

# Commercial and Federal Litigation Section Newsletter

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

## A Message from the Chair

As I undertake the responsibilities of Section chair, I realize what an extraordinary undertaking this involves. Created in 1988 to expand upon the activities of the Federal Courts Committee, our Section is relatively young. Yet, when we were asked recently to review a draft of our Section's history to be included in a volume on



the history of the Association (see page 11), I was struck by how many extraordinary contributions we have already made in the fields of court structure, operations, rule-making and legislation relating to civil procedure and practice in both state and federal courts, not to mention the wealth of reports and CLE programs covering a vast spectrum of issues relating to commercial litigation that we have generated and presented. I follow in the footsteps of a number of outstanding chairs who have made this Section one of the best and most active our Association has to offer. In the coming year, I hope that we will build upon these accomplishments and initiate many new projects and programs as we carry on the great tradition of our Section.

Major goals of our Section for this year include developing new and improved means of providing our members with important and useful information about commercial litigation, more opportunities to meet judges and fellow practitioners, and furthering the exchange of experiences and ideas about how that practice may be enhanced and court procedures improved, through an ongoing dialogue with judges and court administrators.

Our Section's Web site already serves as an important resource of information about the current state of

commercial law and litigation practice. In the coming months we will be implementing a listserv on the Web site to enable our members to communicate more readily about matters of interest to commercial litigators, share information and experiences and ask for or offer comments on both substantive and procedural matters.

Another major resource of information on an enormous range of legal matters relating to commercial litigation is often underutilized: the numerous program books used for CLE programs sponsored by our Section and at our Annual and Spring Meetings. We intend to archive this vast material, catalogued by subject matter, so that it could be made available to our members on

## Inside

Report on the June 21, 2003 House of Delegates Meeting .....	3
Newsflash: Member News .....	4
Continued Support for Arbitration by the U.S. Supreme Court .....	5 (Carroll E. Neeseaman)
Section Co-Sponsors Reception: First Annual Women on the Move Symposium .....	7
Scenes from the Section's 2003 Spring Meeting.....	8
CPLR Amendments 2003 Legislative Session (Chapters 4-264) .....	10
2003 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals in the Court of Appeals and the Appellate Division, and Certain Other Rules of Interest to Commercial Litigators .....	10
Commercial and Federal Litigation Section History.....	11
Notes of the Section's Executive Committee Meetings .....	13
Section Committees and Chairs.....	14

our Web site. We will also include on this Web site archive the extensive body of reports generated by our committees and approved by our Executive Committee, a mainstay of our reputation as a major force in the development of commercial litigation practice.

We will also be enhancing our membership initiative this fall by starting a new program targeted at middle and large law firms with litigation departments. It is more important than ever to increase our membership, especially in light of the recommendations of the Special Committee on Association Governance to increase the number of delegates to the House. And to further increase our membership, we will strengthen our liaison with the Young Lawyers Section and organize an outreach program to seek members among law school students and recent graduates.

I believe that it is always beneficial to work with other Sections on programs and special projects. To this end, we will continue to seek out opportunities to collaborate with other Sections on CLE programs and Annual and Spring Meetings as well as on committee reports and projects where appropriate.

It is important to keep our members apprised of our committees' activities. The remarkable history of our Section is built upon the highly praised reports generated over the years by our committees and approved by our Executive Committee. Judicial administrators and legislators have frequently used these reports in the formulation of statutes, rules and regulations that profoundly affect commercial litigation practice. We should be proud of that history and will ensure that our members are aware of it. To this end we will inform our members of the progress of committee reports after they are approved by our Executive Committee.

Outreach to members located outside New York City will continue this year, with programs and Execu-

tive Committee meetings to be held in various locations around the state, including Nassau and Westchester Counties. We are also continuing to work with the members of Judge Scullin's special committee to develop a program for those who practice in the Northern District.

I encourage all of our members to take an active role in our Section by joining a committee and working on its projects. I hope you all will also accept our invitation to attend an Executive Committee meeting by contacting me or Secretary Michael Smith. The work of our Section is primarily sourced in the work of our committees, and the impact it has on our practice is due to the quality of the discussions and ideas that are generated there.

With the increasing recognition of our contribution to commercial litigation practice by judges and judicial administrators come several requests for more input. The program we presented for the Commercial Division justices at Pace Institute for the Judiciary on May 1, 2003 was a great success and has generated requests for more such programs. Other exciting bench-bar collaborations are being discussed.

We not only welcome these opportunities to have a greater impact upon the judicial system in which we practice, but also urge all our members to join us and share in our important work. Never before have we seen such a willingness on the part of the judiciary and judicial administration to seek the views of the bar on matters affecting the litigation process. Being able to contribute to the development of the rules and procedures that govern the courts in which we practice is both rewarding and stimulating. I hope that all of you will play a part in helping to make our participation in these ventures a great success.

Lewis M. Smoley



**Catch Us on the Web at  
WWW.NYSBA.ORG/COMFED**

# Report on the June 21, 2003 House of Delegates Meeting

The Section's newest delegate, Cathi Hession, attended the House of Delegates meeting in Cooperstown on June 21, 2003. The meeting opened with ceremony and the presentation of several awards. The oath of office was administered to new Association President A. Thomas Levin by Chief Administrative Judge Jonathan Lippman. Outgoing President Lorraine Power Sharp was presented with a chair and a plaque thanking her for her many accomplishments during her term. The Association's Root/Stimson Award for outstanding service to the community was presented to Wayne D. Wisbaum of Eggertsville. William J. Carroll, who retired in 2001 after 23 years as the Executive Director of the Association, was presented with the Distinguished Service Award in recognition of the extraordinary service he rendered on behalf of the Association. The award will bear his name in the future.



Cathi Hession

Mr. Levin's first President's Report touched on the Association's successes in raising its legislative profile and in assisting passage of legislation increasing 18b rates, its continuing support for Rockefeller drug law reform and anti-terrorism legislation, submission to the federal appellate court of an *amicus curiae* brief urging reversal of the *Spargo* decision striking down some speech-restrictive sections of the state's Code of Judicial Conduct, and the Executive Committee's endorsement of the ABA's federal judicial pay increase initiatives—a position supported by the Section and which was approved by the House of Delegates. Mr. Levin also reported that the Association is undertaking its own studies of judicial election issues and jury reform, as well as a study of issues facing same-sex couples.

Bob Haig, the founding Chair of this Section and the new President of the New York Bar Foundation, gave a report on the Foundation, which supports projects in the profession's and the public's interest. Bob encouraged all Association members to support the Foundation with general contributions, memorial and special-occasion gifts, and bequests and other planned giving.

The House unanimously approved the amended report and recommendations of the Special Committee on Multi-Jurisdictional Practice that New York amend DR 3-101 (Aiding Unauthorized Practice of Law) and 1-105 (Disciplinary Authority and Choice of Law) of the Code of Professional Responsibility and add accompanying ethical considerations. The legislation would establish a bright line test for permissible multi-jurisdictional practice, eliminating uncertainty about what constitutes the provision of

legal services "on a temporary basis," and would authorize non-litigation practice consistent with actual practice. The proposed legislation also would make lawyers who provide services in New York subject to New York disciplinary authority.

The most controversial business on the House agenda was consideration of the Report of the Special Committee on Association Governance. The report addresses communication, diversity, section representation in the House, and proportional representation of the various districts. The House tackled the report item by item, unanimously adopting recommendations for enhanced communication, the addition of a fifth Executive Committee meeting each year to be held at rotating locations around the state, and the addition of House seats for the Association's representatives to the ABA House of Delegates and Board of Governors. A recommendation to change the terms of Association and Section officers to begin on February 1 and end on January 31 was defeated, based largely on the views of past Presidents that they could not effectively prepare for their tenures during the months preceding the Association's annual meeting when Association staff is otherwise occupied. Views also were expressed that the Sections are entitled to autonomy on such matters and had not been consulted about the impact of changing their established Section years. (A motion to amend the Bylaws to require that the terms of Association and Section officers coincide also was defeated. The Association will solicit the views of the Sections whether Association and Section years should coincide.)

The House voted to establish a standing Committee on Leadership Development (CLD), but rejected the Special Committee's recommendations about the composition and term of the Committee, leaving those issues open. The recommendation that the Committee's responsibilities include making recommendations to the Nominating Committee for nominations to the Executive Committee was defeated after debate, which included expressions of concern that the CLD not become a "super nominating" committee. The recommendation that the CLD's responsibilities include recommending a pool of persons from whom the President shall make appointments to the Executive and Nominating Committees was tabled, pending discussion of the recommendation to increase the Executive Committee by means of presidential appointments.

Because time did not permit consideration of the entire report, discussion of the remaining recommendations was deferred to the next House meeting. The remaining items include a recommendation that Sections with 2,000 members be allowed a second delegate. Our Section, which is at or very close to that mark, supports that recommendation. The next House meeting is scheduled for November 8, 2003.



### **Mark Zauderer Selected by Chief Judge to Chair Commission on the Jury**

Chief Judge Judith S. Kaye has selected Mark C. Zauderer, a former Chair of the Section, founding partner of the law firm of Solomon, Zauderer, Ellenhorn, Frischer & Sharp, and currently a partner of the law firm of Piper Rudnick, LLP, to chair the Commission on the Jury. The Commission is a special panel charged with examining the current jury system and finding ways to better utilize the time of citizens called to serve as jurors. Judge Kaye formed the Commission after a study revealed that 82 percent of New Yorkers called for jury service are never actually selected to serve as jurors on a trial.

The Commission, under Mr. Zauderer's direction, is composed of 28 members, including jurists, prosecutors, defense attorneys and civil litigators from around the state. Mr. Zauderer and the Commission scheduled a series of public hearings in which attorneys and jurors were invited to testify before the Commission during the months of June and July regarding the manner in which both jurors and attorneys feel the jury system could be improved to better utilize both attorney and juror time during the selection process and to enhance the jurors' understanding of the importance of jury service.

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### **Hon. Richard C. Wesley Receives Robert L. Haig Award**

The Section extends its congratulations to the **Hon. Richard C. Wesley**, who was honored at our Spring Meeting in Hershey with the presentation of the Robert L. Haig Award. The Haig award recognizes outstanding contribution to public service.

Judge Wesley, who served as an associate justice of the New York State Court of Appeals for six and a half years, was sworn in on June 18, 2003 as a Judge on the United States Court of Appeals for the Second Circuit. We offer our sincerest wishes to Judge Wesley for continued success and distinction in his new appellate venue.

\* \* \*

Congratulations are also in order for **P. Kevin Castel**, a former Chair of the Section, and a partner at the law firm of Cahill Gordon & Reindel, who has been nominated by President Bush as a United States District Judge for the Southern District of New York.

*Save the Date!*

**Commercial and Federal Litigation Section**

**2004 Annual Meeting**

**Wednesday, January 28, 2004**

**New York Marriott Marquis**



# Continued Support for Arbitration by the U.S. Supreme Court

By Carroll E. Neesemann

The U.S. Supreme Court has decided another important case on an issue related to arbitration, although its importance may not be apparent on the face of the opinion.

*Green Tree Financial Corp. v. Bazzle*<sup>1</sup> presented the question of whether a contract provision requiring the arbitration of all disputes permits a class action to proceed in arbitration as a “class arbitration” if the clause is silent on that specific issue. In an opinion by Justice Breyer, in which Justices Scalia, Souter and Ginsburg joined and in which Justice Stevens concurred, the Court decided to remand the case to the arbitrator for a construction of the contract on the issue—in the words of the Court: “thereby enforcing the parties’ arbitration agreements according to their terms.”

In a dissenting opinion in which Justices O’Connor and Kennedy joined, Chief Justice Rehnquist found that the imposition on the parties of class arbitration would contravene language in the arbitration clause providing for the selection of a single arbitrator by the respondent with the consent of the claimant, which could have resulted in the selection of different arbitrators for disputes between the respondent and its various customers. Thus, the Chief Justice would have ruled that the clause precluded class arbitration.

While the case deals with arbitration clauses that are silent on the issue, its true significance lies in what it implies for arbitration agreements that expressly require individual arbitrations between a supplier of goods or services and its customers or employees and expressly preclude participation in class actions in court or arbitration. Such clauses have become very prevalent, and the implication of *Bazzle* is that they are enforceable.

The concurring opinion of Justice Stevens would have affirmed the decision below of the Supreme Court of South Carolina that under state law “class-action arbitrations are permissible *if not prohibited by the applicable arbitration agreement.* . . .” (emphasis added). Similarly, under the dissenting opinion, if class-action participation can be precluded by party intent as found by court construction, surely it can be precluded by express party agreement. And under the plurality opinion, the remand for an arbitrator’s determination of whether the parties intended to preclude class-action participation would be meaningless if such a determination would not be enforceable.

The Supreme Court has found, in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>2</sup> and *Green Tree Financial Corp.—Alabama v. Randolph*,<sup>3</sup> that to be enforceable, an agreement to arbitrate must be such as to provide a mechanism by which a party can vindicate its rights. Both cases enforced agreements to arbitrate to the preclusion of class-action participation in court or arbitration. In *Gilmer* it was assumed that arbitration did not include class arbitration. In *Randolph* the issue of preclusion of class-action participation was expressly not reached because it had not been addressed below.<sup>4</sup>

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*“The U.S. Supreme Court has decided another important case [Green Tree Financial Corp. v. Bazzle] on an issue related to arbitration, although its importance may not be apparent on the face of the opinion.”*

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While none of the opinions in *Bazzle* focuses on the fact, the arbitration agreements at issue in the case included waiver of the right to a jury trial and provided to the arbitrator the power to award any remedy available in court.<sup>5</sup> Also obvious in *Bazzle*, although not expressly addressed, is the fact that the agreement in question was a contract of adhesion. Thus, implicit in the *Bazzle* decision is the proposition that, at least where an arbitration agreement provides to the arbitrator the power to award any remedy available in court, it may preclude class-action participation in court and in arbitration.

*Bazzle* was decided under the Federal Arbitration Act, pursuant to which agreements to arbitrate are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>6</sup> The Supreme Court has held that unconscionability is such a generally applicable contract defense.<sup>7</sup> Increasingly, lower courts around the country have been refusing to enforce arbitration agreements, on the ground of unconscionability, where the preclusion of class-action participation is one of the allegedly one-sided unfair provisions giving rise to the defense. In at least two cases, the preclusion of class-action participation, standing alone, has been found a sufficient basis on which to find an arbitration agreement unconscionable.<sup>8</sup>

Now, however, under *Bazzle* it appears that, at least if an agreement provides to the arbitrator, in an individual arbitration with a customer or an employee, the power to award any relief available in court, it may preclude class-action participation in court and in arbitration and still provide an adequate forum for the vindication of rights, as a matter of federal law. If that is the case, it would seem no longer viable for a court to find as a matter of state law that such a provision is unconscionable.

If this is how the courts interpret *Bazzle*, it is a significant case indeed.

### Endnotes

1. 2003 WL 21433403 (U.S.S.C.).
2. 500 U.S. 20 (1991).
3. 531 U.S. 79 (2000).
4. See 531 U.S. at 92.

5. "THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US (AS PROVIDED HEREIN). . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. Those powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." 2003 WL 21433403 (U.S.S.C.) at 3.
6. 9 U.S.C. § 2.
7. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686-87 (1996).
8. See *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 118 Cal. Rptr. 2d 862 (2002), cert. denied, 123 S. Ct. 1258 (2003); *Luna v. Household Finance Corp. III*, 236 F. Supp. 2d 1166 (W.D. Wash. 2002).

**Mr. Neesemann is an arbitrator and mediator, and a partner in Morrison & Foerster LLP in New York City. He is co-chair of the Section's Arbitration & ADR Committee.**

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*Save the Dates*

## **Commercial and Federal Litigation Section**

# **2004 SPRING MEETING**

## **May 21-23, 2004**

## **Mohegan Sun • Uncasville, CT**

## Section Co-Sponsors Reception: First Annual Women on the Move Symposium



The Section co-sponsored a networking reception following the First Annual Women on the Move Symposium held on May 22, 2003, in New York City. A sell-out crowd attended the afternoon symposium on the changing face of the profession, compensation, diversity, alternative work arrangements and other aspects of professional development in a legal community that now includes almost 30 percent women lawyers. The symposium's co-sponsors included the Committees on Women in the Law, Law Practice Management and CLE. Former Section Chair Cathi Hession spoke on a panel on different approaches to compensation; Treasurer Lesley Friedman Rosenthal spoke on a panel on managing people for maximum performance. Several judges, including Commercial Division Judges Carolyn Demarest, Helen Freedman and Karla Moskowitz, joined the crowd for the lively cocktail reception, which the Section co-sponsored with seven other Sections.



Our Section received considerable publicity and thanks for its sponsorship, and several symposium attendees expressed interest in joining the Section.







Outgoing Section Chair Cathi Hession, Former Section Chair Robert L. Haig, Hon. Richard C. Wesley, Hon. Howard A. Levine, and Incoming Section Chair Lewis M. Smoley



Hon. Kenneth W. Rudolph, Hon. Louis C. Benza, Hon. Carolyn E. Demarest, Hon. Ira B. Warshawsky, Hon. Ira Gammerman, Hon. Bea Shainswitt, Hon. Jack B. Jacobs, Hon. Stephen Crane, Hon. Thomas A. Stander, Hon. Leonard B. Austin, Hon. Richard B. Lowe III, Hon. Joseph G. Makowski



Hon. Howard A. Levine, Barbara Levine, Dr. Julia Rosenblatt, Hon. Albert M. Rosenblatt; Front: Kathryn Wesley, Hon. Richard C. Wesley



James P. Kreindler gave an update on civil suits brought by victims of terrorism



Mitchell Katz, Outgoing Section Chair Cathi Hession, Stephen H. Orel



Panelists Thomas N. Pieper and Jay G. Safer, with Panel Chair Ted G. Semaya, discussing international litigation and arbitration



Hon. Richard B. Lowe III and Hon. Joseph G. Makowski, participating in the Commercial Division Forum roundtable discussion, share a humorous moment



Section Secretary Michael's wife, Lauren

SCENES FROM  
**COMMERCIAL  
 LITIGATION  
 SPRING MEETING**

**May 16-17  
 HOTEL HEARST**





Incoming Section Chair Lewis M. Smoley, Outgoing Section Chair Cathi Hession, Section Executive Vice-Chair Stephen P. Younger, Hon. Jack B. Jacobs, Section Chair-Elect Lauren Wachtler



Outgoing Section Chair Cathi Hession accepts a parting gift—and a parting shot—from Incoming Section Chair Lew Smoley and Section Chair-Elect Lauren J. Wachtler

FROM THE  
AND FEDERAL  
SECTION  
MEETING



Hon. Jack B. Jacobs speaks about commercial cases in the Delaware Court of Chancery



Hon. Richard B. Lowe III, Patricia Rudolph, Hon. Louis C. Benza, and Hon. Kenneth W. Rudolph



Michael B. Smith with his



Back: Harold Levy, Hon. Joseph G. Makowski, Stephen H. Orel; Front: Melissa Klein, Kathy Kass, Jay G. Safer, Carrie Cohen, Former Section Chair Sharon M. Porcellio, Joseph Kubarek



Hon. Thomas A. Stander and Hon. Ira B. Warshawsky participate in the Commercial Division Forum roundtable discussion

18, 2003  
RSHEY, PA



Panel on the Alien Tort Claims Act. Back: Judith Chomsky, Michael Hausfeld, David Zaslowsky; Front: Prof. Paul Dubinsky, Paul Edelman, and Panel Chair Stephen H. Orel

## CPLR Amendments 2003 Legislative Session (Chapters 4-264)

CPLR §	Chapter (§)	Change	Eff. Date
304	261 (1)	Extends pilot program on commencement of actions by fax or e-mail until 9/1/05	7/29/03
1101(f)	16 (20)	Extends effective date for 1101(f) until 9/1/05	3/31/03
2103(b)(7)	261 (1)	Extends pilot program on service of interlocutory papers by e-mail until 9/1/05	7/29/03
2104	62 (Part J, 28)	Requires defendant to file stipulations of settlement with county clerk	7/14/03
3217(d)	62 (Part J, 29)	Requires that all notices, stipulations, and certificates pursuant to CPLR 3217 be filed by defendant with county clerk	7/14/03
4111(d)	86 (1)	Replaces section with new CPLR 4111(d) on itemized verdict in medical, dental, or podiatric malpractice actions	7/26/03 <sup>1</sup>
5031	86 (2)	Replaces section with new CPLR 5031 on basis for determining judgment to be entered	7/26/03 <sup>1</sup>
5035	86 (3)	REPEALS CPLR 5035, relating to effect of death of judgment creditor	7/26/03 <sup>1</sup>
8011(h)(1), (2)	11 (2)	Increases sheriff's fees	2/24/03
8018(a)(1)	62 (Part J, 23)	Increases index number fee to \$190 [plus \$20 under CPLR 8018(a)(3), for a total of \$210]	7/14/03
8019(f)	62 (Part J, 24)	Increases fees for copies of records	7/14/03
8020(a)	62 (Part J, 25)	Increases RJJ fee to \$95 and subsequent calendaring fee to \$30; imposes \$45 fee for motions and cross-motions	7/14/03
8020(c)	62 (Part J, 25)	Increases jury demand fee to \$65	7/14/03
8020(d)	62 (Part J, 25)	Imposes \$35 fee for filing stipulation of settlement pursuant to CPLR 2104 or notice, stipulation, or certificate pursuant to CPLR 3217(d)	7/14/03
8022(a)	62 (Part J, 27)	Increases notice of appeal filing fee to \$65	7/14/03
8022(b)	62 (Part J, 27)	Increases filing fee to \$315 for record on appeal pursuant to CPLR 5530 and imposes \$45 filing fee for motions and cross-motions	7/14/03
8023	261 (1)	Extends pilot program on payment of fee by credit card until 9/1/05	7/29/03

### Endnote

1. Applies to actions and proceedings commenced on or after 7/26/03.

## 2003 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals in the Court of Appeals and the Appellate Division, and Certain Other Rules of Interest to Commercial Litigators

22 N.Y.C.R.R. §	Court	Subject (Change)
202.5-a	Sup./County	Filing by facsimile transmission (changes in applicability)
202.5-b	Sup./County	Filing by electronic means (changes in applicability and procedures)
600.15(a)(5)	A.D., 1st Dep't	Increase in fee for filing record on appeal to \$315
600.15(a)(6)	A.D., 1st Dep't	Addition of \$45 fee for filing motions and cross-motions
670.4	A.D., 2d Dep't	Management of causes (adds Active Management procedures)
670.8(d)	A.D., 2d Dep't	Enlargements of time (requires court permission for extensions)
670.8(e)-(f)	A.D., 2d Dep't	Abandonment of appeals for failure to perfect (replaces motions to extend with cross-reference to 670.8(d))
670.22(a)(1)	A.D., 2d Dep't	Increase in fee for filing record on appeal to \$315
670.22(a)(2)	A.D., 2d Dep't	Addition of \$45 fee for filing motions and cross-motions
670.22(a)(7)	A.D., 2d Dep't	Deletion of \$2 fee for filing and entering order, affidavit, or other paper changing name of attorney

# Commercial and Federal Litigation Section History

**MISSION AND DATE FORMED:** 1988. The Section was created to permit a substantial expansion of the activities of the Committee on Federal Courts and to enable more lawyers to participate in those activities.

“We decided to establish the Section in order to provide more meaningful opportunities for lawyers practicing commercial and federal litigation in New York than are currently available through membership in other professional organizations.”

—Robert L. Haig, first Chair of the Section and past Chair of its forerunner, the Committee on Federal Courts

**MEMBERSHIP:** 1,911 as of July 19, 2003

**INITIATIVES:** Initial CLE included a program on commercial litigation in federal and New York state courts, and another on criminal law practice in federal District Court. Publications included the 1989 book, *Federal Civil Practice* and a 1994 publication, *Federal Rules of Civil Procedure 1993 Amendments: A Practical Guide*. The Section also initiated, compiled and periodically updated a volume containing the rules and procedures, and forms employed by the U.S. District Judges in each of the four districts of New York.

The inaugural issue of the *Commercial and Federal Litigation Section Newsletter* was published in 1993 to apprise its members more fully of Section reports, actions, activities and events, and to encourage members to participate in one or more of the Section’s many committees. In 1995, the Section inaugurated an additional publication, the *NYLitigator: Journal of the Commercial & Federal Litigation Section*, created to showcase the work of the Section. This publication, produced with the editorial assistance of students at St. John’s University Law School, has become a leading medium for articles and reports exploring issues and ideas of importance to New York litigators.

Since the Section was established, it has issued numerous reports that cover a broad range of substantive and procedural aspects of commercial and federal litigation. In 1988, the Section issued a report that commented on certain proposed amendments to Rule 45 of the Federal Rules of Civil Procedure under consideration by the Civil Rules Advisory Committee of the Judicial Conference of the U.S. In 1989, the Section:

- opposed a proposal being considered by the Advisory Committee to abolish the Federal Rule 12(b) (6) motion to dismiss.
- recommended greater use of separate “mini-trials” in civil matters of issues, which may potentially resolve an entire case, or materially advance the disposition of a case.
- proposed Uniform Definitions in Discovery Requests that became Rule 26.3 of the Local Rules of the U.S. District Court for the Southern District of New York.
- recommended expanded use and greater judicial supervision of requests for admissions under Rule 36 of the Federal Rules of Civil Procedure.
- recommended adoption of a Uniform Rule regulating service by fax in state court proceedings.
- raised concern about certain recent decisions by the Second Circuit Court of Appeals relating to civil RICO liability.

In 1990, the Section, with House of Delegates’ endorsement, called for a uniform rule in the state appellate divisions for the perfection of civil appeals. Also in that year, the Section also issued a significant report with supporting data that dispelled myths about the consequences of allowing lawyers to serve on juries. The project was part of the Association’s extensive work to enhance the jury system and resulted in the elimination of automatic occupational exemptions. Another significant report issued by the Section that year proposed the creation of an International Criminal Court, which later became a reality. Additionally, in 1991-92, the House of Delegates approved Section proposals for modification of Rule 11 of the Federal Rules of Civil Procedure on sanctions and changes in federal rules of discovery as an alternative to the proposal of the U.S. Judicial Conference Committee, and a report urging law schools to give greater emphasis to teaching pre-trial litigation skills. In 1992 the Section prepared proposing the adoption of commencement of civil actions by filing, replacing the long-established method of commencement by service, and including draft legislation to accomplish this. The report was approved by the Association’s House of Delegates at its April 1992 meeting and enacted into law the same year.

In 1995, a task force of the Section issued a key report dealing with the flight of commercial litigants from New York state courts, which had played a leadership role in adjudicating major commercial disputes. “A Commercial Court for New York” called for the creation of a new Commercial Court, building on the experimental Commercial Parts. Citing the Section’s initiative, Chief Judge Judith S. Kaye appointed a task force to implement the concept proposed in the report. The Section has continued to provide



input on the functioning of the Commercial Divisions, which had been created in eight counties by 2003.

Other significant reports adopted by the Section during 1995-96 include guidelines on civility in litigation; expanding the scope of cases that can be initiated under CPLR 3213; fixing counsel fees in class actions; a proposed article of the CPLR on summary proceedings for commercial disputes; comments on the Craco Committee's report on the legal profession and the courts; and guidelines for the arbitration of employment disputes.

In December 1998, the Section issued a report recommending certain changes in court rules concerning treatment of related cases in the U.S. District Court for the Southern District of New York. The impetus for the report was the controversy that accompanied charges of "judge shopping" in several cases. On March 30, 1989, the Southern District Court adopted a revised "related case" rule and acknowledged the Section's contribution to the revision.

A business records bill proposed by the Section became a law in 2002, significantly changing and expanding procedures for discovery of business records of non-party witnesses, in an effort to make involvement in litigation less burdensome for those who are not parties.

The Section has presented numerous CLE programs on litigation practice in both state and federal courts. In 1997, at one such program on appellate practice in the Second Circuit Court of Appeals, the first oral argument of a real case was conducted via video-conferencing. As a result of the Section's initiative, the Second Circuit adopted rules for the submission of briefs and records on CD-ROM.

Each year since 1995, the Section has held its Spring Meeting during a weekend in May, at which it presents various programs relating to commercial and federal practice. The first Spring Meeting featured a panel of newly appointed federal judges, moderated by N.Y.U. Law Professor Burt Neuborne, and a keynote address by Second Circuit Judge Roger Miner. The 2003 Spring Meeting showcased the first Commercial Division Forum, in which Commercial Division Justices from each of the counties that have a Commercial Division discussed rules, practices and procedures.

In May 2003, the Section presented the first program for Commercial Division Justices held at the newly created New York State Judicial Institute at Pace University School of Law.

**AWARDS:** Beginning in 1995, the Section presents two awards annually to highly respected members of the profession. The Stanley H. Fuld Award for outstanding contributions to commercial law and litigation is named after one of the most distinguished judges ever to sit on the New York State Court of Appeals. He was the first recipi-

ent of this award. Subsequent recipients include Milton Gould, Esq.; Hon. Judith S. Kaye, Chief Judge of the New York Court of Appeals; Hon. Constance Baker Motley, U.S. District Court Judge, Southern District of New York; Hon. Antonin Scalia, U.S. Supreme Court Justice; Hon. Jack B. Weinstein, U.S. District Court Judge, Eastern District of New York; Prof. David D. Siegel, Albany Law School; Dean Joseph W. Bellacosa, St. John's University School of Law, formerly Associate Judge, New York Court of Appeals; and Hon. Sidney H. Stein, U.S. District Court Judge, Southern District of New York.

The Robert L. Haig Award for distinguished public service is presented at the Section's Spring Meeting. This award is named for its first recipient, Robert L. Haig, the Section's founder and first chair, who has been instrumental in the development of commercial litigation practice. Other recipients of this award have been Hon. E. Leo Milonas, former Chief Administrative Judge, New York State Courts; Hon. Stephen G. Crane, Appellate Division Justice, Second Department; Hon. Nina Gershon, U.S. District Court Judge, Eastern District of New York; Hon. Jonathan Lippman, Chief Administrative Judge, New York State Courts; Hon. John T. Curtin, U.S. District Court Senior Judge, Western District of New York; Hon. Howard A. Levine, Associate Judge, New York Court of Appeals; Hon. Shira A. Scheindlin, U.S. District Court Judge, Southern District of New York; and Hon. Richard C. Wesley, Associate Judge, New York Court of Appeals.

**PAST CHAIRS:** Mark H. Alcott, Jack C. Auspitz, P. Kevin Castel, Michael A. Cooper, Robert L. Haig, Cathi A. Hession, Bernice K. Leber, John M. Nonna, Gerald G. Paul, Sharon M. Porcellio, Jay G. Safer, Hon. Shira A. Scheindlin, Harry P. Trueheart III and Mark C. Zauderer.

A number of the Section's leaders have been appointed to judgeships, including Hon. Shira A. Scheindlin, Hon. Melanie L. Cyganowski (U.S. Bankruptcy Court, Eastern District of New York), Hon. Nina Gershon, Hon. Sidney H. Stein and Hon. P. Kevin Castel (U.S. District Court, Southern District of New York).

**PREDECESSOR GROUPS:** Preceded by the *Committee on Federal Courts*. At the time of the Section's formation, the Committee had 96 members and 31 subcommittees working on various projects. The Committee had issued 16 reports on various issues during the prior two years, including "Service of Process Abroad: A Nuts and Bolts Guide"; "The Abstention Doctrine: The Consequences of Federal Court Deference to State Court Proceedings" and "Improving Jury Comprehension in Complex Civil Litigation." It also prepared a compendium of the individual rules and procedures of the judges in the U.S. District Courts of the Southern and Eastern Districts of New York, a project expanded by the successor Section. The Committee sponsored various CLE programs on federal court practice and other topics between 1985-1988.



# Notes of the Section's Executive Committee Meetings

## February 12, 2003

Guest Speaker Honorable Leonard B. Austin, Justice of the Supreme Court, Commercial Division, Nassau County, spoke about the success of the Commercial Divisions throughout New York State, particularly in Nassau County.

The Executive Committee approved a report of the Federal Procedure Committee on revisions to Fed. R. Civ. P. 50.

## March 13, 2003

Before the beginning of the meeting, which was held at the Bar Center in Albany, leaders of the Albany and Syracuse bars addressed the Executive Committee on issues concerning the bar and bench in the Northern District of New York. Guest speaker Honorable Louis C. Benza, Presiding Justice of the Commercial Division, Supreme Court, Albany County, discussed the Commercial Division.



Lauren Wachtler reported on the Association's support for the adoption in New York of the Uniform Mediation Act. The Executive Committee also discussed the Chief Judge's jury project and the Young Lawyers' mentoring programs.

## April 9, 2003

Guest speaker Honorable Ira B. Warshawsky, Justice of the Supreme Court, Commercial Division, Nassau County, discussed practice in the Commercial Division.

The Executive Committee discussed the report of the Association's Special Committee on Association Governance and the Association's report on strategic planning. On the recommendation of the Section's CPLR Committee, the Executive Committee voted to oppose Assembly Bill A02305, which would add a new CPLR Article 31-A (Sunshine in Disclosure Act), and Assembly Bill A04142, which would amend CPLR 5704.

## Did You Know?

Back issues of the *Commercial and Federal Litigation Section Newsletter* (2001-2003) and the *NYLitigator* (2000-2001) are available on the New York State Bar Association Web site.

**([www.nysba.org](http://www.nysba.org))**

Click on "Sections/Committees/ Commercial and Federal Litigation Section/ Member Materials/ *Commercial and Federal Litigation Section Newsletter* or *NYLitigator*

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*Note: Back issues are available at no charge to Section members only. You must be logged in as a member to access back issues. For questions, log in help or to obtain your user name and password, e-mail [webmaster@nysba.org](mailto:webmaster@nysba.org) or call (518) 463-3200.*

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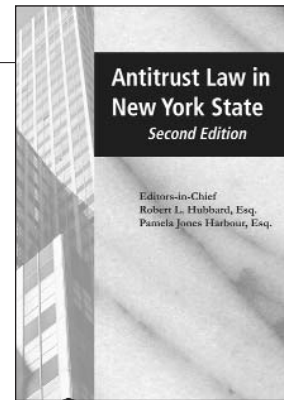
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