

## **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 to 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 your 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?