REPORT OF THE APPELLATE PRACTICE COMMITTEE OF THE COMERCIAL AND FEDERAL LITIGATION SECTION: **En Banc Review For Intermediate Appellate Courts in New York State**

This report analyzes a cogent and well-researched report from the New York City Bar's Committee of State Courts of Superior Jurisdiction (City Bar Report). The City Bar Report has detected conflicting decisions on the same appellate court and has proposed en banc review as a possible solution to resolving these perceived conflicts. We have analyzed the City Bar's Report with a focus on commercial cases.

We have not researched independently the extent of the problem, but have assumed from the City Bar Report that at least conflicting decisions do sometimes occur. Nevertheless, we conclude that en banc review is not advisable.

I. Identification of the Problem: Decisions in Conflict

The City Bar Report points out that at times different benches from the same appellate division have issued seemingly contradictory rulings. Sometimes this occurs with the judges on the subsequent case recognizing their departure from prior precedent. *Compare Fieldston Property Owners Assn v Heritage Ins. Co.*, 61 AD3d 185 (1st Dep't 2009) with *Sport Rock International, Inc. v Am. Cas. Co. Of Reading PA.*, 65 Ad3d 12 (1st Dep't 2009) (interpreting "other insurance" clauses). Other times conflict comes about seemingly accidentally. *Compare Matter of United Service Auto Assn v Melendez*, 27 Ad3d 296 (1st Dep't 2006) with *In re National Grange Mut. Ins Co., v Louie*, 39 AD3d 293 (1st Dep't 2007). Of concern to our section is that these discrepancies occur far more in commercial cases than in other areas. 99% of the examples in the City Bar Report involved a commercial issue. It is true that, in the majority of instances, the Court of Appeals has resolved the conflict or reasserted a rule that the appellate court seemingly did not follow. *See, e.g., Great Canal Realty Corp v Seneca Ins Co. Inc.*, 5 NY3d 742 (2005); *Samuel v Druckman & Sinel, LLP*, 12 NY3d 205 (2009). However, on its own, the Court of Appeals cannot take a case that the court below has not finally resolved. The only way for a non-final, civil decision of an appellate division to reach the Court of Appeals is if that appellate division grants leave upon motion. In a civil case, it has become customary in the Appellate Division, First Department, to grant leave as long as two justices agree to do so. The Appellate Division, Second Department requires the consent of only one justice in order to grant leave. Thus, there are cases that invariably fall through the cracks, because: (1) the decision is non final (such as denial of a summary judgment motion) and (2) there are not enough or no justices who wish to grant leave. Given the economic realities of litigating a commercial case to conclusion, it is likely that the appellate division is truly the court of last resort for commercial cases in this procedural posture. This is because, while there may be a discrepancy with another decision from the same court, it is more economical to settle than to proceed through trial.

II. Possible Solution: En Banc Review

Currently, the New York State Constitution Art 6 § 4 limits to five the number of justices that can sit on any case in an appellate division. The City Bar report advocates amending the

Constitution to remove this impediment thereby clearing the way for rehearings en banc. An en banc rehearing occurs when all active judges on an intermediate court sit together to rehear and decide an appeal. This is intended to be a rare occurrence, reserved only for cases where there is a lack of uniformity of decisions in that particular court and the matter is of great importance.

Although New York does not currently allow for en banc review, Federal Rule of Appellate Procedure 35 has long permitted en banc review in the federal courts of appeals if: (1) necessary to secure or maintain uniformity of the court's decisions and (2) the proceeding involves a question of "exceptional importance." About 4,855 petitions for rehearings en banc were filed in the federal courts in 2008. The application usually tags along with a motion for rehearing before the original panel and therefore, as a practical matter, does not increase the court's workload. The same should hold true were en banc review to come to fruition in state court. Applications are rarely granted. En banc hearings comprise less than one percent of all cases in the federal court of appeals.

The City Bar Report stated that Delaware provides for some form of en banc review. This drew our initial interest given how well Delaware handles commercial cases. However, as there is no intermediate appellate court in Delaware, it is only the state's highest court, the Supreme Court of Delaware, that utilizes an en banc procedure. This court usually sits in panels of three, while there are five judges on the court in total. Accordingly, en banc review in Delaware would involve all five judges on that court. As all the judges on our Court of Appeals preside over appeals, the procedure in Delaware is not a useful guide for New York. It is noteworthy, however, that in Delaware, litigants can appeal a decision from Delaware Chancery court (the court that handles nearly all commercial cases) directly to the Supreme Court of Delaware on an expedited and interlocutory basis. *See, e.g., In re Topps Co. Shareholders Lit*., 924 A2d 951, 954 (Del. Ch. Ct. 2007). This "bee line" to the highest court in Delaware for even non final commercial decisions is important to preserve Delaware's dominance in the area of commercial law.

III. Conclusion: En Banc Review is Unnecessary and Not Feasible; Alternative Solutions Preferable

While the City Bar Report's recommendation to amend New York law to allow for en banc review purports to alleviate the perceived problem of conflicting decisions, we conclude that this extreme measure is not necessary, particularly not on a statewide basis. The appellate divisions in the third and fourth departments are quite small comparatively. The Appellate Division, Third Department has 12 justices and the Appellate Division, Fourth Department has eleven. Accordingly, when five justices sit, there is already close to a majority of the entire court on that case. The case law reflects this reality. There are relatively few conflicts in these two jurisdictions. Indeed, the City Bar Report cites to no instances of conflict in either upstate Appellate Division. Accordingly, calling for en banc review on a statewide basis is unnecessary. It is also does not solve conflicting decisions. What if the court decides not to grant en banc? Then, the conflict remains. It is interesting to note that the federal courts of appeals do not suffer from any lack of conflict while they already have en banc review.

It is also not practical from a political standpoint. Involving the legislature on something as

grand as amending the constitution could take years. It would require much more time and effort than the situation really needs. This is because there are alternative, less intrusive means for addressing the perceived problem of conflicting decisions downstate.

One approach would be to encourage the use of a "mini en banc." Mini en banc involves a panel circulating a proposed decision to the entire court on an informal basis for comment. Panels on the federal courts of appeal have used this procedure when deciding to depart from prior precedent, but the use of mini en banc could easily include instances where there is a conflict among decisions on the court. This would at least give a panel a sense of what the majority of the judges would do, and, if the majority differs from the result that panel was about to reach, might lend itself to a reconsideration of that position.

Another approach would be to encourage the appellate divisions to grant more applications for leave to appeal to the Court of Appeals. This could, at the very least, take the form of a letter from the section to the First and Second Departments or perhaps a meeting with the new Clerks in both downstate departments. We could even invite the new clerks to one of our executive committee meetings.

We also cannot overlook the importance of e-filing to this matter. It is possible, indeed highly likely, that in many of the cases where there is a perceived conflict, there is some difference in the fact patterns that engendered the difference in the decisions. Currently, the record on appeal is not available over the internet. A curious attorney seeking to distinguish between the two cases would have to personally come into court to pull the records. This is both time consuming and disruptive. Were the records available electronically, attorneys could see for themselves the reason for the discrepancy without the hassle. Reference to the record on appeal would occur far more frequently and would enlighten everyone.

Finally, there are legislative changes we may want to encourage that would cut down on the impact of any lack of uniformity, but are less intrusive than amending the State Constitution. Currently, New York Judiciary law §§ 431 and 433a require the publication of every Appellate Division decision, no matter how short and no matter its precedential value. Perhaps amending this publication requirement, so that judges publish only what they want in an official publication, or choose what may be cited for precedential value, would cut down on the impact of these seemingly disparate decisions, particularly in those cases where an unusual fact pattern has perhaps led to the apparent conflict. We might also recommend an end to the rule of finality so that the Court of Appeals could hear more commercial cases, but this remains a distant hope.

This report was prepared by the Appellate Practice Committee of the Commercial and Federal Litigation Section which is co-chaired by Section Vice-Chair David H. Tennant and Melissa Crane. The report was approved by the Section's Executive Committee on March 16, 2010. [1]

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[1] Committee co-chair and Executive Committee member Crane, who works in the Appellate Division, First Department, abstained from all votes concerning this report. The views expressed in this report are not intended to express the views of the Appellate Division, First Department or any judge of that court.