



NEW YORK STATE  
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS  
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL  
COUNSEL

MEMORANDUM

March 12, 2018

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed New Rule 9-a of the Rules of the Commercial Division (22 NYCRR §202.71[g], Rule 9-a), Relating to the Encouragement of Use of CPLR Provisions Permitting Immediate Trial or Pretrial Evidentiary Hearing on a Material Issue of Fact

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The Administrative Board of the Courts is seeking public comment on a proposed new Rule 9-a of the Rules of the Commercial Division (22 NYCRR §202.71[g], Rule 9-a), proffered by the Commercial Division Advisory Council, designed to encourage parties to take advantage of CPLR provisions (CPLR 2218, 3211[c], and 3212[c]) permitting immediate trial or pretrial evidentiary hearing on a material issue of fact (Exh. A, pp. 3-4). As set forth in the Council's explanatory memorandum, the failure to employ these provisions – particularly in cases where the disputed issue may be dispositive, such as a statute of limitations defense or a jurisdictional defect – can lead to delay and inefficiency in resolving Commercial Division disputes. The proposed new rule "simply encourages parties to ask the court to exercise its existing authority under the CPLR to conduct pre-trial evidentiary hearings in appropriate circumstances," and "does not expand, modify, or otherwise affect the court's existing authority to conduct such hearings" (Exh. A, p. 2).

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Persons wishing to comment on the proposed rule should e-mail their submissions to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than May 15, 2018.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

## **EXHIBIT A**

## **MEMORANDUM**

To: Administrative Board of the Courts

From: Commercial Division Advisory Council

Re: Proposed Amendment to Commercial Division Rules (Section 202.70 of the Uniform Civil Rules of the Supreme Court) to Encourage Application of Immediate Trial/Evidentiary Hearing Provisions Under CPLR §§ 2218, 3211(c) or 3212(c),

Date: December 8, 2017

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The Commercial Division Advisory Council proposes an amendment to Section 202.70 of the Rules of the Commercial Division of the Supreme Court, to include a new Rule 9-a which promotes use of the available applications of CPLR §§ 2218, 3211(c) or 3212(c), in swiftly and efficiently resolving commercial disputes in the New York Commercial Division.

### **INTRODUCTION**

The Commercial Division Advisory Council strongly supports and commends the efforts which the New York State courts are making to improve court processes and procedures. In particular, the Advisory Council believe that Chief Judge DiFiore's Excellence Initiative is one of the most important and valuable new programs in our state courts in many years. Much progress has been made in improving the efficiency of the Commercial Division over the last few years and the Commercial Division is now renowned for its creative and innovative approaches to dispute resolution. Nevertheless, not all proceedings in the Commercial Division are as efficient as they might be. This memorandum discusses one of the significant remaining problem areas and proposes a solution.

We introduce this topic by providing an example of the problem which the Advisory Council's new rule is designed to address.

When a lawsuit is commenced in the New York State courts, a defendant may have a defense which could result in immediate resolution of the entire action. An example of such a defense might be the statute of limitations or a jurisdictional defect. Nevertheless, the court may be unable to adjudicate the defense on the basis of motion papers provided to the court because there is a material issue of fact connected with the defense. For example, there may be a fact issue as to when the plaintiff discovered or should have discovered the factual basis for its cause of action. Under these circumstances, New York State courts often do not conduct an immediate trial of such fact issues and instead postpone their resolution until the plenary trial. The result of the failure to resolve the fact issue by conducting an immediate trial sometimes is that a litigation continues for years through extensive discovery and other proceedings until trial where the fact issue is finally

adjudicated and the case is resolved in a way that it might have been years ago. The new rule which the Advisory Council now proposes is designed to reduce the waste of time and money which such situations create.

All too often litigants engage in costly, broad-based litigation when a dispute might be resolved, settled or significantly narrowed in scope by targeting key issues for early limited discovery and an immediate evidentiary hearing or trial. Early disposition, where proper, will conserve judicial and litigant resources. CPLR § 3211(c) and CPLR § 3212(c), provide for a hearing of issues raised on a motion to dismiss, and on a motion for summary judgment, respectively. Often overlooked, CPLR § 2218 also permits a court or a court-appointed referee to conduct an immediate trial in connection with any motion, regardless of the type of factual issue raised. With recent changes to the Commercial Division rules to help streamline litigation and to save costs, the Commercial Division Advisory Council proposes adoption of Rule 9-a to encourage the use of evidentiary hearings and immediate trials as yet another tool to help efficiently dispose of commercial disputes.

This proposed new rule simply encourages parties to ask the court to exercise its existing authority under the CPLR to conduct pre-trial evidentiary hearings in appropriate circumstances. The proposed new Rule does not expand, modify, or otherwise affect the court's existing authority to conduct such hearings. The reasons that such encouragement is necessary are twofold. First, the Advisory Council believes that such hearings are significantly underutilized in the Commercial Division. Second, the Advisory Council believes that implementation of this new Rule will help the Commercial Division achieve the objectives of Chief Judge DiFiore's Excellence Initiative which is designed "to improve promptness and productivity, eliminate case backlogs and delays and provide better judicial services to the public." (Chief Judge's 2017 State of our Judiciary Address, page i).

### **PROPOSED RULE 9-a**

Courts have the discretion to invoke CPLR §§ 3211(c) and 3212(c) and direct an evidentiary hearing upon finding that a material issue of fact was raised by the dispositive motion. CPLR § 2218 likewise provides that courts have the discretion to direct an immediate trial upon finding on any motion that "...an issue of fact raised on a motion shall be separately tried by the court or a referee."<sup>1</sup> Whether the court or a court-appointed referee<sup>2</sup> should conduct an immediate trial depends in large part on the court's assessment of the proof presented by the motion papers. It is fundamental that a motion may be decided without a hearing unless the papers submitted raise a factual dispute on a material point which must be resolved before the court can decide the legal issue.

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<sup>1</sup> CPLR 2218 further provides that "[i]f the issue is triable of right by jury, the court shall give the parties an opportunity to demand a jury trial of such issue. Failure to make such demand within the time limited by the court, or, if no such time is limited, before trial begins, shall be deemed a waiver of the right to trial by jury. An order under this rule shall specify the issue to be tried."

<sup>2</sup> Pursuant to CPLR § 4001, the court may appoint on its own motion a referee to hear and determine an issue of fact.

Examples of situations in which immediate trials of fact issues may be helpful in expediting and streamlining litigation are questions of improper notice or other jurisdictional defects, or dispositive defenses (for example, to determine which statute of limitations applies, where the resolution of the issue in defendant's favor would make the complaint time-barred). The importance and value of immediate trials of fact issues is particularly apparent in the context of controversies arising from employee non-compete and non-solicitation clauses and trade secrets. Such litigation often requires immediate resolution in order to provide meaningful relief to the parties. For example, an employee who persuades the court after three years of litigation that a restrictive covenant in her employment contract is invalid may obtain an empty victory.

Traditionally, it has been thought that holding one trial of all issues only after full-blown discovery has been had is more time-efficient because it avoids having a time-consuming hearing only to later relitigate the same issues at trial. However, early disposition of an action in its entirety or a material part thereof saves the court and the parties the time and expense of engaging in unnecessary discovery and other pre-trial proceedings on ancillary issues which may not be critical to ultimate disposition of the entire case. If early identification of key issues of fact, followed by limited discovery and an evidentiary hearing may lead to early resolution of all or a material part of a case, then the Advisory Council believes that use of CPLR §§ 3211(c), 3212(c) and 2218 should be encouraged.

Proposed Rule 9-a identifies a non-exhaustive list of motions where an immediate trial or evidentiary hearing of a material issue of fact might be more time and cost efficient in resolving a material part of the case. Thus, the Commercial Division Advisory Council proposes for inclusion in the existing Rules of the Commercial Division of the Supreme Court (Section 202.70 of the Uniform Civil Rules for the Supreme Court) the following Rule 9-a:

**Rule 9-a. Immediate Trial or Pre-Trial Evidentiary Hearing**

Subject to meeting the requirements of CPLR §§ 2218, 3211(c) or 3212(c), parties are encouraged to demonstrate on a motion to the court when a pre-trial evidentiary hearing or immediate trial may be effective in resolving a factual issue sufficient to effect the disposition of a material part of the case. Motions where a hearing or trial on a material factual issue may be particularly useful in disposition of a material part of a case, include, but are not limited to:

- (1) Dispositive motions to dismiss or motions for summary judgment;
- (2) Preliminary injunction motions, including but not limited to those instances where the parties are willing to consent to the hearing being on the merits;
- (3) Spoliation of evidence motions where the issue of spoliation impacts the ultimate outcome of the action;

- (4) Jurisdictional motions where issues, including application of long arm jurisdiction, may be dispositive;
- (5) Statute of limitation motions; and
- (6) Class action certification motions

In advance of an immediate trial or evidentiary hearing, the parties may request, if necessary, that the court direct limited expedited discovery targeting the factual issue to be tried.