

The 'Long-Arm' Statute

Instant Messaging May Confer Personal Jurisdiction on Defendant

BY MARK A. BERMAN

In an age where instant messaging, text messaging and e-mail are just as popular, or possibly even more so, than communicating face-to-face, issues arise whether personal jurisdiction can attach based on such electronic communications.

In this ever expanding technological environment, New York courts have been willing to exert "long-arm" jurisdiction over an out-of-state defendant that transacts "business by phone, e-mail or mail, which causes goods or services to be provided in New York."¹

With the growing popularity of e-mail and the use of other technologies, courts must now deal with the "question whether...the absence of actual personal visits to the forum is any longer of critical consequence."²

In June, the New York state Court of Appeals in *Deutsche Bank Securities, Inc. v. Montana Board of Investments*, ___ N.E.2d ___, 7 N.Y.3d 65, 2006 WL 1525924 (2006), addressed the issue of whether personal jurisdiction can attach to a non-domiciliary predicated upon electronic "instant messaging" with a New York plaintiff.³

In New York, the "long-arm" statute, CPLR §302 (a)(1), provides that "a court may exercise personal jurisdiction over any non-domiciliary...who in person or through an agent...transacts any business within the state or contracts anywhere to supply goods or services in the state." Sometimes called the "single act statute," a

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defendant that never enters New York can be subject to jurisdiction in New York "so long as the defendant's activities here were purposeful and there is a substantial

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relationship between the transaction and the claim asserted."⁴

In *Deutsche Bank*, the Court of Appeals recently found personal jurisdiction to exist over the Montana Board of Investments, a sophisticated institutional trader, which negotiated a trade with the New York plaintiff Deutsche Bank Securities, Inc. through instant messaging via the

Bloomberg Messaging System.

The Bloomberg Messaging System provides instant messaging between subscribers of the Bloomberg service for the purpose of "negotiating and completing trades and dispensing other financial information."⁵

In *Deutsche Bank*, nine electronic instant messages were sent on one day. The communications initially emanated from New York, when Deutsche Bank proposed a "swap" for the Montana board's Pennzoil bonds. The board declined to enter into this transaction. Ten minutes later, the board initiated a conversation with Deutsche Bank from Montana and proposed an outright sale of the Pennzoil bonds, which resulted in the board selling \$15 million dollars of Pennzoil bonds to Deutsche Bank. Hours after the parties agreed to this transaction, it was announced that Pennzoil was being acquired by a competitor, an event that would potentially increase the value of the bonds. The following day the Montana board "broke" the trade because it believed Deutsche Bank possessed inside information concerning Pennzoil being acquired by a competitor.

Deutsche Bank sued the Montana board for breach of contract and both parties moved against each other seeking, among other things, summary judgment and a ruling on whether New York had personal jurisdiction over the board. The board's cross motion to dismiss for lack of personal jurisdiction was granted by state Supreme Court, but was reversed by the Appellate Division.⁶ The Court of Appeals affirmed the Appellate Division on the issue of personal jurisdiction.

In arriving at its determination, the Court of Appeals turned to its prior decisions in *Parke-Bernet Galleries v. Franklyn*, 26 N.Y.2d

13, 308 N.Y.S.2d 337 (1970), and *Ehrlich-Bober & Co., Inc. v. University of Houston*, 49 N.Y.2d 574, 427 N.Y.S.2d 604 (1980), to demonstrate that, in the past, the Court had found “electronic and telephonic means” of communication capable of serving as a predicate for finding personal jurisdiction when such means were used for the purpose of “project[ing oneself] into New York to conduct business transactions.”⁷ The Court came to this conclusion even though, as discussed below, in both *Parke-Bernet* and *Ehrlich-Bober*, the electronic “contacts” were far less ephemeral than what occurred in *Deutsche Bank*.

In *Parke-Bernet*, the defendant arranged with a New York auction house to actively participate in an auction over an “open telephone line” from California and have an employee of the auction house announce his bids to the bidders that were present in New York.⁸

The Court found that the defendant “projected himself into the auction room in order to compete with the other prospective purchasers who were there. This activity far exceeded the simple placing of an order by telephone.”⁹

The Court of Appeals found that the defendant was subject to jurisdiction in a New York court because he “purposefully” availed himself “of the privilege of conducting activities” within New York and thereby “invoke[d] the benefits and protections of its laws.”¹⁰

‘Ehrlich Bober’

In *Ehrlich Bober*, the plaintiff, a New York securities dealer, engaged in 22 separate securities transactions from November 1976 to March 1977 with the defendant, the University of Houston, having an aggregate value of approximately \$44 million dollars.

Personal jurisdiction was found where the two transactions between the parties at issue arose out of phone calls made to the plaintiff in New York, the transactions were accepted by the plaintiff in New York, the monies for the transactions were paid in New York, and the securities were delivered in New York.

In *Deutsche Bank*, the Court noted that, with the growth in “technological advances in communication[s]” that enable parties to transact business within New York without physically entering it, “[s]o long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and

should reasonably expect to defend its actions there, due process is not offended if the party is subjected to jurisdiction even if not ‘present’ in that State.”¹¹

The Court further found that the Montana board “should reasonably have expected to defend its action in New York” and “knowingly enter[ed New York]—whether electronically or otherwise—to negotiate and conclude a substantial transaction.”¹²

In performing its analysis, the Court in *Deutsche Bank* commented that in the 13 prior months the Montana board, whose “mission,” in part, was to negotiate substantial transactions, had completed eight other bond transactions with Deutsche Bank in New York, purchasing approximately \$471 million worth of securities. Thus, the Montana board availed itself of the benefits of conducting business in New York.

However, the Court did not consider, and thus did not rule on, whether the Montana board was “doing business” in New York such that it would be “present” in New York, which would have provided an alternative basis for jurisdiction aside from long-arm jurisdiction.¹³

Where business is now frequently conducted using electronic means such as by telephone, facsimile, e-mail and instant messaging, courts are looking not to “the quantity of contacts with New York, but rather the nature and quality of the contacts.”¹⁴

Courts look to the nature of the parties (i.e., whether they are sophisticated), their prior history of engaging in business together, and the defendant’s “availing” itself of a New York entity and the laws of New York, in analyzing whether to extend long-arm jurisdiction to a transaction.

Deutsche Bank does not appear to have changed New York jurisprudence relating to what is required for personal jurisdiction to attach, but rather has evolved the law to include “instant messaging” as a means by which personal jurisdiction may be found.

Long-standing “long-arm” jurisprudence that would find personal jurisdiction predicated upon, for instance, a single order from outside New York, whether by telephone¹⁵ or by facsimile, e-mail or instant message, appears to have remained unchanged.

What is becoming increasingly clear in New York jurisprudence is that state courts are coming of age to take into account evolving technological changes. This is true whether it be a court’s recognizing

that personal jurisdiction may attach based on “instant messaging” or the extension of the tort of conversion to include electronic information or to address new developments in electronic discovery.

Continued technological developments will pose new and interesting challenges to New York courts as the law adapts to take into account technological marvels which may have yet to be conceived.

1. *Boehner v. Heise*, 410 F. Supp.2d 228, 236 (S.D.N.Y. 2006).

2. *Agency Rent A Car System, Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 30 (2d Cir 1996).

3. “‘Instant messages’ differ from e-mail in that [instant message communications] are used only when both people are on line simultaneously, and the messages, when sent, appear directly on the computer screen of the recipient, rather than going to a ‘mailbox’ for later retrieval.” *People v. Jovanovic*, 263 A.D.2d 182, 184 n.1, 700 N.Y.S.2d 156, 184 n.1 (1st Dep’t 1999). Instant messages, like e-mails, may be printed out, and the communications thus memorialized on paper.

4. *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195, 198-99 (1988).

5. *Deutsche Bank Securities, Inc. v. Montana Board of Investments*, 21 A.D.2d 90, 92, 797 N.Y.S.2d 439, 441 (1st Dep’t 2005).

6. See *Deutsche Bank*, 21 A.D.2d 90, 797 N.Y.S.2d 439.

7. *Deutsche Bank*, 7 N.Y.3d at *2.

8. *Parke-Bernet*, 26 N.Y.2d at 17, 308 N.Y.S.2d at 340.

9. *Id.* at 18, 308 N.Y.S.2d at 340-41.

10. *Id.* at 18, 308 N.Y.S.2d at 341 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240 (1958)).

11. *Deutsche Bank*, 7 N.Y.3d at *2 (quoting *Kreutter*, 71 N.Y.2d at 466, 527 N.Y.S.2d at 198).

12. *Id.* at *3.

13. *Id.* at *2 n.2.

14. *Lawrence Wisser and Co., Inc. v. Slender You, Inc.*, 695 F. Supp 1560, 1562-63 (S.D.N.Y. 1988) (80 telephone calls and 30 facsimile transmissions do not on their own constitute “transacting business” so as to confer jurisdiction on an out-of-state defendant); *Jones v. Monroe*, 2 Misc. 2d 24, 25, 773 N.Y.S.2d 498 (App. Term 1st Dep’t 2003) (Florida defendant sold an automobile to plaintiff through e-Bay; an “isolated sales transaction, the result of ‘random’ and ‘attenuated’ contacts was insufficient to confer personal jurisdiction”; “defendants’ conduct in sending faxes and e-mails or making phone calls to New York City [did not] constitute the transaction of business within the meaning of the applicable long-arm statute.”).

15. See *Parke-Bernet*, 26 N.Y.2d at 17, 308 N.Y.S.2d at 340 (quoting *Katz & Son Billiard Prods. v. Corrales & Sons*, 20 N.Y.2d 903, 285 N.Y.S.2d 871 (1967)).

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