



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

COMMERCIAL AND FEDERAL LITIGATION SECTION

2014-2015 Officers

PAUL D. SARKOZI

Chair
Tannenbaum Helpem Syracuse &
Hirschtritt LLP
900 Third Avenue
New York, NY 10022
212/508-7524
FAX 212/937-5207
sarkozi@thsh.com

JAMES M. WICKS

Chair-Elect
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
516/227-0617
FAX 516/336-2204
jwicks@farrellfritz.com

MARK A. BERMAN

Vice-Chair
Ganfer & Shore LLP
360 Lexington Avenue, 14th Floor
New York, NY 10017
212/922-9250
FAX 212/922-9335
mberman@ganfershore.com

JACLYN H. GRODIN

Secretary
Tannenbaum Helpem Syracuse &
Hirschtritt LLP
900 Third Avenue
New York, NY 10022
212/508-6700
FAX 212/371-1084
grodin@thsh.com

DEBORAH E. EDELMAN

Treasurer
Supreme Court of the State of New York
60 Centre Street - Room 232
New York, NY 10007
646/386-3214
FAX 212/748-7793
dedelman@courts.state.ny.us

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June 10, 2015

John W. McConnell, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Dear Mr. McConnell:

On behalf of the New York State Bar Association's Commercial and Federal Litigation Section, I enclose the attached memoranda with the Section's comments on the Commercial Division Advisory Council's proposal concerning eligibility criteria for matters that may be heard in the Commercial Division.

If you have any questions about the Section's comments, please let me know.

Sincerely,

/s/ James M. Wicks

James M. Wicks
Chair

Enclosure

TO: Office of Court Administration
FROM: New York State Bar Association's Commercial and Federal Litigation Section
DATE: June 10, 2015
RE: The Advisory Council's Proposal Concerning Eligibility Criteria For Matters That May Be Heard In The Commercial Division

The Commercial and Federal Litigation Section ("**Section**") is pleased to submit these comments in response to the Commercial Division Advisory Council's Memorandum dated April 14, 2015, proposing an amendment of Section 202.70 (b) and (c) of the Rules of the Commercial Division relating to three aspects of the eligibility criteria for cases that may be heard in the Division (the "**Proposal**").

I. EXECUTIVE SUMMARY

A. Arbitrated Matters

The Section agrees that a commercial dispute that is subject to arbitration should not be treated differently than other commercial disputes for purposes of eligibility for assignment to the Commercial Division, and the monetary threshold should apply to such disputes. The Section, therefore, enthusiastically welcomes the Advisory Council's Proposal as it pertains to the application of the Commercial Division monetary threshold to arbitrated matters. The Section respectfully suggests, however, that there is no basis upon which to treat disputes subject to arbitration outside the United States differently from those subject to arbitration within the United States with respect to application of the monetary threshold.

B. Yellowstone Matters

The Section agrees that crafting a rule to differentiate among *Yellowstone* injunction cases appropriate and inappropriate for Commercial Division assignment is impractical. Accordingly, the Section agrees with the Advisory Council that no change to the current rule in this regard is advisable.

C. Home Improvement Matters

Finally, the Section agrees that disputes concerning home improvement contracts for single family residences (or individual residential units) should not be heard in the Commercial Division even if they meet the monetary threshold. In order to avoid unintended consequences of the proposed amendment; however, the Section respectfully suggests that the amendment should make clear that in the case of a condominium or cooperative unit, the exemption applies when the subject home improvement contract applies solely to an individual unit, since construction contracts involving common areas of a building can be deemed to "involve[e] . . . individual units", as well.

II. SUMMARY OF PROPOSAL

A. Arbitrated Matters

As set forth in the Proposal, in the Taskforce Report of Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century it was recommended that the Commercial Division Advisory Council "remov[e] . . . the exemption to the monetary threshold for actions involving arbitration -- these matters should be subject to the same monetary threshold as are all other non-exempt categories." The Taskforce Report also noted that the Commercial Division policies should encourage New York as a venue for international arbitrations because "New York's economy benefits from the business that hosting international arbitrations can provide." (Taskforce Report at 29). Accordingly, the Taskforce recommended that specific justices be designated with lead responsibility for such matter. The Taskforce also recommended that the Advisory Council "periodically examine the categories of cases eligible for the Commercial Division." The Advisory Council, recognizing the demands placed on the Commercial Division, has recommended that the exemption from the monetary threshold applicable to arbitrations be eliminated, but only with respect to proceedings involving arbitrations held in the United States. Pursuant to the Proposal, therefore, the monetary threshold will apply to arbitrations conducted in the United States, but not to matters involving arbitrations conducted abroad.

B. Yellowstone Injunction Matters

The Proposal recommends that no change be made to the rules which permit matters involving *Yellowstone* injunctions to be assigned to the Commercial Division.

C. Home Improvement Contract Matters

The Proposal recommends that disputes concerning home improvement contracts that involve one to four family dwellings or individual units in a condominium or cooperative building should not be assigned to the Commercial Division; however, disputes involving renovations affecting residential buildings generally (as opposed to individual units) shall be eligible to be heard in the Commercial Division if they satisfy the monetary threshold.

III. RESPONSE AND SUGGESTIONS TO FURTHER THE GOALS OF THE PROPOSAL

A. The Section Agrees That Arbitrated Matters Should Be Subject To The Division's Monetary Threshold

The Section concurs with the Proposal's decision to apply the monetary threshold to arbitrated matters except under limited circumstances. The Section believes, however, that the Advisory Council's proposal is unclear as to whether it is proposing to continue to apply the exemption from the monetary threshold only to those international arbitrations held outside the United States or whether to apply the exemption also to international arbitration matters heard within the United States. The Section supports the policy of encouraging international arbitrations to take place in New York. As a threshold matter, it appears somewhat unlikely that where New York courts are selected as a venue to resolve issues concerning arbitrations held

abroad, the amount in controversy would be below the Commercial Division threshold. Nevertheless, the Proposal can be read to apply different Commercial Division eligibility criteria to international arbitrations held outside New York and those held in New York, by applying a monetary threshold only to the latter. It is unclear whether the Advisory Council intended to treat international arbitrations held in New York different from those outside New York and potentially give the latter greater access to the Commercial Division. Accordingly, the Section recommends that this be sent back to the Advisory Council for further study.

B. The Section Agrees That *Yellowstone* Matters Should Be Eligible For Assignment To The Commercial Division

The Section strongly agrees with the Advisory Council that the current rule should not be revised in an attempt to differentiate between matters appropriate and inappropriate for the Commercial Division. The Section agrees that the practical difficulties of adopting and implementing such a rule are likely outweighed by the negligible burden that *Yellowstone* cases have on the Commercial Division docket.

C. The Section Agrees That Matters Involving Home Improvement Contracts For Individual Residential Units Should Not Be Eligible For Assignment To The Commercial Division

The Section agrees with the Proposal's position that home improvement contracts involving one to four family dwellings and individual units in condominium or cooperative residential buildings are not true commercial cases and should not be eligible for Commercial Division assignment. In order to avoid precluding the assignment to the Commercial Division of cases that involve home improvement contracts affecting numerous units in a condominium or cooperative residential building, the Section recommends that the text of the amendment be revised to insert the word "solely" before the word "individual" in the second line.

**REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION,
COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION
AND COMMITTEE ON LITIGATION**

**COMMENTS ON PENDING PROPOSALS
FROM THE COMMERCIAL DIVISION ADVISORY COUNCIL**

These comments reflect the input of the City Bar's Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.

1. Proposed adoption of new Commercial Division Rule and amendment of Commercial Division Rule 11-d, relating to depositions of entity representatives.

The City Bar supports the objective of the proposed Rule concerning entity designees, which is to reduce the likelihood of a mismatch between the information sought and the witness produced. However, the City Bar questions whether an amendment of the Commercial Division Rules is necessary to achieve this objective.

The permissive, rather than mandatory, language of the proposed Rule makes it unnecessary in light of existing practice under the CPLR and the case law. A party desiring to depose a specific corporate representative may designate such person in the deposition notice under CPLR 3106(d). Further, CPLR 3107 already permits a party desiring to take the deposition of an entity representative to enumerate the matters upon which the person is to be examined, and, as the Advisory Council points out on page seven of its memorandum, the case law imposes an obligation on the entity being deposed to tender a knowledgeable witness. Thus, the proposed Rule adds nothing to the procedures already provided by the CPLR and developed under case law.

The City Bar is also concerned about the complexity of the proposed Rule. The multiple subsections and sub-subsections make the Rule difficult to understand and could lead to confusion and disputes over issues that are now settled.

The dissent among City Bar members supports the proposed Rule, believing that a single rule rather than a procedure derived from multiple sources will provide better guidance to attorneys. The dissent is not concerned about the permissive language of the proposed Rule, because, as with any other discovery device, a party may elect to utilize the proposed Rule or may elect to forego it. In addition, the dissent believes the requirement that an entity identify the

witness it will tender prior to the deposition (even if no specific witness is named in the notice) would allow litigants to be better prepared.

The Advisory Council also proposes to amend recently adopted Commercial Division 11-d, which presumptively limits depositions to seven hours. The proposed amendment would limit the deposition of an entity to seven hours in total, irrespective of the number of constituent witnesses. The City Bar opposes this amendment. A seven hour limit is too restrictive for a corporate entity that provides information through multiple representatives. Each representative will provide information about different aspects of the case, and each examining party should be allowed to explore these aspects fully. This is especially true for cases in the Commercial Division, which frequently involve complex factual and legal issues. Further, the proposed amendment will impose the unnecessary burden on the examining party to obtain consent or apply to the court for an enlargement of this limit, creating the added burden of motion practice.

This amendment also has some dissenting City Bar members who believe a presumptive seven-hour limit would encourage better preparation and more focused questioning of entity representatives, leading to fewer multi-day depositions and thereby decreasing costs.

2. Proposed amendment of Preamble to the Rules of the Commercial Division relating to proportionality in discovery.

The City Bar favors proportionality in discovery and supports the proposed amendment to reaffirm in the Preamble to the Commercial Division Rules the guiding principle of proportionality in the conduct of discovery in the Commercial Division. However, a significant number of members are concerned that the term 'proportionality' is not sufficiently well-defined and would favor a more specific definition of the standard.

3. Proposed amendment of 22 NYCRR § 202.70(b) and (c), relating to eligibility criteria for matters that may be heard in the Commercial Division.

The City Bar supports the proposed amendment to add a monetary threshold for arbitration cases (except international arbitrations) in the Commercial Division. The City Bar supports the proposed amendment to exclude home improvement contract cases involving residential properties, but notes that the proposed rule does not reflect the Advisory Council's stated intent in the memorandum, which is not to exclude renovations contracted for by the owner of a rental property, a co-op board or a condominium board. The proposed rule as drafted does not address this exception.

4. Proposed new Model Status Conference Order Form for use in the Commercial Division.

The City Bar opposes the use of the model status conference form because it does not believe it will help accomplish the goal of expediting the litigation process. Instead, the burdensome requirements of the form will impose unnecessary legal fees on litigants without providing substantial value at status conferences. The status conference form should primarily focus on identifying the outstanding discovery issues between the parties, rather than cataloging

the parties' progress as to each facet of the preliminary conference form. The proposed form also assumes that the assigned Commercial Division justice knows nothing about the case, when in fact the assigned justice should be familiar with the issues and the parties by the time of the status conference.

June 2015