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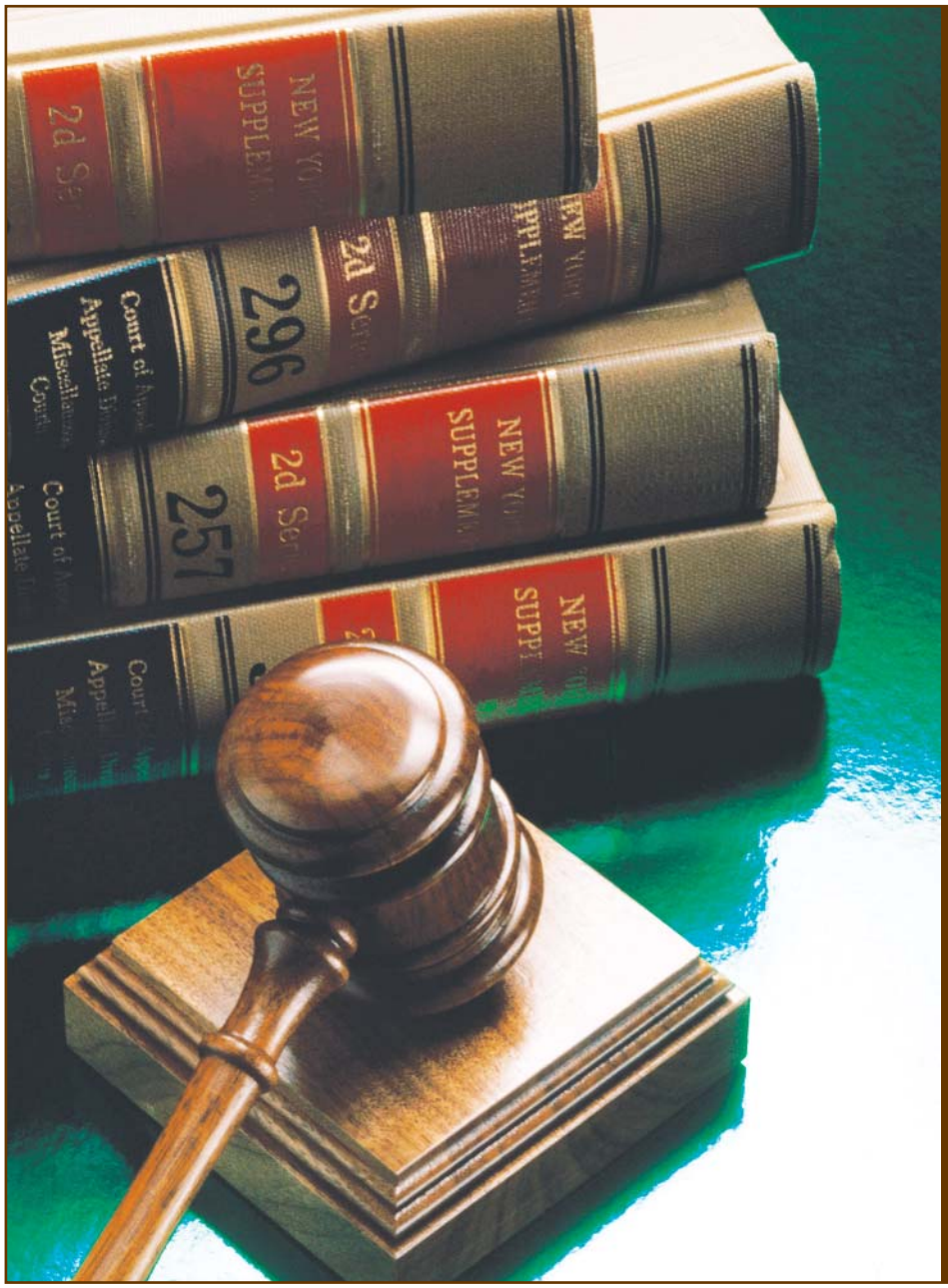

Commercial and Federal Litigation Section

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NYSBA

Commercial and Federal Litigation Section

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A Message from the Chair

In this issue of the *NYLitigator* we celebrate a milestone, the 20th anniversary of the founding of the Commercial and Federal Litigation Section. In the following pages we are honored to have the thoughts and recollections of five of our distinguished former Section leaders, including New York State Bar Association President Bernice K. Leber, former New York State Bar Association President Mark H. Alcott, U.S. District Judge P. Kevin Castel, Robert L. Haig and Jack C. Auspitz. They provide a multi-faceted view of the Section's many accomplishments and a few humorous recollections. Together, they offer an insightful review of 20 solid years of accomplishment.

Like many of our former leaders, I have had an opportunity to serve in other local and national Bar Associations. Yet I look upon my service to the Commercial and Federal Litigation Section as the most personally satisfying experience of any of these groups. The satisfaction comes from the fact that the Section has a uniquely intimate relationship with the judiciary of the State of New York. The Section recommended and spearheaded the formation of the Commercial Division in the New York State Supreme Court, and we remain actively involved in its growth and evolution. The Commercial Division judges are frequently invited as guest speakers to our meetings and CLE programs. The Section has organized events to celebrate the Commercial Division in almost every district across the state. The Commercial Division judges have become our colleagues and friends.

Similarly, the judges of the federal courts see our Section as representing the very best of the Commercial Bar. Like our colleagues in the Commercial Division, members of the federal bench are frequently involved in our Section's activities. Indeed, to two former Section leaders, the Honorable P. Kevin Castel and the Honorable Shira A. Scheindlin, are both now judges in the Southern District of New York. Members who are active in the Section have an opportunity to meet these federal and Commercial Division judges in informal settings. Such informal contact gives practicing lawyers an insight into personalities, concerns and courtroom requirements of these judges.

When our colleagues in the Commercial Division or the federal bench face practical issues impacting the Bar or the administration of justice, they turn to the Section for our support and advice. We are honored to support the judiciary and the administration of justice in New York State.

The Section has created opportunities for leadership and contribution for more than 20 years. As in many activities in life, the more you put into the Section, the more rewards you will receive. I urge you to become an active and contributing member to the Section and make your own contribution to our next 20 years.

Peter Brown

Productivity, Accomplishments, Collegiality—and Fun

By Robert L. Haig

Since its inception 20 years ago, the most visible hallmarks of the Commercial and Federal Litigation Section have been its prodigious productivity and its numerous substantive accomplishments. Perhaps less visible, but no less noteworthy, have been the opportunities provided by the Section for collegiality and even fun (yes, it is still possible for lawyers to have fun). I welcome this opportunity to say a few words about each of these hallmarks.

Productivity

The Section's productivity is easy to demonstrate. Simply go to the Section's Web page and click on "Commercial and Federal Litigation Section Reports." You will see a compilation of many (but not all) of the Section's reports for each year from 1988 to 2008. Count them up: the total is 128. Then consider whether any other Bar association section or committee has generated so many substantive reports during the past 20 years.

The Section has been productive since its inception. In 1989, the Section's Executive Committee consisted of the chairs of the Section's 38 committees. The committee chairs accepted their appointments with the understanding that each committee would undertake to complete at least three projects per year. In 1990, the Section issued 19 reports—still the record for one year. Back then, the Section also established the foundation for future Section productivity. In addition to recruiting energetic committee chairs, the Section assured those chairs that they and their committees would receive widespread recognition and support for their hard work. The Section's fidelity to that basic principle has continued to provide meaningful incentive to committee chairs and members for 20 years.

In addition to its reports, the Commercial and Federal Litigation Section has sponsored dozens of well-attended and valuable CLE programs over the last 20 years. The Section's Web page provides access to the thousands of pages of written materials in the program books for the Section's Annual and Spring Meetings. The Section has presented many other CLE programs as well (for example, a popular annual CLE program on Ethics and Civility, which has been held in up to five different locations throughout the state each year for the past 10 years). An interesting and promising recent innovation has been a joint venture with the Young Lawyers Section to present dual-track CLE programming targeted to junior litigators at the Commercial and Federal Litigation Section's Spring Meeting.

The Section publishes a Newsletter and *NYLitigator*; assists the Office of Court Administration in drafting, editing, publishing and disseminating the Commercial Division's publication, the *Commercial Division Law Report*; has published a book on federal civil practice; and has made important charitable contributions. In short, the Section's productivity is unsurpassed.

Accomplishments

As noted above, the volume of the Section's work product has been prodigious. In addition, many of the Section's reports and other activities have had a positive impact on the lives of lawyers, clients and citizens. Here are a few examples.

The Commercial Division

The Section's role in advocating for establishing commercial courts in New York is well known. In addition, every commercial litigator in New York is aware of the Commercial Division's success, so I will refrain from addressing that subject. What is less well known is the impact of the Commercial Division on other commercial courts throughout the United States and on other parts of the New York court system. Readers may be interested in a few highlights.

The Commercial Division was launched in November 1995 only after careful resolution of difficult issues. Little guidance was available from other sources. As *The Wall Street Journal* reported on October 11, 1995, "While several other states have been pushing for trial courts devoted exclusively to business litigation, New York is the first in which a general trial court has implemented such a program."

The Commercial Division is a "pure" business court, not a complex litigation court that handles both commercial and personal injury cases. It was established by court rules and directives, not by constitutional amendment or statute. Great care was taken in defining a "commercial case" and in creating procedures for assigning cases to the Commercial Division. In these and other important ways, the Commercial Division has become the model for most of the many business courts that have been created throughout the United States over the last 14 years. As a practical matter, the Commercial Division established the framework for the modern business court in the United States.

In addition, the Commercial Division has provided leadership to other parts of the New York State courts. In 2005, Chief Judge Kaye conceived of using a series of focus groups to elicit suggestions for improvements in the Commercial Division. Although those focus groups produced a number of ideas for improving the Commercial Division, it soon became apparent that the Commercial Division's constituents were, for the most part, satisfied with its operations. Accordingly, the focus groups devoted the majority of their attention to identifying Commercial Division innovations that had proved successful and should therefore be considered for exportation to other parts of the New York State court system. Consideration of the focus groups' proposals is under way in New York. The Commercial and Federal Litigation Section's support for the proposals was crucial to their approval as the official policy of the New York State Bar Association.

Elimination of Occupational Exemptions for Jurors

When I mentioned a Section project on this subject to a senior Office of Court Administration (OCA) official 20 years ago, he laughed and said, "That's never going to happen." However, it did happen, primarily as a result of efforts by the Commercial and Federal Litigation Section.

Prior to 1996, many professionals were exempt from jury service in New York. The exempted categories included, to name just a few, optometrists, psychologists, podiatrists, embalmers, prosthetists, orthotists, and licensed physical therapists! The numerous occupational exemptions produced juries that were not representative of the communities from which they were drawn. Yet, the political obstacles to changing the system were considered by many to be insuperable. The conventional wisdom was that legislators would not support a change because some of their most prominent constituents would be angry at them for eliminating their exemptions from jury service.

The Commercial and Federal Litigation Section made a major contribution to changing this system. One of the biggest obstacles to change was the exemption for lawyers. Lawyers could not change the system of occupational exemptions without also eliminating the exemption for lawyers. Yet, there was opposition to calling lawyers for state juries because some thought they wouldn't be selected and that if they were, they would exercise disproportionate influence on the jury's deliberations.

In 1989, in response to these concerns, the Section conducted an empirical study of the use of lawyers as jurors in the U.S. District Court for the Southern District of New York. That study concluded that lawyers were being selected to serve as jurors in the Southern District and that the lawyers who were selected did not exercise disproportionate influence on the juries' verdicts. That report had a salutary impact on reducing the opposition to using lawyers as jurors. With the reduction of that opposition, it became possible to eliminate the numerous other occupational exemptions as well.

Other Examples

The Commercial and Federal Litigation Section has been responsible for so many other useful accomplishments that it has been difficult to pick and choose among them to comply with the space limitations for this article. One example is a report issued by the Section that led to the enactment in 2002 of amendments to CPLR 2305 and 3122 and the addition of CPLR 3122-a to make it easier to obtain business records from a non-party witness (including by eliminating the need for a deposition or a court order). Another example is a report issued by the Section that led to the enactment of the Standards of Civility in Appendix A to the Disciplinary Rules of the Code of Professional Responsibility. Yet another example is Local Rule 26.3 of the Rules of the U.S. District Courts for the Southern and Eastern Districts of New York, which was proposed by the Section nearly 20 years ago to provide uniform definitions for discovery requests.

The Section sponsored a CLE program on business litigation in federal courts on October 24, 2003. Held in the Jury Assembly Room of the Southern District of New York, it sold out at 450 registrants in advance of the program. The Section has also provided leadership in establishing a restricted fund at the New York Bar Foundation to provide funding for fellowships to minority law students to work in litigation positions in the public sector. A number of similar fellowships have been established by other NYSBA Sections since then, but the Commercial and Federal Litigation Section showed the way.

Collegiality and Fun

The Commercial and Federal Litigation Section has come a long way since its inception in 1988. Many lawyers have been active in the Section for most or all of those 20 years. Lawyers vote with their feet; they have voted decisively in favor of the Section.

Many past chairs of the Section regularly attend the annual dinner for past chairs both for the pleasure of their colleagues' company and to provide suggestions for new activities to the Section's current leadership. The Section's Luncheon during NYSBA's Annual Meetings is usually close to a sell-out; in 2009, it was hard to find an empty seat. The Section's Spring Meetings, numerous receptions, and other social events are consistently well-attended.

A recent successful innovation which demonstrates the breadth of the Section's outreach (as well as its enthusiasm for a good party!) has been the Section's annual series entitled "Smooth Moves: Career Mobility for Attorneys of Color." This event combines a free MCLE program, an award ceremony for presentation of the Section's Honorable George Bundy Smith Award and

the Section's Minority Law Student Summer Fellowship, and culminates in a cocktail reception. Other memorable events include the Section's reception to celebrate the Tenth Anniversary of the Commercial Division, which was held at Lincoln Center on November 21, 2005, and the Section's "Hail to the Chiefs" reception, attended by about 250 Section members at Lincoln Center on September 29, 2006, at which we honored the five new Chief Judges appointed in New York federal courts during 2006.

In addition to these quantitative indicia, participants in the Section's activities over the years share a sense of mutual respect and accomplishment. That mutual respect has been heightened by the professional leadership that Section chairs have subsequently undertaken. For example, two former chairs became Southern District Judges; two became NYSBA Presidents and one is President-elect; one became President of both the City Bar Association and the American College of Trial Lawyers; two became President of the Federal Bar Council; one became President of the New York County Lawyers' Association and the New York Bar Foundation; many are authors of chapters in the two definitive treatises on commercial litigation in federal courts and in New York State courts; and many others are poised to eclipse the achievements of their predecessors.

Many Section members participate in the work of the Section's numerous committees. In Section committees, Section members meet in small groups, get to know other Section members, and become involved in Section projects. Section members also have numerous opportunities to meet judges and each other at receptions and other social events sponsored by the Section. Particularly noteworthy are the panel discussions and receptions the Section has hosted for Commercial Division Justices throughout New York State.

The Commercial and Federal Litigation Section has never been a closed club. The Section welcomes new members and recognizes and promotes them quickly if they are talented and willing to work hard. There is room in the Section for both senior and more junior members of the Bar. The Section encourages diversity of practice areas and welcomes members from all parts of New York State. Diversity and inclusiveness have been guiding principles for the Section for many years. So too has the sense of mutual accomplishment and satisfaction that comes from doing good work and doing it well with colleagues you like and respect.

Conclusion

The Commercial and Federal Litigation Section has made significant contributions to the courts and the legal profession in New York. The Section has also enriched and enlivened the professional lives of its members. In light of the deep reservoir of talent and goodwill available to the Section, the best may be yet to come.

"A Commercial Court for New York," Revised

By Mark H. Alcott

Of the many accomplishments of the Commercial and Federal Litigation Section, surely one of the most noteworthy was the 1995 initiative that led directly to the creation of the Commercial Division of the New York State Supreme Court. How did a fledgling, small Section of a Bar Association bring about such a major, long-lasting change in the court system?

To begin with, our timing was right. A new, reform-minded Chief Judge, Judith S. Kaye, herself a former commercial litigator, was in charge of New York's court system. A new, business-oriented Governor, George Pataki, was at the helm of the executive branch. And the experimental Commercial Parts were attracting favorable reviews in New York County.

It was my good fortune to chair the Section at that propitious moment. I saw a unique opportunity to advance a cherished goal of New York's commercial litigators and their clients—the creation of a specialized forum to adjudicate commercial disputes. And so, I appointed a special task force charged with the mission of recommending ways and means to create such a forum.

The task force was fully deserving of the label "blue ribbon." Its membership included four future Section chairs (Lesley Friedman Rosenthal, Bernice K. Leber, Gerald G. Paul and Mark C. Zauderer); a future U.S. District Judge (P. Kevin Castel); two future New York State Bar Association presidents (Ms. Leber and your author); and a wide range of commercial litigation experts (Vincent C. Alexander, William J. Dreyer, Richard F. Griffin, Michael S. Oberman, S. Robert Schrager and Warren N. Stone).

The Section's Commercial Court Task Force spent the better part of a year analyzing this concept and developing its recommendations. Among the many important features of its report, three stand out:

- The Task Force persuasively made the case for the creation of a specialized commercial court. Although this seems self-evident today, it was an innovative and controversial proposition in 1995.
- The Task Force demonstrated that a specialized forum to adjudicate business disputes did not require a constitutional amendment or even an act of the legislature, as was generally believed. Rather, it could be created by the Chief Administrator of the Courts. This proved to be an essential point.
- The Task Force struck a balance between calling for a totally independent business court, which would not have been feasible, and a continuation of the experimental Commercial Parts, which would not have been adequate.

The Task Force proposal was incorporated in a report entitled "A Commercial Court for New York," which still reads well 14 years later. I remember sitting at the kitchen table over the New Year holiday and giving it a final edit. Two of the final drafting challenges and my last-minute inserts that resolved them stand out in my mind.

First, what should be the name of this new entity? Instead of a stand-alone court (too utopian) or a continuation of the Commercial Parts (too timid), I inserted the following into the report: "[W]e recommend something quite different, that falls between these two extremes. We call upon New York to create a separate new entity within the Supreme Court to adjudicate commercial cases: a Commercial Division of the Supreme Court." The name stuck.

Second, how could we encapsulate the need for and the mission of this proposed new body in vigorous, pithy language? I inserted a new, opening paragraph of the report that proclaimed: "New York is the center of world commerce, the home of America's leading businesses. As such, it urgently needs a modern, well-staffed, properly equipped forum for the swift, fair and expert resolution of significant commercial disputes."[1]

The report was approved by the Section, issued to the public and reported in the media. Through the good offices of our Section's founder, Bob Haig, I presented it to Chief Judge Kaye and Chief Administrative Judge E. Leo Milonas. I remember that meeting well. It was my first of what became countless meetings, interactions and joint efforts with Judge Kaye over the years. Obviously, at this initial meeting, I did not yet understand that I was in the presence of a bold reformer, a woman of action, as the following demonstrates:

Judge Kaye began by complimenting me and the Section on our report, and then said she was appointing a committee—to be chaired by Judge Milonas and Mr. Haig—to take the next steps.[2]

"That's great," I said. "I'm delighted that you're going to study our proposal."

"Not study it," she said. "Implement it."

And the rest, as they say, is history.

Endnotes

1. I was surprised and delighted to hear these lines quoted by Hon. Loretta A. Preska, U.S. District Judge, S.D.N.Y., in her speech upon receiving the Stanley Fuld Award at the Section's Annual Meeting in January, 2009.
2. I served on that committee–superbly led by Messrs. Milonas and Haig–along with other members of our task force and numerous prominent members of the New York Bar.

Commercial and Federal Litigation Section—20th Anniversary Celebration

By Bernice K. Leber

These remarks were presented at The Russian Tea Room, New York City, on November 18, 2008

Good evening. First, I want to thank Peter Brown (who is the 20th Chair of our Section) for inviting me to speak to you as we celebrate the 20th Anniversary of the creation of the Commercial and Federal Litigation Section. Ordinarily, I would toast to Peter on his reaching this historic moment in time, but then I realized I would also have to toast each of our 19 former Chairs and by that time, we would run out of champagne and all be drunk . . . and probably forget the reason for meeting here in the first place.

Reaching the 20th year of anything is a real milestone. Tradition has it that for a 20th wedding anniversary, one exchanges platinum with one's beloved, or in this case, all 20 Section Chairs; so before coming here tonight, I checked the Section surplus . . . and wondered if that could possibly be viewed as a member benefit? Shall we take a vote? Instead, costing far less, I'd like to present some platinum achievers and achievements from our Section's history.

I can recall the first meeting of our Section in Bob Haig's conference room at Kelley Drye back in 1988. As you might expect, knowing Bob as we do, he invited every commercial lawyer he knew to join! And they all came—all 50–60 of them—to discuss the (you guessed it!) 50–60 projects Bob had already planned and the books he had in mind for us to write, including his treatise on Commercial Law in New York State Courts.

Where would we be without him, the one, the only, the inimitable Bob Haig, the George Washington of our Section?

Mike Cooper, who's also here tonight, followed Bob. Mike brought that *savior faire*, that special *je ne sais quoi* to our deliberations—a talent he acquired from being president of that "other Bar association."

Now since then, we've had Upstate Chairs and Downstate Chairs, including Harry P. Trueheart from Rochester and Sharon Porcellio from Buffalo (now of Rochester!).

And, of course, you all know that Our Section Chairs go on to do greater! bigger! and better! things. Two of our Chairs—including the first woman Chair of the Section (the "mother of our Section"), Shira Scheindlin, and in the sincerest form of flattery, imitated by Kevin Castel—both became federal district court judges in the S.D.N.Y. How's that for raising the level of the Bar? Not to put any pressure on you, Peter, tonight.

But what our Section is best known for is its formidable achievements, achievements that have raised the level of the Bar and the profession, and they are a tribute to you all. To highlight a few of them:

First, the creation of the Commercial Division, inspired by Mark Alcott, who also went on to become the 109th President of this great State Bar. Mark equated his vision to John Winthrop's vision of a City upon a Hill (and at our very first meeting, believe you me, quoted John Winthrop), so I feel that tonight being what it is, we should probably rename the Section "according to Mark." Do I hear a motion? I'll be taking votes on this bylaw change at the end of this evening, for submission to the HOD. "Commercial Division Fever" really took hold with Mark and our Gang of 6 (including Mike Oberman, Chair Gerry Paul, Chair- to-Come Mark Zauderer, Bob Schrager, and yours truly)—assisted by none other than Lesley Rosenthal, who was a mere whippersnapper of an associate back then. You know the rest . . . and if you don't, you probably should check your reception ticket because you are at the wrong reception.

Second, the elimination of jury exemptions. This was the brainchild of none other than our Hon. Melanie Cyganowski (who did not believe that being Chair of the Nominating Committee was enough public service for her and went on to an even greater challenge, becoming a bankruptcy judge in the Eastern District). (I also have to add, as an aside, that our very own Frank Maas, who had been listening to Melanie at Section meetings, obviously took heed and also went on to further public service and has become a Magistrate Judge of the S.D.N.Y.). Now, getting back to the story: Melanie and her colleague, Cathi Hession, another illustrious Section Chair, managed single-handedly to present the report on jury exemptions to the HOD—the policy-making body of the State Bar—who voted favorably on it, and from there the Report went to the Chief Judge, who enacted it, just as the HOD did with the Commercial Division Report; thus this Report and its codification into Judge Kaye's Jury Project follows in the great tradition of this Section.

Third, several Chairs over several years successfully advocated for more Commercial Divisions around the State (Mark Zauderer, Jerry Safer, Sharon Porcellio, *et moi*) until today there are 22 Divisions (give yourself a round of applause).

The Section promoted greater ethical conduct and civility in our profession through Reports like the one that Mark Zauderer spearheaded, and participated in lawyer satisfaction surveys that assessed the courts and the case management system and proposed changes to both. For this we have to thank John Nonna, my successor as Chair, and Jack Auspitz, his successor Chair. John also began the Intern Program at the Commercial Division that the Section has

underwritten since 1999, in order to interest law students in the study and practice of commercial law.

By now you are probably getting the theme of this evening—what great things a great Bar Association and this Section can accomplish together, and how lawyers DO make a difference to our profession, our clients and to our society through their advocacy and innovation. This was evident by our Section Chair, Lauren Wachtler, aided by none other than my No. 1 spouse, David Rosenberg (c'mon, I gotta give him a plug!), who advocated for providing a special law clerk dedicated for the Commercial Division Justices—and as to this innovation I say hats off to Chief Administrative Judge Ann Pfau, who made this a reality.

Another Chair, Lesley Rosenthal, (yes, we do have a tradition of promoting from within) inspired a wonderful concept—the First Minority Law Student Clerkship; this idea has taken hold in many other Sections of the State Bar and thereby directly promoted greater diversity of the profession.

Lew Smoley, another Type A personality Chair, deciding that "more is more," created a group within the Section who liaise with Commercial Division Judges on all matters practical and substantive.

This Section is all about innovation and staying on top of your game. Most recently, this past June in Cooperstown, your outgoing Section Chair Carrie Cohen and Jim Bergin presented the Report adopted by the HOD, to change the CPLR as to provide for E-Discovery.

Now I could also not conclude these remarks without noting 20 years of dedication of certain specific Section members over the long haul. People like Greg Arenson and Jim Blair, who labor tirelessly on improving the CPLR; people like my dream team of Melanie Cyganowski, Sharon Porcellio and Greg, who agreed in June to study the state of our courthouses, one of my key initiatives this year for the State Bar, so that the public, those whom we serve, are ensured appropriate, user-friendly places for justice, whether they are in the Commercial Division or in the Family Court or any other of our courts, and I want to thank them for agreeing to help me.

This Section holds a special place in my heart as it was here, as a member of the section's Executive Committee, where my service to the Association began in 1987. It goes without saying that were it not for this Section, I would not be standing up here today.

We have all had the rare privilege and honor of collaborating with virtually all of our Commercial Division Justices around the state and most of our federal court judges and appellate judges, many of whom are here with us tonight, who have participated in countless programs, reports and initiatives, both great and small, that we have begun. Not many attorneys can say they know their judges, but members of our Section do. I am sure that I would leave out one or more of you, and I would not want to appear in court to hear this … so let me just give a collective thanks to all of you for your graciousness and willingness to view our Section as a partnership with you.

And as I close, I think we might consider Chief Judge Kaye's final State of the Judiciary address last week, who hailed the Commercial Division as "an initiative that has reached maturity in good shape, poised to assist New York State in another sort of litigation engendered by our flailing economy." And who spoke of this Section, your Section, as the "co-parent" of the Commercial Division. Her high praise is a testament to all of the dedicated souls in our section who have collaborated on this historic initiative and many, many others. You are all a part of this rich history of our Section.

As we confront these difficult economic times, now more than ever, membership in a Bar Association does matter. We face greater challenges both individually and as a profession. Many law firms are taking measures to limit or eliminate Bar memberships altogether from their budgets, questioning their relevance. This is penny-wise and pound-foolish. A Bar Association, and particularly our State Bar, as exemplified by the work of this Section, not only strengthens and improves our justice system, it also creates a profound professional bond among all of us, whether you are practicing law in the trenches every day or judging those who appear before you, or whether you are advocating for needed pay raises for our state and federal judges or advocating to uphold our ethical standards and civility. A Bar Association helps lawyers within our profession during times of need, not just times of plenty. Our Bar Association and its members helps make referrals, assists with employment and helps guide career choices. Our Bar Association helps lawyers with depression, alcohol and drug dependency through the Lawyer Assistance Program, which unfortunately in these difficult times reaches ever greater numbers. So as I leave you tonight, I hope you will all advocate not just for retaining your Bar membership but also ask those who are considering re-upping or have never been a member—to join us. We will all be better—and stronger—as a profession and as a society—when we speak with our collective voices rather than stand alone. Congratulations on celebrating 20 years of making a difference—and I hope 20 years from now we can all reconvene to celebrate another 20 years of achievements and success!

The Commercial and Federal Litigation Section

By the Honorable P. Kevin Castel

Did we become a nation in 1789 when the federal government came into existence? Do we trace our nationhood back to the issuance of a declaration by the united colonies in 1776? Was it the solidarity forged between the Virginia, Massachusetts and other colonies over common grievances, injustices and aggressions, or was it the shedding of blood? How much credit belongs to Washington, the dominant personality, as distinguished from Jefferson, the political philosopher, Madison, the governmental architect, and Hamilton, who breathed life into important concepts?

"Since its founding, this Section has thrived on camaraderie, collaboration, and the kind of friendly and lively discourse that causes busy lawyers to leave their offices and delay their return home to attend a meeting."

Fortunately, when we look back at the 20-year history of our Section, we do not have to pause on such deep questions. It is an incontrovertible fact that Robert L. Haig was the singular force behind the transformation of an active Federal Courts Committee into a new Section. More than that, he persuaded, cajoled and nudged the members of the old Committee, and then the new Section, to make important contributions to the administration of justice and the profession through report writing and CLE presentations.

During my tenure with the Section and its predecessor, I had my hand in reports on subjects including civility and professionalism, motions *in limine*, bifurcation, civil RICO case statements and judicial impact statements for federal legislation. Within this work, there is one small accomplishment of which I am especially proud. It originated with an idea of Mike Oberman. Prior to 1987, document requests and interrogatories in federal court began with five-plus pages of boilerplate definitions. With the advent of the word processor, the definitions were growing in length. Attorney definitions also varied, leaving litigants and non-parties to grapple with dueling definitions of "identify" or "communications." With help from Cathi Hession, Mike Chepiga and later-to-become Magistrate Judge Frank Maas, we did the wordsmithing—and then the advocacy to the Boards of Judges—that resulted in the present day Local Rule 26.3 in the Southern and Eastern Districts. This is an enduring accomplishment.

As the Section's fifth Chair, I presided over the first sit-down luncheon at the State Bar's Annual Meeting, which drew a crowd of 400, despite snow. We had three things going for us that day. We had the first-ever public presentation by the assembled judges of New York County's Commercial Part (Justices Altman, Cahn, Gammerman and Shainswit). Second, we had a presentation on new amendments to the Federal Rules of Civil Procedure, which had, as its companion, a beautiful and comprehensive 200-page softcover book authored by Section members (*Practical Guide to the 1993 Amendments*). Third, the Honorable E. Norman Veasey, the Chief Justice of the Delaware Supreme Court, one of the premier commercial courts in the nation, addressed our Section. Shortly before the Annual Meeting, I announced the creation of a task force, chaired by my immediate successor, Mark Alcott, to transform New York County's Commercial Part into a statewide concept. The rest is history.

These milestones are only part of what I cherish about the Section. As Bob and his successors have recognized, no bar group can survive and prosper on report writing and CLE presentations alone. Since its founding, this Section has thrived on camaraderie, collaboration, and the kind of friendly and lively discourse that causes busy lawyers to leave their offices and delay their return home to attend a meeting. The Section has also been blessed with great leaders, and long may this be the case. As the Romans say, *Ad multos annos.*

Happy 20th Anniversary

By Jack C. Auspitz

Of course, there are drawbacks to being a Chair of the Commercial and Federal Litigation Section. There are the autograph seekers, the paparazzi, the difficulty of finding extra parking spaces for your entourage. But then there are the rewards: the time when you're having dinner at a quiet and yet extremely trendy restaurant and Madonna or Bobby De Niro comes over and asks, "Aren't you Chair of the Commercial and Federal Litigation Section? I thought your Section's memo on the proposed changes to Article 80 of the CPLR was masterful." It's those little things that make all the hard work worthwhile.

It's so hard to pick a particular event to discuss here. There were so many wonderful occasions. There was the annual Spring Meeting that we held on St. Barts where the evening's entertainment was Bruce Springsteen and Yo-Yo Ma performing their inimitable tap-dancing version of "Oh! Susanna." Or perhaps that was a convention by some bank using TARP funds. In any event, the point is that simply by being a member of the Commercial and Federal Litigation Section, one is invited to so many elegant conventions and parties, one simply can't keep track of them all.

Not that it's just parties, mind you. Think of all the reports we wrote. "Does Scarsdale Need Its Own Commercial Division?" "The Rule in Shelly's Case: A Doctrine for the 21st Century." "How Collateralized Debt Obligations Can Be Used to Shift Costs in Electronic Discovery." We spent hours debating these issues. Well, not so much the merits of these fine reports but the proper placement of commas in the covering letters accompanying them. There were times that it was all a Chair could do to keep order. I do think that the introduction of metal detectors for Executive Committee meetings did much to dampen the unfortunate outbursts that occurred at earlier meetings when there were ill-conceived proposals that we deviate from the previously announced agenda.

"[W]e've never lost our childlike sense of wonder and love of the law governing commercial and federal litigation in New York."

And speaking of Executive Committee meetings, I want to use the "bully pulpit" offered me here to call to everyone's attention the deplorable deterioration in the quality of food served at those meetings. There was a time when full-course hot meals, with dessert, were offered. Recession or no recession, the practice of recycling that one bag of Cheetos from meeting to meeting simply can no longer be tolerated. I propose—and I mean no disrespect to any current or former officer of the Section—that the time has come to establish a Task Force on Food. We need to reach out to the best minds available to improve the snacks at meetings. I mean, people, this is New York, the food capital of the world, and we're eating Pringles at meetings! Isn't Bobby Flay a member of the State Bar?

In sum, it's hard to believe that it has already been 20 years for our Section. My, how we've grown from an adorable little baby section to an adult able to vote in House of Delegate meetings. And yet, we've never lost our childlike sense of wonder and love of the law governing commercial and federal litigation in New York. I say, hooray for us!

I want to thank all the little people.

Scenes from the Commercial and Federal Litigation Section

20th Anniversary Celebration

November 18, 2008
Russian Tea Room • New York City









A Tribute to the Honorable Herman Cahn's Years on the Bench

By Lewis M. Smoley

With the advent of 2009 comes the retirement from the bench of distinguished jurists who have had a major impact on the development of commercial litigation in New York during the course of their tenure. Many well-deserved accolades have been bestowed upon Chief Judge Kaye and Administrative Judge for New York County Jacqueline Silbermann, both of whom retired at the end of last year. These eminent judges enthusiastically supported the creation of the Commercial Division and were instrumental in its development. Now, after more than 15 years since the Commercial Division began as designation of four Parts in New York County Supreme Court to which commercial cases were to be assigned exclusively, the last of the original four justices, and who continued in the Commercial Division when it was formally established, is retiring.[1] That Justice, now the senior member of the Commercial Division in New York County Supreme Court, is the Honorable Herman Cahn.

"[Justice Cahn's] legal opinions evidence well-reasoned, knowledgeable and sophisticated analyses of complex legal issues and a work ethic that refuses to take short-cuts for convenience when a thorough explication of findings and conclusions is warranted."

In mid-February, 2009, Justice Cahn retired from the bench and moved to private practice. During his more than 35 years as a trial judge, serving the last 15 years in the original commercial Parts and in the Commercial Division in New York County, Justice Cahn established a legacy that will be difficult to equal. His erudition, expertise and professionalism are matched only by his extraordinarily practical approach that assisted parties in achieving untold numbers of settlements. His legal opinions evidence well-reasoned, knowledgeable and sophisticated analyses of complex legal issues and a work ethic that refuses to take short-cuts for convenience when a thorough explication of findings and conclusions is warranted. Past Section Chair Mark Zauderer, who has tried many cases before Justice Cahn, refers to him as a "lawyer's judge" because of his intelligent and thoughtful approach to adjudication and his respectful treatment of counsel who appear before him. Another commercial litigator and currently an officer of the Commercial and Federal Litigation Section, Jonathan Lupkin, reflected:

> I had the privilege of trying my first jury case before Justice Cahn. By watching the way he presided over the case, I came to understand how a truly exceptional trial judge can enhance the overall trial experience. He was, to be sure, extremely demanding, but he always showed tremendous respect for the attorneys, the litigants and the members of the jury. The lessons I learned during that trial will stay with me for the rest of my career.

After Harvard Law School, Justice Cahn practiced law with a small Manhattan law firm for 20 years before being elected to serve on the New York City Civil Court in 1977. In 1980, he became an acting Supreme Court Justice. He was elected to that position in the same year in which he was appointed to serve in one of the commercial Parts that later became the Commercial Division. Few judges in New York County Supreme Court have been accorded an equally high level of praise and respect.

His hard-working, intelligent and serious-minded attributes have been a mainstay during his long career, particularly as a member of the Commercial Division, where these abilities are most often severely put to the test. Justice Cahn was never one to cut corners in his decisions; no short-cuts here, only extensive, intelligent analysis of the legal arguments presented and well-reasoned opinions relating thereto. He has been very attentive at oral argument, listening carefully to counsels' stated positions and often questioning them so as to ferret out the essence of the issues and give counsel an opportunity to convince him as to matters that were raised in submissions or arose during argument of which he was skeptical of or adverse to on first impression.

Choosing a few representative decisions from among the thousands issued by Justice Cahn during what was an extraordinarily active tenure of more than 30 years is a daunting task. Rarely does a week go by when one or more of his decisions does not appear among those highlighted in the *New York Law Journal*. But the decisions that remain uppermost in his recollection often are memorable not only for the erudition and cogent reasoning they evidence but also for the unusual circumstances involved in those cases. For example, recently Justice Cahn had a rare opportunity to tout the expertise and efficiency of the Commercial Division when its ability to apply foreign state law was challenged by another prestigious court whose law it deemed to govern the issues in

the case. In 2007, shareholders' derivative actions were commenced both in the Commercial Division and in Delaware Chancery Court against Topps, Inc., the well-known manufacturer of baseball cards. Motions were made by the respective defendants in both courts to stay the action in the other venue in deference to the former. But the Chancery Court refused to grant the motion, principally on the ground that Delaware law applied and, therefore, presumably the Chancery Court would be better able to interpret its home law than the Commercial Division in New York. Justice Cahn, however, refused to stay the New York action on such grounds, arguing, *inter alia*, that the Commercial Division has ample expertise and ability to properly apply Delaware Law. Apparently, he must have proved to the satisfaction of the eminent jurists on the Chancery Court that the Commercial Division justices were eminently qualified to apply Delaware law, for when similar motions were made in a later series of shareholders' derivative actions brought in both jurisdictions involving Bear Stearns, the Chancery Court decided to stay the action before it in deference to the Commercial Division.

Other important and newsworthy cases handled by Justice Cahn include the litigation over the construction of the new Yankee Stadium. In that case, Justice Cahn rejected a claim by environmentalists to enjoin the project, determining that the city's approval of the plans took into consideration the claims of the plaintiffs after they were afforded a fair opportunity to be heard. Simply put, Justice Cahn refused to substitute his own judgment for that of departmental agencies entrusted to examining the project and against whom no adequate showing of arbitrary or capricious conduct was presented. Justice Cahn also presided over an unsuccessful challenge of certain rules of competition involving the America's Cup, which received wide publicity. He was instrumental in helping to settle various insurance cases involving the rebuilding of the World Trade Center site, in which he had the rare and unusual opportunity to coordinate with a Southern District Court Judge, before whom distinct but related cases had been brought.

Another interesting case involved the Foreign Assets Control Act (FACA) that resulted in the freezing of bank accounts relating to the governments of Serbia, Montenegro, Yugoslavia, Bosnia and Herzegovina. Among the issues in this case was plaintiff's claim that it had a private right of action under the FACA, which Justice Cahn confirmed in a well-reasoned decision.

An example of his even-handed treatment of litigants concerns his rejection of a breach of contract claim against the Plaza Hotel for its canceling a scheduled bas mitzvah affair, after the Hotel was sold to a condominium developer. Justice Cahn carefully weighed the evidence presented and found it showed that the plaintiffs had agreed to and received return of the deposit and payment of out-of-pocket expenses, which by having been acknowledged in writing was an accord and satisfaction. Consequently, he dismissed the case.

"[Justice Cahn] will be sorely missed as a mainstay of intelligent, fair and diligent adjudication that he has come to represent during his many years of hard work as a New York Supreme Court Justice."

These decisions are only some of the many that were highly publicized, and admittedly far from adequately representative of Justice Cahn's rare abilities as a trial judge. He will be sorely missed as a mainstay of intelligent, fair and diligent adjudication that he has come to represent during his many years of hard work as a New York Supreme Court Justice. All our best wishes go with him.

Endnote

1. The four original justices who presided in commercial Parts in the Supreme Court, New York County, were Hon. Ira Gammerman, who became a JHO recently; Hon. Miriam Altman, who passed away a few years ago; Hon. Herman Cahn; and Hon. Beatrice Shainswit, who is retired.

Remarks on the Presentation of the Robert L. Haig Award for Distinguished Public Service to the Honorable P. Kevin Castel at the Commercial and Federal Litigation Section Spring Meeting, May 3, 2008

By the Honorable Kevin T. Duffy

Good evening, ladies and gentlemen. It's a real pleasure for me to be with you here. My job is simple and made more so by the request from the honoree tonight that my remarks be very short, and the script he gave me is very short.

When I was first asked to make tonight's presentation, a number of "why" questions popped into my mind.

"[Kevin Castel] is one hell of a good lawyer and one hell of a good guy."

First of all: Why is the New York State Bar or any Section thereof having a meeting in Vermont? Now, I'm aware that the Bar Association, since colonial days, has met at the Homestead Hot Springs Resort in Hot Springs, Virginia.

But the cross-border traffic there was occasioned by a great civil war. To the best of my knowledge, we New Yorkers have not fought against the people of Vermont or have taken up arms against them. It might change after we get our bills tomorrow morning.

My second "why" question has to do with why this award was named the Robert L. Haig Award. Generally such awards are named after dead people.

At least as of this evening, Bob Haig is alive and well. In fact, he's sitting there and looks warm.

Bob Haig is an unusual man. He founded this Section and led it into uncharted fields and fully deserves to be immortalized by this award.

Why is this award being given to Judge Castel?

Prior to becoming a judge, Kevin had an interesting career: After spending two years as my law clerk, he went on to Cahill Gordon, where he stayed for many years and became a partner. That's not to suggest that it took him a long time to get to partner, just that he stayed there for a long time.

When Bob Haig set up this Section, among the co-conspirators that he had was P. Kevin Castel. Over the years thereafter, Judge Castel was active in the Section, writing a report on civil RICO case statements, and a report urging the adoption of uniform definitions for use in discovery requests for the federal courts of New York City. Now, those suggestions are presently part of the Eastern and Southern District Rules, and Judge Castel is finally figuring out that they are to be adhered to by everyone except the judges.

In 1993, P. Kevin Castel became chairman of this Section and had the Section's first major luncheon on a snowy day in January. The Chief Justice of Delaware was surprised to find that there were 400 people in attendance. Apparently in Delaware they don't have 400 lawyers.

As chairman of the Section, Kevin Castel learned how to delegate. He set up a task force to ask the state judiciary for a full-time commercial part throughout the state. Judge Castel chose as the head of this task force Mark Alcott, who, from this humble start, went on to become the president of the New York State Bar Association. This is proof that Judge Castel knows how to delegate and how to pick for such delegation.

I ask you to remember this, should you appear before Judge Castel and he asks you to write a brief or a memo. Do your very best because, later, it may redound to your benefit to be the stepping stone that will start you on your way to becoming the president, maybe even the president of the United States. Why not? Did you see who was in the primaries last year?

I see I'm running out of the few minutes that Judge Castel has allotted me. It is a great pleasure for me to present this award to Judge P. Kevin Castel, who not only as my law clerk, but as my friend, has tried to keep me out of trouble for over 34 years.

In these few minutes, it is just too little time to remind you of the many, many reasons why it's appropriate that Kevin Castel is chosen to receive this award. Let me sum up the reasons in just two: He is one hell of a good lawyer and one hell of a good guy.

Recipient of the Robert L. Haig Award for Distinguished Public Service at the Commercial and Federal Litigation Section Spring Meeting, May 3, 2008

Acceptance remarks by the Honorable P. Kevin Castel

Well, Kevin Thomas Duffy, you've been my friend and mentor for 34 years.

I have to tell you when I became a judge, Judge Duffy said to me, "A wise judge always listens to his law clerk." And I've got to tell you: Once a law clerk, always a law clerk.

So I regret, Judge Duffy, there are a few amendments to your comments that I need to make.

First of all, this Vermont thing. The New York Bar does have an affection for Vermont because of events in '63. I'm talking about 1663, of course, which was a very good year unless you were either French or an Indian.

And with the new territory available, the Governor of New York thought it would be a great idea if those beautiful Green Mountains became part of New York, and coincidentally the Governor of New Hampshire had the very same idea. And that concept continued for about 100 years until the Green Mountain Boys came along.

Now, they weren't formed to fight a revolutionary war with England. They were formed to keep the New York taxing authorities out of *Les Monts Verts*.

So the fact of the matter is: We of the New York Bar come to Vermont with a certain nostalgia for the "good ole days."

By the way, this nostalgia business holds true for the Vermont Bar, because I have heard they have had their annual meeting where? In Montreal.

So one thing I'll tell you, though, it was Ethan Allen who really led the movement for the breakaway Vermonters and its admission to the Union as the 14th state. And I'm telling you, Ethan Allen would have liked Bob Haig, a revolutionary who led us into the land of freedom and gave us our birth as a Section.

That leads me to another important correction of Judge Duffy's remarks: There's only one man who can lay just and honest claim for the formation of this Section, for pushing and shaping the idea. We were there and we supported him, and that was Bob Haig. And I'm sure that Sofia is also very happy—as I know Bob is—that I am standing at this podium and accepting the Bob Haig Memorial Award.

So I had a lot of fun with this Section over the last 20 years, and that brings me to another point: Judge Duffy cited a number of reports. The reality is: I was the cheerleader for the other people in the Section who did the work, the good reports. They were valuable contributions, many subjects.

Seeing Neil Getnick here reminds me of the work on IPSIG—Independent Private Sector Inspector Generals. Those of us who have been here for 20 years know what an IPSC is, courts on motions in *limine*. We had some dumb ideas, too, but that was part of the fun of it. And it was always the wonderful camaraderie that we had.

Now, the other area where I have to correct Judge Duffy is with regard to launching people's careers. I claim no credit or responsibility for launching Mark Alcott's career. He was destined to success before, but I am proud of Mark. And I'm proud of Bernice Leber, and I'm proud of Mark Zauderer and those who have gone on to other leadership positions, and Judge Maas, who was not yet a magistrate judge when we all started working together in the Section.

I could stand up here and I could tick off all the different points of friendship and association with so many of you in this room. We all had our moments where we worked together on projects, but we'd be here and you would not be eating dessert, and it doesn't sound like a very good idea, so I won't.

Now, Judge Duffy asked the question: Why is it now, why is Castel—or as he called me P. Kevin—getting this award now?

Well, you know, I've got to tell you, if you think about it, Kevin Thomas Duffy has been on the Southern District bench for 36 years. Let's go through some of the greatest hits. The Paul Castellano trial started off as a conspiracy trial, and in the course of the trial Paul Castellano was rubbed out at Sparks restaurant. Judge Duffy had to deal with, "What do you tell the jurors as to why the defendant isn't there?"

He presided over the Brink's robbery and conspiracy trial, the Brink's robbery which resulted in the deaths of police officers and Brink's guards.

He presided over the World Trade Center bombing case, those who actually rented the vans and drove them into the sub-garage of the World Trade Center in the 1993 situation.

The trial of Ramsey Youssef, who conspired to highjack American aircraft and fly them into the Pacific Ocean. This was before 9/11.

So all I can say to you, Judge Duffy, is keep up the good work. Keep at it, get a few more high-profile cases, and maybe in a couple of years, there will be some Bar group that will want to honor you.

Now, how did I get hired as this man's law clerk? Judge Duffy didn't have very exacting standards back in the day. These days, about 700 top law graduates compete for a couple of spots in chambers at a salary which is 36 percent of what they could make at a big firm. I want to briefly share with you some of my insights on the output of our nation's law schools.

The GPAs, frankly, are dazzling of the candidates I see. But I've come to learn it is a little bit like buying a new car. That car that gets 31 miles per gallon and is on sale for $19,500, says the sticker—well, that comes without automatic transmission.

So, too, it is with law students. Some law schools allow students to take non-law school classes. One that I frequently see on resumes is "Introduction to Italian."

Now, law schools also charge tuition and award academic credit for such things as directed research, participating in a journal, teaching first year law students how to write, interning for a judge.

Now, don't get me wrong, I'm a beneficiary of this, I get these interns, so I kind of love that. But a student who obtains academic credit in too many of these endeavors is forgoing some of the substantive areas.

And the course work has evolved in recent years. Law schools tend to stick to a fairly traditional first year curriculum, but after that, all bets are off. I don't know whether you're aware of this, but in many law schools, you can now decide whether to do a paper for the course or take an exam. And if you decide to take an exam, you can self-schedule the exam. Now, I can't wait when these young darlings try to self-schedule the filing of a notice of appeal.

Georgetown Law offers a course entitled "The Law of 24." It seems the class gets together every week and talks about which federal, state, or local laws Jack Bauer violated in the latest episode of that series.

The University of Connecticut has a course entitled "Wal-Mart" and the students sit around in the class discussing which laws Wal-Mart has been violating lately. Labor, international treaties, you name it, antitrust, they go through the litany.

One school awards credit for a course entitled "How to Save the Planet." Now, I'm all in favor of saving the planet, but do we really have to dumb down law school to that level?

Now, there is something in this for everybody. If you're a law professor, do you really want to go to the cocktail party talking to your friends about teaching Article 9 of the UCC? It is much more fun talking about the course in interplanetary property law.

Think about the poor student. You have some students who are naive and are doing this because they are told that this is all very enriching. But then you have some savvy, sophisticated types, and I've had conversations with them, and they point out, quite correctly, that law firms and some judges hire on the basis of GPA, and they are taking the courses that will produce the best GPA for them. And I can't really argue too much with that.

And so, ladies and gentlemen, somebody has to stop the madness, and I suggest that is you, the employer. Start looking at the transcripts, not just the resumes, and look behind that GPA and see where the course work is. Is it in substance, or is it in fluff?

Now, how are you all going to do this? I've worked this out for you, so pay close attention and take notes if you want.

This is what you do: You look at the transcript and you mark off the first three fluff courses that you see. The first three, you give their transcript the same read as anybody else. After all, we all had senioritis; we want to broaden people's horizons. Three courses off in another discipline, that's wonderful.

But when you get above three, take a tenth of a point off the GPA in your analysis. So instead of 3.7, if it is "Golfing and the Law," maybe it becomes a 3.6. Yeah, and by the way, that course, "Golfing and the Law," that's called "The Law of Fore," okay? And we say we are going to have "The Law of 21," which is going to be legal liability in the casino. It will be endless. McDonald's "House of Hazards" with trans fatty acids and hot coffee. So somebody has to stop this. And my view is that it is you all.

Now, Peter Brown, you have done a magnificent job with this meeting.

Carrie Cohen, you have been a pleasure to have in my courtroom as an Assistant U.S. Attorney. Unfortunately, if the wheel is not kind to you, you will have to appear before Judge Duffy.

And to all the wonderful friends who are here tonight who I have enjoyed associating with over the years and to this entire Section that I love so much, I say thank you very much.

(Standing ovation)

The Supreme Court Trims Money-Laundering Laws

By Allison G. Schnieders and Damion K.L. Stodola

The Supreme Court issued two decisions in June 2008 that clarified the scope of the federal money-laundering laws. In *United States v. Santos*[1] and *Cuellar v. United States*,[2] the Supreme Court increased the threshold of proof that federal prosecutors will be required to meet to prove money-laundering violations. These additional hurdles reduce (at least somewhat) the leverage that prosecutors have and use to induce guilty pleas to underlying offenses by threatening to tack on money-laundering charges.

In *Santos*, a fractured Supreme Court ruled that the meaning of the word "proceeds" as used in the federal money-laundering statute is limited to "profits" rather than "gross receipts."[3] In *Cuellar*, a unanimous Court held that even though the government does not need to prove an intention to create the impression of legitimate wealth, it must prove that the overall purpose of the transportation of funds was to conceal or disguise the funds' nature, location, source, ownership, or control.[4]

United States v. Santos

In *United States v. Santos*, the Respondent had been convicted of running an illegal lottery and, based on payments he made to runners, collectors, and winners, was also convicted of violating the federal money-laundering statute.[5] Section 1956(a)(1)(A)(i) of Title 18 targets those who use the "proceeds" from an unlawful activity in order to promote that activity.[6] Santos appealed on the issue of whether the word "proceeds" referred to total receipts from the illegal activity, as the government argued, or whether "proceeds" referred only to profits.[7] The federal money-laundering statute does not provide a definition for the term "proceeds."[8] On collateral review, the District Court defined "proceeds" as criminal profits and vacated the conviction. The Seventh Circuit affirmed.[9]

Justice Scalia, in a plurality opinion joined by Justices Souter, Thomas and Ginsburg, wrote that because the word "proceeds" was equally susceptible of both the "profits" and the "receipts" definitions in common usage as well as in the federal Criminal Code, the rule of lenity dictated that the ambiguity must favor the defendant,[10] and thus the narrower definition of "profits" must apply.[11]

Justice Scalia also found that the narrower definition of "proceeds" solved what the Court referred to as the "merger problem."[12] The "merger problem" is essentially a double jeopardy concept raised by Respondent to point out the unfairness of the broader "receipts" definition of the word "proceeds."[13] Respondent argued that if "proceeds" meant "receipts," then the elements required to prove the underlying charge of illegal gambling would merge with the elements required to prove money-laundering, an offense with quadruple the maximum sentence relative to the maximum sentence for running an illegal gambling business.[14] Justice Scalia found that the merger problem could exist whenever there is a predicate crime that involves expenses that must be paid in order to carry out the illegal activity.[15] The "merger problem" was resolved by defining "proceeds" more narrowly, because "profits" specifically addresses the leveraging of one criminal activity into another, which is beyond the scope of the predicate crime.[16]

The Court's analysis on this point, however, was fractured by Justice Stevens's narrower concurring opinion, so this issue may resurface in cases involving different contexts.[17] Justice Stevens's concurrence was based on the absence of legislative intent to suggest that the "gross receipts" definition was intended in the context of a standalone illegal gambling venture.[18] Justice Stevens argued that the definition of the word "proceeds" may change depending on the discernible legislative intent for each predicate crime. [19] Thus, Justice Stevens pointed to organized crime syndicates as an example of where legislative intent would suggest the broader "receipts" definition.[20]

Justice Scalia's response, joined only by Justices Souter and Ginsburg, strongly rejected Justice Stevens's view that the definition changes depending on legislative intent, as applied to different factual contexts, calling it the "purest of *dicta*."[21] Justice Scalia also addressed the ambiguous *stare decisis* impact of the split opinions, which he said was only that "'proceeds' means 'profits' where there is no legislative history to the contrary."[22] Justice Scalia warned, however, that the Court does "not hold that the outcome is different where contrary legislative history does exist."[23]

In a dissent joined by Chief Justice Roberts and Justices Kennedy and Breyer, Justice Alito took issue with the majority's "profits" definition, based on a pragmatic concern over the difficulties of parsing the limited or nonexistent financial records of criminal enterprises to prove whether "profits" or mere gross receipts were used.[24] Justice Alito also argued that while dictionary definitions of the term "proceeds" may be ambiguous, rather than turning to the rule of lenity, a pattern of usage could be discerned from state laws and international treaties, which interpret "proceeds" to include gross receipts.[25] Justice Breyer, also dissenting, suggested that the "merger problem" was a fairness issue and should be resolved through revisions to the U.S. Sentencing Guidelines, not through judicial interpretation of the term "proceeds."[26]

Cuellar v. United States

In *Cuellar*, the Petitioner was convicted under 18 U.S.C. § 1956 after he was found transporting $81,000 in cash hidden in a secret compartment in his car as he was driving in Texas toward the Mexican border.[27] The Fifth Circuit first reversed[28] and then, following an *en banc* rehearing, upheld the conviction under the illegal transportation section of the money-laundering statute, 18 U.S.C. § 1956(a)(2)(B)(i).[29] This section of the statute prohibits the transportation of funds "designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of some specified unlawful activity."[30] The Petitioner argued that this section of the statute required the government to show that there was an attempt to create the appearance of legitimate wealth, and that concealment alone did not satisfy the requirements of the statute.[31]

Justice Thomas wrote a unanimous decision reversing the conviction.[32] The Court agreed with the government that the statute does not require proof of any attempt to create the appearance of legitimate wealth.[33] But on the issue of whether concealment during transportation is sufficient for a conviction under the statute, the Court agreed with Petitioner that there must be more than "mere hiding" to meet the "design" element of the statute.[34] The Fifth Circuit had interpreted "design" to refer to the manner in which the transportation was structured.[35] Justice Thomas disagreed with this analysis, holding that "design" should refer instead to the purpose—not merely the effect—of the transportation.[36] The Court held that defining the statutory term "design" to mean "manner" would be unintentionally broad, and Congress more likely intended "design" to mean purpose and intent, which is common in criminal law.[37] Because the government had argued that the purpose of the transportation was only to pay off the leaders of the operation, the government had not proven that the purpose of the transportation of the cash was to conceal its nature, location, source, ownership, or control.[38] The concealment of the money in the process of the larger plan to pay off people was not sufficient to support a conviction for money-laundering.[39]

In a concurring opinion joined by Chief Justice Roberts and Justice Kennedy, Justice Alito elaborated on what the prosecutors would have needed to prove in order to show illegal transportation under the money-laundering statute.[40] In addition to showing that the purpose of the transportation was to conceal the funds, the prosecutors would also need to prove that the defendant knew the purpose of the transportation.[41]

In deciding *Cuellar*, the Supreme Court contemporaneously vacated decisions of the Second,[42] Fifth[43] and Eleventh[44] Circuits, remanding these cases for further consideration in light of *Cuellar*.[45]

Santos and *Cuellar* clearly narrow the scope of the federal money-laundering laws, and will likely diminish prosecutors' ability to use the threat of money-laundering charges in the plea bargaining process. Instead of relying on a broad definition of money-laundering and the substantial associated recommended sentences, prosecutors will now need to take extra steps to meet their burden of proof. Indeed, the Supreme Court's clarification of the scope of the word "proceeds" has already resulted in the reversal of convictions in a number of cases.[46]

While it may not be difficult for a prosecutor under *Cuellar* to make the required showing concerning the purpose of the concealment of funds, the Supreme Court's confusing guidance on the scope of the term "proceeds" in *Santos* leaves it unclear how "proceeds" should be defined for different types of criminal activity. The uncertainty in the law and complications inherent in proving profits as opposed to gross receipts, especially in the context of street operations of narcotics sales and illegal gambling, may deter prosecutors from tacking on the money-laundering charge. Illegal businesses tend not to have books and records that comply with GAAP, so the difficulties of proving the profits (receipts minus business expenses) may often not be worth the time and resources required. The statutory maximums and guidelines ranges for most predicate offenses that could support add-on money-laundering charges give sentencing judges ample authority to impose substantial sentences, so after *Santos* and *Cuellar*, prosecutors interested in efficiency may focus on charging and proving just the underlying offenses.

Endnotes

1. 553 U.S. __, 128 S. Ct. 2020 (2008).
2. 553 U.S. __, 128 S. Ct. 1994 (2008).
3. *Santos*, 128 S. Ct. at 2025.
4. *Cuellar*, 128 S. Ct. at 2006.
5. *Santos*, 128 S. Ct. at 2021.
6. 18 U.S.C. § 1956(a)(1)(A)(i) (2008).
7. *Santos*, 128 S. Ct. at 2023.
8. *Id.* at 2024.
9. *Id.* at 2023 (finding that there was no evidence that the transactions involved profits, as opposed to receipts).
10. *Id.* at 2025 (stating that the rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them).
11. This plurality is not entirely extraordinary in light of Justice Scalia's past reliance on the rule of lenity in defendants' favor (*see, e.g.*, Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67, 72-73 (2005)) and Justices Ginsburg's and Souter's arguable skepticism toward money-laundering laws generally. *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 315 (1994) (concerning proof needed to convict under antistructuring provisions of the Money Laundering Control Act of 1986) (Ginsburg, J., delivered the opinion of the Court, in which Stevens, Scalia, Kennedy, and Souter, JJ., joined).
12. *Santos*, 128 S. Ct. at 2026.

13. *Id.* ("If 'proceeds' meant 'receipts,' nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery." (quoting Brief for Respondent Diaz 34)).
14. *Id.* (reasoning that Congress decided that lottery operators ordinarily deserve up to five years imprisonment, 18 U.S.C. § 1955(a), but as a result of merger they would face an additional 20 years, § 1956(a)(1)).
15. *See id.* at 2026–27 (explaining that anyone who pays for the costs of a crime with funds obtained from that crime violates the money-laundering statute).
16. *Id.* at 2028–29.
17. Other courts have since noted the somewhat confusing effect of the *Santos* split but declined to rule on the issue. *See*, *e.g.*, *United States v. Brown*, No. 05-20997, 2008 U.S. App. LEXIS 26431, at *33 (5th Cir. Dec. 18, 2008) (noting the "thorny issues" but holding that "even if the *Santos* plurality's more stringent reading of the statute governs in this case, the appellants lose"); *United States v. Happ*, No. CR2-06-129(8), 2008 U.S. Dist. LEXIS 103668, at *7 n.1 (S.D. Ohio Nov. 25, 2008) (stating that it is unnecessary to determine whether *Santos* is limited solely to gambling contexts because defendant's actions fell within narrower definition); *but cf. Bull v. United States*, No. CV 08-4191 CAS, 2008 U.S. Dist. LEXIS 100764, at *23–24 (C.D.Ca. Dec. 3, 2008) (denying defendant's collateral challenge because the court could not "conclude that *Santos* announces a 'new rule' defining the term 'proceeds' to mean 'profits' in all statutes").
18. *See Santos*, 128 S. Ct. at 2032 ("Just as the legislative history fails to tell us how to calculate the 'proceeds' of violations of § 541, it is equally silent on the proceeds of an unlicensed stand-alone gambling venture.").
19. *See id.* at 2031 ("[I]t seems clear that Congress could have provided that the term "proceeds" shall have one meaning when referring to some specified unlawful activities and a different meaning when referring to others.").
20. *Id.* at 2032.
21. *Id.* at 2031. Justice Alito's dissent also disagreed with Justice Stevens's approach, but noted that five Justices agree with Justice Stevens's conclusion that "proceeds" "include[s] gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id*. at 2035 (Alito, J., dissenting).
22. *Id.* at 2031.
23. *Id.*
24. *Id.* at 2036.
25. The United Nations Convention Against Transnational Organized Crime, adopted by the United States and 146 other countries, contains a provision very similar to § 1956(a)(1)(B)(i) that covers "gross receipts." Interpreting 18 U.S.C. § 1956(a)(1) as limited to profits arguably violates the Convention. However, the U.S. State Department took the position—albeit in 2004—that no new legislation was needed to bring the United States into compliance with the Convention. 2008 U.S. LEXIS 4699, at *48, n.3 (Alito, J., dissenting).
26. *Id.* at 2035 (Breyer, J., dissenting).
27. *Cuellar v. United States*, 128 S. Ct. 1994, 1997–98 (2008).
28. *United States v. Cuellar*, 441 F.3d 329, 334 (2006).
29. *United States v. Cuellar*, 478 F.3d 282 (2007).
30. 18 U.S.C. § 1956(a)(2)(B)(i) (2008).
31. *Cuellar*, 478 F.3d at 290 (2007).
32. *Cuellar*, 128 S. Ct. 1994 (2008).
33. *Id.* at 2002.
34. *Id.* at 2003.
35. *Id.* (discussing how the money was packed, where it was placed, and other means used to disguise it); *see Cuellar*, 478 F.3d at 289–90 (referring to the efforts taken by the defendant to conceal the cash, the Circuit Court held that "[t]he jury could conclude that these aspects of the transportation were designed to conceal or disguise the nature of the cash as drug proceeds").
36. 128 S. Ct. at 2003.
37. *Id.* at 2005 (noting that the definition would be both underinclusive and overinclusive; it would fail to distinguish between "*how* one moves the money… from *why* one moves the money. Evidence of the former, standing alone, is not sufficient to prove the latter.") (emphasis in original).
38. *Id.* at 2004 (rejecting the court's definition of the term, the Court stated, "We think it implausible [] that Congress intended this meaning of 'design.' If it had, it could have expressed its intention simply by writing 'knowing that such transportation conceals or disguises,' rather than the more complex formulation 'knowing that such transportation . . . is designed . . . to conceal or disguise.'").
39. *Id.* at 2003, 2006.
40. *Id.* at 2006 (Alito, J., concurring).
41. *Id.*
42. *Ness v. United States*, 128 S. Ct. 2900 (2008).
43. *Balderas v. United States*, 128 S. Ct. 2901 (2008).
44. *Nunez-Virraizabal v. United States*, 128 S. Ct. 2901 (2008); *Moreno-Gonzalez v. United States*, 128 S. Ct. 2901 (2008).
45. 128 S. Ct. 2900 (2008).
46. *See, e.g., United States v. Kelley*, No. 1:08-CR-51, 2009 U.S. Dist. LEXIS 2484, at *3 (E.D. Tenn. Jan. 14, 2009) (denying defendant's motion to dismiss but warning that the "government will not only have to prove the elements of money laundering, but also that the money was 'proceeds' as discussed in *Santos*"), *United States v. Pope*, No. 2:08-cr-49, 2008 U.S. Dist. LEXIS 103195 (W.D. Pa. Dec. 19, 2008) (denying motion to dismiss indictment on basis that it did not specifically allege "profits").

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Report Approving Proposal to Amend CPLR 1008

Prepared by the Civil Practice Law and Rules Committee

For the reasons stated herein, the Commercial and Federal Litigation Section (the "Section") APPROVES the proposal put forward by the Committee on the Civil Practice Law and Rules (the "Standing Committee") to amend CPLR 1008 to undo the effects of the decision in *Charles v. Long Island Community Hospital et al*., 850 N.Y.S.2d 173 (2d Dep't 2008) regarding third-party practice.

CPLR 1008 provides that third-party defendants may assert in their answer any defenses they have to the defendant/third-party plaintiff's claim. The statute further provides that a third-party defendant's answer may assert "against the plaintiff" . . . "any defenses which the third-party plaintiff has to the plaintiff's claim."

In *Charles*, the plaintiff did not effectuate proper service on the defendant, but the defendant chose not to contest service of process. When the defendant subsequently brought a third-party complaint, the third-party defendant moved to dismiss on the ground that plaintiff had failed to effect proper service on the defendant/third-party plaintiff. The trial court granted the motion and the Second Department affirmed.

Contemporary practice both discourages needless objections to service of process and requires defendants who wish to assert such a defense to do so promptly. With the advent of commencement by filing, there is often little incentive for a defendant to raise a defense of defective service; because the filing of the action tolls the statute of limitations, even if the defense is successful in the first instance, the plaintiff will often be able to re-serve and cure the defect. Moreover, CPLR 3211(e) requires that a defense to service of process must be raised promptly by the defendant or it will be deemed waived.

The decision in *Charles*, by permitting a third-party defendant to assert the *plaintiff's* failure to properly serve the *defendant* as a complete defense against the *defendant/third-party plaintiff* —and to do so at a time when the defendant/third-party plaintiff no longer has the ability to assert the same defense against the plaintiff—effectively forces defendants who are contemplating third-party practice to raise and litigate any service defenses that they may have at the outset of the case. Such a result is wasteful of the resources of courts and litigants; where a defendant reasonably chooses not to contest service, that defendant should not then be penalized by a possible loss of rights that they may have against potential third parties.

The proposed amendment offered by the Standing Committee would eliminate the negative effects of the *Charles* decision by clarifying that third-party defendants may not assert the plaintiff's failure to serve the defendant as a defense against the third-party complaint. The proposal would not limit the third-party defendant's rights in any other way. This proposal is entirely reasonable and deserves the support of the Bar.

Conclusion

For the reasons stated, the Commercial and Federal Litigation Section recommends that the proposed legislation be APPROVED.

This report was prepared by the Civil Practice Law and Rules Committee of the Commercial and Federal Litigation Section of the New York State Bar Association. The Civil Practice Law and Rules Committee is co-chaired by James Michael Bergin of Morrison & Foerster LLP and Thomas C. Bivona of Milbank, Tweed, Hadley & McCloy LLP. To join this Committee, please contact Mr. Bergin at jbergin@mofo.com or Mr. Bivona at tbivona@milbank.com.

This report was sent to John A. Williamson, Associate Executive Director of New York State Bar Association, on April 3, 2008.

Rule 8(a)(2) After *Twombly*: Has There Been a Plausible Change?

Prepared by the Federal Procedure Committee

I. Introduction

Bell Atlantic Corp. v. Twombly[1] was an antitrust case decided toward the end of the Supreme Court's 2006 term. While its holding concerned the adequacy of pleading an antitrust case alleging an agreement in violation of Section 1 of the Sherman Antitrust Act,[2] it has since been cited innumerable times for certain broader statements concerning pleading a claim generally. This report focuses on the inferences about the general pleading requirements under Rule 8(a)(2) of the Federal Rules of Civil Procedure which the Circuit Courts of Appeals have drawn from the language used by the Supreme Court in *Twombly*.[3]

In *Twombly*, the Supreme Court "retired" the statement in *Conley v. Gibson*[4] that "the accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[5] While there is inconsistency among the formulations adopted by the Courts of Appeals, it appears that this statement, to some extent, is being replaced by Justice Souter's statement in *Twombly* that a complaint must allege "only enough facts to state a claim to relief that is plausible on its face."[6]

II. The Supreme Court's Decisions

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." On its face, there appear to be three elements of this relatively short rule: (1) a "short and plain statement," (2) a "showing," and (3) an "entitle[ment] to relief."[7] *Twombly* discussed the last two requirements.

Regarding the entitlement requirement, Justice Souter wrote in *Twombly*:

> We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharms., Inc. v. Broudo* . . . [W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.[8]

Regarding the "showing" requirement, in footnote 3 of *Twombly*, Justice Souter wrote, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."[9] Quoting *Conley v. Gibson*,[10] he expanded this obligation to include a requirement that a pleading must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[11]

Therefore, "[w]hile a complaint . . . does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[12] "Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."[13] Thus, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[14]

To emphasize that a formulaic or conclusory recitation of the elements of a claim is insufficient, Justice Souter "retired" the no-set-of-facts statement from *Conley*.[15] His reasoning was that with "a focused and literal reading of *Conley's* 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery."[16]

The remainder of the *Twombly* opinion applies the pleading standard to allegations of a violation of Sherman Act § 1 and, in particular, to determining whether there was "enough factual matter (taken as true) to suggest that an agreement was made."[17] It is in this context that Justice Souter discusses the concept of plausibility, and it could be argued that the entire discussion about plausibility in *Twombly* is related solely to a claim asserted under Sherman Act § 1.[18]

Justice Souter closed his opinion in *Twombly* with a reiteration of his statement in footnote 14 of the opinion[19] that no "heightened" pleading standard was being applied.[20] However, in the same sentence, he also stated that the requirement to be met is "enough facts to state a claim to relief that is plausible on its face."[21] The requirements under Rule 8(a)(2) were reiterated by the Supreme Court in *Erickson v. Pardus*,[22] a *pro se* case decided without argument, in which the Court reached out to restate *per curiam* the Rule 8(a)(2) requirements outside an antitrust context. Partially quoting *Twombly* quoting *Conley*, the Court said,

> Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement

> of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.[23]

No mention was made of any plausibility standard.

III. The Courts of Appeals' Varying Standards

With arguably conflicting signals from the Supreme Court, the Courts of Appeal have articulated different standards.

District of Columbia Circuit

The District of Columbia Court of Appeals in *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*,[24] concluded "that *Twombly* leaves the long-standing fundamentals of notice pleading intact," that is, "a sufficient complaint 'contain[s] a short and plain statement of the claim showing that the pleader is entitled to relief,' enough to give a defendant 'fair notice of the claims against him.'"[25] Regarding "plausibility," the court commented, "*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim."[26] However, in a later non-precedential, not-for-publication decision in *Rodriguez v. Editor in Chief,* [27] the D.C. Circuit merely reiterated Justice Souter's conclusion in *Twombly* as the applicable standard: "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."[28]

Third Circuit

In *Phillips v. County of Allegheny*,[29] the Third Circuit refused "to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context."[30] Instead, the Third Circuit described what it called in *Wilkerson v. New Media Technology Charter School Inc.*[31] the *Twombly* "plausibility paradigm:" "'[S]tating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element."[32] This "does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of" the necessary element.[33]

Seventh Circuit

The Seventh Circuit has found that, while *Twombly* "did not . . . supplant the basic notice-pleading standard,"[34] *Twombly* "retooled federal pleading standards"[35] so that, "[i]n each context, [the court] must determine what allegations are necessary to show that recovery is 'plausible.'"[36] "In a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the civil rules' Appendix of Forms may be necessary to show that the plaintiff's claim is not 'largely groundless.'"[37] "If discovery is likely to be more than usually costly, the complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim."[38] In contrast, in the Seventh Circuit, there is only a "minimal pleading standard for simple claims of race or sex discrimination."[39]

Second Circuit

The Second Circuit has adopted an approach similar to the Seventh Circuit's. In *Iqbal v. Hasty*,[40] the Second Circuit held that the Supreme Court "is . . . requiring a flexible 'plausibility standard' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[41] However, the Second Circuit, unlike the Seventh Circuit, has not delineated the types of claims that require more factual detail than others.[42]

Sixth Circuit

While the Sixth Circuit has applied a "plausibility" standard to "determine whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face,'" it has focused on the rejection of conclusory allegations embodied in the *Conley v. Gibson* no-set-of-facts rule.[43] In *Sensations, Inc. v. City of Grand Rapid*,[44] the Sixth Circuit stated:

> In *Bell Atlantic Corp. v. Twombly,* the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level. . . ." In *Erickson v. Pardus,* decided two weeks after *Twombly,* however, the Supreme Court affirmed that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."' The opinion in *Erickson* reiterated that "when ruling on a defendant's motion to dismiss, a judge must accept as true, all of the factual allegations contained in the complaint." We read the *Twombly* and *Erickson* decisions in conjunction with one another when reviewing a district court's decision to grant a motion to dismiss for failure to state a claim or a motion for judgment on

> the pleadings pursuant to Federal Rule of Civil Procedure 12.[45]

Eighth Circuit

Similarly, in *Benton v. Merrill Lynch & Company Inc.*,[46] the Eighth Circuit stated,

> While a complaint attacked by a Fed. R. Civ. P. 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

The complaint must allege facts, which, when taken as true, raise more than a speculative right to relief.[47] Yet, in *Stalley v. Catholic Health Initiatives*,[48] the court said that a "plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims . . . rather than facts that are merely consistent with such a right."[49]

Fourth Circuit

The Fourth Circuit appears to have adopted a standard that "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." A complaint attacked by a Rule 12(b)(6) motion to dismiss will survive if it contains "enough facts to state a claim to relief that is plausible on its face."[50]

Fifth Circuit

In the Fifth Circuit:

> [t]o survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[51]

Ninth Circuit

The Ninth Circuit has the same standard as the Fifth Circuit.[52]

Tenth Circuit

The Tenth Circuit interprets the "showing" requirement as meaning "that the plaintiff must allege enough factual matter, taken as true, to make his 'claim to relief . . . plausible on its face.'"[53] It is explained that:

> "[P]lausibility" in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs "have not nudged their claims across the line from conceivable to plausible." The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief.[54]

Eleventh Circuit

In *Watts v. Florida International University*,[55] the Eleventh Circuit articulated a somewhat different standard:

> The Supreme Court's most recent formulation of the pleading specificity standard is that "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest" the required element. The standard is one of "plausible grounds to infer." The Court has instructed us that the rule "does not impose a probability requirement at the pleading stage," but instead "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of" the necessary element. It is sufficient if the complaint succeeds in identifying facts that are suggestive enough to render [the element] plausible.[56]

First Circuit

The First Circuit has applied a standard requiring that, "[t]o survive a motion to dismiss, a complaint must allege 'a plausible entitlement to relief,'"[57] and must "state facts sufficient to establish a 'claim to relief that is plausible on its face.'"[58]

IV. Conclusion

Whether *Twombly*'s "retirement" of the *Conley* pleading standard has resulted or will result in granting motions to dismiss under Fed. R. Civ. P. 12(b)(6), or motions for judgment on the pleadings under Fed. R. Civ. P. 12(c) in cases where they previously would not have been granted is beyond the scope of this report. The foregoing Courts of Appeals' decisions do make clear, however, that whatever pleading requirement *Twombly* has imposed for a claim to survive a Rule 12(b)(6) or Rule 12(c) motion has not been limited to antitrust or conspiracy claims, except possibly in the D.C. Circuit. Given the Courts of Appeals' diverse formulations of what the proper standard is, under Rule 8(a)(2), for determining whether a complaint will survive motions under Rule 12(b)(6) or Rule 12(c), it would be prudent for the Supreme Court to revisit this issue in the near future.

Endnotes

1. 550 U.S. 544 (2007).
2. 15 U.S.C. § 1.
3. This report does not address the applicability of *Twombly* to antitrust cases. *See* "Antitrust Looms Large in the Supreme Court's Last Term," NYSBA Commercial and Federal Litigation Section, Antitrust Litigation Committee (Dec. 2007). For example, in *Transhorn, Ltd. v. United Techs. Corp.*, 502 F.3d 47, 50 (2d Cir. 2007), the Second Circuit stated, "*Twombly* does not require heightened fact pleading of specifics," however, it requires plaintiffs "to allege facts that would provide 'plausible grounds to infer an agreement,' *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)." In contrast, in *Kendall v. Visa U.S.A., Inc.*, the Ninth Circuit noted that:

   > [a]t least for the purposes of adequate pleading in antitrust cases, the Court specifically abrogated the usual "notice pleading" rule, found in Federal Rule of Civil Procedure 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957), which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," to "give the defendant fair notice of what the claim is and the grounds upon which it rests."

   518 F.3d 1042, 1047 n.5 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 555).
4. 355 U.S. 41 (1957).
5. 550 U.S. at 561 (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).
6. *Id.* at 570.
7. Fed. R. Civ. P. 8(a)(2).
8. 550 U.S. at 558 (quotation marks and citations omitted).
9. *Id.* at 556 n.3.
10. 355 U.S. 41 (1957).
11. 550 U.S. at 555.
12. *Id.*
13. *Id.* at 556 n.3.
14. *Id.* at 555.
15. *Id.* at 562–63.
16. *Id.* at 561.
17. *Id.* at 556.
18. *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), at 581 ("[t]he [C]ourt [of Appeals] apparently did not consider whether it was as *plausible* to conclude that petitioners' price-cutting behavior was independent and not conspiratorial" (emphasis added)), at 587 ("if the factual context renders respondents' claim *implausible* . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary" (emphasis added)), at 588 ("[t]o survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude *the possibility*' that the alleged conspirators acted independently" (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (emphasis added))), at 593 ("[i]n *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are *implausible*" (emphasis added)), and at 596 ("the absence of any *plausible* motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial exists'" (emphasis added)).
19. 127 S. Ct. at 1973.
20. *Id.* at 1974.
21. *Id.*
22. 127 S. Ct. 2197 (2007).
23. *Id.* at 2200 (internal quotation marks and citations omitted).
24. 525 F.3d 8 (D.C. Cir. 2008).
25. *Id.* at 15. (quoting *Ciralsky v. CIA*, 355 F.3d 661, 668–70 (D.C. Cir. 2004)).
26. *Id.* at 17.
27. No. 07-5234, 2008 WL 2661993, (D.C. Cir. July 2, 2008) (*per curiam*) (not for publication).
28. *Id.* at *2 (quoting *Twombly*, 550 U.S. at 570) (quotation marks omitted).
29. 515 F.3d 224 (3d Cir. 2008).
30. *Id.* at 234.
31. 522 F.3d 315, 321 (3d Cir. 2008).
32. *Id.* (quoting *Twombly*, 550 U.S. at 556).
33. *Phillips*, 515 F.3d at 234.
34. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008).
35. *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007).
36. *Tamayo*, 526 F.3d at 1083.
37. *Phillips*, 515 F.3d at 231–32.
38. *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803–04 (7th Cir. 2008).
39. *Tamayo*, 526 F.3d at 1084 (relying on *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 781–82 (7th Cir. 2007)).
40. 490 F.3d 143 (2d Cir. 2007).
41. *Id.* at 158–59 (emphasis in original).
42. *See Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008) ("*Iqbal* does not offer much guidance to plaintiffs regarding when factual 'amplification [is] needed to render [a] claim *plausible*.'" *Id.* at 213 (emphasis in original)).
43. *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 502 (6th Cir. 2007) (quoting *Twombly*, 127 S. Ct. at 1974).
44. 526 F.3d 291 (6th Cir. 2008).
45. *Id.* at 295–96 (internal quotations marks and citations omitted).
46. 524 F.3d 866 (8th Cir. 2008).
47. *Id.* at 870.
48. 509 F.3d 517 (8th Cir. 2007).
49. *Id.* at 521.
50. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 466 (4th Cir. 2007); *Lanier v. Norfolk S. Corp.*, 256 Fed. Appx. 629, 632 (4th Cir. 2007) (not for publication).
51. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 570).
52. *See Williams v. Gerber Prods. Co.*, 523 F.3d 934, 938 (9th Cir. 2008).
53. *Bryson v. Gonzales*, 534 F.3d 1282, 1287 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570).
54. *Aguilera v. Negron*, 509 F.3d 50, 53 (1st Cir. 2008) (quoting *Twombly*, 550 U.S. at 570).
55. 495 F.3d 1289 (11th Cir. 2007).
56. *Id.* at 1295–96 (quoting *Twombly*, 550 U.S. at 556).
57. *Cook v. Gates*, 528 F.3d 42,48 (1st Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1967).
58. *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 320 (1st Cir. 2008) (quoting *Twombly*, 550 U.S. at 570).

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