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JUDGES FIND N.Y. JURISDICTION REACHES ELECTRONIC MESSAGES

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ALBANY -- New York's traditionally elastic interpretation of its long-arm jurisdiction in commercial disputes was extended yesterday to e-mails and instant messages for the first time in a bellwether opinion by the Court of Appeals.

In a unanimous decision, the Court said that commercial entities' use of e-mail and instant messaging to 'project themselves into New York to conduct business transactions' is covered by the long-arm provisions in the Civil Practice Law and Rules in the same way and for the same reasons that telephonic negotiations are covered.

'[W]hen the requirements of due process are met...a sophisticated institutional trader knowingly entering our state--whether electronically or otherwise--to negotiate and conclude a substantial transaction is within the embrace of the New York long-arm statute,' Chief Judge Judith S. Kaye wrote in *Deutsche Bank Securities Inc. v. Montana Board of Investments*, 71.

Deutsche Bank was one of a trio of commercial law decisions handed down yesterday. Another, *Sung Hwan Co. v. Rite Aid Corp.*, 60, was also a long-arm jurisdiction case that resulted in a unanimous reversal in holding that New York will enforce a foreign money judgment entered in the Republic of Korea so long as due process rights have been protected.

The third, *Fundamental Portfolio Advisors Inc. v. Tocqueville Asset Management*, 76, dealt with the enforceability of non-compete agreements.

The three cases spotlighted the four women on the Court, with Chief Judge Kaye writing *Deutsche Bank* and Judge Susan Phillips Read dissenting on one point; Judge Carmen Beauchamp Ciparick writing the *Rite Aid* decision; and Judge Victoria A. Graffeo authoring the *Fundamental Portfolio* ruling.

The *Deutsche Bank* case is essentially a breach of contract case involving a bond transaction between a Manhattan-based bank and a Montana state agency that manages its state's public retirement system and other assets.

Court records show that on the morning of March 25, 2002, an official with *Deutsche Bank* contacted an official in Montana about a possible bond swap. The banker contacted the Montana Board of Investments through the Bloomberg Messaging System, an instant-messaging service, and asked whether the government agency was interested in swapping its Pennzoil-Quaker State 2009 bonds for *Deutsche Bank's* Toys R Us bonds, or selling the Pennzoil bonds for a stated price. The official in Montana said he was not interested, and the banker in New York signed off with a simple 'THX' (thanks).

About 10 minutes later, the Montana official reconsidered and sent the banker a new instant message and negotiated a trade.

That evening, Shell Oil announced that it had agreed to acquire Pennzoil-Quaker State, potentially increasing the value of the bonds.

The next day, the Montana Board advised Deutsche Bank that it would not honor the agreement because it suspected it was predicated on 'unethical and probably illegal' inside information. Deutsche Bank then bought the Pennzoil bonds elsewhere, but paid \$1.6 million more than it would have paid Montana. It then brought an action in Manhattan Supreme Court for breach of contract.

Supreme Court dismissed the complaint, holding that Deutsche Bank could not establish that New York retained jurisdiction. The Appellate Division, First Department, reversed in an opinion affirmed yesterday.

New York Jurisdiction

All seven judges of the Court of Appeals agreed that the electronic communication established long-arm jurisdiction, and that New York had no need to yield to a Montana statute that would vest exclusive jurisdiction in that state's district courts.

'We continue to hold that where, as here, a lawsuit arises from a commercial transaction in which another state, or its agent, has knowingly projected itself into New York to take advantage of our financial markets, New York courts should not dismiss the action as a matter of comity,' Chief Judge Kaye wrote.

The majority also said that the Montana Board of Investments offered 'no evidence to support its claim of insider trading,' short of the timing of the transaction. On that point alone, Judge Read dissented, arguing that the Montana board should be afforded 'an adequate opportunity to investigate its legitimate suspicions through discovery.'

Judge Read said the Montana agency was denied that opportunity because Deutsche Bank never fully responded to its interrogatories and moved for summary judgment while the plaintiff's request for depositions was pending.

'While comity does not require us to dismiss this claim, comity does call upon us to afford the benefit of the doubt to [the Montana Board of Investments], a sister state's agency charged with oversight over state pension and other funds,' Judge Read said. Herbert C. Ross of Olshan Grundman Frome Rosenzweig & Wolosky in Manhattan and Chris D. Tweeten of Helena, Mont., argued for the Montana Board. Larry H. Krantz of Krantz & Berman in Manhattan appeared for Deutsche Bank.

Mr. Krantz said the ruling makes clear that long-arm jurisdiction will be broadly interpreted consistent with new technology.

'I think it was implicit in the law, but this makes it express that when an institutional investor engaged in an electronic trade it will in most cases be sufficient for long-arm jurisdiction as long as the party can reasonable expect to be sued here,' he said.

Mr. Ross declined to comment.

Due Process

The Rite Aid case also raised issues of long-arm jurisdiction and comity.

In that case, a Korean corporation that operated a chain of ice cream stores is attempting to enforce a foreign money judgment against Rite Aid.

Sung Hwan Co. alleged that Rite Aid sold it contaminated ice cream that was produced by an affiliate, Thrifty Payless Inc. in California.

In 1997, the South Korean government found listeria bacteria in some of the Thrifty ice cream, a discovery that Sung Hwan claims destroyed consumer demand for the product in Korea.

It sued Rite Aid in Seoul District Court, obtaining a default judgment of about \$5 million when Rite Aid failed to appear, and then sought enforcement in New York under CPLR Article 53 (the Uniform Foreign Country Money-Judgments Recognition Act).

Yesterday, the Court of Appeals unanimously reversed the First Department and held, as it did in the Deutsche Bank case, that New York is inclined to recognize long-arm jurisdiction so long as due process rights are protected. It flatly rejected Rite Aid's argument that the judgment should not be enforced in New York because New York does not permit negligence-based recovery for economic loss.

'We see no reason why jurisdiction should be denied merely because a plaintiff is relying on a theory of economic loss resulting from a tortious act rather than seeking compensation for personal injury resulting from that same tortious act,' Judge Ciparick wrote. 'To hold otherwise would undermine the fundamental principles of comity by interfering with the acts of a foreign jurisdiction's legislature or judicial body. [A]lthough Korean law appears more expansive than New York law in imposing liability for economic loss under a tort theory, we see no reason to foreclose the use of [the long-arm statute]...merely because of this difference in the substantive tort law of the two jurisdictions.'

David B. Hamm of Herzfeld & Ruben in Manhattan argued for Sung Hwan. Rite Aid was represented by Peter Buscemi of Morgan Lewis & Bockius in Washington, D.C.

Summary Judgment Denied

Fundamental Portfolio centers on a now-defunct association of mutual funds founded in 1980 by Lance Brofman. Mr. Brofman was forever barred from associating with a broker, investment adviser or investment firm after the Securities and Exchange Commission accused him of misrepresentations.

Fundamental Portfolio Advisors Inc. was under investigation by the SEC in September 1996, when it began negotiations with Tocqueville Asset Management about a possible acquisition. As part of those negotiations, the president and senior vice president of Tocqueville signed a non-disclosure/non-compete agreement. That agreement was designed to ensure that Tocqueville would not use its posture in the acquisition negotiations to solicit funds with which Fundamental Portfolio Advisors (FPA) had advisory contracts.

At issue in this case was whether FPA, by fostering a business relationship between Tocqueville and the funds, waived its right to enforce the noncompete provision.

The Court said through Judge Graffeo that since there are factual questions remaining, Tocqueville is not entitled to summary judgment.

Appearing were Max Folkenflik of Folkenflik & McGerity in Manhattan for FPA and Mark J. Hyland of Seward & Kissel in Manhattan for Tocqueville.

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