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Message From **The Co-Chairs**

Mark S. Mulholland

Douglas J. Good

Welcome to the Winter 2009 edition of the *RMF Litigator*, which is published by the Litigation Department at Ruskin Moscou Faltischek, P.C. as a service to our fellow members of the Bar.

In this edition, you will read about the current state of email and the statute of frauds, the quest for a new chief judge on the Court of Appeals, procedural updates on removal of actions to federal court, as well as reports on the activities of our Litigation Department members. We welcome your feedback on our publication as well as your ideas for future issues.

The RMF Litigation Department is the largest commercial litigation practice on Long Island. Ruskin Moscou Faltischek litigators regularly team with area practitioners, out-of-state lawyers and in-house counsel alike, covering all manner of business disputes. For forty years, we have represented clients in federal and state courts throughout New York and the country and before all forums and tribunals, state and federal, international and domestic. Contact us if we can be of assistance.

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STRIKING KEY TO KEYBOARD:
Email and the Statute of Frauds

By Jennifer F. Hillman

Jennifer F. Hillman

Email is an integral part of today's business and negotiations. Each day we click "send" countless times, yet the law still lags behind these advances, particularly in the context of the statute of frauds.

The statute of frauds, modeled after an old English law, is meant to prevent the possibility of a nonexistent agreement between two parties being "proved" by fraud. This objective is accomplished by voiding particular contracts unless a writing exists signed by the persons bound by the contract's terms or their authorized representatives. Email, with its language informality and standard pre-programmed signature blocks, presents a particularly interesting question for courts, and yet there is surprisingly little caselaw on this issue.

Prior to 2004, the sole guidance was from cases involving facsimiles. In the Court of Appeals decision in *Parma Tile Mosaic & Marble Co. Inc. v. Estate of Short*, 87 NY2d 524 (1996), the court held that the automatic imprinting of a sender's name at the top of all outgoing faxes did not satisfy the authentication requirement of the statute of frauds because "the intentional act of programming a fax machine" did not demonstrate "intent to authenticate the particular writing at issue." The court decreed that the sender of the fax still needed to sign their name on the document and that the fax line was not appropriate for purposes of the statute of frauds.

This was the climate in 2004 when *Rosenfeld v. Zerneck* was decided by the Supreme Court, Kings County. In *Rosenfeld*, an oral real estate transaction agreement was later confirmed in an email that included acceptance, some terms of the agreement, and ended with the typed language "with kind regards, Michael." In the later action for specific performance of the agreement referenced in the email, the court wrestled with whether the statute of frauds applied to the email. The court found that by typing his name at the bottom of the email, the seller showed his intention to authenticate the email for purposes of the statute of frauds, however a binding agreement was not reached because the email lacked a vital term.

This physical action of typing a name at the end of an email is seemingly determinative in more recent decisions as well. For example, in *Al-Bawaba.com Inc. v. Nstein Techs. Corp.*, 19 Misc3d 1125(A) (N.Y. Sup. Ct. Kings Co. 2008), an email exchange concerning a licensing agreement was found to be a "signed writing" under the statute of frauds. The court's decision hinged on the fact that the sender typed his name at the bottom of the email, whereby he authenticated the email. Similarly, in *Stevens v. Publicis*, S.A., 50 AD3d 253 (1st Dept 2008) *lv to appeal dismissed by* 10 NY3d 390 (2008), the First Department held that email transmissions that contain the typed name of the sender at the foot of the message constitute a signed writing sufficient to modify an employment agreement.

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THE COURT OF APPEALS' SEARCH FOR A NEW CHIEF JUDGE

By Matthew Didora

Matthew Didora

After a quarter-century of service on the Court of Appeals, Chief Judge Judith Kaye retired from the Court on December 31, 2008. The Court's rules require judges to step down at the end of the year following their 70th birthday.

Governor Mario Cuomo appointed Judge Kaye as the Court's first female associate judge in 1983. Ten years later, Governor Cuomo elevated Judge Kaye to Chief Judge, placing her in charge of the State's highest court for the next 15 years.

During her tenure as Chief, Judge Kaye overhauled the state's program for jury service by eliminating many automatic exemptions and reducing the length of each juror's service. Judge Kaye also oversaw the creation of specialized courts, such as the Midtown Community Court, which punishes offenses such as prostitution, unlicensed vending, gambling and vandalism with community service rather than jail time. Perhaps the best-known "specialized" court that was created under Judge Kaye's supervision is the Commercial Division of the Supreme Court, which provides a forum for resolving complex commercial disputes.

Candidates interested in succeeding Judge Kaye were required to apply through the Judicial Nomination Commission. After an extensive screening and interview process, on December 1, 2008, the Commission submitted to Governor Paterson the names of seven candidates to replace Judge Kaye. Governor Patterson is required to select the next Chief Judge from this list. If the selection is someone from within the Court, that would create an opening for an associate judge. The State Senate must approve nominations for the Court of Appeals. Here is a closer look at the candidates:

Honorable Theodore T. Jones: Judge Jones has been an Associate Judge of the Court of Appeals since February 2007. Prior to his appointment by Governor Spitzer, Judge Jones was a member of the Supreme Court, Kings County since 1990, and served as administrative judge in the Civil Term of Brooklyn Supreme Court from January 2006 until his appointment to the Court of Appeals.

Honorable Eugene F. Pigott, Jr.: Judge Pigott joined the Supreme Court in 1997 and was designated to the Appellate Division, Fourth Department a year later by Governor George Pataki, eventually rising to Presiding Justice of that Court. Governor Pataki nominated Judge Pigott to the Court of Appeals in 2006.

Justice Jonathan Lippman: Justice Lippman is currently the Presiding Justice of the Appellate Division, First Department, and was appointed by Governor Spitzer in 2007. Previously, Justice Lippman served as Chief Administrative Judge of the New York State Courts from 1996 to 2007 where he reported to Judge Kaye on all matters regarding the administration and operation of the court system.

Justice Steven A. Fisher: Justice Fisher was elected to the Supreme Court, Queens County in 1993 and served as a member of that Court until 2004 when he was appointed an Associate Justice of the Appellate Division, Second Department by Governor Pataki.

In addition to the sitting appellate judges, the Commission also nominated three attorneys currently in private practice: George F. Carpinello, partner at Boies, Schiller & Flexner; Evan A. Davis, partner at Cleary Gottlieb Steen & Hamilton; and Peter L. Zimroth, partner at Arnold & Porter.

David M. Schwartz, a partner in the Ruskin Moscou Faltischek White Collar Crime & Investigations and Litigation Departments, is a member of the Judicial Nomination Commission.

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Major Federal Pharmaceuticals Jury Trial Results in Impressive Win for RMF's Litigation Department

2008 saw one of the largest federal civil matters tried to verdict on Long Island in recent memory. With the parties having identified over 50 trial witnesses, 2000+ trial exhibits and more than 20 expert witnesses, RMF's litigators, under the leadership of Department Chair Mark Mulholland, scored a major win for their client, Rising Pharmaceuticals. Mr. Mulholland (seated, center) is shown with team members (l-r) Jennifer Hillman, Matthew Didora, Jonathan Sullivan and Michael Amato.

REMOVAL REFRESHER

By Thomas Telesca

Thomas Telesca

Imagine your client is served with a state court complaint from a foreign jurisdiction alleging various claims for breach of contract. Of course, the issue of removal to federal court immediately comes to mind. Considering the strict requirements, this article gives a quick refresher regarding the requirements and procedure for removal.

Under 28 U.S.C. §1441, an action brought in state court may only be removed to federal court if the federal court has original jurisdiction i.e., federal question or diversity of citizen jurisdiction. Diversity of citizenship also requires that the amount in controversy exceed $75,000. If the complaint does not specify the damages sought, you cannot merely state in the removal petition that the amount in controversy is satisfied. The removal petition must set forth how the amount is satisfied through the facts alleged in the complaint or other additional evidence.

The procedure for removal is found at 28 U.S.C. § 1446. The action may only be removed to a federal district court located where the state court action is pending. For example, a New Jersey state court action cannot be removed to the Southern District of New York. Moreover, the notice of removal must be filed within 30 days after *receipt* of a copy of the initial pleading by the defendant, which is usually, but not always, service of the complaint. For instance, your client may have received a courtesy copy of the complaint prior to service.

Importantly, parties cannot stipulate to enlarging the 30-day period to remove – you must file your notice of removal regardless of whether you have stipulated to extend your time to answer or otherwise move.

If there are multiple defendants, you must comply with the rule of unanimity, which provides that all defendants must consent to the removal within the thirty-day period specified in 28 U.S.C. § 1446. Although it is not required that all defendants sign the removal petition itself, courts typically require that each defendant timely submit some form of unambiguous written evidence of consent.

In a multi-defendant case, there is a conflict among the federal circuit courts as to when the thirty-day period for consent to removal begins to run. The majority of courts apply the "first-served rule," in which the thirty-day period to consent begins to run when the first defendant is served, and is not extended when another defendant is later served. Under the "first-served rule," if your client was served 29 days after the first defendant was served, you would only have one day to consent to the removal. A minority of courts apply the "later-served rule," which restarts the thirty-day clock to both remove and to consent to removal each time another defendant is served. Another group of courts apply the so-called "McKinney Rule," which requires the first-served defendant to file a removal petition within thirty days, and the thirty-day clock for consent only restarts when a new defendant is served. There is no Second Circuit decision on this issue, and courts in the Eastern and Southern Districts of New York have applied both the majority "first-served rule" and the minority "later-served rule."

Although the decision concerning removal to federal court is a topic that merits its own consideration, the tight deadlines warrant immediate consideration when a client is sued in a state court of a foreign jurisdiction.

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Recent RMF Speaking Events

Litigation Partner and Chair of the Employment Law Practice Group **Jeffrey M. Schlossberg** along with associate **Kimberly Malerba**, presented a CLE on wage and hour compliance and related litigation on October 29, 2008. Presenting to a standing-room-only crowd, the program covered issues such as the pitfalls involved in failing to properly pay overtime, including the risks of class actions and extraordinary financial liability. Guest panelist Irv Miljoner, District Director of the United States Department of Labor's Wage and Hour Division, shared many insights into how the agency enforces compliance with the wage and hour laws.

Partner and Chair of the Litigation Practice Group **Mark Mulholland**, Partner and Co-Chair of the White Collar Crime and Investigations Practice **Alexander G. Bateman**, along with litigation associate **Jonathan Sullivan**, presented a CLE "The Art of Cross-Examination: A Discussion of Successful Strategies and Recent Case Law" in September 2008. This program addressed the ability to control the direction and outcome of a case through effective use of cross-examination, including strategies and techniques for different forums and proceedings.

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STRIKING KEY TO KEYBOARD: *Email and the Statute of Frauds*

Even where a signature is not typed, the email can still satisfy the statute of frauds. For example, in *JSO Assoc. Inc. v. Price*, 2008 WL 904703 (N.Y. Sup. Ct. Nassau Co. 2008), a case involving a dispute over a finder's fee and services contract, in the absence of a typed signature, the court looked at the substance of the relevant emails and determined that when there is no question regarding the source and authenticity of an email, the email is "signed" for purposes of the statute of frauds if the individual's name clearly appears in the email as the sender.

Practice Tips:

- The Statute of Frauds solely addresses the authentication of a document by signatures to prevent fraud and perjury.
- In a contract action, the material terms of an agreement must still exist, regardless of the existence of a signature.
- Courts will probably look beyond whether the email has a typed signature or an automatic signature block, to the language of the email and the circumstances surrounding the transaction.

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About the Firm

Founded in 1968, Ruskin Moscou Faltischek, P.C. has emerged as Long Island's preeminent law firm. As specialized as we are diverse, we have built cornerstone groups in all of the major practice areas of law, and service a diverse and sophisticated clientele. With more than 60 legal professionals, superior knowledge of the law, polished business acumen and proven credentials, Ruskin Moscou Faltischek has earned a reputation for excellence and success. It is this ongoing achievement that makes us an acknowledged leader among our peers and the preferred choice among business leaders.

The strength of Ruskin Moscou Faltischek's resources greatly enhances what we can accomplish for our clients – to not only solve problems, but to create opportunities. We take pride in going beyond what is expected from most law firms. The invaluable contacts and relationships we have nurtured in the business community and our multidisciplinary approach heighten our value-added services.