

New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>



Comments on Proposed Establishment of a “Large Complex Case List” in the Commercial Division

COMMERCIAL & FEDERAL LITIGATION SECTION

Com-Fed #2

July 19, 2017

The Commercial and Federal Litigation Section of the New York State Bar Association (“Section”) is pleased to submit these comments in response to the Memorandum of John W. McConnell, Counsel, to Chief Administrative Judge Lawrence K. Marks, dated June 8, 2017 (“Memorandum”), proposing the establishment of a “Large Complex Case List” in the Commercial Division. As stated in the Memorandum, this proposal submitted by the Commercial Division Advisory Council (“CDAC”) creates “essentially a special docket limited to matters in which a minimum of \$50 million (exclusive of punitive damages, interest, costs, disbursements, and counsel fees) is at issue.” *Id.* The Memorandum advises that a pilot program would be established “in New York County and expanded as appropriate.” *Id.* The formal proposal by CDAC (“CDAC Memorandum”) is attached as Exhibit A.

I. EXECUTIVE SUMMARY

For over two decades, New York’s Commercial Division has stood at the apex as the preferred court “for the resolution of high-stakes, complex commercial disputes.” *CDAC Proposal at 1.* However, because of competition from other venues both domestically and internationally (specifically, the establishment by the London Commercial Court of a docket “for financial claims of £50 million or more, that concern certain complex financial products” *id.*), the CDAC believes that New York should offer a comparable alternative, albeit much broader, for the resolution of complex commercial disputes. CDAC’s proposal would have the “advantage of making available to the Commercial Division enhanced procedures and tools that would not only benefit litigants qualifying large complex cases and in facilitating the efficient and just resolution of these cases, also benefit the Commercial Division as a whole in enabling large cases to be resolved more quickly.” *Id. at 2.*

II. SUMMARY OF PROPOSAL

Cases which would otherwise qualify for inclusion within the Commercial Division and where the amount in controversy “exceeds \$50 million, exclusive of punitive damages, interest, costs, disbursements, and counsel fees claimed” or “present issues of sufficient complexity and importance that the enhanced case management available to the Large Complex Case List would be of material benefit” would be part of the pilot program. *Id.* Designation could be based upon venue provisions included in business agreements which expressly provide that the Large Complex Case List within the Commercial Division act “as the exclusive forum for resolution of disputes arising under contract in which the \$50 million monetary threshold is met.” *Id. at 3.* In addition, a party may designate a case to the Large Complex Case List based upon the criteria set forth above or a court in its discretion may so designate a case based upon the “complexity and the importance of the interests and issues at stake.” *Id. at 4.*

Cases on the “Large Complex Case List” would have access to enhanced case management procedures, including, but not limited to “special referees with expertise in resolving discovery disputes in large commercial cases,” “special mediators,” “dedicated ‘back-up’ settlement judges...with expertise in handling large, complex commercial cases,” “[t]echnological receptivity” relating to digital issues, “hyperlinked briefs,” and fast-tracked case management. *Id. at 4-5*. As the CDAC Memorandum acknowledges, the above “is simply a further step in the continuing evolution of enhanced case management in the New York Courts.” *Id. at 12*.

III. COMMENTS

The Section views the concepts raised in the CDAC Memorandum to be well-thought out and it fully endorses the CDAC’s proposal for the creation of a “Large Complex Case List” within the Commercial Division.



**NEW YORK
CITY BAR**

**STATE COURTS OF SUPERIOR
JURISDICTION COMMITTEE**

ADRIENNE B. KOCH
CHAIR
605 THIRD AVENUE
NEW YORK, NY 10158
PHONE: (212) 716-3225
FAX: (212) 716-3349
AKOCH@KATSKYKORINS.COM

**COUNCIL ON JUDICIAL
ADMINISTRATION**

HON. CAROLYN DEMAREST
CHAIR
CED79P@GMAIL.COM

LITIGATION COMMITTEE

BARBARA SENIAWSKI
CHAIR
1460 BROADWAY
FLOOR 4
NEW YORK, NY 10036
PHONE: (212) 595-4536
FAX: (917) 591-4692
BARBARA@SENIAWSKILAW.COM

July 25, 2017

By Email

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

Re: New York City Bar Comments on the Proposed Large Complex Case List in the Commercial Division

Dear Mr. McConnell:

The New York City Bar Association supports, with the reservations expressed below, the proposal by the Commercial Division Advisory Council for a pilot program that would establish a Large Complex Case List to provide enhanced case management procedures for certain cases.¹

We recommend that the touchstone of eligibility for the List be complexity, not an arbitrary monetary threshold.² As the Proposal recognizes, cases involving ostensibly modest monetary stakes may present issues of sufficient complexity and importance to benefit from enhanced case management tools. Conversely, cases in which the amount in controversy exceeds \$50 million might very well present straightforward issues that do not require enhanced management.

Adopting more nuanced criteria for eligibility would have several benefits. First, it will help ensure that the List is not perceived as a group of cases receiving special privileges and

¹ 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.

² Of course, amount in controversy can be a factor in determining complexity, but it should not be the sole controlling factor.

attention only on the basis of amount in controversy. Second, litigants would be discouraged from alleging inflated damages to secure a place on the List. Third, resources supporting the List will be better allocated to the cases that truly need them, and cases not on the List will be less likely to suffer from the diversion of resources.

In addition, the Proposal does not explicitly discuss sources of funding for the various enhanced procedures and tools. Although we recognize that funding may not be addressed in detail until the budget process begins, committee members raised a concern that the Proposal ultimately could result in a diversion of resources from other Commercial Division cases or from courts outside the Commercial Division. And, while we recognize the efforts being made to enhance efficiencies in the Commercial Division, we believe that courts throughout the State would benefit from additional resources and enhanced tools. Therefore, we urge the Office of Court Administration to ensure that the Large Complex Case List is not run at the expense of other courts.

We hope our suggestions and observations prove to be helpful. We stand ready to provide further comments upon request.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Chair, Council on Judicial Administration

Adrienne B. Koch
Chair, Committee on State Courts of
Superior Jurisdiction

Barbara Seniawski
Chair, Committee on Litigation

[REDACTED]

From: Michael Rakower <mrakower@rakowerlaw.com>
Sent: Tuesday, July 11, 2017 7:11 PM
To: rulecomments
Subject: Proposed Establishment of a Large Complex Case List in the Commercial Division

Categories: [REDACTED]

Mr. McConnell,

I write in response to the request for public comment concerning the proposal to establish a large complex case list. I have reviewed the memorandum by the Subcommittee on Procedural Rules to Promote Efficient Case Resolution dated March 3, 2017 and have one comment concerning the assignment of large complex cases. While the memo indicates that a Justice may decline an assignment under the proposed program, I think the public should be advised as to whether a Commercial Division Justice ordinarily has the right to decline an assignment based on the same terms and procedures as would be afforded a Justice under the proposed program. If the answer is no, then an explanation should be given as to why the procedures for declining large complex cases are slated to be different.

Michael C. Rakower
Rakower Law ♦ PLLC
488 Madison Avenue, 18th Floor
New York, New York 10022
Direct (212) 660-5552
Main (212) 660-5550
Fax (212) 660-5551
mrakower@rakowerlaw.com
www.rakowerlaw.com

This e-mail communication is confidential and is intended only for the recipient(s) named above and others who have been specifically authorized to receive it. If you are not the intended recipient, please do not read, copy, use or disclose the contents of this communication to others. If you have received this e-mail in error, please notify me immediately by replying to the e-mail or by telephoning me at (212) 660-5550. Please then delete the e-mail and any copies of it. Thank you.

From: Fay, Milton <MFay@crowell.com>
Sent: Tuesday, July 25, 2017 3:37 PM
To: rulecomments
Subject: Comments re "Large Complex Case List" proposal...

Categories: [REDACTED]

I am the Managing Clerk for a firm in NYC. As such I have frequent contact with litigation issues and concerns that often involve the Commercial Divisions of several NYS Counties. I write to share some thoughts about the recently-announced proposal to create a "Large Complex Case List" within the Commercial Division. THESE COMMENTS ARE MY OWN; ALTHOUGH I AM SENDING THEM FROM MY WORK E-MAIL ADDRESS AS A CONVENIENCE, THEY DO NOT REFLECT ANYONE ELSE'S OR THE FIRM'S OPINIONS.

First and most importantly, is not the NYS judiciary the exclusive branch of NYS government Constitutionally charged with fairly and justly adjudicating disputes between citizens of NYS or between citizens of NYS and those of other jurisdictions? If this is reasonably so then how does the role of hawker of New York's judicial wares in an imagined global judicial marketplace fit in with the Court's original mission? Along the same vein of thought, aren't the New York and UK judicial systems based in large, functionally crucial part on different mental methods? Ours is *primarily* a Constitutional court; theirs is primarily common law and case-law. (The Magna Carta is not the UK's "founding document".) How can OCA think to minimize for financial reasons the role of a foundational document whose creative mind-set was the explicit design by consenting adults of a system of checks and balances to reasonably regulate behavior without resorting to shifting (and shifty) political winds?

A few individual thoughts and concerns:

- The concept as described may suggest judge and venue "shopping";
- It leaves the impression that extremely deep-pocketed parties can "buy" their way into New York courts;
- To the extent that foreign parties (non-USA or non-NYS) can successfully file in NY, how many will be eligible for removal to US federal courts under the federal diversity statute? Will SDNY be given a chance to weigh-in? Do we want deep-pocket litigants from China or Paraguay to potentially use NYS Courts as a gateway to federal protections?
- Even if removal to federal court is not an option, do we want the NYS Courts to entangle themselves with entirely foreign, possibly sovereign litigants for whom agreements on paper may be secondary to success in other realms inimical to the NYS Courts' mission? Do we really want to skirt with violations of US Constitution Article I and II foreign policy prerogatives?
- New York County Supreme Court Commercial Division may have a few judges well-enough versed in some of the complex areas of legal practice you are seeking to attract. What about the Justices of the Appellate Division and the Judges of the NYS Court of Appeals? What will happen when "Large Complex Case List" judges start getting reversed or worse, reprimanded (ever so genteelly) on "the law" by judges apparently less expert in micro-complexities of foreign contracts but more interested in NYS law and its ramifications?
- On that last bullet-point, what kind of "truth in advertising" will be held out if only the bottom layer of the judicial apparatus is even remotely "expert" enough to attract global attention?
- The NYS Courts have been hurting financially for decades – I don't have to tell you. How long did it take for judges to get a raise in recent years? How about the court staffs shrunk through attrition? The power of the purse belongs to the Legislature; that will never change. How long after implementation of the "Large Complex Case List" and success in attracting big, expensive and time and resource-consuming cases exclusively involving non-NYS actors will enterprising politicians running for legislative office in Albany seize on the program as an example of judicial branch abuse of the public trust and, even worse, tax money.

- If the democracy as constituted here by nature means that, with a little application people like me (a non-lawyer) can understand and work with “the law” to their own and others’ benefit, how does it help the future of democracy to encourage the ever-increasing specialization and complexification of the law to the point where only an elite of certain individuals will have the ability to understand, much less rule on cases? Should there not instead be conversations between the bench and bar about voluntarily limiting (in the same spirit of reasonable behavior in which the Constitutions of our land were crafted) the degree of complexity of contracts and financial instruments? While the sky (or outer space) may be the limit for human *aspirations*, it cannot be the limit for practical, down-to-earth relationships embodied in our private and commercial agreements and transactions.
- Even discounting all that I’ve written above, there is one immutable, unwritten feature applicable to ALL human endeavors: the Law of Unintended Consequences. “So” you might say, “everything we do is subject to that Law”. True but as long as the NYS Courts hew closely to their Constitutionally-mandated task the future of the Courts with respect to the citizens of NY (their primary allegiance) will be fairly predictable. If the NYS judiciary succumbs to “mission creep” in the hopes of outdoing the London “Financial List” (whose own future is cloudy thanks to Brexit) its future may more closely resemble a lottery with occasional big winners and everybody else compulsively praying for their numbers to come up.

Thank you for your time.

-Milton Fay