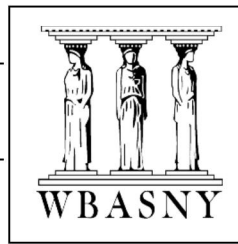


# Women's Bar

OF THE STATE



# Association

OF NEW YORK

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November 1, 2024

David Nocenti

Counsel

NYS Office of Court Administration

25 Beaver Street, 10th Floor

New York, NY 10004

Dear Mr. Nocenti:

Re: Response to Request for Public Comment to amend 22 NYCRR §202.70

The Women's Bar Association of the State of New York ("WBASNY") supports the proposal to amend 22 NYCRR §202.70(a) and (b), consistent with the recommendations of the Commercial Division Advisory Council (CDAC) to set a monetary threshold based upon the "value of the object of the action," in Commercial Division cases seeking equitable and/or declaratory relief. The provisions of 22 NYCRR § 202.70(a) and (b) reference monetary thresholds for Commercial Division cases, however, the current language of 22 NYCRR § 202.70(b) does not require a monetary threshold for actions seeking equitable or declaratory relief. The proposed amendments would instead institute a monetary threshold of "the value of the object" for cases seeking equitable or declaratory relief.<sup>[1]</sup>

In addition to input from its members, WBASNY considered the recommendations of CDAC regarding the proposed amendments, which acknowledge the volume of the Commercial Division caseload and its expertise in handling complex litigation cases. It further recommended the proposed amendments would provide for maximizing the allocation of the Commercial Division resources and noted the "value of the objection of the action" is utilized in federal cases (i.e.: *see Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)), for assessing monetary thresholds in equitable and declaratory actions. Accordingly, WBASNY is in favor of the proposed amendments.

<sup>[1]</sup> The proposed amendments would not, however, modify the current language of 22 NYCRR § 202.70(b)(4), (5), (11), and (12), cases involving shareholder derivative actions, commercial class actions, corporate dissolutions and Article 75 arbitration issues, in which the monetary threshold is not considered.

Very Truly Yours,

Marea L. Wachsman  
President, WBASNY



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November 1, 2024

David Nocenti, Esq.  
Counsel, Office of Court Administration  
25 Beaver Street, 10th Floor  
New York, NY 10004

Proposed Amendment to 22 NYCRR 202.70

Dear Mr. Nocenti,

We write on behalf of the Managing Attorneys and Clerks Association, Inc. (“MACA”) in response to the Request for Public Comment on a proposal to set a monetary threshold for Commercial Division cases seeking equitable and declaratory relief dated September 20, 2024.

MACA is comprised of approximately 120 law firms with litigation practices (primarily large and mid-sized firms) and inhouse law offices, as well as the New York State Attorney General’s Office. Managing attorneys’ and managing clerks’ positions within our respective firms and concomitant responsibilities afford us a breadth of understanding of court rules and procedures, clerk’s office operations, and the needs of attorneys and litigants. In particular, our members’ attorneys litigate frequently in the Commercial Division, and as a result we are well acquainted with the Uniform Rules as they pertain to practices and procedures within the Division.

MACA supports the proposed rule change as it will reduce the heavy caseload of the Commercial Division, but we suggest that more clarity is needed as to how the “value of the object of the action” will be determined. The Advisory Council suggests that the “value of the

object of the action” will be measured by turning to federal case law, including *Hunt v Washington State Apple Adv. Comm’n*, 432 US 333, 347 [1977] and its progeny. But federal courts are split as to how to measure the amount in controversy.

As noted by the leading treatise on federal civil procedure, *Federal Practice and Procedure* by Wright & Miller, “[i]t is sometimes the case, . . . notably in suits for an injunction . . . or for other forms of specific relief, that the benefit of the action to the plaintiff will have a different value than the burden imposed on the defendant should relief be granted.” 14B Fed. Prac. & Proc. Juris. § 3708 (5th ed.). For example, a plaintiff who seeks an injunction to prevent a defendant from conducting its business could potentially derive relatively little monetary benefit from the action. But the burden on the defendant in that case could be enormous. That presents the question of “which value should represent the amount in controversy for jurisdictional amount purposes.” *Id.* Federal courts are split on this point. *Id.* Some federal courts “look only to the benefit of the action to the plaintiff,” on the theory that federal courts are courts of limited jurisdiction, and it is the plaintiff’s burden to establish a federal court’s subject matter jurisdiction under Federal Rule of Civil Procedure 8(a)(1). *Id.* But a growing and now significant number of federal courts “have found that jurisdiction exists if more than the statutory amount is involved from the viewpoint of either the plaintiff or the defendant.” *Id.* Professor Miller describes this “either party” approach as the “desirable rule, since the purpose of a jurisdictional amount requirement—to keep trivial cases out of the federal court system—is satisfied when the case is worth a large sum of money to either party.” *Id.*

We believe that the “either party” approach is the desirable rule for the Commercial Division, as it will ensure that complex injunctive and declaratory relief cases that can present enormous burdens to defendants are not excluded from the Commercial Division. At the same time, such an approach will accomplish the proposed rule’s goal of ensuring that the Commercial Division’s limited resources are not spent hearing non-complex cases. We suggest that the Administrative Board formally adopt the “either party” approach in the proposed rule. We respectfully suggest that it would not be appropriate to leave the decision of which approach to adopt to case law, because it is unlikely that a body of binding New York state case law will develop given the non-appealability of decisions of the applicable Administrative Judge on applications to transfer cases into the Commercial Division. 22 NYCRR 202.70(e) and (f)(2).

Accordingly, MACA proposes that the wording of Uniform Rule 202.70(b) be modified as follows (changes to the proposed rule are bolded):

(b) Commercial cases

Actions in which the principal claims involve or consist of the following will be heard in the Commercial Division provided that the monetary threshold is met ~~or~~, and for such actions that seek equitable or declaratory relief is sought, satisfaction of the applicable monetary threshold shall be measured by the **greater of the value of the object of the action to the plaintiff(s) or the defendant(s)**:

\* \* \* \*

If Uniform Rule 202.70(a) is amended, we respectfully propose that the Commercial Division Request for Judicial Intervention Addendum Form UCS-840C be amended to reflect the rule change. As the Administrative Board is aware, any party may initially request assignment to the Commercial Division by filing a Request for Judicial Intervention (“RJI”) and Commercial Division RJI Addendum. In our collective experience, the applicable clerk’s office makes an initial determination of whether the case meets the Commercial Division’s monetary threshold based on the Commercial Division RJI Addendum. Because the current Commercial Division RJI Addendum only requires the filer to value the plaintiff’s claim for compensatory damages and does not require the filer to value the object of the action for equitable or declaratory relief, the form should be amended in conformance with the amended rule. In that regard, we suggest that UCS 840-C be modified as follows:

*First*, in order to facilitate the evaluation of the amount in controversy by the Court and the other parties, the language at the top of page 2 of 2 should be revised as follows:

**The combined value of Plaintiff/Petitioner’s claims for compensatory damages and/or equitable or declaratory relief, excluding punitive damages, interest, costs, and counsel fees claimed: \$ \_\_\_\_\_**

*Second*, in order to facilitate the Court’s and parties’ evaluation of the value ascribed to equitable or declaratory claims, the following language should be added to the bracketed words in the succeeding request for information concerning plaintiff’s equitable or declaratory claims:

**[brief description including basis for valuing equitable or declaratory claims set forth above]**

We are grateful for the opportunity to offer MACA's views on the proposed amendment. If we can elaborate further on our comments or assist the Board in any way, please let us know.

Respectfully submitted,

*s/Owen Wallace*

MACA President  
Managing Attorney  
Cahill Gordon & Reindel LLP

*s/Dan Kaplan*

MACA Rules Committee Member  
Litigation Counsel and Managing Attorney  
Milbank LLP

*s/H. Miriam Farber*

MACA Rules Committee Member  
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Allen Overy Shearman Sterling US LLP

*s/Kurt R. Vellek*

MACA Rules Committee Member  
Managing Clerk  
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*s/Edward Miller*

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*s/James Rossetti*

MACA Rules Committee Member  
Managing Clerk  
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*s/Gabriella Sarnoff*

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November 1, 2024

*By Email*

David Nocenti, Esq.  
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New York, NY 10004  
[rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov)

**Re: New York City Bar Association Response to Request for Public Comment on Proposal to Set a Monetary Threshold for Commercial Division Cases Seeking Equitable and Declaratory Relief**

Dear Mr. Nocenti:

We write to provide comments with respect to the Request for Public Comment on amending 22 NYCRR § 202.70 to set a monetary threshold for Commercial Division cases seeking equitable and declaratory relief.

The City Bar's Council on Judicial Administration, State Courts of Superior Jurisdiction, and Litigation Committees have considered and discussed the proposed rule change. We adopt the spirit of the proposal, propose minor revisions, and pose some questions.

At the outset, we note that the proposed rule addresses a valid concern that the extant exemption to the monetary threshold requirement for cases seeking equitable and declaratory relief has enabled cases that would not otherwise qualify for Commercial Division treatment to draw disproportionately on the Division's resources. We are swayed by the fact that this proposal seems to address a particular concern raised by Commercial Division Judges of New York County.

We think the language of the proposed rule should be modified slightly such that only section (b) of 22 NYCRR § 202.70 is amended, as set forth below.<sup>1</sup>

(b) Commercial cases

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<sup>1</sup> The proposed amendment set forth in Exhibit 1 to the September 20, 2024 Memorandum differs from the proposed amendment discussed in Exhibit 2.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

Actions in which the principal claims involve or consist of the following will be heard in the Commercial Division provided that (i) the monetary threshold is met or (ii) equitable or declaratory relief is sought and the value of the object of the action meets the monetary threshold, except that for actions brought under paragraphs (4), (5), (11) or (12) herein the value of the object of the action need not meet the monetary threshold.

We do not see a need to modify subsection (a) and we believe the language above makes the proposed rule clearer.

Although we adopt the proposed rule above, we wish to address certain practical concerns with how the rule will be analyzed and implemented. First, it is unclear how the “value of the object of the action” will be determined. Although we understand that there is federal case law on this point, we think it would be useful if the proposed rule, or the commentary thereto, clarified that the value of the object of the action may be measured from either plaintiff’s or defendant’s perspective.

Second, we have questions about how the rule will be applied. It is unclear how a plaintiff should inform the Court that the value of the object of the action meets the monetary threshold. Will the Commercial Division Request for Judicial Intervention form be modified to permit a plaintiff to claim that the equitable relief meets this requirement? If so, will submission of that form be sufficient for the assignment to the Commercial Division, or will the clerk pool review the matter in more depth? If the clerks are tasked with discretion to make the determination, there may be an influx of letter briefs to the Administrative Judge’s office protesting that the standard was misapplied. We want to ensure both that the clerks’ pool and the Administrative Judge’s office will have adequate resources to address the additional analysis required under the new rule. We think these practical issues should be considered and addressed before the proposal is implemented.

Thank you for considering our comments. If you believe that it would be beneficial, we would be happy to discuss these comments with you further.

Sincerely,

*Fran Hoffinger*

Fran Hoffinger, Chair  
Council on Judicial Administration

*Cassandra Porsch*

Cassandra Porsch, Chair Litigation  
Committee

*Amy D. Carlin*

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