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Commercial and Federal Litigation Section Newsletter

A publication of the Commercial and Federal Litigation Section of the New York State Bar Association

Message from the Outgoing Chair

David H. Tennant

What a great honor and privilege to have had a turn at the helm of the Section, working closely with Tracee Davis and the other talented and collegial group of officers, committee chairs, and members—often in committees, working groups, and task forces. (And I thought Presbyterians held lots of meetings!) JetBlue and AirTrain became a regular commute from Rochester to New York City, but the Section made noteworthy strides in shortening distances by technology. Videoconferencing connected an Executive Committee meeting—hosted in Buffalo—with Rochester, Syracuse, Albany, Binghamton, and New York City, and also united three "thruway communities" for an upstate "tri-city" CLE program (linking Syracuse, Rochester, and Buffalo courthouses). We got a glimpse of the future as

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Message from the Incoming Chair

Tracee E. Davis

I am honored and privileged to have the rare opportunity to lead what I believe is the most dynamic Section of any bar association. The Commercial and Federal Litigation Section has a long and extraordinary history of achieving fundamental changes in the substance and practice of commercial law. From its ground-breaking work in the formation of the New York State Commercial Division to the substantive reform of various state and federal laws, the Section's reputation as a thought leader and instigator of change has only grown, and certainly not by chance. Great legal luminaries, from the Section's founding chair, Bob Haig, to our immediate Past Chair, David Tennant, have tirelessly dedicated their services to our Section and the bar. I am humbled, and at the same time thrilled, to be placed in their com-

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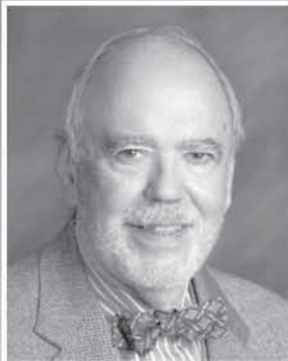
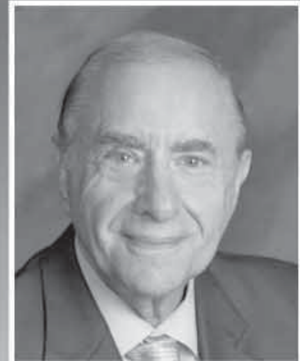


Hon. Francis G. Conrad
Judge of the Federal Bankruptcy Court - Retired; Certified Public Accountant

Hon. John P. DiBlasi
Justice of the Supreme Court, Westchester - Retired; Ranked by the New York Law Journal in 2010 and 2011 as one of the top two mediators in New York State

Hon. Ira Gammerman
Justice of the Supreme Court, New York - Retired



Hon. Howard Miller
Assoc. Justice, Appellate Division, 2nd Department, Rockland - Retired

A sample of cases resolved by our commercial panel:

- Claim against indenture trustees for not making appropriate claims in bankruptcy of major airline, resulting in loss of $75 million.
- Dispute between two hedge funds and Russian mathematicians concerning codes and models involving statistical arbitrage.
- Alleged breach of fiduciary duty by lawyers hired to represent former finance minister of oil-rich country.
- Accounting malpractice claim by high-income clients based on tax shelter recommendations made by national accounting firm.
- Dispute between satellite company and giant entertainment network about appropriate charges for television channels.
- Commercial libel and tortious interference claim on media personality's contract covering his on-air statements.
- Dispute concerning control of a magazine between popular television host and publishing company.
- Dispute between prominent film maker and financial backer concerning allocation of costs and profits on a series of six movies.
- Dispute between a landowner and a municipality regarding road construction and drainage easement.
- Dispute about quality of manuscript submitted by popular author and book publisher.
- Brokerage fee dispute involving properties sold for over of $20 million.
- Breach of an agreement to insure against the criminal acts of Bernard Madoff in his capacity of financial advisor/security broker which resulted in an investor loss in excess of $20 million.
- Fraud and breach of contract involving the construction of a large condominium.

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the video and audio connections worked flawlessly and brought Section members together. Such technological advances will allow the Section to project its presence and programming to all four corners of the state, making this preeminent Section of the bar relevant and attractive to commercial litigators everywhere.

An outgoing chair's message naturally is backward-looking. But as I look back on the past twelve months I am struck in equal measure by what has been added to the foundation of the Section for the future. In addition to making a renewed commitment to increasing our membership upstate, the Section is poised to continue two other significant initiatives established over the course of the past year: (1) the work of the faster-cheaper-smarter working group and (2) the minority moot court program to attract undergraduate students of color to law school.

More Faster-Cheaper-Smarter

The mantra of "faster-cheaper-smarter" ("FCS") has been invoked by judges at CLEs and by former State Bar President Steve Younger in the House of Delegates, and is captured in the final report of the FCS Working Group, adopted by the Section on June 12. The report identifies five specific initiatives to reduce the time-line and cost of traditional litigation: (1) aggressive early neutral evaluation; (2) expanded mediation; (3) automatic non-binding arbitration in the Commercial Division for cases under a specified amount; (4) use of a neutral search facilitator to help with e-discovery; and (5) amendments to the CPLR re e-discovery. The complete report is available on the Section's website at http://www.nysba.org/ComFedFasterCheaperSmarter. The "Davis Administration" is exploring how to build upon and advance the FCS agenda and the recommendations of the Chief Judge's Task Force on Commercial Litigation in the 21st Century. The FCS Working Group's efforts dovetailed with the Chief Judge's Task Force and have given voice to client-centered reforms. I am deeply indebted to the FCS working group, especially the cadre of exceptional in-house counsel who drove the initiative under the leadership of Chair Mitchell F. Borger, Vice President and Associate General Counsel for Macy's Inc. I look forward to seeing how these ideas may be implemented.

A Pipeline Initiative for the Ages

Diversity and inclusion are woven into the fabric of our Section, with the groundbreaking Smooth Moves program leading the bar. This year saw another groundbreaking event as the Section established a model pipeline program at UB law school: a moot court program aimed at undergraduate students of color. The inaugural competition at UB Law School will provide a template for undergraduate minority moot court programs at other law schools in New York. This pipeline initiative is multi-cultural in design with all minority law student associations participating. We expect competitions to be organized at several other law schools this next year. The goal is to eventually establish this feeder program at each law school in New York, working with the State Bar and its Committee on Diversity and Inclusion. I am deeply indebted to my partner, Sheldon K. Smith, for organizing the UB Law program, and Justice Ariel Belen of the Appellate Division, Second Department, for promoting the pipeline program downstate.

At the end of the day, the Section's strength is its people. I am extremely grateful to have had the chance to serve the terrifically dedicated members of this Section.

Thank you.

David H. Tennant

(Continued from page 1)

pany. I am equally excited about the unique and significant opportunities facing us as the practice of commercial litigation undergoes enormous change.

Either as in-house litigators, outside counsel, or as members of the judiciary, we face the same universal challenge of resolving commercial disputes quickly and more efficiently while providing quality legal services that our consumers deserve. We have already started responding to this challenge by rethinking how to best resolve commercial disputes. Under former Chair David Tennant's leadership, we promulgated recommendations by our Faster, Cheaper, Smarter Working Group, which was insightfully chaired by Vice President and Associate General Counsel of Macy's Inc., Mitchell Borger, and included several members of our esteemed judiciary. We also participated in crafting the recommendations in the recently released report by Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century (on which I along with several former Section Chairs served as members). We have begun exploring ways to support the new case management techniques being implemented by the Southern District's Pilot Project for Complex Civil Cases.

During my term as Chair, I want to pursue the Working Group's recommendation of examining early mediation as a means of delivering more cost-efficient commercial dispute resolution. Because the same heightened emphasis on mediation can be found in the Southern District's recent initiatives, I want to create a similar working group to develop "best practices" for navigating cases through court-annexed mediation in the Southern and Eastern Districts of New York. By soliciting input from in-house counsel, members of the judiciary, and other Section members, all of whom play a crucial role in the process, we can distill those practices that enhance the ability of litigators to successfully handle the Southern and Eastern District's mediation processes. The end result should be a useful guide that assists us in delivering more cost efficient solutions to our clients and other stakeholders. I look forward to consulting with many of you and soliciting your input and ideas in the coming months.

On the state side, I have looked at the Task Force Report on Commercial Litigation in the 21st Century as a useful guide in continuing our tradition of lending ongoing support to New York's Commercial Division. As improvements are on the horizon, we have already begun laying the groundwork. To promote and support the legislative initiatives outlined in the Report, I will recommend that the Executive Committee establish a new standing committee called the Committee on Legislative and Judicial Affairs. The purpose of the Committee is: (a) to work in conjunction with NYSBA's Department of Governmental Relations and Committee on Legislative Policy to identify, monitor, and assess legislation or judicial initiatives that may impact substantive commercial litigation; (b) to devise strategies for the Section to lend its support or opposition to any legislation or judicial initiative of interest; and (c) to collaborate and coordinate with other Section committees in the development of affirmative legislation and judicial proposals. If my recommendation of establishing this new committee is adopted, former Section Chair Vince Syracuse will serve as the inaugural Committee Chair.

In response to a request for our input, we also will review and examine, in conjunction with the official Committee on Pattern Jury Instructions, the pattern instructions for commercial claims. With the assistance of Honorable Andrea Masley, former Section Chair Lauren J. Wachtler, and the Section's Appellate Practice Committee Co-Chair, Melissa Crane, we will consider the area in which enhancements might be made, and draft proposed revisions for consideration by the Committee on Pattern Jury Instructions of the Association of Supreme Court Justices of the State of New York. It is our goal to present our Section's recommendations to the PJI Committee by January.

As we move into the year of the Section's 25th Anniversary, I believe we should take stock of the Section's numerous contributions to the practice of commercial law by drafting a commemorative Section brochure. The Commercial and Federal Litigation Section offers excellent opportunities to enhance practitioners' professional skills and knowledge through committees and Section meetings while affording interaction with colleagues throughout the state and even internationally. A Section brochure will be a testament to this tradition, hopefully enticing other practitioners to join the ranks of our 2,230 members while celebrating the Section's enormous accomplishments.

These are just a few of many exciting projects which the Section will focus on this coming year. I welcome your contributions and support and that of the Section's Committees. The Section's Committees have always been at the forefront of developments in commercial litigation, and it is my great fortune to work with a highly talented and motivated team of Section Officers: Chair-Elect Gregory Arenson, Vice-Chair Paul Sarkozi, Treasurer James Wicks, and Secretary Rebecca Hollis. I am confident that, with their involvement, we will accomplish much this year.

If there are activities, professional reports, or specific CLE programs of interest to you, please do not hesitate to call me or send an email (tdavis@zeklaw.com). I look forward to meeting and working with as many Section members as possible during the months ahead.

Tracee E. Davis

Spring Meeting 2012

The Mohonk Mountain House was home to our Section's Spring Meeting, held May18-20, 2012. The weather, scenery, and mountain home were all perfect, providing an exceptional setting for education and camaraderie. Incoming Section Chair Tracee E. Davis, who organized and chaired the meeting, did a spectacular job in planning the event and graciously presiding over it. The Saturday evening gala dinner was attended by more than 112 judges, Section members, and their families.

The highlight of the meeting was the presentation of the Robert L. Haig Award for Distinguished Public Service by former Section Chair Vince Syracuse to the Honorable Theodore T. Jones, Jr. of the New York Court of Appeals.

Former Section Chair Vincent Syracuse presents the Robert Haig Award to Court of Appeals Judge Theodore T. Jones

Judge Jones was particularly proud to receive an award from the Commercial and Federal Litigation Section given that his career started in criminal court and he did not begin presiding over commercial cases until the mid-1990s.

Two other awards were bestowed. Section Chair David H. Tennant presented Chair Awards in recognition of outstanding contributions to the Section. Sheldon K. Smith received one award for his work in setting up and running the SUNY Buffalo Law School moot court for diverse undergraduates interested in the law, as well as for his efforts to recruit Section members upstate. Carla Miller received the Chair Award for her many contributions, including serving as co-chair of the Section's Diversity Committee, organizing and presenting the Section's

Section Chair David Tennant presents Service Award to Sheldon Smith

highly successful Smooth Moves program for diverse attorneys, and contributing her in-house perspective to the Faster Cheaper Smarter Working Group.

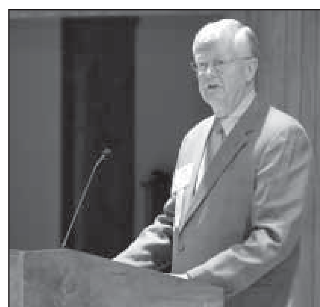
Section Chair David Tennant presents Service Award to Carla M. Miller

During the gala dinner, David summarized the Section's accomplishments during his year as Chair. Among those were the publication of the E-Discovery Guidelines, which David acknowledged was the brainchild of former Section Chair Jonathan Lupkin; the SUNY Buffalo Law School moot court "pipeline" program for diverse students, a program that will serve as a template for other schools; upstate recruitment efforts, including the Executive Committee meeting in Buffalo and upstate CLE program held simultaneously in three upstate cities featuring Commercial Division Justices and Magistrates Judges; and the report of the Faster Cheaper Smarter Working Group.

Incoming Chair Tracee E. Davis

Incoming Section Chair Tracee Davis thanked David for his year of leadership and contributions to the Section. Tracee also outlined the goals and initiatives that the Section would undertake in the year ahead. Among them are the creation of a Section brochure that describes the numerous contributions and practice tools that the Section has made to the bar over the last roughly 25 years; the targeted outreach to in-house counsel, including inviting them to speak at our monthly Executive Committee meetings; and the expansion of our support of the federal and state judiciary as they implement comprehensive initiatives for resolving complex commercial cases.

Friday Evening Festivities and CLE Program



NYSBA President-Elect David M. Schraver

The weekend opened with a banquet during which NYSBA President-Elect Designee David M. Schraver welcomed attendees to the Spring Meeting and encouraged them to become more involved in the Section and NYSBA activities.

The Section then offered a CLE program featuring Ursula Wynhoven, General Counsel of the United Nations Global Compact Office.

Ursula Wynhoven

Ursula described the efforts of the United Nations to encourage corporate social responsibility around the world. At the end of the CLE presentation, those remaining were treated to the 10th annual contemporary jazz program with former Section Chair Lesley Rosenthal on the violin and her husband, Ted Rosenthal, at the piano. It was a fitting and rousing end to the opening evening.

Saturday's Programs

Education of Section members was not neglected. The first Saturday morning panel focused on New York's competitiveness in international dispute resolution. Former Section Chair Jay Safer moderated a panel consisting of former Section Chair Jonathan Lupkin; Ted Semaya, Chair of the Section's International Litigation Committee; New York County Commercial Division Justice Charles E. Ramos; and former Bankruptcy Judge and NAM Arbitrator Francis Conrad.

(l to r) Ted Semaya, former Section Chair Jonathan Lupkin, Justice Charles E. Ramos, former U.S. Bankruptcy Judge Francis Conrad, and former Section Chair Jay G. Safer

Jay pointed out that New York's competitive advantage is the predictability and consistency of New York's well-developed business law. Ted emphasized that we must communicate these advantages. He noted that, from a foreigner's perspective, the impediments to using a New York forum are the cost and intrusiveness of United States-style discovery, the possibility of punitive damages, and the prospect of a jury trial. Jonathan explained that many things can be done to mitigate these negatives through contractual provisions but not in non-contractual business disputes. Ted responded that these issues can be managed through the concepts of materiality, relevance, and proportionality. Justice Ramos presented his recently adopted proposed stipulation to control discovery. Its purpose is to get the parties thinking about ways to limit

the cost and intrusiveness of discovery. It is an attempt to express proportionality by making discovery comparable to what is at stake in the case. Judge Conrad emphasized that a judge should take control of the case early and make decisions rather than drag the case out. He pointed out that you do not need that much information to try a case so that the parties do not need that much discovery. His view is that everyone wants speedy and decisive action by the court.

The second Saturday morning panel was moderated by Vince Syracuse. Panel members included former Section Chair Mark Zauderer; Jeremy Feinberg, Statewide Special Counsel for Ethics in the Office of Court Administration; James Walker; Judge Andrea Masley of the New York City Civil Court; and Justice Timothy Driscoll of the Nassau County Commercial Division.

Judge Andrea Masley, Statewide Special Counsel Jeremy Feinberg, James Q. Walker, Judge Timothy Driscoll and former Section Chair Mark C. Zauderer

This panel focused on ethics and civility in litigation. Mark pointed out that the Section's civility rules, when they were first promulgated and adopted by the State Bar as well as by the Courts, were merely precatory. However, case law has woven them into the fabric of the law in ways that are more than precatory. Vince commented that there is less civility in e-mails than in letters because e-mail is in a certain sense a substitution for a conversation. Jeremy emphasized two words: "e-mail yoga." He recommended that whenever one is ready to send an e-mail, the person should close his or her eyes and wait five seconds and think whether he or she really wants to send that e-mail. Jim advised on ethical rules concerning social media. In chat rooms, attorneys should not provide a tailored response directed toward being retained because that would run afoul of Rule 7.1 of the Rules of Professional Conduct. There is no confidentiality of communications in a chat room, and no conflict check would have been made. Nothing in the disciplinary rules specifically prohibits blogging about another lawyer if it is done truthfully, but the civility rules suggest it should not be done. Mining social media in the context of litigation to obtain information about others is allowed if done truthfully. That is, a lawyer may "friend" someone on Facebook, if he or she discloses that she is a lawyer. However, attorneys cannot "friend" potential or actual jurors.

Sunday's Programs

On Sunday morning, participants were treated to a riveting session on the News Corporation phone-hacking scandal. Joe DeMarco, Co-Chair of the Section's Internet and Intellectual Property Litigation Committee, moderated a panel that included Tyler Maroney, an investigator with the James Mintz Group; David Szuchman, Chief of the Cybercrime and Identity Theft Bureau in the Manhattan District Attorney's Office; Jonathan Donnellan, Deputy General Counsel of the Hearst Corporation; Lynn Oberlander, General Counsel of *The New Yorker*; and Dana Rosen, General Counsel of Wenner Media.

(l to r) David Szuchman, Dana Rosen, Tyler Maroney, Lynn B. Oberlander, and Jonathan R. Donnellan

Tyler stated that so far there have been about 4,800 victims of phone hacking, and 55 law firms are involved. The attorney for three of the victims, two sports figures and a United States citizen, are threatening to sue in the United States, under the Foreign Corrupt Practices Act, for illegal payments to government officials for information. David reviewed the New York criminal law provisions that could be used to prosecute people who engage in hacking telephone calls, but pointed out that many of the violations are merely misdemeanors, not felonies. Jonathan maintained that phone hacking on the scale of what News Corporation did could not occur in the United States. Tyler concurred because investigators are licensed and regulated here so that it would be very difficult to break the law as investigators did in Great Britain. There is a different culture here with different ethical and legal rules. Lynn noted that it is legal to take pictures of people doing embarrassing things in the United States. It is also legal to publish the pictures, except in California where no telephoto lenses can be used to see into a celebrity's home.

The last CLE session was broken into two tracks. On one track there was a discussion of the handling of complex commercial matters through the courts from the perspective of outside counsel, in-house counsel, and the state and federal bench. Dana Syracuse moderated the panel, which included Justice Sylvia Hinds-Radix, Judge Nina Gershon, former Justice Ira Gammerman of NAM, James Chou of Akin Gump, and Taa Grays, Assistant General Counsel, Chief of Staff to General Counsel, Metropolitan Life Insurance Company.

(l to r) Taa Grays, James P. Chou, Justice Sylvia O. Hinds-Radix, Judge Nina Gershon, former Justice Ira Gammerman, and Dana Syracuse

Taa and James discussed the budgetary and other concerns that in-house and outside counsel must confront at the onset of a complex commercial case. In identifying the strategic implications of litigating in the Eastern District, Judge Gershon discussed the Eastern District's mandatory arbitration program for cases under $150,000, the absence of interlocutory appeals, and the lack of alternate jurors in jury trials. Justice Hinds-Radix and former Justice Gammerman discussed the differences between Kings County and New York County commercial divisions, from the nature of commercial cases filed in each county, to the size of a judge's inventory, to the speed with which cases are resolved.

The alternative panel examined the basic legal and ethical precepts concerning non-profit corporations under New York law. It was moderated by former Section Chair Lesley Rosenthal with panelists Sean Delany, Executive Director of the Lawyers Alliance for New York, Inc., and former Section Chair Carrie Cohen.

(l to r) Sean Delaney, former Section Chair Carrie H. Cohen, and former Section Chair Lesley Rosenthal

Lesley emphasized the major difference between a non-profit and a for-profit entity, which is that a non-profit has no shareholders but a mission (that is, a public purpose). Sean described the three duties that board members of a non-profit must observe: (1) a duty of care, (2) a duty of loyalty, and (3) a duty of obedience (which exists only in New York). However, day-to-day management is usually through committees. Regulation in this area may change relatively soon because the New York Attorney General has recently proposed a complete overhaul of the non-profit law.

Outgoing Chair David H. Tennant, Incoming Chair Tracee E. Davis, Chair-Elect Gregory K. Arenson, and Vice-Chair Paul D. Sarkozi

The Spring Meeting was a wonderful opportunity for bench and bar to mingle in an informal setting and to exchange views on topics of the day. In this respect, as in all others, the meeting was highly successful.

The Section is grateful to all of the panelists who participated in the programs at this year's meeting, and also to NAM, Hudson Court Reporting, James Mintz Group, and AppealTech for their sponsorship of the meeting.

Affirmative Defenses: Does *Iqbal/Twombly's* Heightened Pleading Standard Apply?

Gregory K. Arenson

At its April 12, 2012, meeting, the Section's Executive Committee adopted the report of the Federal Procedure Committee, principally authored by Jim Parver, regarding the applicability (or inapplicability) of the pleadings requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), to affirmative defenses. The courts are split on the issue. The determination depends on the language of Rule 8 of the Federal Rules of Civil Procedure and an evaluation of the principles and policies underlying pleading requirements.

Rationale In Favor of Applying *Iqbal/Twombly*

The report found that the courts that have determined that the *Iqbal/ Twombly* pleading requirements apply to the pleading of affirmative defenses have based their decision on one or more of the following rationales:

1. Fairness, common sense, and litigation efficiency require the application of the same pleading standard to complaints and to defenses; and, therefore, the pleading of a defense should provide more than merely the possibility that the defense may exist. *See, e.g., Amerisure Ins. Co. v. Thomas*, 2011 U.S. Dist. LEXIS 79530, at *6 (E.D. Mo. July 21, 2011) ("'[i]t makes little sense to hold defendants to a lower pleading standard than plaintiffs when, in both instances, the purpose of pleading requirements is to provide enough notice to the opposing party that there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case'"); *Francisco v. Verizon South, Inc.*, 2010 U.S. Dist. LEXIS 77083, at *17 (E.D. Va. July 29, 2010) ("[t]he same logic holds true for pleading affirmative defenses as for pleading claims—without alleging facts the plaintiff can't prepare adequately to respond"); *Palmer v. Oakland Farms, Inc.*, 2010 U.S. Dist. LEXIS 63265, at *13 (W.D. Va. June 24, 2010) ("it neither makes sense nor is it fair to require a plaintiff to provide the defendant with enough notice that there is a plausible, factual basis for her claim under one pleading standard and then permit the defendant under another pleading standard simply to suggest that some defense may possibly apply in the case").

2. Application of the *Iqbal/Twombly* heightened pleading standard insures that an affirmative defense supplies sufficient information to explain the parameters of and the basis for the affirmative defense such that the adverse party can reasonably tailor discovery to it. *See Francisco, supra*, 2010 U.S. Dist. LEXIS 77083, at *24 (" '[a]n even-handed standard as related to pleading insures that the affirmative defenses supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery'").

3. Applying the *Iqbal/Twombly* heightened pleading standard to affirmative defenses "serves a valid purpose in requiring at least some valid factual basis for pleading an affirmative defense and not adding it to the case simply upon some conjecture that it may somehow apply." *Barnes v. AT&T Pension Benefit Plan-Non Bargained Program*, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010).

4. Defenses that are nothing but boilerplate recitations or conclusory allegations clutter the docket and create the need for unnecessary or extended discovery. *See, e.g., Barnes, supra*, 718 F. Supp. 2d at 1172-73. In *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687 (N.D. Ohio 2010), the court made the same point and stressed that "the holdings of *Twombly* and *Iqbal* were designed to eliminate the potential high cost of discovery associated with meritless claims." *Id.* at 691.

5. In pleading an affirmative defense, the defendant must comply with Rule 8's requirement of a short and plain statement to give the opposing party fair notice of the defense and the grounds on which it rests. *See, e.g., Barnes, supra*, 718 F. Supp. 2d at 71. The court in *Barnes,* stated:

   > Rule 8's requirements with respect to pleading defenses in an answer parallel the Rule's requirements for pleading claims in a complaint. *Compare* (a)(2) "a short and plain statement of the claim showing that the pleader is entitled to relief," *with* (b)(1) "state in short and plain terms its defenses to each claim asserted against it."

   718 F. Supp. 2d at 1172.

   In *HCRI TRS Acquirer LLC, supra*, 708 F. Supp. 2d 687, the court also recognized that the Rule 8(a)(2) language applicable to claims differs from the Rule 8(b) and (c) language applicable to defenses and

affirmative defenses, but concluded that the difference did not matter: "While the language in Civil Rule 8(a) differs from the language in Civil Rules 8(b) and (c), this difference is minimal and simply reflects that an answer is a response to a complaint. Furthermore, the shared use of the 'short and plain' language—the essence of the pleading standard—indicates the pleading requirements for affirmative defenses are the same as for claims of relief." *Id.* at 691.

6. Application of the *Iqbal/Twombly* heightened pleading standard will not limit a defendant's ability to mount a thorough defense because under Rule 15(a)(2) a defendant can seek to amend its answer to assert a viable defense that becomes apparent during discovery, and leave to amend is to be freely given absent a showing of prejudice or futility. *See Bradshaw v. Hilco Receivables, LLC*, 725 F. Supp. 2d 532, 536 (D. Md. 2010); *see also* 6 Wright, Miller & Kane, Federal Prac. & Procedure: Civil 3d §§ 1471, 1473, 1484 & 1487 on policy and practice regarding amendments.

7. Form 30, appended to the Federal Rules of Civil Procedure pursuant to Rule 84, "underscores the notion that a defendant's pleading of affirmative defenses should be subject to the same pleading standard as a plaintiff's complaint because it includes factual assertions in the example it provides. The Form includes within it a suggestion that minimal facts be asserted before raising a statute of limitations defense." *Francisco, supra*, 2010 U.S. Dist. LEXIS 77083, at *26.

Rationale Against Applying *Iqbal/Twombly*

The report found that courts that have concluded that the *Iqbal/Twombly* heightened pleading requirements do not apply to pleading affirmative defenses have based their conclusion on one or more of the following rationales:

1. There are differences in wording between Rule 8(a)(2) and Rules 8(c) and 8(b), and *Iqbal* and *Twombly* only addressed the requirements of Rule 8(a)(2). Rule 8(a)(2) requires a "statement…showing that the pleader is entitled to relief," while Rules 8(b) and 8(c) do not contain comparable language requiring a party to show why a defense or affirmative defense is relevant or why the party is entitled to claim that defense. The Supreme Court in *Iqbal* and *Twombly* relied heavily on the language in Rule 8(a)(2) requiring a "showing" of entitlement to relief in concluding that the claimant must allege sufficient facts to "show that the claim is plausible." The absence of language in Rules 8(b) and (c) comparable to the "showing…entitled to relief" language in Rule 8(a)(2) means that the pleading requirement under Rules 8(b) and (c) is not the same as that under Rule 8(a)(2). *See, e.g., Cottle v. Falcon Holdings Mgmt., LLC.*, 2012 U.S. Dist. LEXIS 10478, at *8-9 (N.D. Ind. Jan. 30, 2012); *Adams v. JP Morgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 79366, at *7-9 (M.D. Fla. July 21, 2011); *Bowers v. Mortgage Electronic Regis. Sys.*, 2011 U.S. Dist. LEXIS 58537, at *11-13 (D. Kan. June 1, 2011); *Falley v. Friends Univ.*, 2011 U.S. Dist. LEXIS 40921, at *6-8 (D. Kan. Apr. 14, 2011).

2. It would be unfair to defendants to require them to provide detailed factual allegations when they have only 21 days to respond to the complaint (see Fed. R. Civ. P. 12(a)(1)(A)), whereas plaintiffs have a great deal more time to conduct an investigation prior to filing the complaint. *See, e.g., Cottle, supra,* 2012 U.S. Dist. LEXIS 10478, at *10.

3. Failure to plead an affirmative defense risks waiving that defense. *See, e.g., Falley, supra*, 2011 U.S. Dist. LEXIS 40921, at *9.

4. The purpose of Rule 8(c) is merely to provide the plaintiff with notice of an affirmative defense that may be raised at trial. *See, e.g. Adams, supra*, 2011 U.S. Dist. LEXIS 79366, at *9.

5. Federal Rule of Civil Procedure Form 30 serves as a form for presenting a Rule 12(b) defense and allows the simple statement that "[t]he complaint fails to state a claim upon which relief can be granted" in order to assert the defense of failure to state a claim. *See, e.g., Bowers, supra*, 2011 U.S. Dist. LEXIS 58537, at *14.

6. Granting a motion to strike an affirmative defense under Rule 12(f) encourages parties to bog down litigations by filing and fighting motions to strike prematurely, which is contrary to the purpose of Rule 12(f) to "minimize delay, prejudice and confusion." *See, e.g., Bowers, supra*, 2011 U.S. Dist. LEXIS 58537, at *15.

7. Not applying the *Iqbal/Twombly* pleading standard to affirmative defenses avoids the Court having to rule on multiple motions to amend the answer during the course of discovery as the defendant obtains information that would support additional affirmative defenses that defendant had no practical way of investigating before discovery. *See Leon v. Jacobson Transp. Co., Inc.*, 2010 U.S. Dist. LEXIS 123106, at *3 (N.D. Ill. Nov. 19, 2010).

8. An additional reason for not applying the *Iqbal/Twombly* pleading standard to affirmative defenses relates to the scope of permissible discovery under Rule 26(b)(1). Rule 26(b)(1) limits the scope of discovery to non-privileged matter "that is relevant

to any party's claim or defense," unless otherwise limited by court order. If an affirmative defense cannot properly be pled until the party has sufficient facts to satisfy *Iqbal/Twombly*, and the facts needed to plead that affirmative defense are in the hands of the plaintiff, how can the defendant obtain them? Presumably any discovery request (including questions at a deposition) seeking such information will be subject to the objection that because the particular affirmative defense has not been raised, the requested discovery, including the deposition question, is improper. The argument that a defendant needs the discovery to determine if there is a basis for asserting the affirmative defense will be subject to the argument that defendant is engaged in an impermissible fishing expedition, that a defendant cannot use discovery to determine if an affirmative defense may exist. *See Leon, supra*, 2010 U.S. Dist. LEXIS 123106, at *3 ("The Court would also like to avoid the discovery disputes that would inevitably develop as a defendant seeks discovery related to an affirmative defense it had not stated in its answer".)

In that Catch-22 situation, a possibly meritorious affirmative defense will fall by the wayside because the defendant does not have sufficient facts allowing the defendant to allege the affirmative defense in its answer and those facts can only be learned though discovery from the plaintiff, which cannot be obtained because it relates to an affirmative defense that has not been alleged.

In *Bayer Cropscience A.G. v. Dow Agrosciences LLC*, 2011 U.S. Dist. LEXIS 149636 (D. Del. Dec. 30, 2011), the court listed nine reasons for not making the *Twombly/ Iqbal* pleading standard applicable to affirmative defenses: (1) the textual differences between Rules 8(a) and 8(c); (2) "a diminished concern that plaintiffs receive notice in light of their ability to obtain more information during discovery"; (3) "the absence of a concern that the defense is 'unlocking the doors of discovery'"; (4) "the limited discovery costs, in relation to the costs imposed on a defendant, since it is unlikely that either side will pursue discovery on frivolous defenses"; (5) the unfairness of holding the defendant to the same pleading standard as the plaintiff when the defendant has only a limited time to respond to the complaint; (6) "the low likelihood that motions to strike affirmative defenses would expedite the litigation, given that leave to amend is routinely granted"; (7) the risk that a defendant will waive an affirmative defense by failing to plead it at the early stage of the litigation; (8) the lack of detail in Form 30; and (9) "the fact that a heightened pleading requirement would produce more motions to strike, which are disfavored." *Id.* at **3-4.

District courts in the Second Circuit are split on the issue. Three district court judges have concluded that the *Iqbal/Twombly* pleading standard applies to pleading affirmative defenses. *See EEOC v. Kelley Drye & Warren, LLP*, 2011 U.S. Dist. LEXIS 80667, at *4-6, 15 (S.D.N.Y. July 25, 2011) (Swain, J.); *Tracy v. NVR, Inc.*, 2011 U.S. Dist. LEXIS 90778, at *28-30 (W.D.N.Y. Sept. 30, 2009) (Payson, M.J.) (Report & Recommendation), *aff'd without discussion on the basis of the Report & Recommendation*, 667 F. Supp. 2d 244, 247 (W.D.N.Y. 2009) (Larimer, J.); *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620 (S.D.N.Y 2008) (Chin, J.). Judge Hall in the District of Connecticut has concluded that the *Iqbal/Twombly* pleading standard did not apply to the pleading of affirmative defenses. *See Aros v. United Rentals, Inc.*, 2011 U.S. Dist. LEXIS 125870, at *4-11 (D. Conn. Oct. 31, 2011); *Whitserve, LLC v. GoDaddy. Com, Inc.*, 2011 U.S. Dist. LEXIS 132636, at *4-5 (D. Conn. Nov. 17, 2011) (Hall, J.).

The report concluded that arguments exist on both sides of the issue as to whether the *Iqbal/Twombly* pleading standard should apply to affirmative defenses. Not only is there a split in the courts, but there is also a split among practitioners. All agree, however, that there should be one standard for pleading affirmative defenses, whether imposed through the rule-making process or by an interpretation by the Supreme Court.

A copy of the full report may be found by Section members on the Section's website and will be published in the next issue of the *NYLitigator*.

Gregory K. Arenson is Chair-Elect of the Section and a partner at Kaplan Fox & Kilsheimer LLP.

The Section Presents Its Sixth Annual "Smooth Moves" CLE Program for Attorneys of Color and Presentation of the Honorable George Bundy Smith Pioneer Award to the Honorable Samuel Green

On April 24, 2012, the Commercial and Federal Litigation Section presented its sixth annual "Smooth Moves" program, which is the Section's premiere diversity event, organized to attract attorneys of color to more active participation within the Section. Since its inception in 2007, Smooth Moves has included both a CLE program and a networking reception, culminating in the presentation of the Section's Honorable George Bundy Smith Pioneer Award. The Pioneer Award is given each year to an attorney of color whose career accomplishments exemplify those of the retired Court of Appeals judge for whom the award is named: legal excellence, community involvement, and mentoring.

Large crowd attends Smooth Moves program

The CLE program this year was entitled "Views from the Corner Office: Diverse General Counsels Discuss How to Get There, and How to Win Their Business." The program featured the following stellar group of chief legal officers, representing a wide variety of industries: Jeffrey Harleston, Executive Vice President, General Counsel for Universal Music Group—North America; Sandra Leung, General Counsel and Corporate Secretary, Bristol-Myers Squibb; Don Liu, Senior Vice President, General Counsel and Secretary for Xerox Corporation; and Colonel Maritza Sáenz Ryan, Esq., Head of the Department of Law, United States Military Academy. Skadden LLP partner, and former federal judge, the Honorable Stephen Robinson, moderated the panel's discussion, which focused on the panelists' perspectives on career development within the corporate legal department, as well as business development strategies for law firms as corporate executive suites become increasingly diverse and as corporations focus more on truly value-added legal services.

(l to r) Jeffrey Harleston, Executive Vice President, General Counsel for Universal Music Group; Sandra Leung, General Counsel for Bristol-Myers Squibb; Don Liu, General Counsel for Xerox Corporation; Col. Maritza Sáenz Ryan, Head of Dept. of Law, United States Military Academy; Hon. Stephen Robinson, a partner at Skadden, Arps, Slate, Meagher & Flom LLP

The George Bundy Smith Pioneer Award was established by the Section in recognition of Judge Smith's work in the civil rights movement and his 30 years of public service in the New York judiciary, including 14 years as an associate judge of the Court of Appeals. This year's Pioneer Award was presented to The Honorable Samuel Green, the recently retired Associate Justice of the Supreme Court, Appellate Division, Fourth Department, who has been one of the most respected New York jurists for decades.

Ret. Judge George Bundy Smith, Mrs. Ernestine Green, Judge Samuel Green

Born in Gadsen, Alabama, Justice Green came north with his family as a young boy on a segregated rail car, and in 1978 became the first African-American elected to a state judgeship outside of New York City. Even as a youngster, Justice Green dreamed of becoming a lawyer, and ultimately achieved his goal by graduating from State University of New York, Buffalo School of Law in 1967. He subsequently built a highly successful private law practice through the late 1960s and early 1970s, before embarking upon a career as a jurist on the City Court bench in Buffalo—the court on which Justice Green still believes he was most able to effect positive change.

After Justice Green's election to the Supreme Court, Erie County, Governor Mario Cuomo elevated him to the Fourth Department, where he became the first African-American appointed to an intermediate appellate court outside of New York City. Upon his retirement in December 2011, he had been the longest serving associate justice on the Fourth Department bench, and the main courtroom in the courthouse now bears his name in tribute. In his remarks at the award presentation, Justice Green noted, "I accept this award with certain humility. I served 38 years on the court. I was there, you know, to see and to, hopefully, do justice."

Past recipients of the Section's Pioneer Award include Hon. George Bundy Smith of New York (JAMS—New York), Cesar A. Perales (New York Secretary of State and Co-Founder, and past President and General Counsel, Puerto Rican Legal Defense and Education Fund), Elaine R. Jones (Director-Counsel Emeritus, NAACP Legal Defense and Educational Fund), the Honorable Carmen Beauchamp Ciparick, and the pioneering, father-son law practice of Kee & Lau-Kee.

Program Co-Chair Hon. Barry A. Cozier, Hon. Samuel Green, Diversity Fellow Jonathan Riddix, Hon. Shirley Kornreich, Bar Foundation Director Kay Crawford Murray, Program Co-Chair Carla M. Miller, Section Chair-Elect Tracee E. Davis

Finally, the Section awarded the Commercial Division's Minority Law Student Fellowship at the event to a first year law student, who will spend the summer working in the chambers of a Commercial Division justice. The New York Bar Foundation provides a stipend for the fellowship recipient. Jonathan Riddix, a first year law student at Hofstra University School of Law, was selected as this year's Minority Fellow. Mr. Riddix received his undergraduate degree and a Doctorate of Divinity from Howard University, and will spend summer 2012 in the chambers of Commercial Division Justice Shirley Kornreich.

Carla M. Miller

2013 NYSBA Annual Meeting

January 21-26, 2013

Hilton New York

1335 Avenue of the Americas

New York City

Commercial and Federal Litigation Section Meeting

Wednesday, January 23, 2013

Book Review: *Business and Commercial Litigation in Federal Courts*, Third Edition

Reviewed by Gerald G. Paul

The Third Edition of this remarkable treatise is a testament to its indefatigable Editor-in-Chief, Robert L. Haig. Under Mr. Haig's guidance, 34 new chapters have been added to the Third Edition, and the 96 chapters carried forward from the Second Edition have been substantially expanded. The Third Edition is 11 volumes and contains a staggering 12,742 pages. There is also a separate Appendix, which will be replaced annually, containing tables of all jury instructions, forms, laws, rules, and cases discussed in the Third Edition.

As with the First and Second Editions, the publication's principal authors are a who's who of distinguished federal judges and litigators from throughout the United States. Their collective work product is a unique blend of useful discussions of all aspects of federal civil procedure and in-depth treatments of some 63 areas of substantive law, covering the gamut from admiralty to white collar crime.

Members of the Commercial and Federal Litigation Section should be particularly pleased that five former Chairs of the Section (in addition to Mr. Haig, the Section's founding Chair) are among the work's principal authors. The diversity of their contributions is itself instructive as to how truly comprehensive this treatise is:

- Hon. Shira A. Scheindlin (Chapter 25, Discovery of Electronically Stored Information)
- Harry P. Trueheart, III (Chapter 99, Agency)
- Mark H. Alcott (Chapter 102, Theft or Loss of Business Opportunities)
- Jay G. Safer (Chapter 31, Magistrate Judges and Special Masters)
- David H. Tennant (Chapter 55, Appeals to the Court of Appeals).

Other chapters deal with topics as far-ranging as Pro Bono, Ethical Issues in Commercial Cases, Final Arguments in Jury and Bench Trials, Selection of Experts, and Comparison with Commercial Litigation in State Courts.

Aside from the fact that this work is *sui generis*—there is no other book on commercial litigation in federal courts—it is, first and foremost, a user-friendly practice guide. It is almost impossible to consult any chapter without picking up a valuable tip on strategy or a warning about a common pitfall. In fact, no feature of the treatise better demonstrates its usefulness to commercial litigators in the trenches than the various Checklists, Jury Instructions, Forms, and other Practice Aids that appear at the end of each chapter. For example, the chapter on Discovery of Electronically Stored Information by Judge Scheindlin and Jonathan M. Redgrave concludes with Checklists for interviewing various organization employees, investigating the hardware environment, investigating backup systems and archives, and investigating applications. These tools are absolutely essential in the representation of parties to modern-day business disputes. For another example, Chapter 49, Trial and Post-Trial Motions, by Charles H. Dick, Jr., includes Procedural Checklists enumerating, in one convenient section, the filing deadlines and technical requirements for motions both during trial and post-trial for judgment as a matter of law, a motion to exclude witnesses, a motion to conform pleadings, a motion for a mistrial, a motion for continuance, a motion for a new trial, and requests for findings of fact and conclusions of law.

The timeliness of the work is also impressive. For example, included in the Practice Checklists for the chapter on Selection of Experts are reminders on the impact of the 2010 amendments to Fed. R. Civ. P. 26 on communications between counsel and experts required to submit a report under Fed. R. Civ. P. 26(a)(2)(B); the chapter on Summary Judgment includes discussions of the substantial revision of Fed. R. Civ. P. 56 in 2010; and the chapter on Responses to Complaints deals with the 2010 changes to Fed. R. Civ. P. 8 affecting the need to plead discharge in bankruptcy as an affirmative defense.

The treatise's emphasis on the practical needs of commercial litigators is apparent throughout, but a number of chapters are devoted entirely to these everyday needs. There are chapters on Litigation Avoidance and Prevention, Techniques for Expediting and Streamlining Litigation, Litigation Technology, Litigation Management by Law Firms, Litigation Management by Corporations, and even Crisis Management.

A joint venture between West and the American Bar Association Section of Litigation, the Third Edition of *Business and Commercial Litigation in Federal Courts* is a stunning achievement. It is beautifully organized, with copious, up-to-date case citations that do not overwhelm the reader or distract from the legal analysis. And if what's past is prologue, we can expect that each chapter of the Third Edition, as was the case with the prior editions, will be updated annually with pocket parts. Anyone practicing commercial litigation in the federal courts without ready access to this treatise does so at his or her peril. It is that good.

Gerald G. Paul is a former Chair of the Section and a partner at Flemming Zulack Williamson Zauderer LLP.

Memorandum in Opposition
Commercial and Federal Litigation Section

Commercial & Federal Litigation #5
A. 9953-A
S. 6949

May 30, 2012
By: M of A Simotas
By: Senator Bonacic

Assembly Committee: Judiciary
Senate Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to the effect of the entry of judgment on certain rights attendant to a cause of action

LAW AND SECTIONS REFERRED TO: CPLR §5011-a

MEMO PREPARED BY: Commercial and Federal Litigation Section

THE COMMERCIAL AND FEDERAL LITIGATION SECTION OPPOSES THIS LEGISLATION

This bill ("Bill") would enact a new CPLR 5011-a, "Merger doctrine clarified," to broadly and retroactively amend the common law merger doctrine in New York. Section 1 of the bill provides: "No right, benefit or advantage that attends a cause of action shall be lost when the cause of action is successfully reduced to a judgment, but shall be deemed to append to the judgment as well." Section 2 of the bill provides: "This act shall take effect immediately and shall apply to all judgments that are rendered after such effective date or that are unsatisfied as of such date."

The Bill supersedes A 07967A/ S 3767-C, introduced last year, which sought to amend the General Obligations Law to eliminate the merger doctrine defense to the enforcement of judgments on foreign sovereign debt to ensure that the Republic of Argentina would be unable to succeed on that defense in pending judgment collection proceedings brought by a hedge fund.

The Commercial and Federal Litigation Section strongly opposed that proposal in a memorandum, dated June 14, 2011. We summarized the grounds for opposing that proposed legislation as follows:

1. This legislation appeared tainted by special interests bent on interfering with specific ongoing cases, which we opposed as bad public policy.

2. The legislation was unnecessary because it addressed an argument made by lawyers, not errant decisions by courts.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

3. The legislation was unnecessary because, according to its supporters, it would not change current law—or—the legislation, contrary to its stated effect, would change the application of longstanding principles of res judicata and the merger doctrine. In either event, it would change the law in existence at the time of entry of the existing judgments that it would govern and creates new issues in cases seeking to enforce them.

4. The legislation was bad law. It sought to change substantive law while the issue of merger relates to res judicata, a procedural matter.

5. The legislation would create a new burden on parties and the courts in fashioning judgments, in cases involving the sovereign debt contracts that it covered, to itemize issues that were directly addressed and subsumed within the judgment.

6. By applying the proposed law only to foreign state litigation, the legislation dangerously suggested that covenant mergers should be more readily permitted in all domestic loan and in foreign private (non-state) debtor situations.

7. The issue of whether a provision was "directly addressed," under the language of the proposed law, to the extent it differed from the law of res judicata generally (if it did not, then, we said, the law was manifestly unnecessary), would simply create another issue to be resolved in future litigation.

8. The proposed law might have been subject to federal preemption.

This year's effort is an obvious attempt to avoid some of the criticisms of last year's bill by placing the change into the CPLR (so that it now does not amend substantive law to solve a perceived procedural problem) and by not expressly limiting its effect to foreign sovereign debt cases. However, the result will be the same, except that the effect will be broader and subject to more unintended consequences than last year's effort.

The Committee on Civil Practice Law and Rules (May 18, 2012) and the International Section (May 19, 2012) each have filed memoranda that do an excellent job of detailing the many problems with the current proposed legislation from its special-interest roots and specious purported legal basis, through its ill-considered change in public policy and undermining of centuries of jurisprudence, to the havoc that it would wreak in fashioning judgments and litigating their effects. Moreover, as those reports make clear, it wouldn't work.

We make special note of the statement in the sponsor's memorandum in support of the subject legislation, claiming that it would encourage more parties to provide for New York law and forum in their contracts when it would, in fact, do just the opposite. It goes so far as to lift language and citations directly from the April 18, 2011 Final Report of the New York State Bar Association's Task Force on New York Law in International Matters (see the Task Force Report at 6 and footnotes 10 and 11). By passing special interest legislation to influence the outcome in a particular pending case against a foreign sovereign, New York would send the worst message possible to prospective foreign litigants, undermining New York's hard-won and long-standing reputation for the stability and predictability of its law.

For all of the reasons cited against the previous legislation, with exceptions that make this year's proposal more broadly destructive, and for the reasons set forth in the CPLR Committee and International Section memoranda, the New York State Bar Association's Commercial and Federal Litigation Section **OPPOSES** this legislation.

Person who prepared this memorandum: Ted Semaya, Esq.

Section Chair: David H. Tennant, Esq.

NEW YORK STATE BAR ASSOCIATION

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Memorandum in Opposition
Commercial and Federal Litigation Section

Commercial & Federal Litigation #6	May 30, 2012
A. 7002-C	By: M of A Titone
S. 5798	By: Senator Fuschillo

Assembly Committee:	Judiciary
Senate Committee:	Rules
Effective Date:	Immediately

AN ACT to amend the civil practice law and rules, in relation to grounds for vacating an arbitration award on the basis of partiality of arbitrator

LAW AND SECTIONS REFERRED TO: CPLR §§ 7500(new), 7501, 7505-a (new)

REPORT PREPARED BY: Commercial and Federal Litigation Section

THE COMMERCIAL AND FEDERAL LITIGATION SECTION OPPOSES THIS LEGISLATION

This bill would amend New York State's arbitration statute (CPLR 75) by adding § 7500, amending § 7501, and adding § 7505-a, in relation to grounds for vacating an arbitration award on the basis of partiality of the arbitrator. By its terms the measure applies to all arbitrations.

The new language of the proposed amendment and additions is so vague that it would lead to an unending stream of litigation challenging arbitral awards.

New CPLR 7500 contains two definitions. The first one could mean any arbitration that does not meet the criteria set forth is entirely outside Article 75, rendering the Article inapplicable to any arbitration failing to meet the narrow definition. Additionally, the second definition appears to directly contradict the Federal Arbitration Act, 9 U.S.C. § 5.

New 7505-a requires certain disclosures from arbitrators. Vacating an award is controlled by FAA § 10, and any additional grounds provided by this proposed amendment is superseded by the FAA.

For the reasons stated, the Section OPPOSES this legislation.

Section Chair: David H. Tennant

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

CPLR Amendments: 2012 Legislative Session

(2012 N.Y. Laws ch. 1-446)

CPLR §	Chapter, Part (Subpart, §)	Change	Eff. Date
214-b	69	Extends commencement deadline to June 16, 2014	6/29/12
2310	333(1)	Repeals CPLR 2310	8/1/12
7701	155(47)	Delete second reference ot Superintendent of Financial Services	7/18/12

Notes: (1) 2012 N.Y. Laws ch. 184, § 3, eff. 7/18/12, extends until January 1, 2015, the deadline for the Chief Administrator's report to the legislature, governor, and Chief Judge on commencement, filing, and service by electronic means in criminal and certain family court proceedings and expands the scope of the report.

2012 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's N.Y. Orders 1-22 of 2012)

22 NYCRR §	Court	Subject (Change)
202.5-b(d)(3)(iii)	Sup.	Prohibits secure filings of a affirmation/affidavit of service, notice of pendency, cancellation of notice of pendency, bill of costs, proof of service, RJI, release of liens, and satisfaction of judgment
202.5-bb	Sup.	Amends requirements for mandatory e-filing to include breach of contract actions; permits authorized representatives to claim exemptions from e-filing
202.6(b)	Sup.	Eliminates default applications to the clerk from RJI's filed without fee
202.12-a	Sup.	Authorizes Chief Administrator to require parties to bring additional documents to settlement conference

Note that the court rules published on the Office of Court Administration's website include up-to-date amendments to those rules: http://www.nycourts.gov/rules/trialcourts/index.shtml.

COMMERCIAL AND FEDERAL LITIGATION SECTION

Visit us on the Web at WWW.NYSBA.ORG/COMFED

Notes of the Section's Executive Committee Meetings

February 14, 2012

Guest speaker, Christopher Bogart, CEO of Burford Group Limited, discussed litigation financing. The Executive Committee discussed the Annual Meeting, the Faster, Cheaper, Smarter Working Group, proposed amendments to BCL service of process procedures, the upcoming Smooth Moves program, the upcoming Spring Meeting, and the Section's mentoring initiative.

March 13, 2012

Guest speaker, the Hon. Matthew A. Rosenbaum, Supreme Court, Monroe County, Commercial Division, discussed how he resolves discovery disputes without motion practice, settling of cases, preliminary conferences, and email.

The Executive Committee approved a report on a proposed amendment to CPLR 7511 in regard to arbitrators' impartiality. The Executive Committee discussed an ABA proposal to permit non-lawyer ownership of law firms and also discussed third-party funding of litigation, the upcoming Spring Meeting, the upcoming Smooth Moves program, the upcoming report of the Faster, Cheaper, Smarter Working Group, and the Mentoring Program Speaker Series.

April 10, 2012

Guest speaker, the Hon. Chief Judge Loretta A. Preska, United States District Court, Southern District of New York, discussed initiatives undertaken by the Court, infrastructure upgrades in the courthouse, the Court's complex civil case pilot program and mandatory employment mediation program. The Executive Committee approved a report of the Federal Procedure Committee on the applicability of *Iqbal/Twombly* pleading standards to affirmative defense. The Executive Committee also discussed the upcoming Spring Meeting and the Section policy on comping judges and speakers.

May 8, 2012

Guest speaker, the Hon. Joseph F. Bianco, United States District Court, Eastern District of New York, discussed his practice with respect to motions and settlement conferences.

The Executive Committee approved a report of the Special Committee on Discovery and Case Management in Federal Litigation. The Executive Committee discussed the Smooth Moves program, the University of Buffalo Law School Students of Color Moot Court competition, the upcoming Spring Meeting, and the 2013 Spring Meeting.

NYLitigator Invites Submissions

The *NYLitigator* welcomes submissions on topics of interest to members of the Section. An article in the *NYLitigator* is a great way to get your name out in the legal community and advertise your knowledge. Our authors are respected statewide for their legal expertise in such areas as ADR, settlements, depositions, discovery, and corporate liability. MCLE credit may also be earned for legal-based writing directed to an attorney audience upon application to the CLE Board.

If you have written an article and would like to have it considered for publication in the *NYLitigator*, please send it in electronic document format (pdfs are NOT acceptable), along with biographical information to its Editor:

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Authors' Guidelines are available under the "Article Submission" tab on the Section's Web site: www.nysba.org/NYLitigator.

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