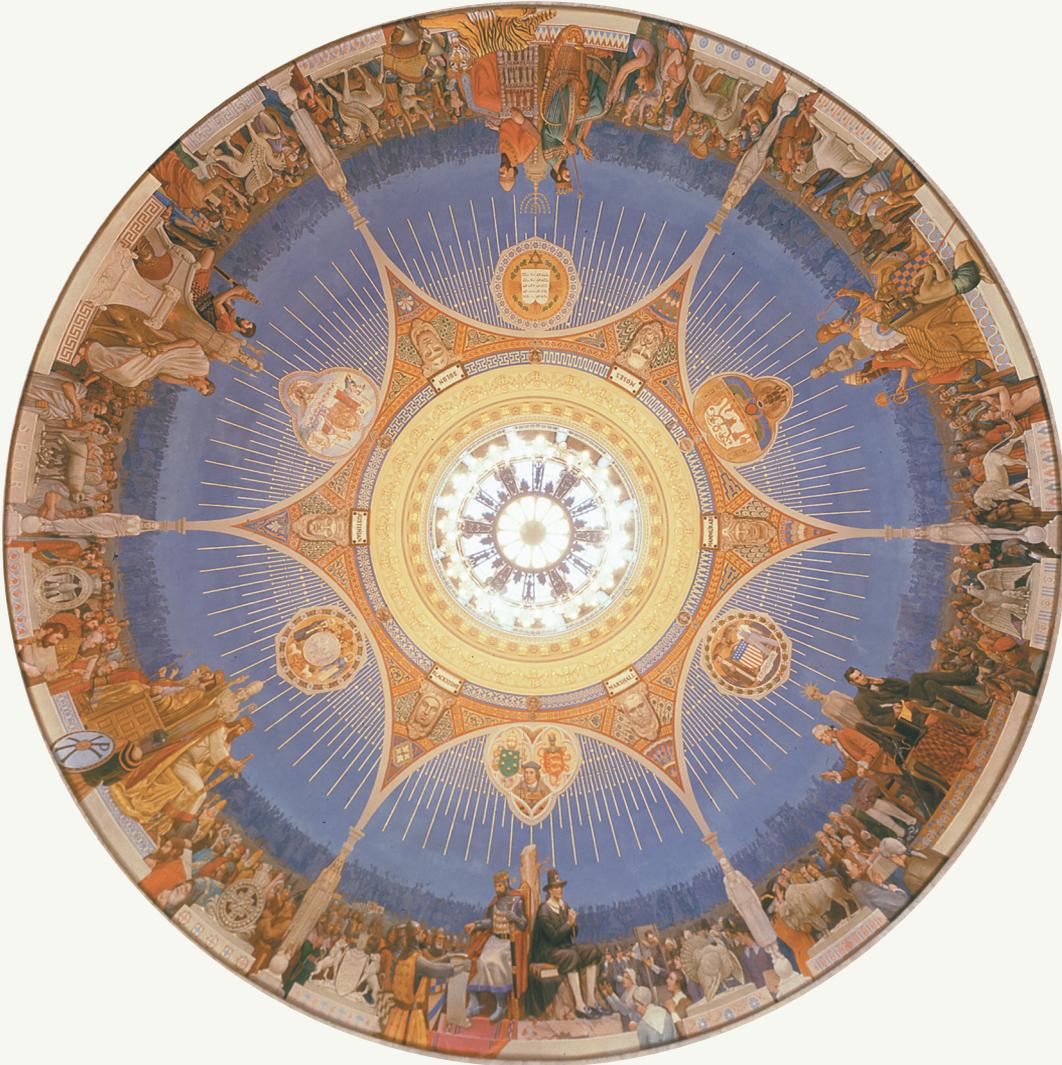


THE COMMERCIAL DIVISION *of the*
SUPREME COURT *of the* STATE *of* NEW YORK

AN EFFICIENT AND COST-EFFECTIVE FORUM
FOR THE RESOLUTION OF BUSINESS DISPUTES



GOOD FOR BUSINESS — GOOD FOR NEW YORK

MAY 2015

**JUSTICES OF THE
COMMERCIAL
DIVISION
of the SUPREME
COURT OF THE STATE
OF NEW YORK**

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KINGS COUNTY

Hon. Carolyn E. Demarest

Hon. David I. Schmidt

Hon. Martin M. Solomon

NASSAU COUNTY

Hon. Stephen A. Bucaria

Hon. Vito M. DeStefano

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Hon. Elizabeth Hazlitt Emerson

Hon. Emily Pines

Hon. Jerry Garguilo

WESTCHESTER COUNTY

Hon. Alan D. Scheinkman

Hon. Linda S. Jamieson

SEVENTH JUDICIAL DISTRICT

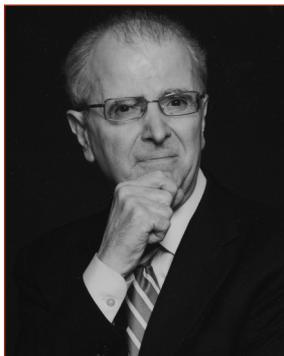
Hon. Matthew A. Rosenbaum

EIGHTH JUDICIAL DISTRICT

Hon. Timothy J. Walker

MESSAGE FROM *the* CHIEF JUDGE

FROM THE EARLIEST DAYS OF OUR REPUBLIC, a crucial connection has existed between the quality of our court system and the well-being of our State and national economies. Litigation is a major cost of doing business in any society guided by the rule of law, and the business community — and the public — can only benefit when the courts are capable of



handling business disputes in an efficient, cost-effective and reliable manner. I am proud that, here in New York State over the last two decades, the Commercial Division of the State Supreme Court has become an internationally respected forum for the resolution of business disputes. Since 1995, the Division has transformed the ability of New York's courts to handle complex commercial matters, has continuously provided expert, efficient, innovative dispute resolution services for New York's expanding business community, and has contributed substantially to the preservation of our State's reputation as an international commercial center.

While our State courts face many daunting challenges, including immense dockets and limited resources, we must never retreat from our longstanding commitment to provide a judicial forum for business litigation commensurate with New York's status as a global leader of business and finance. I look forward to working with our partners in government, the New York State Business Council and the State's business and legal communities to ensure that the Commercial Division continues to flourish as a respected and attractive venue for commercial litigation.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Lippman". The signature is fluid and cursive, with a long horizontal flourish at the end.

JONATHAN LIPPMAN

CHIEF JUDGE OF THE STATE OF NEW YORK

MESSAGE FROM THE BUSINESS COUNCIL of NEW YORK STATE, INC.

THE BUSINESS COUNCIL OF THE STATE OF NEW YORK is pleased to join Chief Judge Jonathan Lippman and Chief Administrative Judge A. Gail Prudenti in a breakfast presentation focused on the Commercial Division of the Supreme Court.

Established formally in 1995 to provide a cost-effective and predictable forum for the resolution



of complex business disputes — with a cadre of judges who are experienced and expert in this specialized field — the Commercial Division has continuously embraced innovations that commercial litigants want and need. The Commercial Division has earned widespread praise as demonstrably good for business and good for New York and has served as a case study of how the courts and the business community can work together to foster greater expertise and efficiency in commercial litigation through innovative dispute resolution services.

The underlying theme of today's breakfast is: How can we continue working together to ensure that the Commercial Division remains strong and vibrant and continues to succeed in meeting the needs of the business community?

Yours truly,

A handwritten signature in black ink that reads "Heather C. Briccetti".

HEATHER C. BRICCETTI, ESQ.
PRESIDENT & CEO

A BRIEF HISTORY *of the* COMMERCIAL DIVISION

IN 1993, THE CIVIL BRANCH OF THE NEW YORK COUNTY SUPREME COURT established four experimental Commercial Parts designed to test whether specialized handling of commercial litigation would improve the efficiency and quality of judicial treatment of those cases. In January 1995, the experiment's success prompted the Commercial and Federal Litigation Section of the New York State Bar Association (NYSBA) to recommend establishing a Commercial Division of the Supreme Court in those areas of the State with a significant volume of commercial litigation. In response, then Chief Judge Judith S. Kaye created the Commercial Courts Task Force to develop a blueprint for implementation.

On November 6, 1995, the Commercial Division officially opened its doors in New York and Monroe Counties. By its first anniversary, 6,500 new cases were filed in the Division in New York County alone, and the Division as a whole showed excellent results in case processing times and pre-trial settlements. Since 1995, the Division has expanded to meet growing demand and today encompasses 29 Commercial Division Justices presiding in ten different jurisdictions: Albany, Kings, Nassau, New York, Onondaga, Queens, Suffolk and Westchester Counties as well as the entire Seventh and Eighth Judicial Districts. Thus, commercial cases in the New York State courts are now assigned to judges who are interested in handling these types of cases and have the experience and expertise to do so capably and efficiently. Moreover, removing these complex, motion-heavy cases from the general docket has relieved pressure on other court parts, enabling them to devote more time to non-commercial cases. The result of these changes is that all parts of the court system function better.

The Commercial Division's strong growth over the last two decades reflects the commercial bar's and business community's confidence in the efficiency and quality of the Division's work. The NYSBA's Commercial and Federal Litigation Section referred to the Division as "a case study in successful judicial administration." The Business Council of New York State described it as "the envy of businesses in other states." The American Corporate Counsel Association urged other states to emulate New York's Commercial Division. And the ABA's Business Law Section hailed it as a model for specialized business courts everywhere. In 2006, the NYSBA Commercial and Federal Litigation Section awarded its prestigious Stanley H. Fuld Award to the entire Commercial Division.

KEYS TO SUCCESS

- **JUDICIAL EXPERTISE.** The assignment of well-qualified jurists to specialize in hearing commercial cases has fostered deep judicial expertise, improved the quality and consistency of decision-making, and contributed to the development of a comprehensive and reliable body of decisional law.
- **CASE MANAGEMENT.** Motion practice and disclosure in commercial cases can be complex, protracted and expensive. The Division emphasizes close judicial oversight and vigorous case management. Early preliminary conferences enable judges to lay out a roadmap with timetables for discovery, dispositive motions and trials. Deadlines are set and enforced. Discovery is managed with proportionality in mind, balancing the parties' rights to fair disclosure with minimizing expense and delay.
- **ADVANCED TECHNOLOGY.** From its inception, the Commercial Division has used advanced technology to help manage its caseload efficiently. It pioneered case management software, now in use Statewide, that enables judges to track each case closely and enforce deadlines. New York County's high-tech, computer-integrated Courtroom for the New Millennium has long been home to the most complex commercial trials, featuring, among others, real-time court reporting, electronic evidence presentation, and computer monitors for jurors, witnesses and counsel.
- **ELECTRONIC FILING.** The Division has been a leading force behind the growth of e-filing in the New York courts. Today, all newly-filed Commercial Division cases in Erie, Kings, Nassau, New York, Suffolk and Westchester Counties are subject to e-filing.
- **ELECTRONIC DISCOVERY.** Although the CPLR does not specifically address e-discovery, the Commercial Division has been at the forefront in developing rules and guidelines that require the parties to focus on e-discovery-related issues early in the case and be prepared to discuss and resolve those issues at the court's preliminary conference.
- **ADR.** The Commercial Division has always made innovative use of ADR to promote pre-trial settlements. Justices may refer cases to ADR at any time. Detailed rules and protocols and rosters of seasoned ADR neutrals have been established in most jurisdictions around the State.
- **UNIFORMITY.** In 2006, the court system adopted Statewide uniform rules governing the Commercial Division's jurisdiction and procedures, thus fostering greater predictability of practice for the commercial bar in many key areas, including motion practice, e-discovery, pretrial conferences, and eligibility criteria for categories of cases that may be heard in the Division.

MOVING INTO *the* 21ST CENTURY

IN 2012, CHIEF JUDGE JONATHAN LIPPMAN ANNOUNCED the creation of the Task Force on Commercial Litigation in the 21st Century, co-chaired by former Chief Judge Judith S. Kaye and distinguished commercial practitioner Martin Lipton. In an effort to build upon and ensure the Division's continued success as a desirable forum for business litigants, the Task Force was charged with setting "a new vision for how we in the New York State court system might better serve the needs of the business community and our state's economy."

The Task Force's 2012 Report offered numerous recommendations to improve the Division in six basic areas. In response to one of these recommendations, Chief Judge Lippman named a permanent Commercial Division Advisory Council in 2013 to advise him on all matters pertaining to the Commercial Division. Chaired by Robert L. Haig, Esq., the Advisory Council consists of sitting Commercial Division Justices, corporate in-house counsel and distinguished commercial practitioners from around the state.

Thanks to the Task Force's long-term vision and the Advisory Council's practical guidance, the Commercial Division has benefitted from an unprecedented series of reforms to streamline litigation, improve efficiency, enhance judicial expertise and limit litigation expense. Highlights include:

- **Limitations on depositions.** Rule 11-d establishes presumptive limitations on the number and duration of depositions: 10 per side and seven hours per deponent.
- **Limitations on interrogatories.** Under Rule 11-a, the number of interrogatories a party may serve is limited generally to 25, with their scope limited to names of witnesses having material and necessary information, computation of damages, and description and location of material and necessary documents and physical evidence.
- **Limitations on privilege logs.** Rule 11-b creates a preference for categorical designations of privileged documents. This cost-saving measure greatly reduces the time and expense associated with document-by-document logging. Parties are expected to discuss privilege log issues as part of the meet and confer process.

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- **Accelerated adjudication procedure.** Rule 9 enables the parties to agree by contract to resolve disputes through an accelerated adjudication procedure whereby all pretrial proceedings are to be completed within nine months provided the parties agree to limited discovery and waive their rights to a jury trial, punitive damages, interlocutory appeals and certain procedural defenses.
 - **E-Discovery Involving Nonparties.** To reduce the costs and burdens of e-discovery for nonparties, the Division issued guidelines emphasizing proportionality, listing specific factors the parties should consider in crafting e-discovery requests, and addressing the circumstances under which a nonparty's reasonable production costs should be defrayed.
 - **More timely and robust expert disclosure.** Rule 13 was amended to require parties to disclose expert witnesses within 30 days of completion of fact discovery. Parties must set a schedule for exchange of expert reports and deposition of testifying experts, which are to be completed within four months after completion of fact discovery. Rule 8 requires counsel to discuss the timing and scope of expert disclosure and confer on e-discovery issues before the preliminary conference. These changes enable parties to assess the issues quickly and thoroughly, helping them make settlement decisions early in the litigation process.
 - **Staggered court appearances.** To reduce unproductive attorney downtime caused by long calendar calls, Rule 34 implements staggered time slots for motion hearings.
 - **Responses and objections to document requests.** To foster clearer, more useful responses to document requests, Rule 11-e requires a party responding to a document request to state with specificity the grounds for any objection to production.
 - **Resolving disclosure disputes.** Rule 14 was amended to set forth guidelines supporting the Division's preference for resolving discovery disputes through letters and court conferences rather than formal motion practice.
 - **Settlement-related disclosure.** Discussion of any voluntary or informal exchange of information that the parties agree would help promote early settlement of the case was added to the list of topics upon which the parties are required to meet and confer.
 - **Mandatory mediation pilot.** Under a pilot program in New York County, every fifth case newly assigned to the Division is referred to mediation.

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- **Special Masters program.** This pilot program allows Justices, with the parties' consent, to refer complex discovery issues to a pool of Special Masters, consisting of seasoned former practitioners serving pro bono, who help narrow disputed issues and make recommendations to assist the court in resolving any remaining issues.
 - **International arbitration matters.** A single Justice has been designated to hear all applications for judicial relief in commercial international arbitration cases in New York County, ensuring that a judge experienced in such applications will be available to decide them quickly and knowledgeably.
 - **Increased monetary thresholds for commercial division cases.** The monetary threshold for new cases filed in New York County was raised from \$150,000 to \$500,000, and was doubled in nearly every other area of the State.

These reforms are helping the Commercial Division set a national standard for judicial excellence and efficiency in the resolution of complex business disputes, thereby enhancing New York's status as an attractive business venue.

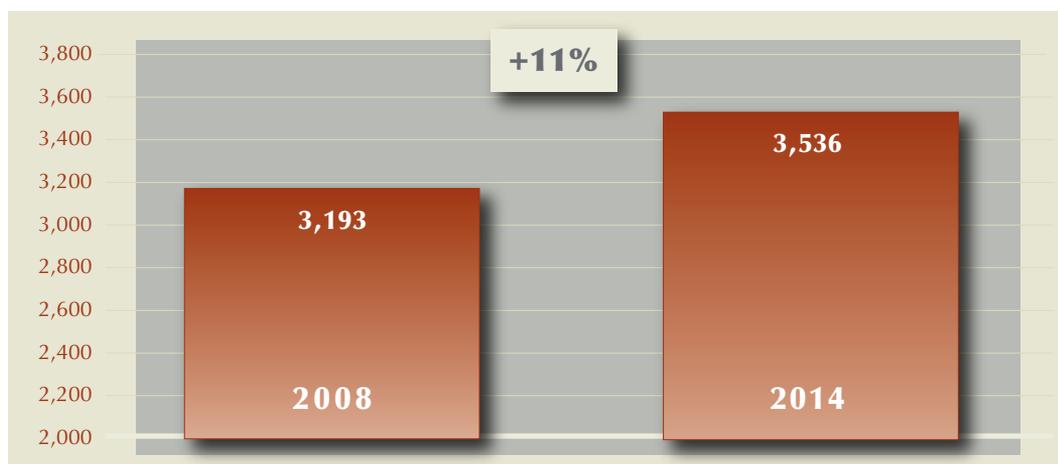
THE CHALLENGE *of* KEEPING *the* COMMERCIAL DIVISION STRONG

THE COMMERCIAL DIVISION HAS DONE MUCH to raise New York's profile as a nationally respected forum for resolution of complex commercial disputes. Businesses today routinely select New York as the forum of choice for their disputes, thus contributing greatly to New York's robust legal industry, which is so critical to job creation and the State's economic well-being.

Ironically, the Commercial Division's success now poses one of the greatest challenges to its future, as its popularity has led to significantly increased judicial workloads. Moreover, Commercial Division Justices and staff consistently report that cases are growing more complex and taking longer to resolve due to the cutting-edge legal issues presented, a dramatic increase in motion practice and the need to oversee massive discovery involving multiple parties, dozens of depositions and millions of documents.

Since 2008, case dispositions in the Commercial Division have increased by 11% Statewide. In other words, the same number of Justices are disposing of considerably more cases.

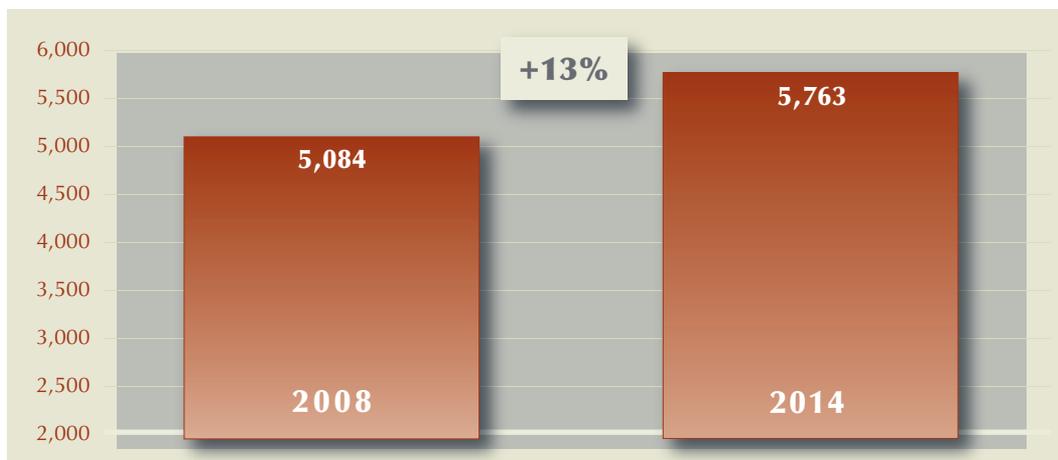
Cases Disposed Statewide



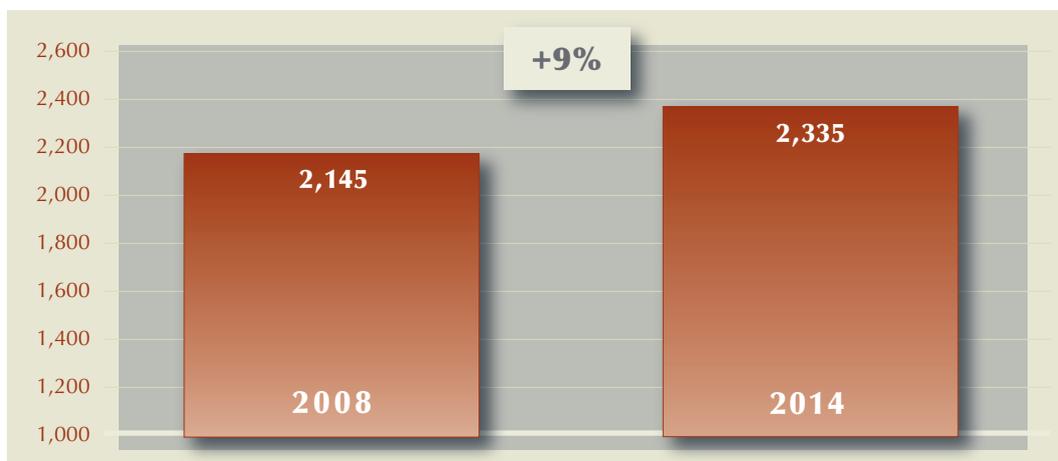
At the same time, however, the number of cases pending in the Division has risen 13% Statewide, including 9% in New York County. Thus, even though the Justices have risen to

the challenge and substantially increased their productivity, they still face an uphill battle in keeping up with increasing caseloads.

Cases Pending Statewide

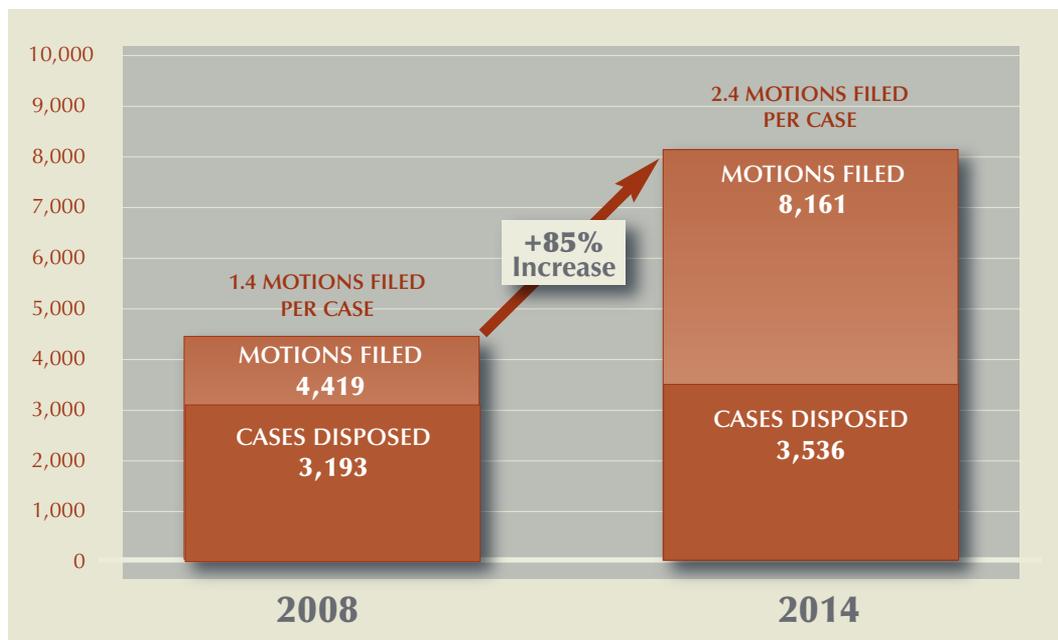


Cases Pending NY County



The main reason for the rising number of pending cases is the dramatic increase in motion practice since 2008, as shown below. Motion practice can be extremely complex and time consuming and comprises much of the activity in the Commercial Division. Over the last six years, the number of motions filed in the Division increased by 85% across the State and by 84% in New York County.

**Statewide
Increase in
Motions 85%**



The Justices of the Commercial Division are doing their part and working harder to avoid backlogs, but the rapidly escalating number of motions makes it difficult to gain ground. With burgeoning dockets in so many areas and a finite number of judges at its disposal, the court system's ability to assign additional judges to the Commercial Division is severely limited. Additional judicial resources are essential to the continued success and future vitality of New York's preeminent business court.

CONCLUSION

THE NEW YORK STATE COURT SYSTEM IS FULLY COMMITTED to maintaining the high standing and reputation of the Commercial Division. We have worked tirelessly to implement dozens of improvements to better address the litigation needs of the business community and maintain a strong connection between the quality of our courts and the health of the State economy. We have enjoyed two decades of success in providing an efficient and effective forum for resolving business disputes and serving as a model for other states. But the Commercial Division is at a crossroads. We must ensure that the Division has the judicial resources it needs to keep growing and adapting to the challenges of a rapidly changing business world and increasing dockets. As we move forward to meet these challenges, we need the support of New York's business community, the commercial bar and our partners in government.

CASE SUMMARIES

A KEY MEASURE OF THE DIVISION'S SUCCESS has been the development of a comprehensive and predictable body of jurisprudence that is guiding the commercial bar, influencing business transactions and drawing commercial litigants and lawyers back to the New York courts. When judges specialize in a discrete area of law and regularly face similar issues, they have every incentive to engage in the kind of in-depth research and thinking that promotes not only cutting-edge judicial expertise but the coherent articulation and development of commercial law — a critical factor contributing to greater predictability surrounding decision making on important business and corporate governance matters.

A brief sampling of recent decisions confirms the Commercial Division's role in resolving important, complex commercial disputes reflecting the latest issues and trends in American commercial law.¹

Ferolito v. Arizona Beverages USA, LLC (2014 WL 5834862, Nass. Co. 2014, Driscoll, J.) is indicative of the complex, high-stakes disputes heard in the Division. This hybrid action for dissolution of several limited liability companies and a corporation is believed to be the largest civil case in Nassau County history and the largest litigated valuation case in State history (approximating \$1 billion). The court considered and rejected several valuation models in favor of a discounted cash flow methodology while employing a discount for lack of marketability. The parties (1) presented affidavits of their witnesses in lieu of live, direct testimony (witnesses underwent live cross-examination and redirect); and (2) had a limited amount of in-court time (50 hours per side) to present their case. This protocol enabled a complex trial involving 36 witnesses and tens of thousands of exhibit pages to be completed in less than six weeks.

MBIA Insurance Corp. v. Countrywide Home Loans, Inc. (40 Misc. 3d 643, N.Y. Co. 2013, Bransten, J.). Financial guaranty insurer sued originator of residential mortgage loans and bank that acquired originator, claiming originator breached contracts and fraudulently induced insurer to cover numerous residential mortgage-backed securitizations, and asserting successor liability claim against bank. The court's decision analyzed the legal standards pursuant to which a corporation may be held liable for the torts of its predecessor; addressed choice of law issues involving an asserted conflict between New York and

¹ A searchable electronic database of hundreds of Commercial Division decisions is available on the New York State Law Reporting Bureau web site at http://www.nycourts.gov/reporter/slipidx/com_div_idxtable.shtml.

Delaware law relating to the de facto merger doctrine; and applied the de facto merger doctrine to the facts of the case before finding that genuine issues of material fact precluded summary judgment in the plaintiff's favor.

Dorothy G. Bender Foundation, Inc. v. Carroll (40 Misc. 3d 1231[A], N.Y. Co. 2013, Kornreich, J., aff'd 126 A.D. 3d 585, 1st Dept. 2015). An art dealer arranged with two separate buyers, John McEnroe and Morton Bender, to purchase the same two paintings by Arshile Gorky, "Pirate I" and "Pirate II." The dealer then conveyed "'Pirate II" to the defendant without the plaintiffs' knowledge in exchange for other artwork. After the dealer's conviction of grand larceny, the plaintiffs agreed to become equal partners in "Pirate I," and then together brought an action for replevin of Pirate II. After a bench trial, the court ruled that plaintiffs were the true owners of Pirate II, as the defendant acquired the painting in a grossly undervalued transaction and made no inquiry as to the dealer's authority to sell the work despite behavior by the dealer marking a departure from their normal course of dealings. By disregarding these red flags, defendant did not observe the "reasonable commercial standards of the art trade," and therefore was not entitled to the usual protections of the Uniform Commercial Code.

Trilegiant Corp. v. Orbitz, LLC (40 Misc. 3d 348, N.Y. Co., 2014, Ramos, J.). This breach of contract action arose from Orbitz's early termination of a contract involving use of DataPass, an arrangement whereby in exchange for commissions Orbitz marketed Trilegiant's services to its customers and transferred their credit card billing data to Trilegiant upon enrollment in the latter's services. The contract provided for early termination by Orbitz upon its making periodic payments totaling over \$18 million. Orbitz terminated the contract in 2007 based on widespread consumer dissatisfaction with DataPass, and later stopped its termination payments in 2010 after Trilegiant discontinued DataPass. The court held that Orbitz's promise to make early termination payments was supported by adequate consideration as a whole at the time the contract was executed, even though Trilegiant was no longer forfeiting potential earnings from DataPass after 2010. Trilegiant did not have to show it was ready, willing and able to perform under the contract before it could sue Orbitz, and the contract was not rendered unenforceable by Congress's passage of the Restore Online Shoppers' Confidence Act, which was enacted primarily to protect consumers, not marketers, from DataPass.

People by Eric T. Schneiderman v. Credit Suisse Securities (USA) LLC (2014 WL 7665038, N.Y. Co. 2014, Friedman, J.). In this enforcement action for damages and injunctive relief under the Martin Act—New York's Blue Sky law authorizing the Attorney General to investigate and enjoin fraudulent practices in the marketing of securities – the

court held that a six-year statute of limitations applied to the Attorney General's allegations that defendants and related entities committed fraudulent and deceptive acts in connection with sale of residential mortgage-backed securities. Defendants moved to dismiss on the ground that the action was time-barred under CPLR 214(2)'s three-year statute of limitations applicable to actions to recover upon a liability or penalty. The court denied the defendant's motion after surveying the law and finding substantial authority to apply the six-year statute of limitations for fraud where the essence of plaintiff's claims sought to impose liability based on the longstanding common-law tort of investor fraud.

Keyspan Gas East Corp. v. Munich Reinsurance, Inc. (46 Misc. 3d 395, N.Y. Co. 2014, Scarpulla, J.). Keyspan brought an action seeking a declaration that defendant insurers were obligated to indemnify it for environmental cleanup costs at two former gas plant sites under eight excess liability policies issued to LILCO, Keyspan's predecessor, from 1953 to 1969. The court held that where environmental damage occurs over many decades triggering multiple sequential policies and insurers and it is virtually impossible to parse out the exact amount of property damage occurring during each policy period, the insurers' coverage obligations would be fixed through a pro rata time on the risk allocation, which requires costs to be allocated according to the number of years that each insurer was on the risk, with liability prorated to Keyspan for those years dating back to 1882 when no insurance coverage was in place.

TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC (Ind. No. 652044/2014, N.Y. Co. 2014, Marks, J.). In this long-running dispute between the Washington Nationals and the Baltimore Orioles involving tens of millions of dollars in annual network rights payments from the Mid-Atlantic Sports Network, which the teams co-own, the court granted a preliminary injunction preventing Major League Baseball (MLB) from terminating the network rights agreement and enforcing an MLB arbitration panel award providing for more favorable broadcast rights payments to the Nationals.

Eric Woods, LLC v Schrade (45 Misc. 3d 1206[A], Alb. Co. 2014, Platkin, J.). In granting a preliminary injunction to enforce the terms of a covenant against competition given in connection with the sale of an insurance agency, the court reviewed New York law governing enforcement of a covenant not to compete ancillary to the sale of an ongoing business involving a transfer of good will. The court found the covenant was enforceable in scope and duration as it served to reasonably protect plaintiff's legitimate interest in the enjoyment of a valuable asset and gave him time to foster relationships with his purchased client base free of the seller's interference.

