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THE DISAPPEARING DOCUMENT DILEMMA

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LEGAL PROCEEDINGS will often hinge on whether or not one of the parties has received a particular document through the mail.

In this author's experience, if the document seriously jeopardizes a claim or defense, the purported recipient will almost inevitably deny that it was ever delivered. Assuming that such a denial has been asserted, this article will discuss how the sender's attorney may nonetheless demonstrate that a document was received by the addressee, with considerable emphasis being placed on attaining this objective for the corporate client.

Background

Litigators are routinely confronted with claims that, at first glance, seem readily provable or defensible based on their adversary's receipt by mail of a single document relating to the matters in dispute. Where an insurer is sued by an insured to contest a declination of coverage, for example, the policy may have been cancelled before the loss was incurred, warranting dismissal of the claim predicated on the insured's receipt of a “notice of cancellation” in compliance with the New York Insurance Law.

Conversely, a major component of the insured's case may be proving that a “notice of claim” was timely received by the insurer or his agent. In other common situations, the case may turn on an investor's receipt of a prospectus, a property owner's receipt of a tax assessment, or an insured's receipt of an insurance policy. The status of such “dispositive documents” is all the more crucial since they may well facilitate accelerated judgment with the concomitant savings in discovery and trial costs.

Even where the client's copy of a dispositive document has been carefully maintained on file, the adversary will often deny receipt of the original, hypothesizing that it has been lost in the mail or never forwarded in the first place. This rudimentary strategy may prove enormously frustrating, threatening at the very least to preclude accelerated judgment and, at worst, to carry the adversary to a favorable verdict.

The purported “disappearance” of a dispositive document, however, need not consign it to irrelevance. To the contrary, New York law incorporates a presumption that documents transmitted through the U.S. Postal Service have been received by the addressee where there is evidence that the mailing was properly prepared, addressed, stamped and mailed. This “presumption of receipt” is “founded on the probability that the officers of government will do their duty; and the usual course of business.”[FN1] Once established, the presumption of receipt may not be overcome by a mere conclusory assertion that the document was not received or that it was lost in the mail.[FN2]

Where a document is relevant to the outcome of a motion, the sender's attorney will be called upon to prepare his client's affidavit to establish that it was properly prepared, addressed, stamped and mailed. Where the case has proceeded to trial, such information must be developed by the client's direct testimony.

Natural Persons

Where a document is forwarded by a natural person for private business, he or she will generally be able to recall the actual mailing and may testify accordingly to establish the presumption of receipt.[FN3] Of course, such testimony is more persuasive and given greater credibility where the person's testimony is supplemented with a certified mail receipt, a certificate of mailing issued by a post office, or a personal record of the mailing.[FN4]

In drafting affidavits or preparing the client for direct testimony, the sender's attorney should of course ensure that the client produces a copy of the mailed document. The sender must further confirm that the item was placed in an accurately addressed envelope, preferably by identifying the source for the name and address and affirming that the envelope was checked against same. Finally, the sender should confirm that adequate postage was affixed to the envelope and recall the exact circumstances of the mailing, including most notably the location, date and approximate time when the item was delivered to the custody of the Postal Service.

The presumption of receipt is not recognized in connection with items mailed by means other than the official U.S. Mail.[FN5] In this context, the presumption of receipt will not be established if testimony does not confirm direct delivery to a post office, official mail box, mail carrier or private mail box on a regular postal route. Testimony that a mailing was entrusted to a friend, or that it was forwarded through an office mail system, will not establish receipt without further evidence establishing that it was subsequently delivered to the custody of the Postal Service.

Businesses

Where the sender is a corporation or other business entity, the employee(s) who actually prepared a particular mailing will rarely recall doing so, or may not be identifiable. Under such circumstances, however, the presumption of receipt may still be available.

In Nassau Insurance Co. v. Empire Mutual Insurance Co.,[FN6] the Court of Appeals held that an insurance company was entitled to a presumption that a notice of cancellation had been received by its insured. To establish this presumption of receipt, the insurance company was required to show “an office practice and procedure followed by the insurers in the regular course of their business, which shows that the notices of cancellation have been duly addressed and mailed.” Moreover, the insurer was required to demonstrate that its office practices were “geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and mailed.”

The court determined that the insurer had fully complied with these requirements and that the insured's denial of receipt was ineffective absent a showing that “routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed.”

The Nassau Insurance decision does not discuss the specific office procedures that created the presumption of receipt. More guidance in this regard is provided by the First

Department in In re Lumbermens Mutual Casualty Co. v. Collins,[FN7] whereby receipt of a notice of cancellation was also at issue. In concluding that the presumption of receipt had not been established despite considerable testimony as to the internal procedures of the premium finance company that had issued the notice of cancellation, the court carefully identified the additional procedures that should have been addressed to comply with the criteria set forth in Nassau Insurance.

In Lumbermens, the insurer called as a trial witness a vice president of the premium finance company, who testified that a premium payment check from the insured had been returned for insufficient funds. The vice president testified further that when a check was so returned it was custom and practice within his office to consider the insured in default on its premium loan, which permitted the premium finance company to cancel coverage. To that end, the return of the check typically triggered a mailing to the insured, on the same date, of a provisional notice that the policy would be cancelled if the overdue payment was not received within 15 days.

The vice president went on to offer into evidence a computerized mailing list identifying the insured and various other policy holders whose coverage had been cancelled as of a certain date, which was signed by another employee of the premium finance company. The vice president identified this employee as being responsible for mailing all provisional cancellations, which he testified were folded into “self-mailing” forms to effect delivery. If no payment was received within the allotted time, a final cancellation notice would be generated and forwarded to the insured by the same employee.

The trial court ruled that the insurer had failed to demonstrate compliance with the statutory notice requirements for cancelling coverage. In upholding this ruling, the First Department observed that no presumption of receipt had arisen for the cancellation notice. Specifically, the court criticized the absence of testimony concerning the premium finance company's procedures for delivering its mail to the post office.

The court emphasized that no testimony had been presented to establish “internal precautionary procedures” to ensure that the cancellation notices were properly addressed and mailed. For example, there had been no testimony as to “whether a practice existed of comparing the names on the mailing list with the names and addresses on the envelopes for accuracy,” or as to “whether anyone routinely checked that the total number of envelopes matched the number of names on the mailing list.”

The Lumbermens court also focused on the insurer's failure to elicit testimony from the employee responsible for mailing cancellations, who apparently remained in the premium finance company's employ. While other New York decisions have permitted testimony from supervisory personnel to establish the presumption of receipt,[FN8] the Lumbermens court clearly suggests that the vice president's testimony might have been effectively supplemented by the other employee.

In light of Nassau Insurance and Lumbermens, proving receipt of a document mailed by a business entity will require detailed analysis as to its internal procedures. The sender's attorney should therefore allow considerable time for interviewing mailroom supervisors and other administrators charged with oversight of the appropriate departments.

Of course, if the person(s) who actually prepared and mailed a given document may be identified, they should also be interviewed, as should a more senior executive who is able to explain how the mail room interacts with other departments of the business. The affidavits or testimony of such persons are absolutely necessary to establish the presumption of receipt; the sender's attorney should never rely on testimony from the in-house legal staff or other executives who typically work with outside counsel unless they are directly involved with clerical and administrative functions.

The client's employees must be able to testify as to the actual preparation of the document. In the alternative, their testimony must establish that the document is of a kind routinely generated in response to certain circumstances, and that such circumstances had in fact occurred. Thereafter, they must testify to a uniform procedure whereby such documents are always placed in an envelope or other wrapper and actually delivered to the custody of the Postal Service with proper postage affixed thereto. In this context, there must be evidence that adequate safeguards are in place to ensure that the envelope is properly addressed and forwarded.

As noted in Lumbermens with regard to mass mailings of a particular kind of document, such safeguards may encompass a procedure whereby the names and addresses on all envelopes are checked for accuracy against a master list, and the number of envelopes is counted to confirm that an equal number of names appears on a master list.

Contents of a Mailing

Proving the actual content of a mailing presents an especially perplexing problem in many cases. The alleged recipient of a document will frequently admit to receiving a mailing, but deny that it contained what the sender says it does. This problem in particular seems to plague the insurance industry, with insureds frequently contending that the policy they received lacked a crucial endorsement or that an insurer's letter acknowledging a claim failed to include blank “proof of loss” forms as required by statute.[FN9]

The contents of a mailing should be confirmed by evidence that safeguards are in place to examine the contents of the envelope before it is sealed, perhaps by comparing the file copy of a document with the mailed original.[FN10] Of course, this requires as a threshold matter that the sender maintain a complete file copy of a document, including all attachments.[FN11] As noted in Bailey v. Nationwide, where the sender's files do not include the attachments to a letter (blank “proof of loss” forms in that case), it will be far more difficult, if not impossible, to establish receipt of the attachments by the addressee.

Certified Mail

Documents may be forwarded by “certified mail, return receipt requested” to confirm receipt by the addressee, which in theory would not require establishing the presumption of receipt. In practice, however, it is the relatively unusual case where a certified mail receipt alone will serve this purpose.

While the certified mail receipt does represent strong evidence of delivery, such may be negated if the addressee will not acknowledge the signature on the return receipt[FN12] or if the person signing the return receipt is not the actual addressee. Moreover, an executed certified mail receipt does not necessarily establish the content of the mailing, even if it establishes that the envelope was in fact delivered.

Numerous New York decisions recognize the evidentiary value of a certified mail receipt, and these cases generally assume that a certified mailing may create the presumption of receipt.[FN13] However, a recent decision, Metropolitan Life v. Young,[FN14] suggests that use of certified mail may actually preclude reliance on the presumption of receipt when an executed return receipt is not obtained.

In Metropolitan Life, a judgment creditor forwarded information subpoenas to two judgment debtors by certified mail, return receipt requested, as authorized by CPLR

5224(a)(3). Both of the mailings were returned as “unclaimed” and the judgment creditor thereafter moved to hold the judgment debtors in contempt of court for disregarding the subpoenas.

The court denied the contempt motion, noting that the requested sanctions were only available if the subpoenas were actually received. In so holding, the court reasoned that the “act of mailing” created a presumption of receipt only for documents forwarded by “ordinary first class mail” in properly stamped and addressed envelopes. By contrast, the court held the presumption of receipt does not apply where “the method of mailing requires the addressee to sign a return receipt” since the “mailing can not be received until the addressee signs for it.” The court's decision clearly implies that receipt of documents forwarded by certified mail may only be established by a signed return receipt.

Metropolitan Life seems inconsistent with the numerous cases that assume the common law presumption of receipt applies interchangeably to certified mail and ordinary mail. Nonetheless, Metropolitan Life appears to be the first decision directly analyzing this issue, and if this decision is adopted by other courts, the utility of certified mail will be drastically limited.

In any event, reliance on certified mail is impractical and cost-prohibitive for many businesses, and most documents are simply not sent by this device. As such, a certified mail receipt in and of itself will establish delivery only in a minority of cases.

Conclusion

The presumption of receipt may effectively negate a conclusory denial of non-receipt by the addressee. To invoke this presumption, however, the sender's attorney must recreate the circumstances attendant to the mailing in considerable detail. Particularly when representing a corporate client, the practitioner is advised to regard this as a major factual issue and to allocate his or her time accordingly.

FN1. See, e.g., News Syndicate Co. v. Gatti P.S. Corp., 256 NY 211 (1931). The presumption of receipt may also be created by statute for particular documents; as an example, §1147 of the New York Tax Law creates a presumption of receipt based upon a mailing in a postpaid envelope to the taxpayer's last known address.

FN2. See, e.g., Engel v. Lichterman, 95 AD2d 536, 538 (2d Dept. 1983), aff'd, 62 NY2d 943 (1984).

FN3. See, e.g., Rosa v. Board of Examiners of the City of New York, 143 AD2d 351 (2d Dept. 1988).

FN4. See, e.g., Allstate Ins. Co. v. Patrylo, 144 AD2d 243, 246 (1st Dept. 1988); Aetna Casualty and Surety Co. v. King, 204 AD2d 627 (2d Dept. 1994).

FN5. See, e.g., People v. Johnson, 190 AD2d 910, 911 (3d Dept. 1993); People v. Fulton, 162 Misc.2d 360, 363 (Sup. Ct. Monroe Co. 1994).

FN6. 46 NY2d 828, 829 (1978).

FN7. 135 AD2d 373 (1st Dept. 1987).

FN8. State-Wide Ins. Co. v. Simmons, 201 AD2d 655, 656 (2d Dept. 1994).

FN9. See, e.g., Bailey v. Nationwide Mutual Fire Ins. Co., 133 AD2d 915, 916-917 (3d Dept. 1987).

FN10. See, e.g., 31-33 Lenox Avenue Wine & Liquor Corp. v. Brueckner, 185 AD2d 762, 763 (1st Dept. 1992).

FN11. See, e.g., State-Wide Ins. Co. v. Simmons, 201 AD2d at 655 (microfiche copy of cancellation notice adequate evidence of document).

FN12. Mareno v. New York State Tax Commission, 144 AD2d 114, 115 (3d Dept. 1988).

FN13. See, e.g., In re Greenspan, 43 AD2d 998, 999 (3d Dept. 1974); Allstate v. Patrylo, 144 AD2d at 246; Sea Ins. Co. v. Hopkins, 91 AD2d 998, 999 (2d Dept. 1983).

FN14. 157 Misc.2d 452 (N.Y. City Civ. Court 1993).

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