back-up tapes that might capture an individual's e-mails, or not, depending on when the e-mails were deleted. The court explained that a party seeking sanctions based on spoliation must establish that the party controlling the evidence had an obligation to preserve it; destroyed it in a culpable state of mind; and that the evidence was relevant. The court noted that it is well established that an utter failure to implement an effective litigation hold at a suit's outset is grossly negligent. Plaintiffs had established that the realtor defendant, as "the party having control" had an obligation to preserve relevant e-mails, and yet, the court found, the realtor defendant had failed to change its business communication policy when the suit began, when it was served with a discovery demand, or even upon plaintiffs filing multiple OSCs. This rose to the "culpable conduct" required for spoliation. Plaintiffs also had established that the deleted e-mails were relevant, and the court found by a preponderance of the evidence that the e-mails defendants had produced were selective. It noted, for example, that one defendant had e-mailed the buyers' broker putting off a visit to the duplex for a scheduling reason, but within the hour had e-mailed various realtor and co-defendants that she had put off the visit "due to heavy rain." The first e-mail was produced but not the second. Thus, even if the failure to establish a litigation hold was merely negligent, the record supported an adverse inference against realtor defendant because some of the deleted e-mails were favorable to plaintiffs. In addition, it was a separate egregious default on defendant's part to fail to disclose the manual deletion policy even after multiple court orders and after plaintiffs had paid tens of thousands of dollars to review the two hard drives; had plaintiffs and the court known that individual defendants were continuing to delete e-mails throughout the course of litigation preservation measures could have been taken. The court found without merit defendants' assertion that plaintiffs' review of the hard drives and their thousands of documents had not been necessary. The court had ordered the drives produced precisely because realtor defendants had failed to produce relevant e-mails. The court awarded plaintiffs attorneys' fees and costs arising from review of the drives, as well as attorneys' fees and costs incurred in bringing two previous orders to show cause. In lieu of striking the realtor defendants' answer, the court sanctioned them by finding that they were deemed to have known of the water infiltration problem and to have wilfully misled plaintiffs by concealing the problem during the sale. Einstein v. 357 LLC, Index No.604199/2007, 11/12/09 (Ramos, J.).

Donnelly Act (General Business Law § 340); collateral estoppel. Contracts; distributorship agreements; breach of contract; promissory estoppel; tortious interference with commercial relations. Plaintiff, a domestic retailer of antique and faux furniture in Suffolk County, had sold products purchased almost exclusively from one of the defendants, a manufacturer and distributor of faux antique furniture. When plaintiff advised the defendant furniture manufacturer that it planned to place a large order in contemplation of opening a second store, the defendant had terminated the parties' business relationship. Plaintiff sued under the Donnelly Act, alleging that the defendant furniture manufacturer had conspired with another defendant, a large retailer of home furnishings and plaintiff's largest competitor, to obtain a monopoly over the faux antique furniture business in Suffolk County. Plaintiff also asserted claims for breach of contract and promissory estoppel. Defendants moved to dismiss. The court granted the motion in part. It dismissed plaintiff's claim under the Donnelly Act based on the doctrine of collateral estoppel, explaining that plaintiff previously had sued the defendants in federal court based on the identical facts, and that the federal court had dismissed plaintiff's federal anti-trust claim on the merits. "When, as here, the parties in the state and federal actions are identical and the merits of the plaintiff's claims were decided by the federal court after the plaintiff was afforded a full and fair opportunity to litigate them, collateral estoppel precludes relitigation of such claims," the court held. Alternatively, even if the doctrine of collateral estoppel did not apply, the court found that plaintiff's complaint failed to state a claim under the Donnelly Act because plaintiff did not allege market-wide injury to competition. Additionally, the court explained that a Donnelly Act violation occurs only when the alleged conspirators are in competition with one another or with the plaintiff. The court said it was not a violation of the Donnelly Act for a supplier to terminate a relationship with a distributor in response to complaints from another distributor. With respect to plaintiff's second cause of action for breach of contract, the court held that plaintiff had alleged sufficient facts to survive a motion to dismiss. The court explained that the plaintiff had alleged the existence of an agreement with the defendant to supply it with products for resale. Even though that agreement was terminable at will, the court held there was a question of fact as to whether defendant provided reasonable notice. Next, the court dismissed plaintiff's third cause of action for promissory estoppel on the ground that the at-will relationship rendered unreasonable plaintiff's claimed reliance on defendant's promise to supply it with products. Finally, the court also dismissed plaintiff's tortious interference with contract claim. The court explained that in order to sustain such a claim, plaintiff would have to allege the use of wrongful means by defendants, including physical violence, fraud, misrepresentation, civil suits, criminal prosecution, or some degree of economic pressure. In this case, the allegations showed, at best, that one defendant had persuaded the other to terminate its relationship with the plaintiff. Habitat, Ltd. v. Art of the Muse, Inc., Index No. 19481/2009, 12/14/09 (Emerson, J.).**

Employment; wrongful discharge; Whistleblower Statute (Labor Law § 740). Plaintiffs, two auto damage appraisers, sued their former employer for wrongful discharge, breach of contract, and a violation of the Whistleblower Statute. Defendant moved to dismiss, and the court granted the motion. The court explained that because plaintiffs were at-will employees, their breach of contract and wrongful discharge claims had to be dismissed in the absence of allegations that "the employer made [plaintiffs] aware of its express written policy limiting its right of discharge and that [plaintiffs] detrimentally relied on that policy in accepting employment." Plaintiffs had not pleaded these elements, and the court dismissed the wrongful discharge and breach of contract claims accordingly. The court also dismissed plaintiffs' claim under the Whistleblower Statute based on plaintiffs' failure to allege a policy or practice of the employer that violated the law. Although plaintiffs had asserted that defendant's actions might encourage automobile body shops to undertake rushed and shoddy repairs of automobiles, and that these rushed repairs could cause a hazard to the public, the court held that these allegations were insufficient to survive a motion to dismiss. Stantyos v. Liberty Mutual Insurance Company, Index No. 00805/2009, 11/19/09 (Bucaria, J.).**

Execution of judgments; turnover proceeding; CPLR 5225; CPLR 5227. Joinder of parties; necessary and indispensible parties; sovereign immunity. Foreign judgment; renewal of judgment. The representative of a class of persons injured by the activities of former Philippine President Ferdinand Marcos holds a Hawaii federal judgment against the Marcos Estate. Petitioner registered the judgment in New York and brought a turnover proceeding pursuant to CPLR §§ 5225 and 5227, seeking to recover estate assets in the custody of third parties in New York. The third parties moved to dismiss the proceeding for failure to join the Government of the Philippines, which also claims the assets but cannot be sued without its consent under the doctrine of sovereign immunity. The court held that pursuant to CPLR §§ 5225 and 5227, a judgment creditor is not required to join competing claimants to assets as parties; however, other claimants may intervene in the proceeding, whereupon the court evaluates the validity and priority of the rival claims. Where another claimant could be inequitably affected by the outcome of the proceeding, general joinder principles under CPLR 1001 may be considered in determining whether to proceed, but in general, dismissal for inability to join a party is disfavored in New York. The court analyzed the applicable factors and declined to dismiss the turnover proceeding. It was significant that petitioner did not have an alternative remedy to pursue if this proceeding were dismissed. For example, petitioner's prior attempt to sue in the Philippines had failed because petitioner could not afford an $8.4 million filing fee due under Philippine law. Although the respondent moving for dismissal was concerned about the potential for inconsistent judgments should successive petitioners seek turnover of the same funds,that potential existed no matter where petitioner's claim was ultimately litigated. Dismissal could lead to a situation where ownership of the assets remained undetermined indefinitely. If the Philippine Government wished to assert its claim to the assets, it retained the right to intervene in this proceeding, as it had done in several related proceedings. Two other claimants to the assets also sought and were granted the right to intervene and assert claims. Finally, the court rejected a contention that the Hawaii federal judgment had lapsed. Petitioner had registered its Hawaii judgment in Illinois in 2009, and this court could enforce the Illinois-registered judgment. Any challenge to the validity of the Illinois registration had to be brought in Illinois. Swezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Index No. 104734/2009, 11/5/09 (Ramos, J.).**

Judgments; rejecting and/or modifying referee's report (22 NYCRR §202.44(a)); calculation of damages; partnership dissolution; good will; value of continuity of place and name. Plaintiff moved for an order setting the amount of damages and/or judgment and to schedule any further hearings the court might require. Defendants cross-moved for an order pursuant to NYCRR §202.44(a) rejecting or modifying the referee's supplemental decision and report, wherein the referee had held that there was no ending business goodwill in the partnership that should be taken into account in the dissolution. The court had previously issued a decision and order referring this matter back to the referee specifically to analyze the value, if any, of the continuity of place and name in the circumstances presented. The court had held in this prior decision that it was within the referee's discretion to determine whether and/or what value should be apportioned to ending goodwill. In their cross-motion defendants continued to argue that the referee failed to properly account for the partnership's ending business goodwill. Referring back to its prior decision and order where it had distinguished Spaulding v. Benenati [57 N.Y.2d 418 (1982)], the court confirmed that, unlike in Spaulding, the parties here had no agreement to pay for this specific aspect of goodwill, continuity of time and place, upon dissolution. Further relying on the more recent case Matter of Ravitz [65 A.D.3d 1049 (2d Dept. 2009)], the court held that in New York the absence of an agreement by the parties to value and distribute good will in the event of dissolution precludes the inclusion of good will in the corporate assets to be distributed. The court further rejected defendants' contentions that the testimony of their accounting expert mandated a ruling in their favor, finding that defendants did not provide clear evidence that approximately 40% of the practice's business was attributable to the saleable aspect of goodwill. The court concluded that the expert's testimony provided no compelling basis that the saleable goodwill should be given 40% weight in valuation. Therefore, defendants provided no compelling reason for the court to reject or modify the supplemental decision and order of the referee. As such, the court held that plaintiff was entitled to confirmation of the referee's supplemental decision and report and held that the supplemental decision sufficiently explained the referee's rationale for not assigning value to the ending business goodwill. The court ordered the parties to submit within 10 days their views on the need for further testimony regarding damages and the desired length of the continued trial on the damages issue. Carroll, v. Abaie, Index No. 2002/06732, 12/09 (Fisher, J.).**

Jurisdiction; forum non conveniens; CPLR 327(a); comity. Plaintiffs brought suit based on a complex set of commercial and investment relationships involving ImageSat, a Netherlands Antilles corporation with its principle place of business in Israel. Plaintiffs were the investment vehicles for a group of mainly United States funds that invested in ImageSat as shareholders and debt holders. Defendants were the controlling shareholders of ImageSat, the main one being IAI, an Israeli corporation owned entirely by the government of Israel. Plaintiffs pled eight causes of action against defendants all relating to fraud and breach of contract, including breach of a Securityholders Agreement by two Israeli corporate defendants regarding a provision for the appointment of independent directors. All defendants moved to dismiss on the basis of forum non conveniens and defendant IAI also moved separately to dismiss on the basis of comity. The Securityholders Agreement contained a choice-of-law and consent to jurisdiction provision naming New York as its relevant forum and governing law. Plaintiffs therefore argued that since all their claims stemmed from breach of the corporate governance arrangements under the Securityholders Agreement, the jurisdiction provision controlled for all purposes in this action and that on that basis defendants' forum non conveniens objections were contractually waived. The court disagreed. The test the court applied was whether the plaintiffs' web of claims depended on the rights and duties that must be analyzed with reference to the Securityholders Agreement. The court held that except as that agreement related to the requirement of independent directors it did not. Since the rest of plaintiffs' claims related to the commercial relationships between ImageSat and defendants that were embodied in numerous other agreements, many of which contained forum selection and governing law clauses specifying Israel and not New York as the relevant forum or governing law, the provision in the Securityholders Agreement did not govern all of plaintiffs' claims in this case. Therefore, the court granted the motion to dismiss on the basis of forum non conveniens except as it related to the cause of action for breach of the provision of the Securityholders Agreement pertaining to independent directors. The court held that it could dismiss a claim on grounds of forum non conveniens when it found that in the interest of substantial justice, the action should be heard in another forum. The court noted that in deciding whether to dismiss, New York courts consider the following factors, no one of which is controlling: the residency of the parties; whether the underlying transaction occurred primarily in a foreign jurisdiction; the potential hardship to defendants; the unavailability of another forum in which plaintiffs may bring suit; the burden on our courts. In this case, the court placed great emphasis on the fact that all the defendants resided in Israel, ImageSat had its principal place of business in Israel and did not conduct business in New York, and most importantly, the alleged misconduct that plaintiffs claimed led to the purported diminution in value of ImageSat and their investment was carried out in Israel by Israeli residents. Therefore, these factors favored granting dismissal and the court found that defendants met their heavy burden and dismissed all claims for forum non conveniens, except the claim specifically arising under the Securityholders Agreement – the appointment of independent directors. The court further explained that having invested in an Israeli-based corporation and chosen to bring suit based on claims that the corporation had mismanaged its affairs to benefit its two largest shareholders, both of which were Israeli companies, the plaintiffs had no fair grounds to complain that the defendants insisted on being sued in Israel. The court next turned to plaintiffs' claim under the Securityholders Agreement and found defendants' argument that Israel was the proper venue for resolution of that specific dispute unavailing. The court held that the claim concerning the independent directors had to be adjudicated in New York in accordance with the express agreement of the parties because New York law clearly contemplates contractual forum selection clauses such as that in the Securityholders Agreement, notwithstanding the court's holding that the relevant forum non conveniens test mandates resolution of the other claims in Israel. Lastly, defendant IAI argued that all the claims against it should be dismissed on the basis of comity. The court noted that as it dismissed all other claims against IAI on forum non conveniens grounds, it was not necessary to consider IAI's comity argument. With regard to the claim concerning the independent directors, however, the court denied IAI's motion to dismiss on the basis of comity. The court was not persuaded by IAI's argument that this case was deeply entangled with the political and sovereign decisions of the Israeli government and should be dismissed because it would require the court to examine the decisions of Israeli governmental agencies with respect to Israel's security interests. Although this argument might relate to some of the other claims in the case, the court found that it had nothing to do with the claim here. Imaging Holdings I, LP v. Israel Aerospace Industries Ltd., Index No. 601061/2009, 12/11/09 (Schweitzer, J.).

Legal Malpractice; "but for." Unclean hands. Arbitration; establishing plaintiff's liability. Breach of

fiduciary duty; California law. Breach of contract. Plaintiff, a real estate investment analyst, sued for legal malpractice and sought damages of at least $51,500,000. Plaintiff maintained that, aware of a 120-day notice provision and aiming to protect his right to millions of dollars in fees, he had sought defendants' advice in how to leave his former firm. He had agreed to a plan drafted by defendants that involved giving the firm notice and negotiating a settlement. According to plaintiff, at a certain point during negotiations, defendants had advised him to resign effective immediately without advising him that if he were found liable for violating the notice provision, it could be considered a breach of fiduciary duty. Plaintiff had allegedly followed defendants' advice, which included immediately starting his new firm. His former firm then had expelled him and terminated him for cause. Plaintiff demanded arbitration to collect all compensation he claimed was due him. Information that emerged during arbitration led the firm to expel plaintiff a second time under additional grounds and, subsequently, resulted in an arbitration award against plaintiff for damages and legal fees to the firm of approximately $20,000,000. Here, defendants argued that collateral estoppel barred plaintiff's malpractice and other claims. But the court found that the arbitrator had not ruled on the issues in this action, only on those litigated between plaintiff and his former firm. Concerning malpractice, the court explained that a plaintiff must show that "but for" a defendant's negligence he would have prevailed in the matter in question. The arbitrator's award had included over $12,000,000 in compensatory damages based on plaintiff's ceasing to work on a certain fund his former firm was developing, before he resigned. Plaintiff claimed that defendants had advised this course, found by the arbitrator to be a breach of fiduciary duty. However, plaintiff could not establish the "but for" test because the arbitrator had indicated that plaintiff had ceased work on the fund before the alleged negligent advice. Plaintiff also asserted that defendants' negligent advice had caused him to forfeit incentive and other fees he would have continued to receive had he not resigned. But the arbitrator had found that while working for his former firm plaintiff had made an offer on an investment property using the firm's name and "financial clout" without its permission or intending to purchase it for the firm; instead purchasing it for his own, new company. This action, which plaintiff did not indicate was advised by defendants, was the ultimate cause of plaintiff's expulsion and inherently of his damages, the court found. The arbitrator had not assigned monetary damages to plaintiff's conduct in respect to the property but this did not mean that plaintiff had incurred no liability. The arbitrator had found plaintiff's conduct breached both the contract and his fiduciary duty. Plaintiff having collected the firm's financial information for his personal use constituted another breach, and under California law, governing plaintiff's duties to the firm, an employee who breaches a fiduciary duty to an employer forfeits his right to compensation. The court summed up that plaintiff could have justifiably been expelled for his self-dealing and dismissed the claim for malpractice, along with duplicative claims for breach of contract and fiduciary duty. It commented that if ever a person had come into court with "unclean hands" it was plaintiff. Bernard v. Proskauer Rose, LLP, Index No. 103456/2009, 10/19/09 (Lowe, J.).

Procedure; forum selection clauses; mandatory versus permissive. Plaintiff commenced this action for an injunction barring defendant from terminating plaintiff's rights under a distribution and licensing agreement. Defendant moved to dismiss on the ground that the parties' agreement included a forum selection clause, which provided that any "legal matter" arising out of the agreement "shall be brought in a court of competent jurisdiction located in Hong Kong." The court granted the motion to dismiss. The court rejected the plaintiff's claim that the forum selection clause at issue was only permissive and not mandatory. The court explained: "[t]he forum selection clause does not say that the parties agree that a certain forum have jurisdiction, leaving open the possibility that the action might proceed elsewhere; rather, it specifically states that matters arising from the Agreement 'shall be brought in a court of competent jurisdiction located in Hong Kong.' This language, similar to the words 'shall be litigated' and 'shall be prosecuted,' could not be more mandatory." The court also rejected the plaintiff's claim that the forum selection clause did not apply to the instant action because it was an equitable action. While acknowledging that the clause provided that all "*legal* matters" shall be brought in Hong Kong, the court held that the instant lawsuit – which included a claim for damages in excess of $2 million – could not be characterized as an equitable matter. Finally, the court rejected the plaintiff's claim that defendant's termination of the parties' agreement negated the forum selection clause. "[I]t is at the contested termination of an agreement," the court explained, "when a forum selection clause is most likely to apply to resolve" any matter arising under such agreement. Green Life Technologies, LLC v. Great Harbour Holdings Company, Ltd, Index No. 602065/2009, 10/8/09 (Lowe, J.).

Procedure; personal jurisdiction; equitable estoppel; forum non conveniens; pre-judgment attachment. In these two consolidated actions, plaintiff, a citizen of the United Kingdom residing in the United Arab Emirates, sued defendants, two hedge funds and their administrator, for breach of contract, fraud, unjust enrichment, and negligent supervision arising out of the defendants' failure to redeem plaintiff's investments. Defendants moved to dismiss for lack of personal jurisdiction and on the ground of forum non conveniens. Plaintiff cross-moved for partial summary judgment and for a pre-judgment order of attachment. The court denied the defendants' motion to dismiss and granted in part the plaintiff's cross-motion. The defendant administrator, which was incorporated in the Commonwealth of the Bahamas and had its principal place of business in Dubai, and the defendant hedge funds, both formed in the Commonwealth of Dominica, argued that they did not do business in New York and that the court, therefore, lacked personal jurisdiction. The court rejected this argument, finding that the defendants were equitably estopped by their own misconduct from contesting personal jurisdiction. In particular, the court explained that the defendants had represented on both their website and in their prospectuses that they maintained a New York office, and the defendants' office manager and attorneys had directed the plaintiff to send correspondence, including his redemption request, to New York. The court held that the defendants could not take "advantage of the prestige and trust that a New York office" conferred upon them and then, at the same time, seek "to avoid any state or judicial recourse." The court also rejected the forum non conveniens argument. It explained that the party seeking a change of forum "must clearly establish that another jurisdiction was a more appropriate forum." In this case, the defendants failed to establish that another jurisdiction is a more appropriate forum and, at oral argument, refused to agree to jurisdiction in Dubai. The court granted the plaintiff partial summary judgment with respect to the first breach of contract cause of action, but denied it with respect to the second. With respect to the first breach of contract cause of action, the court held that the record established that plaintiff had an investment in one of the defendant hedge funds worth approximately $600,000, that he had made a demand for the redemption of his shares, and that, under the terms of the relevant prospectus, plaintiff's investment should have been redeemed within 14 days. Based on this evidence, the court held as a matter of law that the defendants were liable for the amount of plaintiff's investment plus interest. With respect to plaintiff's second breach of contract cause of action, the court found that the record did not establish the amount of plaintiff's investment and that defendants had raised an issue of fact regarding whether they should be held liable for the fraudulent conduct of their employee. The court also denied the plaintiff's motion for a pre-judgment order of attachment on the ground that the plaintiff had not demonstrated that the defendants would be unable to satisfy any eventual judgment. Peers v. Montague Morgan Slade Ltd., Index Nos. 602010/2008, 650496/2008, 12/9/09 (Lowe, J.).

Procedure; preliminary injunction; irreparable harm; balance of the equities. Corporations; stock redemption agreements; life insurance policies purchased by the corporation; judgment creditors; breach of fiduciary duty; fraud. Plaintiff, the executrix of the estate of a stockholder in the defendant corporation, moved for, among other things, a preliminary injunction enjoining the defendant escrow agent from distributing life insurance proceeds that had been paid to the defendant corporation upon the decedent's death. The court denied plaintiff's motion. Plaintiff argued that under the terms of a Stock Redemption Agreement, the defendant corporation was required to use the insurance proceeds to purchase the shares of stock that the decedent had held in the corporation at the time of his death. Intervenor-defendant, a judgment creditor of the defendant corporation, argued, by contrast, that the insurance proceeds should be used to pay his judgment. The court held that plaintiff had failed to establish irreparable harm because its claim "which is monetary, can be satisfied through an action for damages." The court also found that a balance of the equities did not weigh in plaintiff's favor given that the intervenor-defendant had been attempting to collect on his judgment for more than eight years, and the decedent allegedly had played a role in preventing that money from being paid. McCallen v. MRW Group, Index No. 24000/2009, 11/4/09 (Pines, J.).**

Procedure; statute of limitations; UCC § 2-725(1); tolling based on misrepresentations. Art law; breach of contract; fraudulent or negligent appraisals; unjust enrichment; fraudulent concealment; negligent misrepresentation. Attorneys' fee awards. Plaintiffs art dealer and sole shareholder sued to recover $11 million paid to defendant for ancient Chinese art. Plaintiffs alleged that the art was not authentic, and that defendants furnished appraisals they knew to be false. Defendants moved for summary judgment. The court granted the motion with respect to plaintiffs' claim for attorneys' fees, given that there was no agreement between the parties authorizing the recovery of attorneys' fees, nor any specific statutory authorization. The other claims remained. As to plaintiffs' breach of contract claims, defendants argued that those claims were time-barred to the extent they related to any art purchases and appraisals more than four years prior to the commencement of the action. The court acknowledged that the UCC's four-year statute of limitations applied but found that the limitations period was tolled based upon defendants' misrepresentations. In particular, the court said there was evidence that defendants had discouraged plaintiffs from obtaining third -party appraisals in order to conceal their misconduct. With respect to plaintiffs' unjust enrichment claim, while recognizing that this claim generally lies only in the absence of an express agreement, the court declined to dismiss the claim here on the grounds that (1) plaintiffs were seeking rescission of any agreement with defendants; and (2) defendants denied that they provided appraisals to plaintiffs for compensation. The court also denied defendants' motion with respect to plaintiffs' remaining claims for negligent appraisal, fraudulent appraisal, fraudulent concealment, and negligent misrepresentation. To the extent that these claims required plaintiffs to establish the existence of a fiduciary relationship, the court found that the evidence that plaintiffs and defendants had a social relationship, along with the evidence of defendants' expertise, was sufficient to create an issue of fact for trial. Concorde Arts Associates, LLC v. Weisbrod Chinese Art, Ltd., Index No. 014427/2004, 11/3/09 (Driscoll, J.).**

Property; negative easements; public and private nuisance. Injunctive relief. Plaintiff, a cooperative that owned a 20-story residential building, had an easement for unrestricted light, air, and view above an adjacent commercial building, which was owned by one of the defendants. The easement specified the exact location and volume of any air conditioning tower that could be installed on the roof of the commercial building. Plaintiff sued the owner of the commercial building, as well as a company that operated a grocery store in the building, claiming that the defendants had installed a new air conditioning tower that violated the terms of the easement and created a nuisance. Plaintiff sought a permanent injunction, enjoining defendant from operating the air conditioning tower and compelling them to remove it on the grounds that the tower allegedly violated the terms of the easement and/or the noise limits of the New York City Administrative Code, and/or that the tower constituted a public or private nuisance. The court granted plaintiff's motion for summary judgment. Through expert evidence, plaintiff established that the air conditioning tower violated both the terms of the easement and the New York City Administrative Code. The court also found that the size, location, and noise level of the air conditioning tower adversely impacted the residents' quality of life, thus constituting a private nuisance. However, the court held that the air conditioning tower did not constitute a public nuisance because it did not cause damage to the public. Finally, although defendants argued that plaintiff had not established irreparable harm, the court disagreed, explaining that in the absence of an injunction, plaintiff could lose its rights under the easement by virtue of defendants' adverse possession of a portion of the roof of the commercial building. Based on all of the above, the court granted plaintiff a permanent injunction, directing defendants to remove, replace or modify the air conditioning tower to bring it into compliance with the terms of the easement. First Avenue Owners, Inc. v. Valentina Enterprises, LLC, Index No. 115812/2005, 10/14/09 (Bransten, J).

Surety agreements; novation; Insurance Law § 7434; priority of creditors' claims. A coal company in Kentucky had executed a bond in favor of claimants, a Kentucky agency and a Kentucky not-for-profit legal entity, both of which were established to ensure that the injured employees of self-insured coal employers receive workers' compensation payments. After the coal company filed for bankruptcy, the surety on the bond entered into a series of agreements with the claimants, under which the surety agreed to assume the coal company's liability for workers' compensation claims rather than making immediate payment under the bond. Thereafter, the surety had made payments to claimants totaling more than $8 million. The surety subsequently argued that its agreements with the claimants constituted a novation of the bond, and that its payment obligations under those agreements were fully satisfied. Claimants had argued that the surety still was obligated to complete payment on the bond. The parties submitted the dispute to a referee, who agreed with the surety. Claimants moved for an order rejecting the referee's report, and the surety moved for an order confirming it. Applying Kentucky law, the court rejected the referee's finding that the parties' agreements established a novation that extinguished all obligations under the original bond. While acknowledging that the parties had recited that the agreements were intended to provide "substitute security," the court found that other language in the parties' agreements expressed their intention that the bond would survive. In particular, the court pointed to language in the agreements that provided that the surety was excused from making further payment on the bond "so long as" it complied with its obligations under the agreements. The parties' agreements also recited that the parties' rights and responsibilities under the bond "shall not be altered or impaired." Reading the agreements as a whole, the court concluded that they did not manifest an intention to extinguish the bond until the full amount of the bond had been paid. The court, however, confirmed the referee's finding that claimants were not entitled to collect interest. Given that the surety had been adjudicated an insolvent insurer, the court held that under the Insurance Law, a creditor may not recover post-insolvency interest. Finally, the court rejected the surety's argument that claimants' claim against the bond was entitled to no greater priority than any other unsecured general creditor. In the Matter of the Rehabilitation of Frontier Insurance Company, Index No. 97/2006, 11/16/09 (Platkin, J.).**

SUPREME COURT, CIVIL BRANCH
NEW YORK COUNTY
ELECTRONIC FILING OFFICE

IMPORTANT NOTICE TO COMMERCIAL PRACTITIONERS: MANDATORY ELECTRONIC FILING

Pursuant to Chapter 416 of the Laws of 2009, **mandatory electronic filing will be instituted in this Court soon in certain commercial cases ("mandatory commercial cases"). The target date for commencement of this program is May 24, 2010.** A Uniform Rule is being drafted that will set forth the procedures for mandatory e-filing. Although that Rule will, of course, control, the following are the key aspects of mandatory e-filing that the Court at present expects to implement. If upon issuance of the Rule any changes in procedures are required, the Court will provide notice thereof as expeditiously as possible.

Any mandatory commercial case commenced on or after May 24 and any previously-commenced such case in which a Request for Judicial Intervention ("RJI") is filed on or after that date must be electronically filed through the New York State Courts Electronic Filing System ("NYSCEF"), as must subsequent filings therein. Mandatory e-filing also applies to Commercial Division cases commenced since June 15, 2008 in which no party has declined to consent to e-filing. Mandatory commercial cases consist of commercial matters of the types set forth in Uniform Rule 202.70 (b) (excluding those listed in 202.70 (c)), irrespective of whether the cases have been or will be designated as Commercial Division actions, provided that the amount in controversy is over $ 100,000 (exclusive of interest, costs, disbursements, counsel fees, and punitive damages). However, in two categories of mandatory commercial cases there is no monetary threshold: corporate and other business dissolution proceedings and commercial arbitration matters (see Uniform Rule 202.70 (b) (11) and (12)).

Except to the extent that the Uniform Rule may provide otherwise, on and after May 24, the County Clerk and court clerks will not accept documents filed in mandatory commercial cases in hard copy form. Working copies of motion papers and other documents intended to be reviewed by a Justice must be delivered to the court unless the Justice indicates otherwise. Final procedures regarding submission of working copies will be promulgated soon by amendment to the Protocol on Electronic Filing now posted on the "E-Filing" page of this Court's website at www.nycourts.gov/supctmanh. Attorneys should familiarize themselves with the current version of the Protocol and any revisions that may be posted in the next few weeks. To facilitate identification of mandatory commercial cases, the County Clerk may require the filing of a special cover sheet upon the commencement of new actions and a supplement to the RJI may be required as well.

The NYSCEF system offers many benefits to attorneys and their clients. There is no charge to use the system (usual court fees apply) - - that is, there is no charge to file a document, serve a document (which NYSCEF does automatically), consult the NYSCEF case file, or print documents from the system. The NYSCEF system resembles the Federal ECF system. Thus, those familiar with the latter will be able to use the former with no formal training. Because the system is simple and easy to learn, many will find sufficient a brief review of the *User's Manual* and *FAQ's* that are available on the NYSCEF site (www.nycourts.gov/efile), or some practice using the NYSCEF "Practice System." Training, however, is available: those interested are urged to contact the NYSCEF Resource Center at efile@courts.state.ny.us or 646-386-3033. A two-credit CLE course is offered at no charge at the New York County Courthouse every week. The staff of the Resource Center can answer any other questions attorneys may have and are eager to be of assistance.

Please follow our website for additional information on this important new initiative. Thank you.

Dated: March 24, 2010

HON. SHERRY KLEIN HEITLER
Administrative Judge

JEFFREY CARUCCI
Statewide Coordinator for Electronic Filing
Unified Court System

The complete texts of decisions discussed in the *Law Report* are available by hyperlink on the website of the Commercial Division at www.nycourts.gov/comdiv (under the "Law Report" section), and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org (and following links). Members of the Commercial and Federal Litigation Section may sign up at the Section's home page to receive copies of the *Report* by e-mail automatically. The decisions as they appear on the home pages have not been edited and may differ from the final text published in the official reports by the State Reporter.

**** The decisions discussed have been posted in PDF format, but the reader should be aware that these PDF copies may not be exact images of the original signed text as filed in the County Clerk's Office.**