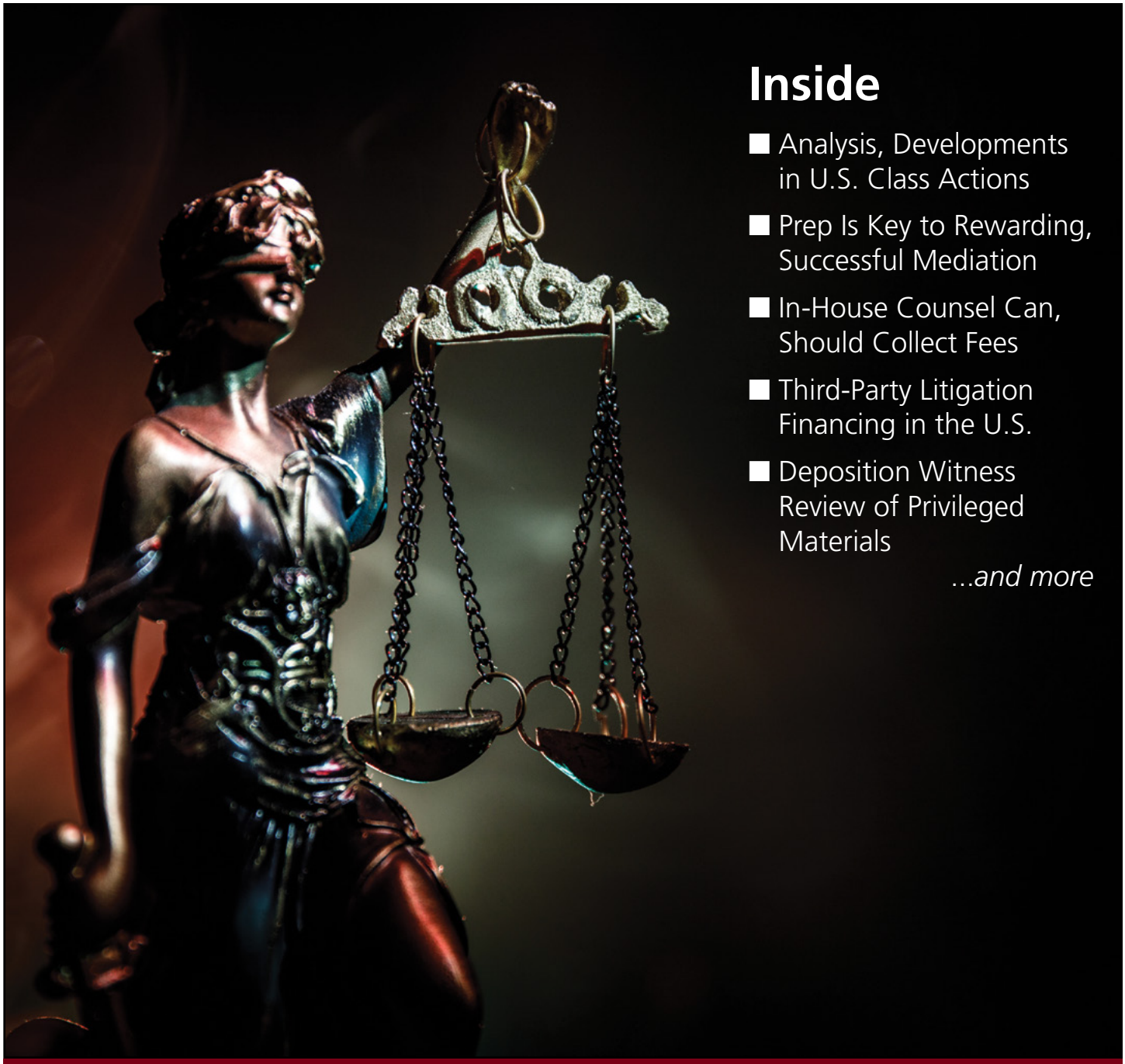
NYSBA SPRING 2019 | VOL. 24 | NO. 1

NYLitigator

A Journal of the Commercial & Federal Litigation Section
of the New York State Bar Association



Inside

www.nysba.org/ComFed

Commercial and Federal Litigation Section

OFFICERS

Chair:
Robert N. Holtzman
Kramer Levin Naftalis
& Frankel LLP
1177 Avenue of the Americas
New York, NY 10036-2714
rholtzman@kramerlevin.com

Chair-Elect:
Laurel R. Kretzing
Jaspan Schlesinger LLP
300 Garden City Plaza
Garden City, NY 11530
lkretzing@jaspanllp.com

Vice-Chair:
Jonathan B. Fellows
Bond, Schoeneck
& King, PLLC
One Lincoln Centre
Syracuse, NY 13202-1324
fellowj@bsk.com

Secretary:
Daniel K. Wiig
Municipal Credit Union
22 Cortlandt Street
New York, NY 10007
dwiig@nymcu.org

Treasurer:
Anne B. Sekel
Foley & Lardner LLP
90 Park Avenue
New York, NY 10016-1301
asekel@foley.com

Delegates to the House of Delegates:
Tracee E. Davis
Zeichner Ellman &
Krause, LLP
1211 Avenue of the Americas
Floor 40
New York, NY 10036-8705
tdavis@zeklaw.com

Mitchell J. Katz
Barclay Damon LLP
125 East Jefferson Street
Syracuse, NY 13202-2078
mkatz@barclaydamon.com

James M. Wicks
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556
jwicks@farrellfritz.com

Alternate Delegate to the House of Delegates:
Robert N. Holtzman
Kramer Levin Naftalis &
Frankel LLP
1177 Ave. of the Americas
New York, NY 10036-2714
rholtzman@kramerlevin.com

The *NYLitigator*

Editor
Daniel K. Wiig
Municipal Credit Union
22 Cortlandt Street
New York, NY 10007
dwiig@nymcu.org

Contributing Editors
Moshe O. Boroosan
Associate
Robbins Geller Rudman & Dowd, LLP

Beth Gazes
Class of 2020
Touro Law School

Salvatore Lapetina
Associate
Geringer McNamara & Horowitz LLP

Megan Schnader
Class of 2019
New York Law School

Former Chairs:

Robert L. Haig
Michael A. Cooper
Shira A. Scheindlin
Harry P. Trueheart, III
P. Kevin Castel
Mark H. Alcott
Gerald G. Paul
Mark C. Zauderer
Bernice K. Leber
John M. Nonna
Jack C. Auspitz
Sharon M. Porcellio
Jay G. Safer
Cathi A. Baglin
Lewis M. Smoley
Lauren J. Wachtler
Stephen P. Younger
Lesley F. Rosenthal
Carrie H. Cohen
Peter Brown
Vincent J. Syracuse
Jonathan D. Lupkin
David H. Tennant
Tracee E. Davis
Gregory K. Arenson
Paul D. Sarkozi
James M. Wicks
Mark A. Berman
Mitchell J. Katz

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

ISSN 1085-4193 (print) **ISSN 1933-8589 (online)**
Cite as *NYLitigator*

Table of Contents

Spring 2019 • Vol. 24, No. 1

Section Reports

Thank you for being a NYSBA and Commercial and Federal Litigation Section member!

Renew your memberships for 2019 by visiting www.nysba.org/renew or calling the Member Resource Center at 800-582-2452.

Have you considered also joining the Dispute Resolution Section at only $35 per year? Network with knowledgeable lawyers in your field and continually learn important issues most pressing in your area of practice. Let us know when you renew!

Don't let your NYSBA membership lapse, enroll in Automatic Renewal.

Why Automatic Renewal?

- Continuous membership. Ensure your exclusive benefits and services continue without interruption.
- Save time. One less bill to deal with or phone call to make.
- Environmentally friendly. Less paper generated with fewer mailings.
- You will be notified each year/month with a reminder before your credit card is charged

NYSBA NEW YORK STATE BAR ASSOCIATION

A Note from the Chair

As I write, the partial shutdown of the federal government has ended or, at a minimum, has been adjourned for several weeks. The legal community was lucky this time—the effects on the federal judiciary were limited, largely due to the remarkable work of chief judges and administrative staff who were able to ensure that the courts remained open and funded through the course of the shutdown. But it was a close call, and had the shutdown not ended the courts would have suffered the same impact as other parts of the government—furloughed employees, others required to work without pay, and a reduction in services to the public.

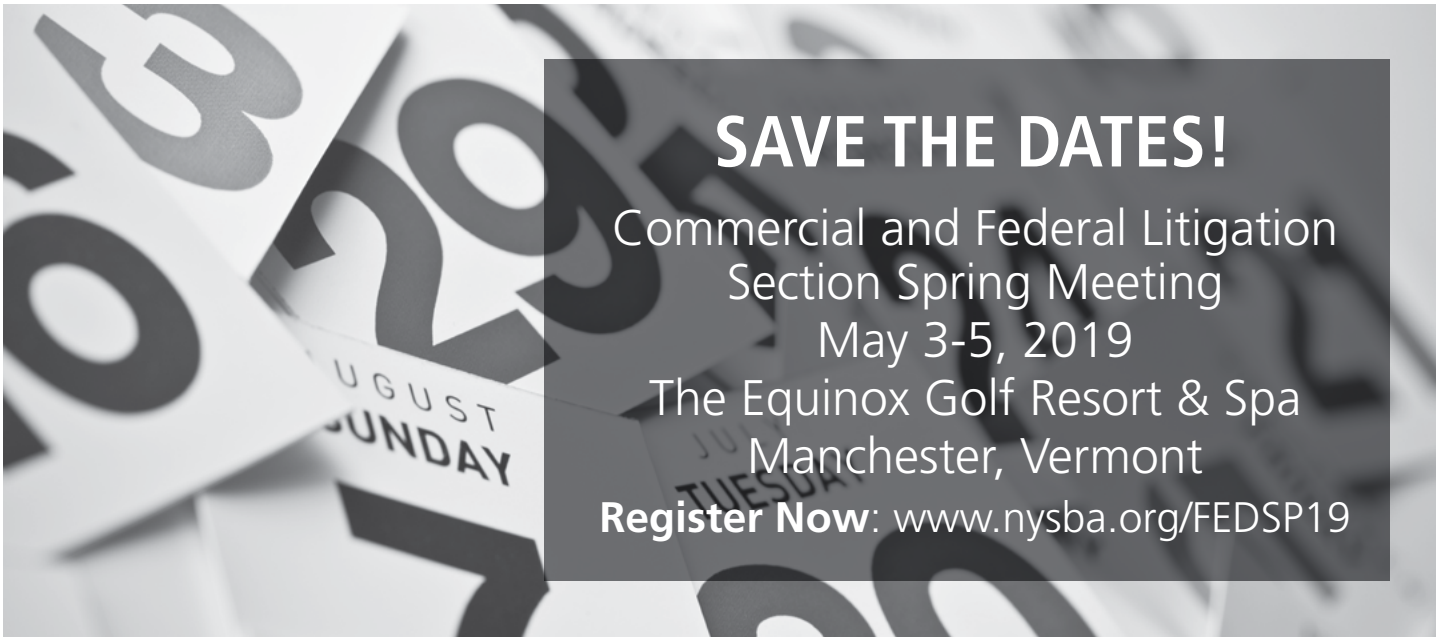
I express no position here on the politics of the issues that led to the shutdown—I do not see that as within the scope of my role as Chair of this august Section. But in this forum I think we are compelled to recognize what almost came to pass in the realm we occupy—the legal forum and the administration of justice—and to do what we can to ensure it does not happen again.

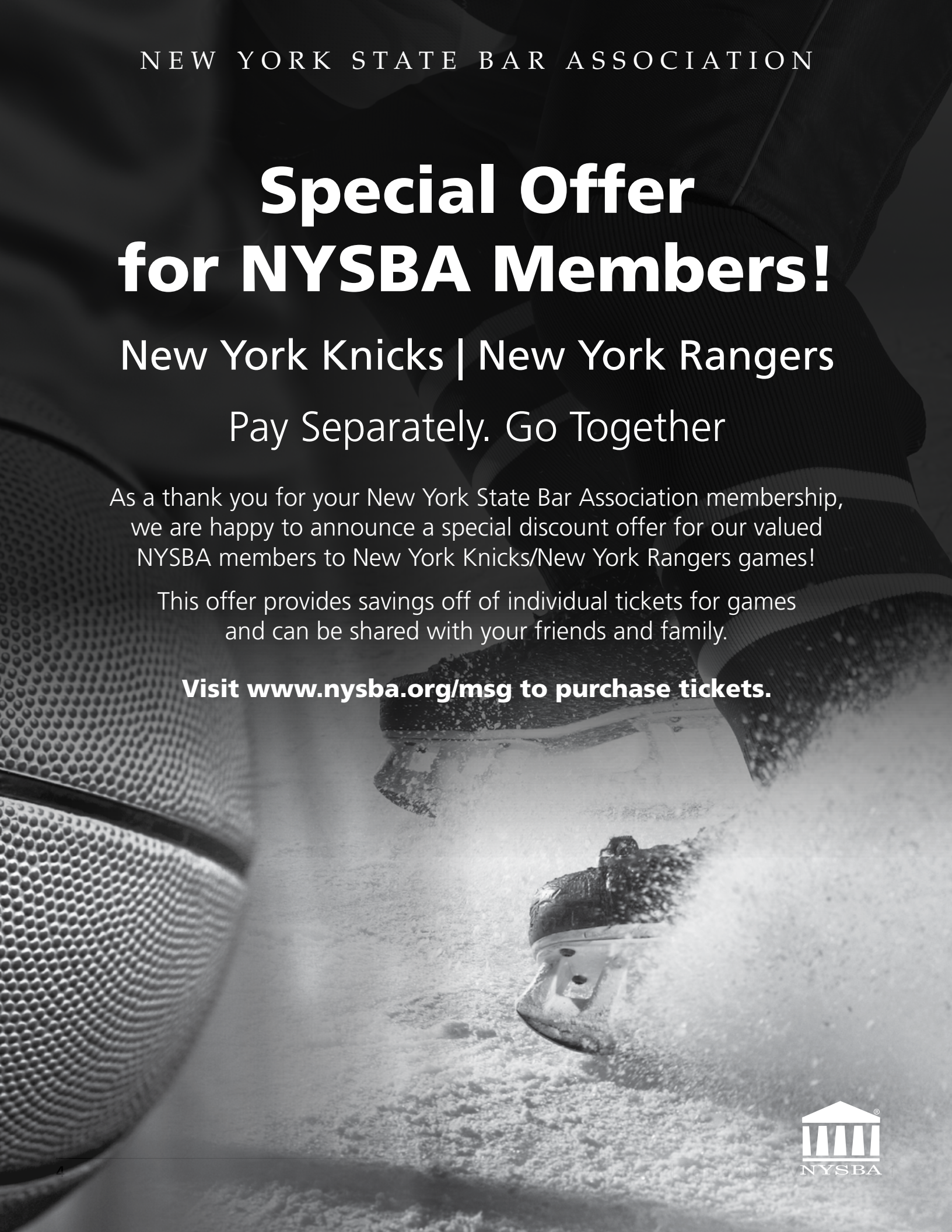
Once the judiciary ran out of funds, the impact would have been immediate. Article III judges would have continued to receive their salaries, as required under the Constitution, but all other employees of the judicial branch would have gone unpaid—some sent home after being deemed "nonessential," and others forced to work with no pay until the resolution of the shutdown. Then, the stresses placed on other government workers—we all have heard stories of individuals who took on second jobs, drove for Uber or Lyft, or simply were unable to pay their bills—would have been visited on employees of the judiciary. And while our colleagues in the courts would no doubt have made extraordinary efforts to keep the wheels of justice turning, inevitably we and our clients would soon have experienced a direct impact.

This cannot be permitted to happen to the judicial branch again. The judiciary is, of course, a co-equal branch of government, but it had no role in this battle between the executive and legislative branches. The Constitution protects Article III judges from a decrease in salary, but not the rest of the many thousands of employees who ensure that justice is done on a daily basis. And, if there is a next time, the impact on clients and the administration of justice could be severe.

Our New York Congressional representatives opposed the shutdown, and there are now discussions regarding the possibility of legislative action to ensure that government shutdowns do not occur in the future. I submit that whatever the outcome of those efforts, the judiciary must not be a pawn in any future budget battles. Our bar association, other bar associations around the country, and individual attorneys should support action to insulate the judiciary from any future shutdown. And if there is a next time, we should be vocal supporters of the judicial branch and opponents of any shutdown potentially impacting its operations.

Robert N. Holtzman





Special Offer for NYSBA Members!

New York Knicks | New York Rangers

Pay Separately. Go Together

As a thank you for your New York State Bar Association membership, we are happy to announce a special discount offer for our valued NYSBA members to New York Knicks/New York Rangers games!

This offer provides savings off of individual tickets for games and can be shared with your friends and family.

Visit www.nysba.org/msg to purchase tickets.

NYSBA

Fed. R. Civ P. 30(b)(6), 56(c)(4) and Fed. R Evid. 602, 802: Can the Concept of "Corporate Knowledge" Be Stretched?

By Stephen M. Harnik and Armin Kaiser

Introduction

Federal Rules of Evidence (FRE) 602 and 802 are clear: a witness must have personal knowledge of the matter and cannot testify as to hearsay.[1] Federal Rule of Civil Procedure (FRCP) 56(c)(4)[2] is similarly clear: a declarant/affiant on a motion for summary judgment must have personal knowledge of the facts to which he is attesting. Nevertheless, during discovery, FRCP 30(b)(6) permits corporations, partnerships, and other entities to offer evidence that is not known personally but is offered as the knowledge of the organization. Sometimes, on a motion for summary judgment, or at trial, an admissibility clash arises when the declarant/affiant or the witness, as the case may be, seeks to rely affirmatively on FRCP 30(b)(6) deposition testimony that has not been made with personal knowledge. Can this concept be stretched?

Whether FRCP 30(b)(6) testimony can be introduced at trial will generally depend on who is seeking to rely upon it. While FRCP 30(b)(6) exempts the deponent from the personal knowledge requirement and the rule against hearsay, under the Federal Rules of Evidence only an *adverse* party may rely upon such testimony. Indeed, courts generally refuse to hear FRCP 30(b)(6) testimony if it is being introduced by the party on whose behalf the deponent testified, allowing only testimony that is personally known. Although, as noted below, there is case support for liberalizing that rule, which would accommodate organizations that no longer have in their employ persons with personal knowledge of the disputed facts, only a few courts have expressed a tendency to deviate from the strict limitations on the admissibility of FRCP 30(b)(6) testimony.

"When a party moves for summary judgment, the courts are not consistent in their approach to the admissibility of FRCP 30(b)(6) testimony."

FRCP 30(b)(6) is a frequently employed and very useful tool for obtaining discovery from corporations, partnerships, and other entities. In a nutshell, it permits a party to require a party opponent or third-party entity to produce a witness within its organization with not just personal knowledge of the matter at hand, but, so long as the notice sets forth the topics to be explored with reasonable particularity, then with knowledge of specific facts, as they are known to the organization as a whole. It goes without saying that FRCP 30(b)(6) streamlines the discovery proceedings because it obviates the need for a party to produce, and the opposing party from having to notice and depose, multiple individuals within an organization with personal knowledge about matters pertinent to the issues in dispute. As the Advisory Committee on the Civil Rules noted when the novel procedure was promulgated, FRCP 30(b)(6) would alleviate the deposing party's burden, allowing it simply to identify the subject matter of the deposition rather than an individual with personal knowledge, and thereby "curb the bandying" by an organization of its corporate officers or managers with each disclaiming knowledge of facts that are clearly known to the organization itself.[3] FRCP 30(b)(6) is also beneficial for deponent organizations, "which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge."[4]

When a party moves for summary judgment, on the other hand, the courts are not consistent in their approach to the admissibility of FRCP 30(b)(6) testimony. As is well known, in such instances, the record is viewed in the light most favorable to the nonmoving party, drawing all reasonable inferences in the latter's favor.[5] The court should not weigh evidence or make credibility determinations. Those tasks should be left to the fact-finder.[6] Nevertheless, while a party does not necessarily have to produce evidence in a form that would be admissible at trial, inadmissible hearsay should not be used to overcome a properly supported motion for summary judgment.[7]

Does FRCP 30(b)(6) allow room for an exception to FRE 602's personal knowledge requirement and FRE 802's rule against hearsay? In the context of motions for summary judgment, some trial courts have said yes. When it comes to trial testimony, we have also identified one district that has been inclined to show some leniency. We

Stephen M. Harnik and **Armin Kaiser** are principal and associate at Harnik Law firm. Harnik is engaged in complex international litigation. Among other international and domestic clients, he represents the Austrian Government in NY. He is a graduate of Case Western University Law School and Swarthmore College. Kaiser earned his LL.M at NYU and was a principal co-author of the Committee's Report on the Evolution of General Jurisdiction Rules in the Years since *Daimler AG v. Bauman*, NY Litigator, Fall 2017, Vol 22, No 2.

see merit to that position. At the same time, we believe similar standards should apply irrespective of whether the testimony is offered on a summary judgment motion or at trial.

The Permitted Use of FRCP 30(b)(6) Testimony at Trial

The discovery tool enshrined in FRCP 30(b)(6) was introduced as part of the 1970 amendment to FRCP 30 in order to facilitate and streamline the discovery process. The novel procedure was intended to reduce the difficulties previously encountered when deposing corporations, partnerships, and other entities or government agencies, where the deposing party had to guess the identity of the individual with personal knowledge of the specific issue at hand.

Pursuant to FRCP 30(b)(6), the deposing party must notify the organization of the intended deposition, describing "with reasonable particularity" the matters which the deposing party seeks to examine. The organization must then designate an individual to testify as to matters known or reasonably available to the organization. The designee does not testify at deposition based on personal knowledge, but rather speaks for the organization about matters to which the organization has reasonable access.[8] Accordingly, an organization noticed pursuant to FRCP 30(b)(6) "must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by the party noticing the deposition and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed as to the relevant subject matters."[9] While the testimony of a FRCP 30(b)(6) deponent is not binding on the organization to the same extent as a judicial admission, it will, nonetheless, be considered as the organization's testimony for evidentiary purposes.[10] This is not the case for testimony that exceeds the scope identified by the deposing party in the 30(b)(6) notice, which will instead be treated as the testimony of the individual deponent.[11]

FRCP 32 governs the use of depositions at trial and constitutes an independent exception to the hearsay rule in cases where the deponent is not available to testify at trial.[12] Pursuant to FRCP32(a)(3), the testimony of a FRCP 30(b)(6) designee may be used by "an adverse party for any purpose."[13] While the statements of an organization's agent or employee could also be admitted as an adverse party's admission pursuant to FRE 801(d)(2), FRCP 32(a)(3) acts independently to obviate an opposing party's burden to prove the existence of a qualifying agency or employment relationship.[14] As the Advisory Committee noted in the context of the 1970 revision of FRCP 32, this subsection was intended to complement the (at that point novel) procedure for taking the deposition of corporations or other organizations. Taken together, FRCP 30(b)(6) and FRCP 32(a)(3) thus allow an *adverse* party to circumvent the strict requirements of FRE 602 and FRE 802 when introducing the testimony of corporate deponents at trial.

Restrictions on the Testimony of FRCP 30(b)(6) Designees at Trial

While FRCP 30(b)(6) only governs the admissibility of deposition testimony, the Fifth Circuit extended its application to live trial testimony by corporate representatives in *Brazos River Auth. v. GE Ionics, Inc.*[15] In that case, the plaintiff River Development Authority sought to question the co-defendant contractor's designated FRCP 30(b)(6) witness at trial as to matters within the contractor's corporate knowledge. The contractor and its co-defendant objected to that line of questioning and the district court agreed, ruling that the plaintiff could only elicit testimony that was based on the witness's personal knowledge. The Fifth Circuit vacated and remanded, holding that the River Development Authority should have been permitted to question the contractor's FRCP 30(b)(6) witness as to his corporate knowledge. Pointing out the general judicial preference for live testimony where the deponent is available at trial, the Fifth Circuit explained that

> [a]lthough there is no rule requiring that the corporate designee testify "vicariously" at trial, as distinguished from at the FRCP 30(b)(6) deposition, if the corporation makes the witness available at trial he should not be able to refuse to testify to matters as to which he testified at the deposition on the ground that he had only corporate knowledge of the issues, not personal knowledge.[16]

However, in *Union Pump Co. v. Centrifugal Tech. Inc.*,[17] the Fifth Circuit reiterated that only an *adverse* party may rely on testimony by a corporate witness designated under FRCP 30(b)(6). In that case, the defendant corporation appealed a district court's evidentiary findings, requesting a new trial. The defendant argued *inter alia* that the district court should not have permitted plaintiff Union Pump's corporate representative to testify to matters that were hearsay and not within his personal knowledge. Union Pump countered that although the disputed testimony had not been within the witness's personal knowledge, it should nonetheless be admissible as corporate knowledge, since the witness had been designated as a corporate representative under FRCP 30(b)(6). The Fifth Circuit expressly rejected Union Pump's argument and held, citing FRCP 32(a)(3) and *Brazos*, that only an adverse party may rely on a corporate representative's testimony based on corporate knowledge.[18] Thus, the Fifth Circuit reiterated that where a party seeks to introduce the testimony of its own corporate representative, the latter "may not testify to matters outside his own personal knowledge to the extent that information is hearsay not falling within one of the authorized exceptions."[19] Similar to the Fifth Circuit, most federal courts have adopted a narrow read-

ing of FRCP 32(a)(3) and regularly hold that FRCP 30(b)(6) does not apply to live trial testimony, which remains subject to the personal knowledge requirement and the rule against hearsay.[20] For the most part, a corporation therefore should not expect to rely on the testimony of its FRCP 30(b)(6) designees at trial, unless the testimony is founded on personal knowledge.

Stretching the Scope of FRCP 30(b)(6) to Trial Testimony

A somewhat different, albeit measured, approach has been taken by the Northern District of Illinois in *Sara Lee Corp. v. Kraft Foods Inc.*,[21] a case about hot dogs. Two of the largest hotdog manufacturers, Oscar Meyer and Ball Park Franks, accused each other of deceptive advertising. Among other things, the defendant claimed that the plaintiff had misused a taste-test award given by non-party ChefsBest. The litigants had deposed ChefBest's FRCP 30(b)(6) witness both as a corporate representative and personally. As corporate representative, the witness gave deposition testimony that was not based on personal knowledge regarding his company's licensing practices in respect of the taste-test award. The plaintiff gave notice that it planned to use ChefsBest's deposition testimony at trial and the defendant objected on the basis that it was not knowledge known to the witness personally in violation of FRE 602.

Reiterating the important benefits of FRCP 30(b)(6) in the context of discovery, the court perceptively noted that "[w]hen it comes to using Rule 30(b)(6) depositions at trial, strictly imposing the personal knowledge requirement would only recreate the problems that Rule 30(b)(6) was created to solve" by presenting corporations with the "daunting task" of identifying employees or former employees to establish the corporation's position—as previously identified at the FRCP 30(b)(6) deposition.[22] However, the district court also recognized the inherent difficulty of reconciling the objectives of FRCP 30(b)(6) with the fundamental requirement for personal knowledge and the prohibition against hearsay. Thus, it further queried whether

> [g]iven that some of Thompson's [the witness] testimony may be admitted based on the corporate knowledge of ChefsBest, the next question is how far the concept of "corporate knowledge" can be stretched. Few courts have addressed this issue, but the purposes underlying Rule 30(b)(6) must be balanced against the real dangers of admitting testimony based on hearsay. *See Deutsche Shell Tanker Gesellschaft mbH v. Placid Refining Co.*, 993 F.2d 466, 473 n.29 (5th Cir. 1993) (corporate representative may not repeat "rank hearsay"). For instance, the Court doubts that a Rule 30(b)(6) witness should be allowed to testify about the details of a car accident in lieu of the corporation's truck driver who actually witnessed the event. If he could, Rule 30(b)(6) would severely undercut the requirement, fundamental to our adversary system, that fact witnesses have personal knowledge of the matters upon which they testify.[23]

Seeking to strike a balance, the *Sara Lee* court held that "the admission of testimony based on corporate knowledge should be limited to topics that are particularly suitable for Rule 30(b)(6) testimony," including "matters about which the corporation's official position is relevant, such as corporate policies and procedures, or the corporation's opinion about whether a business partner complied with the terms of a contract."[24] The court, however, also found that "Rule 30(b)(6) testimony is less appropriate for proving how the parties acted in a given instance."[25] Based on this distinction, the court concluded that the deponent's testimony could be admitted for purposes of explaining the corporate non-party's licensing policies and whether it believed that one of the parties had violated those policies.

It may be argued that the court's rationale in *Sara Lee* is not unwarranted. As previously explained, before the introduction of FRCP 30(b)(6) depositions, in cases involving large organizations it often was a challenge to find a person with personal knowledge of the matters at hand. Evidently, in the context of complex issues and transactions within large organizations, the more likely scenario is that multiple individuals have personal knowledge of only certain specific aspects of the relevant facts. FRCP 30(b)(6) permits the organization to designate one or several individuals who can testify outside of the bounds of FRE 602 and 802, based solely on their review of the organization's books and records and interviews of various knowledgeable employees.

Thus, while the discovery process is certainly streamlined by FRCP 30(b)(6), as the court points out in *Sara Lee*, those benefits are lost—at least for the organization on whose behalf the witness testified—when a case goes to trial. Consider, for instance, litigation involving large multi-national organizations where most officers or employees with personal involvement in the pertinent transactions, which may have occurred long ago, have moved on. At the tail end of years-long discovery, the case finally proceeds to trial, but none of the employees with personal knowledge—including those that testified at deposition—remain under the organization's control. Based on a strict application of the personal knowledge requirement, the organization cannot rely on live direct testimony of its own FRCP 30(b)(6) witness. Aside from reading into the record prior deposition testimony of former employees with knowledge, the organization can thus present no live witnesses at trial and typically must heavily rely on the cross-examination of the opposing party to make its case.

The *Sarah Lee* approach could alleviate these concerns, however, at the expense of FRE 602 and 802.

The Northern District of Illinois subsequently affirmed its more permissive stance with regard to FRCP 30(b)(6) deposition testimony in *University Healthsystem Consortium v. United Health Grp., Inc.*,[26] albeit in a different context. In that case, the court was faced with a motion to strike a declaration offered in support of a motion for summary judgment based on an alleged lack of personal knowledge. Although trial testimony was not at issue, the court cited the Seventh Circuit's decision in *Brazos* (but not *Sara Lee*) arguing that FRCP 30(b)(6) witnesses could testify at trial as to matters within corporate knowledge.[27] Arguably, however, the court overstated the holding in *Brazos*, which only concerned the issue whether an *adverse* party could question a FRCP 30(b)(6) witness as to corporate knowledge where the witness was made available at trial. Nevertheless, the court held that "a Rule 30(b)(6) witness may testify both in a deposition and at trial to matters as to which she lacks personal knowledge, notwithstanding the requirements of Federal Rule of Evidence 602."[28] The district court thus found "little principled distinction" between allowing a FRCP 30(b)(6) witness to testify at trial as opposed to testifying by way of a declaration in support of a motion for summary judgment, and it ultimately denied the motion to strike.

It should be noted that *Sara Lee* and *University Healthsystem* both cite to *Brazos* but fail to address the Fifth Circuit's subsequent holding in *Union Pump*. In that regard the Northern District of Illinois thus appears to be an outlier, with the majority of federal courts following the *Union Pump* approach requiring live trial testimony by corporate representatives with personal knowledge. But, as seen, *Sara Lee* suggests a "balancing test" that would require the courts to distinguish between situations in which the "corporation's official position is relevant" as opposed to situations that require a determination as to "how the parties acted in a given instance."[29] Nevertheless, *Sara Lee* has only been sparingly cited by other courts, and it has been distinguished and criticized. In *Indus. Eng'g & Dev., Inc. v. Static Control Components, Inc.*, for instance, the Middle District of Florida expressly rejected *Sara Lee*, relying on *Union Pump* and holding that FRE 602's personal knowledge requirement is not eliminated by FRCP 30(b)(6).[30] The District of Delaware directly addressed *Sara Lee's* balancing test for admitting a party's own FRCP 30(b)(6) testimony at trial in *ViiV Healthcare Co. v. Mylan Inc*.[31] It found that while such testimony may be admissible if proffered by a non-party (as was the case in *Sara Lee*), the untrustworthiness of hearsay is too compelling where a party to the case affirmatively seeks the introduction of its own FRCP 30(b)(6) testimony as to its truth. To be fair, as previously explained, the *Sara Lee* court had noted that "the purposes underlying FRCP 30(b)(6) must be balanced against the real dangers of admitting testimony based on hearsay."[32] Nevertheless, it appears unlikely at this time that the *Sara Lee's* balancing test will gain much traction, sensible as we believe it to be.

Use of Non-Personal FRCP 30(b)(6) Testimony in Support of Motion for Summary Judgment

With the exception of *Brazos*,[33] *Sara Lee*,[34] and *University Healthsystem*,[35] we have found no court that has recognized an exception, under FRCP 30(b)(6), to the personal knowledge requirement of FRE 602 and the prohibition against hearsay under FRE 802 outside the context of deposition testimony. Curiously, the courts are not so strict applying this tenet, however, when it comes to summary judgment motions, and here, their logic gets fuzzy. Thus, while FRCP 56(c)(4) requires that affidavits or declarations used in support or opposition to summary judgment motions be "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify," several courts appear to have adapted a more lenient approach to the personal knowledge requirement applicable to FRCP 30(b)(6) designees.

In *Lloyd v. Midland Funding, LLC*,[36] for example, the plaintiff sued the defendant under the Fair Credit Reporting Act because the defendant had failed to dismiss a pending collection action after the plaintiff had paid off her debt. That resulted in the case going to default and the lowering of the plaintiff's credit score, which in turn had raised the interest rate she was required to pay on a loan. The district court granted the defendant summary judgment on all of the plaintiff's claims for damages, relying heavily on affidavits submitted by three FRCP 30(b)(6) declarants without personal knowledge. The plaintiff appealed, arguing, *inter alia*, that the FRCP 30(b)(6) affidavits constituted inadmissible hearsay because they were not based on personal knowledge. Although the Sixth Circuit acknowledged that the FRCP 30(b)(6) declarant's affidavits were not based on personal knowledge, it held that summary judgment was proper because the admissibility standards are different when the court considers summary judgment from when the same evidence is offered at trial. The holding begins cheekily:

> The personal knowledge requirement works differently in this setting, where a human being ([the declarant]) speaks for a corporation (Midland). It is not easy to take a deposition of a corporation or for that matter obtain an affidavit from one. In one sense, indeed, it is not even possible to do so, as inanimate objects are not known for their facility with language. That means, whenever a corporation is involved in litigation, the information sought must be obtained from natural persons who can speak for the corporation. […] And that means there is no obligation to select a person with personal knowl-

> edge of the events in question, so long as the corporation proffer[s] a person who can answer regarding information known or reasonably available *to the organization*. In this instance, [the declarant] presented facts known to Midland based on his review of the company's records. That does not run afoul of the personal knowledge requirement in [FRCP] 56(c)(4).[37]

The problem with this holding is that the Sixth Circuit does not explain why evidence that is not personally known should be acceptable under FRCP 56(c)(4), but not at trial under FRCP 30(b)(6). It skirts that question by merely observing that "evidence at the summary judgment stage does not have to be in a form that would be admissible at trial."[38] In similar fashion, the Fifth Circuit recognized an affiant's FRCP 30(b)(6) witness status to reinforce a finding that the statements in her affidavit constituted "competent summary judgment evidence" albeit noting first that irrespective of her capacity as personal representative the affiant appeared to have personal knowledge.[39]

The Fourth Circuit, on the other hand, has observed the inconsistency in this. Albeit not ruling directly on the issue, in *Sutton v. Roth, LLC* it noted in a footnote that an affidavit submitted by the movant in support of its motion for summary judgment was "of questionable value because the affiant's 'personal knowledge' [was] based on a review of files rather than direct, personal knowledge of the underlying facts."[40] At the district court level, a number of courts have followed this same reasoning and insisted on a stricter interpretation of FRCP 56(c)(4). In particular, the Eastern District of Virginia emphasized in *Soutter v. Equifax Info. Servs. LLC* that the mere fact that a person was previously deposed as a FRCP 30(b)(6) witness does not vest that person with personal knowledge of the matters discussed at deposition.[41] Thus, the district court stressed the distinction between a FRCP 30(b)(6) deposition given on behalf of a corporation and based on corporate knowledge, and a declaration that is supposed to reflect the personal knowledge of the declarant.[42] In so doing, the court distinguished cases in which the deponent had relied on corporate records and criticized precedent in which other courts had admitted affidavits by FRCP 30(b)(6) deponents that were not founded in personal knowledge, noting that they "offer no explanation in support of the decision to allow an affidavit."[43] Several other district courts have refused to extend the FRCP 30(b)(6) exemption to the personal knowledge requirement to declarations or affidavits submitted in support of summary judgment motions.[44]

On the other side are district courts which, like the Sixth Circuit, are not troubled by affidavits or declarations by corporate representatives not grounded upon personal knowledge. In *Pace v. Air & Liquid Sys. Corp.*,[45] for example, the S.D.N.Y. declined to strike an affirmation based on a purported lack of personal knowledge where the affiant stated that he had testified as the organization's corporate representative previously and performed research regarding the organization's current and historic products manufactured and sold, thereby rendering him knowledgeable as to the organization's product lines.

The court held that it is "axiomatic" that a corporate representative may "testify and submit affidavits based on knowledge gained from a review of corporate books and records" and, to the extent the affirmation was based on such review in the affiant's official capacity as corporate representative, it could be considered under Rule 56(c)(4).[46] This approach was accepted by numerous other district courts, particularly where a corporate representative's testimony was based on his or her review of corporate books and records.[47] Although, arguably, the Sixth Circuit's and the S.D.N.Y.'s respective holdings in *Lloyd* and *Pace* did not deviate from the traditional admissibility requirements, both courts emphasized that the testimony in question was based on the affiant's review of admissible corporate records and personal knowledge. Other district courts, however, do not offer much justification for departing from the requirements of FRCP 56(c)(4).[48]

One may argue that the personal knowledge requirement can be viewed more liberally with regard to non-moving parties in the context of summary judgment motions because the movant bears the heavy burden to show that there is no genuine dispute as to any material fact.[49] On the other hand, a declaration introduced by the moving party and based on corporate as opposed to personal knowledge may result in a dispositive ruling just as binding as a judgment entered after trial. As just one example, in *Kennedy v. Life Ins. Co. of N. Am.*,[50] the Western District of Kentucky refused to strike a corporate representative's declaration introduced by the moving party and ultimately relied on that declaration to grant summary judgment in favor of that party, dismissing the case with prejudice.[51]

Conclusion

As discussed, not all courts agree with the position taken by the Sixth Circuit in *Lloyd* regarding the personal knowledge requirement of FRCP 56(c)(4). However, even though FRCP 30(b)(6) is strictly limited to depositions, various district courts have accepted FRCP 30(b)(6) non-personal deposition testimony to support a declaration or affidavit submitted in connection with a summary judgment motion. At the same time, most courts reject live trial testimony by corporate representatives under FRCP 30(b)(6) if such testimony is not based on personal knowledge (unless, of course, it is offered by an adverse party). We believe that it is illogical not have one uniform standard applied when considering non-personal FRCP 30(b)(6) testimony, whether it is being offered on a summary judgment motion or directly at trial by a non-adverse witness.

Turning to our title, we further believe that the "stretch" made by *Sara Lee*, allowing *general* non-personal FRCP 30(b)(6) testimony pertaining to an organization's official position at trial, is a step forward given the "daunting" task an organization may face gathering relevant evidence from long-departed employees. In light of the conflict with the traditional rules of evidence this creates, it remains to be seen whether the Northern District of Illinois—or other district courts for that matter—will elaborate or expand upon the *Sara Lee* balancing test.

Endnotes

1. Those Rules provide:

   > Fed. R. Evid. 602. Need for Personal Knowledge:
   >
   > A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.
   >
   > ***
   >
   > Fed. R. Evid. 802. The Rule Against Hearsay:
   >
   > Hearsay is not admissible unless any of the following provides otherwise: [i] a federal statute; [ii] these rules; or [iii] other rules prescribed by the Supreme Court.

2. Fed. R. Civ. P. 56(c)(4) states:

   > Fed. R. Civ. P. 56(c)(4). Affidavits or Declarations.
   >
   > An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

3. *See* Fed. R. Civ. P. 30, Notes of Advisory Committee on 1970 amendments (citing *Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940, 944 (4th Cir. 1964)).

4. *Id*.

5. *See Scott v. Harris,* 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007).

6. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986); *Jeffreys v. City of New York*, 426 F.3d 549, 553-54 (2d Cir. 2005); *Jerge v. City of Hemphill*, 80 Fed. Appx. 347, 352 n.7 (5th Cir. 2003); *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 630 (7th Cir. 2011).

7. *See, e.g., Selvam v. Experian Info. Sols., Inc.*, 651 Fed. Appx. 29, 31-32 (2d Cir. 2016) ("the party opposing summary judgment cannot rely on inadmissible hearsay in opposing a motion for summary judgment absent a showing that admissible evidence will be available at trial.") (quotations omitted).

8. *See SEC v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y. 1992); *State Farm Mut. Auto. Ins. Co. v. New Horizon, Inc.*, 250 F.R.D. 203, 216 (E.D. Pa. 2008).

9. *Morelli, supra*, at 45 (S.D.N.Y. 1992) (quoting *Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Resources Authority,* 93 F.R.D. 62, 67 (D.P.R. 1981)).

10. *See, e.g., Keepers, Inc. v. City of Milford*, 807 F.3d 24, 34 (2d Cir. 2015) (noting that while a FRCP 30(b)(6) deponent's testimony can be used against the organization, it is not binding "in the sense that it precludes the deponent from correcting, explaining, or supplementing its statements"); *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001) (explaining that FRCP 30(b)(6) deposition testimony is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes); *Snapp v. United Transp. Union*, 889 F.3d 1088, 1104 (9th Cir. 2018) (agreeing with "the majority of the courts [that] treat the testimony of a Rule 30(b)(6) witness as merely an evidentiary admission and do not give the testimony conclusive effect"); *Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc.*, 839 F.3d 1251, 1261 (10th Cir. 2016) ("We agree with our sister circuits that the testimony of a Rule 30(b)(6) witness is merely an evidentiary admission, rather than a judicial admission."); *cf. Crawford v. George & Lynch, Inc*., 19 F. Supp. 3d 546, 554 (D. Del. 2013) ("A Rule 30(b)(6) witness's testimony is binding on the corporation.").

11. *See, e.g., Falchenberg v. N.Y. State Dep't of Educ.*, 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008).

12. *See Ueland v. United States*, 291 F.3d 993, 996 (7th Cir. 2002) ("Rule 32(a), as a freestanding exception to the hearsay rule, is one of the 'other rules' to which Fed. R. Evid. 802 refers. Evidence authorized by Rule 32(a) cannot be excluded as hearsay, unless it would be inadmissible even if delivered in court.").]

13. Fed. R. Civ. P. 32(a)(3).

14. *See Estate of Thompson v. Kawasaki Heavy Indus*., 291 F.R.D. 297, 307 (N.D. Iowa 2013) ("if the [parties seeking to rely on the testimony] meet the requirements for admissibility of [the deponent's] Rule 30(b)(6) deposition pursuant to Rule 32(a)(3), [they] are not required to demonstrate that [the deponent's] statements in his Rule 30(b)(6) deposition also meet the requirements of Rule 801(d)(2) for the statements to be admitted as admissions of a party-opponent.").

15. 469 F.3d 416, 432-35 (5th Cir. 2006).

16. *Id*. at 434

17. 404 Fed. Appx. 899 (5th Cir. 2010).

18. *Id*. at 907-08. The Fifth Circuit ultimately held, however, that the district court's decision to admit the disputed testimony was harmless and not reversible, given the remaining evidence presented.

19. *Id*. (quoting *Brazos, supra*, and *Deutsche Shell Tanker Gesellschaft mbH v. Placid Refining Co*., 993 F.2d 466, 473 n.29 (5th Cir. 1993))

20. *See, e.g., Brooks v. Caterpillar Glob. Mining Am., LLC*, 2017 U.S. Dist. LEXIS 125093, at *15 (W.D. Ky. Aug. 8, 2017) ("contrary to Defendant's argument, Rule 30(b)(6) does not eliminate Rule 602's personal knowledge requirement[.]"); *Stryker Corp. v. Ridgeway,* 2016 U.S. Dist. LEXIS 163131, at *7-9 (W.D. Mich. Feb. 1, 2016) (Rule 30(b)(6) designee could not testify at trial as to matters outside of her personal knowledge or not falling under one of the hearsay exceptions); *Indus. Eng'g & Dev. v. Static Control Components, Inc*., 2014 U.S. Dist. LEXIS 141823, at *10 (M.D. Fla. Oct. 6, 2014) ("Rule 30(b)(6) does not eliminate Rule 602's personal knowledge requirement."); *Sabre Int'l Sec. v. Torres Advanced Enter. Sols.*, LLC, 72 F. Supp. 3d 131, 146 (D.D.C. 2014) (holding that Rule 30(b)(6) designee could not testify at trial as to matters outside of his personal knowledge, since Rule 30(b)(6) is restricted to discovery and "does not govern the admissibility of testimonial evidence at trial"); *Roundtree v. Chase Bank USA, N.A*., 2014 U.S. Dist. LEXIS 76255, at *3 (W.D. Wash. June 3, 2014) ("FRCP 30(b)(6) is inapplicable to the issue of witness testimony at trial."); *TIG Ins. Co. v. Tyco Int'l Ltd*., 919 F. Supp. 2d 439, 454 (M.D. Pa. 2013) ("Although Rule 30(b)(6) allows a corporate designee to testify to matters within the corporation's knowledge during deposition, at trial the designee 'may not testify to matters outside his own knowledge' to the extent that information is hearsay not falling within one of the authorized exceptions.") (quoting *Union Pump*); *L-3 Communs. Corp. v. OSI Sys*., 2006 WL 988143, at *9 (S.D.N.Y. Apr. 11, 2006) (corporate party was only permitted to introduce testimony within its own corporate representative's personal knowledge).

21. 276 F.R.D. 500 (N.D. Ill. 2011).

22. *Id*. at 503.

23. *Id*.

24. *Id*.

25. *Id*.

26. 68 F. Supp. 3d 917 (N.D. Ill. 2014).

27. *Id*. at 921.

28. *Id*.

29. *Sara Lee*, 276 F.R.D. at 503.

30. 2014 WL 4963912, at *4 n.1 (M.D. Fla. Oct. 6, 2014) ("Because of Rule 602's personal knowledge requirement, the Court declines to adopt the approach set forth in [*Sara Lee*].").

31. 2014 WL 2195082, at *2 (D. Del. May 23, 2014).

32. *Id*. (emphasis added).

33. And, in that case, only in respect of the testimony of an adverse party.

34. Only as to the testimony of a non-party.

35. Concerning a declaration offered in support of a motion for summary judgment.

36. 639 Fed. Appx. 301 (6th Cir. 2016).

37. 639 Fed. Appx. at 305 (citations omitted).

38. *Id*. at 305 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Shazor v. Prof'l Transit Mgmt., Ltd*., 744 F.3d 948, 960 (6th Cir. 2014)).

39. *See Cutting Underwater Techs. USA, Inc. v. Eni U.S. Operating Co*., 671 F.3d 512, 516 (5th Cir. 2012).

40. 361 Fed. Appx. 543, 550 n.7 (4th Cir. 2010).

41. 299 F.R.D. 126, 131-32 (E.D. Va. 2014).

42. *Id*. (quoting *McDonald v. OneWest Bank, FSB*, 929 F. Supp. 2d 1079, 1090 (W.D. Wash. 2013)).

43. *Id*.

44. *See, e.g., Woods v. Austal, U.S.A., LLC*, 2011 U.S. Dist. LEXIS 42361, at *17 n.14 (S.D. Ala. Apr. 11, 2011) (doubting that "the 'personal knowledge' aspect of Rule 56(c)(4) is suspended as to a 30(b)(6) declarant"); *Apparel Bus. Systems, LLC v. Tom James Co*., 2008 U.S. Dist. LEXIS 26313, at *61-62 (E.D. Pa. Mar. 28, 2008) (evaluating declaration of former 30(b)(6) deponent based on the personal knowledge requirement of Rule 56(e), now Rule 56(c)(4)); *LaSalle Bank Nat'l Assoc. v. Citicorp Real Estate, Inc*., 2003 U.S. Dist. LEXIS 15069, at *30-33 (S.D.N.Y. Aug. 26, 2003) (striking as hearsay portions of an affidavit by former 30(b)(6) affiant who stated that he reached his conclusions based on his investigation and discussions with the organization's personnel).

45. 171 F. Supp. 3d 254 (S.D.N.Y. 2016).

46. *Id*. at 272 (quoting *Harrison-Hoge Indus. v. Panther Martin S.R.L*., 2008 U.S. Dist. LEXIS 25480, at *83 (E.D.N.Y. Mar. 31, 2008)).

47. *See, e.g., Kennedy v. Life Ins. Co. of N. Am*., 2017 U.S. Dist. LEXIS 97341, at *6-7 (W.D. Ky. June 23, 2017) (corporate representative did not need not to have personal knowledge of the events described in the declaration made on behalf of organization); *Weinstein v. D.C. Hous. Auth*., 931 F. Supp. 2d 178, 186-87 (D.D.C. 2013) ("if a corporate officer is noticed for deposition pursuant to Rule 30(b)(6), 'his sworn affidavit is admissible,' even if that declaration is not based on personal knowledge.") (quoting *Williamson v. Life Ins. Co. of N. Am*., 2012 U.S. Dist. LEXIS 111069, at *1 n.1 (D. Nev. Aug. 8, 2012)); *Seifried v. Portfolio Recovery Assocs., LLC*, 2013 U.S. Dist. LEXIS 167092, at *5-6 (E.D. Okla. Nov. 25, 2013) (declaration by Rule 30(b)(6) witness would not be stricken, "even though it [was] not based on his personal knowledge"); *Sunbelt Worksite Mktg. v. Metro. Life Ins. Co*., 2011 U.S. Dist. LEXIS 87387, at *5-6 (M.D. Fla. Aug. 8, 2011) ("While Rule 56(c)(4) does require an affidavit to be based on personal knowledge . . . an affidavit by a Rule 30(b)(6) designee does not have to be based on personal knowledge but is expected to be based on the organization's collective knowledge."); *Afroze Textile Indus. LTD. v. Ultimate Apparel, Inc*., 2009 U.S. Dist. LEXIS 61805, at *4 n.5 (E.D.N.Y. July 20, 2009) ("to the extent [the affiant's] affidavit is based upon his review of plaintiff's books and records . . . it can be considered under [Rule 56(e)].").

48. *Id*.

49. *See Celotex Corp*., 477 U.S. at 324 (1986).

50. 2017 U.S. Dist. LEXIS 97341.

51. *Kennedy v. Life Ins. Co. of N. Am*., 262 F. Supp. 3d 481, 492 (W.D. Ky. 2017), *aff'd*, 718 F. App'x 409, 411 (6th Cir. 2018).

"The Future Ain't What It Used to Be"[1]

Rigorous Analysis, Predominance and Other Developments in U.S. Class Actions

By Jay L. Himes and Jonathan S. Crevier

I. Introduction

Rule 23 of the Federal Rules of Civil Procedure prescribes the requirements that a plaintiff seeking to prosecute a class action must satisfy. Under Rule 23 (a), the plaintiff must show that: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of fact or law common to the class (commonality); (3) the plaintiff's claims are typical of the claims of the class (typicality); and (4) the plaintiff will fairly and adequately protect the interests of the class (adequacy of representation). In addition, under Rule 23(b) if the plaintiff seeks money damages, she must further show that: (1) the questions of law or fact common to the class predominate over questions affecting only individual class members (predominance); and (2) class litigation would be superior to other methods of adjudication, such as litigating individual class member cases (superiority).

Predominance, required by Rule 23(b)(3), has become the Maginot line for most class certification motions today. That was not always so, however.

Some years back, the Supreme Court sent two overarching messages to the lower courts called on to decide whether to permit a class to be certified. On the one hand, in the *Eisen* case, the Supreme Court wrote that Rule 23 does not "give[] a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[2] Yet, on the other hand, in *Falcon* the Court also emphasized that a class "may only be certified if the trial court is satisfied, after a rigorous analysis," that Rule 23's "prerequisites . . . have been satisfied."[3] While the lower courts struggled with the tension between the two messages, more recent rulings, including those in the Supreme Court itself, tilt decidedly in favor of "rigorous analysis." Thus, class certification motions today will receive much closer judicial scrutiny than they did in years past.

This scrutiny occurs not only in the district courts, but also in the circuit courts of appeal. That, too, was not always so. Rule 23(f) of the Federal Rules of Civil Procedure, which authorizes the court of appeals in its discretion to review a district court order granting or denying class certification, was adopted in 1998. Before that, orders on class certification motions rarely received appellate review.

We provide below an overview of notable appellate decisions reflecting the trend in rigorous scrutiny, beginning with *In re Hydrogen Peroxide Antitrust Litig.*[4] and ending with *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*.[5] Although the Third Circuit was not the first court of appeals to push the needle toward rigorous analysis, the Court's *Hydrogen Peroxide* ruling is a good starting point because the Third Circuit, historically, tended to look favorably on class litigation to resolve complex cases.[6]

Following this discussion, we address other recent developments in class action litigation, specifically: (1) "mapping" liability theory to impact on class members and damages sustained; (2) rebuttal of predominance evidence; (3) class member "ascertainability" as an element of certification; (4) "numerosity" as a limitation on class certification; (5) class representative "injury-in-fact" as a feature of constitutional standing to sue, and standing to sue for non-plaintiff class members; (6) application of the statute of limitations tolling principle, established in *American Pipe*,[7] to a class action brought after denial of certification; (7) appealability of a denial of certification; and (8) the enforceability of arbitration and class action waiver provisions.

II. Predominance in the Fore: *In re Hydrogen Peroxide Antitrust Litigation*[8]

In the *Hydrogen Peroxide* litigation, purchasers of (surprise) hydrogen peroxide alleged a price fixing conspiracy by its manufacturers. The district court certified the class. On appeal to the Third Circuit, the defendants did not dispute the district court's determination that the prerequisites of Rule 23(a) were satisfied. Instead, they challenged the district court's ruling under Rule 23(b)(3) that common questions predominated over individual ones.

The Third Circuit held that a district court must undertake a "rigorous analysis" of the Rule 23 requirements for class certification. That analysis, the court wrote, may sometimes require the district court to make a "preliminary inquiry into the merits" of a plaintiff's case.[9] Indeed, a district court must not only "***inquir[e] into***" any fact dispute whether a Rule 23 requirement is satisfied, but indeed ***resolve*** the dispute by a preponderance of evidence. That is, the plaintiff must prove on the evidentiary record

Jay L. Himes is a partner and **Jonathan S. Crevier** is an associate at Labaton Sucharow LLP in New York City. Mr. Himes also co-chairs the firm's antitrust practice group and is the former antitrust bureau chief in the New York Attorney General's office. This article updates and substantially revises an earlier version prepared for New York State Bar Association International Section 2014 Seasonal Conference, Oct. 15-17, 2014, held in Vienna, Austria.

that it is more likely than not that the Rule's requirements are met.[10]

The Third Circuit held that the district court was too lenient in its Rule 23 determination. The lower court failed to conduct the type of inquiry needed to determine whether Rule 23(b)(3)'s predominance requirement was satisfied.[11] Specifically, the district court failed to weigh the defendants' expert's testimony, which refuted the evidence offered by the plaintiffs' expert. Further, the district court erroneously relied on the so-called "*Bogosian* short-cut," which permits the impact of price fixing to be presumed once a plaintiff shows that all class members paid higher prices for the products that were the subject of an antitrust conspiracy than they would have paid absent the conspiracy.[12] This presumption did not apply, however, because the plaintiffs had not ***proven*** that there were class-wide overcharges during the period of the alleged conspiracy. "We emphasize that '[a]ctual, not presumed, conformance' with the Rule 23 requirements is essential."[13]

The Third Circuit reversed certification and instructed the district court, on remand, to conduct a rigorous analysis of the disputed evidence offered by both sides' experts.

Rigorous Analysis Applied

A. *Kohen v. Pacific Investment Management Company, LLC*[14]

In *Kohen*, commodities futures purchasers alleged that the defendant cornered the futures market for 10-year U.S. Treasury notes. The defendant argued on appeal that the district court erred in certifying the class of purchasers because the district court failed to determine "which class members . . . suffered damages,"[15] and instead included purchasers that were unharmed by the defendant's conduct. The Seventh Circuit rejected the argument, holding that such a requirement would be "putting the cart before the horse in a way that would vitiate the economies of class action procedure; in effect the trial would precede the certification."[16]

> The Seventh Circuit noted,
>
> [A] class will often include persons who have not been injured by the defendant's conduct; indeed, this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification.[17]

The Seventh Circuit cautioned, however, that a class containing "a great many persons who have suffered no injury" should not be certified. But even then, it might be preferable to preserve class treatment by narrowing the class definition—not by throwing out the class action baby with the unharmed bath water.[18]

Last, the Seventh Circuit rejected the defendant's contention that conflicts among class members, based on their trading results, meant that the named plaintiffs were inadequate representatives. While the court acknowledged that some class members might have been able to cover their futures positions to limit their losses, that possibility did not present the type of real conflict necessary to find that adequacy of representation is not satisfied.[19] If such a conflict materialized, "the district court can certify subclasses with separate representation of each."[20]

B. *Wal-Mart Stores, Inc. v. Dukes*[21]

The *Dukes* decision was the first notable Supreme Court ruling on class certification of the 2010s. Present and former Wal-Mart employees alleged that the company had engaged in a systematic policy of failing to promote and provide equal pay to female employees in violation of federal anti-discrimination laws. The plaintiffs, however, had no direct proof of any national directive from Wal-Mart, and they also admitted that promotions and pay decisions were determined on the local and regional levels. Nonetheless, they asserted that a disproportionate share of promotions went to men and that pay for women was often lower, even if a man and woman held the same position.[22] The plaintiffs supported their claims with several expert analyses. For its part, Wal-Mart presented its own experts' reports refuting the claims. The district court certified a class that, by some estimates, numbered as many as 1.5 million women, employed at Wal-Mart's 3,400 stores. The Ninth Circuit (by this time, the Third Circuit's pro-certification successor) affirmed class treatment.[23]

At issue before the Supreme Court was whether the plaintiffs had satisfied Rule 23(a)'s commonality requirement. The Court ruled that commonality required more than simply the ability to recite common questions of fact or law. Instead, it requires the plaintiff "***to demonstrate*** that the class members 'have suffered the same injury.'"[24] At the same time, however, the Court recognized that "'[e]ven a single [common] question'" can suffice to satisfy Rule 23(a).[25] The focus is not on the number of questions, but on the nature of the question itself: "What matters to class certification . . . [is] the capacity of a class wide proceeding to generate common *answers* apt to drive the resolution of the litigation."[26]

> Thus, to satisfy commonality,
>
> [The plaintiffs'] claims must depend upon a common contention . . . That common contention, moreover, must be of such a nature that it is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.[27]

And in making such an assessment, the lower court has to conduct a rigorous analysis of the evidence of commonality, even if that requires an inquiry into the merits of the plaintiffs' case.

Reviewing the evidence, the Supreme Court found that it was not possible to answer the question whether female Wal-Mart employees, as a whole, suffered from discriminatory conduct on the part of their supervisors. There were hundreds of different supervisors, each with discretion on employment matters. The conduct of one supervisor, even if discriminatory, could not be imputed to another.[28] Moreover, the plaintiffs' experts' analyses, while showing regional or national pay disparities, nevertheless failed to establish the existence of discriminatory policies at the individual store level, where these allegedly discriminatory decisions were made. Thus, the analyses on pay disparity did not establish "the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends."[29]

In sum, on the commonality issue the Supreme Court found that the plaintiffs and the purported class members had "little in common but their sex and this lawsuit."[30]

C. *In re Whirlpool Corporation Front-Loading Washer Products Liability Litigation*[31]

In the *Whirlpool* litigation, washing machine purchasers alleged that Whirlpool's front-loading washers were defective because mold and mildew grew in them. The district court certified a purchaser class on claims of breach of warranty and negligent design. The Sixth Circuit recognized that *Wal-Mart* required a rigorous analysis of Rule 23's requirements—even if "'rigorous analysis' may involve some overlap between the proof necessary for class certification and the proof required to establish the merits of the plaintiffs' underlying claims."[32] Making the necessary analysis, the Sixth Circuit affirmed the district court's class certification order.

The Court held that commonality was met because,

> [W]hether design defects in the [washer] proximately caused mold or mildew to grow and whether Whirlpool adequately warned consumers about the propensity for mold growth are liability issues common to the plaintiff class. These issues are capable of class wide resolution because they are central to the validity of each plaintiff's legal claims and they will generate common answers likely to drive the resolution of the lawsuit.[33]

The court also held that the class was properly certified even though some class members never experienced a mold problem. "Class certification is appropriate," the court wrote, "if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate."[34]

D. *Messner v. Northshore University Healthsystem*[35]

In *Messner*, hospital patients sought to represent a class of individuals who were overcharged on medical services provided by a hospital that had merged in violation of federal antitrust law. The district court refused to certify the class because it found that questions of law and fact individual to proposed members predominated over common ones. Thus, Rule 23(b)'s predominance requirement was not met. The Seventh Circuit reversed because the district court applied too stringent a standard.

First, the Seventh Circuit found that plaintiffs' expert analysis was sufficient to show that common evidence and common methodology could be used to prove the class' claims:

> [The expert] claimed that he could show whether and to what extent [the hospital's] post-merger price increases were the result of increased market power resulting from the merger. In other words, [the expert] claimed that he could use common evidence—the post-merger price increases [that the hospital] negotiated with insurers—to show that all or most of the insurers and individuals who received coverage through those insurers suffered some antitrust injury as a result of the merger.[36]

The district court erred because it read Rule 23(b)(3) to require "not only common evidence and methodology, but also ***common results*** for members of the class."[37]

Second, as in *Kohen*, the hospital argued that the presence of "many individuals who were not injured" necessarily precluded class treatment.[38] The court rebuffed this argument because the existence of non-injured class members "is at best an argument that some class members' claims will fail on the merits if and when damages are decided, a fact generally irrelevant to the district court's decision on class certification."[39] While the existence of unharmed class members might create a question whether the class was fatally overbroad, the hospital had failed to show the pervasiveness of these unharmed class members. Accordingly, the potential for uninjured class members was not a basis to deny certification.

By contrast, in *In re Rail Freight Fuel Surcharge Antitrust Litig.*,[40] the court of appeals for the District of Columbia vacated certification where the terms of contracts that some of the shipper-plaintiffs had with the defendant-railroads precluded injury to those shippers from the railroads' alleged price-fixing. *Kohen* and *Messner*, however, reflect the prevailing view of the appellate courts: the prospect of uninjured class members does not generally preclude certification.[41] The Supreme Court

has declined to rule on whether certification requires a plaintiff to demonstrate "that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) do not contribute to the size of any damage award and (2) cannot recover such damages."[42] We discuss both *Rail Freight* and *Tyson* further, below.

Also noteworthy, in 2017 the U.S. House of Representatives passed a bill known as the "Fairness in Class Action Litigation Act of 2017."[43] Among other things, the proposed law would require, for certification in cases alleging personal injury or economic loss, that the plaintiff "demonstrate[] that each proposed class member suffered the same type and scope of injury as the named class representative . . . ."[44] The U.S. Senate has not acted on the proposed legislation, however.

E. *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*[45]

Dukes made clear—and the next Supreme Court decision, *Amgen*, confirmed—that in resolving a class certification motion, the court may not only consider merits issues, but also resolve them. However, as the *Amgen* Court also explained, there is "no license to engage in free-ranging merits inquiries at the certification stage."[46] Rather, the court may consider merits questions "to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[47]

In *Amgen*, the Supreme Court addressed whether the plaintiff in a securities fraud class action was required to prove materiality of the defendant's misrepresentations in order to satisfy Rule 23's predominance requirement. Both the district court and the Ninth Circuit held that this was not required at the class certification stage and that the class could, therefore, be certified. The Supreme Court similarly agreed and affirmed class treatment.

The Court noted that, while materiality was an essential element of a securities fraud claim, to require proof of it in order to determine whether common questions of law or fact predominate would risk "put[ting] the cart before the horse."[48] Indeed, it was the very centrality of the materiality question that made it predominate over individual questions because if the misrepresentations were material, they would be material for the entire class:

> [A] failure of proof on the issue of materiality would end the case . . . . As to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry.[49]

Significantly, however, the question ***whether*** the misrepresentations ***were*** material did not need to be answered in order for that question to predominate. Rather, the Supreme Court wrote, materiality was best "addressed at trial or in a ruling on a summary-judgment motion."[50]

III. Mapping Liability Theory to Impact and Damages

A. *Comcast Corporation v. Behrend*[51]

Two months after the *Amgen* decision, the Supreme Court decided an appeal from Third Circuit that had affirmed class certification in an antitrust monopolization class action. The Supreme Court placed the onus on the plaintiffs to assure their theory of anticompetitive conduct maps to their expert's analysis of damages stemming from that theory. A significant disconnect between the two will preclude class certification.

The plaintiffs, cable television subscribers, alleged that Comcast swapped its cable systems with a competitor's systems to amass a monopoly position in the Philadelphia market, thus enabling Comcast to charge inflated rates for service. The plaintiffs sought to certify a class of some 2,000,000 cable subscribers, relying on four proposed theories of antitrust injury:

> First, Comcast's clustering [of services in Philadelphia] made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers. Second, Comcast's activities reduced the level of competition from "overbuilders," companies that build competing cable networks in areas where an incumbent cable company already operates. Third, Comcast reduced the level of "benchmark" competition on which cable customers rely to compare prices. Fourth, clustering increased Comcast's bargaining power relative to content providers. ***Each*** of these forms of impact, respondents alleged, increased cable subscription rates throughout the Philadelphia DMA.[52]

The district court accepted the overbuilder theory as susceptible of common proof, but rejected the three other theories, and certified the class. The Third Circuit affirmed.

The issue in the Supreme Court turned on the damages model that the plaintiffs' expert had prepared for class certification. The model presented an overcharge based on all four theories of liability, without attributing any part of the overcharge to any particular theory of liability. The Supreme Court held that class certification was inappropriate: "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory" of injury to the class members.[53] Accordingly, '[i]n light of the model's inabil-

ity to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class."[54]

As the Supreme Court put it, the district court's and the Third Circuit's rejection of the need to "'tie each theory of antitrust impact' to a calculation of damages . . . flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim."[55]

Following the Supreme Court's ruling, "*Comcast* mapping" has become a frequently litigated issue. The decisions below are illustrative.

B. *Butler v. Sears, Roebuck & Co.*[56]

In *Butler* the Seventh Circuit revisited its prior class certification ruling. Before the *Comcast* decision, the Seventh Circuit had reversed the district court's denial of class certification, and ordered certification of two consumer classes alleging that Sears (in seeming competition with Whirlpool) sold defective washing machines. One class of consumers alleged that certain washing machines were defective because they permitted the growth of mold, which created foul odors. The other class claimed that defendant knew that certain washing machines contained a defective computer device that caused the machine to cease operation, and charged customers to replace the defective units.

The Seventh Circuit construed *Comcast* to stand for the proposition "that a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the class-wide *injury* that the suit alleges."[57] The Court found that no such concern was presented, however, because "all members of the mold class attribute their damages to mold and all members of the control-unit class to a defect in the control unit."[58] Unlike *Comcast*, there was no failure by plaintiffs to base all their damages on the injury that they were complaining they had suffered. In addition, unlike the district court in *Comcast,* in *Butler*, the district court certified only liability—not damages—for class-wide treatment.[59]

C. *In re Deepwater Horizon*[60]

Liability, and not damages, similarly was the linchpin for certification in *Deepwater Horizon*. As in *Butler*, the Fifth Circuit declined to adopt an expansive reading of *Comcast*.

Deepwater Horizon was an appeal from approval of a class action settlement in litigation arising from the 2010 explosion and fire on one of BP's offshore oil drilling platforms in the Gulf of Mexico. The magnitude and intricacy of the settlement led to uncommonly close attention paid to the district court's approval order. The settlement objectors—who included settlement signatory BP itself—argued that *Comcast* "precludes certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for classwide measurement."[61] The Court of Appeals responded:

> This is a misreading of *Comcast* . . . which has already been rejected by three other circuits. . . . *Comcast* held that a district court errs by premising its Rule 23(b)(3) decision on a formula for classwide measurement of damages whenever the damages measured by that formula are incompatible with the class action's theory of liability. . . . But nothing in *Comcast* mandates a formula for class wide measurement of damages in all cases.[62]

The Fifth Circuit similarly rejected the objectors' argument that under *Comcast* "Rule 23(b)(3) requires a reliable, common methodology for measuring class wide damages."[63] "This reading," the court wrote, "is a significant distortion of *Comcast*."[64] As the Fifth Circuit saw it:

> The principal holding of *Comcast* was that a "model purporting to serve as evidence of damages . . . must measure only those damages attributable to th[e] theory" of liability on which the class action is premised. "If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)."[65]

Thus, the Court of Appeals upheld the certification for settlement purposes.

D. *In re IKO Roofing Shingle Products Liability Litigation*[66]

Unlike *Butler* and *Deepwater Horizon*, certification on damages was, however, front and center in *IKO Roofing*. The Seventh Circuit reversed a district court order denying class certification for a class of purchasers who bought allegedly defective and non-conforming roofing tiles. The court held that the district court misread *Comcast* and *Dukes* as requiring the plaintiffs to show "commonality of damages."[67] The Seventh Circuit noted that if this was the correct approach, then "class actions about consumer products are impossible, and our post-*Comcast* decision in [*Butler*], must be wrong."[68] *Butler* survived, however, as the Seventh Circuit read *Comcast* to require only that there be a link between the remedies sought and the theories of liability advanced by plaintiffs.

In *IKO Roofing*, the purchasers' theory of liability led to two theories of damages. One was based on the defendant's delivery of non-conforming tiles, with damages measured as the difference between the market price for a conforming tile and that of a non-conforming tile, and the difference was applied to the entire class' purchases. The second theory of damages was predicated on the point in

time that the non-conforming tiles actually failed in use, with damages determined on buyer-specific basis. The Seventh Circuit held that "neither approach [to damages] runs afoul of *Comcast*: both the uniform and the buyer-specific remedies match the theory of liability."[69] Accordingly, the Seventh Circuit reversed the denial of certification and remanded for further consideration.

J. *In re Modafinil Antitrust Litigation*[70]

The Third Circuit considered the application of *Comcast* in a pharmaceutical "pay-for-delay" case. The plaintiffs were wholesalers who purchased the drug modafinil directly from Cephalon, its manufacturer. The wholesalers alleged that Cephalon and four generic competitors settled patent litigation under agreements that delayed entry of generic versions of modafinil and thus conspired to violate the Sherman Act. The plaintiffs were a class of wholesalers who purchased the drug directly from defendant Cephalon, manufacturer of Provigil, brand name modafinil. After the district court certified the class, the defendants appealed on the ground that the wholesalers failed to show predominance.[71]

Defendants argued that plaintiffs' damages model lacked *Comcast*-compliance because it did not: (1) allocate damages among Cephalon and the four generic competitors; (2) attribute specific amounts of harm to each individual pay-for-delay settlement payment; or (3) identify those class members harmed by each settlement.[72] The defendants further argued that since only two of the original five manufacturer-defendants remained, the plaintiffs' damages model was inappropriate. The Court of Appeals disagreed. Because plaintiffs' theory was that each individual settlement contributed to market-wide harm and because each of the defendants was jointly and severally liable for the harm, a new model was not required.[73]

F. *In re Rail Freight Fuel Surcharge Antitrust Litigation*[74]

While the Fifth, Sixth and Seventh Circuits read *Comcast* in ways that resulted in grants of class certification, in *Rail Freight* the D.C. Circuit came to a different conclusion. The plaintiffs alleged that four major rail carriers agreed to fix the fuel surcharges imposed on freight shippers, purportedly to cover fuel cost increases. But some of the shippers had "legacy contracts" with the defendants, which provided they would be subject to fuel surcharge formulas that predated the conspiracy.[75] In consequence, not all shippers were affected by the conspiracy.

The plaintiffs' argument in favor of class certification hinged on two regression models prepared by their expert, both of which, when taken together, "set forth a persuasive inference of causation: certain common factors predominate in the determination of freight rates; controlling for those common factors, analysis of defendants' transaction data reveals that there was a structural break in the relationship between freight rates and fuel prices around [the start of the Class Period]."[76] The defendants, however, criticized the regressions as "defective" because it "detects injury where none could exist."[77] Specifically, when the regression models were applied to shippers with "legacy contracts," the model yielded positive damages results – "false positives" – something that should not have happened since legacy shippers were unaffected by the defendants' conspiracy. Nonetheless, the district court certified a class of shippers that paid these allegedly price-fixed surcharges, including within the class shippers with legacy contracts.

The D.C. Circuit reversed. The court noted that *Comcast* "sharpens the defendants' critique of the damages model as prone to false positives,"[78] and that the district court failed to appreciate the effect of these false positives. Relying on *Comcast*, the D.C. Circuit wrote: "[i]t is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it."[79] Because the district court, in a pre-*Comcast* ruling, had failed to consider whether these false positives rendered the plaintiffs' expert's regression models unreliable for purposes of showing predominance, the D.C. Circuit remanded for further consideration.[80]

IV. Predominance Revisited: Individual Issues and Sample Evidence

A. *Halliburton Co. v. Eric P. John Fund, Inc.*[81]

Halliburton is an outgrowth of an issue in the court's earlier *Amgen* decision, which confirmed using the fraud-on-the-market theory to establish reliance in a federal securities fraud class action. The fraud-on-the-market approach relieves the plaintiff of any need to show individual reliance on the claimed misrepresentation underlying the case. The defendants in *Halliburton* sought to have the Supreme Court overturn *Basic Inc. v. Levinson*,[82] the precedent that created the fraud-on-the-market presumption. The defendants argued, among other things, that the "presumption cannot be reconciled with [the Supreme Court's] recent decisions governing class action certification under Federal Rule of Civil Procedure 23."[83]

The Supreme Court rejected the defendants' argument, stating that, consistent with *Wal-Mart* and *Comcast*, the plaintiffs in securities class actions are required to prove that the fraud-on-the-market presumption applies by showing "publicity [of the misstatement], materiality [of the misstatement], market efficiency, and market timing."[84] All this must be done before class certification. In so holding, the Court reaffirmed the teaching of *Wal-Mart* and *Comcast* that the plaintiff in a would-be class action must ***prove***, rather than merely ***plead***, compliance with the elements of Rule 23. The *Halliburton* Court therefore recognized that once a federal securities fraud plaintiff had presented the facts needed to invoke the fraud-on-the-market presumption in moving for class

certification, the defendant was entitled to offer evidence rebutting the presumption.

However, the Court also noted that if the defendant's attempted rebuttal consisted of showing that particular class members did not rely on the alleged misstatement, that proof would ***not*** mean that individualized questions for those members "will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3). That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal ***does not*** cause individual questions to predominate."[85]

B. *Tyson Foods, Inc. v. Bouaphakeo*[86]

Much of the briefing to the Supreme Court related to a predominance issue discussed earlier: whether the presence of arguably uninjured class members precluded certification. The Supreme Court avoided this issue, however. Instead, ruling narrowly, the Supreme Court addressed the proof that a plaintiff could offer to establish predominance.

In *Tyson*, employees sued the company for violations of the federal Fair Labor Standards Act (FLSA), alleging that they were not paid overtime wages for time spent "donning and doffing" protective outerwear.[87] The parties did not dispute that recovery required each employee to "prove that the amount of time spent donning and doffing, when added to his or her regular hours, amounted to more than 40 hours in a given week."[88] Tyson argued that these inquiries were "necessarily person-specific" and would "predominate over the common questions raised by respondents' claims, making class certification improper."[89] The employees answered by offering expert proof, based on a sample of time needed "don[] and doff[]," and argued that "individual inquiries [were] unnecessary because it can be assumed each employee donned and doffed for the same average time observed in [their expert's] sample."[90] The lower courts held that the plaintiffs' expert proof sufficed for certification.

The Supreme Court noted that '[i]n a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class."[91] The Court further held that "[w]hether a representative sample may be used to establish class wide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action."[92] The Court reasoned that a representative sample is often the only practicable means to present data related to a defendant's liability. In such a situation, a class action plaintiff's use of a representative sample is similarly appropriate whenever "each class member could have relied on that sample to establish liability if he or she had brought an individual action."[93]

The Court found that the employees were similarly situated: "each employee worked in the same facility, did similar work, and was paid under the same policy."[94] For this reason, any employee in the class could rely on the same study to prove their damages in an individual action. Accordingly, the Supreme Court upheld the lower courts' reliance on the representative sample on class certification.

V. Ascertainability: How Identifiable Are Class Members?

While not an express element of Rule 23, some courts require plaintiffs to establish that the proposed class is "definite" or "ascertainable."[95] These recent lower court rulings have begun to percolate up to the courts of appeal, which currently are split on whether plaintiffs need to prove that there is an "administratively feasible" way to identify class members. Thus far, the Supreme Court has declined to review the issue.[96]

A. *Marcus v. BMW of North America, LLC*[97]

In *Marcus*, the Third Circuit not only adopted an ascertainability requirement, but also set a high bar for establishing it. A proposed class of purchasers and lessees of certain BMWs equipped with Bridgestone run-flat-tires (RFTs) brought an action against BMW and Bridgestone for failing to disclose defects of the tires. Although the district court certified the class, the court of appeals vacated and remanded the case. A main appellate issue was the ascertainability of class members. As the court put it, "an ***essential*** prerequisite of a class action . . . is that the class must be currently and readily ***ascertainable*** based on objective criteria."[98]

The ascertainability issues were two-fold. First, the court was troubled by the lack of records available to identify those vehicles that were (1) factory-equipped with Bridgestone RFTS; and (2) purchased or leased from New Jersey dealerships. Second, even if the relevant cars and tires could be identified "defendants' records would not indicate whether all potential class members' Bridgestone RFTs 'have gone flat and been replaced,' as the class definition requires, because the class is not limited to those persons who took their vehicles to BMW dealers to have their tires replaced."[99]

Accordingly, the Third Circuit instructed the district court to "resolve the critical issue of whether the defendants' records can ascertain class members and, if not, whether there is ***a reliable, administratively feasible*** alternative."[100] The Third Circuit further emphasized that, absent records, class member self-identification was likely insufficient to certify: "[f]orcing BMW and Bridgestone to accept as true absent persons' declarations that they are members of the class, without further indicia of reliability, would have serious due process implications."[101]

Since *Marcus*, the Third Circuit has re-visited ascertainability on several other appeals.[102] We address one of the court's more recent decisions.

B. *Byrd v. Aaron's Inc.*[103]

Here, computer users filed suit against Aaron's, an electronics retailer, for alleged violations of the Electronic Communications Privacy Act (ECPA). According to the plaintiffs, Aaron's installed spyware on computers that it leased, which collected screenshots, keystrokes, and webcam images from the computer and its users. The district court denied certification for failure to demonstrate class member ascertainability.

The Third Circuit reaffirmed that ascertainability is a two-part inquiry. A plaintiff must show that: "(1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'"[104] However, the court also emphasized that "[t]he ascertainability inquiry is narrow" and that "[i]f defendants intend to challenge ascertainability, they must be exacting in their analysis and not infuse the ascertainability inquiry with other class-certification requirements."[105] Thus ascertainability was, in the court's view, an independent requirement for certification—and not to be conflated with Rule 23's other requirements.

C. *Briseno v. ConAgra Foods, Inc.*[106]

By contrast, the Ninth Circuit recently rejected ascertainability (in the form of "administratively feasible" identification) as an independent class certification requirement. Consumers who purchased defendant's cooking oil products brought a class action alleging that the products' "100% Natural" label was false or misleading because the products included bioengineered ingredients. The defendant opposed certification, arguing that "consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil."[107] In consequence, according to the defendant, there was no "administratively feasible way to identify members of the proposed class[]."[108] The district court granted certification, however.

On appeal, the court of appeals relied on the Supreme Court's *Amchem* decision, which precedent instructs that "Federal courts . . . lack authority to substitute for Rule 23's certification criteria a standard never adopted." [109] Thus, because Rule 23 does not mention a "freestanding administrative feasibility prerequisite," the Circuit Court was unwilling to impose one. Further, the court found such a requirement unnecessary because Rule 23's express requirements and longstanding procedural safeguards already appropriately addressed any policy concerns that class member ascertainability might implicate. For instance, while ascertainability proponents argue that the requirement mitigates administrative burdens, as the Ninth Circuit saw it, the existing manageability element of the superiority requirement already achieves this goal.[110]

The court also rejected the concern that self-identification could never suffice to prove class member identity. Individuals would be unlikely to risk committing perjury by submitting a false claim involving low-cost consumer goods. Moreover, to address this risk, courts "can rely, as they have for decades, on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court."[111]

The House of Representative's "Fairness in Class Action Litigation" bill, referred to earlier, sides with the Third Circuit's approach to ascertainability.[112]

VI. Numerosity: How Many Class Members Are Enough?

The numerosity element of Rule 23 generally is not controversial. However, from time to time class action defendants dispute this requirement. The *Modafinil* case,[113] previously discussed, is an example, and there the defense challenge resulted in the Third Circuit adopting a new "framework" for analyzing numerosity.[114]

First, the court stated that district courts should always start their analysis with the number of class members. While refraining from imposing a minimum required number of class members for certification, the court instructed that the analysis "be particularly rigorous when the putative class consists of fewer than forty members."[115] With at most 25 potential members in *Modafinil*, the numerosity inquiry required rigorous analysis.

Because some class members in *Modafinil* were partial assignees of claims of other class members, coming up with a precise number was contested. The Court of Appeals held that the partial assignees should be included as class members: "The text of Rule 23(a)(1)," the court emphasized, "says nothing about the number of claims; instead, it refers to the number of class *members*."[116] The court thus directed that the district court determine the exact number of claimants using this approach on remand.

Next, the court of appeals set out for the first time a non-exhaustive list of factors that a district court should consider when determining whether joinder of all the class members would be impracticable. The listed factors were: "[1] judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, [2] the financial resources of class members, [3] the geographic dispersion of class members, [4] the ability to identify future claimants, and [5] whether the claims are for injunctive relief or for damages."[117] The court further cautioned that these factors should not be given equal weight. Instead, the court called out "judicial economy and the ability to litigate as joined parties" as "of primary importance.[118]

On judicial economy, the focus should be "whether the class action mechanism is substantially more efficient

than joinder of all parties."[119] Here, however, the lower court held that certification would best serve judicial economy when the litigation was in its late stage.[120] The Third Circuit rejected this approach: "the late stage of litigation is not by itself an appropriate consideration to take into account as part of a numerosity analysis."[121] As the court of appeals explained, using late stage of litigation as a consideration would favor finding numerosity in nearly all complex cases where class certification rulings are often deferred for many years.

Finally, the Circuit Court examined the ability and motivation of the plaintiffs to litigate via joinder. The court found, once again, that the district court erred, this time because the lower court "focused . . . on whether the individual plaintiffs could have *brought* their own, individual suits," rather than on whether they could have *pursued* their claims through joinder.[122] Here, some class members had claims estimated at over $1 billion. According to the court of appeals, these class members could "hardly be considered as candidates who need the aggregative advantages of the class device."[123] By contrast, other class members had claims below $1 million. Because the district court did not consider whether it would have been uneconomical for these plaintiffs to be joined as parties in a traditional suit, the court reversed on this additional basis.

VII. Rigor on the Road

A. Constitutional Standing to Sue: *Spokeo, Inc. v. Robins*[124]

Article III of the U.S. Constitution prescribes that federal court jurisdiction extends only to "cases" and "controversies"—a limitation often referred to as "constitutional standing to sue." Constitutional standing has three elements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[125] The Supreme Court's *Spokeo* decision examined the injury-in-fact element of constitutional standing. And while constitutional standing is not an express requirement of Rule 23, since the Supreme Court's 2016 ruling, this overarching limitation—and specifically the injury-in-fact element—has become an increasingly common issue in class actions.

Briefly, Spokeo operated a website that allowed users to search for information about individuals using their name, email address, or phone number. An anonymous Spokeo user apparently searched for information about an individual named Thomas Robins, and, according to Robins, Spokeo provided inaccurate information to the requestor.[126] Robins sued Spokeo individually and on behalf of a class, alleging violations of the Fair Credit Reporting Act of 1970 (FCRA). Under the FCRA, consumer reporting agencies such as Spokeo must "follow reasonable procedures to assure maximum possible accuracy of" consumer reports.[127]

Although the Ninth Circuit upheld Robins' standing to sue, the Supreme Court vacated that ruling. The Supreme Court emphasized that "the injury-in-fact requirement requires a plaintiff to allege an injury that is both '**concrete *and* particularized**.'"[128] As the Supreme Court explained, "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'"[129] For concreteness, the injury "must actually exist" and be "real . . . not abstract."[130]

An injury, the Supreme Court further wrote, does not necessarily need to be tangible to be concrete. Rather, in some circumstances "violation of a procedural right granted by statute can be sufficient . . . to constitute injury in fact" and "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."[131] That said, alleging merely "a *bare* procedural violation" is not necessarily enough.[132]

Instead of considering both injury-in-fact features, the Ninth Circuit focused only on particularity, and that was insufficient to establish constitutional standing. The Supreme Court therefore remanded to enable the Ninth Circuit to decide whether Spokeo's dissemination of inaccurate information pleaded a concrete injury.

Spokeo's Supreme Court victory proved pyrrhic. On remand, the Ninth Circuit held that Robins' alleged injuries were sufficiently concrete: "FCRA procedures," the Court of Appeals wrote, "were crafted to protect consumers' (like Robins') concrete interest in accurate credit reporting about themselves."[133] The Supreme Court declined to review the court of appeals' remand ruling.

Since the Supreme Court's decision, lower federal courts have diverged on what, exactly, constitutes an injury-in-fact. Class actions arising from company data breaches and from disclosure of online user information generally have regularly dealt with this issue. The next two cases are illustrative.

1. *Attias v. Carefirst, Inc.*[134]

Customer data maintained by the defendants, a group of health insurance companies, was hacked in 2014. The defendants, however, did not discover—and thus did not announce—the data breach until nearly a year later. Shortly after the announcement, customers of the defendants began several class actions, asserting various state-law claims. The district court held that the plaintiffs lacked standing and dismissed the cases. In the district court's view, an "increased risk of identity theft as a result of the data breach" was too speculative to constitute an injury-in-fact.[135]

On appeal, the principal question was "whether the plaintiffs ha[d] plausibly alleged a risk of future injury that is substantial enough to create Article III standing."[136] The Court of Appeals upheld Article III standing, and reversed the dismissal:

> Here . . . an unauthorized party has already accessed personally identifying data on CareFirst's servers, and it is much less speculative—at the very least, it is plausible—to infer that this party has both the intent and the ability to use that data for ill. . . . No long sequence of uncertain contingencies involving multiple independent actors has to occur before the plaintiffs in this case will suffer any harm; a substantial risk of harm exists already, simply by virtue of the hack and the nature of the data that the plaintiffs allege was taken.[137]

The Supreme Court declined further review.

2. *In re SuperValu, Inc.*[138]

While the facts of *SuperValu* are similar to those of *Attias,* the case outcome differs. In *SuperValu,* a grocery store chain was the victim of multiple cyber-attacks. Following the attacks, the stores announced that the attack may have resulted in the theft of customer credit card information.[139] Customers thereafter filed class actions, but, of the 16 named plaintiffs, only one, David Holmes, alleged that his credit card information had actually been compromised.[140] The district court evaluated the standing of all the plaintiffs together, concluding that injury-in-fact was not sufficiently pleaded:

> [B]ecause the complaint alleged only an "isolated single instance of an unauthorized charge" suffered by plaintiff Holmes, there was insufficient evidence of misuse of plaintiffs' Card Information connected to defendants' data breaches to "plausibly suggest[ ] that the hackers had succeeded in stealing the data and were willing and able to use it for future theft or fraud."[141]

On appeal, the plaintiffs argued that they had sufficiently pled injury "because the theft of their Card Information due to the data breaches at defendants' stores creates the risk that they will suffer identity theft in the future."[142] The Eighth Circuit cited to findings from a 2007 report from the General Accounting Office, which suggested that consumers affected by a data breach of this type were not faced with a substantial risk of identity theft or credit/debit card fraud.[143] Therefore, the court held that, Holmes aside, the plaintiffs had failed to plead the "substantial risk of future identity theft" needed to show standing.[144]

The case survived nonetheless because "[e]ach plaintiff's standing must be assessed individually."[145] And Holmes "suffered a fraudulent charge on the credit card he previously used to make a purchase at one of defendants' stores affected by the data breaches. This misuse of Holmes' Card Information was credit card fraud and thus a form of identity theft."[146] Accordingly, Holmes's allegations of actual data misuse after the breach sufficed "to demonstrate that *he* had standing."[147] There was no need to establish injury-in-fact for the other plaintiffs or that unnamed class members generally had been injured, as Holmes' own standing to sue did not, as the lower court incorrectly held, depend on whether others also had standing.[148]

3. Standing of Non-Plaintiff Class Members

As *Spokeo* reflects, Article III constitutional standing is a threshold question in every federal litigation, whether a class action or an individual case. However, in a class action the plaintiff may allege a claim arising under the law of the plaintiffs' home state, as well as on behalf of unnamed class members who reside in other states (non-home states) and whose claims arise under the laws of those non-home states. There often is no dispute that the named plaintiff has constitutional standing to assert the claim arising under the law of its home state. But the named plaintiff typically cannot assert injury based on violation of the laws of the non-home states where alleged class members also reside. Then, defendants may argue that the plaintiff lacks constitutional standing to sue under the laws of non-home states, and, therefore, cannot represent alleged class members who reside in those non-home states.

This defense argument raises the question whether the named plaintiff's lack of constitutional standing to sue under the laws of non-home states requires outright ***dismissal*** of the claims asserted under those laws, thus narrowing the class pleaded to home-state residents. Or, should the matter, instead, be analyzed and resolved under Rule 23 when the court is called on to determine whether to certify a class that includes members residing in those other non-home states? The prevailing appellate view is that the defense argument "'conflat[es] the standing inquiry with the inquiry under Rule 23 about the suitability of a plaintiff to serve as a class representative[.]' . . . [I]t is best to confine the term "standing" to the Article III inquiry and thus to keep it separate from the plaintiff's entitlement to relief or her ability to satisfy the Rule 23 criteria."[149]

The Second Circuit's recent decision in *Langan v. Johnson & Johnson Consumer Companies, Inc.*[150] is illustrative. Langan, a Connecticut resident, filed a class action alleging that Johnson & Johnson (J&J) misrepresented several baby products as "natural," when in fact they were not. Langan pleaded violations of both Connecticut law on behalf of consumers in Connecticut and of the laws of several other states on behalf of consumers in those states. The district court denied summary judgment, and certified a class of consumer who purchased J&J's baby products in Connecticut and the others states.

Langan's standing to allege a Connecticut law violation was undisputed. However, on appeal J&J argued that Langan lacked constitutional standing "to bring a

class-action on behalf of consumers in states other than Connecticut . . . ."[151] Rejecting the argument, the court of appeals held that "whether a plaintiff can bring a class action under the state laws of multiple states is a question of predominance under Rule 23(b)(3), not a question of standing under Article III."[152]

Accordingly, where a class action plaintiff satisfies constitutional standing to allege a claim under its home state's law, the Article III requirement is met. There is no need to show that alleged class members in non-home states also have constitutional standing to sue, although the named plaintiff's ability to include these individuals in the class is appropriately considered on class certification.

B. *Appealability: Microsoft Corp. v. Baker*[153]

Rule 23(f) of the Federal Rules of Civil Procedure authorizes a court of appeals, in its discretion, to permit an appeal from a district court order granting or denying class certification. If the court of appeals denies permission to appeal, the lower court's ruling can be reviewed only if the final judgment in the case is appealed.[154] *Microsoft* arose from the plaintiffs' attempted work-around the discretionary feature of Rule 23(f).

Purchasers of Microsoft's Xbox 360 videogame consoles brought a class action alleging product design defects.[155] After the district court denied certification, the purchasers petitioned for permission to appeal under Rule 23(f). They argued that the district court's decision created a "death-knell situation"—one where refusal to certify a class effectively ends the lawsuit because the small amount involved in the individual claim makes it economically prohibitive to litigate the claim to final judgment.[156]

The Ninth Circuit denied review, after which the plaintiffs voluntarily dismissed their own case with prejudice. Plaintiffs stated that after voluntary dismissal, they intended to appeal the district court's order striking their class allegations.[157] On appeal after dismissal, the Ninth Circuit upheld jurisdiction under 28 U.S.C. § 1291 because the stipulated dismissal was a "sufficiently adverse–and thus appealable–final decision."[158]

The Supreme Court granted review and held that courts of appeals lack § 1291 jurisdiction in these circumstances.[159] The Supreme Court expressed three main concerns with the Xbox purchasers' approach.

First, the Court noted the potential for protracted litigation and piecemeal appeals. Under plaintiffs' approach, they *alone* would "determine whether and when to appeal an adverse certification ruling," and they had the power to appeal every adverse district court certification ruling by simply dismissing their case.[160]

Second, the purchasers' approach would allow indiscriminate appellate review of interlocutory orders—an idea that "undercuts Rule 23(f)'s discretionary regime."[161] The Court emphasized Rule 23(f)'s evolution and eventual adoption: "Over years the Advisory Committee on the Federal Rules of Civil Procedure studied the data on class-certification rulings and appeals, weighed various proposals, received public comment, and refined the draft rule and Committee Note." [162] As a result, "Rule 23(f) reflects the rulemakers' informed assessment, permitting . . . interlocutory appeals of adverse certification orders, whether sought by plaintiffs or defendants, solely in the discretion of the courts of appeals."[163]

Finally, the purchasers' approach was one-sided. The Court observed that only *plaintiffs* could use dismissal to secure an immediate appeal, even though "the 'class issue' may be just as important to defendants, for '[a]n order granting certification . . . may force a defendant to settle rather than . . . run the risk of potentially ruinous liability.'"[164]

C. *American Pipe* "Stacking": *China Agritech, Inc. v. Resh*[165]

Years ago, in *American Pipe*,[166] the Supreme Court held that filing a class action tolls the statute of limitations for all would-be class members pending a court decision whether to grant certification.[167] If the court denies certification, the tolling ends, and the limitations period begins to run again, but "members of the failed class could timely intervene as individual plaintiffs in the still-pending action, shorn of its class character,"[168] or else they could file a new suit, regardless of whether the limitations period would have run, absent the tolling.

The Supreme Court revisited *American Pipe* in *China Agritech*, where the Court considered this question: "Upon denial of class certification, may a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, commence ***a class action*** anew beyond the time allowed by the applicable statute of limitations?"[169] The Court's answer: *American Pipe* does not allow a "follow-on class action past expiration of the statute of limitations."[170] So, the tolling from the first class action may not be "stacked" on in order to extend the limitation period applicable to a later class case.

Briefly, in 2011, purchasers of China Agritech's common stock filed a class action, alleging that the company committed securities fraud.[171] After discovery, the district court denied class certification.[172] Thereafter, purchasers filed a second, similar class action within the limitations period; once again, the court denied certification.[173] Purchasers filed yet a third securities fraud class action against China Agritech. However, this time the statute of limitations had run.

The district court dismissed the suit as untimely, holding that the prior lawsuits did not toll the time to begin another class action.[174] The Ninth Circuit reversed, writing that to allow "future class action named plaintiffs,

who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling . . . would advance the policy objectives that led the Supreme Court to permit tolling in the first place."[175]

The Supreme Court disagreed. The Court reasoned that the "'efficiency and economy of litigation' that support tolling of individual claims . . . do not support maintenance of untimely successive class actions . . . ."[176] Instead, additional class action filings, the Court wrote, "should be made early on, soon after the commencement of the first action seeking class certification."[177] Early filing forces "all would-be [class] representatives" to come forward and allows the district court to "select the best plaintiff with knowledge of the full array of potential class representatives and class counsel."[178] The Court's ruling thus encourages all would-be class plaintiffs to "file suit well within the limitation period and seek certification promptly."[179]

D. Arbitration and Class Action Waiver Provisions: *Epic Systems Corporation v. Lewis*[180]

Under the Federal Arbitration Act (FAA) an agreement to arbitrate is "valid, irrevocable, and enforceable . . . ."[181] The FAA evinces a "liberal federal policy favoring arbitration agreements,"[182] and requires enforcement of agreements to arbitrate claims arising under both federal and state statutes. So, for example, the FAA applies to federal antitrust claims,[183] federal securities fraud claims, [184] and federal age discrimination claims.[185] Although the FAA has a "savings" clause—which authorizes invalidating an agreement to arbitrate "upon such grounds as exist at law or in equity"[186]—the provision has had little traction in the Supreme Court in recent years.

A common companion to a contractual agreement to arbitrate is a class action waiver provision, which requires that any arbitration proceed on an individual, rather than class, basis. The Supreme Court has enforced these waivers even in the face of contrary state law provisions,[187] and even where litigating an individual claim would be cost-prohibitive.[188] In the most recent Supreme Court ruling on class arbitration, *Epic Sys. Corp.*, the case law upholding waivers of class arbitration clashed with national labor policy, which favors collective employee action. In a 5-4 ruling, national labor policy lost.

The employees there had entered into employment agreements, which included arbitration and class action waiver provisions. Despite their signed contracts, the employees sought to assert class action claims for violations of the Fair Labor Standards Act (FLSA). They seemingly were on solid ground, as a 2012 decision of the National Labor Relations Board (NLRB) held that the National Labor Relations Act (NLRA) nullifies the FAA in FLSA cases.[189]

The employers sought to compel arbitration, and the case thus raised the following question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?"[190] The Supreme Court majority answered yes: "In the Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms. . . . Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful."[191]

The employees' argument that their agreements to arbitrate were invalid because "they require[d] individualized arbitration proceedings instead of class or collective ones"[192] fell on deaf ears. In the majority's view, an argument that "a contract is unenforceable *just because it requires bilateral arbitration* is . . . one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability."[193]

By contrast, in dissent Justice Ginsburg cited the NLRA and "over 75 years" worth of precedent:

> [T]he [National Labor Relations] Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. . . . For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7."[194]

The majority was not persuaded, however.

Conclusion

The messages from recent appellate decisions are unmistakable. First, arbitration agreements and class action waiver provisions are likely to stop a U.S. federal court class action in its tracks. Second, even if these obstacles can be overcome, there are no shortcuts to class certification in the federal courts. Just the opposite—class certification proceedings have become increasingly contentious, time-consuming and expensive. Reports from multiple experts on both sides, and extensive evidentiary hearings, are commonplace.[195] Rigorous scrutiny under Rule 23 is the norm.

In *Comcast*, the Supreme Court reminded that "[t]he class action is an 'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[196] Thus, plaintiffs seeking to sue as class representatives must meet Rule 23's standards through the presentation of supporting evidence, and they must also be prepared to address the underlying merits of their claims to the extent necessary to determine whether Rule 23 has been satisfied. Anything less risks a decision denying certification.

One other message may also be noteworthy: Not only classes with a really, really large number of members—as in *Dukes* and *Comcast*—but also ones with a really, really small number of members—as in *Modafinil*—are likely to be really, really hard to certify!

When the court grants certification, the settlement needle moves markedly towards the plaintiffs and the represented class. And although many certified cases therefore settle, some do not, but are dismissed, despite certification, on summary judgment.[197] When class cases are tried on the merits, the upside potential can be huge. In *In re Urethane Antitrust Litig.*, a jury held Dow Chemical liable for price fixing and awarded damages of $400,049,039, which the Court trebled to $1,060,847,117.[198] By contrast, in *Nexium* the jury found for the defendant after trial.[199]

Dated: September 28, 2018

Endnotes

1. Attributed to Yogi Berra, among others. *See* https://quoteinvestigator.com/2012/12/06/future-not-used/.
2. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). The Court quoted with approval Judge Wisdom's ruling in *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971): "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."
3. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Although the *Falcon* Court wrote in reference to Rule 23(a), the lower courts applied the Supreme Court's admonition to all Rule 23 requirements. *See, e.g.*, *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (opinion amended on denial of reh'g, 273 F.3d 1266 (2001)); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996).
4. 552 F.3d 305 (3d Cir. 2009).
5. 568 U.S. 455 (2013).
6. *Compare, e.g., In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002) (affirming the district court's grant of class certification based on a presumption of antitrust injury to all members of the class) *with In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008) (holding that "when a Rule 23 requirement relies on a novel or complex theory as to injury, as the predominance inquiry does in this case, the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed").
7. 414 U.S. 538 (1974).
8. 552 F.3d at 305.
9. *Id.* at 316.
10. *Id.* at 320 (emphasis added). *See also Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) (holding that the district court did not err in resolving factual disputes connected to the merits because "[w]e have stated that in ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case").
11. *Id.* at 325.
12. *Id.* at 325-26 (citing *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977)).
13. *Id.* at 326 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154,167 (3d Cir. 2001)).
14. 571 F.3d 672 (7th Cir. 2009).
15. *Id.* at 676.
16. *Id.*
17. *Id.* at 677 (citations omitted).
18. *Id.*
19. *Id.* at 679-80.
20. *Id.* at 680.
21. 564 U.S. 338 (2011).
22. *Id.* at 342-45.
23. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 (9th Cir. 2010) (en banc), *rev'd*, 564 U.S. 338 (2011).
24. 564 U.S. at 350 (emphasis added).
25. *Id.* at 359 (quoting Richard Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 176, n. 110 (2003)). *See also Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) ("Neither Rule 23 nor any gloss that decided cases have added to it requires that every question be common.").
26. *Wal-Mart*, 564 U.S. at 350 (emphasis in original) (citation and quotation marks omitted). *See also Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (Commonality "analysis does not turn on the number of common questions, but on their relevance to the factual and legal issues at the core of the purported class' claims . . . . [A] class meets Rule 23(a)(2)'s commonality requirement when the common questions it has raised are 'apt to drive the resolution of the litigation,' no matter their number.") (quoting *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 962 (9th Cir. 2013)).
27. *Wal-Mart*, 564 U.S. at 350.
28. *Id.* at 355.
29. *Id.* at 357.
30. *Id.* at 360 (quoting *Dukes*, 603 F.3d at 652 (Kozinski, J. dissenting)).
31. 678 F.3d 409 (6th Cir. 2012), *vacated sub nom. Whirlpool Corp. v. Glazer*, 569 U.S. 901 (2013), *on remand*, 722 F.3d 838 (6th Cir. 2013).
32. 678 F.3d at 417.
33. *Id.* at 419.
34. *Id.* at 420 (quoting *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012)) (internal quotation marks omitted).
35. 669 F.3d 802 (7th Cir. 2012).
36. *Id.* at 818.
37. *Id.* at 819 (emphasis added).
38. *Id.* at 822.
39. *Id.* at 823.
40. 725 F.3d 244 (D.C. Cir. 2013).
41. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 14 (1st Cir. 2015) ("We conclude that class certification is permissible even if the class includes a de minimis number of uninjured parties.").
42. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016) (citation and quotation marks omitted).
43. H.R. 985, 115th Cong., 1st Sess. (Mar. 13, 2017).
44. *Id.* § 103(a) (proposed § 1716 (a)).
45. 568 U.S. 455 (2013).
46. *Id.* at 466.
47. *Id. See also EQT Prod. Co. v. Adair*, 764 F.3d 347, 361 (4th Cir. 2014) ("Prior to certifying a class, a district court must definitively determine that the requirements of Rule 23 have been satisfied,

even if that determination requires the court to resolve an important merits issue.").

48. *Amgen*, 568 U.S. at 460.
49. *Id*.
50. *Id*. at 470.
51. 569 U.S. 27 (2013).
52. *Id*. at 31 (emphasis added).
53. *Id*. at 35.
54. Id. at 38.
55. *Id*. at 35 (quoting *Behrend v. Comcast Corp*., 655 F.3d 182, 206 (3d Cir. 2011), *rev'g judgment*, 569 U.S. 27 (2013)).
56. 727 F.3d 796 (7th Cir. 2013).
57. Id. at 799 (emphasis in original).
58. *Id*. at 800.
59. *Id*.
60. 739 F.3d 790 (5th Cir. 2014).
61. *Id*. at 815.
62. *Id*. (citing *Butler*, 727 F.3d at 800, *Whirlpool*, 722 F.3d at 860, and *Leyva v. Medline Indus. Inc*., 716 F.3d 510, 514 (9th Cir. 2013)). In *Leyva*, the Ninth Circuit reversed denial of certification on liability in an employment litigation: "Here, unlike in *Comcast*, if putative class members prove [defendant's] liability, damages will be calculated based on the wages each employee lost due to [defendant's] unlawful practices." *Leyva*, 716 F.3d at 514. That damages might differ among individual class members did not bar certification on liability. *Id*. *See also Jimenez*, 765 F.3d at 1167-68.
63. *Id*. at 817.
64. *Id*..
65. *Id*. (quoting *Comcast*, 133 S. Ct. at 1433).
66. 757 F.3d 599 (7th Cir. 2014).
67. *Id*. at 602.
68. *Id*.
69. *Id*. at 603. *See also In re U.S. Foodservice, Inc. Pricing Litig*., 729 F.3d 108, 123 n.8 (2d Cir. 2013) ("Plaintiffs' proposed measure for damages is thus directly linked with their underlying theory of classwide liability . . . and is therefore in accord with the Supreme Court's recent decision in [*Comcast*] . . . [T]he Supreme Court held that courts should examine the proposed damages methodology at the certification stage to ensure that it is consistent with the classwide theory of liability and capable of measurement on a classwide basis.").
70. 837 F.3d 238 (3d Cir. 2016) (as amended).
71. *See also* pp. 29-31 *infra* (discussing the court's analysis of the numerosity requirement).
72. 837 F.3d at 262.
73. *Id*.
74. 725 F.3d 244 (D.C. Cir. 2013).
75. *Id*. at 248.
76. *Id*. at 250 (citation and quotation marks omitted).
77. *Id*. at 252-53.
78. *Id*. at 253.
79. *Id*. at 255.
80. On remand, the D.C. District Court denied class certification, citing concerns with the proof on predominance offered by plaintiffs, including the apparent presence of uninjured class members and the need for individualized proceedings to determine damages. *In re Rail Freight Fuel Surcharge Antitrust Litig*., 292 F. Supp. 3d 14, 132–41(D.D.C. 2017). That decision has been appealed.
81. 134 S. Ct. 2398 (2014).
82. 485 U.S. 224 (1988).
83. *Halliburton*, 134 S. Ct. at 2412.
84. *Id*.
85. *Id*. (emphasis added).
86. 136 S. Ct. 1036 (2016).
87. *Id*. at 1041.
88. *Id*. at 1046.
89. *Id*.
90. *Id*.
91. *Id*.
92. *Id*. at 1049.
93. *Id*. at 1046.
94. *Id*. at 1048.
95. *See generally* 1 Newberg on Class Actions § 3:2 (5th ed.) (discussing ascertainability).
96. *ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313 (2017) (denying certiorari); *Direct Dig., LLC v. Mullins*, 136 S. Ct. 1161, 1162 (2016) (same).
97. 687 F.3d 583 (3d Cir. 2012).
98. *Id*. at 592-93 (emphasis added).
99. *Id*. at 594.
100. *Id*. (emphasis added).
101. *Id*.
102. *See Hayes v. Wal-Mart Stores, Inc*., 725 F.3d 349 (3d Cir. 2013); *Carrera v. Bayer Corp*., 727 F.3d 300 (3d Cir. 2013); *Grandalski v. Quest Diagnostics Inc*., 767 F.3d 175, 184 (3d Cir. 2014); *Byrd v. Aaron's Inc*., 784 F.3d 154 (3d Cir. 2015), *as amended* (Apr. 28, 2015); *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc*., 867 F.3d 434, 441 (3d Cir. 2017).
103. 784 F.3d 154 (3d Cir. 2015).
104. *Id*. at 163 (quoting *Hayes*, 725 F.3d at 355).
105. *Id*. at 165.
106. 844 F.3d 1121 (9th Cir. 2017), *cert denied sub nom., ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313 (2017).
107. *Id*. at 1125.
108. *Id*. at 1124.
109. *Id*. at 1126 (alteration in original) (quoting *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 622 (1997)).
110. *Id*. at 1128.
111. *Id*. at 1130-1131 (quoting *Mullins v. Direct Dig*., LLC, 795 F.3d 654, 667 (7th Cir. 2015)). *See also In re Petrobras Sec*., 862 F.3d 250, 264 (2d Cir. 2017) (ascertainability "requires only that a class be defined using objective criteria that establish a membership with definite boundaries").
112. *Supra* at 42.
113. *In re Modafinil Antitrust Litig*., 837 F.3d 238 (3d Cir. 2016).
114. *See supra* pp. 19-20 (discussing the *Modafinil* Court's treatment of predominance).
115. *In re Modafinil Antitrust Litig*., 837 F.3d at 250. (Citing to 5 James Wm. Moore, et al., Moore's Federal Practice § 23.22 and William B. Rubenstein, 5 Newberg on Class Actions § 3:12, the court wrote that a class of 20 or fewer class members is usually insufficient to meet the numerosity requirement, while a class with more than 40 members is generally sufficient.).

116. *Id*. at 251. The court said that while partial assignees may be part of a class, they have less individual rights than other class members. For example, under Third Circuit precedent, a partial assignee may not opt-out of the class. *Id*. at 252 (citing *In re Fine Paper Litig*., 632 F.2d 1081, 1091 (3d Cir. 1980)).

117. *Id*. at 253 (bracketed matter added).

118. *Id*.

119. *Id*. at 254.

120. The district court was concerned that "[j]oinder of the absent class members would likely require additional rounds of discovery, which would only further delay a trial date" and "if cases were brought within other jurisdictions, additional discovery is certainly a possibility, and separate trials could result in inconsistent verdicts." *King Drug Co. of Florence v. Cephalon, Inc*., 309 F.R.D. 195, 206–07 (E.D. Pa. 2015), *vacated and remanded sub nom In re Modafinil Antitrust Litig*., 837 F.3d 238 (3d Cir. 2016).

121. *In re Modafinil Antitrust Litig*., 837 F.3d at 254.

122. *Id*. at 258.

123. *Id*.

124. 136 S. Ct. 1540 (2016).

125. *Id*. at 1547.

126. *Id*. at 1546. *Spokeo* reported that Robins "is married, has children, is in his 50's, has a job, is relatively affluent, and holds a graduate degree," all of which allegedly was incorrect.

127. 15 U.S.C. § 1681e(b).

128. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 at 1545 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (bold emphasis added)).

129. *Id*. at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, n.1 (1992)).

130. *Id*. at 1548 (citations omitted).

131. *Id*. at 1549.

132. *Id*. at 1550 (emphasis added).

133. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1115-17 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).

134. 865 F.3d 620 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018).

135. *Id*. at 623.

136. *Id*. at 626.

137. *Id*. at 628-29. *See also Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017) (because the Video Privacy Protection Act (VPPA) is intended to protect online user control of personally identifiable information, wrongful disclosure confers standing despite the absence of "consequential harm."); *Perry v. Cable News Network, Inc*., 854 F.3d 1336, 1340 (11th Cir. 2017) (upholding standing under the VPPA although the plaintiff did "not allege any additional harm beyond the statutory violation").

138. 870 F.3d 763 (8th Cir. 2017).

139. *Id*. at 766.

140. *Id*. at 766. Holmes alleged that following the data breach he "noticed a fraudulent charge on his credit card statement and immediately cancelled his credit card, which took two weeks to replace." *Id*. at 767 (quotations omitted).

141. *Id*. at 768 (brackets in original).

142. *Id*. at 768-69.

143. *Id*. at 771.

144. *Id*. at 768. *See also Crupar-Weinmann v. Paris Baguette Am., Inc.*, 861 F.3d 76, 81 n.1 (2d Cir. 2017) ("where the plaintiff alleges no particular harm beyond a purely procedural violation, and Congress has found that that particular bare procedural violation does not increase the risk of the relevant material harm, the plaintiff lacks standing to proceed with such a suit"); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909 (7th Cir. 2017) (although the defendant violated the Cable Communications Policy Act, there was no standing where the plaintiff "has not alleged any plausible (even if attenuated) risk of harm to himself from such a violation").

145. *Id*. at 773.

146. *Id*. at 772.

147. *Id*. at 773 (emphasis added).

148. *Id*.

149. *Arreola v. Godinez*, 546 F.3d 788, 795 (7th Cir. 2008) (quoting *Payton v. Cty. of Kane*, 308 F.3d 673, 677 (7th Cir. 2002)).

150. 897 F.3d 88 (2d Cir. 2018).

151. *Id*. at 91.

152. *Id*. at 96. *See also Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 361-62 (3rd Cir. 2015) ("[O]nce Article III standing 'is determined vis-a-vis the named parties . . . there remains no further separate class standing requirement in the constitutional sense.'. . . [U]nnamed, putative class members need not establish Article III standing. Instead, the 'cases or controversies' requirement is satisfied so long as a class representative has standing . . . .") (citations omitted); *In re Deepwater Horizon*, 739 F.3d 790, 798-808, 821-27 (5th Cir. 2014) (extended discussion of case law in the majority and dissenting opinions).

153. 137 S. Ct. 1702 (2017).

154. Subsection (f) was added to Rule 23 in 1998. Prior to that, appellate review of lower court rulings on class certification were rare. *See generally id*. at 1707-10.

155. *Baker* was the second-class action lawsuit against Microsoft for this same defect. In the earlier case, *In re Microsoft Xbox 360 Scratched Disc Litig*., No. C07-1121-JCC, 2009 WL 10219350 (W.D. Wash. Oct. 5, 2009), the Court denied certification because individual issues were held to predominate. *Id*. at *7. The *Baker* plaintiffs argued that the prior class certification ruling did not control because an "intervening Ninth Circuit decision constituted a change in law sufficient to overcome the deference ordinarily due, as a matter of comity." *Baker*, 137 S. Ct. at 1710.

156. *Baker*, 137 S. Ct. at 1711. The Supreme Court previously rejected the death knell argument in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

157. *Baker*, 137 S. Ct. at 1711.

158. *Baker v. Microsoft Corp*., 797 F.3d 607, 612 (9th Cir. 2015), *rev'd and remanded*, 137 S. Ct. 1702 (2017). Under § 1291, courts of appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291 (emphasis added).

159. *Baker*, 137 S. Ct. at 1712.

160. *Id*. at 1713-14.

161. *Id*. at 1714.

162. *Id*.

163. *Id*. at 1714.

164. *Id*. at 1715 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. at 476).

165. 138 S. Ct. 1800 (2018).

166. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

167. *China Agritech*, 138 S. Ct. at 1804.

168. *Id*.

169. *Id*. (emphasis added).

170. *Id*.

171. *Id*.

172. *Id*. at 1805.

173. *Id*.

174. *Id*.

175. *Id*. (quoting *Resh v. China Agritech, Inc*., 857 F.3d 994, 1004 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 1800 (2018)).

176. *China Agritech, Inc. v. Resh*, 138 S. Ct. at 1806.

177. *Id*.

178. *Id*. at 1807.

179. *Id*. at 1811. *See also Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc*., 902 F.3d 735 (7th Cir. 2018) (rejecting tolling where class plaintiffs in an amended complaint were not named in the original class complaint, and where their claims were not encompassed by those in the original complaint).

180. 138 S. Ct. 1612 (2018).

181. 9 U.S.C. § 2.

182. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983).

183. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc*., 473 U.S. 614 (1985).

184. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

185. *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 23 (1991).

186. 9 U.S.C. § 2 (2012).

187. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

188. *Am. Express Co. v. Italian Colors Rest*., 570 U.S. 228 (2013).

189. *In re D. R. Horton, Inc*., 357 N.L.R.B. 2277 (2012).

190. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. at 1619.

191. *Id*. at 1619.

192. *Id*. at 1622.

193. *Id*. at 1623 (emphasis in original).

194. *Id*. at 1637-38 (quoting *Leviton Mfg. Co. v. N.L.R.B*., 486 F.2d 686, 689 (1st Cir. 1973)).

195. *See, e.g., Behrend v. Comcast Corp*., 655 F.3d 182, 188 (3d Cir. 2011) (four-day evidentiary hearing and 32 expert reports submitted), *judgment rev'd*, 569 U.S. 27 (2013); *In re High-Tech Emp. Antitrust Litig*., 985 F. Supp. 2d 1167, 1205-06 (N.D. Cal. 2013) (one-day evidentiary hearing and four expert reports submitted); *In re Air Cargo Shipping Servs. Antitrust Litig*., No. 06-1175, 2014 WL 7882100, at *16 (E.D.N.Y. Oct. 15, 2014) (three-day evidentiary hearing with 20 hours of expert testimony, and an additional day of argument), report and recommendation adopted, 2015 WL 5093503 (E.D.N.Y. July 10, 2015).

196. *Comcast Corp. v. Behrend*, 569 U.S. 27,33 (citation omitted); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036,1053 (2016) (Thomas, J., dissenting).

197. *See, e.g., Lanovaz v. Twinings N. Am., Inc*., No. 12-CV-02646-RMW, 2016 WL 4585819, at *2 (N.D. Cal. Sept. 2, 2016) (summary judgment granted based on plaintiff's lack of standing after a class for injunctive relief was certified), *aff'd*, 726 F.App'x 590 (9th Cir. 2018).

198. *In re Urethane Antitrust Litig*., 768 F.3d 1245, 1252 (10th Cir. 2014).

199. *In re Nexium (Esomeprazole) Antitrust Litig*., 842 F.3d 34 (1st Cir. 2016).

Preparation Is the Key to a Rewarding and Successful Mediation

By Theo Cheng

Mediation is a confidential process in which the parties to a dispute engage an impartial, disinterested third-party to facilitate discussion among the parties and assist them in arriving at an informed and mutually consensual resolution of the dispute. Oftentimes, attorneys and their clients approach the mediation process solely as a calendaring exercise for the main event, i.e., scheduling a mutually convenient time and date for the mediation session. In doing so, they almost always never provide for much time between the initial contact with the mediator and the desired mediation session. However, a meaningful mediation process is so much more than that, and it can be both rewarding and successful if attorneys and clients both expend the time and energy to prepare for the various stages that take place throughout that process and the clients' expectations are managed in advance. The more they both know about what will likely happen during a mediation process, the higher the likelihood that a resolution of some kind can be achieved and/or they will reap the other benefits of undertaking a mediation process. This article highlights some things to consider during that preparation.

First, the client needs to understand the nature of a mediation process and, especially, how it differs from litigation. Axiomatically, the parties who are most directly affected by a dispute are, given the right circumstances, the ones who are best able to resolve it. Thus, because the normatively best resolution is likely to flow directly from the parties themselves, mediation is based upon the principle of party self-determination. "Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."[1] To assist in that endeavor, the nature and design of a mediation process is completely flexible and can be tailored to meet the specific needs of the parties and their dispute. In some cases, having the parties together in a joint session at the beginning of a mediation can be a fruitful way to start a dialogue and, perhaps, the healing process; in other cases, keeping the parties separate and apart from each other is more conducive to making progress toward a productive and meaningful resolution. These and other design issues should be carefully considered by both the attorney and the client, as well as discussed with the other participants, along with the mediator. In most instances, a one-size-fits-all approach to mediation would ignore pertinent characteristics of the parties and the dispute, leading to mediation being treated in a cookie-cutter fashion that deprives the parties of the full benefits of that process. Specifically, doing so eliminates one of the fundamental attributes of a mediation process—the ability for the participants to customize it for the particular dispute in question.

By contrast, litigation presents several limitations, including the lack of real flexibility in designing a mechanism for resolution tailored to the dispute in question; the additional expense (in time and legal fees) of appearing before a decision maker with possibly little to no expertise in the subject matter of the dispute; the inability to maintain true confidentiality because of the public nature of the proceedings; and, perhaps most poignantly, the frustration of having no control over the timing of the process and when relief can be afforded. Unlike litigation, mediation is a non-adjudicative process. There is no judge or other decision maker who will determine the merits of the dispute. Rather, a mediator selected jointly by the parties conducts the proceedings with an eye towards trying to improve communications between the parties, explore possible alternatives, and address the underlying interests and needs of the parties in hopes of moving them towards a negotiated settlement or other resolution of their own making.

Additionally, while litigation generally looks to past events to find fault and impose appropriate relief, mediation focuses on the future to determine how the parties can best resolve the pending dispute and move on. Moreover, usually by statute, rule, or case law, mediation is a confidential process, which generally means that any communications made during the mediation cannot be used or disclosed outside of the mediation. It also means that *ex parte* communications with the mediator are kept confidential from the other participants in the process, absent consent from the party with whom the mediator communicated. Confidentiality is another bedrock principle of mediation because it helps foster open, honest, and candid communications with the mediator, if not also with the other participants.[2]

Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and labor/employment disputes. He also has over 20 years of experience as an intellectual property and commercial litigator. Among others, Mr. Cheng has been appointed to the rosters of the American Arbitration Association, the CPR Institute, Resolute Systems, and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. He was also recently inducted into the National Academy of Distinguished Neutrals. Mr. Cheng is the President of the Justice Marie L. Garibaldi American Inn of Court for ADR and the Chair-Elect of the NYSBA Dispute Resolution Section. More information is available at www.theocheng.com, and he can be reached at tcheng@theocheng.com.

Second, the attorney and the client both need to be prepared for a change in mindset from an adversarial posture to one that is more cooperative and collaborative. Mediation is a completely different mechanism from litigation for resolving disputes. In litigation, a party advocates for positions while simultaneously trying to undermine the other party's positions. By contrast, mediation is prospective in nature and tries to help put parties on a path to a resolution for mutual benefit. Moreover, parties to a dispute oftentimes are unable to engage in negotiations towards a resolution because the dispute has triggered the emotional, sometimes irrational part of the brain (the amygdala) and is interfering with the thinking, rational decision-making part of the brain (the neocortex). For a resolution to be achieved, human brains need to shift and change from the former to the latter. Unless and until the conflict between those different parts of the brain is resolved, a complete resolution of the dispute is not a likely outcome of a mediation.

Mediation can be a process that helps parties undergo that shift and change, and one of the skills of a mediator is to help parties do just that. In the context of a mediation, an expression of concern for the injury or pain suffered by the other party need not be accompanied by any admission of fault or agreement with the other party's positions. That is, there is nothing inconsistent with a party holding a strong conviction about its positions, while also recognizing that continued litigation typically means spending more money, more time, and more emotional capital to achieve an outcome over which the party has increasingly less and less control.[3] The change of mindset from adversarial to cooperation and collaboration is a hallmark of the mediation process.

Third, both the attorney and the client need to understand the importance of finding the right mediator for the dispute in question. Selecting the appropriate mediator is an important aspect of the process that is oftentimes critical to maximizing the likelihood that a resolution can be achieved. The parties could opt to select a mediator who is well-versed in mediation process skills and/or someone who is an "expert" familiar with the subject matter of the dispute, the industry or background business norms in which the dispute arose, or the legal framework governing the dispute itself. Thus, not every mediator is best suited for every conceivable dispute. Put differently, as is the case in the real estate field, there's a buyer for every property, but not every buyer is the right buyer for any particular property.

As currently practiced in the mediation marketplace, selecting a mediator is largely based upon individual profile and reputation. Attorneys and parties typically use a combination of informal and formal due diligence methods, including soliciting feedback from colleagues (e.g., word of mouth, underground information, e-mails sent around the firm, etc.); soliciting feedback from other mediators; conducting social media research (e.g., LinkedIn, Twitter, Facebook, Instagram, etc.); and consulting other publicly available information (e.g., generally researching the internet, conducting Westlaw/LEXIS searches, retrieving publicly available awards, etc.). Two other methods worth noting are (1) sending out questionnaires or e-mail queries to potential mediators and (2) interviewing potential mediators. Particularly because *ex parte* contact and communications with mediators are generally permissible (unlike the case with an adjudicator like a judge or an arbitrator), it is surprising that these methods are not used more often. Indeed, the personality of the mediator and his or her ability to build rapport and trust with the participants are important attributes that may well determine the course of the mediation process. Thus, it seems a missed opportunity that these two methods are not more widely used.

The purpose of employing the foregoing due diligence methods is designed to ascertain the reputation, knowledge, expertise, experience, effectiveness, and suitability of particular mediators to the dispute in question. The experience and competency of the mediator's process skills is certainly one key focus of this inquiry, and, depending upon the nature of the dispute in question, industry, business, legal, or subject matter expertise may also be important.[4] Thus, to the extent that attorneys and parties are having difficulties either identifying an appropriate mediator and/or are bereft of tangible, helpful information about potential mediators, they should undertake a robust due diligence process, consulting as wide a variety of sources of information as time, money, and energy will permit.[5]

Fourth, attorneys and their clients need to spend the time and effort to provide both the other participants and the mediator with sufficient information not only about the dispute, but also about the factors that may affect how a resolution could be achieved. Oftentimes, the parties will agree to undergo a mediation process without enough information in hand about each other's respective positions and interests. Conversely, attorneys and parties often resist mediation on the theory that holding a session at this time would be premature because they are not sufficiently informed (or, said differently, have not conducted enough discovery) to be able to make rational decisions regarding a resolution. But one of the roles of a mediator that is often overlooked is to assist the attorneys in structuring a limited, informal exchange of information and/or documents that will help each party better understand the parameters of the dispute, what positions each party is taking and why, and help each party undertake a more serious, balanced, and informed evaluation of both the merits of the dispute and an appropriate valuation for resolution purposes. Doing so will ultimately allow the parties to better appreciate not only their own contentions, but the contentions being advanced by the other participants.

Most mediators will also ask the parties to submit additional information in advance of the mediation session, either on an *ex parte* basis and/or exchanged with each other. This is a tremendous advocacy opportunity to address the client's perspectives as to both liability and damages; the client's interests and concerns regarding the dispute; the client's reasonable proposals for a resolution, including any non-monetary proposals; the status of any prior settlement discussions; and any other information that might be relevant for the mediator and/or the other participants to know while preparing for the mediation session. The submission can also address some fundamental questions, such as what is at the core of the dispute; what is preventing the dispute from resolving; what potential roadblocks, barriers, or impasses to a resolution might exist; and what would need to happen to resolve the dispute, such as any specific conditions (i.e., "must-haves") that need to be a part of any resolution.

The pre-mediation submission is also an opportunity to alert the mediator and/or the other participants about any cultural issues that could impair the mediator's ability to develop a rapport with the participants, impede the receipt/flow of communications and information during the mediation, or otherwise interfere with the mediator's attempt to create an environment conducive to cooperation and collaboration. To the extent that the submission is shared with the other participants (even if only in a redacted form), it will begin the process of educating them about the client's positions, interests, and needs and, in the process, help move the dialogue forward. The more the other participants understand and appreciate the strengths of the case (as perceived by the attorney and the client), as well as the interests and needs of the client, the more likely that progress can be made at the mediation session itself. Taking full and serious advantage of the pre-mediation submission is an opportunity not to be missed.

For many mediators, one of their practices is to hold a pre-mediation call with the participants, or at least with the attorneys. During that call, certain housekeeping matters will invariably be discussed, such as who will be attending the mediation session; the date, time, and place of the mediation session; and how the mediation session will be conducted (opening remarks, joint sessions, etc.). The topics of informally exchanging information and/or documents and submitting pre-mediation briefs or other materials before the actual mediation session are ones that are also likely to be raised by the mediator in that call. The participants should be prepared to discuss what information and documents they think would be helpful to exchange in order to have a more productive session and set a schedule for that exchange. Although the mediator cannot compel disclosures from any participant, he or she can facilitate that exchange by helping the parties reach agreements on its scope and set dates, as well as be available should the parties need assistance with that portion of the mediation process.

Fifth, the client needs to be prepared to participate in the mediation process itself. Unlike meet-and-confer conferences with opposing counsel or an oral argument or trial in a courtroom, a client should not sit idly by at a mediation session while the attorney handles the proceedings. Mediation requires a client to be actively engaged in the process and participate by helping the mediator (if not also the other participants) better understand what interests, concerns, needs, feelings, and motivations are underlying the adversarial positions being taken in the dispute. Clients (and/or their representatives at the mediation) should be familiar with the background facts of the dispute, be able to answer questions from the mediator (who will typically be gathering and assimilating the basic facts during the early portions of the mediation session), and be involved in re-evaluating positions as new information comes to light during the mediation. Active participation by the client is critical to the success of a mediation.

Sixth, all the participants in a mediation should take advantage of the flexibility that mediation affords to exercise the opportunity to be creative and truly "think outside of the box." Much too often, attorneys and their clients come to mediations focused on a resolution based solely upon monetary terms. They fail to recognize that mediations—which are, at their core, a type of facilitated negotiation—can be at its most efficacious when the concepts of integrative negotiation (or principled bargaining) are employed. Integrative negotiation techniques allow the parties to uncover and identify the real underlying interests and needs behind the positions the parties are espousing; determine how to articulate such interests and needs to each other; and creatively search for and develop options for mutual gain (i.e., "expand the pie") that integrate those various interests and needs.[6] By focusing on the problem at hand, rather than the people who brought the dispute forward, mediation affords the participants the opportunity to explore any number of potential solutions that may resolve the dispute. And because these solutions will eventually be embodied by a voluntary, consensual, and informed agreement between the parties, they can accomplish objectives that an adjudication cannot because a court or arbitrator is usually constrained by the legal framework to provide only certain kinds of relief. Creative and innovative thinking are highly encouraged in a mediation.

Finally, and perhaps most important, attorneys and clients should be prepared to spend enough time to allow the mediation process to unfold and, thereby, reap its benefits. Mediation is a marathon, not a sprint, and progress towards a resolution or other desired outcome can only be made if the participants are willing to engage with the mediator, if not with each other, and undergo the steps necessary in an integrative bargaining process. Those steps include recognizing how and when options for mutual gain can transform into the foundation for a resolution, as well as acknowledging when the parties are at an impasse, at least at this time, and leaving open the possibility of reconvening and resuming the process at a

different time. A mediator needs to set the appropriate tone and establish a rapport with the participants, giving them the opportunity to be heard. In turn, doing so will allow the participants to truly hear any observations that the mediator offers about the dispute, the parties' respective positions, and the proposals for resolution being considered. Moreover, although a mediator may be asked to recommend possible solutions, a mediator is not authorized to impose a resolution, but, rather, provides an impartial perspective on the dispute to help the parties satisfy their best interests while uncovering areas of mutual gain. In that respect, mediation can be particularly helpful in those situations where the parties either are not effectively negotiating a resolution on their own or have arrived at an impasse in their dialogue. Not only does all of this take some time to develop, but also the shift in the brain from the emotional/irrational part to the thinking/rational decision-making part takes some time to accomplish. The participants in a mediation need to be realistic about their expectations on how the mediation process will unfold in order for it to be as rewarding and successful as possible.

Attorneys oftentimes treat mediations as just another extension of the litigation process, where their finely honed legal skills—sharpened for the inevitable adversarial battles inherent in discovery and trial—will simply be put to good use before the mediator. But a mediator is not the adjudicator of the dispute, and mediation is an entirely different process altogether. As much as preparing for a motion argument, an evidentiary hearing, or a trial requires much advanced preparation, preparing for a mediation also requires a different set of skills, a different mindset, and, as in all effective advocacy, proper representation and solid preparation during all phases of the process, both before and during the mediation session. To paraphrase a prominent litigator, the key to success in litigation is preparation, preparation, and more preparation. That mantra applies equally in the mediation context. It is only through dedicated preparation by both the attorney and the client (as well as the mediator) that a mediation process can be rewarding and successful for the participants.

Endnotes

1. Standard I.A., Model Standards of Conduct for Mediators (2005) ("Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.").
2. *See generally id.*, Standard V. (Confidentiality).
3. *See* Theodore K. Cheng, *Managing Disputes Across the Resolution Process Spectrum*, Diversity & The Bar (Summer 2017), at 10, available at http://www.diversityandthebardigital.com/datb/summer_2017?pg=1#pg1.
4. *See generally* Theodore K. Cheng, *Providing for Neutrals with Industry, Legal, and Business Expertise*, NYSBA Entertainment, Arts & Sports L. J., Vol. 29, No. 3, at 97 (Fall/Winter 2018).
5. For example, the International Mediation Institute (https://www.imimediation.org/) maintains feedback evaluations on mediators it certifies that are available to the public on its website. Several initiatives have also been started to help fill the "information gap" that exists with respect to identifying potentially suitable mediators and arbitrators, including Arbitrator Intelligence (https://www.arbitratorintelligence.org/), a non-profit organization founded at Penn State Law that is helping to develop resources to promote transparency, accountability, and diversity in the arbitrator selection process; Dispute Resolution Data (http://www.disputeresolutiondata.com/), an online data subscription service providing access to closed international arbitration and mediation process information; and the GAR Arbitrator Research Tool (https://globalarbitrationreview.com/arbitrator-research-tool), a database of information on arbitrators maintained by Global Arbitration Review. Additionally, reputable sources listing mediators can be consulted, such as the American Arbitration Association's Mediation.org website and the National Academy of Distinguished Neutrals (www.nadn.org).
6. *See generally* Roger Fisher, William Ury, and Bruce Patton, Getting to Yes: Negotiating Agreement Without Giving In (Penguin Books 3d ed. 2011).

In-House Counsel Can and Should Collect Attorney Fees

By Daniel K. Wiig

When weighing his post-Senate career options, then-U.S. Sen. Howard "Buck" McKeon rejected an offer from a prominent law firm, opting not to "live his life in six-minute increments." Indeed, it is with fair certainty to state a top reason lawyers in private practice transition to in-house is to escape the billable hour. And while the imminent death of the billable hour may have been highly exaggerated (again and again), it remains the predominate metric for private-practice attorneys handling commercial work to track their time and collect fees.

Numerous reports suggest the in-house lawyer is "rising," with companies opting to retain more and more legal work within their law departments, and decreasing the amount of work they disseminate to outside counsel. Sources cite various reasons from cost to the intimate knowledge in-house lawyers possess regarding their employer vis-à-vis outside counsel. Whatever the genesis, it reasons that in-house lawyers morphing into the role traditionally held by outside lawyers should assume all such components of the role, which, when possible, can include recovering attorney fees for actual legal work performed, as noted in *Video Cinema Films v. Cable News Network* (S.D.N.Y. March 30, 2003), (S.D.N.Y. Feb. 2, 2004), and other federal and state courts.

"For the in-house lawyer, recovering attorney fees can also occasionally turn the legal department from a cost center into a quasi-profit center. In-house lawyers can and should collect attorney fees."

Recovering attorney fees is that extra win for the victorious litigant, whether provided by statute or governed by contract. It leaves the client's bank account intact (at least partially) and gives the prevailing attorney additional gloating rights. For the in-house lawyer, recovering attorney fees can also occasionally turn the legal department from a cost center into a quasi-profit center. In-house lawyers can and should collect attorney fees.

To be clear, recovering attorney fees is not available for in-house lawyers functioning in the traditional role of overseeing outside counsel's work. As noted in *Kevin RA v. Orange Village* (N.D. Ohio May 4, 2017), a court will not award fees to in-house lawyers that are redundant, i.e., those which reflect work performed by outside counsel. Indeed, when in-house counsel is the advisee of litigation status rather than drafter of the motion or attends the settlement conference as one with authority to settle rather than to advocate more advantageous settlement terms, she functions as the client rather than the lawyer, for which attorney fees are unavailable.

Unlike their counterparts in private practice, in-house counsel do not have set billing rates, although an exception may exist if internal policies permit the legal department to invoice the department that generated the legal matter. Even in such a situation, as with law firm billing rates, the actual fees/rates are considered by the court but not determinative in awarding fees, as noted in *Tallitsch v. Child Support Services*, 926 P2d 143 (Colo. App. 1996). In determining what constitutes an appropriate and reasonable attorney fee award, courts frequently apply the "reasonably presumptive fee" or the "lodestar" method. Under the lodestar method, as explained in *Earth Flag v. Alamo Flag*, 154 F. Supp. 2d 663 (S.D.N.Y. 2001), fees are determined by "multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate."

Reasonableness is a question of fact for the trial court. In determining a reasonable hourly rate, federal courts look to those reflected in the federal district in which they sit, while state courts consider the prevailing rates in their respective city and geographical area. Courts will also consider other factors such as the complexity of the case, the level of expertise required to litigate the matter, and the fees clients in similar situations would be willing to pay outside counsel in determining the appropriate hourly rate for the in-house lawyer. Determining whether the tasks performed by the in-house lawyer were reasonable is left to the court's discretion.

Recognizing legal departments do not necessarily operate in lockstep fashion as a law firm, courts will consider the "blended" rate in the lodestar calculation. Here,

Daniel K. Wiig is in-house counsel to Municipal Credit Union in New York, where he assists in the day-to day management of the legal affairs of the nearly $3 billion financial institution. He is also an adjunct law professor at St. John's University School of Law. He can be reached at dwiig@nymcu.org.

a court will combine or "blend" the reasonable rates for associates, partners, counsel and paralegals in their locale to devise the appropriate hourly rate for the in-house lawyer. The premise is in-house lawyers general take on less defined roles in litigating a matter than their counterparts in private practice, performing a combination of litigation tasks that may be more clearly delineated among law firm staff.

In order to successfully receive an award of attorney fees, the in-house lawyer must maintain a record akin to a law firm's billing sheet of her time spent on the matter, as reflected in *Cruz v. Local Union No. 3 of International Brotherhood of Electrical Workers*, 34 F.3d 1148 (2d Cir. 1994). Consequently, an excel spreadsheet, or similar document, enumerating the time and task, with as much detail as possible, is required to sustain a court's scrutiny in looking for tasks that were "excessive, redundant or otherwise unnecessary," as noted in *Clayton v. Steinagal* (D. Utah Dec. 19, 2012). Moreover, the in-house attorneys who worked on the matter must execute affidavits attesting to the accuracy of their time records, and include the same in their moving papers.

As the legal profession changes and corporate legal departments retain more of their work, in-house should take advantage of statutory or contractual attorney fee provisions, notably for the litigation their handle internally. In so doing, the in-house lawyer may find a number of benefits, such as approval to commence litigation that they may have otherwise shied away from because of the possibility to recoup attorney fees and the benefit of essentially obtaining payment for the legal work performed.

Third-Party Litigation Financing in the United States

By Aaron Katz and Steven Schoenfeld

Third-party litigation financing (also referred to as alternative or external dispute financing) is a mechanism by which a party not affiliated with a certain lawsuit pays for another party's (usually a plaintiff's) legal fees and costs to pursue that lawsuit, in exchange for a portion of any proceeds recovered by settlement or collection of a damages award.

Part of a growing industry in the UK and the US, the market for litigation financing is estimated to exceed $1 billion (N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2011-2 (2011); see also *Second-hand suits*, The Economist (April 6, 2013)). In the U.S., banks, special litigation financing investment funds, hedge funds, and electronic marketplaces that match plaintiffs with funders have collectively invested substantial capital into this new asset class. The capital invested in litigation is categorized as uncorrelated investments because the returns are not correlated to the price movements of the stock, bond, commodity, or similar traditional capital markets.

"Litigation financing is a mechanism by which a party not affiliated with a certain lawsuit pays for another party's (usually a plaintiff's) legal fees and costs to pursue that lawsuit, in exchange for a portion of any proceeds recovered by settlement or collection of a damages award. It is also known as alternative (or external) dispute funding."

In the current market, third-party litigation financing is primarily being used to pursue plaintiff-side or affirmative claims. This is because the metrics for success in affirmative claims are clear: if a claimant recovers cash from its adversary, then there is cash to pay the funder. However, there is interest in the industry in developing ways to help companies finance their defense-side dockets as well. The model is more difficult for defense-side financing situations because there is no clear metric for success when a company settles a claim or loses but pays less than its potential liability. Some financing companies have considered reverse contingency arrangements, but the market for these types of products is still in the early stages of development.

This article provides an overview of third-party litigation financing for commercial litigation, including:

- How to evaluate whether litigation financing could be beneficial to a company's overall claims management (see Preliminary Considerations).
- How market forces have created a demand for litigation financing in the U.S. (see Increasing Demand for Third-Party Litigation Financing).
- Scenarios where litigation financing may be appropriate for a corporate plaintiff (see Appropriate Situations for Third-Party Litigation Financing).
- The ethical issues raised by litigation financing (see Ethical Issues).
- How a litigation financing company assesses a claim (see Funder Considerations in Evaluating a Claim).
- The steps involved when applying for litigation financing (see Application Process for Third-Party Litigation Financing).
- The various types of financing products and pricing structures (see Litigation Financing Products, Deal Structure and Pricing).
- The role of the funder after the investment is made (see Post-Investment Role of the Funder).

The financing of personal injury and consumer claims and class actions is beyond the scope of this article.

Preliminary Considerations

Litigation financing companies offer a range of financing options. To determine whether third-party litigation financing could be beneficial to a company's overall claims management, corporate counsel should:

- Evaluate the company's potential commercial claims in the US and abroad.
- Obtain estimates of the related legal fees and costs of litigation.

Aaron Katz is co-founder, chief investment officer and managing principal of Parabellum Capital LLC. **Steven Schoenfeld** is a partner in the commercial litigation and bankruptcy practice groups at DelBello Donnellan Weingarten Wise & Wiederkehr, LLP.

This Practice Note was first published by Practical Law on its Practical Law Litigation web service at http://us.practicallaw.com/5-518-1314.

- Consider what financing options may be appropriate, such as whether the company should:
  - fund the case from corporate cash flow;
  - enter into an alternative fee arrangement (AFA) with litigation counsel; or
  - combine these options in some way.

Third-party litigation financing arrangements are complex financial transactions that must be negotiated and structured to address the unique needs of the specific investment. Because investors may be asked to put significant amounts of capital into a situation with extraordinary risk, they seek pricing appropriate to that risk. Therefore, corporate counsel and executives should approach these arrangements with the same diligence and care that they apply to any important, high-value transaction.

Increasing Demand for Third-Party Litigation Financing

Traditionally, corporate claimants have paid for legal fees and other litigation costs from corporate cash or, occasionally, through contingency fee arrangements with outside counsel. The business model and use of capital of most U.S. corporate law firms are set up for hourly billing fee arrangements and are not usually suited to take on contingency fee commercial litigation. Because corporate counsel are under considerable pressure to reduce their legal expenses, they have demanded AFAs from their outside counsel to such an extent that offering at least some type of discount has become the norm for many law firms. Courts also have become more receptive to the need for litigation funding. One court, for example, granted plaintiff a continuance so that it could secure external funding to prosecute the litigation (*Telesocial v. Orange, S.A.*, 2015 WL 1927697 (N.D. Cal. April 28, 2015)).

Pressure to Reduce Legal Fees and Costs

Despite AFAs becoming more accepted, companies continue to insist that their legal departments innovate to reduce their overall legal expenses, especially in connection with litigation. One way to do that is to arrange for outside financing of the legal fees and costs to pursue affirmative claims.

Depending on the lawsuit's outcome and its particular financing arrangement, a company that uses outside financing to pursue a claim can limit its legal department expenses and may even recover enough cash on the claim to finance in whole or in part the legal department budget for other matters. This arrangement, which also allows a company to spread the risk of pursuing a claim, encourages legal departments to think like a plaintiff by looking at potential claims as an asset that can be turned into cash.

Ability to Monetize Legal Claims

Litigation financing companies in the U.S. promote their services as a way for companies to access investment capital to fund their valuable claims. Some of a company's most valuable (although illiquid) assets are commercial claims, including claims for breach of contract, infringement of intellectual property rights, antitrust violations, and similar legal claims. Usually, a company cannot access the monetary value embedded in those claims unless it incurs the expense of what is often costly litigation. However, under certain circumstances, third-party litigation financing can function as a tool for corporate plaintiffs to obtain the monetary value embedded in specific claims that are otherwise too expensive to pursue due to budgetary constraints.

Opportunity for Risk-Sharing

Third-party litigation financing is a market-based solution for corporate legal departments and the law firms they retain in a range of situations (see Appropriate Situations for Third-Party Litigation Financing). At the most general level, third-party financing facilitates fee arrangements between clients and outside counsel that might not be possible otherwise. For example, when a client needs a discount or contingent AFA that would require its trial counsel of choice to share risk that is beyond the law firm's tolerance level or capabilities, third-party financing can help bridge that gap by allowing the company to retain the firm on an alternative-fee basis. At the same time, third-party litigation financing can enable a law firm to:

- Offer its clients fee arrangements that are not strictly based on hourly billing.
- Take on additional preferable fee arrangements that are partially outcome dependent.
- Share risk cautiously while protecting itself from a total loss in the event of an adverse outcome.

Appropriate Situations for Third-Party Litigation Financing

Litigation investments are complex transactions tailored to address a company's unique situation and specific needs and objectives, such as to:

- **Pay unaffordable legal costs.** A company that cannot afford to pursue an action, or that has run out of funds during a pending litigation, may benefit from a third-party funder to defray all or part of its attorneys' fees or out-of-pocket litigation expenses (or both). These situations may include a small company with an expensive litigation investment or one in a distressed situation.
- **Use available capital for other business needs.** A company that can afford its legal fees and expenses may prefer to use its available capital for other purposes. For example, a large company may

have equity or debt capital available to pursue meritorious claims, but would prefer to use that available capital for attractive business opportunities (such as overseas expansion or research and development). Or, a company may want to apply its limited legal department budget to more urgent (and less controllable) expenses on its defense-side docket.

- **Free up embedded capital.** A company may have a case that is already under way and adequately funded, and know that the claim represents an important contingent asset that could be underwritten and monetized to free up some embedded capital for other business or legal department uses. In this situation, a funder may invest capital on a risk basis now, against an agreed portion of the expected returns. This approach would be similar to a company's securitization of its accounts receivable.

  Traditionally, companies have been unable to access efficiently the value embedded in their affirmative litigation-related claims. Legal departments have generally been unable to monetize claim assets through the capital markets. Often, accounting rules have prevented companies from assigning any value to claim-related assets short of pursuing them to conclusion and cash recovery in litigation. Because companies have been unable to realize (or in many cases value) their legal claims as assets on their books, or to unlock the value of their claims in the marketplace, they have been prevented from accessing potentially large amounts of capital for productive business purposes. In some instances, third-party litigation financing has helped companies unlock the value of their claim assets and transform their legal departments from cost centers into profit centers (see, for example, *Vanessa O'Connell, Company Lawyers Sniff Out Revenue,* The Wall Street Journal (May 13, 2011)). Additionally, in-house legal departments have felt cost pressure and are considering alternative financing as a tool for managing their budgets in certain areas (see *Jess Davis*, *In-House Counsel Eye Litigation Funds for Trademark Battles*, Law360 (May 7, 2013)).

Ethical Issues

Third-party litigation financing raises ethical issues that affect the funder's pre-investment evaluation of a claim and post-investment control of the litigation. These ethical issues relate to:

- Champerty and maintenance.
- The duty of confidentiality and the related attorney-client privilege.
- Litigation counsel's duties of loyalty and independence.

Champerty and Maintenance

Historically, the common law doctrine of champerty, as codified in most states, barred third parties from financially assisting a claimant in a civil suit. In practice, this has meant that third parties could not help a claimant commence or prosecute a civil suit in exchange for a portion of the monetary recovery.

In the U.S., the law of champerty varies by jurisdiction and, depending on the applicable state laws, could be an issue that corporate counsel must consider when structuring litigation financing transactions. For example, Maine requires litigation financing companies that provide funding to consumers to register with state authorities and include a representation in their dispute financing agreements that they will not control the course of the litigation (among other mandates) (Me. Rev. Stat. Ann. tit. 9-A, §§ 12-104, 12-106). Ohio has a similar law requiring a provision on non-control (Ohio Rev. Code Ann. § 1349.55).

Several states expressly prohibit champerty either by statute or common law. Examples include Delaware, Georgia, Minnesota, and Mississippi (see *Hall v. State,* 655 A.2d 827, 829-30 (Del. Super. Ct. 1994); *Johnson v. Wright,* 682 N.W.2d 671, 678 (Minn. Ct. App. 2004); Ga. Code Ann. § 13-8-2(a)(5); Miss. Code Ann. § 97-9-11 (1999)). A Pennsylvania court recently held an unusual attorney fee agreement with a litigation financing component invalid based on champerty (*WFIC, LLC v. Labarre,* 2016 WL 4769436).

Recently, the courts have relaxed champerty prohibitions on third-party litigation financing. For example, in the context of a financing arrangement with a law firm client, the Court of Appeals in New York has held that "to acquire indemnification rights to the costs of past litigation" is not champerty (*Merrill Lynch v. Love Funding Corp.,* 13 N.Y.3d 190, 202-03 (2009)). Similarly, New York courts have accepted litigation finance for a law firm. (See *Hamilton Capital VII, LLC v. Khorrami, LLP*, 2015 WL 4920281 (Sup. Ct. N.Y. Co. Aug. 17, 2015) (noting that alternative litigation finance furthers the policy of favoring that cases be decided on their merits instead of based on the greater financial resources of one party, and holding that financing of law firm did not run afoul of a prohibition on lawyer splitting fee with non-lawyer or restrictions on usury); *Lawsuit Funding LLC v. Lessoff*, 2013 WL 6409971 (Sup. Ct. N.Y. Co. Dec. 4, 2013).)

However, in the extreme scenario where a party without any relationship to the underlying claim or a valid assignment of the claim takes over litigation of the claim as the purported "plaintiff" for a share of the proceeds and remits the majority of the proceeds to the real party in interest, New York's champerty prohibition applies (*Justinian Capital v. WestLB AG*, 2016 WL 6270071 (N.Y. Oct. 27, 2016) (finding champertous an assignment arrangement where purported assignee of securities

claims paid no consideration for assignment but nonetheless sued as plaintiff, with the understanding that the majority of the proceeds from such claim would be remitted to the actual injured party; the court found that New York's safe harbor rule that assignment of claims for $500,000 or more is not champertous did not apply because the contract did not properly bind the assignee to pay the stated consideration)).

Additional examples of recently relaxed champerty restrictions on third-party litigation financing have occurred in the following states:

- Delaware (*Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co.*, 2016 WL 937400 (Del. Super. Ct. Mar. 9, 2016)).
- Florida (*Kraft v. Mason*, 668 So.2d 679, 683 (Fla. Dist. Ct. App. 1996)).
- Texas (*Anglo-Dutch Petroleum Int'l v. Haskell*, 193 S.W.3d 87, 104-05 (Tex. App. 2006)).
- Massachusetts (*Saladini v. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1997)).
- South Carolina (*Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 277-78 (S.C. 2000)).
- Illinois (*Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. Jan. 6, 2014)).

In most states today, because champerty has been either abolished or narrowly defined, it can usually be avoided by properly structuring the investment or limiting the funder's influence on the litigation (see *American Bar Association Commission on Ethics 20/20 White Paper on Alternative Litigation Finance*).

Client Confidentiality and the Attorney-Client Privilege

When evaluating a prospective investment in a claim, a funder must conduct due diligence on the various parties and their claims and defenses. After making an investment, the funder will want to monitor it, including the progress of the litigation and any conclusion that results in the collection of proceeds to which the funder may be partially entitled. A funder may look at public information on potential claims (such as pleadings) if the litigation has already commenced. However, it may want additional information from the claimant and its litigation counsel, especially before committing to an investment in a lawsuit.

Risk of Waiver

Attorneys have an ethical duty to preserve a client's confidential information. Therefore, litigation counsel should not disclose information to a third-party funder without explaining the risks of doing so to the client and obtaining the client's informed consent (American Bar Association Model Rules of Professional Conduct (MRPC) Rule 1.6(a)). The principal risk is that sharing information with a third-party litigation funder might waive the attorney-client privilege and, although less likely, the work-product protection. These waivers could:

- Subject privileged information to discovery by the adverse party.
- Damage the claimant's case (and consequently, damage the funder's investment).

For example, in *Leader Technologies, Inc. v. Facebook, Inc.*, the court compelled disclosure in discovery of documents shared with financing companies during discussions about potential financing, rejecting the argument that the documents were protected by the common interest exception to the waiver of the attorney-client privilege (719 F. Supp. 2d 373, 376-77 (D. Del. 2010); see also *Litigation Funders Face Discovery Woes, Nat'l L.J., Feb. 21, 2011*). However, a court has held that disclosure to prospective investors of documents reflecting the plaintiff's litigation strategy did not waive the work-product protection (*Mondis Tech. Ltd. v. LG Elecs., Inc.*, 2011 WL 1714304 (E.D. Tex. May 4, 2011); *Viamedia, Inc. v. Comcast Corp., et al.*, 218 F. Supp. 3d 674 (N.D. Ill. November 4, 2016) (finding that due diligence documents shared between claimant and litigation funder did not waive the work-product doctrine because it did not make it more likely that the information would fall into the hands of the defendants)). A bankruptcy court also held that the work product doctrine protected from discovery certain parts of the dispute funding agreement and opinion-related communications between the client, the client's attorney, and the funder (*In re International Oil Trading Company, LLC*, 548 B.R. 825 (Bankr. S.D. Fla. 2016)). Additionally, courts have found that information shared with an investor under "controlled conditions" and as part of a confidentiality, common interest and non-disclosure agreement is protected by both the attorney-client privilege and the work product doctrine (*Devon IT, Inc. v. IBM Corp.*, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012); *Doe v. Society of Missionaries of Sacred Heart et al.*, 2014 WL 1715376 (N.D. Ill. May 1, 2014)).

On April 3, 2018, Wisconsin enacted a new statute requiring the disclosure of third-party dispute funding agreements in civil actions filed in state court (2017 Wisconsin Act 235 (Apr. 2018)). Under Wisconsin Act 235, "a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise." However, Wisconsin Act 235 does not address the potentially privileged nature of certain terms within funding agreements (for example, economic terms) that may reveal risk assessment in the nature of mental impressions and opinions of litigation that several courts have found are protected by the work

product doctrine and can be redacted (for example, *In re: International Oil Trading Co.*, 548 B.R. 825 (citing *Carlyle Investment Management LLC v. Moonmouth Co.*, 2015 WL 778846 (Del. Ch. 2015); *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, 2015 WL 1540520 (Del. Super. Ct. 2015)) (permitting the redaction of terms, including payment terms in a funding agreement, to prevent disclosure of attorney mental impressions and opinions)).

Nonetheless, even if a litigation funding agreement is produced in discovery, a court may exclude the evidence at trial for lack of relevance or risk of prejudice (or both) under FRE 403 (*AVM Technologies, LLC v. Intel Corporation*, 15-33-RGA (D. Del.) April 28, 2017)).

Claim Evaluation with Limited, Non-Privileged Information

Because the consequences of waiving privilege are detrimental to both the claimant and the funder, they have a mutual interest in avoiding a privilege waiver. Therefore, they must tread carefully when exchanging information about the claimant's case.

Although concerns about waiver limit a funder's ability to conduct due diligence and increase the risk of the funder's investment, usually these concerns do not prevent the funder from obtaining sufficient information to evaluate a prospective investment in a claim. This situation is similar to attorneys who work on a contingency fee basis and routinely determine whether a litigation is worthy of investment despite incomplete or uncertain information.

In any event, the claimant may disclose the underlying documents and other information that:

- Are not privileged.
- It reasonably expects will be disclosed to the adverse party during discovery in the litigation.

Using that information and other data it may collect, the funder can assess the claim.

After the funder makes an investment, the claimant's litigation counsel may report on developments in the case that are either publicly available or already disclosed to the adverse party, subject to any protective order or other confidentiality limits. Usually this type of information is enough to allow the funder to monitor the litigation, typically as a passive investor, without compromising the claimant's attorney-client privilege.

Counsel's Duty of Loyalty and Independence

Litigation counsel owes a duty of loyalty to a client. This duty requires litigation counsel to act in the client's best interests and give the client independent legal advice without interference from third parties, even if a third party pays the attorney (MRPC Rule 1.7). An attorney cannot serve parties with conflicting interests (MRPC Rules 1.7, 1.8(f), and 5.4(c)). However, an attorney may have an interest in the outcome of a civil case because an attorney may contract with a client for a reasonable contingency fee (MRPC Rule 1.8(i)(2)).

Ethical duties of loyalty and independence play a critical role in third-party litigation financing. For example, a third party with an interest in the outcome of the claimant's litigation may be financing litigation counsel's legal fees and costs directly or indirectly through the claimant. Insurers play a similar role in providing litigation financing for defendants. Insurance companies usually contract for the right to be involved in the defense and settlement of a case subject to acting in good faith and respecting the interests of the insured.

In theory, funders of affirmative claims have room to engage in a similar role in exchange for their funding, but responsible investors will use extreme caution to avoid that level of involvement. A third-party funder who controls the litigation may run afoul of litigation counsel's ethical duties of loyalty and independence in addition to champerty laws (see Champerty and Maintenance). Therefore, third-party funders usually do not:

- Hire or terminate litigation counsel.
- Direct litigation strategy.
- Make settlement decisions.

A Florida state appeals court concluded that a funder who controlled the litigation in these ways rose to the level of a party to the lawsuit and therefore was liable for the defendant's attorneys' fees and costs (*Abu-Ghazaleh v. Chaul*, 36 So.3d 691, 693-94 (Fla. 3d DCA 2009)). However, funders of commercial claims usually do not try to exercise this amount of control over the litigation.

Funder Considerations in Evaluating a Claim

A litigation financing company evaluating a claim for potential investment analyzes issues relating to:

- Adverse risk selection and moral hazard.
- The merits of the claim and potential damages available.
- Possible obstacles to recovering damages.
- Reasons to decline a funding opportunity unrelated to the merits of the claim or collection risks.

Adverse Risk Selection and Moral Hazard

A funder faces two significant structural challenges when evaluating a claim for potential funding:

- Adverse risk selection.
- Moral hazard.

The funder must avoid investing in a lawsuit for a company that seeks third-party funding only for matters with the highest risk profile and the lowest chance of success while self-funding all of the company's less risky litigation investments. Frequently, the funder is at an informational disadvantage because the claimant is unable to share important case information due to privilege or other restrictions, such as court-ordered confidentiality. This makes it especially difficult for the funder to evaluate fully the risks that accompany specific cases. As a result, a funder is always at risk of having a portfolio of funded lawsuits that are adversely selected toward litigations with a higher risk of unsuccessful outcomes.

The funder also faces the possibility of moral hazard, by which the litigation counsel or the claimant (or both) can behave in a way that is detrimental to the funder after the financing transaction has closed and the funding arrangement is in place. This is because the funder is precluded from controlling litigation or settlement decisions in most jurisdictions due to champerty and related restrictions.

Therefore, while the funder's investment itself reduces the client's risk and investment of resources (and possibly disincentivizes the client to make the best litigation or settlement decisions), the funder is unable to protect itself by controlling those decisions. In effect, the funder faces the challenge of deploying significant capital into a lawsuit that could have a very high risk profile. The possibility of moral hazard on the part of the claimant and its litigation counsel is usually accounted for in the funder's pricing of its investment by, for example, increasing the funder's prospective share of any settlement or damages award.

Although the funder is usually a passive investor, in some situations concerns may arise regarding the client's control over settlement decisions. In general, between a client and its attorney, the client has the sole authority to decide whether to settle a civil lawsuit (MRPC Rule 1.2(a)). This is inherent in the fiduciary nature of the attorney-client relationship. While it has been suggested that a client could, in an arm's-length transaction, give up some of its authority over settlements to a funder (see American Bar Association Commission on Ethics 20/20 White Paper on Alternative Litigation Finance), a responsible funder will be extremely careful in this area and, as a practical matter, will seek only to protect itself against fraud or bad faith.

Aligning Incentives

To overcome the challenges of adverse risk selection and moral hazard, the interests of the claimant, its litigation counsel and the funder must be aligned. The funder compensates for its lack of information and control by structuring the transaction to ensure that all of the parties have the same incentives. Accomplishing this requires true risk sharing; that is, the claimant and its litigation counsel must be at risk of meaningful loss alongside the funder. However, in many situations the funder is more insistent that litigation counsel share the risk than that the claimant do so. This is because litigation counsel is often a better judge of the risk than the claimant itself, and litigation counsel's role is usually critical in determining the dispute's outcome.

Litigation counsel's time and budget have a substantial embedded profit margin. This makes the funder's and litigation counsel's respective investments unequal so that designing a risk-aligning transaction with litigation counsel is often imperfect. Therefore, the funder seeks to structure a transaction in which the funder and litigation counsel are investing and sharing risk in a parallel fashion, with the funder investing alongside litigation counsel as each incremental dollar is spent on fees or disbursements in the case. This way the funder knows that litigation counsel is putting at least some of the law firm's resources (principally, the investment of billable attorney time) at risk as the case proceeds.

Usually, specific arrangements are individually negotiated and dependent on other terms, such as fee caps where the attorney's total paid fee apart from a contingent component is limited to a certain amount. As an example, the funder or the claimant may negotiate a reduced billing rate with litigation counsel (such as 60 percent of counsel's standard rate). When the claimant is either awarded damages or settles the case for a favorable amount, the percentage of fees that was withheld during the litigation (in this example, 40 percent) is paid to litigation counsel upon recovery after the funder has been paid. Moreover, the claimant's agreement with its litigation counsel would likely include a provision to pay counsel a contingent bonus or kicker tied to a metric for success with respect to the proceeds recovered. Although this may not guarantee a perfect alignment of interests (or guarantee a successful outcome), if properly done and carefully underwritten, this type of deal structure can help ensure that interests are sufficiently aligned to protect the funder against true adverse risk selection.

Merits of the Claim and Potential Damages

To conduct adequate due diligence and underwrite a litigation financing transaction, the funder tries to understand a potential claim's risks as much as possible, despite the funder's likely inability to obtain full case information. Understanding risk includes analyzing the merits of the legal claims and the potential damages available. The funder also tries to understand:

- How long the matter is likely to last.
- The nature of the parties and their litigation counsel.
- Any ethical or regulatory concerns that may arise.

An important consideration in this analysis is whether the outcome of the case can turn one way or another

based on a single factual finding or legal conclusion by the jury or court, or additional risks that the financing transaction's structure cannot address (for example, unusual collection risks such as recoveries that depend on pursuing foreign assets). The funder tries to avoid these risks and, if it accepts them, prices the investment appropriately by increasing its prospective share of any settlement or damages award.

Possible Obstacles to Recovering Damages

An important consideration in a funder's analysis is the risk that the client will not be able to collect its award even if it succeeds on the merits of its claims. If available assets are not readily identifiable, independent investigation or discovery in the litigation may be required.

Collection efforts occasionally involve the challenge of pursuing assets both in the U.S. and abroad, possibly in multiple foreign jurisdictions. This can involve substantial expense and added legal risk, as a successful recovery may require expertise in the laws and procedures of multiple foreign jurisdictions. In some instances, the corporate structure of the defendant may require reliance on a veil-piercing or other theory that permits direct access to the assets of a related entity that is better able to satisfy the judgment. The creditworthiness of the defendant also can be an issue when the defendant (possibly because of the judgment itself) is at risk of insolvency. Finally, there may be situations where political considerations within a given country can be an obstacle to a U.S. entity's ability to collect from a local concern.

Reasons a Funder May Reject a Claim

There are several reasons a funder may decline a funding opportunity that have nothing to do with the merits of the case or the risks of collection. For example, the dispute may implicate domestic or international political issues that entail risks or uncertainties that the funder does not want to bear. Alternatively, the case may be against a party that the funder does not want to be seen as investing against. In other circumstances, the case may relate to sensitive or controversial subject matter with which the investor simply does not want to be associated. Additionally, a funder who also invests in public securities may turn down an opportunity that would restrict its ability to trade public securities because as a litigation investor it would be privy to confidential information about the applicable claims and litigants.

Application Process for Third-Party Litigation Financing

Although most litigation financing arrangements are heavily negotiated and customized transactions, the funding process usually involves some or all of the following basic steps:

- Preparing for the funder's assessment of the claim.
- Conducting due diligence for the funder's initial evaluation of the claim.
- Executing the financing agreement.

Preparing for Assessment

As part of the traditional, early case assessment process, a claimant should consider whether the claim should be pursued. This analysis may include:

- Identifying and reviewing key documents and witnesses.
- Analyzing legal theories.
- Assessing potential monetary recoveries.

For additional issues that plaintiff's counsel should consider before commencing a lawsuit in federal district court.

If the claimant decides to pursue third-party litigation financing, it should prepare relevant case materials for the funder, but only after consulting with litigation counsel to avoid sharing any materials that may implicate a waiver of privilege or breach of confidentiality. Examples of potentially relevant case materials include:

- Primary documents relied on in the case (for example, the operative contract).
- Likely evidence (such as correspondence and witness statements).
- Key court documents filed in an already pending case.
- Non-privileged documents analyzing and supporting the legal claims and the damages sought.

Additionally, the claimant should provide the funder with an estimated budget for legal fees and expenses, preferably broken down into the various expected stages of the litigation. For a monthly litigation budget template for estimating or calculating projected or actual legal fees and expenses.

Initial Evaluation

The funder's evaluation process usually begins with a confidential (but not privileged) meeting or conversation in which the claimant or its litigation counsel describes the matter generally, and the funder describes its products and potential funding solutions. If this initial discussion confirms their mutual interest, the parties execute a formal confidentiality agreement to facilitate more in-depth discussions.

The confidentiality agreement is mutual. The funder agrees to keep confidential any information or materials provided by the claimant, and the claimant agrees

to keep confidential any information regarding the funder's proprietary products and process. However, all parties must bear in mind that the confidentiality agreement may not shield the communications between the funder and the claimant (and the claimant's litigation counsel) from discovery in litigation..

Term Sheet

After the initial confidential meeting, the client provides case-related information and documentation to the funder. During one or more conversations or meetings, the funder and the claimant (and frequently, the claimant's litigation counsel) discuss the claims and the parties' proposed economic terms for the transaction.

If the funder's initial evaluation of the case suggests that it makes sense to develop a transaction, and the funder and the claimant can agree on initial economic terms, the parties execute a non-binding term sheet. Although this term sheet outlines the parties' understanding of the parameters of a potential transaction, it is understood at this stage that the terms of the potential transaction may require adjustment based on the funder's evolving evaluation of the case following more extensive due diligence.

Underwriting Due Diligence and Investment Decision

After the term sheet is executed, the funder conducts a deep dive into the matter's legal and factual issues. This includes analyzing the claim's legal merits and potential recoveries, as well as several other important factors that vary from case to case, such as:

- The nature of the parties and their litigation counsel.
- The likely amount of time before resolution.
- The potential for resolution on legal issues without a jury determination.
- The collection risks.
- The nature of the court or forum.
- The unique ethical or reputational issues.

A funder's simple due diligence checklist typically includes some of the following issues:

- **Merits of the case.** What are the strengths and weaknesses of the legal arguments the claimant will make? What are the strengths and weaknesses of the supporting evidence? What arguments and evidence will the opposing party use in defense?
- **Damages.** What is the proper measure of damages for the claims asserted? How likely is it that the claimant can prove its damages at trial? What level of damages might the claimant achieve in settlement?
- **Collection.** Is the defendant financially able to pay a judgment? If not, are other payment sources available, such as from the defendant's liability insurance? Will collection require additional investigation or litigation?
- **Duration.** How long will it take for the case to reach a resolution, including any appeal?
- **Legal fees and costs.** What are the estimated legal fees and costs for the case?

As with other financings, potential investments typically go through a vetting process after due diligence is complete. For example, an underwriting or investment committee or similar group may review the due diligence information and will either reject or approve the financing, subject to certain conditions and final documentation.

Executing the Financing Agreement

If the funder's underwriting criteria are met, and the parties come to a final agreement on economic terms, the parties execute a definitive financing agreement. Because litigation counsel may have a stake in the agreement's terms, clients who do not have in-house counsel may wish to consider having independent outside counsel not involved with the case negotiate and review these agreements. Where court approval of the transaction may be required, the agreement terms should account for any additional considerations imposed by the judge, such as that the terms of the financing be economically reasonable under the circumstances (see *Forsythe v. ESC Fund Mgmt. Co.*, 2013 WL 458373 (Del. Ch. Feb. 6, 2013)).

Litigation Financing Products, Deal Structures, and Pricing

Most third-party litigation financing in the commercial claims segment of the market focuses on large, business-to-business litigation and arbitration across the full range of commercial disputes, such as:

- Breach of contract.
- Antitrust violations.
- Trade secret, copyright and patent infringement.
- Cross-border investment disputes and other international arbitration claims.
- Joint venture or non-class shareholder disputes.

A transaction in this market segment may require the funder to invest between $500,000 and $10 million or more to fund the litigation (this segment does not include personal injury or consumer class actions).

Types of Products

There is substantial creativity in the litigation financing community, and many funders may want to explore

and develop transactions for cases or programs across a wide range of products and deal types. Generally, funders provide the following types of products for the commercial claims market segment:

- **Early-stage funding.** In this situation, attorneys' fees and case disbursements are borne by a combination of the litigation counsel, funder and claimant. From the claimant's perspective, this product looks like a contingency fee arrangement. However, instead of litigation counsel handling the matter on a full contingency fee basis, it pursues it on a partial contingency fee basis, with the funder making up all or most of the balance.
- **Claim monetization.** In this case, funds are used for general company purposes rather than for prosecuting the litigation. This is used where the claimant has the litigation fees and costs covered but needs immediate liquidity for other business uses. The funder provides the amount of the monetization at closing, and receives its return from any proceeds recovered on the claim.
- **Funding case disbursements or out-of-pocket expenses.** This type of funding is applicable for early or later stage cases when litigation counsel has accepted the case on a contingency fee basis but it (or the claimant) cannot, or prefers not to, fund disbursements or out-of-pocket costs. This allows litigation counsel to invest its time rather than its cash.
- **Appeals hedging or monetization.** For judgments on appeal (or verdicts in post-trial proceedings), the funder provides liquidity or a simple guarantee of a portion of the judgment amount.
- **Law Firm Portfolio Financing.** This is a direct funding to a law firm, whereby a funder advances money to help fund a pool of contingency cases in exchange for a fixed return at a specified waterfall of recovery. The funder's investment is non-recourse and can be recovered only out of the agreed pool of contingency cases. This arrangement allows a law firm to share risk and take on more contingency cases.

Programmatic Solutions and Non-Cash Receivables

Generally, funders in the commercial claims market segment are underwriting and investing in individual, large affirmative cases. However, financing is also available for programmatic recovery operations. Rather than focusing on one-off, individual situations, a funder might engage in a longer-term relationship with a client, providing financing for a range of related matters.

One prime example is an intellectual property enforcement program against numerous targets (or other recurring types of claims) that may be individually small but substantial in the aggregate. In these situations, the principal relief typically sought is cash, although there are valuation mechanisms possible where the principal relief is a business solution rather than monetary damages. The funder typically negotiates a return consisting of a cash payment when the individual cases in the program are resolved or based on the resolution of a group of cases. Transaction documents generally include a mechanism for valuing any non-cash assets (for example, cross-licenses or contractual concessions by the adverse party) recovered by the client.

Although forward-running royalties in intellectual property cases may be substantial, many funders may prefer a pre-set payout mechanism instead of a revenue stream. Nonetheless, if the business opportunity looks attractive, large, sophisticated funders may be willing to be paid out over time or carry a non-cash asset. It may also be possible to monetize the future payment stream through a financial institution, such as an investment bank.

Additionally, an investor may be able to provide solutions to assist a client with post-judgment enforcement and collection efforts, such as:

- Financing a collateral collection action.
- Monetizing a portion of the judgment.
- Hedging some of the collection risk.

Pricing

Third-party litigation financing agreements are individually negotiated deals that must be structured according to the unique facts of the case. Pricing is an important part of these negotiations because it reflects the degree of risk the funder assumes. Pricing terms, for example, depend heavily on the parties' respective assessments of the potential recovery available despite the risks presented. A funder's analysis of the risk of loss may include a variety of factors, such as:

- The strength of the claim.
- The amount to be invested.
- The duration of the investment.
- The potential collection risks.

Financing companies may weigh pricing and risk factors differently and may provide varying pricing structures for different situations. For example, different pricing factors may come into play when the funder and claimant have an existing relationship, or when the claimant's litigation counsel has a specialized skill set or reputation with respect to the claim's subject matter.

Therefore, pricing and returns vary, sometimes widely, based on:

- The characteristics of the individual claim.
- The due diligence and analysis of the funder and the claimant.
- The bargaining process between the funder and the claimant.

In light of these highly individualized and case-specific factors, it is not useful to cite typical or average pricing across the dispute financing industry, or even across specific market segments or product types. Calculating an average pricing range is made more difficult by the fact that investors have many ways of pricing transactions. For example, the return may be a multiple of invested capital or a percentage of the recovery (or some combination of the two). Or, the return may be calculated as a specific internal rate of return on the invested capital. In some unusual circumstances, it may be appropriate to use a different metric entirely. For example, if the funded litigation enables the client to achieve an injunctive, transactional, or other strategic objective, the pricing might reflect some of the new business value that has been created, although not specifically based on the metrics described above.

Post-Investment Role of the Funder

After the financing transaction is closed, the funder monitors developments in the case as it progresses until the matter is finally resolved. Because the funder must continue to be vigilant with respect to privilege and confidentiality limitations, its monitoring is usually limited to:

- Examining publicly available case filings (which sometimes may be unavailable or redacted due to protective orders).
- Receiving reports from the claimant and its litigation counsel that comply with any applicable restrictions.
- Reviewing documents not subject to privilege or otherwise protected by a confidentiality agreement between the claimant and the defendant.

In some instances, it can take several years for a case to reach a resolution. If the case is resolved favorably, the funder is entitled to payment according to the financing agreement. Depending on the financing agreement, payment may be made or secured through cash, securities, liens, escrow accounts, or a combination of these.

Deposition Witness Review of Privileged Materials: A Certain Waiver?

By Benjamin R. Nagin and Melissa Colón-Bosolet

At almost every deposition in a commercial case, the witness will be asked if defending counsel presented the witness with documents to review in preparation for the examination. If the answer is yes (and it almost invariably is), the questioner will proceed to ask whether the documents refreshed the witness's recollection. Generally speaking, if the documents presented to the witness refreshed his or her recollection, the examiner should be permitted to ask about those documents. Because those documents most often have already been produced in the case, there also should not be too much concern about disclosing any unnecessary or protected information. What happens, however, if the document or other information reviewed is protected from production by the attorney-client privilege or work-product doctrine? This article explores several cases where state and federal courts in New York confronted this very issue.

In *McDonough v. Pinsley*,[1] the plaintiff reviewed a privileged document *during* the deposition to refresh his recollection. The First Department held that "[a]ny privilege" had been waived and that the defendant was "entitled to inspect the entire document."[2] This seems like an unsurprising result. The Second Department reached the same conclusion with respect to privileged materials used by witnesses to refresh their recollections *before* depositions and trial.[3] In other words, in these instances, a witness's mere review of an otherwise privileged document to refresh his or her recollection was enough to vitiate the privilege.

More recently, the First Department considered the question of waiver in a case involving work product and materials prepared for litigation. In *Beach v. Touradji Capital Management, LP*,[4] plaintiff's counsel retained a forensic expert during discovery to examine certain computers owned by plaintiff and related files. At the request of plaintiff's counsel, the forensic expert subsequently prepared reports summarizing the search and the expert's findings.[5] When, in his deposition, the forensic expert acknowledged reviewing the reports in preparation for his deposition, defense counsel demanded their production.[6] The court first outlined a distinction between work-product (i.e., mental impressions and direction of counsel) and material prepared for litigation (here, the forensic examination).[7] The court's holding followed from this distinction. The court concluded that the "conditional privilege that attaches to material prepared for litigation is waived when used by a witness to refresh a recollection prior to testimony."[8] However, to "the extent that any portion of the reports prepared by the forensic analyst is attorney work-product, the privilege protects the reports notwithstanding that the analyst reviewed the reports prior to his deposition."[9]

In short, while New York state court decisions have reached seemingly conflicting conclusions, it appears that if a deponent reviews a privileged document, the attorney-client privilege potentially may be deemed waived along with any conditional litigation preparation protection. However, certain New York courts have not reached the same conclusion with respect to a deponent's review of attorney work-product materials.

In federal litigation, courts typically first turn to Federal Rule of Evidence 612, which provides, in pertinent part:

> (a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
>
> (1) while testifying; or
>
> (2) before testifying, if the court decides that justice requires the party to have those options.
>
> (b) Adverse Party's Options; Deleting Unrelated Matter. [Other than in a certain criminal context], an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

Courts have applied FRE 612 to deposition testimony.[10] On its face, FRE 612 requires production of the relevant portion of the document at issue when used by a witness to refresh his or her recollection. What happens if a privilege claim is made with respect to the writing? Relying on the unequivocal language of FRE 612, some district courts have directed production notwithstanding any assertion of privilege. In other words, those courts found that a witness's use of a document to refresh his or her recollection waives the privilege without further inquiry.[11]

Other courts, however, have focused on a "reliance" inquiry in considering whether production is appropri-

Benjamin R. Nagin and **Melissa Colón-Bosolet** are partners with Sidley Austin LLP in New York.

ate. For example, in *Suss v. MSX International Engineering Services, Inc.*,[12] the court stated that FRE 612 did not "change the law with respect to privilege" and that "the relevant inquiry is not simply whether the documents were used to refresh the witness's recollection, but rather whether the documents were used in a manner which waived the attorney-client privilege."[13] The court went on to explain that even if disclosure of attorney-client communications under some circumstances may be warranted, a movant would have to demonstrate that the witness relied on the document in question. In that regard, the court held that "[r]elied upon means more than simply reviewing."[14] Unless there is some demonstrated impact on the witness's testimony, "the witness cannot be deemed to have relied on the document."[15]

Still other courts have employed a balancing test that involves consideration of various factors. In *In re MTBE Products Liability Litigation*, for example, the court concluded that the "proper approach is to conduct a balancing test to determine whether Rule 612 requires disclosure, notwithstanding the existence of a privilege."[16] According to the court, the relevant factors for the balancing test include: "(1) whether production is necessary for a fair cross-examination; (2) the extent to which reviewing the document impacted the witness's testimony; (3) whether the witness was himself the author of the document (and therefore whether the document represents a mere memorialization of the witness's knowledge); and (4) whether the party seeking production is engaging in a fishing expedition."[17] The court remanded the dispute to a Special Master to "determine whether, under the balancing test . . . , Rule 612 mandates the production" of the documents at issue.[18]

Barcomb v. Sabo[19] provides another example of a court employing the balancing approach. There, a defense witness "reviewed a plethora of documents prior to her deposition which affected her testimony and served as the basis for a time-line she created and distributed to other defendants."[20] The court ordered the production of the documents and time-line despite an assertion of privilege. The court deemed it important that (i) the witness did not author all of the emails she reviewed and (ii) the emails, along with the time-line, appeared to have an important impact on the testimony.[21] In these circumstances, the court concluded that disclosure was appropriate under Rule 612.

In short, New York state and federal courts have taken divergent approaches to reconciling privilege and counsel's need to inspect documents that have refreshed a witness's recollection. Some courts have concluded that a witness's use of a document to refresh his or her recollection vitiates all claims of privilege or that such conduct at least vitiates certain privileges. Meanwhile, other courts have concluded that a witness's use of a document to refresh his or her recollection only vitiates a privilege when there is some independent waiver of the privilege or when all the relevant facts and circumstances warrant overriding the privilege. Given the differing approaches, attorneys should be aware of the significant risks of witness review of privileged materials in advance of giving testimony.

Endnotes

1. 239 A.D.2d 109 (1st Dep't 1997).
2. *Id*. at 109.
3. *Grieco v. Cunningham*, 128 A.D.2d 502, 502 (2d Dep't 1987) ("Any privilege under CPLR 3101 was waived when [plaintiff] used his written statement prior to his deposition to refresh his recollection as to the events of the incident, and when the plaintiffs' witness reread her statement prior to the trial for the same purpose."); *see also Crawford v. Lahiri*, 250 A.D.2d 722, 723 (2nd Dep't 1998) (requiring production of records defendant reviewed in preparation for testimony "whether or not his review was expressly admitted to be for purposes of refreshing his recollection and whether or not the material had been supplied to him by his attorney" (internal citations omitted)).
4. 99 A.D.3d 167 (1st Dep't 2012).
5. *Id*. at 169.
6. *Id*. at 169-70.
7. *Id.* at 171.
8. *Id.*
9. *Id.*; *see also id.* at 172 ("[W]e clarify that that the attorney work product privilege is not waived when a privileged document is used to refresh the recollection of a witness prior to testimony.").
10. *See, e.g.*, *In re MTBE Prods. Liab. Litig.*, No. MDL 1358 (SAS), 2012 WL 2044432, at *2 (S.D.N.Y. June 6, 2012); *Thomas v. Euro RSCG Life*, 264 F.R.D. 120, 122 (S.D.N.Y. 2010).
11. *See, e.g.*, *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 637 (E.D.N.Y. 1997) ("[B]eing phrased in mandatory language, Rule 612(1) prevails when pitted against a claim of privilege."); *Ehrlich v. Howe*, 848 F. Supp. 482, 493 (S.D.N.Y. 1994) ("Federal Rule of Evidence 612 provides a wholly independent basis for ordering disclosure of the Memorandum, even if it is work product or protected by the attorney-client privilege.").
12. 212 F.R.D. 159 (S.D.N.Y. 2002).
13. *Id*. at 164.
14. *Id.* at 165 (internal quotation marks omitted).
15. *Id.*; *see also Robinson v. Time Warner, Inc.*, 187 F.R.D. 144, 147 (S.D.N.Y. 1999) (holding that the movant "must not only show" that the witness "reviewed the documents in preparation for his deposition" but also that "he relied upon them in testifying" (internal quotation marks omitted)).
16. 2012 WL 2044432, at *3 (internal quotation marks omitted).
17. *Id.* (internal quotation marks omitted).
18. *Id.* at *4; *see also In re Rivastigmine Patent Litig.*, 486 F. Supp. 2d 241, 243-44 (S.D.N.Y. 2007).
19. No. 07-CV-877 (GLS/DRH), 2009 WL 5214878 (N.D.N.Y. Dec. 28, 2009).
20. *Id*. at *2.
21. *Id.* at *9.

Guidelines for Obtaining Cross-Border Evidence

> *"Life in a great society, or for that matter in a small, is a web of tangled relations of all sorts, whose adjustment so that it may be endurable is an extraordinarily troublesome matter."*
>
> *—Judge Learned Hand, 1872-1961, Chief Judge of the United States Court of Appeals for the Second Circuit*

Increasingly, parties who have disputes in court or in arbitration find a need to obtain evidence from some person or entity located in another country. These guidelines are intended to serve as best practices to courts and counsel as a guiding set of principles to facilitate the process of gathering evidence. They are not intended to be fixed rules. The authors hope that these guidelines will contribute to the development of increased cooperation and coordination among courts and litigants in different jurisdictions in matters of cross-border evidence collection.

Guideline 1.

Utilizing the laws and respecting the customs of sovereign nations is the most effective means of gathering evidence abroad.

Commentary. Seeking extraterritorial evidence will often require the aid of a foreign court, which will present the evidence-seeker with a different and perhaps unfamiliar set of rules and customs upon which to base its request. It is important to remember that if the assistance of a foreign court is needed, that court will apply its own evidence laws, not those of the country from which the request originated.[1] What may be a reasonable request in one jurisdiction may offend the laws and customs of another jurisdiction and cause the request to be summarily rejected.[2] It is thus important to respect the laws and customs of the jurisdiction in which that court sits when asking for help in gathering evidence. Since these laws and customs provide an important background against which the request is evaluated, respecting these foreign laws and customs and drafting evidence requests that conform to them will often be the best and most effective means of obtaining evidence.

Guideline 2.

The Hague Evidence Convention is an internationally agreed means of gathering evidence abroad and counsel practicing internationally should be familiar with its operation along with that of other internationally recognized methods.

Commentary. Nearly 50 years ago, a group of signatory nations, "[d]esiring to improve mutual judicial co-operation in civil or commercial matters," signed the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970) ("Hague Evidence Convention").[3] The Hague Evidence Convention thus established a system of state-by-state "Central Authorities" that, by agreement among the ratifying nations, were authorized to accept "Letters of Request" seeking evidence in their nations.[4] It remains the most universally-accepted means of obtaining cross-border evidence,[5] and in some nations, the only accepted means of obtaining cross-border evidence.[6] Nevertheless, concerns regarding the perceived ineffectiveness of and delays associated with the Hague Evidence Convention procedures sometimes result in its being viewed by many as a last resort, rather than the first option.[7] But the number of countries that require use of the Hague Evidence Convention is growing. In the European Union, for example, the General Data Protection Regulation (GDPR) only recognizes judgments of foreign courts pertaining to data transfer if "based on an international agreement . . . in force between the requesting [foreign] country and the Union or a Member State." *See* GDPR Article 48. In the absence of other multinational treaties, the Hague Evidence Convention may soon be the exclusive means of obtaining cross-border disclosure within the EU.[8]

Thus, the Hague Evidence Convention will likely find increasing use as it becomes mandatory in other jurisdictions.[9] Accordingly, a working familiarity with the Hague Evidence Convention, an understanding of its requirements and limitations, and a willingness to use it are important skills for any litigator involved in a case where international evidence is involved.[10]

On February 22, 2018, the Commercial and Federal Litigation Section of the New York State Bar Association convened a Special Committee on Cross-Border Evidence Collection ("the Committee"). Mindful of the growing need for cross-border collaboration in an increasingly complex and global world, the Committee sought to author a set of guidelines and best practices to foster cooperation in evidence gathering in international cases ("the Guidelines"). The foregoing Guidelines are the result of: legal research; interviews with current practitioners around the world; and deliberation among the Committee members. The Guidelines were approved by the Executive Committee of the NYSBA Commercial and Federal Litigation Section on December 19, 2018.

Guideline 3.

Cross-border evidence disclosure issues that are expected to arise in a multi-national case should be raised with and addressed by the presiding court in the home forum at the earliest possible juncture.

Commentary. Due to the often time-consuming complexity of the issues concerning cross-border evidence gathering, as well as the delay inherent in navigating through multiple layers of national and international bureaucracy, it is important to address cross-border disclosure issues as early as practicable. Early discussion can help ensure that all parties appropriately preserve relevant documents and data. Obligations to preserve evidence, which are imposed by U.S. courts, may be unfamiliar to non-U.S. litigants who become involved in U.S. litigation. Courts and litigants in U.S.-based litigations may similarly lack familiarity with the extent to which courts elsewhere have similar (or dis-similar) requirements to preserve documents and data generally.

Many courts have rules that encourage case disclosure issues to be raised as early as possible.[11] However, in cases that are known to implicate data, documents or knowledgeable witnesses located in countries other than the home jurisdiction, issues unique to international evidence-gathering are likely to arise, including:

(a) Whether the applications for cross-border evidence collection will be made under the Hague Convention and the schedule for making those applications;

(b) Whether oral testimony is needed from individuals abroad and the manner in which that testimony may be taken; and

(c) Whether documents or data located outside of the forum state[12] will be sought for production, whether any party will object, and whether the documents or data are subject to the data protection laws of a non-forum country.

With early discussion of these and related issues, anticipated problems likely to arise can be aired (and perhaps resolved), and a realistic schedule can be adopted that accommodates the longer timeframes often necessary for international evidence-gathering.

Guideline 4.

Cooperation between adversaries should be promoted in order to help narrow and manage evidence-gathering issues in international cases.

Commentary. Cooperation with one's adversary is viewed by some counsel as being in tension with the notion of zealous advocacy for one's client.[13] This perception is unwarranted, however. In fact, cooperating with one's adversary is often to the client's benefit, as it tends to resolve disputes and reduce litigation costs otherwise spent on issues that would have to be adjudicated by the court, despite likely having no effect on the ultimate outcome of the case.

In the context of international disclosure, cooperation among adversaries is oftentimes especially necessary. Everything—from negotiating search mechanisms to gathering data housed abroad, to arranging convenient locations to take testimony from foreign witnesses, to communicating with non-parties who possess key information but may not be subject to personal jurisdiction of the country where the case is pending—requires cooperation among adversaries to accomplish the objective of seeking international disclosure.

Cooperation with one's adversary is a "principle[] of behavior to which the bar, the bench, and court employees should aspire."[14] Particularly in the realm of international evidence gathering, where sovereign nations may disagree on the ability to obtain certain data, documents, or testimony, cooperation between adversarial parties can help avoid or resolve issues that can be costly but unlikely to affect the merits of the case.[15] And resolving these issues amicably—something that is often encouraged by forum and non-forum jurisdictions—can provide the foreign jurisdiction with some comfort that all issues affecting the parties are being adequately raised, discussed, and addressed. Therefore, it is critical for counsel to cooperate with adversaries in order to obtain necessary cross-border evidence in a case.

Guideline 5.

The scope of the requested disclosure should be proportional to the needs of the multi-national case.

Commentary. The amount of evidence that is gathered before trial varies extensively in individual nations, particularly between countries with civil law systems rather than common law systems. The United States is a well-known outlier, which permits the collection of large amounts of data during pretrial discovery.[16] But 2015 amendments to the U.S. Federal Rules of Civil Procedure narrowed the scope of discovery and required that the discovery of information be "proportional to the needs of the case."[17]

In the context of cross-border disclosure, seeking a narrower scope of evidence may, in many instances, be to the benefit of the requesting party. In addition to promoting cooperation between adversaries and reducing the total litigation costs incurred by both sides, seeking narrower disclosure makes it more likely that the requesting party will obtain the disclosure being sought. Moreover, when the disclosure is provided, it will not be buried in thousands of other documents (a task far too easy when so much data is generated day-to-day), but rather it will be presented amidst a smaller body of documents that can be readily reviewed by the receiving party. Further, many jurisdictions (other than the United States) will simply refuse to entertain a request for "all documents" concerning a subject and will insist instead on a request that identifies

"particular documents."[18] Thus, it is all the more important to request evidence with particularity and specificity when seeking cross-border evidence.[19]

Because massive amounts of data may need to be processed in order to respond to broad requests, disclosure requests in international litigations should be tailored so they are narrow and specific and not duplicative of other requests. Consideration should also be given to whether requesting parties may obtain the same or similar evidence through less expensive or burdensome means.

Guideline 6.

It is important to respect and comply with the varying laws and customs of different jurisdictions concerning the taking of depositions, witness statements or other pretrial testimony.

Commentary. The taking of pretrial oral testimony, too, varies extensively from jurisdiction to jurisdiction. In the United States, pretrial oral testimony can be taken by deposition (questioning under oath), usually over a period of seven hours.[20] But elsewhere, the procedure may be much different. Sometimes, the witness examination must be written out ahead of time and provided to the witness. Sometimes the questions must be confined to a particular scope.[21] In some countries, consular officials must be present during the witness examination.[22] In others, the examination must take place at a particular location or require the permission of the government in order to take testimony or witness statements. In still others (as in Switzerland and China),[23] witness examinations cannot be conducted at all, and are deemed illegal. It often is more convenient (or sometimes necessary) to make witnesses available in another, familiar location to conduct the examination; or to take the examination telephonically or through video conferencing. But this, too, may sometimes be frowned upon by foreign courts, at least when done under judicial compulsion.[24]

Therefore, it is important to keep in mind the various conditions under which pretrial examinations may be taken in jurisdictions where knowledgeable witnesses may be located and to engage opposing counsel in discussions regarding a mutually convenient location for witnesses to provide testimony that can be used in the presiding court.

Guideline 7.

It is important to be mindful that requested data may be protected by or subject to the jurisdiction of a foreign country, which may have data protection or other privacy laws different from those of the forum state.

Commentary. Data that is accessible in a country may not always be data that is subject to the jurisdiction of that country. Data accessed every day by someone located in a jurisdiction where litigation is pending may be housed on computer servers located in another country, and thus, will be subject to that country's data protection laws.[25] Furthermore, document preservation obligations in connection with U.S. litigation may conflict with privacy and data protection laws in other jurisdictions.[26] Indeed, some nations, such as France, have implemented so-called "blocking statutes," which prohibit the transfer of information outside of their borders if the information is intended to be used for the purposes of litigation.[27] Understanding that such data are governed by different laws and will not always be retrievable by a litigant in another country (or, for that matter, by a foreign court) is important to properly handling litigations with international scope. Therefore, it is important to be cognizant of the location of data and the laws that govern it when seeking to retrieve data for use in international litigation.

Guideline 8.

When seeking evidence in a foreign nation, it is prudent to engage local counsel familiar with that jurisdiction's policies and procedures on pretrial disclosure.

Commentary. In gathering evidence from a specific foreign jurisdiction, it is important to engage local counsel or technical experts, where appropriate, to obtain guidance about legal principles and practical considerations that will govern data security and regulation, as the liability that can result from a breach are becoming new sources of risk that clients must address. Keeping abreast of these regulations and obtaining outside advice when considering how to collect data from an unfamiliar jurisdiction, are now standard parts of international litigation.

Commercial and Federal Litigation Section Special Committee on Cross-Border Evidence Collection

Clara Flebus, Co-Chair

Stephen P. Younger, Co-Chair

Ryan M. Mott, Secretary

Frank Maas

Joseph V. DeMarco

Laura Dexter

Ignatius Grande

Jay L. Himes

Matthew Perez

Renée Plexousakis

Karen Steel

The Committee would like to thank the Honorable Charles E. Ramos and the Honorable Master Steven Whitaker for lending their insight as jurists; as well as attorneys Ho May Kim (Duane Morris & Selvam LLP, Singapore), Lara K. Delamarre (Cohen & Gresser LLP, France), and Antonio Marzagao Barbuto Neto (Tozzini-Freire Advogados, Brazil) for adding much-needed perspectives as cross-border practitioners.

Endnotes

1. *See Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 428-29 (S.D.N.Y. 2002) (Marrero, U.S.D.J.) ("Absent extraordinary circumstances, it would not comport with considerations of 'practicality and wise administration of justice' for the courts of one nation as a matter of course to sit in judgment of the adequacy of due process and the quality of justice rendered in the courts of other sovereigns, and to decree injunctive relief at any time the forum courts conclude that the laws of the foreign jurisdiction under scrutiny do not measure up to whatever the scope of rights and safeguards the domestic jurisprudence recognizes and enforces to effectuate its own concept of justice. On this larger scale, there can be no room for arrogance or presumption, or for extravagant rules or practices that may encourage insularity or chauvinism rather than respect for comity. It cannot be the proper province of any one judge in any one country, giving expression to the push of a moment or the pull of the immediate case, to promulgate judgments that impose that court's rule and will across all sovereign borders so as to reach the rest of humankind.") (footnotes omitted).
2. Under U.K. law, an evidence request must not only request the evidence, but also provide a basis for the judicial authority to conclude that the evidence is in the possession of the party to whom the request is made. Requests for evidence lacking a legal basis would be rejected under U.K. law. *See, e.g.,* Evidence (Proceedings in Other Jurisdictions) Act 1975; *Re Asbestos Industrial Coverage cases*, 1985 1 WLR 331; *Golden Eagle Refinery v. Associated International Insurance,* 1998 EWCA Civ 293.
3. *See* Hague Evidence Convention, Preamble.
4. *See* Hague Evidence Convention, Articles 2 and 3.
5. Other international agreements on the taking of evidence exist, such as the Inter-American Convention on the Taking of Evidence Abroad, a multilateral treaty between 18 member states of North, Central and South America. *See* 1438 UNTS 390; OASTS No. 44; 14 ILM 328 (1975), *available at* http://www.oas.org/juridico/english/treaties/b-37.html. The United States is not a signatory to this particular Convention, however.
6. In France, for example, the only legal means of collecting documents or for obtaining witness testimony to be used in a foreign proceeding is through the Hague Evidence Convention. In the United States, discovery may be sought either through the Hague Convention or according to the procedural rules of the federal or state jurisdiction where the action is pending. *See, e.g., Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987) ("*Aérospatiale*"); *Cheney v. Wells,* 2008 NY Slip Op 28436 [22 Misc 3d 502]. *See also* Gary B. Born, The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure, 57 Law and Contemporary Problems 3 (Summer 1994).
7. *See, e.g.,* Abigail West, *A Meaningful Opportunity to Comply*, 63 Kan. L. Rev. 189 (2014) (noting that in response to a survey of member nations conducted by the Hague Evidence Convention, the U.S. claimed that letters of request issued pursuant to the Hague Convention "can take anywhere from one month to two years to execute," and that the U.S. Department of State had once indicated on its website that requests to China "have not been particularly successful in the past."). *But see Tiffany (NJ) LLC, et al. v. Andrew, et al.*, 10-cv-9471-RA-HBP (S.D.N.Y.) at D.I. 58 (November 7, 2012) (describing a successful request made under the Hague Evidence Convention directed to China which resulted in the production of responsive documents after a period of nine months).
8. Not all privacy laws are as restrictive as the GDPR. In Singapore, for example, the Personal Data Protection Act of 2012 ("PDPA") permits personal data to be used without the consent of the individual if "the use is necessary for any investigation or proceedings." PDPA Schedule 2 ¶ 1(f). Meanwhile, Singapore's Personal Data Protection Regulations of 2014 ("PDPR") provide that the personal data may be transferred outside of Singapore so long as the recipient is bound by "legally enforceable obligations" that provide to the transferred personal data "a standard of protection that is at least comparable to the protection under the Act." PDPR ¶ 9. Pursuant to ¶ 10, a "legally enforceable obligation" would include "any law," "any contract . . . ," "any binding corporate rules . . ." or "any other legally binding instrument."*Id.*
9. While use of the Hague Convention may increase, there is nevertheless ongoing discussion of the Treaty's effectiveness and of alternative mechanisms. *See, e.g.*, Daniel S. Alterbaum, *Comment: Christopher X and CNIL: A Clarion Call to Revitalize the Hague Conventions,* 38 Yale J. Int'l L. 271 (Winter 2013) (arguing that U.S. courts should "designate the Hague Convention" as the first-resort set of procedures for procuring evidence); Marissa L. P. Caylor, *Modernizing the Hague Evidence Convention: a Proposed Solution to Cross-Border Discovery Conflicts During Civil and Commercial Litigation*, 28 B.U. Int'l L.J. 341 (Summer 2010) (recommending that Hague Convention be amended to delegate the resolution of cross-border conflicts of evidence-related law to special authorities or an institution within the Hague Conference); Brian Friederich, *Reinforcing the Hague Convention on Taking Evidence Abroad After Blocking Statutes, Data Privacy Directives, and Aerospatiale*, 12 San Diego Int'l L.J. 263 (Fall 2010) (recommending making the Hague Convention the "first resort for taking evidence abroad").
10. A model letter of request is available on the Hague Convention website which can be used as a template. *See* https://www.hcch.net/en/instruments/conventions/publications1/?cid=82&dtid=2.
11. For example, Rule 26(f) of the Federal Rules of Civil Procedure provides that all cases in U.S. federal courts must have an initial case management conference that sets the schedule for the case and addresses fundamental discovery issues in the case such as the number of interrogatories, depositions, and document requests that the parties may use to take discovery. In the Commercial Division of New York State Supreme Court, Commercial Division Rule 8 further requires the identification at the preliminary conference of any known issues relating to electronically stored information (ESI). Other jurisdictions have procedures providing for similar conferences. *See, e.g., Discovery Best Practices: General Guidelines for the Discovery Process in Ontario,* ONTARIO BAR ASSOCIATION ("Issue #2: How should discovery planning be initiated? . . . As soon as practical but at least by the close of pleadings, all parties should hold a discovery conference in person or at least by telephone to discuss the most expeditious and cost effective means to complete the discovery process, with regard to: [i]. the nature and complexity of the proceedings; [ii]. the number of documents and potential witnesses involved; [iii]. the ease and expense of retrieving discoverable information; and [iv]. whether given the volume of documents and the time/cost of production, some form of proportional discovery may be considered and agreed to.").
12. "Forum state" refers to the state where litigation is pending.
13. *See, e.g.,* Preamble, Model Rules of Professional Conduct, American Bar Association, Center for Responsibility (2018), at [9] ("[9] . . . These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.").
14. New York State Standards of Civility, N.Y. Ct. Rules, Pt. 1200, App. A.
15. It is also a principle in the New York State Bar Association's 2011 Best Practices in E-Discovery in New York State and Federal Courts. *See* Best Practices in E-Discovery in New York State and Federal Courts (Version 2.0), Report of the E-Discovery Committee of the Commercial and Federal Litigation Section of the New York State Bar Association (December 2012) ("Guideline No. 4: Counsel should endeavor to make the discovery process more cooperative and collaborative."). And the latest edition of the *Principles of the Sedona Conference*, a leading guide for best practices in e-discovery,

includes the so-called "Cooperation Proclamation," which encourages counsel to cooperate as much as possible to reduce unnecessary delay and expense associated with non-merit issues. *See The Sedona Principles, Third Edition*, 19 Sedona Conf. J. 1, 30-32 (2018) (listing cooperation as a "common theme" of the Sedona Principles); *see also id.* at 76-78 (comment 3.b includes cooperation as part of the Sedona Principles).

16. *See, e.g.*, The Sedona Conference International Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition) (January 2017) at 2-3 ("'Discovery' is a central–and somewhat unique—feature of civil litigation in the American legal system . . . which often conflicts with the significantly narrower scope permitted in other countries, particularly concerning information deemed confidential or subject to Data Protection Laws.").

17. *See* Rule 26, Federal Rules of Civil Procedure 26 (as amended December 1, 2015). While the federal government has adopted this standard, individual U.S. states continue to follow their own rules of civil procedure, which may not embrace the concept of proportionality. For example, New York State has not yet formally adopted the concept of proportionality into its discovery rules. The Rules of the Commercial Division of New York State state that the Court is "mindful of the need to conserve client resources, encourage proportionality in discovery, promote efficient resolution of matters, and increase respect for the integrity of the judicial process." Preamble, Commercial Division Rules of Practice.

18. *See, e.g.*, *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp*, [1978] App. Cas. 547, 1 C.M.L.R. 100 (House of Lords 1977) (Lord Diplock) ("The requirements of [section 2](4)(b)...are not in my view satisfied by the specification of classes of documents. What is called for is the specification of 'particular documents' which I would construe as meaning individual documents separately described . . ."). *See also In re Asbestos Insurance Coverage Cases*, *supra* n. 2 (noting that a request for "'monthly bank statements for the year 1984 relating to his current account' with a named bank would satisfy the requirements of the paragraph, provided that the evidence showed that regular monthly statements had been sent to the respondent during the year and were likely to be still in his possession. But a general request for 'all the respondent's bank statements for 1984' would in my view refer to a class of documents and would not be admissible.").

19. Note, however, that by Directive, the European Commission has called on member states to implement measures designed to enhance the ability of private litigants to pursue damages actions arising from violations of EU competition law. Among the required measures are liberalized means to gather evidence, which include enabling national courts "to order specified . . . categories of evidence upon request of a party." European Commission Directive 2014/104/EU, Preamble (16). This Directive further instructs that evidence gathering should be bounded by "proportion[ality]" considerations. *Id.*, Art. 5.3. Implementation of the Directive though national legislation is ongoing. *See, e.g.*, Jacques-Phillipe Gunther, et al., Transposition of the European Damages Directive into French Law, Wilkie Farr & Gallagher LLP (Mar. 28, 2017); NCTM, Italian implementation of the Directive 2014/104/EU on antitrust damages actions (Jan. 8, 2018), http://www.nctm.it/en/news/articles/italian-implementation-of-the- directive-2014-104-eu-on-antitrust-damages-actions; Henar Gonzalez, et al., Spain transposes the EU directive on antitrust damages claims, Lexology (June 2, 2017); Norton Rose Fulbright, German competition law update: New revised act against restraints of competition entered into force (June 2018).

20. *See, e.g.*, FRCP 30(d)(1); N.Y. Commercial Division Rule 9(c)(5)(ii).

21. *See, e.g.*, David Epstein, *Obtaining Evidence from Foreign Parties*, Int'l Bus. Litig. & Arbitration 2004, at 131, 133 (PLI Litig. & Admin. Practice Course, Handbook Series No. 704, 2004).

22. For example, in Brazil, the questions must be drafted ahead of time, which are then provided to a government official who asks the questions on the party's behalf. *See* U.S. Department of State Bureau of Consular Affairs, Judicial Assistance Country Information: Brazil, *available at* https://travel.state.gov/content/travel/en/legal/Judicial- Assistance-Country-Information/Brazil.html (accessed 12/11/2018) (noting that the government of Brazil "views the taking of depositions for use in foreign courts as an act that may be undertaken in Brazil only by Brazilian judicial authorities").

23. The U.S. Department of State reports that attorneys who attempt to take depositions in Switzerland without pre-approval by the Swiss government "are subject to arrest on criminal charges." *See* U.S. Department of State Bureau of Consular Affairs, Judicial Assistance Country Information: Switzerland, *available at* https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Switzerland.html (accessed 03/19/2018). In China, "participation in such activity could result in the arrest, detention or deportation of the American attorneys and other participants." *See* U.S. Department of State Bureau of Consular Affairs, Judicial Assistance Country Information: China, *available at* https://travel.state.gov/content/travel/en/legal/Judicial- Assistance-Country-Information/China.html (accessed 03/19/2018).

24. *See, e.g.*, Brief for the Federal Republic of Germany as Amicus Curiae at 6-7, *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority*, 474 U.S. 812 (1985) (No. 85-98) ("The Federal Republic of Germany likewise considers it a violation of its sovereignty when a foreign court forces, under the threat of sanctions, a person under the jurisdiction of German courts to remove documents located in Germany to the United States for the purpose of pretrial discovery, or orders a person, under the threat of sanctions, to leave the Federal Republic of Germany and travel to the United States to be available for oral depositions. The taking of evidence is a judicial function exclusively reserved to the courts of the Federal Republic of Germany.").

25. *See* Damon C. Andrews & John M. Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 Md. L. Rev. 313, 324 (2013).

26. For example, certain provisions of the European Union's GDPR, a privacy law that took effect on May 25, 2018, may conflict with U.S. litigation hold document requirements. *See* Regulation (EU) 2016/679. In particular, unlike in the U.S., the GDPR's definition of "processing" is very broad and includes the act of preserving data. *Id.* Art. 4.

27. The French blocking statute prohibits "any person to request, search for or communicate . . . documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of establishing evidence in view of foreign judicial or administrative procedures . . . ." *See* Art 1bis, Law no. 68-678 of July 26, 1968, relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents and Information to Foreign Individuals or Legal Entities, as modified by French Law no. 80-538 dated July 16, 1980. *See also* Thomas Rouhette and Ela Barda, *The French Blocking Statute and Cross-Border Discovery*, 84 Defense Counsel Journal 3 (July 2017). For an analysis of some blocking statutes from other nations, *see, e.g.*, M.J. Hoda, *The* Aérospatiale *Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It*, 106 Cal. Law Rev. 231 (2018) (noting that the effectiveness of blocking statutes on an international level depends in part on whether they are actually enforced by the national governments).

NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION

TO: Robert N. Holtzman, Section Chair
FROM: Melanie L. Cyganowski, Chair of the Nominating Committee
DATE: November 26, 2018
RE: *Nomination of Officers for the 2019-2020 Year*

Report of the Nominating Committee

The Nominating Committee (comprised of Robert N. Holtzman, Esq., Laurel Kretzing, Esq., Jonathan Lupkin, Esq., Sharon Porcellio, Esq. and myself)[1] met in recent weeks to consider nominees for the officer and delegate positions for the 2019-2020 year. Nominations were solicited from the membership and the officers. On behalf of the Committee, I am honored to advise you that the following persons were unanimously nominated for each office as noted respectively below:

Chair	Laurel Kretzing
Chair-Elect	Jonathan Fellows
Vice-Chair	Daniel Wiig
Secretary	Natasha Shishov
Treasurer	Anne B. Sekel

Delegates to the House of Delegates:

Term of June 2019 - May 2020:	Robert N. Holtzman
Term of June 2019 - May 2020:	Mitchell Katz
Term of June 2019 - May 2020:	James Wicks

Alternate Delegate for the Term of June 2019 - May 2020:	Laurel Kretzing

In accordance with Article III of the Section's By-Laws, the Chair-Elect for the current year succeeds to the position of Chair for the succeeding year and, in like fashion, the Vice-Chair succeeds to the position of Chair-Elect. The Committee has also nominated the delegates named above, each respectively for one-year terms.

Thus, the Committee's nominations of the Vice-Chair, Secretary, Treasurer and Delegates fulfill the Committee's duties as set forth in Article IV of the Section's By-Laws.

M.L.C.

cc. Members of the Nominating Committee

Proposed Amendment of Rule 3 of the Rules of the Commercial Division

To: John W. McConnell

Counsel, Office of Court Administration

From: Commercial and Federal Litigation Section of the New York State Bar Association

Date: August 14, 2018

Re: Proposed Amendment of Rule 3 of the Rules of the Commercial Division (22 N.Y.C.R.R. § 202.70[b], Rule 3[a]), Relating to Selection of Mediators

The Commercial and Federal Litigation Section of the New York State Bar Association ("Section") is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated June 22, 2018, proposing an amendment to Rule 3 of the Rules of the Commercial Division (22 N.Y.C.R.R. § 202.70[g], Rule 3[a], relating to the selection of mediators (the "Memorandum"). A copy of the Proposal is attached hereto as Exhibit "A."

I. Executive Summary

Rule 3(a) of the Rules of the Commercial Division currently permits the court to direct or counsel to seek appointment of a mediator to resolve all or some of the issues presented, at any stage of the litigation. The ADR Committee of the Commercial Division Advisory Council (the "Advisory Council") has made two recommendations: (1) that the language of Rule 3(a) be amended to include the following language: "Counsel are encouraged to work together to select a mediator that is mutually acceptable, and may wish to consult any list of approved neutrals in the county where the case is pending"; and (2) that the Office of Court Administration ("OCA") and State ADR Coordinator coordinate with local ADR Administrators in each Commercial Division to determine whether applicable ADR rules should be revised to provide a uniform five (5) business day deadline for the parties to agree upon a mediator before assignment by the court.

II. Summary of Proposal

Rule 3(a) provides in part: "At any stage of the matter, the court may direct or counsel may seek the ***appointment*** of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation" (22 NYCRR § 202.70[g], Rule 3[a] (emphasis added)). Rule 3(a) refers to the "appointment" of a mediator, and the Advisory Council notes that various Commercial Divisions have implemented programs whereby mediators are appointed by the court from a roster of qualified neutrals, rather than by agreement between the parties.

Citing feedback from Bar Associations, the Advisory Council suggests that mediation may be more successful when parties are given the opportunity to agree upon a mediator. According to the Memorandum, statistically, where parties are permitted to first agree upon a mediator, agreement on a mediator is reached in approximately 70 percent of cases. In federal district courts, where the parties are first given the opportunity to agree upon a mediator, statistics show a settlement rate of around 70 percent.

The rationale asserted by the Advisory Council is that allowing the parties to agree upon a mediator facilitates greater trust in the competence of the mediator and greater party satisfaction, thereby increasing the settlement rate:

> Experienced counsel recognize that identifying a mediator that all parties and counsel can trust will facilitate information exchange and help create a climate where settlement is more likely to occur—or at least will not be impeded by concerns about the competence, effectiveness and trustworthiness of the mediator.

(Proposal at 3).

While the Advisory Council believes a uniform five (5) business day rule is ideal, the Advisory Council recognizes that local concerns may weigh against adopting formal rule dictating a specific time period for party-selection of a mediator. Therefore, the Advisory Council has suggested an amendment to Rule 3(a) without any specific deadline, as follows:

> At any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation. Counsel are encouraged to work together to select a mediator that is mutually agreeable, and may wish to consult any list of approved neutrals in the county where the case is pending. Additionally, counsel for all parties may stipulate to having the case determined by a summary jury trial pursuant to any applicable local rules or, in the absence of a controlling local rule, with permission of the court.

(Proposal at 4). In addition, the Advisory Council suggests that the OCA and State ADR Coordinator coordinate with local ADR Administrators in each Commer-

cial Division to determine whether the local ADR rules can be revised to provide a five (5) business day deadline to agree upon a mediator before one is appointed by the court.

COMMENTS

The Section strongly agrees that confidence in the competence and experience of a mediator is essential to the mediation process, and that allowing party-selection of a mediator facilitates that confidence. The proposed amendment does not provide a firm deadline for party-selection of a mediator, thereby allowing each Commercial Division in the State to adopt its own rule to facilitate party-selection. Therefore, the Section recommends that the proposed amendment to Rule 3(a) be adopted, and agrees that the OCA and State ADR Coordinator should coordinate with local ADR Administrators to determine whether a five (5) business day deadline for party-selection of a mediator can be implemented.

Section Committees and Chairs

Arbitration and ADR
Charles J. Moxley Jr.
MoxleyADR LLC
850 Third Avenue, 14th Fl.
New York, NY 10022
cmoxley@moxleyadr.com

Jeffrey T. Zaino
American Arbitration Association
150 East 42nd Street, 17th Floor
New York, NY 10017
zainoj@adr.org

Antitrust Litigation
Jay L. Himes
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
jhimes@labaton.com

Laura E. Sedlak
Sills Cummis & Gross
One Riverfront Plaza
Newark, NJ 07102
lsedlak@sillscummis.com

Appellate Practice
Suzanne O. Galbato
Bond Schoeneck & King PLLC
One Lincoln Center
Syracuse, NY 13202
sgalbato@bsk.com

Civil Practice Law and Rules
Thomas C. Bivona
Milbank Tweed Hadley McCloy LLP
28 Liberty Street, 45th Fl.
New York, NY 10005-1413
tbivona@milbank.com

Helene R. Hechtkopf
Hoguet Newman Regal & Kenney, LLP
10 East 40th Street
New York, NY 10016-0301
hhechtkopf@hnrklaw.com

Civil Prosecution
Neil V. Getnick
Getnick & Getnick LLP
521 Fifth Avenue, 33rd Fl.
New York, NY 10175
ngetnick@getnicklaw.com

Richard J. Dircks
Getnick & Getnick
521 5th Ave., 33rd Fl.
New York, NY 10175
rdircks@getnicklaw.com

Commercial Division
Teresa M. Bennett
Barclay Damon LLP
Barclay Damon Tower
125 East Jefferson Street
Syracuse, NY 13202
tbennett@barclaydamon.com

Mark Arthur Berman
Ganfer & Shore LLP
360 Lexington Avenue, 14th Fl.
New York, NY 10017-6502
mberman@ganfershore.com

Matthew R. Maron
The Trump Organization
725 Fifth Avenue, 26th Fl.
New York, NY 10022
mmaron@trumporg.com

Continuing Legal Education
Kevin J. Smith
Shepherd Mullin Richter &
Hampton LLP
30 Rockefeller Plaza
New York, NY 10112
KJSmith@sheppardmullin.com

Corporate Litigation Counsel
Robert J. Giuffra Jr.
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004-2400
giuffrar@sullcrom.com

Michael W. Leahy
American International Group, Inc.
80 Pine Street, 13th Fl.
New York, NY 10005
michael.leahy2@aig.com

Creditors' Rights and Banking Litigation
Alan J. Brody
Greenberg Traurig LLP
500 Campus Drive
Florham Park, NJ 07932
brodya@gtlaw.com

Sheryl P. Giugliano
Diamond McCarthy LLP
489 Fifth Avenue, 21st Fl.
New York, NY 10017
sgiugliano@diamondmccarthy.com

James Carlton Thoman
Hodgson Russ LLP
140 Pearl St., the Guaranty Bldg.
Buffalo, NY 14202
jthoman@hodgsonruss.com

Diversity and Inclusion
Sylvia Ometa Hinds-Radix
NYS Appellate Division, 2d Department
320 Jay Street
Brooklyn, NY 11201
shradix@nycourts.gov

Carla M. Miller
Universal Music Group
1755 Broadway, 4th Fl.
New York, NY 10019
carla.miller@umusic.com

Electronic Discovery
Michael L. Fox
Mount Saint Mary College
School of Business
330 Powell Avenue
Newburgh, NY 12550
michael.fox@msmc.edu

Maura R. Grossman
Maura Grossman Law
133 Park Street, Unit 306
Waterloo, ON N2L 0B2
Canada
maura@grossman.com

Employment and Labor Relations
Louis P. DiLorenzo
Bond, Schoeneck & King, PLLC
600 Third Avenue, 22nd Fl.
New York, NY 10016
dilorel@bsk.com

Gerald T. Hathaway
Drinker Biddle & Reath
1177 Avenue of the Americas, 41st Fl.
New York, NY 10036
gerald.hathaway@dbr.com

Ethics and Professionalism
Anthony J. Harwood
Harwood Law PLLC
488 Madison Avenue, 18th Fl.
New York, NY 10022
tony.harwood@aharwoodlaw.com

Anne B. Sekel
Foley & Lardner LLP
90 Park Avenue
New York, NY 10016-1301
asekel@foley.com

Federal Judiciary
Jay G. Safer
Wollmuth Maher & Deutsch LLP
500 Fifth Avenue
New York, NY 10110
JSafer@wmd-law.com

Dawn Kirby
DelBello Donnellan Weingarten
Wise & Wiederkehr, LLP
One North Lexington Ave, 11th Fl.
White Plains, NY 10601
dkirby@ddw-law.com

Federal Procedure
Michael C. Rakower
Rakower Law PLLC
488 Madison Ave, 18th Fl.
New York, NY 10022
mrakower@rakowerlaw.com

Stephen T. Roberts
Mendes & Mount, LLP
750 Seventh Avenue
New York, NY 10019-6829
stephen.roberts@mendes.com

Hedge Fund and Capital Markets Litigation
Benjamin R. Nagin
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019-6018
bnagin@sidley.com

International Litigation
Clara Flebus
New York Supreme Court,
Appellate Term
60 Centre Street, Room 401
New York, NY 10007
clara.flebus@gmail.com

Internet and Intellectual Property Litigation
Joseph V. DeMarco
DeVore & DeMarco, LLP
99 Park Avenue, Room 1100
New York, NY 10016
jvd@devoredemarco.com

Peter J. Pizzi
Walsh Pizzi O'Reilly Falange LLP
One Newark Center
1085 Raymond Boulevard
Newark, NJ 07012
ppizzi@thewalshfirm.com

Legislative and Judicial Initiatives
Vincent J. Syracuse
Tannenbaum Helpern Syracuse
& Hirschtritt LLP
900 Third Avenue, 17th Fl.
New York, NY 10022-4728
syracuse@thsh.com

Nominations
Melanie L. Cyganowski
Otterbourg P.C.
230 Park Avenue
New York, NY 10169
mcyganowski@otterbourg.com

Publications
Mark Davies
11 East Franklin Street
Tarrytown, NY 10591-4116
MLDavies@aol.com

Daniel K. Wiig
Municipal Credit Union
22 Cortlandt Street
New York, NY 10007
daniel.wiig@yahoo.com

Securities Litigation and Arbitration
Jonathan L. Hochman
Schindler Cohen & Hochman LLP
100 Wall Street, 15th Fl.
New York, NY 10005-3701
jhochman@schlaw.com

James D. Yellen
Yellen Arbitration and Mediation
Services
156 East 79th Street, Suite 1C
New York, NY 10021-0435
jamesyellen@yahoo.com

Social Media
Ignatius A. Grande
Berkeley Research Group
810 Seventh Avenue, Suite 4100
New York, NY 10019
igrande@thinkbrg.com

Ronald J. Hedges
Ronald J. Hedges LLC
484 Washington Avenue
Hackensack, NJ 07601
r_hedges@live.com

State Court Counsel
Deborah E. Edelman
Supreme Court of the State of New York
80 Centre Street, Rm 112
New York, NY 10013
dedelman@nycourts.gov

Melissa A. Crane
NYS Supreme Court
71 Thomas Street, Room 304
New York, NY 10013
macrane@nycourts.gov

White Collar Criminal Litigation
Evan T. Barr
Fried, Frank, Harris, Shriver
& Jacobson LLP
One New York Plaza
New York, NY 10004
evan.barr@friedfrank.com

NEW YORK STATE BAR ASSOCIATION

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:
MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

JOIN A COMMITTEE

Rewarding Opportunities for Professional Growth

Committees serve as the laboratory for much of the Section's greatest work: reports, comments on pending legislation or rule changes, continuing education of the bench and bar, and receptions with leading figures in a practice area or in the judiciary.

Commercial and Federal Litigation Committees

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

___ Antitrust (FED1300)
___ Appellate Practice (FED1400)
___ Alternative Dispute Resolution (FED1200)
___ Civil Practice Law and Rules (FED1900)
___ Civil Prosecution (FED2000)
___ Commercial Division (FED5200)
___ Commercial Division Law Report (FED6700)
___ Commercial Jury Charges (FED7700)
___ Continuing Legal Education (FED1020)
___ Corporate Litigation Counsel (FED6600)
___ Creditors' Rights and Banking Litigation (FED2700)
___ Diversity (FED6100)
___ Electronic Discovery (FED6400)
___ Employment and Labor Relations (FED3000)
___ Ethics and Professionalism (FED4300)
___ Federal Judiciary (FED3200)
___ Federal Procedure (FED3300)
___ Hedge Fund and Capital Markets Litigation (FED7600)
___ International Litigation (FED3600)
___ Internet and Intellectual Property Litigation (FED6900)
___ Legislative and Judicial Initiatives (FED7400)
___ Membership (FED1040)
___ Mentoring (FED7300)
___ Publications Committee (FED7800)
___ Securities Litigation and Arbitration (FED4600)
___ Social Media (FED7500)
___ State Court Counsel (FED5700)
___ State Judiciary (FED4700)
___ White Collar Criminal Litigation (FED6800)

NYSBA

NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
One Elk Street, Albany, New York 12207-1002

Legacy donors provide a better tomorrow for generations of New Yorkers in need.
Your gifts help the Foundation fund charitable and educational law-related projects in perpetuity – safeguarding access to justice and the rule of law in New York State.

A Legacy Gift is the greatest honor that a donor can bestow upon the Foundation.
Please join these guardians of justice by making a bequest or establishing a planned gift to the Foundation of $1,000 or more.

Call the Foundation at **518/487-5650** for more information or download the form at **www.tnybf.org/legacysociety**.

THE NEW YORK BAR FOUNDATION
Advancing Justice and Fostering the Rule of Law