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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 Chair

A Focus on Federal Business Litigation

Paul Sarkozi

Although we are called the Commercial and Federal Litigation Section, many of our initiatives over the past twenty-five years have been directed at the Commercial Division. We have worked closely with the Commercial Division Justices and the Office of Court Administration on training programs, educational initiatives for the Bar, and rule reforms. In all our efforts, our goal has been to help ensure—as a partner with the Commercial Division bench—that the New York Courts provide businesses with judges (and law secretaries and court attorneys) who have expertise in commercial law, procedures that help expedite the resolution of disputes, and lawyers who are trained to provide the best possible service to their clients. Our work in this area continues in 2015 as we celebrate the 20th anniversary of the Commercial Division by co-sponsoring with local bar associations Bench-Bar programs ***in every Commercial Division district***, which will bring Commercial Division Justices and business litigators together to discuss best practices and new rules.

But as we all know, it is not just our Commercial Division that handles sophisticated commercial disputes in New York. We are blessed to have a federal bench and federal court practitioners who have led the nation in resolving not just disputes predicated upon federal statutes, but also a broad range of domestic and federal business litigation in which New York and other state common law claims are implicated. As with state law disputes, the landscape of federal court business litigation

(continued on page 3)

Inside

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COMMERCIALLY RICH BACKGROUND

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.
- Major telecommunications company fraud and breach of fiduciary duty claim against former financial advisor and investment banker.
- Dispute between two hedge funds and 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 tortuous interference with contract involving on-air statements by a national media personality.
- 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 about quality of manuscript submitted by popular author and book publisher.
- Dispute relating to a breach of a $400 million dollar credit agreement between 2 major financial companies.
- Brokerage fee dispute involving properties sold for over $20 million.
- Fraud involving the sale of real estate.
- Breach of an agreement to insure against the criminal acts of Bernard Madoff in his capacity as 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.
- 50 claims resulting from a warehouse fire.
- Prevailing wage rate cases.
- Civil rights action involving malicious prosecution of the plaintiff who served 17 years in prison.
- Dispute between pharmaceutical company and investment bank.
- Advertising company in a dispute with its former CEO.
- Major motion picture studio defending against copyright infringement claims.

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Message from the Chair

(Continued from page 1)

is constantly evolving—as new technologies complicate everything from the financial transactions from which the disputes arise, to the privacy and security of confidential personal and business data, to the ability to retrieve, preserve, analyze, compile, sort, and search terabytes of information that potentially can impact how a factual issue might get resolved.

New times require new learning and new tools. Our courts and practitioners must be trained to understand and have access to the best technology our society can offer if our court system is to keep pace with the demands of the businesses whose dispute they seek to resolve.

So what is the Section's role in all of this? How can we help? While the particular solutions may not be clear today, the Section is committed to devote the resources and attention to help our federal courts meet the challenges it will face.

Our first step has been to strengthen our cooperation and involvement in federal court initiatives. In recent years, our Federal Judiciary Committee has fostered this relationship by, for example, preparing for the Eastern and Southern District Judges a compilation of their individual rules and practices so that they can learn from each other and perhaps improve their existing procedures with innovations that their colleagues have implemented. Our former chair, Tracee Davis, went to Washington to explain the extraordinarily harmful impact that sequestration would have on the both the resolution of business disputes in New York Federal Courts and the New York economy in general. Our Federal Procedure Committee has provided detailed feedback and testimony in connection with the recent revisions to the Federal Rules of Civil Procedure.

And this year we have placed an even greater emphasis on collaboration with our federal courts:

- Our Executive Committee meetings—which have been and are being held in Manhattan, Hauppaugue, Albany, and Rochester—have featured and will feature discussions with federal court judges from each of the New York's federal judicial districts, including Magistrate Judge A. Kathleen Tomlinson (EDNY) and District Court Judges Kenneth M. Karas (SDNY), J. Paul Oetken (SDNY), Mae A. D'Agostino (NDNY), and Elizabeth A. Wolford (WDNY).
- We have been actively involved in the anniversary celebrations of the Southern District and Eastern District. For the Southern District, we have prepared a *Bibliography of Books and Articles By and About the Judges and Cases of the United States District Court for the Southern District of New York*. We also are involved in the planning of a reenactment of the Trial of Peter Zenger in Westchester. For the Eastern District, we are involved in planning a 150th Anniversary Celebration of the EDNY in Islip (currently scheduled for June 4) and are working with Jeff Morris of Touro Law School on a publication that will highlight the recent history of the EDNY, including its most significant commercial cases.
- Our Annual Meeting featured presentations to and remarks by the Chief Judges of the Southern and Eastern Districts, the Honorable Loretta A. Preska and the Honorable Carol Bagley Amon.
- Our Spring Meeting at the Sagamore will start on May 15 with a Celebration of the Northern District of New York's 200th Anniversary, and we are hoping to have a strong turnout from the Northern District's District, Magistrate, and Bankruptcy Court Judges, as well as from leaders of the commercial bar in the Northern District's major business centers.
- Finally, at the Gala Dinner at the Spring Meeting on May 16 at the Sagamore we will be presenting the Robert L. Haig Award to the Chief Judge of the Western District of New York, the Honorable William M. Skretny, and are similarly hoping that many of Chief Judge Skretny's colleagues and Western District practitioners will join us to recognize his contribution to the development of business law in New York.

Having worked to strengthen our ties to each of the federal district courts, the Section is now committed and prepared to take an even larger step. At the Section's January 28, 2015, Annual Meeting, I announced that our Executive Committee has authorized and the New York State Bar Association has approved the Section's "Excellence in Federal Business Litigation" initiative. The nature and purpose of this initiative is to dedicate $10,000 to *each* of the federal districts in New York to co-sponsor CLE programs, training, and pilot project initiatives that will allow the courts, their staff, and the litigators who appear before them to stay on the cutting edge of litigation reform, technological challenges, and other aspects of the ever-evolving world of complex commercial litigation. Our Federal Judiciary Committee and Federal Procedure Committee will generate proposals about how these funds may most effectively be spent, and we intend to reach out to judges and practitioners from around the state to solicit ideas and recommendations. If you have an idea that will enhance the effectiveness of federal business litigation, please join those committees or simply reach out to me directly at Sarkozi@thsh.com. As impressive as our federal courts have been over the past 225 years in resolving business disputes, we are eager to work with our courts to make the next 225 years even more effective.

Paul Sarkozi

Section Holds 2015 Annual Meeting

By Mark A. Berman

Paul D. Sarkozi, Mark A. Berman, Hon. Lawrence K. Marks, Hon. A. Gail Prudenti, Deborah E. Edelman, James M. Wicks, Jaclyn H. Grodin

On January 28, 2015, the Section held its Annual Meeting, which was run by Paul D. Sarkozi, Section Chair, with the assistance of James M. Wicks, Chair-Elect, and Mark A. Berman, Section Vice-Chair and Program Chair. Despite the freezing weather, both CLE programs were standing room only. The luncheon was at full capacity with judges in attendance from every level of the New York State Court system and with numerous judges from both the Southern and Eastern Districts of New York.

Raymond H. Sheen, Joseph V. DeMarco and Ariana J. Tadler

The first CLE Program, entitled *The Prosecution and Defense of Data Breach Litigation*, was moderated by Peter J. Pizzi of Connell Foley LLP, with panelists Ian C. Ballon of Greenberg Traurig, LLP, Joseph V. DeMarco of DeVore & DeMarco LLP, Ariana J. Tadler of Milberg LLP, and Raymond H. Sheen of Hanson Bridgett LLP. The audience learned what the future holds in this hot area of the law. All contours of data breach litigation were discussed—ranging from colossal e-discovery issues to trends in data breach settlements. See separate article by Mr. Pizzi.

The second CLE program entitled *Complex Financial Transactions at Trial: Experiences and Observations from the Bench and the Bar*, was moderated by Benjamin R. Nagin of Sidley Austin LLP. The jurists on the panel were the Honorable Paul A. Engelmayer from the Southern District of New York and the Honorable Marcy S. Friedman of the New York State Supreme Court, New York County, Commercial Division. The panel was rounded out with David Meisels, Head of Litigation at Fortress Investment Group, LLP, and Stephen L. Ascher of Jenner & Block, LLP. The audience heard perspectives from the bench, in-house attorneys and practitioners on their experiences and observations at trial in the presentation of complex financial transactions and products. The panel grappled with the special challenges of presenting evidence to a finder of fact in a clear, concise, and straightforward manner. See separate article by Mr. Nagin.

David Meisels, Hon. Marcy S. Friedman, Hon. Paul A. Engelmayer, Stephen L. Ascher, Benjamin R. Nagin

The Section then joyously celebrated the 225th anniversary of the Southern District of New York and the 150th anniversary of the Eastern District of New York. Paul Sarkozi highlighted how the Southern and Eastern Districts of New York have been models for other courts throughout the country in addressing the thorniest and most complex commercial business disputes. Paul announced that the Section in honor of these anniversaries has created an *Excellence in Business Litigation Initiative*, earmarking $10,000 for each of the four Federal Districts in New York State. The money would be used for programs dedicated to fostering education in business litigation that would be jointly sponsored with the Section.

In honor of these two anniversaries, the Section first presented to Southern District Chief Judge Loretta A. Preska a bound bibliography listing books and articles by and about the Southern District Judges and their cases, which was drafted by the Section under the leadership of Federal Judiciary Committee Chair Jay G. Safer with the assistance of the law firms of Sheppard Mullin and Paul

Weiss. Former Section Chair and Southern District Judge P. Kevin Castel and Judge Deborah A. Batts, who are coordinating the SDNY's 225th celebration, gave guidance to the Section as it prepared this bibliography.

The Section then presented to Eastern District Chief Judge Carol Bagley Amon a hard-to-find book written by Eastern District Judge Clarence Galston, who had served on the Eastern District bench for thirty-five years (1929-1964) that contained an original, one of a kind, inscription by Judge Galston to a friend. Paul also announced that the Section would be working with Professor Jeffrey Morris of Touro Law School in updating the history of the Eastern District of New York.

Hon. Carol Bagley Amon and Hon. Loretta A. Preska

The speeches by both Chief Judges highlighted the accomplishments of their Districts, which this article could never do justice in summarizing. But what everyone will remember was the friendly "teasing" between the two Chief Judges concerning the Southern District's nickname, the *Mother Court*. Chief Judge Amon recounted how, when the Districts had their last two major anniversaries 25 years ago, former Eastern District Chief Judge Eugene H. Nickerson got down on one knee and sang *My Mammy*, made famous by Al Jolson, to former Southern District Chief Judge Charles L. Brieant, Jr. Then bringing down the house and not to be outdone, Chief Judge Amon, without bending a knee, sang to Chief Judge Preska from *My Mammy*, the memorable stanza *I'd walk a million miles for one of your smiles*, *My Mammy*!

Thereafter, the Honorable Lawrence K. Marks, the First Deputy Chief Administrative Judge of the Unified Court System and also a Commercial Division Judge, presented the Section's Stanley H. Fuld Award for outstanding contributions to commercial law and litigation to the Honorable A. Gail Prudenti, Chief Administrative Judge of New York. Judge Marks then read out loud a letter from Chief Judge Lippman, which noted that under Judge Prudenti's watch, the New York State Commercial Division has become the number one venue for the state, national, and international business community. Chief Judge Lippman noted that, under Judge Prudenti's guidance, enhancements to the Commercial Division included more active case management, implementing rules to facilitate more efficient claim settlement, encouraging the use of alternative dispute resolution, and increasing the monetary thresholds to conserve resources for the most complex cases. Judge Lippman noted that Judge Prudenti has "brought a vision in creativity with common sense" to the position of Chief Administrative Judge. He further noted that Judge Prudenti brings a "spirit of reform and commitment to progress, always asking what we can do better to serve the People of New York State." Significantly, the Section has many representatives on Chief Judge Lippman's Commercial Division Advisory Council and has also provided comments to the Office of Court Administration on several of the new proposed rules for Commercial Division practice.

Hon. Carol Bagley Amon, Paul D. Sarkozi, Hon. Loretta A. Preska

Judge Prudenti humbly accepted the Fuld Award, but made it clear to the audience that her receipt of the Fuld Award was not for her, but was for all the hard work that all judges in the Unified Court System put into their jobs. Judge Prudenti, while speaking about the initiatives implemented during her tenure, spoke most passionately about how such initiatives become reality. She noted that initially comments often came in from attorneys. She then would speak with the Chief Judge about them and, if the idea merited further discussion, a report on the issue would be authored, public comment would be sought, and then the concept would be voted on by the Unified Court System's Administrative Board, consisting of the Chief Judge and the Presiding Justices of the four Departments of the Appellate Division.

In the end, as noted by Paul Sarkozi, "Judge Prudenti has helped New York's Commercial Division convey a clear message to the business community that it is committed to being a leader in the resolution of commercial disputes."

The Section unanimously nominated, for 2015-2016 year, James M. Wicks as Chair, Mark A. Berman as Chair-Elect, Mitchell J. Katz as Vice-Chair, Deborah E. Edelman as Treasurer, and Jeremy Corapi as Secretary.

After the luncheon, the Section hosted, as it has done for year, a gathering of the State's Commercial Division Justices.

Internet and Intellectual Property Litigation Committee Presents a Panel of Luminaries on the Present State of Data Breach Litigation

By Peter J. Pizzi

Winter [non]storm Juno presented a challenge to the Data Breach Litigation Panel when all flights the day before were cancelled. Through the use of Google Hangout, Ian Ballon, author of the noted Internet law treatise and litigator at Greenberg Traurig's LA and Palo Alto offices, joined the discussion remotely and provided an excellent counterpoint to plaintiff's class action luminary Ariana Tadler, of Milberg, who led off the panel after moderator Peter Pizzi's introduction. Cyber specialist Joseph DeMarco covered the interaction that takes place with law enforcement once a company experiences a breach, followed by San Francisco lawyer Ray Sheen (arriving in New York before the snowstorm), who explained the role of insurance in helping companies prepare for and weather a data breach.

All speakers noted that a breach can occur under a variety of circumstances, including a disloyal or a careless employee; a laptop with unencrypted data left at an airport; an intruder who attaches a USB to the network and pulls down customer data; a remote hacker exploiting weakness in a firm's IT architecture; and others. In 2013, the Edward Snowden release of NSA data saturated the news, along with Target's "point-of-sale" (or cash register) breach during the peak holiday shopping season. In 2014, Home Depot suffered a breach and, at year end, Sony Pictures was attacked, with the perpetrators citing the release of *The Interview* motion picture spoofing Kim Jong-un. 2015 has seen no slowdown in breach announcements, including, most recently, the Anthem Healthcare breach of PII (personally identifiable information) and PHI (personal health information).

Ian Ballon pointed out that there is no federal statute that applies to all or most litigations arising out of data security breaches; the federal privacy law that does exist resides mostly in one of three "silos," namely, financial services (Graham Leach Bliley), health care (HIPAA), and marketing to children on the Internet (COPPA). Most class actions lodged against corporate defendants following a breach therefore fashion claims based upon state common law and, sometimes, state statutes. The primary hurdle for plaintiffs' lawyers is to articulate a basis for standing where a breach of data has taken place but actual identity theft has not. Threat of future harm generally has failed as a basis for standing because there has been no actual harm. This analysis gained credence after the Supreme Court's decision in *ACLU v. Clapper*, which involved NSA data collection practices (decided before the Snowden leaks) and in which the plaintiffs failed to show they were victims of secret government surveillance. The Supreme Court is set to revisit the issue in lawsuits that arose out of Snowden's disclosures of NSA's collection of vast stores of user telco and Internet data.

Ms. Tadler explained that, following the Target POS breach in December 2013, two tracks of class actions ensued, one for consumers (which Ms. Tadler leads) and one for financial institutions that incurred costs in replacing credit and debit cards. Both litigations are in the fact discovery phase, early motions to stay discovery having been defeated. Both teams of plaintiffs' lawyers also defeated Target's Rule 12 motions to dismiss; only the consumer class faced standing arguments, and those were turned aside by the federal court judge presiding. Mr. Ballon explained that outcome as not representing a change in the law but a result brought about by public pressure given the scale of the breach, the size of the classes, and the enormous publicity associated with the breach and the litigations.

Cyber lawyer and adjunct professor Joseph DeMarco began asking rhetorically, "Isn't this a mess?" Joe was referring to the lack of a comprehensive federal enactment applicable to data security breaches; the 47 different state laws requiring notification following a breach; and the ubiquity of breaches themselves, happening almost continuously. Joe noted that breaches began at least in the last century, and those early breaches prompted the various states to enact the notice laws, and increase criminal penalties for hacking. Hence, Joe pointed out, because a breach is almost invariably a crime, any breach scenario involves interaction by the corporate victim with law enforcement. That is where skilled lawyers come in, because the victim wants to cooperate without placing the organization in greater jeopardy. Hence Joe's advice that the lawyer needs to "walk between the raindrops." The best advice is to encourage clients to engage in breach preparedness before an incident occurs, get control over their data ahead of the hackers, test their systems, and simulate a breach and develop response steps and a written plan, all under the cloak of the attorney-client privilege.

Ray Sheen shed light on the role of insurance in responding to breach scenarios. He pointed out that there are cyber incident specific policies available from numerous insurers, and these specialty products can be critical in providing a company with the resources with which to cover breach expenses, repair damage to systems, defend litigation, and otherwise weather the storm. Lawyers should not lose sight of the fact that general liability policies may also provide coverage, and should advise clients to pursue coverage under specialty and general commercial policies following any breach incident.

Hedge Fund and Capital Markets Litigation Committee Presents Panel on Complex Financial Transactions at Trial

By Benjamin R. Nagin

On January 28, the Hedge Fund and Capital Markets Litigation Committee sponsored a panel entitled *Complex Financial Transactions at Trial: Experiences and Observations from the Bench and the Bar*. The panelists included Judge Paul A. Engelmayer, United States District Court for the Southern District of New York; Justice Marcy Friedman, Supreme Court, State of New York (Commercial Division); David Meisels, head of litigation, Fortress Investment Group; and Stephen L. Ascher, chair of Securities Litigation at Jenner & Block LLP. Benjamin Nagin of Sidley Austin LLP moderated the panel.

After introducing the topic, Mr. Nagin asked the panelists to discuss the choice of jury or bench trial. Mr. Ascher observed that in trials as well as mock jury exercises he found it was possible to explain even the most complicated disputes to jurors, and he saw truth in the adage "wisdom of the crowds." Businesses understandably do not want jury trials in lawsuits against consumers and other individuals. But that may not apply in commercial disputes between two large companies.

Judge Engelmayer agreed that juries generally reach a wise result, but recognized that for a financial institution, a decision to avoid a jury would be understandable as a matter of "risk avoidance" in situations where there might be some "populist fury," as with the Enron scandal. Mr. Meisels also described several occasions where he thought juries or mock juries demonstrated bias against financial institutions.

Justice Friedman cautioned lawyers to avoid oversimplification. The complexities inevitably become important. Although visual aids can be useful, they must not be simplistic. Justice Friedman said she wants to hear the guts of transactions. In their desire to explain transactions to non-specialists, lawyers sometimes fail to give her crucial information.

Similarly, Judge Engelmayer welcomed lawyers to embrace complexity up front, and explain the product or transaction in question at every opportunity. In commercial disputes, lawyers may want to adopt a process that has been used in patent cases, namely, giving the court a "no advocacy tutorial." In a jury trial, pre-evidence jury charges may help lay the groundwork for the presentation of evidence.

Mr. Meisels noted that to improve their performance, lawyers should engage with the business people early and often. Mr. Meisels also noted that as an in-house lawyer, he tried to help his outside counsel do a reality check and evaluate the persuasiveness of their arguments. Mr. Nagin agreed that in his practice, it was essential to create a litigation team that includes business people as well as inside and outside counsel.

Mr. Ascher suggested trying out your arguments on non-lawyers, to help make the presentation more accessible to jurors. Jurors, and sometimes even judges, may have absolutely no background knowledge about the industry or practice at issue.

Mr. Nagin then asked the panelists, "Whom do you want as your expert, an undeniable subject matter expert, or someone who is a more seasoned testifier?" Justice Friedman responded, "I want the egghead." She also noted that although the CPLR permits experts to give opinions without an adequate basis on direct testimony, it is crucial for lawyers to present the basis for their expert's opinions affirmatively and in detail on direct.

Judge Engelmayer agreed that he would take "substance over form any day," particularly since judges and juries are skeptical of hired guns. He recommended a "double barreled message" where a fact witness and an expert witness, both with experience in the industry, would explain the same issue, each from his or her own perspective, but in ways that reinforce each other.

Mr. Meisels explained that as outside counsel, he wants to participate actively in the selection of an expert. He wants to make sure that his lawyers don't choose, for example, a brilliant academic who comes across as condescending or unlikable.

Mr. Ascher agreed that subject matter experts were preferable, partly because the litigation team can help an expert testify better, but cannot teach him or her to be the true expert in his field. In addition, having a true subject matter expert on your side might have settlement value in demonstrating the plausibility of your position to your adversary.

Finally, Mr. Nagin asked the panelists about mock jury exercises. Mr. Meisels described one experience where a mock jury exercise revealed the persuasiveness of an argument that he was not previously planning to employ. A mock jury exercise can help you test your themes, identify areas of possible misunderstanding, and see the potential unpredictability of the jurors. Notably, as in-house counsel, Mr. Meisels uses mock jury exercises to evaluate outside counsel.

Drawing from his experience in private practice, Judge Engelmayer recalled a circumstance in which a mock jury proved useful because, rather than focus on potentially problematic emails, it turned out that the mock jury was much more focused on bigger picture questions. Judge Engelmayer also considered mock jury exercises useful to test the appeal of witnesses.

Mr. Ascher noted that, in light of the many possible functions of a mock jury exercise, it was particularly important to decide your objectives before the exercise, and structure it to achieve those specific objectives. It might not be possible to test every issue.

Mr. Nagin noted that perhaps the greatest benefit of the mock jury exercise is that it gives you a great opportunity to prepare for trial, in a holistic way that you would not otherwise have.

Finally, the panelists discussed analogies and metaphors. Justice Friedman stated that analogies are very seldom effective, and almost always oversimplistic. Judge Engelmayer agreed. Mr. Meisels described an experience where a metaphor backfired with a mock jury.

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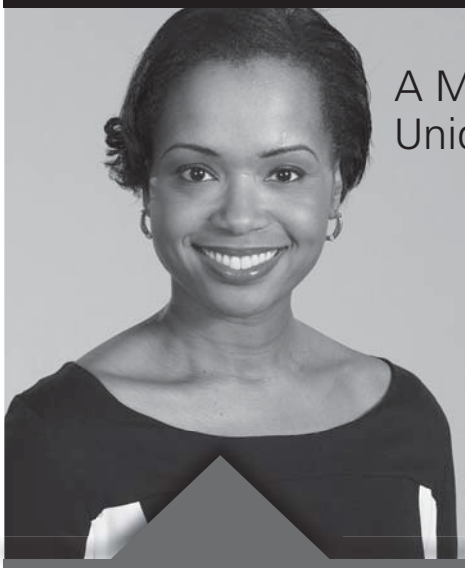

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Chief Judge Lippman's Vision Coming to Life—The ~~Next~~ Third Installment

By Rebecca C. Smithwick

In the Summer/Fall and Winter 2014 editions of this *Newsletter*, I reported on the significant changes in Commercial Division practice under the Division's Rules (the "Rules") since February 2013. At the time of my last article in December 2014, the changes included the following:

1. amending Rule 13 to provide for robust expert disclosure;
2. increasing the jurisdictional threshold in New York County from $150,000 to $500,000;
3. promulgating Rule 11-a, which sets the presumptive limit on interrogatories at 25;
4. enacting Rule 9, which permits litigants to consent to streamlined procedures for expedited adjudication;
5. establishing a pilot mandatory mediation program;
6. rolling out a new (optional) Preliminary Conference Order;
7. promulgating Rule 11-b, which creates a preference for the use of categorical privilege logs;
8. promulgating Rule 11-c, which provides guidance regarding discovery of ESI from nonparties;
9. promulgating Rule 34, which mandates staggered court appearances;
10. amending Rule 8(a), which addresses settlement-related disclosures;
11. amending §§202.70(d) and (e), which address the assignment and transfer of cases into and out of the Commercial Division; and
12. adopting a pilot program in New York County, which involves the referral of complex discovery disputes to Special Masters.

Adding to these, five new amendments were given the green light in the last few months, all of which become effective on April 1, 2015:

1. a new Rule 11-d, relating to limitations on depositions;
2. a new Rule 11-e, relating to responses and objections to document requests;
3. a new Rule 14, relating to disclosure disputes;
4. a new Preamble to the Rules concerning the imposition of sanctions; and
5. a new Model Compliance Conference Order Form.[1]

Limitations on Depositions

Arguably the most significant of the recent changes is new Rule 11-d, which sets presumptive limits on both the number and duration of depositions for parties litigating in the Commercial Division.[2] Under the new Rule—which largely mirrors the deposition parameters in federal practice—depositions are presumptively limited to:

(1) **ten (10) examinations per side**,

and

(2) **seven (7) hours per examination**,

unless

(3) the parties **agree** to modifications,

or

(4) a party demonstrates **good cause** to vary the presumptions.

With respect to the "good cause" requirement, the court may consider the overall complexity of the litigation, as well as other factors,[3] including whether: (a) the deponent requires an interpreter; (b) the deponent insists upon providing evasive and/or non-responsive answers to questions; (c) the lawyer representing the deponent engages in inappropriate or otherwise obstreperous conduct; (d) the examination reveals that documents have been requested but not yet produced; (e) the examination reveals the existence of critical, but as-yet-unrequested documents; (f) additional time is necessary in multi-party cases to permit adequate examination of the deponent by counsel whose interests may not entirely overlap;[4] and (g) the deponent's own lawyer wishes to cross-examine.

The Rule went into effect on April 1, 2015, and is only applicable to cases filed in the Commercial Division on or after that date.[5]

This new Rule is a game-changer, marking a departure from a paradigm where a civil litigant enjoys a virtually unfettered right to take as many depositions as

it wishes, without any constraints on the length of the examinations (subject only to the court's power to issue a protective order under CPLR 3103).

Consistent with the general goals of the new amendments, Rule 11-d was drafted to effectuate the type of reform recommended in the Chief Judge's Task Force on Commercial Litigation in the 21st Century (the "Task Force Report").[6] With respect to limitations on depositions, the Task Force Report took the view that such limitations "are fundamentally fair to all parties," "prevent gamesmanship," and "assist in streamlining discovery in most commercial cases."[7] Added to that list, according to the Advisory Council, is "the encouragement of cooperation amongst counsel," "discouraging unnecessary and potentially wasteful discovery," and "reducing the overall cost of litigation."[8]

As with all of the Rule changes implemented in the last 24 months, it remains to be seen whether the imposition of these presumptive limitations will live up to the intended expectations. I hold out high hopes, as I tend to agree with the notion—posited in the Commercial and Federal Litigation Section Public Comment[9]—that "boundaries provide reasons for lawyers to be more efficient:"[10] "[We] are creative; [we] can figure out how to do more with less."[11]

Responses and Objections to Document Requests

New Rule 11-e effectuates three major changes.[12]

First, it requires parties to provide increased specificity when responding and objecting to document requests (*see* Rule 11-e (b)). Gone are the days of invoking a long list of boilerplate objections alongside an equivocal assurance that "subject to" those objections documents will be produced: The new Rule requires an objecting party to set forth:

(i) whether the objections pertain to all or part of the request being challenged;

(ii) whether any documents or categories of documents are being withheld and, if so, which of the stated objections forms the basis for the responding party's decision to withhold otherwise responsive documents or categories of documents; and

(iii) the manner in which the responding party intends to limit the scope of its production.

The Advisory Council noted that, while the CPLR already requires "reasonable particularity" with respect to objections (*see* CPLR 3122(a)), that mandate is often "honored in the breach."[13] New Rule 11-e (b) is designed to "revitalize the [CPLR's] requirement and make clear that the Justices of the Commercial Division expect attention to (and compliance with) it."[14]

Second, new Rule 11-e sets a deadline (being prior to the commencement of depositions) by which the responding party must have completed its document production (*see* Rule 11-e (c)). Again, gone are the days of rolling productions without an end date.

Third, the new Rule requires a responding party to state—one month prior to the close of fact discovery (or other date set by the Court), and with respect to each and every individual document request—either that the production of documents is complete, or that there are no responsive documents (*see* Rule 11-e (d)).

The new Rule will require practitioners to reexamine with a jaundiced eye their inventory of templates and update them in order to ensure compliance with the new Rule. It will also require practitioners to formulate an entirely new template with respect to the statement of production completion required by sub-section (d).

Practitioners should note that new Rule 11-e is "effective April 1, 2015" (*see* AO/036/15), suggesting that it applies to all cases pending on that date, regardless of when the case was filed. (*Compare* AO/336a/14 re presumptive limitations on depositions, which applies only to "cases *filed* in in the Commercial Division on and after April 1, 2015.")

Disclosure Disputes

New Rule 14 sets forth a procedure to be used as a *default* protocol where the assigned Justice does not have Part Rules that address discovery disputes. It requires counsel for the parties to submit three-page letters to the court regarding unresolved discovery disputes. The court will, in turn, attempt to address the disputes via telephone conference.[15] The new Rule puts significantly more meat on the bones of former Rule 14, which simply directs counsel to contact the court if a discovery dispute cannot be resolved through good faith discussions.

There are clear benefits to the new Rule in terms of efficiencies: Parties can prepare three-page letters (a much cheaper undertaking than drafting 25-page briefs), have a telephone conference with the court about the issues (a much cheaper undertaking than in-court appearances), in a situation where the conference is structured (because the letters essentially provide an agenda), and receive an indication from the judge regarding how the dispute will be resolved (thereby filtering out unnecessary or inefficient motions).[16]

The Rule provides that, if the parties need to make a record, they will still have the opportunity to submit a formal motion. This is a critical component of the Rule as it ensures a party's right to take an interlocutory appeal with respect to a discovery issue—a commonplace occurrence in New York State practice.[17]

The overall consensus seems to be that this is a welcome base-line protocol for addressing discovery

disputes; it increases efficiency and reduces costs and attorneys fees. Judges can, of course, alter the dispute resolution mechanism by providing for it in their Part Rules.

Sanctions

In 2012, the Task Force Report concluded that sanctions were "underutilized" in the Commercial Division, the result of which was the "erosion of judicial trust."[18]

Effective April 1, 2015, this issue will be addressed through the introduction of a new Preamble to the Rules, which sends a strong message that the Commercial Division "will not tolerate" adversaries who engage in "dilatory tactics, fail to appear for hearings or depositions, unduly delay in producing relevant documents, or otherwise cause the other parties in a case to incur unnecessary costs."

The full text of the Preamble (a) acknowledges the problems caused by dilatory tactics (i.e., frustrated court users), (b) directs counsel and litigants to familiarize themselves with existing sanctions provisions (i.e., Rules 12, 13(a) and 24(d), CPLR 3126, and Part 130 of the Rules of the Chief Administrator), and (c) advises that Commercial Division Justices will impose sanctions as the circumstances warrant (thereby conserving client resources, promoting efficient resolution of cases, and increasing respect for the integrity of the judicial process).

Given that there is already substantial authority allowing Commercial Division Justices to impose sanctions, the Advisory Council believed that addressing the sanctions issue in the Preamble to the Rules was the best way to address the Task Force's observations. While some have expressed the view that the Preamble is unnecessary (the Preamble itself states that it is not intended to alter the scope of sanctions available), it surely puts all interested parties on notice about the importance the Justices will be placing on proper, non-dilatory practice. To this end, the language, according to the Advisory Council, takes a "moderate approach," in that it seeks to avoid language that moves too dramatically toward increasing the frequency of sanctions motions, yet has more force than a mere aspirational statement.[19] The Advisory Council has also flagged the possibility of having to re-work the sanctions provisions in the future, in the event they need more teeth.[20]

Whether the ultimate language concerning sanctions stays in the Preamble or steps are taken to enhance the sanction rules themselves, the message is sufficiently clear: practitioners in the Commercial Division need to attend to case management obligations with the utmost diligence, and any attempt to feign ignorance as to the seriousness with which the court will address slippage will not be well received.

Model Compliance Conference Order Form

One of the main appeals of litigating in the Commercial Division is the hands-on approach to case management taken by the Justices. As of April 1, 2015, the Justices have yet another invaluable tool at their disposal to help ensure their cases are staying on track: the Model Compliance Conference Order Form ("Model CC Form"). The new Model CC Form—like the Model Preliminary Conference Order Form ("Model PC Form") that became effective June 2, 2014—is just that: a *model*, not a *mandate*.

The new Model CC Form—which spans 18 pages—presumes that the parties have completed the Model PC Form and are returning to the court a number of months later to report on their progress concerning discovery.[21] To that end, the reworked form includes questions asking whether the deadlines outlined in the Model PC Form have been met and, if not, why not. In the event there has been slippage, the parties must specify proposed new dates for completion. Importantly, the court will have to specifically agree to the parties' proposed new dates. If the court does not agree, it will insert the date by which the parties must complete the task.

The Model CC Form also provides the opportunity to update the Judge regarding: (i) to what extent the pleadings have been amended or causes of action have been dismissed, and the effect those changes have had on the amount of damages at stake; and (ii) the status of electronic discovery and whether court intervention on that front is required.

Finally, like the Model PC Form (which, as I reported in the Summer/Fall 2014 edition of this newsletter, contains an entirely new section on ADR), the Model CC Form provides the court with another opportunity to push litigants towards ADR: The form requires counsel to affirmatively explain themselves if ADR efforts have not begun by the time of the compliance conference.

On the Horizon

At the time this article was submitted for publication, there are no further proposed Rules on the horizon. Having said that, the Advisory Council is a standing body, comprised of sophisticated Judges and practitioners who are acutely aware of the realities (and shortcomings) of day-to-day Commercial Division practice. To that end, it would not be surprising to see additional amendments out for comment within the next 12 months.

Endnotes

1. Copies of the new Rules, and the Advisory Council's recommendations in support of the changes, are available from the New York State Unified Court System website at http://www.nycourts.gov/RULES/comments/index.shtml.
2. Rules 8(b) and 11(c) were also amended to require both the parties and the court to proactively consider any modifications to the presumptive limitations given the circumstances of the case.

3. *See* Memorandum from Subcommittee on Procedural Rules to Promote Efficient Case Resolution to the Commercial Division Advisory Counsel, dated March 26, 2014 ("Advisory Council Recommendation on Depositions") at 5, a copy of which is available at http://www.nycourts.gov/RULES/comments/PDF/DepositionsRuleRequest.pdf.
4. The Advisory Council warns that parties in multi-party cases are not automatically entitled to an upward modification in the presumptive limitations merely by virtue of being party to multi-party litigation. In such cases, counsel are advised to allocate topics amongst themselves or select one attorney to act as lead examiner, in order to maximize efficiency. *See id.* at 5, n 3.
5. *See* AO/336a/14, dated December 23, 2014.
6. A copy of the Task Force Report is available at: https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf.
7. *Id*. at 23-24.
8. Advisory Council Recommendation on Depositions at 6.
9. *See* public comment submitted by the Commercial and Federal Litigation Section of the New State Bar Association in relation to deposition limits, dated August 12, 2014 ("Com Fed Public Comment"), a copy of which is available at http://www.nycourts.gov/rules/comments/PDF/received/DepositionLimits.pdf.
10. *Id.* at 1.
11. *Id.*
12. The Task Force Report requested that the Advisory Council consider a modification of the Rules to restrict the number and scope of document demands. Task Force Report at 23. The Advisory Council concluded that no presumptive limitations be imposed with respect to document demands because: (i) the protections of CPLR 3103(a) and 22 NYCRR § 202.70(g)(11)(c) are sufficient safeguards; (ii) if a presumptive limit were put in place, parties, so as not to deplete the permitted number of requests, may be inclined to issue demands that conflict with the judicial proscription against overbroad blunderbuss requests, leading to an increase in applications to the court; (iii) counting the number of requests may prove problematic; and (iv) traditional document requests may be of diminishing importance in the era of the rise of e-discovery. *See* Memorandum from Subcommittee on Procedural Rules to Promote Efficient Case Resolution to the Commercial Division Advisory Counsel, dated May 22, 2014 ("Advisory Council Recommendation on Document Requests") at 2-6, a copy of which is available at http://www.nycourts.gov/RULES/comments/PDF/PC-Comm-Div-Doc-Requests.pdf. The Advisory Council found that the better approach was the promulgation of a new rule to promote clearer and more useful responses to document requests—which found its shape in new Rule 11-e, discussed here.
13. *See* Advisory Council Recommendation on Document Requests at 6, n 4.
14. *Id.*
15. Again, the new Rule was drafted to address two of the Task Force Report's recommendations. *See* Task Force Report at 20-21.
16. *See generally* Memorandum from Subcommittee on Best Practices for Judicial Case Management to Commercial Division Advisory Council, dated April 29, 2014 ("Advisory Council Recommendation on Disclosure Disputes") at 2, a copy of which is available at http://www.nycourts.gov/RULES/comments/PDF/PC%20Request%20Comm%20Div%20Rule%2014.pdf.
17. *See* CPLR 5701 (providing that an appeal may be taken as of right from an interlocutory judgment or from an order that determines a motion made on notice).
18. Task Force Report at 24.
19. *See* Memorandum from Subcommittee on Best Practices for Judicial Case Management to Commercial Division Advisory Council, dated April 29, 2014 ("Advisory Council Recommendation on Sanctions Preamble") at 2, a copy of which is available at http://www.nycourts.gov/RULES/comments/PDF/PCPacketCommDivSanctions.pdf.
20. *Id.*
21. *See* Memorandum from Commercial Division Advisory Council Subcommittee on Best Practice for Judicial Case Management to Board of Justices, dated September 12, 2014 ("Advisory Council Recommendation on Model PC Form") at 1, a copy of which is available at http://www.nycourts.gov/RULES/comments/PDF/PC%20Request%20Comm%20Div%20Compl%20Conf%20Form.pdf.

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Commercial and Federal Litigation Section

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United States District Court Judge Mae D'Agostino Offers Insights and Advice at Commercial and Federal Litigation Section's Executive Committee Meeting

By Jennie L. Shufelt

Federal District Court Judge Mae D'Agostino was the guest speaker at the Commercial and Federal Litigation Section Executive Committee Meeting on February 10, 2015, which was hosted by Albany District Leader Jim Potter in Albany, New York. Judge D'Agostino was appointed to the Northern District of New York in 2011, after serving as a trial attorney for nearly thirty years. Judge D'Agostino is a past chair of the Trial Lawyers Section of the New York State Bar Association and a member of the International Academy of Trial Lawyers and the American College of Trial Lawyers.

Judge D'Agostino discussed the perceived delay of civil cases in the federal courts and offered her insights into some of the causes of this perception, as well as her advice about civil practice. Although she noted that some of the delay results from the priority that must be given to criminal cases, Judge D'Agostino also identified certain practices within civil litigation that contribute to delay. In particular, she identified the proliferation of civil motion practice as a substantial contributing factor. Judge D'Agostino noted that service of the summons and complaint is almost always followed by a Rule 12(b)(6) motion to dismiss, then a motion to amend the complaint, and then a motion to dismiss the amended complaint. At the conclusion of discovery, a motion for summary judgment generally follows.

Judge D'Agostino suggested that practitioners carefully evaluate whether they really have strong grounds for a motion to dismiss or a motion for summary judgment and, if not, that they consider redirecting their time and resources toward discovery and trial preparation. If, however, a summary judgment motion is made, Judge D'Agostino emphasized the importance of providing specific references to deposition testimony and other exhibits, responding carefully to the factual assertions being made by the opposing party, and using topic headings to organize and present arguments. She also cautioned against submitting extraneous documents to a Rule 12(b)(6) motion, which cannot be considered.

Judge D'Agostino also provided advice about preparing for and conducting a commercial trial. As Judge D'Agostino noted, commercial cases can be complex and difficult for jurors to comprehend. She also noted that jurors have a particularly difficult time with damages in commercial cases. She emphasized the importance of finding ways to present the case that will keep the jury's attention. For example, Judge D'Agostino suggested that attorneys try to stipulate to as much as possible to narrow the factual issues for the jury, and to identify expert witnesses who can explain the scientific or economic issues of the case in a way that the jury can understand. Finally, Judge D'Agostino pointed out that the use of courtroom technology can be very helpful and effective at getting the jury's attention.

Mark McCarthy, Esq., Patrick J. Higgins, Esq., Hon. Victoria A. Graffeo, Hon. Mae D'Agostino, Paul Sarkozi, Esq., Hon. Richard Platkin

Meet the New District Leaders

The following Section members have undertaken service in new District Leader positions:

County (District)	District Leader	Firm
Onondaga (5th)	Jonathan B. Fellows	Bond, Schoeneck & King, PLLC
Erie & Monroe (7th & 8th)	Sheldon Smith	Nixon Peabody LLP
Queens (11th)	Samuel B. Freed	Farrell Fritz, P.C
Queens (11th)	John A. Mitchell	Mitchell & Incantalupo

Jonathan B. Fellows is a member of the firm of Bond, Schoeneck & King, PLLC, and practices in its Syracuse office. He serves on the Firm's Management Committee and is Co-General Counsel of the Firm. He has a diverse litigation practice and has tried numerous cases to verdict in both federal and state courts and in alternative forums. He handles cases throughout the United States. His clients include medical device and pharmaceutical companies, financial institutions, cable television companies, and higher education institutions. In 2009, he was trial counsel for the claimant in a case before FINRA, in which his client was awarded $40 million, one of the largest FINRA arbitration awards ever. He has extensive experience in class actions and multidistrict litigation. Before joining Bond in 1986, he served as a law clerk for the Honorable Phyllis A. Kravitch of the United States Court of Appeals for the Eleventh Circuit. He is a graduate of Hamilton College and Cornell Law School, where he served as Editor-in-Chief of the *Cornell Law Review*.

Samuel B. Freed is Counsel to Farrell Fritz, P.C. An attorney who focuses on business law as well as on commercial real estate transactions, he has extensive experience representing clients in the sale and purchase of commercial properties and in the financing of the acquisitions. He assists clients with applying for New York State government-sponsored financial benefit programs, *i.e.*, Industrial Development Agency (IDA) programs, including straight lease of tax-exempt bond financing and SBA 504 programs used in conjunction with other methods of financing. For corporate clients, he acts as special counsel for industrial revenue projects or as general counsel relating to various business matters. He has chaired the Queens County Bar Association's Real Property Law Section, co-chaired the Commercial Law Section, served on the QCBA's Academy of Law panel, and served on former Chief Administrative Judge Ann Pfau's Commercial Division advisory group. In 2011 he received the QCBA's Special Award for his dedication to the Bar Association and for presenting numerous real estate and commercial law continuing legal education seminars to its members. He is an active, long-time member of the board of directors of the Child Center of New York, Inc., a Queens-based child abuse prevention organization. He holds an AV preeminent Martindale-Hubbell peer review rating.

John A. Mitchell is the Senior Partner at the law firm of Mitchell & Incantalupo, where he practices primarily in the areas of corporate law, commercial real estate, and business law. Mr. Mitchell received his B.A. degree from St. Francis College and his J.D. Degree for Suffolk University Law School. He previously has spoken on television on various legal matters and has lectured at the University of Bridgeport, in addition to having participated as a CLE panelist/lecturer sponsored by the Queens County Bar Association. Mr. Mitchell is a member of the Queens County and New York State Bar Associations. He is Co-Chairperson of the Commercial Law Committee of the Queens County Bar Association and has recently been appointed as an Executive Committee member of the Commercial and Federal Litigation Section of the New York State Bar Association.

Sheldon Smith is a partner in Nixon Peabody's Commercial Litigation practice group in the Buffalo and Rochester, NY, offices. He handles business disputes in federal and state courts and before arbitration tribunals, focusing his practice on representing (i) buyers and sellers of goods in cases involving disputes governed by the UCC and CISG; (ii) banks and financial services companies in matters involving the UCC and various consumer financial protection regulations; (iii) independent power producers and other commercial property owners in tax assessment litigation and condemnation proceedings; and (iv) health care providers with respect to various contract disputes. He also counsels businesses on matters involving restrictive covenants, trade secrets, trademarks and e-discovery. He has been recognized by the *Rochester Daily Record* as a 2014 Attorney of the Year and by the *New York Law Journal* as a 2013 Rising Star. He is currently a member of NYSBA's House of Delegates and has been elected to the Executive Committee beginning June 1, 2015. He also serves on the Board of Directors for Catholic Health Systems of Buffalo and as a leader in the Minority Bar Association of Western New York and the Rochester Black Bar Association.

Bankruptcy Litigation Committee Practice Update: Rights of Trademark Licensees in Bankruptcy—The Sequel

By Douglas T. Tabachnik

In my previous column, I wrote at length about the divergent views among the various circuit courts of appeal concerning the rights of trademark licensees in bankruptcy.[1] There was pending, at the time, a potentially game-changing motion before New Jersey Bankruptcy Judge Michael Kaplan in the *Crumbs Bake Shop* bankruptcy case, 522 B.R. 766, 2014 Bankr. LEXIS 4568 (Bankr. D.N.J. 2014).[2] The referenced motion had the potential to further interpret the rules in a fashion favorable to trademark licensees when a debtor decides to sell all of its intellectual property free and clear of all liens, claims, and encumbrances, and reject the IP licenses, potentially obliterating the licensee's rights under their respective agreements with debtors. The result of that motion was a far-reaching decision announced in a corrected decision dated November 3, 2014, which is discussed in this article—the sequel.

To briefly recap, I had earlier discussed the competing provisions of the Bankruptcy Code that allow, on the one hand, a debtor to sell all of its assets free and clear of liens, claims, and encumbrances (11 U.S.C. § 363(f)), but, on the other hand, protect the rights of intellectual property licensees from having their rights terminated when a debtor decides to reject its license agreements of intellectual property (11 U.S.C. § 365(n)). The question then presents itself that if the debtors cannot wipe out licensees' rights by rejecting their license agreements, can they accomplish the same result by simply selling the assets out from under them using the "free and clear" provisions of section 363?

There is also a parallel provision to section 365(n) that confers similar rights and protections upon tenants who rent property from a debtor (11 U.S.C. § 365(h)). More will be said about this issue later. The main difference between subdivisions (n) and (h) is that in order to determine the aspects of intellectual property protected under subdivision (n), the reader has to refer to another section of the Bankruptcy Code that defines just what intellectual property is protected, namely, 11 U.S.C. §101(35A). There, the reader will discover that the definition of intellectual property to which 365(n) applies conspicuously omits trademarks. This introduces an interesting corollary topic, which is: whether or not trademark licensees are protected notwithstanding the omission of the term trademarks from the definition of intellectual property that is protected by section 365.

Judge Ambro, of the United States Court of Appeals for the Third Circuit, in a lengthy concurrence in *In re Exide Technologies, Inc.*, 607 F.3d 957 (3rd Cir. 2010), had opined that such protection could nevertheless be extended to trademark licensees, since its omission, as indicated by the lengthy legislative history behind the enactment of the statute, could not be taken as an indication of an intentional exclusion by Congress. Judge Ambro concluded that the legislative history evinced an invitation for courts to develop equitable principles that could be later studied by Congress as intended to consider further amendments to the 1988 legislation[3] that was enacted to protect licensees of patents in bankruptcy cases. The 1988 Act was specifically designed to override a decision by the Fourth Circuit that held that rejection of a patent license by a debtor resulted in the termination of all rights by a licensee of intellectual property. *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), *cert den.*, 475 U.S. 1057, 106 S. Ct. 1285, 89 L. Ed.2d 592 (1985). The 1988 Act provided that patent licensees retained the rights to the utilization of the licensed property, notwithstanding any rejection of the license agreement by a debtor in bankruptcy. The issue of whether or not a sale of assets free and clear under section 363 effected a practical rejection of a license agreement that resulted in the termination of the rights of the licensee (since the underlying intellectual property now resided with the purchaser of the assets and not the debtor-licensor) remained subject to dispute.

The Seventh Circuit answered the question and expressly took exception to the widely derided reasoning of the *Lubrizol* decision, in the case *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F. 3rd 372 (7th Cir.), *cert den.*, 133 S. Ct. 790, 184 L .Ed. 2d 596 (2012). The Seventh Circuit reached the same result as Judge Ambro, but rather than rely upon the equitable principles that Judge Ambro utilized to extend protection to trademark licensees, the Seventh Circuit determined that the Bankruptcy Code warranted a contractual rationale for the preservation of the rights of licensees. That court, in following another line of Judge Ambro's reasoning, held that, since section 365(g) specifically provides that rejection of a contract by a debtor is deemed a breach and not a termination, the licensee would still have all the rights under such contract, including the right to continue to utilize the licensed property that a similar party would have outside of bankruptcy—as breach does not equate to termination or rescission.

Returning to the aforesaid game-changing motion, the main question was whether the provisions of section 363(f) allowing sales of assets "free and clear" trumped the ability of licensees under section 365(n) to retain their rights under a rejected license agreement. Enter Lemonis Fischer Acquisition Corp. (LFAC), the party purchasing the assets of Crumbs Bake Shops, pursuant to a credit bid

under section 363(f). The debtor here clearly intended to sell its assets free and clear of the encumbrances of the respective license agreements in a tightly choreographed timetable that provided for a quick approval for the sale after an auction, followed by a motion to reject the trademark licensees' respective agreements, filed the day after the order was entered approving the sale, and one day before the closing on the sale itself. Given the objections raised by the debtor's licensing agent and certain licensees to the attempted obliteration of their rights, the court "invited" LFAC to move for an order assisting the sale for the purpose of defining exactly what rights the respective parties to the asset purchase agreement had to the royalties emanating from the license agreements and the status of the respective license agreements, which were specifically excluded from the sale.

In a corrected decision, dated November 3, 2014, Judge Kaplan held that: 1) the rights of licensees of intellectual property could not be wiped out by a debtor's sale of assets; 2) the more specific terms of the Bankruptcy Code provision protecting licensees under section 365 trumped the more general provisions allowing debtors to sell their assets free and clear of all liens, claims, and encumbrances under section 363; and 3) in a cautionary tale for anyone looking to address these issues in the context of an asset purchase agreement, the court held that the debtor failed to notify the IP licensees of the debtor's intention, with the sale, to strip away their rights, by so burying the description of assets to be sold within the motion, the sale documents (some of which were not even made part of the motion for the court's approval), and the proposed order, that the failure of the licensees to object to the agreement could not be construed as consent.

The decision by Judge Kaplan also held, in a case of first impression, that the omission of the term "trademarks" from the definition of intellectual property in Bankruptcy Code section 101(35a) is not fatal to the rights of trademark licensees for the purposes of affording the licensees all the protections of section 365(n). In this regard, Judge Kaplan closely followed the reasoning of Third Circuit Judge Ambro in holding that equitable principles enable the bankruptcy court to fashion an appropriate remedy to prevent the destruction of the rights of licensees upon a sale of assets. Under the circumstances, such sales under section 363 can no longer be considered to be available completely "free and clear of liens, claims, and encumbrances." This decision was appealed by LFAC. However, as LFAC and the debtor have subsequently resolved their differences regarding the disposition of the royalties under the license agreements, that appeal will not go forward and Judge Kaplan's decision will stand as the last word for now on these matters.

We cannot say, however, that this is the last word on the statutory construction issues discussed by Judge Kaplan and others in this context. This issue has again reared its head in the *Revel* bankruptcy case. There, Judge Burns, sitting in Camden, NJ, declined to follow the lead of her fellow New Jersey bankruptcy judge and issued a ruling this past January 8 (Bankr. D.N.J., Case No. 14-22654 (GMB)), in which she expressly approved the sale of the debtor's assets under section 363, irrespective of the rights of certain commercial tenants, pursuant to Bankruptcy Code section 365(h). The tenants immediately appealed this ruling to the New Jersey U.S. District Court, where Chief Judge Simandle initially denied, on January 21, the appellants' motion for an emergency stay of the closing on the sale pending appeal. *IDEA Boardwalk, LLC v. Revel AC, Inc. (Revel AC, Inc.)*, 2015 U.S. Dist. LEXIS 7190 (D.N.J 2015). Judge Simandle found the question of whether or not the tenant's rights under section 365(h) trumped the rights of the debtor to sell its assets free and clear of all liens, claims, and encumbrances under section 363(f) to be so lacking in authority as to render the matter to be in "equipoise," thus militating against any possibility of showing the likelihood of success on appeal. *Id*. at *31.

The appellants immediately appealed from this decision to the Third Circuit Court of Appeals, where none other than Judge Ambro himself, writing for a two-judge majority on the panel, promptly signed an order overruling Judge Simandle as to one of the appellants who succeeded in filing the motion papers ahead of the others, with a more formal decision to be issued at a later date. *In re Revel AC, Inc*., D.N.J. February 6, 2015, Case. No. 1-15-cv-00299. Seeing this, Chief Judge Simandle was forced, on February 10, 2015, to reverse himself as to the remaining tenants who had also appealed from Judge Burns's January 8 order, in accordance with the Third Circuit's direction, noting this time around that a matter in equipoise "suffices to demonstrate a likelihood of success on the merits," not to mention the fact that the excerpts of the transcript from oral argument before the Third Circuit evinced an apparent disagreement by two of those judges with the holding below. *ACR Energy Partners, LLC v. Revel AC, Inc. (In re Revel AC, Inc.)*, 2015 U.S. Dist. LEXIS 15816, *12.

And there it stands, with all involved awaiting the anticipated elaboration by Judge Ambro of his February 6, 2015, order and, hopefully, putting the final word, at least for the Third Circuit, on the issue of whether the rights of lessees and licensees under section 365 trump the rights of debtors to sell free and clear of those rights under section 363 of the Bankruptcy Code. Stay tuned.

Endnotes

1. NYSBA *Commercial and Federal Litigation Newsletter,* Winter 2014, Vol. 20, No. 3, p. 5.
2. The author represented Brand Squared Limited, the prevailing party in the Crumbs decision discussed in this column.
3. Act to Keep Secure the Rights of Intellectual Property Licensors and Licensees Which Come under the Protection of Title 11 of the United States Bankruptcy Code, Pub. L. 100-506 (1988) (referred to as the "1988 Act").

Corporate Litigation Counsel Committee Update

By Robert J. Giuffra, Jr. and Michael Leahy

Robert J. Giuffra, Jr.

On December 11, 2014, the Corporate Litigation Counsel Committee hosted a roundtable dinner discussion with New York Chief Judge Lippman and Chief U.S. Distirct Judge Preska. This was the inaugural event under new Committee Co-Chairs Michael Leahy of AIG and Robert Giuffra of Sullivan & Cromwell. The event was attended by approximately 20 senior in-house counsel from among New York's largest accounting, banking, consumer products, entertainment, insurance, and telecommunications companies.

The evening began with each of the Chiefs describing recent actions the state and federal courts have taken to improve the efficiency and predictability of commercial litigation in New York.

Chief Judge Lippman discussed the importance of continuing to strengthen New York Supreme Court justices' ability to handle commercial cases, including proposed legislation to create a special class of court of claims judges whom the Governor would appoint specifically for their experience in commercial litigation to sit in the Commercial Division. This proposal grew out of the Chief Judge's Task Force on Commercial Litigation in the 21st Century.

Michael Leahy

Next, Chief Judge Preska stressed the negative impact that budget cuts over the past few years have had on the federal courts and the need for the legal community to press Congress for better funding for the federal court system. She placed particular urgency on funding the SDNY Bankruptcy court and filling two vacancies on that court. Chief Judge Lippman also stated the need for increased funding for the state courts. Chief Judges Lippman and Preska also discussed the desire on the part of the judiciary to engage in conversations with repeat litigants to ensure that the SDNY and state courts remain and grow as premier courts for commercial litigation. Several of the attendees also had suggestions for improving commercial litigation and settlement in New York.

The Committee intends to follow up with further thoughts on implementing several of the ideas expressed for improving commercial litigation in New York, as well as hold future events to brainstorm and implement other reform efforts.

Drafting a Comprehensive Arbitration Clause and Judicial Intervention in the Arbitral Process

By Clara Flebus

The Commercial and Federal Litigation Section and NAM (National Arbitration and Mediation) co-sponsored a complimentary CLE program on the important and timely topic of "Drafting a Comprehensive Arbitration Clause and Judicial Intervention in the Arbitral Process." The program was presented at NAM's headquarters in New York City on February 27, 2015. The panel consisted of Hon. John P. DiBlasi, arbitrator and mediator at NAM and former Justice of the New York Supreme Court, who served as moderator; Mark J. Bunim, a NAM arbitrator and mediator and former partner at Bryan Cave, LLP; and former Section Chair Jonathan Lupkin, a partner at Rakower Lupkin, PLLC. The program offered an in-depth discussion on the use of arbitration as a more efficient, cost-effective option to litigation, as well as the applicability of the Federal Arbitration Act (FAA), the New York Civil Practice Laws and Rules (CPLR), and other operative rules governing arbitrations. The panel also provided practical tips for drafting comprehensive pre-dispute arbitration clauses and addressed the role of the courts in the arbitral process.

At the outset, panelists examined the advantages offered by arbitration vis-à-vis traditional litigation. Mr. Lupkin stated that the records of the parties' arbitration may be rendered confidential by agreement of the parties or if the rules of a particular arbitral forum contemplate confidentiality. By contrast, there is both a common law and First Amendment presumption of open access to the court system and to documents filed in court—a special application is needed to seal sensitive records that could otherwise be easily viewed by accessing the electronic court docket remotely.

Mr. Bunim remarked that arbitration provides a less expensive avenue for dispute resolution because discovery is limited. Typically, discovery in arbitration exists in the form of exchange of documents between the parties. Pre-hearing discovery from nonparties is generally prohibited under both the FAA and the CPLR. Courts have interpreted the FAA as also prohibiting depositions of nonparties. However, the panel noted that an arbitrator can construct a hearing and issue a *subpoena duces tecum* to require a nonparty witness to testify and bring documents to the hearing.

Another advantage of arbitration is expeditiousness. Mr. Bunim stated that even a very complex commercial case could be resolved in one year. Mr. Lupkin observed that arbitration is more streamlined than litigation because the rules of evidence do not necessarily apply. The arbitrator, typically a seasoned practitioner or former judge, evaluates the general reliability of the evidence based upon her experience and common sense, but she is not bound by the hearsay rule. Thus, there is no need for the parties to authenticate documents or satisfy the business record exception to hearsay.

The discussion then focused on statutes governing domestic arbitration in New York. Mr. Lupkin explained that the FAA applies in all arbitration-related proceedings commenced in federal or state court if the dispute affects interstate commerce, while Article 75 of the CPLR applies in purely intrastate disputes. He cautioned that the FAA does not operate as an independent basis for jurisdiction. Thus, if the dispute involves interstate commerce, but does not present a separate jurisdictional basis, such as federal question or diversity of citizenship, a party who seeks judicial intervention may need to do so in state court, which would then apply the FAA. Mr. Bunim noted that the actual arbitral proceedings are typically governed by the rules of the organization administering the arbitration.

Next, the panel discussed items and requirements the parties should consider when drafting a contractual agreement to arbitrate. Mr. Bunim stated that the arbitration agreement needs to be in writing and signed by the party against whom arbitration is sought. The parties should set forth the scope of the arbitration carefully. Broad arbitration clauses providing that "any and all disputes arising out of or related to this agreement shall be arbitrated" have been interpreted by the courts as encompassing fraud and other tort claims. If the parties intend to submit only certain types of disputes to arbitration, the clause should specify the issues or subjects to be excluded. Mr. Bunim also emphasized that the agreement should designate the law to be applied in the arbitration, but the choice of law provision should expressly exclude the application of conflict of laws rules. In addition, the arbitration clause should provide for the arbitration venue, the rules applicable to the arbitral proceedings, the procedure for the selection of the arbitrator(s), and the number of arbitrators who would resolve the dispute.

Mr. Lupkin suggested that the arbitration clause could also define the scope of party discovery. For example, parties could agree to be bound by the rules of a certain arbitral institution or set forth their own rules limiting the number of party depositions and the scope of e-discovery. Another important tip concerned specifying the form of the award to be rendered by the arbitrator. A "naked" award does not provide any explanation for the arbitrator's reasoning and may be difficult to vacate. By

contrast, a reasoned award contains findings of fact and conclusions of law that explain the outcome. A reasoned award could also be used to assert collateral estoppel in a subsequent court action to preclude a party to the arbitration from re-litigating the same issues.

Finally, the panel discussed judicial intervention in arbitration. Mr. Lupkin stated that awards are often honored by the losing party voluntarily. However, sometimes it is necessary to take an additional step and commence a court proceeding to obtain confirmation of the award. If the application to confirm is granted, the award becomes a judgment and may be enforced utilizing any mechanism available under state or federal law to collect on judgments. Mr. Lupkin observed that a losing party may seek to vacate the award, but the grounds are very limited and only include fraud, corruption, partiality of the arbitrator, failure to consider evidence that should have been considered, and excess of powers. Significantly, the issue of whether the arbitrator has applied the law correctly is not a basis to seek vacatur of the award.

In closing, Mr. Bunim commented that the arbitration clause is the first step in structuring an arbitration process suitable to the parties and their particular dispute. "The arbitrator is a case manager bound by the arbitration agreement," he said. As such, practitioners would be wise to familiarize themselves with the legal framework of arbitration before a contract is executed.

The program was well received and provided very helpful materials, including the relevant federal and state statutes, case law, and NAM's rules and procedures for mediation and arbitration. The Section is thankful to all the panelists and NAM for making this event a success.

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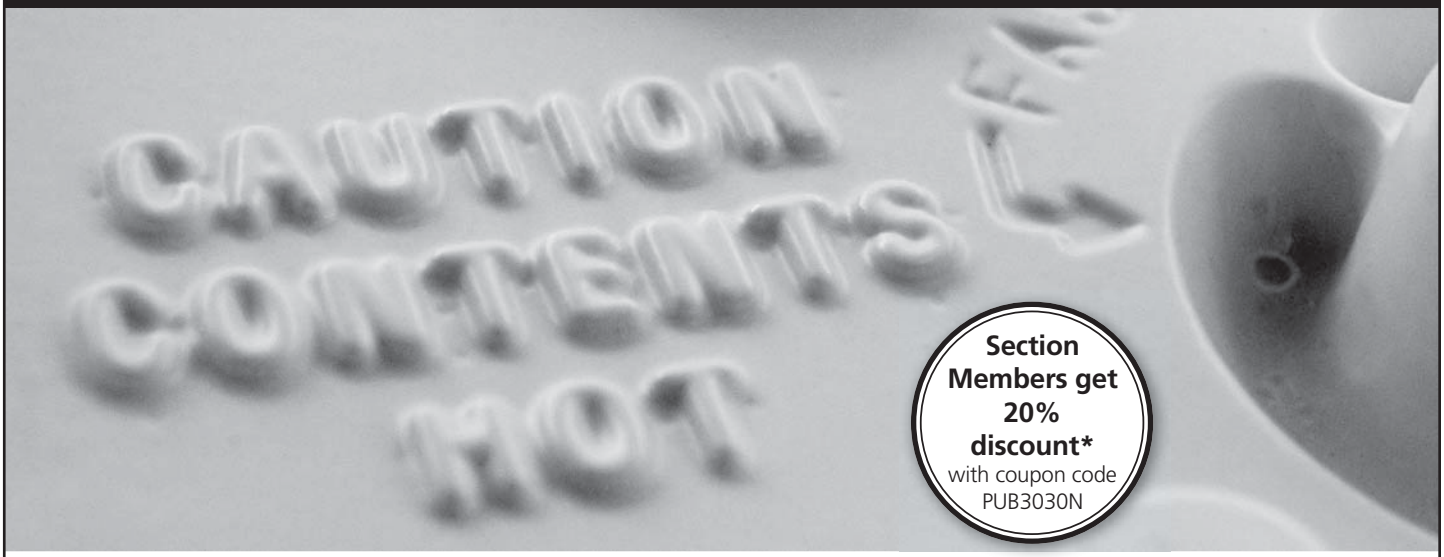

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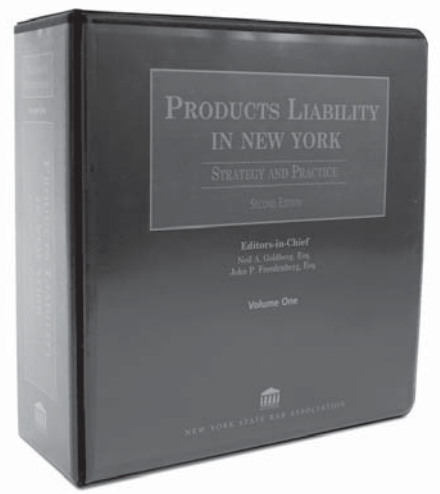

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CPLR Amendments: 2014 Legislative Session

(2014 N.Y. Laws ch. 1-552)

CPLR §	Chapter, Part (Subpart, §)	Change	Eff. Date
105(s-1)	29(2)	Extends expiration until June 30, 2019	6/19/14
2106	380	Permits affirmations by any person located outside U.S. territory	1/1/15
2214(c)	109	Provides that in e-filed action previously e-filed papers need only be referenced by docket number on e-filing system and not filed again for motion, absent a court rule	7/22/14
3113(c)	379	Makes explicit that attorney for non-party deponent may participate in deposition to same extent as attorney for party	9/23/14
3122-a(d)	314	Provides that the CPLR 3122-a certification may be used as to business records produced by non-parties whether or not pursuant to a subpoena	8/11/14
3216(a), (b)	371	Requires notice to parties, authorizes court to issue 90-day demand within six months after preliminary conference order, and requires that, where court issues demand, demand must set forth specific conduct constituting neglect, showing general pattern of delay	1/1/15
3408(a)	29(1)	Extends expiration until Feb. 13, 2020	6/19/14

Note: The expiration of the revival of Agent Orange actions was extended from June 16, 2014, to June 16, 2016. 2014 N.Y. Laws ch. 46. See CPLR 214-b.

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2014 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 1-27, 29-33 of 2014)

22 NYCRR §	Court	Subject (Change)
137, App. A, 8(B)	All	Increases to $10,000 threshold for submission of attorney-client fee disputes to panel of three arbitrators
202.5(e)	Sup.	Adds provision on omission or redaction of confidential personal information
202.6	Sup.	Amends Foreclosure RJI
202.6(b)	Sup.	Requires filing of no-fee RJI in applications for default judgments in consumer credit matters pursuant to 202.27-a
202.9-a	Sup.	Adopts new rule governing special proceedings authorized by UCC § 9-518(d)
202.12-a(c)(2)	Sup.	Adds examples of workout options and requires that plaintiff's representative be fully authorized to dispose of case
202.27-a	Sup.	Adopts new rule on proof of default judgments in consumer credit matters
202.27-b	Sup.	Adopts new rule on additional mailing of notice on action arising from consumer credit transaction
202.70(a)	Sup.	Increases monetary threshold for Albany County to $50,000, 8th Jud. Dist. to $100,000, Kings County to $150,000, Nassau County to $200,000, NY County to $500,000, Onondaga County to $50,000, Queens County to $100,000, 7th Jud. Dist. to $50,000, and Suffolk County to $100,000
202.70(d)-(e)	Sup.	Modifies procedures for assignment to and transfer into Commercial Division
202.70(g), Rule 8(a)	Sup.	Requires parties to consult about exchange of information that would aid early settlement of case
202.70(g), Rule 9	Sup.	Adopts new rule governing accelerated adjudication actions
202.70(g), Rule 11-a	Sup.	Adopts new rule governing interrogatories
202.70(g), Rule 11-b	Sup.	Adopts new rule governing privilege logs
202.70(g), Rule 11-c	Sup.	Adopts new rule governing discovery of electronically stored information from non-parties
202.70(g), Rule 34	Sup.	Adopts new rule governing staggered court appearances
800.24-a	3d Dep't	Modifies contents of the Pre-calendar Statement for Civil Appeals

Notes: (1) The Chief Administrative Judge has added Supreme Court in Livingston and Ontario counties and surrogate's courts in Allegany, Genesee, and Wyoming counties to the list of courts with voluntary e-filing under 22 NYCRR § 202.5-b. (2) The Chief Administrative Judge has added certain matters in Sup. Ct., Queens, Bronx, and Nassau counties to the list of matters for mandatory e-filing under 22 NYCRR § 202.5-bb. (3) 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.

2015 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 1-9 of 2015)

22 NYCRR §	Court	Subject (Change)
202.6(b)	Sup.	Deletes application for default judgment in consumer credit matter pursuant to 202.27-a
202.70(g)	Sup.	Adds preamble on dilatory practices
202.70(g), Rule 8(b)	Sup.	Adds need to vary presumptive number and duration of depositions set forth in Rule 11-d as matter to be considered by counsel in regard to e-discovery issues prior to preliminary conference
202.70(g), Rule 11(c)	Sup.	Adds consideration by court of appropriateness of altering presumptive limitations on depositions set forth in Rule 11-d
202.70(g), Rule 11-d	Sup.	Adopts new rule governing limitations on depositions
202.70(g), Rule 11-e	Sup.	Adds rule on response and objections to document requests
202.70(g), Rule 14	Sup.	Amends rule on resolution of discovery disputes
520.2(a)	Ct. App.	Adds cross reference to 520.17
520.3(b), (c), (d), (e)	Ct. App.	Amends definition of approved law school, instructional requirements, course of study, and credit for law study in foreign country
520.6(b)	Ct. App.	Amends educational requirements for legal education in study of law in foreign country

Notes: 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.

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Notes of the Section's Executive Committee Meetings

October 7, 2014

Guest speaker Judge A. Kathleen Tomlinson, United States Magistrate Judge, Eastern District of New York, discussed consent jurisdiction, proposed changes in the Federal Rules aimed at accelerating the commencement of discovery, and, with the Commercial Division judges present, discovery.

The Executive Committee also discussed the upcoming Annual Meeting, District Leaders, Bench-Bar programs, and the Suffolk County Commercial Division Committee.

November 5, 2014

Guest speaker United States District Court Judge Kenneth M. Karas, Southern District of New York, discussed his own practices and the differences between the White Plains and Manhattan SDNY courthouses.

The Executive Committee discussed and adopted the Commercial Division Committee's Comments on Proposed Commercial Division Rule Regarding Discovery Requests.

December 9, 2014

Guest speaker United States District Judge J. Paul Oetken, Southern District of New York, discussed practices he favors and disfavors.

The Executive Committee discussed and adopted the report of the Pattern Jury Instructions Committee concerning an instruction on agency. The Executive Committee also discussed the Corporate Litigation Counsel Committee's upcoming event, the anniversary celebrations of the Southern and Eastern Districts, an upcoming CLE program of the White Collar Criminal Litigation Committee, and the Annual Meeting.

January 20, 2015

At this special meeting, the Executive Committee discussed and approved the creation of a one-time Excellence in Commercial Litigation Fund for each of New York's four federal court districts.

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Representing the Personal Injury Plaintiff in New York

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