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client. Additionally, the firm must promptly and appropriately screen the disqualified lawyer from the matter, must not apportion any part of the fees to the disqualified attorney and must promptly provide written notice of the representation to the prospective client.

Of special note are the exceptions to the prospective client status. A person who unilaterally communicates information to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship does not come under the prospective client protective umbrella. Neither does the person who seeks a consultation in order to disqualify the attorney from handling a materially adverse representation on the same or a substantially related matter. Thus, the cocktail party guest who starts relaying confidential information to an attorney attending the social gathering is not protected, and neither is the person seeking to disqualify an attorney from representing his or her spouse in a matrimonial matter.

Rule 4.4(b): Inadvertently Produced Material

For too long New York has suffered from contradictions and confusion in legal authority regarding inadvertently transmitted documents. Ethics opinions and case law suggested contradictory obligations, from stating that examining inadvertently sent material was unethical, to permitting full examination and use of the material. Now, Rule 4.4 makes an attorney's obligations clear. He or she must notify the sender. There is no disciplinary violation in examining, or indeed using, in the absence of an order prohibiting use, the inadvertently sent material. The rule does not, however, attempt to establish what use, if any, may be made of such material, and leaves those decisions to the courts.

Conclusion

This article sets forth some significant differences between the Code and the new Rules. There are many additional differences, all of which New York attorneys should become familiar.

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Selection of Venue in a U.S. Swaps Litigation Governed by an ISDA

Article contributed by:
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Introduction

Current strains on the capital markets are causing swap counterparties to file for bankruptcy or default on their trade obligations, a trend which may lead to an increase in swaps litigation over these defaulted swaps in the near term. This article looks at a common litigation issue — forum selection — in swaps cases governed by the industry standard International Swaps and Derivatives Association, Inc. ("ISDA") documentation.

Establishing a proper forum for a swaps litigation can be an important factor in ensuring the favorable resolution of a dispute. This is especially important for a defendant as, absent a clear forum selection clause, the plaintiff may commence a lawsuit in a forum of its choice, however inconvenient for the other parties. Parties to the ISDA documentation governing derivatives may select the forum for any future litigation arising out of or related to the derivatives governed by that documentation, but as described in this article, the basic form ISDA documentation lacks a mandatory forum selection clause.

This article focuses only on ISDA documentation governed by New York law (one of the two alternative choices of law contemplated by the standard ISDA documentation).[1] As discussed more fully below, there are numerous benefits to litigating swaps claims in the courts of New York. This article suggests various litigation tactics by which a defendant may move or transfer a swaps lawsuit originally brought elsewhere into a New York court, and thus avoid litigating the case in an undesirable forum.

Background

The International Swaps and Derivatives Association, Inc. is a self-governing global financial trade association. ISDA's participants are members of the privately negotiated derivatives industry, with approximately 850 member institutions from 56 countries on six continents. These members include most of the world's major financial institutions that deal in privately

negotiated derivatives, as well as many of the business and governmental entities and other end users that rely on over the counter derivatives to manage the financial market risks of their core economic activities.[2]

Swaps are a type of derivative instrument that are documented according to protocols determined by ISDA.[3] The typical swap documentation consists of an ISDA Master Agreement, either the 1992 or the 2002 version, a Schedule and a Confirmation.

Documentation

Master Agreement

The Master Agreement is the boilerplate, pre-printed portion of the ISDA documentation that the parties sign. Typically, ISDA Master Agreements are negotiated by the counterparties and, once executed, remain in place for several years. Thus the terms of the ISDA Master Agreement apply to all subsequent trades between those counterparties. The 1992 ISDA Master Agreement is the version that governs most older swaps, and many recently executed swaps are still governed by this older version. The 2002 ISDA Master Agreement was published by ISDA on January 8, 2003, and is being used in place of the 1992 ISDA Master Agreement in some more recently negotiated agreements.[4] This newer version modified several sections of the 1992 version.[5]

Schedule

While the ISDA Master agreement is standardized, where the parties wish to customize their agreement, they do so in the Schedule. The Schedule is the portion of the ISDA documentation containing the terms negotiated between the two counterparties. The parties may agree to specific terms in the Schedule, such as choice of governing law or choice of venue.[6]

Credit Support Annex

The ISDA Master Agreement can sometimes contain a Credit Support Annex, or "CSA." The CSA contains terms governing the collateral posted by one or both counterparties to the ISDA Master Agreement.

Confirmation

The confirmation or "confirm" is the document that records the economics of each specific trade executed between the counterparties. The confirm can sometimes contain a forum selection clause specific to the particular trade documented between the two parties, but this trade specific forum clause is more common in a heavily negotiated structured derivatives transaction. Unique venue provisions are not as common in more standard trades[7] where the confirms are typically generated using templates by the operations departments supporting the trading desks.

Venue Issue

Where the parties to a swap transaction have specified New York as the exclusive forum of choice within the ISDA documentation, all parties would be compelled to commence any suit arising from the agreement in a New York court. Failure to abide by a clear and unambiguous forum selection clause could result in the transfer of the litigation to the prescribed forum.[8]

By contrast, where the ISDA Schedule lacks an exclusive forum provision, counterparties may sue in local jurisdictions. Under these circumstances, a regional counterparty may choose to commence a lawsuit outside New York, to the substantial inconvenience of a New York based defendant.

Where a defendant has been sued outside of New York, the defendant may have a strong interest in seeking to change the location of the lawsuit to New York. First, swaps are complex and often highly sophisticated financial transactions, and a defendant may prefer that a New York judge, who is likely to be more familiar with complex financial transactions, be the arbiter interpreting the ISDA documents and determining the facts related to a swaps trade.[9] There are also obvious advantages to litigating a case that will be governed by New York law before the courts most familiar with that body of law — the courts of New York. In addition, conventional wisdom suggests that New York judges may be more likely than judges in some other jurisdictions to enforce clear contractual provisions, and less likely than some to be swayed by appeals to more "soft" equitable considerations, particularly where sophisticated parties are involved. Thus, New York may be a more favorable forum for a litigant seeking, for example, to enforce a payment obligation upon an event of default.

Beyond this, significant economic incentives to change venue may exist, particularly where a defendant maintains operations in New York. Litigating disputes in remote courts can be expensive, with travel, transportation of evidence, and local counsel adding to the cost of litigation. Depending on the size of the underlying trade, these additional costs can potentially affect strategic choices in the case.

Alternatively, where federal subject matter jurisdiction exists, defendants without a significant presence in the plaintiff's chosen forum may benefit from a removal from state court to federal court. Such removal may minimize potential local prejudices favoring the plaintiff in a local court of the plaintiff's choosing.[10]

Analysis

In general, courts will give substantial deference to a plaintiff's choice of forum — especially where the plaintiff sues in his "home" court.[11] Where the selected forum may properly exert jurisdiction over the defendant, the issue becomes whether there are sufficient grounds justifying transfer to another, potentially more desirable court.[12]

The standard forum provision of the ISDA Master Agreement for agreements that select New York law — Section 13(b) — is a permissive forum clause (*i.e.*, not a mandatory one). Section 13(b) provides that the parties agree to the "non-exclusive jurisdiction" of the State and federal courts in Manhattan, New York, and waive any objections to jurisdiction and venue (including for forum inconvenience) to any case commenced in those courts.[13] This provision in the ISDA Master Agreement[14] protects the plaintiff's option to file in New York court. However, that the provision is "non-exclusive" means that actions *may* be commenced in other courts.[15]

A plaintiff filing in a court other than New York would, of course, have to satisfy the jurisdictional and venue requirements of that court, and would not be protected from objections to that forum on grounds of inconvenience. Thus, even if a plaintiff files a lawsuit in a court that has jurisdiction and proper venue, a defendant may nevertheless seek to transfer the case to a New York court by several methods, including: (i) a removal to federal court, (ii) a motion to transfer, under the federal "change of venue" statute, for convenience reasons, or (iii) a motion in state court for dismissal on *forum non conveniens* grounds. The defendant may also attempt to file a competing, separate action in its preferred New York court. Each of these tactics are discussed below.

Removal

Where a plaintiff commences a lawsuit in a state court, the defendant has the right to remove the case to the federal district court sitting where the state court case is pending, as long as federal jurisdiction exists.[16] Typically in contractual disputes in swaps litigation, removal is based on grounds that the value of the dispute exceeds $75,000, *and* "complete diversity" of citizenship[17] exists between all the plaintiffs and all the defendants.[18] Of course, the defendant is under no obligation to remove the case to federal court.[19]

If, upon removal, the federal district court discovers a defect in the claim of federal jurisdiction, the case will be remanded back to state court.[20]

Once a case has been removed to federal court, the defendant may then avail itself of the federal venue transfer provision (discussed below) and seek to transfer the case to a federal district in a state other than the original filing state.

If a swaps lawsuit is commenced in (or removed to) a federal district court other than the Southern District of New York, the defendant may request a change of venue under the applicable federal statute.[21] The court may then transfer the case to any other federal district where the case might otherwise have been brought "[f]or the convenience of parties and witnesses, in the interest of justice."[22]

However, because of the general preference for honoring the plaintiff's choice of forum, the moving defendant has the burden of making a "clear and convincing showing" that transfer is proper.[23]

In deciding whether to transfer the case, courts will generally consider the convenience of the parties and witnesses, and the interests of justice. Factors include: the location of the witnesses and documents; the costs of obtaining witness testimony; ease of access to relevant sources of proof; relative means of the parties; the forum's familiarity with the governing law; relative levels of court congestion; trial efficiency; the enforceability of any judgment obtained; and the traditional weight afforded a plaintiff's choice of forum.[24] The court will rule weighing all factors and the totality of the circumstances.[25]

Although no one factor will be dispositive, in a swaps litigation, where the parties have agreed in the ISDA documentation to apply New York law to disputes, the governing law provision will weigh in favor of a transfer to a New York federal court.[26]

Forum Non Conveniens Dismissal in State Court:

In the event a defendant either cannot remove a case from state court,[27] or chooses not to seek removal, then state *forum non conveniens* law may be available to seek dismissal of a case filed outside of New York, in order to compel the re-filing of the lawsuit in a more convenient state court, such as New York.

While each state has its own body of law governing the standards for dismissal for "inconvenient forum,"[28] factors considered by state courts are typically similar to those considered under the federal venue transfer statute.[29] Because the remedy sought will usually be dismissal of the pending action, the moving party will bear the heavy burden of establishing inconvenience.[30]

Separate, New Action

Faced with a lawsuit in an undesirable court, a defendant also has the option of bringing its own competing lawsuit in a New York court. However, even assuming the defendant has valid claims upon which to pursue it's own action in New York, this strategy is vulnerable to the "first filed" rule, which confers priority to the earlier filed case involving essentially the same parties and subject matter.[31]

Federal courts generally recognize two exceptions to the first-filed rule: (1) where the balance of convenience favors the later filed action, and (2) where "special circumstances" favor the later case.[32] Since the cases where "special circumstances" exist are quite rare,[33] the analysis essentially will turn on the same convenience factors considered under the federal venue transfer statute.[34] In that balancing analysis, the presumption will be in favor of the first filed action.[35]

In New York state courts, the first-filed rule is codified, and gives a defending party the right to move to dismiss a cause of action on the grounds that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States."[36] There are exceptions to the rule for unusual cases, such as where the first-filed action is deemed "vexatious,"[37] or where the two actions were filed closely in time and a factual analysis indicates New York is the most appropriate forum. [38] *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Jordache Enters., Inc.*, 205 A.D.2d 341 (1st Dep't 1994). In the latter category, the fact that the parties contractually consented to the jurisdiction of the New York courts and to the application of New York law will weigh against dismissal of a later filed New York action.[39]

It should be noted that filing a competing case in a New York court does nothing to end the first-filed case, so this strategy will require litigating in two separate jurisdictions simultaneously, inevitably increasing costs, unless and until one of the cases is dismissed in favor of the other.

Conclusion

An ISDA counterparty that finds itself sued in a court outside New York has several ways by which to transfer the case to a court in New York. With the methods discussed in this article, a counterparty to an ISDA need not resign itself to a swaps litigation conducted in an undesirable forum.

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[1] The standard ISDA documentation contemplates a choice by the parties of either English law or New York law. *See* note 13, *infra*.

[2] Information about ISDA and its activities is available on the Association's web site.

[3] *Credit Default Swaps Get Attention of U.S. Regulators*, by Judy J. Kim, Bloomberg Law Reports, Risk and Compliance (November 2008).

[4] Paul C. Harding, *Mastering The ISDA Master Agreements (1992 and 2002): A Practical Guide for Negotiation* 139 (2d ed. 2004).

[5] *See* User's Guide to the ISDA 2002 Master Agreement, which was published in July 2003 (interpretive guide). *See also* Harding, *supra* note 4.

[6] Sample venue provisions are:

> Section 13(b) of this [Master] Agreement is amended and restated in its entirety as follows: "(b) ***Jurisdiction.*** With respect to any suit, action or proceedings relating to this Agreement ("Proceedings"), each party irrevocably: (i) submits to the exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City; and (ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party."

and:

> Section 13(b) of the [Master] Agreement is hereby amended by (i) deleting the word "non-exclusive" appearing in paragraph (i) thereof and substituting therefor the word "exclusive" and (ii) deleting the last sentence of Section 13(b) and substituting therefor the following sentence: "Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction if (A) the courts of the State of New York or the United States District Court located in the Borough of Manhattan in New York City lacks jurisdiction over the parties or the subject matter of the Proceedings or declines to accept the Proceedings on the grounds of lacking such jurisdiction; (B) the Proceedings are commenced by a party for the purpose of enforcing against the other party's property, assets or estate any decision or judgment rendered by any court in which Proceedings may be brought as provided hereunder; (C) the Proceedings are commenced to appeal any such court's decision or judgment to any higher court with competent appellate jurisdiction over that court's decisions or judgments if that higher court is located outside the State of New York or Borough of Manhattan, such as a federal court of appeals or the U.S. Supreme Court; or (D) any suit, action or proceeding has been commenced in another jurisdiction by or against the other party or against its property, assets or estate (including, without limitation, any suit, action or proceeding described in Section 5(a)(vii)(4) of this Agreement), and, in order to exercise or protect its rights, interests or remedies under this Agreement, the party (1) joins, files a claim, or takes any other action, in any such suit, action or proceeding, or (2) otherwise commences any Proceeding in that other jurisdiction as the result of that other suit, action or proceeding having commenced in that other jurisdiction."

[7] These trades are referred to as "plain vanilla" trades in the industry.

[8] *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (forum selection clause is enforceable absent showing that it would be unreasonable or unjust, or that the clause is invalid for reasons such as fraud or overreaching).

[9] The ISDA Schedule commonly contains a waiver of jury trial provision. Thus it is the judge, not a jury of laypeople, who will likely be the relevant decision-maker. A common waiver of jury provision may read: "Each party hereby irrevocably waives any and all rights to trial by jury with respect to any legal proceeding arising out of or relating to this agreement or any transaction contemplated hereby."

[10] *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State."); *R.G. Barry Corp. v. Mushroom Makers, Inc.*, 612 F.2d 651, 654 (2d Cir. 1979) ("[T]he underlying reason for diversity jurisdiction is to protect out-of-state litigants from assumed local prejudices").

[11] *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981); *Iragorri v. United Tech. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001).

[12] The U.S. Supreme Court has identified the relevant private and public interests for district courts to consider in determining whether a plaintiff's choice of forum should be honored. *See, e.g.*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, (1947); *see also BFI Group Divino Corp. v. JSC Russian Aluminum*, 481 F. Supp. 2d 274, 279–80 (S.D.N.Y. 2007) (degree of deference to a plaintiff's choice of forum can be overcome only where "private interest factors" relating to the convenience of the litigants, and "public interest factors" relating to the convenience of the forum and the interests of justice, point clearly toward an alternate forum).

[13] Section 13(b) of the 1992 ISDA Master Agreement states:

> With respect to any suit, action or proceedings relating to this [Master] Agreement ('Proceedings'), each party irrevocably: (i) submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law, or to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City, if this Agreement is expressed to be governed by the laws of the State of New York; and (ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party.

By contrast, if the ISDA is governed by English law, Section 13(b) contemplates *exclusive* jurisdiction of the English courts. The submission to the jurisdiction of the English

courts is exclusive as far as courts of the Contracting States of the European Union are concerned and non-exclusive for other courts. This complies with the provisions of the English Civil Jurisdiction and Judgments Act of 1982. Harding, *supra* note 4, at 115.

[14] The 2002 ISDA Master Agreement broadens the scope of Section 13(b) by adding the words "any dispute arising out of or in connection with" to the preamble so that all actions are covered. *See* Section 13(b) of the 2002 ISDA Master Agreement; Harding, *supra* note 4, at 279.

[15] Harding, *supra* note 4, at 115. Note that the Section 13(b) of the 1992 ISDA Master Agreement explicitly states: "Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction . . . ." Section 13(b) of the 2002 ISDA Master Agreement, however, eliminates this language.

[16] 28 U.S.C. § 1441; *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004); *see also* 28 U.S.C. §§ 1331 and 1332 (providing that "federal question" and "diversity of citizenship," respectively, are bases for establishing federal jurisdiction).

[17] *See* 28 U.S.C. §§ 1332(a) and 1441(a); *see also, e.g.*, *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978) (complete diversity of citizenship "does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff") (emphasis in original).

[18] 28 U.S.C. §§ 1441 and 1446.

[19] Note that the right to remove does not exist where one or more defendants are sued in their home court — *i.e.*, where they are a "citizen." 28 U.S.C. § 1441(b).

[20] 28 U.S.C. § 1447.

[21] 28 U.S.C. § 1404. Note that the language of Section 13(b) of the ISDA Master Agreement would likely preclude a Section 1404 motion to transfer such a case *away from* the Southern District of New York.

[22] 28 U.S.C. § 1404(a).

[23] *See Cartier v. D & D Jewelry Imports*, 2007 BL 114796 (S.D.N.Y. 2007).

[24] *See, e.g.*, *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 106–07 (2d Cir. 2006); *Chet Baker Enterprises, L.L.C. v. Fantasy, Inc.*, 257 F. Supp. 2d 592, 595 (S.D.N.Y. 2002).

[25] *See Chet Baker Enterprises, L.L.C. v. Fantasy, Inc.*, 257 F. Supp. 2d at 595–96 (while a motion to transfer venue is in the district court's discretion, "[s]uch a determination requires a court to weigh various factors and balance conveniences"); *Dealtime.com Ltd. v. McNulty*, 123 F. Supp. 2d 750, 754–55 (S.D.N.Y. 2000) (in determining whether convenience and justice favors a transfer of venue pursuant to 28 U.S.C. § 1404(a), the district court has "broad discretion" and will generally consider several factors "based on the totality of the circumstances").

[26] *See Wine Markets Int'l, Inc. v. Bass*, 989 F. Supp. 178, 181 (E.D.N.Y. 1996) (in determining whether an action should be transferred pursuant to 28 U.S.C. § 1404(a), the court will consider "the desirability of having the case tried by the forum familiar with the substantive law to be applied" as one of "a variety of factors that serve as a guidepost, none of which are singly dispositive"); *Anadigics, Inc. v. Raytheon Co.*, 903 F. Supp. 615, 617 (S.D.N.Y. 1995) ("the forum's familiarity with the governing law" is one of a number of factors the district court should consider on a motion to transfer venue).

[27] For example, where no diversity jurisdiction exists.

[28] For example, in New York, dismissal for *forum non conveniens* is governed by statute. N.Y. C.P.L.R. § 327.

[29] *See, e.g.*, *Hewett v.* Raytheon Aircraft Co., 273 Ga. App. 242, 251 (Ga. Ct. App. 2005) (listing factors); *Hoskin v. Union Pacific R.R. Co.*, 365 Ill. App. 3d 1021, 1023 (Ill. 2006) (same); *Kinney System, Inc. v. Continental Insurance Co.*, 674 So.2d 86, 88–93 (Fla. 1996) (same).

[30] *See, e.g.*, *Mar-Land Indus. Contrs., Inc. v. Caribbean Petroleum Refining, L.P.*, 777 A.2d 774, 778 (Del. 2001) ("[A] plaintiff seeking to litigate in Delaware is afforded the presumption that its choice of forum is proper and a defendant who attempts to obtain dismissal based on grounds of *forum non conveniens* bears a heavy burden"); *Varo v. Owens-Illinois, Inc.*, 400 N.J. Super. 508, 519–20 (N.J. Super. Ct. App. Div. 2008) (defendant has heavy burden of persuasion on all elements of analysis for obtaining dismissal on grounds of *forum non conveniens*).

[31] *See Employers Ins. of Wausau v. Fox Enter. Group, Inc.*, 522 F.2d 271, 274–75 (2d Cir. 2008); *see also, e.g.*, *White Light Prods., Inc. v. On the Scene Prods., Inc.*, 231 A.D.2d 90, 96 (1st Dep't 1997) (stating that "[g]enerally the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere," and noting similarity to federal first-filed rule) (quoting *City Trade & Indus. v. New Cent. Jute Mills Co.*, 25 N.Y.2d 49, 58 (1969), *City Trade & Indus. v New Cent. Jute Mills Co.*, 25 N.Y.2d 49 (1969).

[32] *Employers Ins. of Wausau v. Fox Enter. Group, Inc.*, 522 F.2d at 275.

[33] Examples are where the first-filed action is an improper anticipatory declaratory judgment lawsuit, or where "forum shopping *alone*" motivated the filing of the first action, or in particular kinds of patent cases. *Id.* at 275–76 and n.3.

[34] *Id.* at 275.

[35] *Id.*

[36] NY CPLR § 3211(a)(4).

[37] *See White Light Prods.*, 231 A.D.2d at 96.

[38] *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Jordache Enters., Inc.*, 205 A.D.2d 341, 343–44 (1st Dep't 1994); *see also ACE Prop. and Cas. Ins. Co. v. Federal-Mogul Corp.*, 55 A.D.3d 479, 480 (1st Dep't 2008) (applying first-filed rule where defense failed to show earlier New Jersey case was vexatious, or that New York's interests in the lawsuit "predominate[d]" over New Jersey's); *L-3 Commc'ns Corp. v. Safenet, Inc.*, 45 A.D.3d 1, 8–9 (1st Dep't 2007) (listing special circumstances warranting deviation from first-filed rule, including discouraging a race to the courthouse with an improper anticipatory declaratory judgment lawsuit motivated solely by forum shopping).

[39] *See L-3 Communications Corp. v. Safenet*, 45 A.D.3d at 9–10, 841 N.Y.S.2d at 89.

Antitrust

Relevant Market

New York Supreme Court Dismisses Amended Complaint for Failure to State a Claim Under the Donnelly Act

Global Reinsurance Corp. v. Equitas Ltd., No. 600815-2007, 2009 NY Slip Op 29104, 2009 BL 52651 (N.Y. Sup. Ct. Mar. 3, 2009)

On March 3, 2009, the Supreme Court of the State of New York, New York County granted defendants' motion to dismiss the complaint for failure to state a cause of action under the Donnelly Act, Gen. Bus. Law § 340, because plaintiff failed to allege a relevant product market.

Background

Plaintiff Global Reinsurance Corp. brought an action against defendants Equitas Ltd, Equitas Reinsurance Ltd. and Equitas Policyholders Trustee Ltd. for, among other claims, violation of the Donnelly Act, which prohibits contracts or agreements which create a monopoly or restrain trade. To establish a claim under the Donnelly Act, a plaintiff must: "(1) identify the relevant product market; (2) describe the nature and effects of the purported conspiracy; (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question; and (4) show that there is a conspiracy or reciprocal relationship between two or more entities."

Defendants moved to dismiss plaintiff's first and second amended complaints. In their motion to dismiss the second amended complaint, defendants argued that plaintiff failed to state a claim for which relief could be granted because plaintiff failed to allege "a relevant product market or a restraint of trade in that market."

Indicating that "[n]o heightened pleading requirements apply in antitrust cases" and that "[a] short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary," the court noted that "[b]ecause market definition is a deeply fact intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." The court stated however that, "it is improper to assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged."

Lloyd's as a Relevant Product Market

In deciding defendants' motion to dismiss the first amended complaint, the court held that plaintiff established "a relevant product market with a geographic scope consisting only of Lloyd's [of London]." The court indicated that its decision