AMERICAN INNS of COURT

THE THEODORE ROOSEVELT AMERICAN INN OF COURT

&

THE NEW YORK AMERICAN INN OF COURT

MAY 27, 2015

5:30 - 8:00 P.M.

Southern District of New York

500 Pearl Street, New York, New York 10007

Presenting

"Litigation Overload Facing Federal and State Courts-Trying to Stem the Tide" and
"What Makes a Great Commercial Court"

Moderators

Susan Meekins, Esq.
Harry Sandick, Esq.
Kevin Schlosser, Esq.
Mark Berman, Esq.

Judge's Panel

Hon. Richard J. Sullivan, U.S.D.J. - S.D.N.Y.

Hon. Shira Scheindlin, U.S.D.J. - S.D.N.Y.

Hon. Nicholas G. Garaufis, U.S.D.J. - E.D.N.Y.

Hon. Saliann Scarpulla,
Supreme Court of the State of New York, Commercial Division - N.Y. County

Hon. Barbara R. Kapnick,
Associate Justice – Appellate Division- First Department

Hon. Timothy S. Driscoll,
Supreme Court of the State of New York, Commercial Division - Nassau County

A Judicial Panel Discussion On Commercial Litigation:

Litigation Overload – Trying To Stem The Tide
and
What Makes A Great Commercial Court?

New York American Inn of Court and Theodore Roosevelt American Inn of Court
May 27, 2015
Timed Agenda and Materials

Part I: Pleadings and Motions To Dismiss In State and Federal Court (25 minutes)

Moderator: Susan Meekins

Possible subjects of discussion:

- Pleading: Earlier this year, the New York Law Journal featured a recent decision by Judge Pauley in a case where all parties ignored Rule 8 of the Federal Rules. The complaint was 175 pages long, with 1400 pages of exhibits. The answer was 210 pages. The amended answer was 303 pages. The plaintiff moved to dismiss the defendant's 12 counterclaims under Rule 12(b)(6). Judge Pauley dismissed all but one counterclaim with prejudice. He ordered both parties to file amended pleadings conforming to Rule 8 ("stripped of surplusage and exhibits") and stated that failure to comply would result in sanctions.
    - Should there be a page limit for complaints?
    - Some lawyers take a barebones approach to pleading and provide only essential details. Some prefer to tell the whole story of the case in the complaint. Which is more effective?
- Pre-answer motions to dismiss: How useful are such motions in narrowing the issues for discovery, weeding out meritless commercial cases?
- Pre-motion conferences: The statewide Commercial Division rules require pre-motion conferences but they are not used in practice for initial motions because cases are not assigned to a judge until after the initial motion return date. Some SDNY and EDNY judges, including members of our panel, require pre-motion conferences for pre-answer motions and stay the defendant's time to answer until after the conference.
    - Judges Garaufis, Scheindlin and Sullivan - what is your experience with pre-motion conferences on pre-answer motions to dismiss? Do such conferences eliminate resolve the issues raised by proposed pre-answer motions to dismiss in a significant number of cases?

- Justices Driscoll and Scarpulla - has the Commercial Division considered implementing a similar requirement for initial pre-answer motions, possibly in conjunction with the recently adopted rule on early filing of an RJI and request for assignment of cases to the Commercial Division.

- Stay of discovery pending pre-answer motions. Discovery is automatically stayed by most motions to dismiss under CPLR 3211 or 3212 unless the stay is lifted by the court. Commercial Division Rule 12(d) allows the trial judge to decide on a case-by-case basis whether to stay discovery. In federal court, a stay is not automatic.
  - Judges Garaufis, Sullivan and Scheindlin - Is it advantageous for discovery go forward while a motion to dismiss is pending?
  - Justices Kapnick, Driscoll and Scarpulla – What is your experience with applications to lift the stay of discovery while pre-answer motions to dismiss are pending?

Part II: Coordination of State and Federal Litigation
(5 minutes)

Moderator: Harry Sandick

Possible subjects of discussion:

- Discussion of coordination by Justice Kapnick and Judge Sullivan in *Aurelius*
- Other examples of state/federal coordination of case management

Part III: Expert Discovery and Testimony in State and Federal Courts: Use of Daubert and Frye To Prevent Wasteful Misadventures By So-Called Experts
(25 minutes)

Moderator: Kevin Schlosser

Possible subjects of discussion: See attachment

Part IV: Interlocutory Appeals In State Court (5 minutes)

Moderator: Harry Sandick

Possible subjects of discussion:

- Discussion of state law rules for interlocutory appeals
- Different treatment for oral argument than in appeals from final orders
- Trial court ordinarily not deprived of jurisdiction during pendency of appeal
- Does this practice help or hinder speedy resolution of cases?

Part V: The Use of Mediators, Special Masters and Magistrate Judges (25 minutes)

Possible subjects of discussion:

- In the SDNY and in the EDNY, what considerations are taken into account when deciding whether to retain a case for settlement purposes or to refer it to a Magistrate Judge?

- In the SDNY and in the EDNY, what considerations are taken into account when deciding whether to order (without consent) or to suggest that the parties use a court-adjunct or a private mediator to try to resolve a case?

- In the SDNY, how successful has been the automatic referral to mediation of employment discrimination cases (except FLSA cases)?

- In the SDNY, how successful has been the automatic referral to mediation of police excessive force, false arrest and malicious prosecution actions?

- In the SDNY and in the EDNY, under what circumstances are special masters appointed and for what purposes (case management, discovery resolution, fact-finding, settlement or any other purpose)?

- In the SDNY and in the EDNY, when is a special master used in lieu of using a Magistrate Judge to address an ediscovery disputes?

- Have issues arisen in the SDNY and in the EDNY about the order of reference to a master as not being as carefully tailored to fit a particular case as it should be?

- In the New York, Nassau and Suffolk County Commercial Divisions what considerations are taken into account when deciding whether to refer an ediscovery dispute to a court referee as opposed to the trial judge retaining the ediscovery dispute?

- In the New York County Commercial Division, has the use of retired private attorneys as "masters" been successful in resolving complex ediscovery disputes?

- In the Nassau County Commercial Division, the use of a private "master" has been successful in addressing ediscovery disputes. Justice Driscoll - how do you account for that?

- Under the Commercial Division Rules, a judge can direct a case to go to mediation.

    - Justices Kapnick, Scapulla and Driscoll - do you direct mediation or do you want consent from the parties?

    - Are there particular points during a litigation that you feel ordering mediation would have better chances for success?

    - Have you seen any difference in success when parties use court-annexed mediation as opposed to private mediation companies such as JAMS or NAMS?

    - What are you feelings about staying discovery during mediation?

    - Have you suggested a particular person that you feel would be the right person to mediate a particular type of dispute?

- In the New York County Commercial Division, how successful has been the automatic referral of every fifth case to mediation?

- Justice Kapnick – how successful is the Appellate Division mediation process that occurs before an appeal is heard with respect to commercial cases?

Federal Pleadings are Receiving Heightened Scrutiny Under New Standard
Focus on Commercial Litigations
October 28, 2009
Publication Source: The Suffolk Lawyer
Written By: Kevin Schlosser
Download PDF

The dust is starting to clear from the United States Supreme Court's decisions in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), which altered the pleading standards in federal court. It is an opportune time, therefore, to assess how the federal judges in Central Islip have applied these precedent-altering decisions in determining motions to dismiss pleadings.

Conley's "Retirement"
One of the most widely-known and oft-cited cases in federal procedural jurisprudence is the Supreme Court's decision in Conley v. Gibson, 355 U.S. 41 (1957), and its edict 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." Id. at 45-46. Exactly 50 years after that monumental decision was rendered, the Supreme Court observed in Twombly that "Conley's 'no set of facts' language has been questioned, criticized, and explained away long enough ... and after puzzling the profession for 50 years, this famous observation has earned its retirement." 550 U.S. at 562.

The Supreme Court chose to celebrate Conley's retirement in Twombly in the context of an antitrust case. In Twombly, plaintiff consumers attempted to assert a class action against a group of major telecommunications providers, alleging that they conspired to foreclose competition to maintain inflated telephone and internet charges. The main weakness in the complaint was that plaintiffs failed to allege facts to establish that there was any actual agreement among the defendant telephone companies to restrain trade or commerce. Rather, plaintiffs sought to establish the existence of an agreement and, in-turn the conspiracy, by merely relying upon the telephone companies' conscious "parallel behavior," such as refraining from competing against each other and not seeking business opportunities in each other's territories. In reversing the Second Circuit, the Supreme Court ruled that the complaint did not pass muster under Fed.R.Civ.Proc. 8, observing: "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) [an antitrust] agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" 550 U.S. at 557.

The Supreme Court further noted that under "a focused and literal reading of Conley's 'no set of facts,' [standard] 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." Id. at 561.

Because the Supreme Court's analysis in Twombly was so intertwined with antitrust precedent, it was uncertain whether the Court intended its new standard to apply only to antitrust claims. In another decision reversing the Second Circuit, Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), the Supreme Court quickly laid that question to rest and further imbedded the new Twombly standard into federal procedural jurisprudence. In Iqbal, a Pakistani Muslim filed a Bivens action against several federal officials, including the former Attorney General and the Director of the FBI, alleging that they violated his constitutional rights when he was arrested and detained along with thousands of other Arab Muslims in the aftermath of the September 11, 2001 terrorist attacks. Unlike the District Court and the Second Circuit, which sustained the allegations of the complaint, the Supreme Court ruled that the plaintiff did not satisfy the "plausibility" standards announced in Twombly. The Court made clear that the pronouncements it issued in Twombly and its interpretation of Fed.R.Civ.Proc. 8's pleadings requirements apply to "all civil actions" and not merely to antitrust litigation. Among other things, the Court also observed that "bare assertions" that the defendants knew of, condoned and willfully and maliciously agreed to subject plaintiff to conditions in violation of his constitutional rights were merely a "formulaic recitation" of the elements of the claim and, as such, were not entitled to the assumption of truth. The Court also noted that the allegations of wrongdoing, while theoretically consistent with the claim, could be plausibly interpreted as constituting legitimate conduct as well, and as such, were insufficient to form the basis of the claim.

Recent Eastern District Decisions Applying Twombly and Iqbal
Recent decisions by federal district court judges in Central Islip shed light on how Twombly and Iqbal have impacted motions to dismiss. In Argeropoulos v. Exide Technologies, 2009 WL 2132443 (E.D.N.Y. July 8, 2009), for example, Judge Seybert specifically noted that while the complaint would have survived under the Conley standard, the allegations were insufficient to satisfy the new Twombly and Iqbal standards.

In Argeropoulos, plaintiff alleged that he was subjected to discrimination and harassment by his employer because of his national origin (he was a U.S. citizen of Greek origin) and perceived sexual orientation. In reciting the standard of review under Fed.R.Civ.Proc. 12(b)(6), the Court relied upon Twombly and Iqbal exclusively. The Court noted that a "complaint must plead facts sufficient 'to state a claim for relief that is plausible on its face.'" 2009 WL 2132443 * 2 (citing Twombly). The Court then noted: "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Id. (quoting Iqbal). The Court relied upon the following additional key language from Iqbal:

"The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. Thus, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Id. (internal citations and quotations omitted). Examining whether a complaint states a plausible claim for relief is "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," a complaint fails to state a claim. Id. The plaintiff's factual allegations, in short, must show that the plaintiff's claim is "plausible," not merely "conceivable." Id. at 1951. In applying the plausibility standard set forth in Twombly and Iqbal, a court "assume[s] the veracity" only of "well-pleaded factual allegations," and draws all reasonable inferences from such allegations in the plaintiff's favor. Id. at 1950. Pleadings that "are no more than conclusions," however, "are not entitled to the assumption of truth." Id.
Argeropoulos, 2009 WL 2132443*2-3.

In granting the motion to dismiss, and rejecting plaintiff's complaint, the Court analyzed in detail the various discrimination claims attempted to be asserted. After easily rejecting most of plaintiff's claims because he had alleged "no facts" that could even plausibly support his discrimination claims, in a particularly enlightening portion of the decision, Judge Seybert distinguished between the old pleading standard under Conley and the new standard under Iqbal and Twombly. The Court acknowledged that plaintiff's "hostile work environment claim predicated on national origin harassment is pled somewhat better, but still fails to survive Defendants' motion to dismiss." Id. *5. In recognizing that work environment hostility is assessed based upon the "totality of the circumstances," Judge Seybert focused on plaintiff's attempt to satisfy the elements of the claim by providing a few "isolated incidents" while claiming they were "merely some examples of discrimination that occurred on 'daily and continuous basis because he is Greek.'" In rejecting this conclusory effort, the Court held:

"When combined with the two anti-Greek statements pled in the Amended Complaint, this kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old 'no set of facts' standard for assessing motions to dismiss. [Citing Conley.] But it does not survive the Supreme Court's 'plausibility standard,' as most recently clarified in Iqbal.... In applying the plausibility standard set forth in Twombly and Iqbal, a court 'assume[s] the [ ] veracity' only of 'well-pleaded factual allegations.' ... Thus, the Court need not accept as true Plaintiff's conclusory and entirely non-specific allegation that similar conduct occurred on a 'daily and continuous basis because he is Greek.' Rather, Plaintiff must plead sufficient 'factual content' to allow the Court to draw a 'reasonable inference' that Plaintiff suffered from a hostile work environment... And Plaintiff has not done so. At most, Plaintiff's national original hostile work environment claim is 'conceivable.' ... But without more information concerning the kinds of anti-Greek animus directed against Plaintiff, and the frequency thereof, the Court cannot conclude that Plaintiff's claim is 'plausible.'" Id. at *6.

The Court did, however, grant plaintiff leave to amend the complaint again insofar as Iqbal was issued after the Amended Complaint was filed.

In Ferri v. Berkowitz, 2009 WL 2731339 (E.D.N.Y. Aug. 25, 2009), Judge Wexler was faced with a motion to dismiss civil RICO claims and state law claims for fraud and breach of contract. In reciting the new pleading standards under Twombly and Iqbal, the Court noted that 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, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." The Court added: "'Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" Id. *3-4 (quoting Iqbal). The Court further recognized that its task was to "identify bare legal conclusions in the complaint" and "[w]here such conclusions are not supported by allegations of fact, they are not entitled to the assumption of truth. Iqbal, 129 S.Ct. at 1950. Well-pleaded factual allegations, on the other hand, are assumed to be true and may plausibly give rise to an entitlement to relief. Id." Id. at *4.

After reviewing the allegations attempting to assert a civil RICO claim, the Court ruled, among other things, that the plaintiff failed to allege sufficient facts to establish either an "open or closed-ended continuity" under RICO. In summarizing its analysis under the new pleading standard, the Court held: "In sum, Plaintiff's conclusory pleading that Defendants' acts were neither 'isolated nor sporadic,' is precisely the factually unsupported pleading of the law that is not entitled to any presumption of truth." Id. at *8 (citing Iqbal).

In Talley v. Brentwood Union Free School District, 2009 WL 1797627 (E.D.N.Y. June 24, 2009), Judge Hurley decided a motion to dismiss various claims alleging constitutional violations, including plaintiff's First Amendment rights, substantive due process and equal protection. Judge Hurley first noted that the Supreme Court "recently clarified the pleading standard applicable in evaluating a motion to dismiss under Rule 12(b)(6)." Then, relying exclusively upon Twombly and Iqbal, Judge Hurley summarized the new standard as follows:

While a complaint attacked by a Rule 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. 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).
550 U.S. at 555 (citations and internal quotation marks omitted).

More recently, in [Iqbal] the Supreme Court provided further guidance, setting a two-pronged approach for courts considering a motion to dismiss. First, a court should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." 129 S.Ct. at 1950. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Id. Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 1949 (citing Twombly, [550 U.S.] at 555).

Second, "[w]hen there are well-pleaded factual allegations a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. The Court defined plausibility as follows:

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. at 1949 (quoting and citing Twombly, 550 U.S. at 556-57)(internal citations omitted).

In other words, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--that the pleader is entitled to relief." Id. at 1950. Id. at *4.

In Talley, plaintiff alleged that she was terminated as a teacher at the defendant school district "in retaliation for associating with her father," who was a member of the school Board and at odds with other Board members who participated in the decision to terminate her. Plaintiff attempted to allege various claims for constitutional and related violations.

In analyzing the First Amendment retaliation claim, alleging that plaintiff was not granted continued employment with the school district because of her association with her father, the Court sustained the claim, notwithstanding the heightened pleadings requirements in Twombly and Iqbal. The Court held that "the Amended Complaint does sufficiently allege the particular activity engaged in by plaintiff's father that resulted in the retaliation against her. Paragraph 91 of the Amended Complaint alleges that 'Defendants' violated her First Amendment right 'on the basis of her freedom of her association with her father, a protected "familial association" and a direct result of his conduct, the way in which he cast his votes and voting history as a member of the [Board]' resulting in her demotion and eventual termination." Id. at *6. The Court specifically stated that it was not "persuaded" by defendants' argument that these allegations were merely conclusory, noting: "While not overly abundant, there are factual allegations to support plaintiff's claim. For example, she alleges that [individual Board member defendants] called for her father's resignation due to disagreements with his voting. ... She also alleges that at the October 20, 2007 Board meeting when she inquired of the abstaining members regarding the vote on her appointment, [one Board member] responded 'ask your father.'" Id. at *6.

However, in analyzing plaintiff's due process claims, the Court held that plaintiff's "amorphous use of the term 'Defendants,'" was insufficient to plead a factual basis of claims against certain of the defendants that did not participate in the challenged activities. Thus, the Court granted the motion to dismiss as to these defendants.

On the equal protection claims, the Court commented that it was "not overwhelmed" with the factual support, but still found it sufficient only as against one of the Board member defendants, while dismissing these claims against other individual defendants because the complaint did "not contain any factual allegations sufficient to plausibly suggest [their] discriminatory state of mind." Id. at *7.

The Court also dismissed the Section 1985 conspiracy claim, finding that the "plaintiff has failed to allege facts to support that [individual Board members] were acting solely in their personal interests, separate and apart from their duties as members of the Board." Id. at *8. The Court also observed in a footnote that "plaintiff's allegation that [the Superintendant] 'knew of the conspiracy, but failed to prevent it although he had the power to do so in violation of 42 U.S.C. section 1986' is conclusory and, consistent with [Iqbal] is not to be presumed true." Id. at *9, footnote 8.

Conclusion

The Supreme Court's decisions in Twombly and Iqbal appear to be making a significant impact on the analysis and resolution of motions to dismiss. Recognizing the "retirement" of the more liberal Conley standard, courts certainly are scrutinizing allegations with vigor in considering motions to dismiss. This has obvious repercussions for both the plaintiff and defense bar. Plaintiffs' counsel are well-advised to obtain as much detail as possible early on and pack the complaint with a firm factual foundation. On the other hand, defense counsel should be more inclined to consider an early dispositive motion even where the issues are "close," in view of the more demanding standard that will be applied to the pleading.

Kevin Schlosser is a partner and chair of the Litigation Department at Meyer, Suozzi, English & Klein, P.C., in Garden City. He can be reached at kschlosser@msek.com.

PAUL F. MILLUS, ESQ.

Paul Millus is a Member of Meyer, Suozzi, English & Klein, P.C. and practices in the Litigation and Employment Law Departments located in both Meyer Suozzi's Garden City, Long Island and New York City Office. Mr. Millus has been involved in all aspects of state and federal litigation throughout his legal career handling a variety of litigated matters from inception, motion practice, trial and appeals. Mr. Millus has tried both jury and non-jury matters dealing with a wide range of issues from commercial, constitutional, real estate, employment, civil rights, tort and Surrogate's Court matters. Mr. Millus regularly provides advice to employers and employees concerning their rights and obligations in the workplace including consultation on employee handbooks, discrimination policies, FMLA, FLSA, employment contracts, wage and hour concerns and all manner of workplace issues.

Mr. Millus began his litigation career as a former Special Assistant United States Attorney for the Eastern District of New York from 1987 through 1989. There he worked with elite attorneys representing the U.S. Government in commercial matters; false claims act cases, civil forfeiture to name a few. He joined the firm of Snitow & Pauley in 1989 and became a partner in Snitow & Cunningham LLP in 1998 which became known as Snitow Kanfer Holtzer & Millus LLP. Mr. Millus has represented many municipalities on Long Island including the Towns of Brookhaven, Hempstead, and North Hempstead, the City of Long Beach, and the Counties of Nassau and Suffolk trying numerous cases in state and federal courts.

Mr. Millus is rated "AV" by Martindale-Hubbell which is the highest level of professional excellence and ethics and confirms that Mr. Millus is recognized for the highest levels of skill and integrity in the practice of law. Mr. Millus has also been named as a "Top Legal Eagle" by Long Island Pulse magazine for 2013. He has appeared on local media discussing legal topics of the day on "News12 Long Island", WNBC-TV, Fox Business, Fox News, CNN, CNBC and Al Jazeera America.

Mr. Millus is active with various bar organizations in and around New York City and Long Island. He is the Former Chair of the Federal Courts Committee of the Nassau County Bar Association, President of the Theodore Roosevelt American Inn of Court and a member of the Eastern District Association of Former Assistant

and Special Assistant U.S. Attorneys. Mr. Millus also served as an Adjunct Professor of Law at the Jacob D. Fuchsberg Touro Law Center teaching Sales. Mr. Millus has lectured on cutting edge issues affecting the Bar focusing on employment law, federal practice, trial practice and civil rights law for the Nassau County Bar Association, Lorman Continuing Legal Education, the New York City Bar Association and Theodore Roosevelt American Inn of Court.

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Education

Hofstra University Law School
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Nassau County Bar Association,
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Kevin Schlosser is a Member and the Chair of the Litigation and Dispute Resolution Department at Meyer, Suozzi, English & Klein, P.C. located in Garden City, Long Island, N.Y. Mr. Schlosser has been involved in all aspects of state and federal litigation since starting his legal career in 1984. An experienced civil litigator, Mr. Schlosser has engineered the legal strategy for a broad range of cases and arbitrations, including complex commercial disputes, business torts, fraud, breach of fiduciary duty, breach of contract, professional liability and malpractice claims, construction law, real estate and commercial landlord-tenant disputes, corporate and partnership disputes, ERISA, health law, Federal Fair Debt Collection Practices Act class actions, employment and restrictive covenants, intellectual property, products liability, insurance claims and defense, including disability insurance claims and the prosecution and defense of other tort-related claims. His clients consist of some of the largest companies in the world, as well as local businesses and individuals, including senior law partners, accountants, doctors and others in the professions. A proven appellate lawyer, he is also an accomplished trial attorney, whose victories include million-dollar recoveries and a record-breaking jury verdict.

In addition to his litigation experience, Mr. Schlosser also acts as general outside corporate counsel, advising corporate clients on the full spectrum of legal affairs. Mr. Schlosser receives referrals for most of his clients from other practicing attorneys (often former adversaries) and existing clients. Because of his experience in the Commercial Division of the Supreme Court in Nassau County, Mr. Schlosser is also frequently tapped to serve as local Long Island counsel to many other law firms in New York City and out of state.

Notable experience includes:

- Won a $12.6 million judgment in a jury trial in the Commercial Division, Nassau County, in a breach of contract case involving a stock purchase agreement
- Won at trial in Commercial Division, New York County, defeating $1.2 million commission claim by Trump Securities
- Appeared as special litigation counsel to the National Football League and obtained the immediate vacatur of an injunction through an order of the Appellate Division in Long Island, thereby permitting the NFL to pursue its policy of mandatory drug testing of professional football player

Kevin Schlosser

- Successfully defended a $65 million shareholder derivative action alleging breach of fiduciary duties and corporate waste against the former president of a public bank, resulting in the entire action against the president being dismissed with no monetary payment from the president and his counsel fees being reimbursed in their entirety by the bank
- Successfully defended a $25 million action alleging several counts of fraud, breach of contract and business torts against the largest casino operator in the world
- Obtained summary judgment dismissing case and prevailed on appeal to the First Department and Court of Appeals in an action alleging damages of over $20 million, asserting intentional interference with contract and interference with business relations against largest casino operator in the world
- Prevailed on appeal to the Second Department to sustain claim of punitive damages in a commercial fraud and breach of fiduciary duty action
- Prevailed after trial in dispute between senior law partners concerning the proper method for allocating fees in cases handled by the law firm
- Obtained injunctive relief on behalf of product manufacturer/seller in federal district court barring competitors from selling competing, offending product, and prevailed after trial in challenge to the injunction
- Obtained final judgment against large manufacturer's competitor and former employee under restrictive covenants and non-disclosure agreements based upon claims of misappropriation of trade secrets and breach of contract
- Obtained highest jury award on record for damages in an action for nuisance and interference with real property rights on behalf of property owners in the Supreme Court, Suffolk County
- Obtained jury verdict on behalf of international distributor-commercial tenant on the ground of constructive eviction even though tenant continued to remain in the leased premises for lengthy period of time, in which jury awarded tenant significant monetary damages against the landlord and relieved the tenant of any further obligation for rent on remaining lease term after the tenant moved to new space
- Obtained summary judgment against insurer on behalf of insured manufacturer declaring that insurer must defend underlying false advertising and Lanham Act claims pending in federal district court
- Obtained favorable resolution of several actions arising from partnership dispute and sale of real property in New York City, including $14 million fraud claims, breach of fiduciary duty claims and breach of contract
- Recovered, by way of judgment and settlements, millions of dollars on behalf of disabled professionals and other employees under private and ERISA disability insurance policies
- Spearheaded as general outside counsel to an international manufacturer (the largest of its kind in the world) the favorable settlement of a $25 million products liability action after several rounds of mediation, successfully resolving complex insurance issues and coordinating three outside defense firms in the defense of the client
- As general outside corporate counsel to an international manufacturer, provides on-going oversight of all legal affairs of the company, including employment, regulatory, acquisitions and joint ventures, licensing and intellectual property transactions, distribution agreements, independent contractor agreements, operating agreements and related matters

Kevin Schlosser

Mr. Schlosser serves in various teaching capacities: He is a member of the faculty of the National Institute for Trial Advocacy; has chaired the Continuing Legal Education Program on New York Civil Motion Practice at Hofstra Law School; and is a member of the Continuing Legal Education faculty panel of the New York State Bar Association and the Nassau County Bar Association Academy of Law, where he instructs experienced practicing attorneys. He has given CLE seminars and presentations with some of the most prominent judges in the state and federal courts, including Supreme Court Commercial Division Justices Timothy S. Driscoll, Vito M. DeStefano, Stephen Bucaria, Emily Pines, Elizabeth Hazlitt Emerson and Thomas Whelan, Appellate Division Justices Leonard Austin and Karla Moskowitz, and federal judiciary such as U.S. District Court Judge Shira Scheindlin and Magistrate Judges A. Kathleen Tomlinson, Arlene R. Lindsay and William Wall.

Mr. Schlosser has written extensively on many aspects of the law, publishing numerous articles over twenty years in leading legal publications. He has authored the "Litigation Review" column for the New York Law Journal and served on the Board of Editors of the Nassau Lawyer, which is the official publication of the Nassau County Bar Association. Many of Mr. Schlosser's articles are listed below.

Active in charitable organizations, Mr. Schlosser received the 2003 Leadership Award presented by the Long Island Chapter of the National Multiple Sclerosis Society. He also serves as a faculty member of the Construction Management Institute, sponsored by the New York State Chapter of the National Association of Minority Contractors, helping minority-owned contractors enhance their developing businesses.

During law school, Mr. Schlosser was a Member and then Articles Editor of the Hofstra Law Review. In his capacity as Articles Editor, Mr. Schlosser interacted with and edited articles of some of the most prominent and well-respected legal scholars, including law professors, evidence experts and Congressional leaders. He also clerked for the Honorable George C. Pratt, United States Circuit Court Judge, where he drafted several court decisions, including a complex antitrust ruling. He also obtained valuable trial experience while clerking in the Criminal Division of the United States Attorney's Office for the Eastern District of New York, where he assisted in the prosecution of several major felony cases. Mr. Schlosser graduated law school with the highest honors. Additionally, he was a founding officer of a national criminal justice honor society at John Jay College of Criminal Justice of the City University of New York.

At the outset of his career, Mr. Schlosser acquired intensive litigation experience, having been trained at two prominent firms based in New York City: Patterson, Belknap, Webb & Tyler, and Chadbourne & Parke. In 1990, he became an associate of one of Long Island's largest law firms, where he rose to the level of a managing partner and head of its litigation department, the largest group in the firm. After joining Meyer, Suozzi and becoming a Member in 2002, Mr. Schlosser was appointed Co-Chair of the firm's litigation department in November 2002. In 2006, Mr. Schlosser became Chair of the litigation department. He is also a member of the firm's Management Committee.

Mr. Schlosser is rated "AV Preeminent" by Martindale-Hubbell, the highest level in professional excellence. Mr. Schlosser was recognized by *Long Island Pulse Magazine* in 2010 and 2011 as the region's "Top Legal Eagle for Litigation." Mr. Schlosser has been named to the New York Super Lawyers list as one of the top attorneys in New York for 2012, 2013 and 2014.

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Commercial Division - NY Supreme Court

Nassau County

Biography of Justice Timothy S. Driscoll

JUSTICE TIMOTHY S. DRISCOLL is a Justice of the Supreme Court of the State of New York, and has been assigned to the Nassau County Commercial Division since May 2009. From January 2008 through April 2009, Judge Driscoll sat in the Nassau County Matrimonial Center. Judge Driscoll is also an adjunct professor at Brooklyn Law School and has served as a teaching team member at the Harvard Law School's Trial Advocacy Workshop.

Prior to beginning his judicial service on January 1, 2008, Judge Driscoll held a number of posts in the public and private sector. He served as Deputy Nassau County Executive for Law Enforcement and Public Safety from July 2004 to December 2007. In that position, he oversaw all of the public safety and law enforcement agencies in the County, including the Police, Fire Marshal, Probation, Sheriff, Office of Consumer Affairs, Traffic and Parking Violations Agency, Medical Examiner, and Office of Emergency Management.

Judge Driscoll was an Assistant United States Attorney in the Eastern District of New York from November 2000 to July 2004. His case load included violent crime matters including racketeering, murder, gun possession and trafficking, and narcotics distribution, as well as white collar matters including mail fraud, wire fraud and health care fraud. His work as a federal prosecutor was recognized by the FBI, Nassau County Police Department, Old Brookville Police Department, and the Drug Enforcement Administration.

Web page updated: January 14, 2013

Nicholas G. Garaufis is a United States District Judge for the Eastern District of New York. Judge Garaufis took office on August 28, 2000 and sits in Brooklyn, New York. He was appointed by President Clinton on the recommendation of United States Senator Daniel Patrick Moynihan.

Immediately prior to his appointment, Judge Garaufis served for more than five years as the Chief Counsel of the Federal Aviation Administration in Washington, D.C., overseeing a staff of 200 attorneys.

Judge Garaufis began his legal career in 1974 as an associate of Chadbourne & Parke. In 1975, he was appointed as an Assistant Attorney General in the Litigation Bureau of the New York State Attorney General's office under Attorney General Louis J. Lefkowitz. From 1986 to 1995, Judge Garaufis served as Counsel to Queens Borough President Claire Shulman in New York City. He also has practiced law privately in Queens County, New York.

After receiving his B.A. from Columbia College in 1969, Judge Garaufis taught in the New York City public schools. In 1974, he received his J.D. from the Columbia University School of Law. He is currently an adjunct professor at Columbia University School of Law and Benjamin N. Cardozo School of Law at Yeshiva University.

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Appellate Division First Judicial Department Supreme Court of the State of New York

Justices of the Court

Associate Justice Barbara R. Kapnick

Born in New York City, Justice Barbara R. Kapnick received her bachelor's degree cum laude from Barnard College and her juris doctor from Boston University School of Law.

Between 1980 and 1991, Justice Kapnick worked as a Law Clerk to both the Hon. Ethel B. Danzig and the Hon. Michael J. Dontzin in Supreme Court, New York County.

Justice Kapnick was elected to the Civil Court in 1991, appointed an Acting Supreme Court Justice in April 1994, and was elected to the Supreme Court, New York County in 2001. She was assigned to the Commercial Division in 2008, where she handled many high profile cases, and was appointed to the Appellate Division, First Department by Governor Andrew M. Cuomo in January 2014. She has been a member of the Advisory Committee on Judicial Ethics since 2008 and also served as Chairperson of the Board of Trustees of the New York County Public Access Law Library from 2008 to 2014. She is an active member of the New York State Bar Association: Judicial, and Commercial and Federal Litigation Sections, and the New York City Bar Association, where she has served on numerous committees.

Justice Kapnick is a Master of the New York American Inn of Court and past president of the Jewish Lawyers Guild, where she remains active as a member of the Board of Governors. She is also a longstanding member of the New York Women's Bar Association, where she served as Co-Chair of the Litigation Committee.

She sat on the Board of Directors of the Judges and Lawyers Breast Cancer Alert for over a decade, and continues to sit on the Board of the New York State Association of Women Judges. She is also active in the Supreme Court Justices Associations in New York, having served as President of the Citywide Association from 2013-2014, and is a member of the Executive Committee of the Statewide Association.

A frequent lecturer for many Bar Associations, Justice Kapnick has also received numerous awards, including the Benjamin N. Cardozo Award from the Jewish Lawyers Guild, the Harlan Fiske Stone Memorial Award from the New York City Trial Lawyers Association, the Women's History Month Flor de Maga Award from the Puerto Rican Bar Association and the Distinguished Jurist Award from the Defense Association of New York.

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Commercial Division - NY Supreme Court

New York County - Manhattan

Biography of Justice Saliann Scarpulla

Justice Saliann Scarpulla is a graduate of Boston University and Brooklyn Law School, cum laude.

After law school, Justice Scarpulla became Principal Court Attorney to the Hon. Alvin F. Klein. Justice Scarpulla then worked at Proskauer Rose Goetz & Mendelsohn as a litigation associate from 1988 to 1993. At Proskauer, she gained extensive experience in commercial litigation, accountants' liability, securities regulations, real estate, contracts and commercial torts.

In 1993, Justice Scarpulla joined the Federal Deposit Insurance Corporation as Senior Counsel in the New York Legal Services Office. While there, she represented the FDIC as receiver for numerous failed banks and litigated cases on banking and commercial issues, including ERISA and FIRREA. Justice Scarpulla then became Senior Vice Present and Bank Counsel to Hudson United Bank, where she was responsible for all litigation involving the bank, and also oversaw the banks' compliance with state and federal banking regulations.

Justice Scarpulla returned to the New York State court system in 1999, as Principal Court Attorney to the Hon. Eileen Bransten. She was elected to the Civil Court in 2001. While in Civil Court Justice Scarpulla presided over civil, commercial landlord-tenant, no-fault, pro se and small claims actions.

In 2009, Justice Scarpulla was appointed an Acting Justice of the Supreme Court, and initially presided over a City Part, handling civil litigation involving the City of New York as a party. Justice Scarpulla was then assigned to an IAS Part, in which she handled a wide variety of civil cases.

Justice Scarpulla was elected to the Supreme Court in 2012, and was assigned to an IAS part with an emphasis on complex asbestos litigation. In addition to her asbestos caseload, Justice Scarpulla handled construction injury/property damage cases, insurance coverage cases and general commercial litigation. Justice Scarpulla also presided over actions commenced pursuant to Mental Hygiene Law Article 9. Justice Scarpulla was assigned to the Commercial Division in February 2014.

Justice Scarpulla is a member of the Association of the Bar of the City of New York, Catholic Lawyers Guild, Columbian Lawyers Association, Jewish Lawyers Guild, Judges and Lawyers Breast Cancer Alert, the National Association of Italian American Women, the National Association of Women Judges, the New York County Lawyer Association, the New York State Bar Association and the New York Women's Bar Association. Justice Scarpulla is also a frequent lecturer at the Judicial Institute.

Shira A. Scheindlin is a United States District Judge for the Southern District of New York. She was nominated by President William J. Clinton on July 28, 1994. Before taking her current seat on the Southern District, Judge Scheindlin worked as a prosecutor (Assistant United States Attorney for the Eastern District of New York), commercial lawyer (General Counsel for the New York City Department of Investigation and partner at Herzfeld & Rubin), and Judge (Magistrate Judge in the Eastern District of New York 1982-1986 and Special Master in the Agent Orange mass tort litigation). Judge Scheindlin is known for her intellectual acumen, demanding courtroom demeanor, aggressive interpretations of the law, and expertise in mass torts, electronic discovery, constitutional and complex litigation. During her tenure, Judge Scheindlin has presided over a number of high profile cases, many of which advanced important new positions in the common law. She also has been a member of the Judicial Conference of the United States Advisory Committee on the Federal Rules of Civil Procedure (1998-2005). She is a member of the ABA's Standing Committee on Judicial Independence, the American Law Institute, a former Chair of the Commercial and Federal Litigation Section of the NYSBA, a former Board Member of the New York County Lawyers Association, the former counselor of the New York Inn of Court, and a member of various committees of the Association of the Bar of the City of New York. She is the author of the first e-discovery casebook (together with Professor Dan Capra and the Sedona Conference) and many articles. Finally, she is an adjunct Professor at Cardozo Law School. On the subject of electronic records management, her opinions in Zubulake v. UBS Warburg LLC, and Pension Committee v. Banc of America Securities, have come to be recognized as case law landmarks. She is the recipient of many awards including the Fuld Award from the New York State Bar Association, the Weinfeld Award from the New York County Lawyers, and the Brennan Award from the National Association of Criminal Defense Lawyers.

RICHARD SULLIVAN

Richard Sullivan was appointed United States District Judge for the Southern District of New York in July 2007 and entered on duty on August 6, 2007. Prior to becoming a judge, he served as the General Counsel and Managing Director of Marsh Inc., the world's leading risk and insurance services firm, with a work force of more than 25,000 employees in over 100 countries. From 1994 to 2005, he served as an Assistant United States Attorney in the Southern District of New York, where he was Chief of the International Narcotics Trafficking Unit and Director of the New York/New Jersey Organized Crime Drug Enforcement Task Force. In 2003, he was awarded the Henry L. Stimson Medal from the Association of the Bar of the City of New York. In 1998, he was named the Federal Law Enforcement Association's Prosecutor of the Year. Prior to joining the U.S. Attorney's Office, he was a litigation associate at Wachtell, Lipton, Rosen & Katz in New York and a law clerk to the Honorable David M. Ebel of the United States Court of Appeals for the 10th Circuit. He is a graduate of Yale Law School and the College of William & Mary.

Patterson Belknap Webb & Tyler LLP

HARRY SANDICK
Partner

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OVERVIEW

Harry Sandick is a member of the firm's White Collar Defense and Investigations Team, the Structured Finance Litigation Team, and Complex Commercial Actions Team. A former Assistant U.S. Attorney for the Southern District of New York, Mr. Sandick focuses his practice on white collar criminal defense, securities fraud, internal investigations, complex civil litigation and appellate litigation.

Mr. Sandick represents organizations and individuals in internal investigations and prosecutions brought by the U.S. Attorney's Office for the Southern District of New York, the U.S. Department of Justice and the U.S. Securities and Exchange Commission. He has significant experience in matters related to the Foreign Corrupt Practices Act (FCPA) and the regulations promulgated by the Office of Foreign Asset Controls (OFAC). His recent work also includes the representation of several individuals in connection with the ongoing investigation into LIBOR and other benchmark rates, the representation of a taxpayer who was prosecuted in federal and state court for having an undisclosed offshore bank account, the representation of claimants in a multi-million dollar civil forfeiture action, and the representation of a major investor in Bernard L. Madoff Investment Securities LLC in the recent investigation conducted by prosecutors and regulators.

Mr. Sandick also represents clients, both as plaintiffs and defendants, in complex securities and business fraud litigation, including matters involving residential mortgage-backed securities transactions.

For almost six years, Mr. Sandick served as an Assistant U.S. Attorney in the Criminal Division of the U.S. Attorney's Office for the Southern District of New York, where he prosecuted a wide range of federal crimes, including financial fraud cases, acting as lead counsel in 12 trials and more than 20 appeals. He served as Deputy Chief for Criminal Appeals, supervising more than 80 appeals before the United States Court of Appeals for the Second Circuit, and as Acting Chief of the Violent Crimes Unit. Mr. Sandick oversaw matters involving securities fraud, business crimes, obstruction of justice, RICO, drug trafficking and terrorism issues. He successfully argued 19 appeals before the Second Circuit.

A frequent speaker and writer on white collar and financial fraud topics, Mr. Sandick has contributed articles to Forbes.com, New York Law Journal and industry

PRACTICE AREAS

White Collar Defense and Investigations
Structured Finance Litigation Team
Complex Commercial Actions Litigation
Securities and Derivatives Litigation
Appellate
Alternate Dispute Resolution
Class Action Litigation

EDUCATION

J.D., 1995, Harvard Law School, *cum laude*, Editor-in-Chief, Harvard Human Rights Journal, Research Director, Harvard Legal Aid Bureau

B.A., 1992, University of Pennsylvania, *magna cum laude*, Phi Beta Kappa, Benjamin Franklin Scholar, University Scholar

ADMISSIONS

New York
U.S. District Court, Southern and Eastern Districts of New York
U.S. Court of Appeals, Second Circuit; Fourth Circuit

PROFESSIONAL ACTIVITIES

MEMBERSHIPS: New York City Bar Association (Secretary, Committee on Pro Bono and Legal Services, 1997–2000), Professional Responsibility Committee (2008–present); New York State Bar Association (Section on Federal and Commercial Litigation, 2006-present), (Committee on White Collar Criminal Litigation, 2006–present), (Chair, Subcommittee on

publications. He is also co-author of a chapter on pretrial representation in a leading treatise, "Defending Federal Criminal Cases." Mr. Sandick is often called on for commentary in high-profile white collar cases and his quotes have appeared in the Associated Press, The Wall Street Journal, Sports Illustrated, ESPN and BNA White Collar Crime Report, among others.

Following law school graduation, Mr. Sandick clerked for the Hon. Richard J. Cardamone of the U.S. Court of Appeals for the Second Circuit.

Sentencing, 2008-present); New York American Inn of Court (2004–present), (Program Chair, 2014-present), (White Collar Crime Team Co-Leader, 2007-2013)

SPEAKING ENGAGEMENTS:
Presenter, "Insider Trading Liability After *United States v. Newman*," West LegalEdcenter Webcast (February 10, 2015);
Presenter, "The ABC's of AML: An Introduction to the Law of Anti-Money Laundering," Association of Corporate Counsel Webcast (February 14, 2014)

PUBLICATIONS

"2nd Circ. Lays Out New Rules For Restitution," *Law360,* February 23, 2015 (co-author)

"2015 Proposed Amendments to Fraud Sentencing Guidelines: A Good Start," *New York Law Journal,* January 29, 2015 (co-author)

"A 1st Look At Potential Reach Of 2nd Circ. Newman Decision," *Law360,* January 28, 2015 (co-author)

"Search Warrants in White-Collar Crime Cases," *The Review of Securities and Commodities Regulation*, June 20, 2012

"The Statutory Background," *Insider Trading Law and Compliance Answer Book* (Practising Law Institute, forthcoming in 2011)

Mark A. Berman

Mark A. Berman is a partner in the Litigation Practice of Ganfer & Shore, LLP. He is a seasoned litigator whose practice focuses on representing domestic and international companies and individuals in complex commercial disputes in courts and in arbitrations on both the plaintiff and defendant's side with an emphasis on real estate and securities matters, as well as on electronic discovery disputes. Prior to joining Ganfer & Shore, he was an associate in the litigation department at Skadden, Arps, Slate, Meagher & Flom LLP and clerked for United States Magistrate Judge Michael L. Orenstein for the Eastern District of New York.

Mr. Berman is the Chair-Elect of the Commercial and Federal Litigation Section of the New York State Bar Association as well as Co-Chair of the Section's Social Media Committee. He has written and spoken on electronic discovery, social media and legal ethics before the American Bar Association, the New York State Bar Association, the New York State Judicial Institute and the First and Second Appellate Divisions of the New York Supreme Court. He has been appointed by the Chief Administrative Judge as a member of New York State E-Discovery Working Group advising the New York State Unified Court System. Since 2005, Mr. Berman has had a column in *The New York Law Journal* addressing electronic discovery under New York State law. Mr. Berman is on the Board of Advisors of the Benjamin N. Cardozo School of Law Data Law Initiative. Mark is an Adjunct Professor of Legal Writing at Benjamin N. Cardozo School of Law and has lectured at Brooklyn Law School.

Mr. Berman is a 1986 graduate of Columbia College and a 1990 *magna cum laude* graduate of Benjamin N. Cardozo School of Law, where he was a member of the Moot Court Board and was awarded the Order of the Barrister.

Susan L. Meekins

Susan L. Meekins is a solo practitioner whose practice is focused on commercial litigation and arbitration in New York State and federal courts, arbitration, and employment law matters. Ms. Meekins is a graduate of New York University School of Law (J.D. 1983), where she served as Articles Editor of the Review of Law & Social Change, and the University of Chicago (A.B. 1980 with Honors). Before she began practicing independently, Ms. Meekins was a member and co-founder of a commercial litigation boutique (Molton & Meekins) and a member of the litigation departments of the firms now known as Olshan Frome Wolosky LLP and Herrick, Feinstein LLP.