The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 15580

January 23, 2003

NEW YORK COURT ENJOINS SOFTWARE SELLER FROM INCLUDING LANGUAGE IN ITS AGREEMENTS PROHIBITING REVIEWING OR TESTING ITS SOFTWARE

[15580] January 23, 2003 TO: SMALL FUNDS MEMBERS No. 3-03 TECHNOLOGY ADVISORY COMMITTEE No. 1-03 RE: NEW YORK COURT ENJOINS SOFTWARE SELLER FROM INCLUDING LANGUAGE IN ITS AGREEMENTS PROHIBITING REVIEWING OR TESTING ITS SOFTWARE Based upon finding that language included in software diskettes and on its download page on the Internet "may be deceptive," the New York Supreme Court recently issued an injunction against a company engaged in the business of developing, selling and marketing a range of software products, "including the popular McAfee anti-virus and firewall software named VirusScan and Gauntlet."1 The language at issue was set forth in the following "Restrictive Clause" use by the respondent: Installing this software constitutes acceptance of the terms and conditions of the license agreement in the box. Please read the license agreement before installation. Other rules and regulations of installing the software are: a. The product cannot be rented, loaned, or leased – you are the sole owner of this product. b. The customer shall not disclose the result of any benchmark test to any third party without the [company's] prior written approval. c. The customer will not publish reviews of this product without prior consent from [the company]. As a result of this finding, the court imposed various sanctions on the software company, including issuing an injunction prohibiting it from distributing, advertising and selling software that contains the above language. The facts of this case are summarized below. 1 See People of the State of New York v. Network Associates, Inc. d/b/a McAfee Software (N.Y. Sup. Ct. No. 400590/02 January 14, 2003). A copy of the court's decision can be found at: http://www.eff.org/IP/UCITA_UCC2B/spitzer-v- network-assic.pdf. According to the Petition filed by the Attorney General in this matter, the respondent's "anti- virus software products are among the top selling software programs worldwide." See footnote 2, below. 2 BACKGROUND The respondent in this case developed and sold software that included the above prohibitions in a Restrictive Clause that appeared in its software diskettes and on the download page on the respondent's website. According to the court, the form license agreement that was included with the respondent's software did not include this Restrictive Clause. Moreover, the form license agreement included a provision stating that such agreement constituted the entire agreement between the parties and superseded any prior communications with respect to the software and documentation. In July 1999, an online magazine sought permission from the respondent to include the respondent's software in a review of six firewall software products. When permission was denied, the online magazine proceeded with its review, which included the respondent's software. When the software

received an unsatisfactory review in the publication, the respondent, citing the above Restrictive Clause, demanded that the magazine print a correction or retraction, which it did not do. The New York Attorney General then became involved and conducted an investigation of this matter. THE SUIT FILED BY THE ATTORNEY GENERAL Based upon its investigation, the Attorney General filed suit against the company in the Supreme Court of the State of New York alleging deceptive acts and practices in violation of New York Law and seeking issuance of a permanent injunction and other relief based on fraud and the illegality of the respondent's acts. The Petition filed with the court by the Attorney General noted that consumers rely on the respondent's software to protect their computers from viruses, hackers, and cyber-terrorists and it is "imperative that discussion of such software be open and free – as is the public's right to comment on any consumer product."2 It alleged that the Restrictive Clause "protects no legitimate business interest" and argued that the respondent's use of the reference to "rules and regulations" in the Restrictive Clause was deceptive because such words were designed to mislead consumers by leading them to believe that (1) "some rules and regulations . . . exist under state or federal law prohibiting consumers from publishing reviews and the results of benchmark tests" and (2) such clause is enforceable under the lease agreement, when, in fact, it is not. As a result, the Attorney General alleged that consumers "may be deceived into abandoning their right to publish reviews and results of benchmark tests." In response, the respondent argued that there was no evidence that consumers were misled by this language or that they were deterred from publishing their reviews and results of tests.3 2 A copy of the Petition filed by the Attorney General can be found at: http://news.findlaw.com/hdocs/docs/cyberlaw/nyntwrkass020702pet.pdf. 3 According to the Attorney General, during the course of the investigation the respondents also represented in writing to the Attorney General that the company "never took any action against persons who published reviews . . . on the product" and that it endured "unfair and unfavorable reviews without complaint." 3 THE COURT'S RULING In reviewing the facts, the court noted that, because the license agreement contained a clause stating that all of the rights and duties of the parties were contained within that agreement, and such agreement did not include any of the restrictions set forth in the Restrictive Clause, "consumers may conclude that those restrictions are not contractual restrictions," but rather, rules and regulations that exist independent of the license agreement that are enforceable by an entity other than the corporation itself. Based upon this conclusion, the court found that the Attorney General made a showing that the language in the Restrictive Clause "may be deceptive, and as such, . . . is not merely unenforceable, but warrants an injunction and the imposition of civil sanctions [under New York law]." As regards the civil sanctions, the Petition filed by the Attorney General sought imposition of a penalty in the amount of $.50 for each instance of a violation and an injunction prohibiting the respondent from including any language restricting the right to publish the results of testing and review without first notifying the Attorney General at least 30 days prior to such inclusion. With respect to the requested injunction, the respondent argued that granting such injunction would "represent prior restraint on free speech" and be too costly, though they failed to provide details concerning such costs. The court disagreed and granted the Attorney General's request for issuance of an injunction. As for the Attorney General's request for a civil penalty, the court found that the amount of such penalty could not be determined at the time of the court's ruling and directed the respondent to "provide a sworn certified statement indicating the number of instances in which software was sold on discs or through the Internet containing the [Restrictive Clause] in order for the court to determine what, if any, penalties and costs should be ordered." The company apparently intends to appeal the court's ruling. Tamara K. Salmon Senior Associate Counsel