

**The United States District Court
for the Southern District of New York:
A Retrospective (2000-2010)**



**New York County Lawyers' Association
Committee on the Federal Courts**

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The courts are what the judges make them, and the District Court in New York, from the time of [District Judge] James Duane, [President] Washington's first appointment, has had a special distinction by reason of the outstanding abilities of the men [and women] who have been called to its service.

Hon. Charles Evans Hughes, Chief Justice of the United States Supreme Court,
November 3, 1939.¹

Introduction

As Chief Justice Hughes aptly observed, though the Southern District through its age and location has invited some of the most complex and important cases, its unparalleled distinction has arisen from the exceptional judges who have guided the hand of justice. A total of 139 judges have served on the Southern District bench since its founding in 1789.² Although more than a few of these judges—Samuel R. Betts, Charles M. Hough, Learned Hand, and Edward Weinfeld—are widely regarded as among the finest jurists of their (or any) time,³ the Southern District did not gain and has not maintained its well-deserved reputation on the coattails of only a few notable names.

The Southern District always has been and today remains a court of dedicated and skilled jurists who distinguish themselves daily by their workmanlike approach to the business of the federal district court: hearing and deciding cases, great and small. In this way, the judges of the Southern District carry on in the tradition of Judge Weinfeld who famously advised that “every case is important” and “no case is more important than any other case.”⁴

A Brief History of the Court

The “Mother Court,” as the Southern District is colloquially known, is the oldest federal court in the United States, pre-dating by several weeks the organization of the U.S. Supreme Court.⁵

Judge Duane received his commission from President George Washington on September 26, 1789, the same day the President signed the commission for John Jay, the first Chief Justice of the United States.⁶ As difficult as it is for those of us familiar with the busy workload of the modern court to

¹*Proceedings Had on November 3, 1939 in the United States District Court for the Southern District of New York on the One Hundred and Fiftieth Anniversary of its Organization* (1939) (alteration supplied) (hereinafter “Proceedings”).

² History of the Federal Judiciary, available at <http://www.fjc.gov>, web site of the Federal Judicial Center, Washington, D.C. This includes the six who served in the District of New York before the Southern District of New York was created in 1814.

³ Of Judge Weinfeld, the Southern District's most venerated member, Justice William J. Brennan, Jr., once noted that “[t]here is general agreement on bench and bar throughout the nation that there is no better judge on any court.” *Edward Weinfeld – A Judicious Life* 49, Federal Bar Foundation (1998) (hereinafter “Weinfeld”).

⁴ Weinfeld at 49.

⁵ The United States District Court for the District of New York convened for the first time on November 3, 1789. The United States Supreme Court did not hold its first session until February 1790. See H. Paul Burak, HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK 1, Federal Bar Ass'n of N.Y., N.J. and Conn. (1962) (hereinafter “Burak”).

⁶ Burak at 1 (quoting Hough, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK 8 (1934) (hereinafter “Hough”).

believe, for the first several years of its existence, Judge Duane presided over a court that quite literally “had nothing to do.”⁷

Indeed, the court’s first case, *United States of America v. Three Boxes of Ironmongery, Etc.*, an application by the fledgling government of the United States for a declaration that certain goods were subject to duty, was not filed until April 1790.⁸ As its first case suggests, the court’s early years were consumed by customs cases and routine or uncontested admiralty matters. As Judge Thomas D. Thacher, who served on the Southern District bench in the late 1920s, once remarked: “The work of such a court must have been extremely dull.”⁹

In 1812, Congress created a second judgeship in the District of New York to fulfill a statutory requirement that the court hold proceedings upstate.¹⁰ Less than two years later, on April 9, 1814, Congress passed a statute bisecting the District of New York, giving birth to the Southern District of New York.¹¹ In 1821, the Southern District promulgated for the first time, with the assistance of a committee of bar leaders, a set of procedural rules governing cases brought in the court.¹²

On December 21, 1826, Judge Samuel R. Betts was appointed to the Southern District bench.¹³ Judge Betts served on the court for 41 years until his death in 1867, during which time he oversaw dramatic change.¹⁴ An authority on admiralty law, he presided over the court during a period when maritime cases “multiplied many times in volume and importance”¹⁵ and singlehandedly transformed the Southern District from a court that “had nothing to do” into a “busy tribunal.”¹⁶ Holding office during the Civil War era, Judge Betts presided over important cases involving “questions of prize, blockade and contraband resulting from captures of enemy property by U.S. vessels in the blockade of Confederate ports.”¹⁷

Congress created the Eastern District of New York in 1865.¹⁸ This move helped to reduce the Southern District’s burgeoning workload and forestalled for nearly 40 years the creation of a second judgeship on the Southern District bench. The avalanche of filings occasioned by the passage of the Bankruptcy Act of 1898, however, prompted Congress to create a second judgeship for the court in 1903.¹⁹ Indeed, in 1900, for example, bankruptcy filings exceeded the total of all other cases brought in the Southern District during that year.²⁰

In 1906, a third Southern District judgeship was created, followed by a fourth in 1909.²¹ To these posts President Theodore Roosevelt appointed two of the nation’s finest jurists: Judges Charles M. Hough

⁷ Proceedings at 16.

⁸ Burak at 2.

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ Hough at 18. At inception, the Southern District of New York actually included, in addition to the City of New York, the upstate counties of Albany, Delaware, Rensselaer, Schenectady and Schoharie. This oddity was corrected in 1815 when these counties were transferred to the Northern District of New York. *Id.* at 19.

¹² *Id.* at 23.

¹³ Burak at 5.

¹⁴ *Id.* Judge Charles M. Metzner was the Southern District’s longest-serving judge (1959-2009).

¹⁵ *Id.*

¹⁶ Proceedings at 16; Burak at 5.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Hough at 34.

²¹ Burak at 12.

and Learned Hand. Both men served on the Southern District bench for extended terms, ten years for Judge Hough and 15 years for Judge Hand, before he was elevated to the U.S. Circuit Court of Appeals for the Second Circuit.²²

During the first few decades of the twentieth century, the Southern District experienced tremendous growth in both the volume and the variety of its caseload. According to Paul Burak's *History*, the growth was caused by "private litigation in diversity of citizenship [that] increased due to the rapid development of commerce in New York, and government litigation [that] similarly multiplied with the extension of federal control over many private and public activities."²³ Indeed, the Southern District faced a total of 9,123 new filings in 1920, more than three times the number of filings that were made just ten years earlier in 1910.²⁴ From 1920 to 1930, the court's workload grew heavier still when the onset of Prohibition in 1920 caused "a staggering increase in government civil business, such as actions for tax or penalty, forfeitures, and 'padlock' cases, and an even greater rise in criminal liquor cases."²⁵

On November 3, 1939, the 12 judges of the Southern District paused from their labors to commemorate the court's sesquicentennial anniversary with a ceremony presided over by Chief Judge John Clark Knox. Although Judge Knox spoke about the Southern District as it was over 70 years ago, his words still ring true today:

Along with the Government, the court has grown in power, influence and importance. Indeed, it presently exercises a jurisdiction that, perhaps, is wider than that of any tribunal upon the earth In times of peace and days of war, in years of plenty and periods of want, this court—modestly and unostentatiously—has endeavored faithfully to perform duties which these conditions imposed upon it We indulge the hope that, in the future, quite as much as it has done in the past, the court will creditably do its work and fairly administer justice to all who come within its portals We also trust that as long as the Government stands, and may that be forever, this court will be a place to which all men in need of judicial aid may freely come and have confidence that justice will here be dispensed without favor and without price.²⁶

The distinguished jurists of the day who observed the ceremony uniformly praised the quality and dedication of the judges who had served on the Southern District bench. In addition to Chief Justice Knox's words and Chief Justice Hughes's statement quoted at the beginning of this section, Associate Justice Felix Frankfurter praised the court's "great tradition of eminent judges of the highest standard of judicial administration."²⁷

Judge Knox also used the occasion of the court's birthday to press the case that additional judges were needed to handle the Southern District's expanding caseload, noting in his speech that "there is no more heavily burdened court than this District Court whose anniversary we celebrate."²⁸ During the early 1940s, the Southern District's pending civil docket ranged between 3,500 and 4,500 cases per year.²⁹ This figure skyrocketed to more than 10,000 cases in 1947, even though the court disposed of 4,708 cases

²² *Id.*

²³ *Id.* at 12.

²⁴ Hough at 34.

²⁵ Burak at 15.

²⁶ Proceedings at 1, 7.

²⁷ *Id.* at 26.

²⁸ *Id.* at 10.

²⁹ Burak at 16.

in that year alone.³⁰ Congress finally responded with additional judgeships in 1949 when four were added, bringing the court to 16 judges.³¹

In 1950, President Harry S. Truman appointed the 49-year-old President of the National Public Housing Conference and former New York City Public Housing Commissioner, Edward Weinfeld, to the court.³² Judge Weinfeld, widely noted as the greatest judge ever to sit on the Southern District bench and, to many, the greatest judge ever to sit on any district court, did more than any judge before him or since to set the tone and work ethic for the court he called “the greatest in the country, bar none.”³³ For many of his 38 years on the court, Judge Weinfeld regularly arrived at the courthouse before 6 a.m. to begin 12-hour working days for six or seven days a week, including most holidays.³⁴ Judge Weinfeld famously reflected on his attitude towards his vocation:

When, at a fairly early hour of the morning, I put the key into the door of my darkened chambers and walk across the room to start the day’s activities, I do so with the same enthusiasm that was mine the very first day of my judicial career. What one enjoys is not work. It is joy.³⁵

Because of his work ethic and talent, Judge Weinfeld, from his earliest days on the court to the twilight of his judicial career, set an example to which his colleagues and the others who knew him aspired. The more than 2,200 published opinions he authored during his 38-year career are hailed as “well-crafted,”³⁶ “thoroughly grounded in the facts,”³⁷ and “products of reason rather than acts of will.”³⁸ Given those qualities, encouragingly, they were “almost always affirmed.”³⁹ Similarly, as two of his law clerks observed, “[I]t is difficult, if not impossible, to capture the reality of the dignity and fairness that are the hallmarks of a Weinfeld trial ... [in which he brings] to life that which is finest in our legal tradition.”⁴⁰

It would be difficult to overstate Judge Weinfeld’s influence on the judges who have served, and who now serve, on the Southern District bench. In 1985, the judges of the Southern District shared that sentiment in a letter to the selection committee for the nomination of Judge Weinfeld for the Devitt Distinguished Service to Justice Award:

Judge Weinfeld has been a friend, a colleague, and a mentor for us and for other judges on this Court for the past thirty-five years. In that time, no one has labored as long or as hard in the service of justice as has Judge Weinfeld. While his contributions to the administration of justice have been great on many levels, the greatest is the personal example he has set for all those who know him or know of him. . . . Judge Weinfeld has set the standard for the conduct of judges, attorneys, and all others connected with the administration of justice. And he has set that

³⁰ *Id.*

³¹ *Id.* at 17.

³² *Id.* at 18.

³³ Weinfeld at 13.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 44.

³⁷ *Id.* at 46.

³⁸ *Id.*

³⁹ *Id.* at 44.

⁴⁰ *Id.* at 47.

standard not simply by what he has said or written, but rather by the daily devotion he has shown, year after year, to the rule of law.⁴¹

Following a long illness, during which he continued to conduct trials and decide cases, Judge Weinfeld died in January 1988. Although Judge Weinfeld's death undoubtedly marked the end of an era for the Southern District, he is survived by the personal example and standards he set for the judges who served with him and after him. In this way, the Southern District today remains a court of talented and hard-working judges who continue, in the tradition of Judge Weinfeld and the scores of other judges who served before him on the court, to distinguish themselves daily through their work ethic and dedication to the business of the federal district court—hearing and deciding cases, great and small.

The Edward Weinfeld Award

The New York County Lawyers' Association's Committee on the Federal Courts established the Edward Weinfeld Award to honor those who have made distinguished contributions to the administration of justice, in the tradition of Judge Weinfeld.

The following members of the New York legal community have been honored with the Edward Weinfeld Award:

| | |
|-------------------------|------|
| Hon. James L. Oakes | 1992 |
| Hon. Leonard B. Sand | 1993 |
| Hon. Morris E. Lasker | 1994 |
| Hon. Wilfred Feinberg | 1995 |
| Hon. John S. Martin | 1996 |
| Hon. Jon O. Newman | 1997 |
| Mary Jo White, Esq. | 1998 |
| Hon. Eugene Nickerson | 1999 |
| Hon. Joseph McLaughlin | 2000 |
| Hon. Loretta Preska | 2001 |
| Hon. Edward Korman | 2002 |
| Hon. Allen Schwartz | 2003 |
| Hon. Jack Weinstein | 2004 |
| Hon. Shira Scheindlin | 2005 |
| Hon. Charles L. Brieant | 2006 |
| Hon. Pierre Leval | 2007 |
| Hon. John Gleeson | 2008 |
| Hon. Gerard Lynch | 2009 |
| Hon. Denny Chin | 2010 |
| Hon. John F. Keenan | 2011 |

Chief Judges: Transition and Continuity

The position of Chief Judge in the Southern District is given to the most senior active judge in the district who is not yet 65 years old. The position is held for seven years or until its holder turns 70. The duties of the Chief Judge include managing the work of the active and senior judges and the magistrate judges, as well as managing the court clerk's office, probation, pretrial services, court reporters, and

⁴¹ *Id.* at 42.

security. In addition, the Chief Judge is the Southern District's representative to bar groups, national court committees, and other branches of the government.

The Hon. Michael B. Mukasey served as Chief Judge from 2000 through 2006. He had to deal with heightened security concerns at the court and with the need to implement necessary security precautions. Chief Judge Mukasey, along with Chief Judge John M. Walker of the U.S. Court of Appeals for the Second Circuit, was involved in efforts to renovate the courthouse at 40 Foley Square, which in addition to housing judges and court personnel from the Southern District, also houses Second Circuit judges' chambers and courtrooms. The 40 Foley Square courthouse, designed by Cass Gilbert, has been referred to by Chief Judge Mukasey as "a treasure of American architecture." It was renamed the Thurgood Marshall Courthouse in 2003 after the late Supreme Court justice and former U.S. Court of Appeals Judge for the Second Circuit. Since renovations began to the Thurgood Marshall Courthouse in 2006, both the Southern District and the Second Circuit have operated in the Daniel Patrick Moynihan Courthouse.

The Hon. Kimba M. Wood, the Southern District's first female Chief Judge, succeeded Chief Judge Mukasey in 2006 and served in that capacity until she took senior status in 2009. The Hon. Loretta A. Preska, the current Chief Judge and a former member of NYCLA's Committee on the Federal Courts, assumed the reins in 2009.

Judicial Appointments: The Making of a New Court

The court enjoyed substantial growth in the number of judgeships between 1990 and 2000, rising from 38 judges to 50, but that number had retracted to 38 at the start of 2011 before Congress confirmed outstanding appointments to bring the total to 44 by 2012. However, similar to other districts during the tail end of the 2000s, the Southern District in 2012 had five judicial vacancies awaiting confirmation of presidential nomination. Unlike the decade between 1990 and 2000, when more than 20 new judges were appointed to the bench, between 2000 and 2010 only nine new judges were appointed (compared to eight in 1994 alone). Of the 38 judges who sat on the court in the beginning of 2011, 22 were active and 16 were senior, as the court continued to rely upon senior judges to manage its ever-rising caseload.

Of the judges who served in the Southern District between 2000 and 2010, several were historic firsts on the federal bench, including the Hon. Constance Baker Motley (the first African-American woman to serve on the federal bench and the first woman to serve as judge of the Southern District), the Hon. Denny Chin (the first Asian-American appointed as a U.S. district judge outside of the Ninth Circuit and the only Asian-American judge in active service in the federal appellate court system at the beginning of 2011), and the Hon. Deborah A. Batts (the first openly gay person to serve on the federal bench).

Magistrate Judges: Increased Role and Influence

In the Southern District, there are 15 magistrate judges. This is an increase from 14 in 2000 and an increase from nine full-time magistrates in 1990. Magistrate judges are not Article III judges; therefore, they are not appointed by the President and they do not have life tenure. Rather, they are appointed by the local district judges, and full-time magistrate judges serve eight-year terms. Whereas the earliest magistrate judges handled only pretrial discovery matters, today they are much more

involved in all aspects of litigation and in the Southern District often play a key role in assisting the district judges in moving cases along swiftly.⁴²

There has been considerable litigation over the role of magistrate judges in criminal matters. As a result of such litigation, the range of functions performed by magistrate judges in criminal cases has expanded, though gradually. Whereas magistrate judges were once given discretion almost exclusively in “pretrial” matters, in the 1990s they were given considerably more authority to become deeply involved in substantive matters. This trend continues today.

In civil cases, magistrate judges generally are empowered to make three types of decisions. First, they can issue interlocutory orders, which a district judge can then review, as if on appeal. Second, magistrate judges can issue a “report and recommendation” on a case-dispositive motion; these are reviewable *de novo* by the district judge, but often, as a practical matter, may greatly influence the district judge’s ultimate ruling. Finally, with the consent of all parties, magistrate judges can preside over civil trials and bring cases to final judgment, with review available only in the Court of Appeals.

Magistrate judges on the Southern District have also been at the forefront of the developing case law concerning E-Discovery. For example, Judge Frank Maas in *Aguilar v. Immigration & Enforcement Div. of U.S. Dept. of Homeland Sec.*, 256 F.R.D. 350 (S.D.N.Y. 2008), provided a primer on the various types of metadata associated with the many different types of electronic data files and an analysis of the considerations relevant to the discovery of such metadata. Judge Maas also teaches federal judges about E-Discovery for the Federal Judicial Center. Judge Andrew Peck in *William A. Gross Constr. Assocs., Inc. v. American Mfgs. Mut. Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009), issued a “wake-up call to the Bar” on their obligations to cooperate with opposing counsel in formulating “keywords” for searches of electronic data files. Judge Peck (along with Judge Scheindlin) is a member of the Advisory Board of the Sedona Conference, a nonprofit legal research and educational organization dedicated to resolving E-Discovery issues. The Sedona Principles and the Sedona Conference Cooperation Proclamation have been endorsed by courts throughout the country.

The Court’s Changing Docket

The workload of the court increased steadily from 2000 to 2010. A total of 11,547 cases (10,389 civil and 1,158 criminal) were filed in the Southern District in 2000, and 14,275 cases were pending at the end of that year. In 2009, 11,909 cases (10,883 civil and 1,026 criminal) were filed in the court, but 26,320 cases were still pending as of March 31, 2010. Dividing this workload by the 40 judges (26 active, 14 senior) on the court at the time yields an average of 658 pending cases per judge or 1,012 pending cases per active judge in 2010.⁴³

The workload of judges in the Southern District exceeds the workloads of district judges serving in other major metropolitan areas. For example, in 2010, there were 9,642 pending cases in the U.S. District Court for the Northern District of Illinois. That year, the Northern District of Illinois had a total of 33 judges, of whom 19 were active and 14 senior, yielding an average of 292 pending cases per judge or 507 cases per active judge. The Central District of California had 12,415 pending cases in 2010, which were handled by a total of 35 judges, of whom 26 were active and nine senior. This yields an average of 355 cases per judge or 478 cases per active judge.

⁴² See “Report on Magistrates,” 136 F.R.D. 193 (1991), authored by the NYCLA Committee on the Federal Courts, for a historical review of the use and proposed expanded role of magistrate judges in the Southern District.

⁴³ Statistics courtesy of <http://www.uscourts.gov/Statistics.aspx> and the Southern District Clerk’s Office.

There were also significant changes in the composition of the Southern District's civil and criminal dockets during this period. Several categories of civil cases experienced dramatic increases in filings from 2000 to 2009: labor suits (54% increase); torts (15% increase); real property (14% increase); and civil rights (13% increase). By contrast, civil cases in the following areas showed substantial decreases in filings: social security (44% decrease); forfeiture and penalties and tax suits (43% decrease); prisoner petitions (25% decrease); and copyright, patent and trademark (13% decrease). Other civil case categories stayed relatively constant during this period: contracts (6% increase) and all other civil cases (7% decrease).

As noted, criminal case filings rose significantly from 1,158 filings in 2000 to 1,404 filings in 2009, or a 21% increase. The largest increases were seen in the following criminal case categories: robbery (200% increase); and immigration (99% increase). Significant decreases were observed in the following categories: embezzlement (70% decrease); forgery and counterfeiting (42% decrease); fraud (40% decrease); burglary and larceny (15% decrease); firearms and explosives (14% decrease); and all other criminal felonies (10% decrease). There were no significant changes in the remaining criminal case categories: drugs (2% decrease); and homicide and assault (8% decrease).

Notable Cases, Trials, and Decisions

As has been the case throughout the court's long history, Southern District judges during the 2000s weighed in on some of the most pressing legal issues of the day, rendering numerous path-breaking decisions and presiding over a series of important trials. Members of the Report Subcommittee sought to identify an illustrative sampling of notable cases, trials, and decisions, which are discussed below. Of course, many other notable cases, trials, and decisions came out of the court during the 2000s, but due to space constraints this Report is able to refer to only a small fraction of them.

Antitrust

Discover Fin. Servs., LLC v. Visa U.S.A. Inc.

In *Discover Fin. Servs., LLC v. Visa U.S.A. Inc.*, 2008 U.S. Dist. LEXIS 65627 (S.D.N.Y. Aug. 26, 2008), Judge Barbara S. Jones denied defendants' motion for summary judgment in an antitrust case brought by credit card issuer Discover Financial Services, DFS Services, LLC, and Discover Bank ("Discover") against Visa U.S.A. Inc. and Visa International Service Association ("Visa") and MasterCard Incorporated and MasterCard International Incorporated ("MasterCard"). Discover sought damages from Visa and MasterCard for enacting exclusionary rules preventing Visa and MasterCard member banks from issuing Discover Cards. The rules, Discover argued, derailed Discover's joint venture with Citibank to combine Discover's network with Citibank's Diners network, with Citibank moving over its issuing volumes of credit cards to the combined network ("Project Explorer"). Visa and MasterCard filed a summary judgment motion seeking to preclude Discover from recovering damages attributed to the failure of Project Explorer.

Visa and MasterCard argued that there was insufficient evidence to find that the exclusionary rules were an essential element that led to the failure of Project Explorer. Further, Visa and MasterCard argued that the Tenth Circuit had previously found that an analogous exclusionary bylaw did not violate the Sherman Act. Thus, even if the failure of Project Explorer could be attributed to the exclusionary rules, the failure would result from lawful conduct.

Judge Jones denied the motion for summary judgment, relying on the testimony of several Discover executives attributing the failure of Project Explorer to the exclusionary rules. The court opined

that even if the statements of Discover’s executives were self-serving, the statements were made “well before the filing of this private action.” *Id.* at *14. Furthermore, there was “testimony from Citibank executives that the exclusionary rules were a serious consideration during the Project Explorer negotiations” *Id.* at *13. Therefore, Judge Jones noted that, although the evidence was thin, it was sufficient to withstand summary judgment when viewed in the light most favorable to Discover.

The Court also dismissed the defendants’ reliance on a Tenth Circuit decision, *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994), as inapplicable because that decision was based on Visa’s procompetitive justification. In that case, the justification for the analogous bylaw was that it was designed to prevent competitors from freeloading off a system that the competitors had done nothing to create—a justification that did not apply in the case before Judge Jones.

The case subsequently settled.

In Re: IPO Antitrust Litig.

In 2007, the U.S. Supreme Court upheld an antitrust ruling of Judge William H. Pauley III of the Southern District, reinstating the District Court’s dismissal of an action that had been reversed by the Second Circuit. In doing so, the Court ruled that there was implied preclusion of antitrust laws where securities laws and antitrust laws are incompatible.

In January 2002, 60 investors filed two antitrust class-action lawsuits against ten leading investment banks, seeking relief under, among other things, Section 1 of the Sherman Act, the Robinson-Patman Act, and state antitrust laws. The investors alleged that “between March 1997 and December 2000 the banks had acted as underwriters, forming syndicates that helped execute the initial public offerings (IPOs) of several hundred” companies, mostly technology-related. *Credit Suisse Secs. (USA) LLC v. Billings*, 551 U.S. 264, 269 (2007.) The complaints alleged that the underwriters “abused the ... practice of combining into underwriting syndicates” by “agreeing among themselves to impose harmful conditions upon potential investors—conditions that the investors apparently were willing to accept in order to obtain an allocation of new shares that were in high demand.” *Id.* (describing complaints; internal quotation omitted). In particular, the complaints alleged that investors were forced to pay anticompetitive charges over and above the agreed IPO share price plus the underwriting commission. *Id.* at 269-70. The complaints “added that the underwriters’ agreements to engage in some or all of these practices artificially inflated the share prices of the securities in question.” *Id.* at 270.

The District Court dismissed the complaints, finding the conduct alleged by the plaintiffs to be impliedly immune from antitrust laws, acknowledging that “the SEC, the NASD, and other SROs will continue to study the conduct alleged.” *In re Initial Public Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 524-25 (S.D.N.Y. 2003). The Court of Appeals for the Second Circuit vacated and remanded, however, finding that there was no implied preclusion of the antitrust laws. *Billings v. Credit Suisse Sec. (USA) LLC*, 426 F.3d 130, 170, 172 (2d Cir. 2005). The Supreme Court, in turn, reversed the Second Circuit. *Credit Suisse*, 551 U.S. at 264. The Court observed that, when “decid[ing] whether securities law precludes antitrust law, it is deciding whether ... the two are ‘clearly incompatible.’” *Id.* at 275. A court will find incompatibility where: (i) a regulatory authority exists under the securities law to supervise the activities at issue, (ii) there is evidence that authority is exercised, (iii) there is a risk that application of both securities and antitrust laws would produce conflicting requirements or standards, and (iv) the conflict would affect practices that lie “squarely within the heartland of securities regulations” (such as financial market activity) that are subject to “active and ongoing” regulation by the appropriate federal authority. *Id.* at 275, 285. Applying this standard, the Court concluded that the securities laws precluded the plaintiffs’ antitrust claims because, *inter alia*, (i) the challenged conduct—the defendants’ alleged

activities in connection with the sale of newly-issued securities—was adequately regulated; and (ii) a serious conflict existed between the antitrust and securities regulatory regimes, such that application of the antitrust laws would pose “substantial risk of injury to the securities market.” *Id.* at 284-85.

Bell Atlantic Corp. v. Twombly

The U.S. Supreme Court upheld in 2007 a ruling of Judge Gerard E. Lynch (then a Southern District judge) dismissing an antitrust action, reversing a Second Circuit decision that had overturned Judge Lynch—and clarified the pleading standard a plaintiff must meet to withstand a motion to dismiss.

In *Bell Atlantic Corp. v. Twombly*, the plaintiffs brought a class-action lawsuit alleging that Bell Atlantic and a number of other large communications companies had engaged in anticompetitive behavior in violation of Section 1 of the Sherman Act. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007). Specifically, the plaintiffs alleged that the defendants had disadvantaged smaller telephone companies and overcharged consumers by refraining from entering markets where another large company was dominant (thereby preventing price competition). The complaint focused on parallel conduct and did not allege direct evidence of concerted activity. Judge Lynch dismissed the complaint, holding that it had not alleged sufficient facts to state a claim for a violation of the Sherman Act. *Twombly*, 313 F.Supp.2d 174, 179 (S.D.N.Y. 2003). Specifically, the allegations of parallel business conduct, taken alone, did not state a claim; a complaint must allege additional facts that “ten[d] to exclude independent self-interested conduct as an explanation for defendants’ parallel behavior.” *Id.* at 179. The District Court found that plaintiffs’ allegations of parallel actions to discourage competition were inadequate because “the behavior of each [large telephone company] in resisting the incursion of [smaller telephone companies] is fully explained by the [large company’s] own interests in defending its individual territory.” *Id.* at 183. As to the defendants’ supposed agreement against competing with each other, the District Court found that the complaint had “not alleged facts . . . suggesting that refraining from competing in other territories as the small telephone companies was contrary to [the large companies’] apparent economic interests, and consequently [had] not raised an inference that [the large companies’] actions were the result of a conspiracy.” *Id.* at 188.

The Second Circuit vacated and remanded the Southern District decision, applying a lower pleading standard. The Second Circuit held that the plaintiffs were not required to plead “facts in addition to parallelism to support an inference of collusion” for an antitrust claim based on parallel conduct to survive a motion to dismiss. *Twombly*, 425 F.3d 99, 114 (2d Cir. 2005).

The Supreme Court, in turn, reversed the Second Circuit, agreeing that Judge Lynch’s dismissal of the claim was appropriate. *Twombly*, 550 U.S. at 564. As an initial matter, the Supreme Court clarified the requirements of proving a claim of anti-competitive behavior under Section 1 of the Sherman Act. The Court held that while parallel conduct—actions by competing companies that might be seen as implying some agreement to work together—is “admissible circumstantial evidence” from which an agreement to engage in anti-competitive behavior may be inferred, parallel conduct alone is insufficient to establish a Sherman Act claim. *Id.* at 555-54. As such, the Court found that the allegations of the complaint, largely based on allegations of parallel conduct, failed to meet this standard.

The Supreme Court’s decision is most often cited for its enunciation of a new pleading standard under Fed. R. Civ. P. 8. The Court opined that a plaintiff must come forward with factual allegations that are “plausible” enough to raise a right to relief above the “speculative level” on the assumption that all of the complaint’s allegations are true. *Id.* at 555. (“[A] plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements . . . will not do.”). The Court reasoned that asking for plausible grounds does not impose a “probability

requirement at the pleading stage” and simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. *Id.* at 556. The Court held that because the plaintiffs had not “nudged their claims across the line from conceivable to plausible,” their complaint must be dismissed. *Id.* at 570.

Civil Rights

Doe v. Vill. of Mamaroneck

In *Doe v. Vill. of Mamaroneck*, 462 F. Supp. 2d 520 (S.D.N.Y. 2006), Judge Colleen McMahon found that the Village of Mamaroneck, New York (the “Village”) had discriminatorily enforced its laws and thus had violated the Equal Protection Clause. Day laborers of Latino descent had sued under 42 U.S.C. § 1983, alleging that the Village implemented a “campaign of harassment and intimidation” against the day laborers. *Id.* at 526. The complaint alleged that the Village engaged in discriminatory law enforcement activities targeted at the day laborers even though no records indicated any complaints implicating day laborers in any criminal activity. *Id.* at 531. The Village indefinitely barred day laborers from gathering at a park where they had customarily gathered. As a result of such measures, the hiring of day laborers in Mamaroneck almost completely halted.

In finding in favor of the plaintiffs, Judge McMahon reasoned that, while the laws to reduce the number of day laborers were facially neutral, the laws were discriminatorily applied. She concluded that the increase in police activity was designed to harass the day laborers and that the harassment “was tinged with racism.” *Id.* at 552. Judge McMahon found that the Village’s proffered justification failed because no correlation was shown between the day laborers and increased crime or degraded quality of life. However, Judge McMahon found that plaintiffs’ “selective enforcement” claim failed since the plaintiffs could not demonstrate that a “similarly situated” group was treated more favorably. *Id.* at 544-59.

Finch v. New York State Office of Children and Family Services

New York, like most states, maintains a registry that lists the names of people who have been accused of child abuse where an investigation has revealed evidence to support such an allegation. Adding a name to the registry is easily done, but the consequence of such inclusion can be economically devastating and far-reaching. Before an employer who is engaged in childcare may hire an applicant, the law requires that an inquiry be made to ascertain whether the job applicant is listed on the registry.⁴⁴ If the applicant is not listed, the employer receives a “no hit” letter. If listed, a “hit letter” is sent to the employer, effectively foreclosing any opportunity for the applicant to be gainfully employed in the childcare industry. A name can remain on the registry for up to 28 years.

In 1994, the Second Circuit in *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), held that the legal requirement that employers consult the registry is a government-created impediment to employment that infringes upon the constitutionally protected liberty interest to pursue one’s vocation of choice. *Valmonte* required there must be a due process hearing before a listing is disclosed to a prospective employer. Left undecided was the time in which such due process hearing must take place. *Finch v. New York State Office of Children and Family Services*, filed in February of 2004, challenged the substantial delays in scheduling these hearings. As a result of the *Valmonte* decision, the State did not respond at all to a clearance request when a hearing was pending. Since hearings took years to complete, many people who

⁴⁴Licensing or foster care agencies must also consult the registry. For convenience when referring to employer, we are also including a licensing agency.

were awaiting a clearance lost job opportunities even though 60-70% of the people who eventually received their hearings were exonerated.

Judge Shira Scheindlin certified a plaintiffs' class in *Finch*. 252 F.R.D. 192 (Aug. 11, 2008). After denying the State's motions to dismiss (at 499 F. Supp. 2d 521 (July 3, 2007)), and for summary judgment (No. 04 Civ. 1668, 2008 WL 5330616 (Dec. 18, 2008)), the trial was scheduled to begin in March of 2010.

Before the trial was set to start, a worker at the State Central Registry informed counsel that, after the litigation was filed, certain projects were undertaken that resulted in the wrongful termination of hearing requests. In an attempt to alleviate the backlog of hearings, the State contacted prospective employers who had requested information to determine if those employers were still interested in the job applicant. However, because these calls happened years after a clearance request was made, the employers were typically no longer interested in the applicant. Upon so determining, the State closed the request for a hearing, noting the hearing had been waived. Once marked as "waived," the job applicant and subject of the clearance was permanently foreclosed from receiving a hearing in the future. These actions violated the intent of the statutory scheme that created the registry—that the job applicant has a right to a hearing, not the inquiring employer. See N.Y. Soc. Serv. § 422 *et seq.* After discovery confirmed the "whistleblower's" allegations, the State agreed to settle the claims. Beginning in August 2010, and staggered over 15 months, notices were to be sent to 20,000 people whose hearings were terminated by these projects. The notice advised the class members of their right to reopen their waived hearings. As a result of the settlement, over 1,000 New Yorkers have requested their hearings to be reopened.

As the partial settlement related only to the hearing-termination projects, the question as to how long it should take to complete hearings remained outstanding. The trial to settle that issue was scheduled to start in September 2010 but, on the eve of trial, the parties reached a final settlement. For those whose opportunity to work was impeded, hearings were to be completed in four months. For those whose jobs were not immediately at risk, hearings were to be completed in eight months. Compliance with these time limits was to be monitored by appointed class counsel for up to three years.

McBean v. The City of New York

On October 4, 2007, New York City's Department of Corrections admitted that, since 2002, approximately 150,000 pretrial detainees arraigned on misdemeanors and lesser offenses were illegally strip-searched at admission, even though there was no reason to believe they were concealing drugs or contraband. These strip searches required groups of detainees to fully undress in front of each other and in front of multiple guards, lift their genitals or breasts, spread their buttocks, cough while squatting, and allow guards to inspect their private body cavities. The City admitted that these illegal strip searches had been continuing, despite sworn statements to the court in December 2002 that these strip searches had stopped and despite a 2001 Second Circuit decision, *Shain v. Ellison*, 273 F.3d 56, 65 (2d Cir. 2001), which held that it had been "clearly established" since at least 1995 that these strip searches were prohibited by the Fourth Amendment.

In a settlement approved by the court on October 21, 2010 (preliminarily approved March 22, 2010), the City agreed to immediately cease strip-searching pretrial detainees charged with only non-felony offenses and to pay damages to those illegally strip searched between July 23, 2002 and October 4, 2007. The City also agreed to train all officers to ensure that these strip-search practices would not continue, to revise its policies regarding strip-search procedures, and to post signs at Department of Corrections facilities notifying detainees of their right not to be strip-searched at admission without

reasonable suspicion. An independent monitor, appointed by Judge Gerard Lynch of the Southern District, will “ensure” or “supervise” the City’s compliance. New York City agreed to pay \$33,000,000 in damages to approximately 100,000 pretrial detainees arraigned on misdemeanors and lesser offenses who were illegally strip-searched at admission to a City jail between 1999 and 2007.

At the time of the settlement, other cases challenging strip searches of pretrial detainees were pending in courts throughout the nation. One of those cases went all the way to the United States Supreme Court, which ruled in favor of the government, holding that, in many instances, corrections officials have a right to conduct suspicionless strip searches of people who have been arrested for even minor crimes. *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510 (2012). The Supreme Court’s decision does not affect the 2010 settlement in *McBean*.

Class Action Litigation

In re Amaranth Natural Gas Commodities Litig.

In re Amaranth Natural Gas Commodities Litig., 269 F.R.D. 366 (S.D.N.Y. 2010), was a class action case where Judge Scheindlin established the standard for class certification in a case that alleged market manipulation under the Commodity Exchange Act (“CEA”). In *Amaranth*, the plaintiffs—futures traders who sold or held natural gas futures or options on futures contracts between February 16, 2006 and September 28, 2006—brought a case alleging that the defendants manipulated prices of New York Mercantile Exchange natural gas contracts in violation of Sections 6(c), 6(d), and 9(a)(2) of the CEA.

After outlining the requirements under Fed. R. Civ. P. 23(a), Judge Scheindlin discussed the implied requirement of ascertainability: “[A] class will not be deemed satisfied unless the class description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.” *Id.* at 376-78. The *Amaranth* defendants argued that the proposed class was not ascertainable for either of plaintiffs’ claims on the grounds that some of the potential class members had net short or long positions making it impracticable for the court to determine whether an individual was a class member. *Id.* at 381.

The court, citing Judge Richard Posner of the Seventh Circuit, outlined the requirement for ascertainability with respect to the CEA and concluded that ascertainability can be determined objectively through mechanical calculations—notwithstanding that it would require complex math to determine if a plaintiff held a net long or short position. With CEA cases it is true:

that a class will often include persons who have not been injured by the defendant’s conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts that bear on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification, despite statements in some cases that it must be reasonably clear at the outset that all class members were injured by the defendant’s conduct. Those cases focus on the class definition; if the definition is so broad that it sweeps within it persons who could not have been injured by the defendant’s conduct, it is too broad.

Id. at 283 (quoting *Kohen v. Pacific Inv. Mgmt. Co. LLC (“PIMCO II”)*, 571 F.3d 672, 677 (7th Cir. 2009)).

Judge Scheindlin also discussed the relevant time for a court to evaluate expert testimony in a CEA case, holding that at the class certification stage district courts are only permitted to resolve merits-based factual disputes that overlap with certifications. *Id.* at 384. Plaintiffs are not required to successfully employ their proposed methods for finding causality at the class certification stage. *Id.* at 385. Finally, the fact that damages must be calculated on an individual basis was no impediment to class certification. *Id.* The court determined that plaintiffs fulfilled the requirements of Fed. R. Civ. P. 23(a) and (b) and certified the class.

In Re Methyl Tertiary Butyl Ether Prod. Liab. Litig.

In *In Re Methyl Tertiary Butyl Ether (“MTBE”) Prod. Liab. Litig.*, 209 F.R.D. 323 (S.D.N.Y. 2002), private well owners sought class certification for their claims against 20 oil companies based on the alleged widespread contamination of groundwater as a result of the use of gasoline additives. Judge Scheindlin held that treating this case as a class action would “stretch the decidedly elastic class action device beyond its breaking point—causing it to snap” and denied the plaintiffs’ motions for certification. *Id.* at 329.

In reaching that decision, Judge Scheindlin went through an analysis of class action cases where the primary remedy sought by the plaintiffs was injunctive relief. First, Judge Scheindlin addressed the plaintiffs’ lack of typicality. To do this she looked at a market-share theory of liability. In this case, a majority of the class representatives could identify the responsible gasoline manufacturer, but the ambient well owners would be unable to identify the manufacturer(s) of MTBE that allegedly contaminated their wells. *Id.* at 337-38.

The court also took issue with the adequacy of representation. In order to be certified as a class, the plaintiffs are required to show that the potential class representatives have no interests that are antagonistic to the proposed class members. In this case, a majority of the class representatives could identify the responsible gasoline manufacturer, but the ambient well owners would be unable to identify the manufacturer(s) of MTBE that allegedly contaminated their wells. *Id.* at 337-38. Next, the court took issue with the adequacy of representation. In order to be certified as a class, plaintiffs are required to show that the potential class representatives have no interests antagonistic to the proposed class members. In this case, the plaintiffs failed by attempting a claims-splitting approach where they were suing solely for injunctive relief, a proposal that the court pointed out would “haunt the absent class members whose wells may actually have MTBE levels of regulatory significance.” *Id.* at 338. The court noted that, in seeking only an injunctive relief remedy in a products liability case, the absent class members with personal injury claims or property claims would not be properly represented. *Id.* at 340.

The court also outlined why, for mass tort cases, class certification should not be granted under Fed. R. Civ. P. 23(b)(3). The court held that these cases have inherent problems of individualistic causations that would inevitably result in inefficiency and adequacy issues. *Id.* at 349. *MBTE* is a prime example where the injuries occurred over many years across four states and were caused directly or indirectly by 20 defendants and innumerable third parties. For these reasons, among others, the court denied the plaintiffs’ motion for class certification.

In re Oxford Health Plans, Inc. Sec. Litig.

In re Oxford Health Plans, Inc. Sec. Litig., 191 F.R.D. 369 (S.D.N.Y. 2000), involved a securities fraud class action. Though lead plaintiffs had already moved for class certification, another plaintiff also moved to be appointed lead plaintiff and certified class representative. Here, Judge Charles L. Bricant

held that the proposed class met the prerequisites permitting the case to be maintained as a class action and refused to designate a new class representative or lead plaintiff.

Since this case was a securities class action, the litigation was controlled by the Private Securities Litigation Reform Act of 1995 (“PSLRA”). *Id.* at 372. The class consisted of all persons or entities that purchased Oxford Health Plans, Inc. common stock or call options, or sold Oxford put options, during the class period. *Id.* In its decision, the court defined the difference between being a lead plaintiff and a class representative. In his reading of the PSLRA, Judge Briant found that, although the statute provides that a lead plaintiff must otherwise satisfy the requirements of Rule 23, being a lead plaintiff is not the same thing as being a class representative:

Obviously there will be actions brought under the PSLRA by multiple plaintiffs which do not qualify for class action treatment under Rule 23, perhaps for lack of numerosity or for some other reason. Congress is deemed to have understood this and must have intended that the function of lead plaintiff under the PSLRA be different from class representative under Rule 23. There is no requirement found in the plain meaning of the statute that a Lead Plaintiff accept designation of class representative under Rule 23, and the statute does not provide for any specific action by the Court should it turn out after a Lead Plaintiff has been appointed ... that Lead Plaintiff should on further examination fail to meet all of the requirements of Rule 23, or simply withdraw his or her expression of willingness to serve as Class Representative
....

Id. at 378-79. Observing that the PSLRA does not require lead plaintiffs to qualify as class representatives, the court found it appropriate to appoint a group of lead plaintiffs instead of one class representative. *Id.* at 378. Because of this distinction, the court granted the motion for class certification, but re-opened class discovery so that the defendants could do the appropriate due diligence as to the adequacy of class representatives.

Commercial Law

Int’l Business Machines Corp. v. Papermaster

In *Int’l Business Machines Corp. v. Papermaster*, No. 08-CV-9078 (KMK), 2008 WL 4974508 (S.D.N.Y. Nov. 21, 2008), Judge Kenneth M. Karas granted IBM’s motion for a preliminary injunction enjoining defendant Mark D. Papermaster, a former IBM executive, from working for and disclosing confidential information to Apple Inc.

In October 2008, after 26 years of working for IBM, Papermaster entered into an employment agreement with Apple. IBM filed suit, contending that Papermaster’s contract with Apple violated the non-compete agreement that he had signed with IBM. Judge Karas ruled in IBM’s favor. The court found irreparable injury based in part on Papermaster’s access to the “crown jewels” of IBM’s technology, including sensitive information obtained by virtue of Papermaster’s service on two management groups at IBM. *Papermaster*, 2008 WL 4974508, at *8. Moreover, Judge Karas found that the work for which Apple hired Papermaster would likely draw on his expertise developed at IBM and that such work, especially that involving the iPhone and iPad, would directly compete with IBM. In addition, Papermaster’s non-compete agreement itself acknowledged that IBM would suffer “irreparable harm” if he violated the agreement.

The court also found that the restriction in the non-compete agreement was “limited in time” and that the nature of IBM’s business “requires that the restriction be unlimited in geographic scope.” *Papermaster*, 2008 WL 4974508, at *11. Furthermore, the court held that the balance of hardships tilted in IBM’s favor because IBM’s most valuable asset was its intellectual property, as to which Mr. Papermaster was a “top expert” at IBM. *Id.* at *13.

On January 27, 2009, Apple announced that Papermaster would come to Apple as senior vice president of devices hardware engineering and that the litigation with IBM had been settled.

Jones v. Hirschfeld

Paula Jones brought a sexual harassment lawsuit against then President William J. Clinton in 1994. While that decision was under appeal in 1998, New York real estate mogul Abraham Hirschfeld publicly offered Jones \$1 million to drop the lawsuit. Jones and Hirschfeld then signed an agreement under which Hirschfeld would wire the funds to a trust account held by Jones’s attorneys to be disbursed only once a court order had been entered dismissing with prejudice Jones’s lawsuit against Clinton. They signed the agreement at a press conference on October 31, 1998. Jones thereafter settled the case with Clinton for \$850,000, which resulted in its dismissal.

In 2001, while Hirschfeld was in prison for attempting to hire someone to kill his former business partner, Jones filed suit for breach of contract to obtain the \$1 million. It was undisputed that Jones had not received the funds as per the agreement, but Hirschfeld argued that his agreement with Jones had been rescinded when she entered into the settlement with Clinton. In *Jones v. Hirschfeld*, 348 F. Supp. 2d 50 (S.D.N.Y. 2004), Judge Peter K. Leisure held that Jones had rescinded her agreement with Hirschfeld by abandonment and granted Hirschfeld’s two-page motion for summary judgment. *Id.* at 62-63. Hirschfeld’s memorandum in support of summary judgment relied on a letter from Jones’s attorney to Clinton’s attorney the same day the settlement agreement was signed, which stated that it was the final offer to settle the lawsuit in the amount of \$850,000. The letter represented that “the money from Mr. Abraham Hirschfeld is no longer on the table and that there will be no payment from Mr. Hirschfeld as part of the settlement with your client [Clinton].” *Id.* at 54. Jones’s settlement agreement with Clinton further provided that it was “not subject to any condition, and that the consideration recited herein is the sole consideration for the parties’ agreement to this Stipulation.” *Id.* at 55.

Judge Leisure ruled that Jones’s “statements of her intentions [in her August 2002 declaration] made almost four years after the fact during the course of litigation, are insufficient to create a genuine issue of material fact in light of her previous unequivocal manifestations of intent to abandon the October 31 agreement.” *Id.* at 61. Thus, Jones’s claims to the \$1 million payout were dismissed.

SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC

After a trial at which then-Chief Judge Michael B. Mukasey presided, a jury in *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*,⁴⁵ found that nine insurers were bound by agreements that permitted the destruction of the twin towers, 1 World Trade Center and 2 World Trade Center, on September 11, 2001, to be defined as two occurrences, rather than one. The developer of the World Trade Center property had asserted that the applicable insurance policies should be interpreted such that two crashes into two different towers at two different times constituted two separate attacks, entitling the developer to recover up to \$7 billion for two occurrences, as opposed to the \$3.5 billion for one occurrence. The verdict enabled the developer of the World Trade Center site to seek as much as \$1.1 billion in additional coverage.

Previous juries, however, had held that the terrorist attacks constituted one “occurrence” under the terms of certain insurance contracts. The two-phase jury trial presided over by Judge Mukasey determined (i) which insurers were bound to an insurance form that contemplated treating the September 11th attacks as a single occurrence, and (ii) the number of occurrences for each insurer who did not bind to that insurance form. Certain insurers who lost at Phases One and Two of the jury trial appealed the verdict.

The Second Circuit affirmed the judgments entered by the trial court following those two jury verdicts. *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC*, 467 F.3d 107 (2d Cir. 2006). The court concluded that the defined term “occurrence” was not unambiguous. *Id.* at 138. It also rejected a host of purported evidentiary errors, including the admission of expert testimony and evidence of subjective intent and the exclusion of evidence of custom and usage.

Starr Int'l Co. v. Am. Int'l Group, Inc.

In July 2009, a jury in the Southern District, at which Judge Jed Rakoff presided, decided that Maurice R. Greenberg, the former chief executive officer of American International Group (“AIG”) did not wrongfully seize \$4.3 billion in company stock in *Starr Int'l Co. v. Am. Int'l Group, Inc.*, 648 F. Supp. 2d 546 (S.D.N.Y. 2009).

The case revolved around AIG’s retirement plan, which for 35 years was operated by Starr International (“SICO”), AIG’s largest shareholder. In 2005, Greenberg ended the AIG retirement plan and sold its stock for \$4.3 billion. *Id.* at 559. AIG alleged that the stock was in a trust and that Greenberg had no right to sell the stock. Two claims remained for the jury to decide: (i) AIG’s breach-of-trust counterclaim, which alleged that SICO, a company allegedly controlled by Greenberg, held certain AIG stock subject to an express trust for the benefit of AIG and that SICO had breached this trust; and (ii) AIG’s conversion counterclaim, which principally alleged that SICO had converted AIG stock for its own use. *Id.* at 549. Judge Rakoff determined that a jury would decide the second claim and would render an advisory verdict on the first claim. After a three-week trial, the jury rejected both claims, finding that SICO was not liable on either the breach of trust or conversion claims. Judge Rakoff entered judgment on those claims, accepting the jury’s advisory verdict on AIG’s breach-of-trust counterclaim. *Id.* at 549.

⁴⁵ The World Trade Center litigation gave rise to numerous opinions in the lower court. *E.g.*, *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 445 F. Supp. 2d 356 (S.D.N.Y. 2006); *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC*, 2006 U.S. Dist. LEXIS 79326 (S.D.N.Y. Oct. 31, 2006); *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 407 F. Supp. 2d 587 (S.D.N.Y. 2006); *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 381 F. Supp. 2d 250 (S.D.N.Y. 2005).

In re Citigroup Inc. S'holder Derivative Litig.

Judge Sidney H. Stein of the Southern District dismissed without prejudice a multi-billion dollar derivative action brought by Citigroup shareholders—one of the first derivative cases involving the financial crisis of 2008-09 in which a published opinion was rendered. *In re Citigroup Inc. S'holder Derivative Litig.*, No. 07 Civ. 9841, 2009 U.S. Dist. LEXIS 75564 (S.D.N.Y. Aug. 25, 2009). The plaintiffs alleged that certain current and former officers and directors of Citigroup, its board of directors, and subsidiaries (the “defendants”) had breached their fiduciary duties of care and loyalty by allowing Citigroup to make risky mortgage-related investments, ignoring “red flags” that should have alerted them to the impending financial crisis. Second, the plaintiffs alleged that the defendants had failed to inform shareholders of Citigroup’s exposure to risky subprime mortgage-backed securities. Third, the plaintiffs argued that the defendants had breached fiduciary duties and wasted corporate assets by causing Citigroup to repurchase its own stock. Fourth, the plaintiffs contended that the defendants committed securities fraud by failing to disclose the extent of Citigroup’s investment in subprime assets. Fifth, the plaintiffs alleged that some defendants committed insider trading.

Judge Stein dismissed all of these claims, concluding that the allegations in the complaint were insufficient to establish that plaintiffs were excused from the pre-suit demand requirement. Applying the business judgment rule, Judge Stein held that the defendants did not face a substantial likelihood of liability because the plaintiffs did not allege that the defendants acted in bad faith. At most they alleged that the defendants had made bad business decisions. *Id.* at *21. As for the non-disclosure claims, the court held that the complaint failed to allege with particularity which disclosures were misleading. *Id.* at *24. The plaintiffs had not alleged that the purported misstatements were made knowingly or in bad faith, or with the substantial involvement and knowledge of the defendants. *Id.* at *25. The court rejected the securities fraud and insider trading allegations on similar grounds—a lack of particularity in pleading and a failure to allege the involvement of the defendants in the alleged misconduct. *Id.* at *30-35.

The court also rejected the stock repurchase claims because the plaintiffs had failed to allege that the repurchases were so one-sided that “no reasonable and ordinary business person” would have considered the consideration sufficient. *Id.* at *28. In addition, the plaintiffs again failed to allege bad faith and alleged at most, according to the court, a bad business decision. *Id.* at *29.

NYSRA I

The City of New York’s Department of Health and Mental Hygiene adopted Health Code § 81.50 (“Regulation 81.50”) to take effect on July 1, 2007. The regulation was to apply to standardized menu items for which calorie content information was made publicly available on or after March 1, 2007. The regulation required restaurants to post the caloric content value for such items on their menus in a typeface at least as large as the name or price of the item, whichever was larger. The City of New York explained that it enacted Regulation 81.50 in response to the obesity epidemic in America—and in New York specifically. The New York State Restaurant Association brought suit alleging that Regulation 81.50 was preempted by federal law and unconstitutional.

In *New York State Restaurant Ass’n v. New York City Bd. of Health*, 509 F. Supp. 2d 351 (S.D.N.Y. 2007) (“*NYSRA I*”), Judge Richard J. Holwell ruled in favor of the New York State Restaurant Association, finding that Regulation 81.50 was preempted by the Nutrition Labeling and Education Act of 1990, PL 101–535, November 8, 1990, 104 Stat 2353 (“NLEA”). Section 343(r) of the NLEA requires a purveyor to use regulated terms if it labels its food by specifying the levels of any nutrient. Section 343(r) applies only where a purveyor voluntarily chooses to make such a claim. The NLEA expressly preempts states from regulating voluntary claims under Section 403(r), unless the states’ requirements are identical

to the federal requirements. *See* 21 U.S.C. § 343-1(a)(5). Judge Holwell held that, because Regulation 81.50's requirements applied only if a restaurant chooses to make calorie content information available, the provisions of Section 343(r) were implicated and, thus, preempted by Section 343-1(a)(5). *NYSRA I* at 363. The City of New York was therefore permanently enjoined from enforcing Regulation 80.51.

NYSRA II

The City of New York did not appeal Judge Holwell's ruling in *NYSRA I* and instead sought to cure Regulation 81.50's deficiencies. The revamped Regulation 81.50 required mandatory compliance by restaurants that were part of a national chain of 15 or more food service establishments with standardized menu items. Judge Holwell revisited the preemption issue with respect to the revised Regulation 81.50 in *New York State Restaurant Ass'n v. New York City Bd. of Health*, No. 08 Civ. 1000 (RJH), 2008 WL 1752455 (S.D.N.Y. April 16, 2008) ("*NYSRA II*"). He ruled that, because compliance with the regulation was now mandatory, preemption would be governed by NLEA § 343-1(a)(4), which made expressly clear that the federal statute did not apply to food served in restaurants. *Id.* at *5. Accordingly, the revised Regulation 81.50 was not preempted.

Judge Holwell further dismissed NYSRA's argument that Regulation 81.50 violated a First Amendment right to be free from compelled speech. Judge Holwell distinguished "the mandatory disclosure of factual and uncontroversial information" from "the compelled endorsement of a viewpoint." *Id.* at *9 (internal citations omitted). The court further ruled that Regulation 81.50 was reasonably related to the City of New York's interest in reducing obesity. *Id.* at *12. Accordingly, the court declined to enter a preliminary injunction against the revised regulation.

In re Fosamax Products Liability Litigation

More than 900 cases were consolidated as part of the multidistrict litigation in *In re Fosamax Prods. Liab. Litig.*, No. 06 MD 1789. Plaintiffs sued Merck & Co., Inc. ("Merck") alleging that its osteoporosis drug Fosamax caused osteonecrosis of the jaw ("ONJ"), a condition that results in exposure of nonvital bone tissue that can lead to jawbone disintegration. Judge John F. Keenan presided over issues common to the consolidated cases.

Shirley Boles, a 71-year-old Florida resident and former deputy sheriff, alleged that taking Fosamax for almost ten years resulted in ONJ and stunted bone healing that caused her to develop ongoing infections following a tooth extraction. Boles's case was one of several selected as bellwethers in the Fosamax litigation. The parties hotly disputed the point at which Merck should have warned patients about Fosamax's potential risks and whether that duty arose prior to when Boles developed ONJ. In *In re Fosamax Products Liability Litigation*, 647 F. Supp. 2d 265, 275 (S.D.N.Y. 2009), Judge Keenan held that the adequacy of the warning would be assessed at the time of the injury and the time at which the product left the manufacturer's control. After Boles's first trial ended in a hung jury, the retrial resulted in an \$8 million verdict for the plaintiff. Judge Keenan subsequently ordered a remittitur of the verdict to \$1.5 million in *In re Fosamax Prods. Liab. Litig.*, 742 F. Supp. 2d 460, 486 (S.D.N.Y. 2010). Two other cases, *Flemings v. Merck & Co., Inc.*, 06 Civ. 7631 (JFK) and *Greene v. Merck & Co. Inc.*, 06 Civ. 5088 (JFK), were also chosen as initial bellwethers along with Boles's case. Both *Flemings* and *Greene* resulted in verdicts in favor of defendant Merck.

Criminal Law

United States v. Gotti

John A. Gotti III, a/k/a Junior Gotti, son of convicted Gambino boss John J. Gotti, Jr., was the target of two federal indictments. The first indictment was filed in 2004 and charged him with 11 counts of racketeering as well as several other crimes. One of those counts alleged a plot to kill Curtis Sliwa, radio host and founder of the Guardian Angels, for denouncing Gotti as “Public Enemy No. 1.” The second indictment included charges under the Racketeer Influenced and Corrupt Organizations Act and murder conspiracy charges derived from a drug trafficking ring he ran, along with the murders of two drug ring associates. This indictment was first filed in Florida in 2008 but later moved to New York and tried in the Southern District.

Though Gotti failed to have some counts of the first indictment dismissed because he argued they were covered under a previous plea deal in the late 1990s, the federal prosecutors still did not have an easy time proving their case. The first three trials all ended in hung juries. These trials were dramatic and included press demands for greater information access, jurors questioning prosecution witnesses’ credibility, presiding Judge Kevin Castel dismissing two bickering jurors on November 4, 2009, and angry outbursts from Gotti’s mother about her son being “railroaded” like his father by the prosecutors. Nonetheless, Gotti continued to deny the charges, saying he left the mob long before the crimes in question occurred, which enabled him to avoid conviction in the first three trials. By December 1, 2009, the fourth trial also ended in a hung jury. Not long afterward, U.S. Attorney Preet Bharara issued a *nolle prosequi* order on January 13, 2010, declaring that no further prosecutions of Gotti will be made on these charges.

Gotti’s uncle, Peter Gotti, was convicted on charges of conspiring to murder, construction industry extortion, and racketeering in a 2004 trial presided over by Judge Richard C. Casey. The conviction was upheld by the Second Circuit in 2007. *United States v. Matera*, 489 F.3d 115 (2d Cir. 2007). At the time of his conviction, Gotti was already serving nine years in prison for a conviction on separate money-laundering and racketeering charges. Peter Gotti was convicted for plotting to kill Salvatore Gravano, known to the Gambino crime family as Sammy the Bull, for Gravano’s cooperation with authorities in the 1992 murder conviction of John J. Gotti, Jr.

United States v. Muse

Abduwali Abdukhadir Muse, a Somali teenager, was tried for federal hijacking and kidnapping in 2009 for a piracy incident involving a U.S. container ship, the Maersk Alabama, in international waters off the coast of Somalia in the Indian Ocean. Muse and a gang of three other gun-toting pirates boarded the ship on April 8, 2009, taking Captain Richard Phillips hostage on one of the Alabama’s lifeboats. Navy SEAL snipers killed Muse’s three cohorts on April 12 and rescued Captain Phillips, leaving Muse to be taken into custody by the U.S. Navy.

Muse later was taken into FBI custody and flown to the Southern District on April 20, 2009. He was the first person to be tried for piracy in an American court in more than 100 years. According to a report in *The Guardian*, U.S. authorities decided to bring Muse to New York because he was arrested in international waters and the FBI in New York had acquired a specialty in dealing with East African legal affairs.

Magistrate Judge Andrew J. Peck first determined in a closed hearing on April 21, 2009 that Muse was at least 18 years old, allowing him to be tried as an adult. This ruling came after his parents

claimed that he was 16, which would have placed limits on his trial and sentence. The next month, on May 19, a federal grand jury returned a ten-count indictment against Muse, including the piracy charge and possession of a firearm. However, Muse pled guilty to felony charges of hijacking, kidnapping, and hostage-taking one day earlier.

On February 16, 2011, Chief Judge Loretta A. Preska sentenced Muse to almost 34 years in prison for his participation in the hijacking of the Maersk Alabama and hostage taking and for his hijacking of two other vessels earlier in 2009. Regarding the sentencing, FBI Assistant Director Janice K. Fedarcyk said, “The stiff sentence handed down today sends a clear message to others who would interfere with American vessels or do harm to Americans on the high seas: Whatever seas you ply, you are not beyond the reach of American justice, and you will be held accountable for your actions.”

U.S. v. Stewart

On March 5, 2004, a jury convicted celebrity business magnate and television personality Martha Stewart of conspiracy, making false statements to investigators in violation of 18 U.S.C. § 1001, and obstruction of an agency proceeding. The statements at issue were made during an investigation to determine whether Stewart had traded on inside information when she sold shares of stock in ImClone Systems, Inc. (“ImClone”), whose CEO was a close friend of her Merrill Lynch stockbroker, Peter Bacanovic. In the same trial, Bacanovic also was convicted. Stewart sold her almost 4,000 shares of ImClone stock two days after the Food and Drug Administration had rejected ImClone’s application for approval of a cancer-fighting medication called Erbitux. Stewart’s shares were sold one day prior to ImClone’s public disclosure of the rejection.

Following their convictions, Stewart and Bacanovic moved for a new trial pursuant to Fed. R. Crim. P. 33, claiming that one of the jurors deliberately concealed material information in his jury questionnaire. Judge Miriam Goldman Cedarbaum denied the motion for retrial in the absence of that juror’s bias, noting that “the law is clear that lack of candor, in the absence of evidence of bias, does not undermine the fairness of defendant’s trial.” *U.S. v. Stewart*, 317 F. Supp. 2d 432, 443 (S.D.N.Y. 2004).

Stewart and Bacanovic brought a further motion for retrial after the government indicted one of its trial experts, alleging that he committed perjury in his trial testimony. Judge Cedarbaum again denied Stewart’s request for a new trial, ruling that the false testimony had not influenced the jury and that “Stewart was convicted on the testimony of Bacanovic’s assistant, her own assistant, and her best friend.” *U.S. v. Stewart*, 323 F. Supp. 2d 606, 622 (S.D.N.Y. 2004).

Both opinions were upheld on appeal in *United States v. Stewart*, 433 F.3d 273, 288 (2d Cir. 2006). Stewart ultimately received a sentence that included a five-month term in federal prison, five months of house arrest and two years of probation.

E-Discovery

Any discussion of E-Discovery in the Southern District must start with Judge Shira A. Scheindlin’s decisions in the *Zubulake* case, as these five decisions shaped E-Discovery in the decade and became well known throughout the country. Below is a brief summary of the *Zubulake* Five:

Zubulake I, II, III

In *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (“*Zubulake* I”), a plaintiff in a gender-discrimination suit requested that the defendant employer produce “[a]ll documents concerning

any communication by or between UBS employees concerning the plaintiff.” After defendant’s production was demonstrably lacking, plaintiff requested that defendant produce email from archival media and other backup media. Claiming undue burden and expense, the defendant urged the court to shift the cost of production to the plaintiff. The court modified the eight-factor cost-shifting test in *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), explaining that application of the *Rowe* factors may unfairly shift costs away from large defendants, particularly in high-stakes litigation. Using a modified seven-factor test, the court ordered the defendant to produce, at its own expense, all responsive email existing on its active servers and on certain backup media.⁴⁶ The court left open the question of cost-shifting for after the contents of defendant’s archival and backup media were reviewed and the defendant’s costs were quantified. *See also Zubulake v. UBS Warburg, LLC*, 230 F.R.D. 290 (S.D.N.Y. 2003) (*Zubulake II*); *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*) (discussing cost-shifting).

Zubulake IV

In *Zubulake IV, Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003), the court considered spoliation of evidence. In the restoration effort resulting from previous *Zubulake* decisions, the parties discovered that certain backup data was missing and that emails had been deleted. The plaintiff moved for evidentiary and monetary sanctions. Despite finding the requisite culpability to order severe sanctions, the court found that plaintiff could not demonstrate that the lost evidence would have supported her claims and, accordingly, did not give an adverse inference instruction to the jury. 220 F.R.D. at 221. Instead, the court ordered the defendant to bear plaintiff’s costs for re-depositing certain witnesses for the limited purpose of inquiring into the destruction of electronic evidence and any newly discovered emails.

Zubulake V

In *Zubulake V, Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004), the court revisited its earlier sanctions determinations based upon new evidence that the employer had willfully deleted relevant emails despite contrary court orders. The court granted the motion for sanctions and also ordered the employer to pay certain costs. The court held defense counsel partly to blame for the document destruction because it had failed in its duty to locate relevant information, to preserve that information, and to timely produce that information. In addressing the role of counsel in litigation generally, the court stated, “Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” *Id.* at 432. Specifically, the court concluded that attorneys are obligated to ensure that all relevant documents are discovered, retained, and produced. Additionally, the court declared that litigators must guarantee that identified relevant documents are preserved by placing a “litigation hold” on the documents, communicating the need to preserve them, and arranging for safeguarding of relevant and accessible archival media. *Id.* at 431-32.

The *Zubulake* decisions have been adopted in New York State courts as well. In early 2012, the Appellate Division, First Department, twice held that the costs of searching and producing documents and electronically stored information in response to discovery requests falls initially on the party responding to the requests—and that courts may later shift that cost at their discretion. This standard was applied in

⁴⁶ The seven factors were: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production compared to the amount in controversy; (4) the total cost of production compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issue at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.

Voom HD Holdings v. EchoStar Satellite LLC, 600292/08, 2012 N.Y. App. Div. LEXIS 559 (1st Dep't Jan. 31, 2012) and again in *U.S. Bank Nat'l Ass'n v. GreenPoint Mortgage Funding Inc.*, 600352/09, 2012 N.Y. App. Div. LEXIS 1487 (1st Dep't Feb. 28, 2012). In the latter opinion, Justice Rolando T. Acosta wrote that the court was "persuaded that *Zubulake* should be the rule in this Department." *Id.* at *2.

Pension Committee of Univ. of Montreal Pension Plan v. Banc of America Securities, LLC

Rounding out the decade, Judge Scheindlin handed down *Pension Committee of Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. Jan. 15, 2010). In *Pension*, the court held that a party that deletes documents may be sanctioned even when the violating party did not act in bad faith. In cases of "gross negligence," which falls short of "bad faith" or intentional misconduct, courts may give an adverse inference instruction to the jury. Under *Pension*, "gross negligence" can be found based on "the failure to issue a written litigation hold." *Id.* at 488. "Gross negligence" also can be found where a party has not met its obligation to preserve backup tapes. *Id.* at 465. Indeed, the court clarified that a party must preserve backup tapes if the tapes are the sole source of relevant information and that the tapes must be searched if relevant material either exists or should have existed and was not otherwise produced. *Id.* at 471. Following *Pension*, a party also may be grossly negligent if it relies on employees alone to identify responsive documents without any supervision from counsel. *Id.* at 473.

Environmental

Benzman v. Whitman

In *Benzman v. Whitman*, 2006 U.S. Dist. LEXIS 4005 (S.D.N.Y. 2006), Judge Deborah Batts granted in part and denied in part a motion to dismiss a putative class action on behalf of, among others, residents, workers, and students of lower Manhattan and Brooklyn allegedly exposed to dust, debris, and contamination from the collapse of the World Trade Center. The Second Circuit reversed, in part, holding that the complaint should be dismissed in its entirety. *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008).

The suit alleged that the United States Environmental Protection Agency ("EPA") and its former Administrators Christine Todd Whitman, Marianne Hoinko, and Michael Leavitt undertook a series of actions "which consistently exemplified a concerted effort on the part of the EPA to avoid responsibility for the interior clean-up of buildings contaminated by the WTC Dust despite its legal obligations to do so and despite the health risk such contaminants have posed to the occupants." *Id.* at 14. These actions allegedly included statements made by the EPA, Whitman and Hoinko, the failure of defendants to uphold their obligations under law, the improper delegation of indoor cleanup to the City of New York, and the inadequate voluntary cleanup program implemented belatedly in 2003. *Id.* at *15.

Plaintiffs alleged that the defendants' actions violated principles of substantive due process. Judge Batts held that substantive due process could be violated by governmental action that increases the risk of bodily harm and "shocks the conscience." Judge Batts further opined that "Whitman's reassuring and misleading statements of safety after the September 11, 2001 attacks are without question conscience-shocking. The pleaded facts are sufficient to support an allegation of a violation of the substantive due process right to be free from official government policies that increase the risk of bodily harm" *Id.* at *58.

In assessing plaintiffs' claim of personal liability against Whitman under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), Judge Batts also rejected Whitman's defense of qualified immunity, holding that "[n]o reasonable person would have thought that telling thousands of people that it was safe to return to Lower Manhattan, while knowing that such return could pose long-term health risks and other dire consequences, was conduct sanctioned by our laws."

The court dismissed certain claims brought against the EPA under the Administrative Procedure Act ("APA"), finding that the regulations were discretionary in nature and precluded from judicial review by § 5148 of the Stafford Act. However, the court held that it had jurisdiction over constitutional claims and held that the plaintiffs had stated a claim for the reasons set out in the court's substantive due process analysis. The court further concluded that the EPA's World Trade Center cleanup actions were a "final agency action" reviewable under the APA and thus declined to dismiss the plaintiffs' non-constitutional APA claims.⁴⁷

The Second Circuit reversed the lower court's finding of personal liability against Whitman, holding that Whitman had qualified immunity because plaintiffs had not shown that Whitman violated "clearly established" law. *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008). The court stated that "no court has ever held a government official liable for denying substantive due process by issuing press releases or making public statements" and further noted that "Congress has already provided a statutory cause of action for claims 'arising out of' the airplane crashes that destroyed the WTC towers." *Id.* at 125-26.

The Second Circuit also found that no denial of substantive due process had been established because Whitman made her public statements after making a deliberate policy choice to accept the reassurances made by the White House. The Second Circuit ruled that a deliberate choice implicating competing governmental considerations "would preclude a valid claim of denial of substantive due process in the absence of an allegation that the government official acted with intent to harm."

The Second Circuit noted that the plaintiffs had come forward with no showing that Whitman herself had personal knowledge of the risks posed by the debris, dust, and contamination resulting from the September 11 attack. *Id.* at 129. The Second Circuit also reversed the lower court's ruling on the APA claim, holding that there was no reviewable "final agency action." *Id.* at 132.

First Amendment

Fifth Avenue Presbyterian v. City of New York

In 2001, the City of New York notified the Fifth Avenue Presbyterian Church (the "Church") that homeless persons would no longer be permitted to sleep on the covered landings of the Church's steps, although the Church had expressly invited them to do so. On more than one occasion, police removed the homeless from the Church's property. The Church, its outreach associate, and 10 homeless persons brought claims against the City of New York seeking a permanent injunction and claiming their constitutional rights had been violated.

In *Fifth Avenue Presbyterian Church v. City of New York*, No. 01 Civ. 11493, 2004 WL 2471406 (S.D.N.Y. 2004), Judge Lawrence M. McKenna found that the Church's actions in allowing the homeless to sleep outdoors on Church property were based on a sincerely held religious belief. Judge McKenna held that the City's actions were overbroad because it chose to implement a policy that effectively banned

⁴⁷ The court also dismissed the plaintiffs' count for mandamus and their claim under the Comprehensive Environmental Response, Compensation and Liability Act.

all homeless persons from sleeping on the Church's outdoor property rather than entering that property to address specific instances of unlawful conduct, an approach to which the Church had already consented. The Court further held that the City's conduct was under-inclusive because it targeted activities, such as public urination on the Church's private property, that occur regularly on public property. The defendants' attempt to justify their actions as necessary to address a public nuisance was rejected. In so holding, Judge McKenna noted that "the nuisance standard in New York City is necessarily different than in other locales because in a densely populated municipality daily interactions, and even altercations are far more extensive than elsewhere, are not uncommon and are all a part of life in a crowded metropolis." *Id.* at *8 (internal citations omitted).

Judge McKenna held for the plaintiffs that the City's actions unconstitutionally burdened the Church's free speech rights after the Church explained that its actions were expressive conduct meant to tell the world "that the poor and the homeless are welcome and not forgotten" and that their actions were meant to be a "visible and easily understood challenge to our society's tendency toward apathy, materialism, despair and irresponsibility." *Id.* at *10. The court entered a judgment permanently enjoining the defendants from entering the Church's steps to disperse or arrest the homeless in the absence of unlawful conduct or during an officially declared winter alert. The Second Circuit affirmed this order in *Fifth Ave. Presbyterian Church v. City of New York*, 177 F. App'x 198, 199-200 (2d Cir. 2006).

Housing Works, Inc. v. Safir

In *Housing Works, Inc. v. Safir*, 101 F. Supp. 2d 163 (S.D.N.Y. 2000), Judge Harold Baer enjoined the City of New York from enforcing a regulation restricting the number of protesters allowed to protest on the steps of City Hall. This was the third time plaintiff Housing Works had obtained an injunction preventing the city from placing specific numerical restrictions on who could attend events held near City Hall.

In 1998, the City adopted a policy prohibiting certain public gatherings and limiting gatherings near City Hall to 50 people. The restrictions, however, were later amended and incorporated in the final rules to exclude "public ceremonies and commemorations, inaugurations, award ceremonies, celebrations, festivals and similar events which have traditionally been organized or sponsored by the City of New York" *Id.* at 165, 166.

Judge Baer invalidated these restrictions on the ground that the exception for events that had "traditionally been organized or sponsored" would permit the City to pick and choose which events could fall under the rules. *Id.* at 169. Judge Baer ruled that such content-based choices would violate the First Amendment: "It is hard for this Court to imagine that a celebration of the Yankee's (sic) victory is inherently a governmental activity and worthy of City Hall sponsorship while the commemoration for World Aids Day is relegated to an event with no more than fifty or one hundred and fifty participants." *Id.* Judge Baer ruled that the City's rules with regard to numerical limits were not sufficiently narrowly tailored to justify a restriction on the First Amendment, especially since the City had held other events, such as the Yankees celebration, where more than 50 people attended.

Pappas v. Giuliani

The plaintiff, a former New York City police officer, claimed that his firing for responding to charitable solicitations by anonymously mailing racist and anti-Semitic material (apparently not written by him) in approximately 200 mailings to different charities violated his First Amendment rights. In a departmental trial commenced after his identity became known and reported in the media, plaintiff

unsuccessfully claimed that the speech was not on a matter of public concern and that the potential for disruption of police functions was outweighed by the value of the speech. The Police Department then fired plaintiff.

Bypassing Article 78 review, plaintiff filed a federal lawsuit. On cross-motions for summary judgment, Judge Naomi Reice Buchwald resolved an issue then of first impression in the Second Circuit: whether judicially unreviewed determinations of law made in administrative proceedings were entitled to collateral estoppel effect. Judge Buchwald held that collateral estoppel would not preclude her own independent examination of the First Amendment issues, specifically, whether the mailings were on matters of public concern and whether the Police Department's interest in maintaining efficiency and collegiality outweighed any First Amendment protection to which the speech would otherwise be entitled. *Pappas v. Giuliani*, 118 F. Supp. 2d 433, 443-44 (S.D.N.Y. 2000).

Judge Buchwald rejected plaintiff's claim "that somehow, by anonymously sending his white supremacist literature to any charity with the misfortune of soliciting a donation from him, he was commenting on perennial matters of public concern such as taxation, political history, race and religion," and held that plaintiff's speech was not on a matter of public concern and, therefore, did not implicate the First Amendment. *Id.* at 445.

Alternatively, Judge Buchwald held that if plaintiff's speech were considered a matter of public concern, the Police Department had a reasonable basis for "concern about the potential disruption of having a known racist officer on the force and in the media spotlight." She therefore granted defendants' summary judgment motion. *Id.* at 447.

The Second Circuit affirmed 2-1 with three different opinions. *Pappas v. Giuliani*, 290 F.3d 143 (2d Cir. 2002). Judge Leval, joined by District Judge McMahon sitting by designation, assumed that plaintiff's speech was on a matter of public concern but held that a police officer distributing racist materials damages the ability of the Police Department to function effectively in the community and sufficiently outweighs the officer's interest in engaging in such speech. In a separate opinion, Judge McMahon said that she also would have affirmed on the independent ground that the speech in question was not on a matter of public concern. Judge Sotomayor issued a dissenting opinion finding what the majority assumed—that the speech in question was on a matter of public concern—and that plaintiff's right to speak on such matters outweighed the detriment to effective police operations. She emphasized that plaintiff was obscure, employed in a position involving no public contact, and could not have been thought to be expressing the Police Department's views, and the acts at issue occurred away from the office on the plaintiff's own time.

Locurto v. Giuliani

The long-running *Locurto* litigation revisited similar issues in a more dramatic context. A New York City police officer and two New York City firefighters, all white, participated in a Labor Day parade in Broad Channel, Queens. They wore blackface, lipstick, and Afro wigs, along with stereotypically black urban clothing, and rode a float entitled "Black to the Future," depicting a vision of a more integrated Broad Channel neighborhood in 2098. The float was festooned with buckets of fried chicken and watermelon. One of the participant plaintiffs held onto the tailgate of the float screaming, re-enacting the then-recent killing of a black man in Texas dragged to his death behind a truck. The float drew considerable media attention.

Mayor Giuliani expressed his outrage and directed the Police and Fire Commissioners to fire any employees shown to have participated in the "disgusting display of racism." Plaintiffs were fired after

departmental hearings. Plaintiffs then sued for violations of their First Amendment and due process rights.

The early rounds of the litigation mainly involved such issues as *res judicata* and qualified immunity. See *Locurto v. Giuliani*, 95 F. Supp. 2d 161 (S.D.N.Y. 2000), *rev'd in part*, 264 F.3d 154 (2d Cir. 2001). After discovery and further proceedings, Judge John E. Sprizzo granted plaintiffs' summary judgment motion. *Locurto v. Giuliani*, 269 F. Supp. 2d 368 (S.D.N.Y. 2003).

Judge John E. Sprizzo held that the speech in question was on race relations, a matter of public concern, regardless of whether the speech was "inappropriate or controversial" or whether plaintiffs were also "motivated by an ill-conceived desire to be humorous." 269 F. Supp. 2d at 385, 387. He rejected defendants' argument that they were motivated by a reasonable fear of disruption because of the lack of evidence of internal departmental disruption and evidence that defendants were concerned about external community reaction, which, in Judge Sprizzo's view, amounted to a heckler's veto.

The Second Circuit reversed. *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006). Although the court suggested that a public employee's off-duty speech unrelated to employment was presumptively entitled to First Amendment protection regardless of whether it touched on a matter of public concern, the court assumed, as Judge Sprizzo had found, that the speech in question was on a matter of public concern. But the court rejected as a false dichotomy Judge Sprizzo's contrast between concern for disruption and concern for adverse public reaction. Given the need for agencies like police and fire departments to maintain the trust and confidence of the communities they serve, the court held that it was reasonable for defendants to fear that adverse public reaction would impair departmental functions and that the potential for such disruption outweighed the plaintiffs' rights to free expression: "The First Amendment does not require a Government employer to sit idly by while its employees insult those they are hired to serve and protect." *Id.* at 183.

Weingarten v. Board of Educ. of the City of New York

In *Weingarten v. Board of Educ. of the City of New York*, 680 F. Supp. 2d 595 (S.D.N.Y. 2010), Judge Lewis A. Kaplan granted summary judgment dismissing a challenge to Board of Education regulations prohibiting school employees, while on duty or in contact with students, from wearing buttons, pins, or other items "advocating a candidate, candidates, slate of candidates or political organization/committee." *Id.* at 597.

Plaintiffs presented expert testimony to the effect that, at least in high school, students would not tend to associate a teacher's political paraphernalia with any official school message, which Judge Kaplan rejected both as inadmissible under Federal Rule of Evidence 702 and, more fundamentally, because it would have been immaterial. The constitutionality of the regulation turned not on whether a reasonable person would associate the political paraphernalia with government sponsorship but whether "the governing boards of schools are constitutionally permitted, within reason, to regulate the speech of teachers in the classroom for legitimate pedagogical reasons." *Id.* at 600.

Judge Kaplan found that the Board's concern for not exposing captive student audiences to partisan speech, because it might impinge on the rights of students to learn in an atmosphere free of partisan political influence, was a legitimate pedagogical concern, that the regulation was a viewpoint-neutral "good faith professional judgment . . . about the effects of teachers' political campaign buttons in public schools," and that, consequently, the regulation was constitutional. *Id.* at 602.

NYC C.L.A.S.H., Inc. v. City of New York; The Players, Inc. v. City of New York

New York State's and New York City's smoking restrictions generated challenges based on, *inter alia*, First Amendment rights of free speech, association, and assembly. In *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461 (S.D.N.Y. 2004) and *The Players, Inc. v. City of New York*, 371 F. Supp. 2d 522 (S.D.N.Y. 2005), Judge Victor Marrero dismissed the claim that the smoking restrictions "unduly interfere with smokers' right to associate freely with whomever they choose in the pursuit of any protected First Amendment activity." 315 F. Supp. 2d at 473. He also rejected plaintiffs' "association-plus" theory because it would "embellish the First Amendment with extra-constitutional protection for any ancillary practice adherents may seek to entwine around fundamental freedoms," unduly curtailing the government's power to regulate harmful activities. *Id.* at 474. Judge Marrero likewise dismissed the free speech claim because smoking lacked an articulable message and was generally not, therefore, expressive activity, and because smoking was not restricted *because* of any message it might sometimes convey. In short, for First Amendment purposes, sometimes a cigar is just a cigar.

Ecko Complex LLC v. Bloomberg

In *Ecko*, plaintiff sought a permit for a street art display consisting of mock subway cars decorated by former graffiti artists who had "achieved renown." *Ecko Complex LLC v. Bloomberg*, 382 F. Supp. 2d 627, 628 (S.D.N.Y. 2005). The City of New York revoked the permit, for which plaintiff was otherwise qualified, on the grounds that such a display would incite criminal behavior, presumably by encouraging the defacing of real subway cars with graffiti. Indeed, the Mayor had said on his radio program that the exhibition would be tantamount to "encouraging vandalism." Judge Jed Rakoff made short work of this justification. "By the same token, presumably, a street performance of *Hamlet* would be tantamount to encouraging revenge murder. Or, in a different vein, a street performance of 'rap' music might well include the singing of lyrics that could be viewed as encouraging sexual assault. As for a street performance of *Oedipus Rex*, don't even think about it." 382 F. Supp. 2d at 630. Judge Rakoff, finding the City's action a "flagrant violation of the First Amendment," directed that the permit issue. *Id.*

Bronx Household of Faith v. Board of Educ. of the City of New York

The poorly marked territory where free speech and the Establishment Clause overlap has been explored in this long-running litigation over off-hours use of public school facilities by religious groups. After *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), and *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001), school districts may not restrict use of school facilities by religious groups either because they are religious groups or because the otherwise permissible events they wish to sponsor will be presented from a religious point of view. The *Bronx Household of Faith v. Board of Educ. of the City of New York* litigation confronted the issue of whether exclusion of worship services as such is a viewpoint-neutral regulation concerning a distinct type of activity or viewpoint discrimination against an activity that, but for its religious viewpoint, would otherwise be permitted.

In *Bronx Household of Faith v. Board of Educ. of the City of New York*, 226 F. Supp. 2d 401 (S.D.N.Y. 2002), plaintiffs challenged the Board of Education's decision to deny their application to rent the use of a school building after hours for worship services. The Board based its refusal on a policy that disallowed use for religious services or instruction while permitting use for "the purpose of discussing religious material or material which contains a religious viewpoint." Judge Loretta A. Preska granted plaintiffs' request for a preliminary injunction.

Judge Preska held that the Board's regulations had created a limited public forum, which permits government to restrict access to certain uses or topics, but only if the restriction does not discriminate on the basis of viewpoint and if the restriction is otherwise reasonable in light of the purpose of the forum. She rejected the Board's claim that plaintiffs' proposed use was properly characterized as religious worship, as opposed to otherwise permissible activities with a religious viewpoint, and held, moreover, that the Board could not constitutionally draw a distinction between religious worship and other activities involving expression of a religious viewpoint: "the government may not, consistent with the First Amendment, engage in dissecting speech to determine whether it constitutes worship." *Id.* at 423. The Second Circuit affirmed the grant of a preliminary injunction. *Bronx Household of Faith v. Board of Educ. of the City of New York*, 331 F.3d 342 (2d Cir. 2003).

For reasons similar to those given in her preliminary injunction decision, Judge Preska later granted plaintiffs' motion for summary judgment. *Bronx Household of Faith v. Board of Educ. of the City of New York*, 400 F. Supp. 2d 581 (S.D.N.Y. 2005). On appeal, the Second Circuit was unable to come to a conclusion. Judge Leval thought the case unripe because of a lack of clarity over whether intervening changes in the relevant regulations would change the result if plaintiffs applied again; therefore, he did not reach the merits. Judges Calabresi and Walker thought the case was ripe but split on the merits. *Bronx Household of Faith v. Board of Educ. of the City of New York*, 492 F.3d 89 (2d Cir. 2007). As a result, the District Court decision was vacated and remanded.

On remand, after plaintiffs' application was denied under the revised regulation, Judge Preska issued a permanent injunction based on reasons similar to those in her prior opinions. *Bronx Household of Faith v. Board of Educ. of the City of New York*, 01 Civ. 8598 (S.D.N.Y. Nov. 1, 2007). The ripe case was appealed to the Second Circuit, which reversed 2-1, with Judges Leval and Calabresi accepting the argument that a restriction against using school facilities for worship was a viewpoint-neutral regulation of a distinct form of activity, rather than discrimination against religious expression, and Judge Walker accepting Judge Preska's view. *Bronx Household of Faith v. Board of Educ. of the City of New York*, 650 F.3d 30 (2011).

On remand, Judge Preska enjoined the defendants from enforcing the applicable regulations so as to deny the plaintiffs' application or the application of any similarly situated individual or entity to rent space in the Board's public schools for morning meetings that include religious worship. *Bronx Household of Faith v. Bd. of Educ. of the City of New York*, 2012 U.S. Dist. LEXIS 23385 (S.D.N.Y. Feb. 24, 2012). The court reasoned that the 2011 Second Circuit opinion had addressed only plaintiffs' free speech claims and not their free exercise claims. Judge Preska found that Plaintiffs had demonstrated a likelihood of success on the merits of their free exercise claims because, among other things, object of the regulation "is to infringe upon or restrict practices because of their religious motivation." The court rejected the contention that establishment clause concerns could justify this invasion of plaintiffs' free exercise rights, holding that the regulations were not "narrowly tailored" to address these purported establishment clause concerns.

Ford v. McGinnis

Ford v. McGinnis, 230 F. Supp. 2d 338 (S.D.N.Y. 2002), *vacated*, 352 F.3d 582 (2d Cir. 2003), became a leading case on the extent to which judges or other government officials must accommodate religious beliefs that are sincerely held but which may not be "grounded in an authentic religion." In *Ford*, a Muslim inmate who had been held in a high-security section of his prison missed both the traditional Eid-ul-Fitr feast, generally held, in accordance with Islamic law, within three days after the end of Ramadan, and a feast offered by the prison at a Family Day about a week later. The Family Day feast

and a sweet breakfast on the day of the Eid-ul-Fitr feast were available to Muslim prisoners in the general population.

Judge Scheindlin accepted as sincere the inmate's stated belief that the Eid-ul-Fitr feast held on Family Day was a matter of religious significance to him. Nevertheless, she accepted defendants' argument "that the Muslim lunar calendar required the observance of the Eid-ul-Fitr on January 7, 2000. Whatever defendants did or did not do on January 15, 2000, they did not deny an Islamic practice." *Id.* at 346. Judge Scheindlin determined that if a plaintiff's subjective, though sincere, view of his or her religious requirements governed, regardless of whether that belief was "grounded in an authentic religion," no limiting principle would prevent prison officials from being unreasonably burdened by idiosyncratic accommodation requests. *Id.* at 347. Accordingly, Judge Scheindlin granted defendants' summary judgment motion and held that prison officials could decide whether to offer accommodations "after having been advised of Islam's actual requirements by religious experts." She therefore granted defendants' summary judgment motion. *Id.*

The Second Circuit vacated and remanded, holding that the District Court erred in attempting to make an objective determination of the actual religious requirements of Islam: "Nothing [in precedents relied on below] permitted the district court to assess the objective validity of Ford's belief that the Eid ul Fitr feast carried religious significance even when postponed. By looking behind Ford's sincerely held belief, the district court impermissibly confronted what is, in essence, the 'ecclesiastical question' of whether, under Islam, the postponed meal retained religious meaning." *Ford v. McGinnis*, 352 F.3d 582, 590 (2d Cir. 2003). Factual issues remained, however, preventing the Circuit from determining whether the denial of the Eid-ul-Fitr feast to inmates in high-security areas nevertheless served legitimate penological needs, so the case was remanded to the trial court. Apparently, because the expiration of plaintiff's sentence and his release mooted any claim for prospective injunctive relief, and the damages claim had been settled, those issues were never explored on remand.

Intellectual Property

Dimmie v. Carey

In *Dimmie v. Carey*, 88 F. Supp. 2d 142 (S.D.N.Y. 2000), Judge Richard Berman granted the motion for summary judgment of Mariah Carey and several other defendants on a claim that Carey's hit song "Hero" had infringed on a copyright held by plaintiff Rhonda Dimmie on a song entitled "Be Your Own Hero."

In granting summary judgment, Judge Berman ruled that plaintiff did not "establish that the Defendants, or any of them actually had a reasonable possibility of 'access' to a copy of her song 'Be Your Own Hero.'" *Id.* at 146. Although Dimmie claimed to have mailed the song to one of the defendant record companies, she could not confirm receipt. The court determined that there was not even a "scintilla of evidence" that the tape was passed along to Carey. Moreover, Carey had a strict policy of refusing unsolicited recordings.

Judge Berman also rejected plaintiff's contention that there were "probative similarities" between the two songs, which plaintiff claimed rendered it unlikely that the songs were independently created. Judge Berman held that the existence of "probative similarities" was insufficient to find infringement because plaintiff had failed to make a showing of access.

In rejecting plaintiff's argument that the two songs were "strikingly similar" so as to preclude the possibility that the songs were independently created, Judge Berman noted that the plaintiff's own expert

concluded that he did not “possess sufficient evidence ... to state without any doubt that ‘Hero’ was based on ‘Be Your Own Hero.’” *Id.* at 150. In contrast, defendants adduced evidence that the song “Hero” was an independent creation, providing tapes documenting the creative process taken, and providing a journal kept by Carey showing the evolution of the lyrics. Therefore, the court concluded that any inference of “striking similarity” was dispelled by defendants’ evidence that the song was independently created.

Lennon v. Seaman

Yoko Ono Lennon (“Ono”), wife to the late John Lennon (“Lennon”), filed a complaint against Frederic Seaman, who acted as personal assistant to Lennon in the 1970s and 1980s. At the center of the action were 374 photographs and Lennon’s personal journals that Seaman had taken from the Lençons during the course of his employment. Ono claimed that Seaman had been unjustly enriched when he published them without authorization to various media sources. Ono also alleged that Seaman had tortiously interfered with her contract with Capitol Records, Inc. (“Capitol”) to publish a boxed set of Lennon’s works when Seaman sent a letter to Capitol informing them that he was the copyright owner of a photograph used in the booklet to accompany the boxed set.

Seaman had been convicted of second-degree grand larceny in 1983. Under the terms of his plea agreement, Seaman certified that he would not reveal the contents of Lennon’s journals and that he would testify truthfully about the theft of the Lennon’s property and return all such property in his possession. Seaman was sentenced to five years’ probation. In *Lennon v. Seaman*, No. 99-cv-2664, 2002 WL 109525 (S.D.N.Y. 2002), Judge Leonard B. Sand ruled that the conviction could be used against Seaman to support Ono’s claims at trial. Judge Sand further ruled that Seaman could not introduce evidence suggesting that his confession and conviction resulted from physical abuse by the arresting officers or entrapment orchestrated by Ono in an attempt to refute his culpability or undermine the validity of his plea.

After four days of trial, the parties reached a settlement shortly before the jury was expected to begin deliberation. Under the agreement, Seaman relinquished his copyright claims to all 374 photos and publicly apologized to Ono. Seaman was not required to pay Ono the profits he earned from the sale of the photos and other Lennon memorabilia.

Viacom Int’l, Inc. v. YouTube, Inc.

Judge Louis Stanton granted summary judgment in favor of YouTube and its parent, Google, applying the Digital Millennium Copyright Act’s (“DMCA”) “safe harbor” provision in rejecting claims that the video service provider had engaged in direct and secondary copyright infringement. *Viacom Int’l, Inc. v. Youtube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010). Viacom’s suit alleged that YouTube facilitated the display of countless copyrighted works owned by the plaintiff. Judge Stanton rejected Viacom’s principal arguments that YouTube had actual knowledge of and received financial benefit from the infringing material. Instead, he found that YouTube possessed a mere generalized knowledge of infringement, which was insufficient to preclude the service provider from seeking statutory protection.

The DMCA “safe harbor” provision, enumerated in 17 U.S.C. § 512(c), protects online service providers from monetary liability in suits for damages in the event that an end-user uploads infringing content, so long as the provider “lacks actual knowledge ... or is not aware of facts or circumstances from which infringing activity is apparent.” Alternatively, service providers can avoid liability if they act expeditiously to remove the offending content.

Judge Stanton ruled that YouTube lacked knowledge of specific instances of infringement and that specific knowledge is required for a service provider to have the “right and ability to control” infringing activity. *Id.* at 527. The court was especially persuaded by the fact that YouTube swiftly complied with any and all take-down notices furnished by Viacom. The *Viacom* decision placed the burden on copyright owners to identify infringing activity and notify service providers, rather than imposing an affirmative obligation on site owners to monitor potential copyright violations. Judge Stanton observed, “To let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users’ postings infringe a copyright would contravene the structure and operation of the DMCA.” 719 F. Supp. 2d at 523.

Finally, the court held that the replication, transmittal, and display of videos on YouTube were not infringing activities because those activities were “by reason of the storage at the direction of a user” within the meaning of § 512(c)(1) of the DMCA safe harbor. *Id.* at 526-27.

In *Viacom Int’l, Inc. v. Youtube, Inc.*, 2012 U.S. App. LEXIS 6909 (2d Cir. Apr. 5, 2012), the Second Circuit reversed. The Second Circuit ruled that the lower court had correctly interpreted the DMCA to require “actual knowledge” but held that a reasonable jury could have found that defendant had actual knowledge or awareness of specific infringing activity on its website. *Id.* The court further held that factual issues had been raised regarding the defendants’ willful blindness, and it was error to require the plaintiff to demonstrate that the defendant had “item-specific” knowledge. In light of its holding that the DMCA does not include a specific knowledge requirement, the court remanded to the District Court “to consider in the first instance whether the plaintiffs have adduced sufficient evidence to allow a reasonable jury to conclude that YouTube had the right and ability to control the infringing activity and received a financial benefit directly attributable to that activity.” *Id.* at *49. The Second Circuit also affirmed the lower court’s ruling that three particular software functions of the defendant constituted “storage” and thus fell within the DMCA safe harbor.

Ass’n for Molecular Pathology v. U.S. PTO

In what is sure to be a hotly contested issue in the coming decade, and one that may be decided by the U.S. Supreme Court, Judge Robert Sweet on a motion for summary judgment ruled that isolated genes are not eligible for patent protection because they constitute a mere “product of nature.” *Ass’n for Molecular Pathology v. United States PTO*, 702 F. Supp. 2d 181, 220 (S.D.N.Y. 2010). In *Ass’n for Molecular Pathology*, the American Civil Liberties Union and several other groups petitioned the court for a declaratory judgment on behalf of plaintiffs, including which included various medical nonprofit organizations, cancer researchers, and cancer patients, in an attempt to invalidate human gene patents owned by the University of Utah and Myriad Genetics. The patents in question were composed of isolated forms of breast cancer genes and are regarded as significant in early cancer detection.

In his opinion, Judge Sweet noted the weighty implications of the court’s decision. On the one hand, biotechnology companies view patent procurement as a means of investment protection. On the other hand, it is feared that the proliferation of DNA patents will simply diminish the exchange of scientific information and unfairly raise the cost of testing at the expense of patients.

Guided by the principle that “manifestations of laws of nature [are] free to all men and reserved exclusively to none,” *id.* at 219, Judge Sweet held that isolated DNA is tantamount to the DNA that naturally exists in cells and is beyond the scope of patent protection defined by Section 101 of the Patent Act. See *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948). Under the “product of nature” exception to 35 U.S.C. § 101, a purified or isolated product will fall short of patent protection if it

does not possess “markedly different characteristics” from its original counterpart. As the court noted, “purification of a product of nature, without more, cannot transform it into patentable subject matter.” *Id.* at 227.

The court also ruled that certain other method claims, such as those concerning analyzing and comparing DNA sequences and comparing the growth rate of cells, were not patentable, as they did not meet the machine-or-transformation test under *Bilski v. Kappos*, 130 S. Ct. 3218, 3225 (2010).

On appeal, the Court of Appeals for the Federal Circuit in a 2-1 decision reversed, in part, Judge Sweet’s decision. *Ass’n for Molecular Pathology v. United States PTO*, 653 F.3d 1329 (Fed. Cir. 2011). After finding declaratory judgment jurisdiction appropriate under the standards set out in *MedImmune v. Genentech, Inc.*, 549 U.S. 118, 125 (2007), the Federal Circuit ruled that some of the composition claims constituted patentable subject matter, including isolated DNA and a method of using cells to screen for cancer therapeutics, relying on *Funk Bros.* and on *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

However, the court upheld the lower court’s ruling that certain method claims, such as those concerning analyzing and comparing DNA sequences, were not patentable, as they did not meet the machine-or-transformation test under *Bilski*. The Federal Circuit also ruled that the method claim directed to a method for screening potential cancer therapeutics via changes in cell growth rates constituted patentable subject matter under *Bilski*.

The U.S. Supreme Court granted *certiorari*, vacated the Federal Circuit’s decision, and remanded the case for further consideration in light of *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289 (2012). See *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 2012 U.S. LEXIS 2356 (U.S. Mar. 26, 2012).

International Law

Aurelius Capital Partners v. Republic of Argentina

The Republic of Argentina defaulted on its sovereign debt in 2001. Since that time, Argentina has been embroiled in litigation brought by its creditors to recoup their losses. A substantial number of Argentine bonds had been issued under New York law. Accordingly, the New York courts have heard numerous claims by creditors seeking to attach assets belonging to the Republic. Judge Thomas P. Griesa has presided over much of the relevant litigation.

One month prior to default, Argentina refinanced a portion of its sovereign debt in an agreement under which bondholders exchanged their bonds for local Argentine-guaranteed loans to be repaid at lower interest rates over an extended maturity period. As part of that refinancing, the bondholders placed their bonds in a trust account (the “Trust Bonds”) at Caja de Valores, a privately owned securities depository located in Argentina. Argentina defaulted on the Trust Bonds, along with the rest of its sovereign debt, the following month.

In *Aurelius Capital Partners, LP v. Republic of Argentina*, Nos. 07 Civ. 2715 (TPG), 07 Civ. 11327 (TPG), 07 Civ. 2693 (TPG), 2010 WL 2925072 (S.D.N.Y. July 23, 2010), creditors with outstanding money judgments against Argentina sought to attach the defaulted Trust Bonds to sell in partial satisfaction of their outstanding judgments. Plaintiffs relied on Section 5225(a) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1610(a), which permits a judgment creditor to attach a foreign state’s property located in the U.S. and used for a commercial activity in the U.S. Judge Griesa rejected plaintiffs’ attempt to characterize the objective of the attachment as Argentina’s intangible beneficial

interest in the Trust Bonds, the situs of which they argued was New York. Rather, Judge Griesa held that, under the explicit terms of the agreement, the bondholders had transferred the Trust Bonds to Caja de Valores in Argentina. He stated that the fact that the bonds were not “physical objects maintained in a physical location . . . does not take away from the fact that they were deposited, in an ordinary commercial sense, at Caja de Valores in Argentina.” *Id.* at *4. Accordingly, the Trust Bonds were held to be immune from attachment under the Foreign Sovereign Immunities Act.

Kiobel v. Royal Dutch Petroleum Co.

In *Kiobel v. Royal Dutch Petroleum Co.*, plaintiffs brought claims for corporate liability under the Alien Tort Statute, 28 U.S.C. § 1350 (“ATS”). Judge Kimba M. Wood dismissed plaintiffs’ claims in part, and certified her order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Judge Wood had held, among other things, that oil companies could be held secondarily liable under the ATS for aiding and abetting actions of others. 456 F. Supp. 2d 457 (S.D.N.Y. 2006). The Second Circuit granted plaintiffs’ petition and defendants’ cross-petitions for appeal and determined that the issue of corporate liability under the ATS was unresolved in the Circuit and should be determined in light of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010).

Plaintiffs, residents of the Ogoni region of Nigeria, sued defendants, Royal Dutch Petroleum Co. (“Royal Dutch”) and Shell Transport and Trading Co. PLC (“Shell”) operating in Nigeria through its subsidiary Shell Petroleum Development Co. of Nigeria Ltd. (“SPDC”). The underlying claims were that the defendants enlisted the aid of the Nigerian government to suppress the protests of the Ogoni people. Ogoni activists organized the Movement for Survival of Ogoni People to fight against “the environmental effect of oil exploration in the region.” 621 F.3d at 123. Plaintiffs also alleged that Nigerian soldiers committed atrocities such as rape and murder, all while being compensated monetarily by the defendants. Plaintiffs specifically alleged that defendants “aided and abetted, or were otherwise complicit in, violations of the law of nations by the Nigerian government.” *Id.* at 124.

The ATS allows “aliens” who claim tort injuries to sue individual defendants for alleged abuses. At issue was whether or not the ATS allows for the imposition of tort liability against corporations. The Second Circuit answered this question in the negative by affirming the Southern District’s decision to dismiss part of plaintiffs’ complaint, reversing the decision to hear the claims of crimes against humanity and unlawful detention, and dismissed the complaint in its entirety.

Plaintiffs argued that corporations can be sued under the ATS as “juridical” persons. In a 42-page opinion by Judge José Cabranes, the court held that customary international law rather than federal common law governed the issue under the standards set forth in *Sosa*, as the question of potential liability was determined to be one of substantive law. The Court further determined that “customary international law steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations.” *Id.* at 120.

The Court reached its decision by a two-pronged analysis. First, the Court determined whether international law or federal common law applied. Second, having determined under *Sosa* that international law should be followed as the issue involved a question of substantive liability for the corporate defendants, the court next analyzed whether liability could be imposed on corporations for human rights abuses under international law. Consistent with the Supreme Court’s decision in *Sosa*, the court determined that international law applied. The court then analyzed international law to determine how customary international law had been applied to corporations.

After an extensive review of international tribunals (*e.g.*, Nuremberg tribunals), UN declarations, treaties, case law, and scholarly articles, the court found that no “general rule of corporate liability [had] become a norm of customary international law.” 621 F.3d at 139. The substance of the court’s opinion is that individual liability was imposed by the military tribunal at Nuremberg in the aftermath of World War II. According to Judge Cabranes, however, the imposition of liability on individuals never went so far as to include corporations. Since there was no precedent for holding a corporation liable for a violation of customary international law, the Second Circuit declined to impose liability on the defendants under the ATS.

The court held that “insofar as plaintiffs bring claims under the ATS against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs’ claims fall outside the limited jurisdiction provided by the ATS.” *Id.* at 120. The reasoning behind the court’s decision is that the “ATS is a jurisdictional statute only; it creates no cause of action.” *Id.* at 125. Thus, the court determined that the District Court lacked subject matter jurisdiction to hear the complaint. The conclusion that the ATS is a jurisdictional statute only comes directly from *Sosa*, 542 U.S. at 724.

Judge Leval, in a concurrence, joined the majority in judgment only. Judge Leval disagreed fairly strongly with the majority’s logic, finding that “individual nations” may impose liability on corporate defendants because international law leaves the imposition of civil damages to individual states, not to an international tribunal. Concerning the ATS, Judge Leval wrote: “The rule in cases under the ATS is quite simple. The law of nations sets worldwide norms of conduct, prohibiting certain universally condemned heinous acts. That body of law, however, takes no position on whether its norms may be enforced by civil actions for compensatory damages. It leaves that decision to be separately decided by each nation.” Instead of finding the defendants not liable on the basis of the lack of customary international law governing corporate liability, Judge Leval would have found the corporate defendants not liable under the requisite knowledge standard as previously followed by the Second Circuit in an earlier decision.

A three-judge panel, which also included Judge Dennis Jacobs, denied a petition for rehearing. *Kiobel v Royal Dutch Petroleum Co.*, 642 F.3d 268 (2d Cir. 2011). This action currently is on appeal to the U.S. Supreme Court.

In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.

Defendant Assicurazioni Generali S.p.A. (“Generali”) filed a motion to dismiss the complaints of 20 Holocaust insurance claimants based upon federal preemption. Generali claimed that the cases could not be heard in the district courts of the United States because federal policy, and certain executive agreements between the United States and Germany, Austria, and France, required that the exclusive forum for Holocaust insurance claims was the International Commission on Holocaust Era Insurance Claims (“ICHEIC”). In a 2002 opinion by Judge Michael Mukasey, the court agreed and dismissed the main complaint and all ancillary claims. The court stated that to the extent that its earlier decision (*In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348 (S.D.N.Y. 2002)) conflicted with the current decision, the latter controlled. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494, 506 (S.D.N.Y. 2004).

Plaintiffs were beneficiaries of insurance policies issued to Holocaust victims as insurance for loss of life, property damage, and various other insurable claims. Generali wrote thousands of policies during this era. Plaintiffs alleged breach of contract, breach of fiduciary duty, and unjust enrichment, as well as bad faith, breach of good faith and fair dealing, and unfair, unlawful, and fraudulent representation.

Judge Mukasey found that the District Court was controlled by the holding in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), which held that ICHEIC was the “exclusive mechanism” for the adjudication of claims against the European insurers who issued policies to Holocaust victims. 539 U.S. at 406. *Garamendi* determined that the California statute at issue, the Holocaust Victim Insurance Relief Act of 1999, was preempted by the foreign relations doctrine.

The executive policy initiative behind this decision, according to the Supreme Court, was to encourage voluntary resolution of the claims rather than to have protracted litigation in the courts. It was within the sole discretion of the federal government to determine the foreign policy interests of the nation for settling wartime claims, and any state statute that was in conflict with the executive policy was preempted. 228 F. Supp. 2d at 421. State laws are preempted by the executive foreign relations doctrine. *Id.* at 426.

Plaintiffs’ argument that no executive agreement was made with Italy was not persuasive. Judge Mukasey found that based on *Garamendi*, the foreign policy doctrine at issue referred to all European insurers of Holocaust-era claims—not merely those insurers in Germany, Austria, and France where there were actual executive agreements. 340 F. Supp. 2d at 503. The court determined that the “executive policy favoring ICHEIC resolution of Holocaust-era insurance claims extends to claims against Generali in particular.” *Id.* at 503.

Judge Mukasey found that the Supreme Court’s holding in *Garamendi* controlled *Generali* and ruled that claimants must file their complaints with ICHEIC. Federal executive policy favored adjudication of the claims before the international commission and not in federal or state courts. The court determined:

Litigation of Holocaust-era insurance claims, no matter the particular source of law under which the claims arise, necessarily conflicts with the executive policy favoring voluntary resolution of such claims through ICHEIC In short, following *Garamendi*, it appears that plaintiffs cannot use the courts to obtain recovery of benefits due under Holocaust-era policies, regardless of the theory of recovery.

Id. at 501-02. Since plaintiffs could not recover independently on the ancillary claims, they too were dismissed.

On appeal to the Second Circuit, a three-judge panel affirmed the District Court decision holding that ICHEIC is the “exclusive forum” for adjudicating Holocaust-era insurance claims. *See In re Assicurazioni Generali S.p.A.*, 592 F.3d 113, 118 (2d Cir. 2010). The court determined that “state law must yield to the federal policy, regardless of the importance of the interests behind the state law.” *Id.* at 119. The District Court was instructed to allow plaintiff Edward David to amend his complaint if in fact he could demonstrate that his claim fell outside the time period for ICHEIC.

In March 2009, all plaintiffs other than the Weiss plaintiffs and plaintiff David settled with Generali, and their appeals were dismissed. A petition for certiorari from the Weiss plaintiffs was denied. *Weiss v. Assicurazioni Generali, S.p.A.*, 131 S. Ct. 287 (2010).

United States v. Portrait of Wally, A Painting by Egon Schiele, Defendant in Rem

In a decision by Judge Preska, the court denied the summary judgment motions of plaintiff, the U.S. government, and claimants, the Bondi estate, Leopold Museum (“Museum”) in Vienna, Austria, and the Museum of Modern Art (“MOMA”). The court determined that there was a triable issue of fact as to

whether the museum founder, Dr. Leopold “and thus the [Leopold] Museum” knew that the painting *Wally* was stolen when the Museum exported it to the United States.” *United States v. Portrait of Wally, A Painting by Egon Schiele*, 663 F. Supp. 2d 232, 237 (S.D.N.Y. 2009).

The Museum moved for summary judgment under several theories: the Act of State doctrine, international comity, no prior knowledge that the painting was converted or stolen, and the equitable defense of laches. The Museum also argued that forfeiture violated due process. The court found that the Act of State doctrine did not warrant abstention, since there had been no showing that the Austrian courts made a decision on the painting regarding Bondi’s claim for restitution, and that the case need not be dismissed based upon the doctrine of international comity. The United States was denied summary judgment concerning whether or not Dr. Leopold and the Museum knew that they were exporting converted or stolen property.

Judge Preska, as Judge Michael Mukasey did before her, went through a comprehensive chain of title analysis starting with the alleged true owner, Lea Bondi Jaray (“Bondi”), who purchased the painting from the artist in or around 1925, and ending with its seizure by the U.S. government by warrant in 1999. *See* 663 F. Supp. 2d at 237-246; *See United States v. Portrait of Wally, A Painting by Egon Schiele*, 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002); *United States v. Portrait of Wally, A Painting by Egon Schiele*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000).

During World War II (“WWII”), the painting began changing hands because of the Aryanization plan in Austria during the reign of the Nazi regime. It was imported into the United States by the Museum for exhibition at the MOMA in 1997. In the complaint, the government charged the Museum with shipping the painting into the United States in violation of the National Stolen Property Act (“NSPA”), 18 U.S.C. § 2314 (1994), “thereby rendering the Painting subject to civil forfeiture pursuant to 18 USC § 545, 19 U.S.C. § 1595(a)(c), and 22 U.S.C. § 401(a).” 663 F. Supp. 2d at 236.

The NSPA consists of three elements: (1) the transportation in interstate or foreign commerce of property, (2) that the property is valued at \$5,000 or more, and (3) that it was transported with knowledge that the property was stolen, converted, or taken by fraud. 663 F. Supp. 2d at 250. “To prove *Wally* is subject to forfeiture, the Government must first show probable cause to believe that (1) the Museum [exported] *Wally*, (2) *Wally* was stolen, and (3) the Museum knew *Wally* was stolen when it shipped the Painting to the MOMA.” *Id.* at 251-52. Judge Preska determined that there was no dispute as to whether the Museum imported *Wally* or that *Wally* was stolen; however, she determined there were triable issues of fact on whether the Museum knew that *Wally* was stolen but caused the painting to be imported anyway. *Id.*

The Museum argued that the painting was recovered (and thus lost its status as stolen) by U.S. armed forces and transferred to the Austrian government after WWII when the United States assisted with the recovery and transference of property back to their countries of origin. 663 F. Supp. 2d at 260. Judge Preska rejected the Museum’s recovery doctrine arguments since the U.S. forces were not agents for the true owners. The Act of State and title-by-prescription arguments were also rejected as failing to state that the U.S. acted to “embarrass” the government of Austria by ignoring its state sovereignty when it seized the painting by forfeiture, or that the Austrian museum, the Belvedere, ever acquired clean title to the painting.

Judge Preska also found that the government met its burden to show by probable cause that Dr. Leopold possessed the requisite intent for criminal conversion. The court summarily rejected the doctrine of laches and due process claims of the Museum. Previously, Judge Mukasey determined that the Civil

Asset Forfeiture Reform Act of 2000 did not determine the government's burden of proof in this action because the complaint was filed prior to the effective date of the act. *See* 2002 WL 553532 at *13-14.

New York law was found not to apply to this action. In fact, prior to the federal seizure, the New York State Court of Appeals had quashed a subpoena from the Manhattan District Attorney because it was issued in violation of the Arts and Cultural Affairs Law §12.03. *See In re Grand Jury Subpoena Duces Tecum*, 93 N.Y.2d 729, 735-39 (1999). Austrian law was found to apply only to actual ownership and not to the civil forfeiture claim.

With the approval of Judge Preska, the case was settled in 2010 on the conditions that the Museum pay the Bondi estate \$19 million; the estate release its claim to the painting; the U.S. government dismiss the civil forfeiture action brought against the Leopold Museum and release the painting to the Museum; the Museum agree to add Bondi's prior ownership and the Nazi confiscation to the publicly displayed provenance; and the painting be allowed to be exhibited at the Museum of Jewish Heritage in New York with a ceremony commemorating the legacy of Lea Bondi Jaray.

Internet Law

Tiffany (NJ) Inc. v. eBay Inc.

Judge Richard Sullivan's opinion in *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463 (S.D.N.Y. 2008), confirmed the viability of the online marketplace as a business model and stemmed the tide of rights owners' victories in cases seeking to eliminate online sales of counterfeit goods. Only a few months before Judge Sullivan's decision, two French decisions found eBay, Inc. ("eBay") liable for sales of counterfeit or otherwise unauthorized luxury goods at its online auction and retail site. Notably, the plaintiffs in the French actions were Societe Hermes International and Louis Vuitton Malletier, two large French luxury brands. U.S. courts had also handed down comparable decisions in recent years, finding that operators of online exchanges could be held liable for infringement by third parties, albeit under the Copyright Act. *See UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

In a detailed and lengthy opinion following a bench trial, though, Judge Sullivan found that eBay was neither directly liable for trademark infringement arising from its own use of the TIFFANY mark nor "contributorily" liable for its users' sale of counterfeit Tiffany goods in the eBay online marketplace.

The lawsuit arose from the widespread sales of counterfeit Tiffany-branded goods by eBay users, and eBay's use of the plaintiff's marks to advertise that Tiffany-branded items could be purchased on eBay. Tiffany asserted numerous claims, including dilution, false advertising, direct trademark infringement, and trademark infringement under the judicially created common law doctrine of contributory liability articulated in *Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844 (1982).

Neither party disputed that counterfeit Tiffany-branded goods were sold on eBay, but each felt that the other should bear the responsibility and cost of policing the sale of trademarked goods. Judge Sullivan found for eBay on all of the plaintiff's claims, and, apart from his findings relating to false advertising, his decision was upheld by the Second Circuit. *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2010). The false advertising cause of action was remanded for reconsideration, with the Second Circuit suggesting that a simple disclaimer might suffice to remedy any potential violation by eBay.

Judge Sullivan held that eBay's own use of Tiffany's marks was "nominative fair use" or otherwise nonactionable because eBay's use did not suggest sponsorship and referred to plaintiff's actual goods. While the Second Circuit resisted adopting the "nominative fair use" doctrine, it upheld Judge Sullivan's finding of non-infringement on the grounds that "a defendant may lawfully use a plaintiff's trademark where doing so is necessary to describe the plaintiff's product, and does not imply a false affiliation or endorsement." 600 F.3d at 102-03.

Second, and more important to the development and growth of the Internet as a viable marketplace, Judge Sullivan rejected Tiffany's argument that eBay was "contributorily liable" for trademark infringement because it provided marketplace services to users in the face of its generalized knowledge that counterfeit goods were sold on its site. Judge Sullivan held that eBay's generalized knowledge was insufficient to give rise to an affirmative duty to police others' marks, and that liability under *Inwood* requires that a contributory infringer provide services despite having "knowledge or reason to know" of specific instances of infringement. The Second Circuit affirmed Judge Sullivan's ruling in this regard.

Judge Sullivan found that eBay had taken precautions to limit specific instances of infringement through its "fraud engine" and Verified Rights Owner Program, and regularly removed listings of purportedly infringing items reported by Tiffany. Judge Sullivan also remarked that eBay never came into physical possession of—and, therefore, could not examine—the goods at issue and found that eBay spent substantially more than Tiffany in an effort to prevent sales of counterfeit goods at its site.

Importantly, Judge Sullivan also addressed and rejected Tiffany's argument that eBay was a "cheaper cost avoider" that could more economically police trademark use. "[E]ven if it were true" Judge Sullivan noted, "that eBay is best situated to staunch the tide of trademark infringement to which Tiffany and countless other rights owners are subjected, that is not the law." 576 F. Supp. 2d at 518.

Judge Sullivan's landmark opinion set forth a guideline by which online marketplaces may operate and take advantage of the power of the Internet without being subject to massive liability arising from the wrongful acts of others. In doing so, the court promoted online commerce and dealt a blow to rights-holders seeking to eliminate counterfeiting by shifting the burden to the marketplace.

In re DoubleClick Inc. Privacy Litig.

Early in the decade, the Southern District took a prominent role in defining the contours of the Internet's legal landscape by determining that advertisers' use of "cookies" did not violate Federal privacy statutes. In this case, a plaintiff class alleged that DoubleClick, Inc.'s placement of cookies on users' computers in order to collect personal information about them and to target advertising violated three Federal statutes: (1) the Electronic Communications Privacy Act's ("ECPA") Stored Communications Act, 18 U.S.C. § 2701 *et seq.*; (2) the Federal Wiretap Act ("Wiretap Act"), 18 U.S.C. § 2510 *et seq.*; and (3) the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030 *et seq.* Judge Naomi Reice Buchwald dismissed the class action, which sought both monetary damages and injunctive relief.

DoubleClick, the world's largest online advertising company at the time, used information it collected from the cookies it placed to customize "banner ads" on websites. "Cookies," in the words of the court, "are computer programs commonly used by Web sites to store useful information such as usernames, passwords, and preferences, making it easier to access Web sites in an efficient manner." *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 502-03 (S.D.N.Y. 2001).

While Judge Buchwald recognized that cookies “collect information that Web users ... consider to be personal and private,” such as names, email and other addresses, phone numbers, and internet browsing habits, she noted that DoubleClick collected only information concerning users’ activities at sites affiliated with the company, and that users could “easily and at no cost prevent DoubleClick from collecting information about them” by opting out or configuring their browsers to block cookies. *Id.* at 504.

In analyzing the plaintiffs’ claims, the court held that DoubleClick did not run afoul of the ECPA, which prohibits unauthorized access, alteration, or destruction of certain stored electronic communications. Judge Buchwald found that because the information communicated to the DoubleClick-affiliated websites by the cookies was, in turn, transmitted to DoubleClick by the websites themselves, DoubleClick was authorized to receive those communications and could not have violated the ECPA. Furthermore, with respect to the information contained in the cookies’ own identification numbers, Judge Buchwald found that the ECPA did not apply because the cookies were placed on the users’ hard drives (as opposed to being in temporary, intermediate electronic storage). In making this finding, she compared the cookies’ identification numbers to computer bar codes or identification numbers on magazines’ “business reply cards,” insofar as those numbers are meaningful to, and intended to be received only by, the advertisers and not anyone else, including the plaintiffs.

The court also dismissed the plaintiffs’ claim under the Wiretap Act, holding that the DoubleClick-affiliated websites authorized DoubleClick’s access to the information and communications. As set forth above, in order to state a proper cause of action, the plaintiffs had to plead that the primary purpose of DoubleClick’s “interception” of such communications was for a “criminal or tortious” purpose. Judge Buchwald rejected that notion, stating that “DoubleClick’s purpose has plainly not been to perpetuate torts on millions of Internet users, but to make money by providing a valued service to commercial Web sites.” *Id.* at 519. The court found, therefore, that the class failed to make a sufficient allegation that DoubleClick acted with a “tortious purpose” and dismissed its claim under the Wiretap Act.

Finally, Judge Buchwald reviewed the plaintiffs’ claim under the CFAA, which requires a plaintiff to plead more than \$5,000 in compensable damages or losses caused by a wrongful act. Judge Buchwald held that the plaintiffs failed to meet that threshold, as the plaintiffs pled only two bases of damage or loss: the first being “their cost in remedying their computers and data in the wake of DoubleClick’s access” and the second being the “economic value of their attention (to DoubleClick’s advertisements) and demographic information.” *Id.* at 525.

The court confirmed that economic losses to the plaintiffs relating to securing or remedying their systems would be compensable under the CFAA, but found that since “opting-out” or blocking cookies was “easy” and “free of cost,” and since the plaintiffs did not plead that DoubleClick caused any damages to the plaintiffs’ computers, systems or data, their remedial economic losses were insignificant, if existing at all.

As to the second allegation of loss (economic value of the plaintiffs’ attention and their demographic information), the court was similarly unconvinced that plaintiffs could satisfy the CFAA’s damages threshold. Judge Buchwald again compared DoubleClick’s acts to more traditional advertising. “We do not commonly believe that the economic value of our attention is unjustly taken from us when we choose to watch a television show or read a newspaper with advertisements and we are unaware of any statute or caselaw that holds it is. We see no reason why Web site advertising should be treated any differently.” Demographic information was no different, she noted, holding that the value of collected information caused no damage to consumers or unjust enrichment to collectors.

Finally, Judge Buchwald noted that the CFAA addresses only economic losses, and so the plaintiffs' claims that their privacy was invaded, or that there was a trespass, were not recoverable under the statute. With this 2001 ruling, Judge Buchwald confirmed a major economic underpinning of the Internet, namely data mining and targeted advertising, and quickly defused the threats faced by large companies from plaintiffs' privacy class-action lawsuits.

Merck & Co. Inc. v. Mediplan Health Consulting, Inc., d/b/a RxNorth.com

Former District Court Judge Denny Chin upheld the Second Circuit's ruling in *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400 (2d Cir. 2005), by dismissing Merck's claim that defendant's purchase of the keyword "ZOCOR" constituted trademark infringement. *Merck & Co, Inc. v. Mediplan Health Consulting, Inc.*, 425 F. Supp. 2d 402 (S.D.N.Y. 2006). Judge Chin held that this purchase did not constitute actionable "use in commerce" under the Lanham Act. He pointed out that the defendant did not "'place' the ZOCOR mark on any goods or containers or associate documents, nor ... use [it] in any way to indicate source or sponsorship." The sole "use" of the mark, he said, was in the sense that a computer user's search triggered the display of sponsored links to defendant's websites, which was insufficient to constitute use in commerce under the meaning of the trademark laws. Notably, the decision as to the plaintiffs' claim was made easier, given that the defendant also sold the actual ZOCOR product, in addition to allegedly "generic" products, a fact the court found to be "significant." Most of the plaintiffs' remaining claims survived the defendant's motion to dismiss.

Specht v. Netscape Commc'ns Corp.

The plaintiffs, a putative class, alleged that the usage of software provided to users by defendant transmitted private information about the users' activities on the Internet and, thus, violated the ECPA and the CFAA. The defendants moved to compel arbitration and stay the court proceedings pursuant to a binding arbitration clause in the End User License Agreement (the "EULA"), which was allegedly made upon downloading the software from the Internet.

Judge Alvin Hellerstein, applying New York choice-of-law principles and California contract law, held that the arbitration clause found in the EULA was not binding on the plaintiffs because users downloading the software at issue were not affirmatively required to indicate their assent to the terms of the EULA before downloading. *Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001). In fact, the court found, a user was not even required to view the EULA before downloading the software, even though a hyperlink was made available to those who wished to review its terms. Finally, even though the EULA itself indicated that users would be bound by the act of downloading the software, the plaintiffs could not be shown to have agreed to the EULA or the arbitration clause therein. Since both parties did not agree to be bound, a contract was not formed, and an analysis as to whether the Federal Arbitration Act applied was, thus, unnecessary.

The court's decision in *Specht* is instructive insofar as it confirms the binding nature of a "click-wrap" license (*i.e.*, one in which products or services cannot be obtained or used unless and until the icon indicating assent to the license terms is clicked), as opposed to the far less clearly binding "browse-wrap" license (one in which mere notice of the license appears on the website, but the terms and their binding nature are only revealed after clicking a link—which, in any case, is not necessary to do before downloading the software sought).

Securities Litigation

In re Am. Int'l Group, 2008 Secs. Litig.

In *In re Am. Int'l Group, 2008 Secs. Litig.*, 741 F. Supp. 2d 511 (S.D.N.Y. Sept. 27, 2010), Judge Laura Taylor Swain denied the motion of defendants American International Group Inc. (“AIG”), certain underwriters, and other affiliated parties to dismiss a securities fraud action brought on behalf of a putative class of AIG shareholders. Plaintiffs brought claims under Sections 10(b), 11, and 20(a) of the Securities Exchange Act of 1934 (“Exchange Act”) and Section 15 of the Securities Act of 1933 (“Securities Act”) against AIG and its officers for materially misrepresenting to investors AIG’s exposure to the subprime mortgage market through its securities lending program and transactions involving mortgage-backed instruments, including collateralized debt obligations and credit default swaps. Plaintiffs also brought claims under Section 11 of the Securities Exchange Act against PricewaterhouseCoopers LLP and 34 firms that underwrote AIG’s notes, debentures, and common stock.

Although AIG had engaged in swap transactions as early as 1987, in 2005, AIG dramatically increased the extent of its exposure to mortgage-backed products, according to the plaintiffs, without disclosure and without sufficient steps to mitigate the risks posed by the new exposure. As the real estate market faltered, plaintiffs alleged that AIG ignored both internal and external warning signs that its mortgage-backed exposure was increasing in risk. In fact, as the complaint alleged, AIG was unable to evaluate and hedge the risk that it faced, as the overexposure “led to a liquidity crisis that required an unprecedented bailout by the United States Government.” *In re Am. Int'l Group*, 741 F. Supp. 2d at 517.

The complaint alleged that AIG failed to adequately disclose the nature and magnitude of the risks that it faced from its increased exposure to the mortgage market and that AIG had falsely stated that it performed due diligence prior to entering into swap contracts and other risk controls to mitigate the risk of that exposure. It also alleged that AIG failed to disclose warnings from third parties such as PricewaterhouseCoopers. Judge Swain held that the plaintiffs had sufficiently pled that AIG had misleadingly claimed that it was raising capital in 2008 to take advantage of market opportunities when, in reality, AIG needed the capital to cover problems in its portfolios. *Id.* at 530.

Judge Swain held that the allegations brought under the Securities Exchange Act met the heightened pleading standards under the Private Securities Litigation Reform Act of 1995 (“PSLRA”) and Fed. R. Civ. P. 9(b). Judge Swain also denied defendants’ motion to dismiss plaintiffs’ Securities Act allegations. Plaintiffs’ action was timely, Judge Swain ruled, since plaintiffs had inquiry notice of the misstatements only after the government bailout was announced.

With regard to the Section 10(b) claims, the court found that the plaintiffs had adequately pled scienter because the defendants were privy to all the problems occurring at AIG, yet nonetheless “prepared, approved, signed and/or disseminated” the material misstatements and omissions, including in offering statements, press conferences, and press releases. *Id.* at 533. The court found that the plaintiffs properly pled “loss causation” because the alleged misconduct led to the collapse of AIG’s stock price after it disclosed the previously undisclosed information. Further, Judge Swain held that plaintiffs had adequately pled an alternative theory of control person liability pursuant to Section 20(a) of the Exchange Act, under which the defendant executives of AIG could be held liable.

Judge Swain held that AIG’s executives and the underwriters could be held liable for Securities Act violations for the same reasons that their motion to dismiss the Exchange Act violations was denied. Judge Swain also denied PricewaterhouseCoopers’s motion to dismiss plaintiffs’ Securities Act allegations on the ground that there were factual questions as to whether PricewaterhouseCoopers had

blessed financial statements that violated Generally Accepted Accounting Principles (“GAAP”) or Generally Accepted Accounting Standards (“GAAS”).

Fadem v. Ford Motor Co.

Ford Motor Company (“Ford”) entered into forwards contracts in 2000 and 2001 to purchase palladium, which it used to limit emissions from car engines. Thereafter, Ford successfully developed a new design technology that greatly reduced the automaker’s need for the metal. Palladium prices also dropped significantly. Accordingly, the futures contracts, which specified fixed prices for the palladium, turned out to be a poor business decision. Ford, saddled with a large amount of expensive metal for which it had no need, took a write-off of nearly \$1 billion. Ford reported the write-off to its investors in its 2001 Form 10-K Annual Report.

A class of Ford shareholders thereafter filed a complaint alleging that Ford, its former president and CEO, and its former group vice president and CFO made fraudulent or misleading statements with respect to commodities futures activities in violation of the Securities Exchange Act of 1934. In *Fadem v. Ford Motor Co.*, 352 F. Supp. 2d 501 (S.D.N.Y. 2005), Judge Charles S. Haight, Jr. dismissed the class plaintiffs’ claims, finding that Ford did not make a false statement when it claimed that it had entered into the futures contracts to offset palladium price risk. The court found that, while Ford’s mistaken risk assessment was costly to the company, entering into the futures contract did in fact offset commodity price risk, thus cancelling out the risk of price fluctuation entirely.

Judge Haight held that plaintiffs made no showing that the defendants had acted with fraudulent intent, violated any of the applicable accounting rules, or made any material misrepresentations or omissions. Noting that the court had previously dismissed the plaintiffs’ claims with leave to amend, Judge Haight dismissed all claims with prejudice, concluding that “plaintiffs’ amended complaint, while greater in quantity, is no better in quality.” *Id.* at 525-26. The Second Circuit affirmed on appeal in *Fadem v. Ford Motor Co.*, 157 F. App’x 398 (2d Cir. 2005).

In re Fannie Mae 2008 Sec. Litig.

In *In re Fannie Mae 2008 Sec. Litig.*, 742 F. Supp. 2d 382 (S.D.N.Y. 2010), Judge Paul A. Crotty granted in part, and denied in part, defendants’ motion to dismiss a class action suit against the mortgage giant Federal National Mortgage Association (“Fannie”), a number of its executive officers, and its external auditor (collectively “defendants”) for securities violations under the Securities Act, the Exchange Act, and Securities and Exchange Commission Rule 10b-5. Judge Crotty ruled that some portions of the pleading met the heightened pleading standards under the PSLRA and Fed. R. Civ. P. 9(b).

The plaintiffs alleged that defendants materially misrepresented (i) the extent of Fannie’s exposure to the sub-prime and Alt-A mortgage markets and related risks, including the risk posed by Fannie’s underwriting standards and the geographic concentrations of its investments; (ii) the quality of Fannie’s internal risk management and controls; and (iii) the sufficiency of Fannie’s core capital, which was allegedly misrepresented on Fannie’s financial statements in violation of GAAP and GAAS.

Judge Crotty ruled that the plaintiffs failed to meet the pleading requirements with respect to the allegation that Fannie materially misrepresented its exposure to the subprime and Alt-A mortgage markets. The court found that the plaintiffs’ fraud pleading was insufficient because: (i) Fannie’s public filings contained cautionary language concerning Fannie’s mortgage exposure; (ii) the plaintiffs had conceded that Fannie principally invested in low-risk subprime and Alt-A mortgages and that subprime mortgages made up only a small percentage of Fannie’s overall mortgage business; and (iii) the plaintiffs

failed to allege that Fannie acted with scienter, since the executives' only motive to withhold negative reports was to obtain larger bonuses and the officers did not sell their stock holdings prior to the collapse.

The court also granted defendants' motion to dismiss allegations of financial reporting misstatements, allegations that had not been made by the federal regulators. The court opined that "the accounting rules governing the relevant practices are sufficiently flexible so as to encompass Fannie's interpretation of them during the Class Period." *Id.* at 408. The court found that plaintiffs' failure to sufficiently plead that material misrepresentations were made in Fannie's accounting standards precluded a finding of scienter.

The court found in favor of the plaintiffs, however, in ruling that they had sufficiently pled that Fannie had materially misrepresented the adequacy of its internal risk management and controls. In numerous public statements, Fannie stated that it had proper controls in place to deal with increased exposure to the subprime market—yet numerous internal communications stated just the opposite. Moreover, internal emails showed that "Fannie was conscious of its internal inability to manage the risks associated with subprime loans." *Id.* at 406. Thus, Judge Crotty found that plaintiffs had pled scienter because they had alleged that Fannie "recklessly" made public statements regarding the sufficiency of its internal controls.

In re Initial Public Offering Sec. Litig.

This action was one of the largest consolidated cases ever brought in the Southern District and involved over 1,000 separate complaints filed against more than 300 companies; 1,000 officers, directors, and employees of these companies; and nearly 50 underwriters. These 1,000-plus complaints were ultimately consolidated into more than 300 actions and then further coordinated for purposes of motions to dismiss.

The cases involved an alleged scheme by a number of investment banks and issuers to drive up the price of each issuer's stock immediately after the initial public offering ("IPO") of the stock. The plaintiffs, aftermarket purchasers of these stocks, contended that the IPO underwriters engaged in the practice of "laddering"—requiring initial purchasers to enter into agreements to buy additional shares of an issuer in the aftermarket at higher prices as a condition to receive the right to purchase shares in the IPO. According to plaintiffs, these agreements created an artificial demand for the issuer's stocks and a corresponding increase in their prices. Moreover, plaintiffs alleged that the underwriters enriched themselves by requiring the initial purchasers to remit to them a portion of any profits gained by selling shares in the aftermarket.

Plaintiffs alleged various violations of the securities laws, including claims under Sections 11 and 15 of the Securities Act and Sections 10(b) and 20 of the Exchange Act.

The defendants moved to dismiss these actions on the grounds that the complaints failed to comply with applicable pleading standards and failed to state a claim. In a comprehensive ruling concerning these provisions of the securities laws, Judge Scheindlin granted in part and denied in part the motions to dismiss by ruling that the plaintiffs had adequately pled a coherent scheme to defraud the investing public. *In re IPO Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003).

The ruling was significant in a number of respects. In addition to its comprehensive discussion of the standards for bringing Section 11 and Section 10(b) claims, the case was one of the most prominent to hold that Section 20(a) of the Exchange Act—which allows a plaintiff to hold persons "secondarily" liable for the securities violations of others—did not require "scienter," or the intent or knowledge of

wrongdoing. In the years prior to this case, the majority of cases in the Second Circuit and Southern District held that a plaintiff was required to plead “culpable participation” as part of a *prima facie* Section 20(a) case. Although the Second Circuit had never defined “culpable participation,” most lower courts equated it with scienter. Departing from this standard, Judge Scheindlin held that a plaintiff need allege only that a defendant controlled a person or entity that committed a primary violation of the securities laws. Since this decision, many other courts have adopted Judge Scheindlin’s holding, including the Eleventh Circuit Court of Appeals in *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 724 n.16 (11th Cir. 2008); the Eighth Circuit Court of Appeals in *Lustgraaf v. Behrens*, 619 F.3d 867, 875 (8th Cir. 2010); and the U.S. District Court of the Northern District of California in *In re Exodus Commc’ns, Inc. Sec. Litig.*, 2005 WL 1869289 at *44 (N.D. Cal. Aug. 5, 2005).

Following more than eight years of litigation, the parties reached a \$586 million global settlement, which Judge Scheindlin approved on October 5, 2009.

In re WorldCom, Inc. Sec. Litig.

In July 2002, WorldCom, Inc. (“WorldCom”), then a giant in the telecommunications industry, filed what was then the largest bankruptcy in U.S. history as a result of a massive accounting scandal. WorldCom’s stockholders and bondholders lost billions of dollars. More than 20 separate class-action complaints filed in the Southern District were consolidated before Judge Denise Cote.

In the consolidated securities action, plaintiffs alleged that WorldCom’s officers, directors, outside accountants and auditors, underwriting syndicates, and its most influential outside analyst disseminated materially false and misleading information through various filings with the SEC and other public statements. Plaintiffs alleged that by engaging in accounting strategies that inflated earnings and decreased costs, WorldCom misled investors regarding the true value of the company in violation of Sections 11, 12, and 15 of the Securities Act and of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5.

Each of the defendants moved to dismiss. Judge Cote, in a decision that has been cited more than 100 times by the Southern District and other courts, found that the complaint adequately alleged primary violations of the securities laws by WorldCom’s executives, directors, outside accountants and auditors, underwriters, and analysts. Judge Cote also found that plaintiffs had sufficiently pled “control person” violations by members of WorldCom’s board of directors and Citigroup, Inc. (along with a subsidiary) in connection with the employment of an analyst responsible for issuing allegedly fraudulent reports about WorldCom. *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 392 (S.D.N.Y. 2003).

In a significant ruling, Judge Cote found that plaintiffs had alleged sufficient facts to create a strong inference that WorldCom’s former chief executive officer, Bernard J. Ebbers, knew that the company was manipulating its books. Prior to WorldCom’s downfall, Ebbers, a billionaire, was one of the telecommunications industry’s most recognized executives and was responsible for WorldCom’s \$44 billion combination with MCI Communications Corp. in one of the largest mergers in American history. In denying Ebbers’s motions to dismiss, Judge Cote found that he had personal financial motives for manipulating WorldCom’s financial statements. Judge Cote highlighted the fact that Ebbers had personal loans of approximately \$900 million secured by WorldCom stock and that, as the company’s stock price fell, Ebbers faced margin calls on those loans. Judge Cote, therefore, concluded that it was in Ebbers’s personal interest to prop up WorldCom’s stock price through the alleged accounting scheme.

Judge Cote’s denial of Ebbers’s and the other defendants’ motions to dismiss led to several more years of litigation. On September 21, 2005, Judge Cote granted approval of a settlement agreement with

various defendants that resulted in an eventual recovery of over \$6 billion for the plaintiff class. In a separate criminal action brought after Judge Cote's rulings in this case, Ebbers was found guilty of fraud, conspiracy, and various securities violations and sentenced to 25 years in prison.

Terrorism

In re Terrorist Attacks on September 11, 2001

In *In re Terrorist Attacks on September 11, 2001*, 740 F. Supp. 2d 494 (S.D.N.Y. 2010), Judge George Daniels considered motions to dismiss brought by a number of defendants in multidistrict litigation brought by plaintiffs seeking to hold defendants liable for allegedly aiding, abetting, sponsoring, financing, or otherwise assisting Osama bin Laden and al Qaeda in the terrorist attacks of September 11, 2001. The complaint targeted individuals, banks, and other organizations alleged to have provided assistance to al Qaeda, bringing claims under the Anti Terrorism Act ("ATA"), 18 U.S.C. § 2333, the Racketeer Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962, *et seq.*; and the Torture Victim Protection Act ("TVPA").

Judge Daniels granted several motions to dismiss against seven individuals for lack of personal jurisdiction, ruling that the plaintiffs had not shown that those defendants had engaged in sufficient activities in, or affecting, the United States. Although those defendants participated in alleged terrorist activities or in charities that allegedly funded terrorism, the plaintiffs failed to show that the defendants were aware that activities allegedly funded were directed at the United States or reasonably anticipated that "the brunt of the injuries will be felt there . . ." 740 F. Supp. 2d at 507-510.

The ATA claims further failed, according to Judge Daniels, because the plaintiffs had failed to plead purposeful conduct, as opposed to mere knowledge. Thus, the ATA counts were dismissed because the complaints did not plead that any defendant "purposefully aided and abetted, conspired with, or materially supported al Qaeda in the commission of an act of terrorism involving the hijacking of a commercial airplane." *Id.* at 514. The court also dismissed the ATA claims against two financial institutions, Banca Del Gottardo and Dar Al-Maal-Al-Islami Trust, which were alleged to have done no more than provide routine banking services to al Qaeda.

The court dismissed the TVPA claims because the plaintiffs failed to plead that the acts in question were committed under color of state authority or in concert with someone acting under color of state authority.

The court rejected the RICO claims because plaintiffs failed to plead injury arising from the investment of racketeering income as required under 8 U.S.C. § 1962(a). Nor did plaintiffs sufficiently allege that the moving defendants played any part in directing the affairs of the alleged enterprise as required by § 1962(c) of RICO. The court also held that there was no allegation of conscious agreement to commit two RICO predicate acts in furtherance of the RICO enterprise in violation of § 1962(d) of RICO.

The court declined to dismiss ATA claims against certain defendants, including charities and individuals, that were alleged to have generated an al Qaeda front and infused it with financial capital.

U.S. v. Bin Laden

On May 29, 2001, al Qaeda terrorist Wadiah El-Hage was convicted of conspiracy and perjury for his part in al Qaeda's synchronized bombings of two U.S. embassies in Africa that left 224 dead and

thousands injured. El-Hage, along with his codefendants, received a sentence of life in prison. In addition to his role in these atrocities, El-Hage is also infamous for having purportedly acted as Osama Bin Laden's personal secretary.

Jamal al-Fadl, formerly an al Qaeda member, approached a U.S. embassy in 1996 and began cooperating with the U.S. by providing information about the terrorist groups and terrorist threats of which he had knowledge. Al-Fadl was eventually placed into the U.S. Marshals Service's Witness Security Program and was interviewed regularly by the U.S. Marshals for information regarding terrorist organizations and suspected terrorists. Twelve such teleconferences were videotaped prior to the conclusion of El-Hage's trial, at which al-Fadl testified regarding El-Hage's activities within al Qaeda. The prosecutors in the Southern District did not learn about the tapes' existence until after the trial's conclusion. Thereafter, the prosecutors' attempts to obtain copies of the tapes were stonewalled for months, further delaying disclosure of the tapes to El-Hage and his codefendants in what Judge Kevin T. Duffy called "a mixture of inaction, incompetence and stonewalling to cover up their mistakes . . ." *U.S. v. Bin Laden*, 397 F. Supp. 2d 465, 473 (S.D.N.Y. 2005).

El-Hage filed a motion seeking a new trial pursuant to Fed. R. Crim. P. 33 based on the government's failure to timely disclose the videotapes pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); and the Jencks Act, 18 U.S.C. § 3500. The court noted the "utter dearth of guidance given to Marshals Service Investigators regarding the Government's disclosure obligations." *Bin Laden*, 397 F. Supp. 2d at 487. Judge Duffy found that had the material been disclosed, El-Hage could have shown that al-Fadl believed that avoiding prison and maintaining his ability to remain in the U.S. depended on the success of his trial testimony. *Id.* at 515. However, Judge Duffy denied El-Hage's request for retrial, finding that none of the undisclosed information satisfied the relevant materiality requirement. *Id.* at 518. The Second Circuit upheld the decision on appeal in *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 111 (2d Cir. 2008).

United States v. Lynne Stewart

Lynne Stewart, a New York attorney known for representing controversial clients, was tried for conspiring to defraud the United States, providing and concealing material support to terrorist activity, and two counts of making false statements for her role as counsel for Sheikh Omar Abdel-Rahman, a radical Egyptian cleric imprisoned for his role in the 1993 World Trade Center bombing. Stewart was accused by a grand jury of acting as a third-party messenger between Rahman and his Muslim terrorist cell group, Al-Gama'a al-Islamiyya (The Islamic Group), regarding violence against the Egyptian government.

After a nine-month trial and 13 days of jury deliberations, Stewart was convicted in 2005 on all counts and sentenced to 28 months in prison. *United States v. Sattar*, 395 F. Supp. 2d 66 (S.D.N.Y. 2005). There were two co-defendants in the case, Mohamed Yousry and Ahmed Sattar, who were also found guilty. Stewart appealed her conviction to the Second Circuit.

A three-judge panel for the Second Circuit Court of Appeals not only upheld Stewart's conviction but redirected her case back to Judge John G. Koeltl for resentencing after accusing Stewart of making false statements during her initial trial. *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009). Judge Koeltl resentenced Stewart, then 70 years old, to 10 years and one month imprisonment. This sentence was four times what she originally faced.

United States v. Ghailani

Nearly ten years after the government tried four defendants in *United States v. El-Hage*, 98 Cr. 1023 (LAK), for the 1998 embassy bombings that killed 224 people in Kenya and Tanzania, it tried a fifth defendant in the same case, former Guantanamo Bay detainee Ahmed Khalfan Ghailani. In response to President Barack Obama's pledge to close the detention camp at Guantanamo Bay, Cuba, Ghailani arrived in New York in June 2009 to be the first Guantanamo detainee to face trial in a civilian court. Judge Lewis A. Kaplan of the Southern District presided over the trial.

Ghailani's trial was viewed by many as a test case to determine whether Guantanamo Bay detainees could be successfully tried in civilian courts instead of by military commissions. The government charged Ghailani with 285 criminal counts of murder and conspiracy and described Ghailani as a sophisticated member of an al Qaeda cell that bombed two U.S. embassies in East Africa. Ghailani's defense team, however, portrayed him as an unwitting dupe in the al Qaeda conspiracy.

Unlike his co-defendants, who were tried and convicted by 2001, Ghailani remained at large, allegedly working as a cook and bodyguard to Osama bin Laden, until he was captured by the CIA and detained in Guantanamo Bay from 2006 to 2009. While Ghailani claimed he was tortured by the CIA, the government contended that only enhanced interrogation techniques were used against him. The defense further argued that the government learned about its star witness—who would testify that he sold Ghailani TNT used to blow up the two embassies—through the CIA's use of enhanced interrogation techniques against Ghailani.

Judge Kaplan found this argument persuasive and disallowed the government's witness from testifying. Judge Kaplan determined that the government learned of the witness only through the CIA's use of enhanced interrogation techniques against Ghailani, and thus that the testimony was not sufficiently attenuated or remote from those coerced statements to be reliable. *United States v. Ghailani*, 743 F. Supp. 2d 261 (S.D.N.Y. 2010).

As a result of this ruling and the defense's trial strategy, the jury convicted Ghailani of only one of 285 counts: conspiracy to destroy government buildings and property. The defense viewed the verdict as vindication that the jury saw Ghailani as an unwitting pawn. This "vindication" was tempered, however, by the fact that Ghailani still faced a maximum of life imprisonment. Judge Kaplan later imposed the maximum sentence, which is being served in the federal "Supermax" prison in Florence, Colorado.

In Memoriam

This section acknowledges the contributions of the District Judges who served on the court during the 2000-2010 period and are now deceased.

Hon. Charles L. Brieant

Judge Brieant was born in 1923 in Ossining, New York. He was appointed in 1971 by President Richard M. Nixon to the Southern District. Judge Brieant assumed senior status in 2007 and served until his death in 2008.

Judge Brieant graduated from Columbia University (A.B., 1947) and Columbia Law School (LL.B., 1949). Afterwards, he was in private practice from 1949 until his judicial appointment in 1971. While practicing, he served as Water Commissioner for Ossining (1949-59) and was selected as Town Justice. He also served as Village Attorney for Briarcliff Manor (1958-59), Special Assistant District Attorney for Westchester County (1958-59), and Town Supervisor of Ossining (1960-63). He was elected to the Westchester County legislature in 1970.

The former Chief Judge presided over some controversial and unusual cases. Judge Brieant determined, for example, that the oil company Texaco, while appealing a \$12 billion judgment against it, did not have to post a bond equal to the judgment in accordance with Texas legal procedure—instead ruling that \$1 billion was an appropriate figure. Judge Brieant also ruled in 1999 that the Bedford (Connecticut) Central School District violated First Amendment religious freedom when the school district allowed schools to engage in activities like having third graders make likenesses of the Hindu god Ganesha. Also, in 2001, he ruled that conversations between members of Alcoholics Anonymous enjoyed the same privilege as those between clerics and parishioners.

Hon. Robert L. Carter

Judge Carter was born in 1917 in Caryville, Florida. He was appointed in 1972 by President Nixon to the Southern District. He assumed senior status in 1986 and served until his death in 2012.

Judge Carter received his undergraduate degree from Lincoln University, Pennsylvania (A.B., 1937) and his law degree from Howard University Law School (LL.B., 1940). He also received a graduate degree from Columbia University Law School (LL.M., 1942) and honorary degrees from multiple universities. He was a Lieutenant in the U.S. Army Air Corps (1941-44). Judge Carter served in a variety of private and public sector positions, including service as Assistant Special Counsel (1945-56) and General Counsel (1956-68) to the NAACP, and as a member of the American Delegation to the U.N. Conference on Crime and Treatment of Offenders (1965) and the U.N. Conference of African Jurists on African Legal Process and Individual Rights (1968). He was a partner in the firm Poletti, Freidin, Prashker, Feldman & Gartner (1969-72). Judge Carter also taught as an Adjunct Professor of Law at Yale University, New York University, and University of Michigan School of Law.

Judge Carter was a civil rights activist, co-founding the National Conference of Black Lawyers and serving as a member of the NAACP Legal Defense and Educational Fund. He was an architect of the NAACP's arguments in *Brown v. Board of Education* that offered psychological research to reveal an inherent contradiction in the "separate but equal" doctrine that propped up segregation in the South. On the bench, Judge Carter also presided over the merger of the National Basketball Association and the American Basketball Association in the 1970s and oversaw arbitration disputes involving players

including Bill Walton. Judge Carter's 1979 finding of bias shown against black and Hispanic applicants for police jobs by New York City led to changes in hiring practices.

Hon. Richard C. Casey

Judge Casey was born in 1933 in Ithaca, New York. Despite a genetic disorder that left him completely blind by 1987, he was appointed to the Southern District by President William J. Clinton in 1997. He died in 2007.

Judge Casey received his undergraduate degree from the College of the Holy Cross (B.S., 1955) and his law degree from the Georgetown University Law Center (LL.B., 1958). He served in the U.S. Army and in several legal positions in the government from 1958 to 1964, including four years as an Assistant U.S. Attorney in the Criminal Division of the Southern District (1959-63). He then worked in private practice at Brown & Wood (then known as Brown, Wood, Fuller, Caldwell & Ivey) as an associate (1964-70), a partner (1970-84), and of counsel (1984-97).

As a U.S. District Judge, Judge Casey's notable cases included *National Abortion Federation v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), a case that challenged the constitutionality of the 2003 Partial-Birth Abortion Ban Act due to its explicit omission of a "health exception" that would apply to mothers facing health risks during a late-term pregnancy. Judge Casey made headlines throughout the trial by his aggressive questioning. After the lengthy trial, Judge Casey entered a judgment declaring the Act unconstitutional. Judge Casey also presided over the trial of Peter Gotti, brother of Gambino crime family boss John J. Gotti, Jr., sentencing him to 25 years in prison after he was found guilty of conspiring to murder a government informant.

Judge Casey's blindness did not hinder his ability to conduct a trial. In his own words, the Judge assessed credibility by examining whether a witness's story "held water."

Hon. William C. Conner

Judge Conner was born in 1920 in Wichita Falls, Texas. He was appointed to the Southern District by President Nixon in 1973 and assumed senior status in 1987. He died in 2009.

Judge Conner received both his undergraduate degree (B.B.A., 1941) and law degree (LL.B., 1942) from the University of Texas, and was a lieutenant in the U.S. Navy Reserve (1942-46). Judge Conner was awarded the Jefferson Medal for outstanding contributions to the development of U.S. patent law (1975), was President of the New York Patent Law Association (1972-73), and served on the Board of Editors of the Manual for Complex Litigation.

Judge Conner was known for administering a series of rulings in a case he took over in the mid-1970s involving the American Society of Composers, Authors and Publishers, a nonprofit voluntary organization that collects licensing fees from members, provides copyright protection services, and collects and distributes royalties to member recording artists. Among those rulings were a dismissal in the early 1990s of claims from jingle writers, a 2004 ruling on an agreement covering payments from radio stations, a rejection in 2007 of a proposal to treat music downloads as performances, and a 2008 decision establishing a fee of 2.5% of revenue from songs streamed online.

Hon. David N. Edelstein

Judge Edelstein was born in New York, New York in 1910. He received a recess appointment to the Southern District in 1951 from President Harry S. Truman, and a permanent appointment in 1952. Judge Edelstein assumed senior status in 1994, after having served as the Chief Judge of the Southern District from 1971 to 1980. He continued to hear cases until his death in 2000.

Judge Edelstein received a bachelor's degree (B.S.), a master's degree (M.A.), and a law degree (LL.B.) from Fordham University, paying his way through his many years of school by working as a page for the New York Stock Exchange (1929-32). After several years in private practice and one year as an attorney in the Claims Division of the Department of Justice, Judge Edelstein became an Assistant U.S. Attorney for the Southern District (1945-47). His public service continued with terms as special assistant to the U.S. Attorney General, Department of Justice, Lands Division (1947-48), and as Assistant U.S. Attorney General, Department of Justice, Customs Division (1948-51).

As a U.S. District Judge, Judge Edelstein served as a member of the Judicial Conference of the United States. His notable cases included *United States v. International Bus. Machs. Corp.*, 1956 U.S. Dist. LEXIS 3992 (S.D.N.Y. 1956), a seminal antitrust case under the Sherman Act, requiring IBM to modify its business practices in connection with the sale, lease, and repair of its tabulating and electronic processing machines. Though Judge Edelstein ultimately recused himself, he oversaw the IBM antitrust litigation for 43 years.

It is a testament to Judge Edelstein's remarkable work ethic that for many years he held the distinction of being the longest-serving active judge in the country.

Hon. Whitman Knapp

Judge Knapp was born in 1909 in New York, New York. He was appointed to the Southern District in 1972 by President Nixon. He assumed senior status in 1987 and served until his death in 2004.

Judge Knapp received his undergraduate degree from Yale College (B.A., 1931) and his law degree from Harvard Law School (LL.B., 1934). Prior to his appointment to the bench, he was in private practice with Cadwalader, Wickersham & Taft (1934-37); Donovan Leisure Newton & Lumbard (1941); and Barrett, Knapp, Smith, Schapiro & Simon (1950-72). Judge Knapp served in the District Attorney's Office for New York County as Deputy Assistant District Attorney (1937-41), Chief of the Indictments and Frauds Division (1942-44), and Chief of the Appeals Bureau (1944-50). He was Chairman of the so-called Knapp Commission, which investigated allegations of corruption in New York City's Police Department (1970-72). He was also a member of the Temporary Commission on Revision of the New York State Penal Law and Code of Criminal Procedure (1953-54).

As a U.S. District Judge, Judge Knapp presided over the racketeering case against Bronx County Democratic leader Stanley M. Friedman. Friedman was effectively barred from politics after receiving a life sentence handed down to him from Judge Knapp.

Hon. Shirley Wohl Kram

Judge Kram was born in New York, New York in 1922. She was appointed to the Southern District in 1983 by President Ronald Reagan. She assumed senior status in 1993 and died in 2009.

Judge Kram attended the College of the City of New York and Brooklyn Law School (LL.B., 1950). She served as a judge for the Family Court, Civil Court, and Criminal Court of the City of New York (1971-83). She also worked for The Legal Aid Society, where she was head of the Narcotics Unit, and coauthored a book entitled THE LAW OF CHILD CUSTODY: DEVELOPMENT OF THE SUBSTANTIVE LAW (D.C. Heath & Co. 1982).

As a U.S. District Judge, Judge Kram most notably handled major litigation on compensation for Holocaust victims. In 2005, she dismissed several lawsuits seeking to block reparations for Austrian Jews, allowing the payment of billions of dollars in compensation.

Hon. Morris Edward Lasker

Judge Lasker was born in 1917 in Hartsdale, New York. He was appointed to the Southern District in 1968 by President Lyndon B. Johnson. He assumed senior status in 1983 and died in 2009.

Judge Lasker graduated from Harvard College (B.A., 1938) and from Yale Law School (LL.B., 1941). He served as a staff attorney for the U.S. Senate Committee Investigating National Defense Programs (1941-42) and was in private practice in New York City (1946-68). He was Town Attorney for New Castle, New York (1955-57) and a New Castle Justice of the Peace (1957-58). Judge Lasker was Chairman of the Advisory Committee of the Center for Research in Crime and Justice at the New York University School of Law and was a member of the Executive Committee of the Association of the Bar of the City of New York.

As a U.S. District Judge, Judge Lasker was most notable for being an activist judge who oversaw litigation surrounding the poor conditions in New York City jails. In a series of rulings in the 1970s and 1980s, Judge Lasker found the City of New York liable for civil rights violations after evidence showed the severe overcrowding and filthy living conditions in the Manhattan House of Detention and Riker's Island. He also ordered The Tombs, a detention facility in Manhattan, to be shut down due to health and security reasons.

Hon. Charles M. Metzner

Judge Metzner was born in New York, New York in 1912. He was appointed to the Southern District in 1959 by President Dwight D. Eisenhower. In 1977, he assumed senior status and served until his death in 2009.

Judge Metzner received both his undergraduate (A.B., 1931) and law (LL.B., 1933) degrees from Columbia University. He began his legal career in private practice, and then served as a research assistant to the Judicial Council of the State of New York (1934-41) and as a law secretary to the Hon. William C. Hecht, New York State Supreme Court (1942-53). He served as an executive assistant to the U.S. Attorney General (1953-54), before returning to private practice with Chapman, Walsh & O'Connell (1954-59). He also served as a director of the New York County Lawyers' Association from 1957 to 1959. Following his 1959 appointment to the bench, Judge Metzner chaired the U.S. Judicial Conference Committee on the Administration of the Magistrates System (1969-81).

As a U.S. District Judge, Judge Metzner spent five decades presiding over many high-profile cases, the most notable being a lawsuit brought against Howard Hughes by Trans World Airlines, Inc. Judge Metzner ruled in favor of the airline, citing Hughes's absence from the courtroom on his day to testify as a "willful and deliberate default."

Hon. Constance Baker Motley

Judge Motley was born in New Haven, Connecticut in 1921. She was appointed to the Southern District in 1966 by President Johnson. She assumed senior status in 1986 and served until her death in 2005.

Judge Motley graduated from New York University (B.A., 1943) and Columbia University (LL.B., 1946) and received honorary degrees from numerous universities. Judge Motley was on the legal staff of the NAACP Legal Defense and Educational Fund (1945-65). She was President of the Borough of Manhattan (1965-66) and served in the New York State Senate (1964-65). During her tenure with the NAACP, Judge Motley was a principal trial attorney, and worked on the briefs for *Brown v. Board of Education* with Thurgood Marshall, who would later become a Justice of the U.S. Supreme Court; represented Dr. Martin Luther King, Jr. in connection with the 1963 demonstrations in Birmingham, Alabama; and argued a series of vital civil rights cases before the U.S. Supreme Court.

As a U.S. District Judge, Judge Motley's notable cases included *Ludtke v. Kuhn*, 461 F. Supp. 86 (S.D.N.Y. 1978), in which she allowed a female reporter's admission to the New York Yankees locker room, to which she had been denied access due to her gender. Judge Motley was the first African-American woman to sit on the federal bench, and the first woman to serve as a judge of the Southern District. She served as Chief Judge of the Southern District (1982-86). Judge Motley was inducted into the National Women's Hall of Fame in 1993, awarded the Presidential Citizens Medal by President Clinton in 2001, and awarded the Spingarn Medal, the NAACP's highest honor, in 2003.

Hon. Milton Pollack

Judge Pollack was born in 1906 in New York, New York. He was appointed to the Southern District in 1967 by President Johnson. He assumed senior status in 1983. He was the oldest federal judge still sitting when he died in 2004.

Judge Pollack graduated from Columbia University (B.A., 1927) and Columbia Law School (J.D., 1929). He practiced privately in New York City (1929-67). After his appointment, he served on multiple committees of the Judicial Conference of the United States.

Judge Pollack's most notable cases included *In re Drexel*, 130 B.R. 910 (S.D.N.Y. 1991), *affirmed*, 960 F.2d 285 (2d Cir. 1992), a class-action suit resulting from the bankruptcy of Drexel Burnham Lambert, a Wall Street investment bank. The lawsuits relating to Drexel were expected to drag on for decades, but under Judge Pollack's supervision, they were resolved and completed in just over three years.

Hon. Allen G. Schwartz

Judge Schwartz was born in 1934 in Brooklyn, New York. He was appointed to the Southern District in 1993 by President Clinton. He died in 2003.

Judge Schwartz graduated from the City College of New York, Baruch College (B.B.A., 1955), and the University of Pennsylvania Law School (LL.B., 1958). He served in the U.S. Army (1958-59) and the U.S. Army Reserve. He was an Assistant District Attorney in New York County (1959-62) and Corporation Counsel for New York City (1978-81). He was also in private practice with the law firms Proskauer Rose Goetz & Mendelsohn and Schwartz, Klink & Schreiber, P.C.

As a U.S. District Judge, Judge Schwartz ruled in *Abdullah, et al. v. INS*, 921 F. Supp. 1080 (S.D.N.Y. 1996), *aff'd*, 184 F.3d 158 (2d Cir. 1999), that U.S. Immigration and Naturalization examiners had rejected more than 450 green card applicants based on methods of profiling and discrimination against Indians, Pakistanis, and Bangladeshis. Judge Schwartz called this action unconstitutional and ordered the INS to reopen the cases.

Hon. John E. Sprizzo

Judge Sprizzo was born in Brooklyn, New York in 1934. He was appointed to the Southern District in 1981 by President Reagan. He assumed senior status in 2000 and served until his death in 2008.

Judge Sprizzo graduated from St. John's University (B.A., 1956; LL.B., 1959). He worked in the Organized Crime Section, Criminal Division, U.S. Department of Justice (1959-63), was an Assistant U.S. Attorney for the Southern District (1963-68), Chief Appellate Attorney (1965-66), and Assistant Chief of the Criminal Division (1966-68) before returning to private practice with Curtis, Mallet-Prevost, Colt & Mosle (1970-81). He was also Associate Professor of Law at Fordham Law School from 1968 to 1972.

As a U.S. District Judge, Judge Sprizzo's most notable cases included *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), which dealt with the extradition of Joe Doherty, a member of the Provisional Irish Republican Army, who escaped to New York from a prison in Belfast, Ireland two days before his conviction for killing a British soldier in an ambush in Northern Ireland. Judge Sprizzo ruled that the discipline of the IRA's provisional wing made the killing a political act that was excluded from the extradition treaty between the U.S. and Britain. Although both British and American officials were unsettled by the decision, this ruling eventually led to changes in U.S. extradition laws, and Doherty was finally deported in 1992.

Hon. Robert J. Ward

Judge Ward was born in New York, New York in 1926. He was appointed to the Southern District by President Nixon in 1972. He assumed senior status in 1991 and served until his death in 2003.

Judge Ward graduated from Harvard College (B.S., 1945) and Harvard Law School (LL.B., 1949). He served in the U.S. Navy Reserve (1944-46) and was discharged as a lieutenant junior grade. Judge Ward was an Assistant District Attorney for New York County (1951-55), an Assistant U.S. Attorney for the Southern District (1956-61), and in private practice (1961-72).

As a U.S. District Judge, Judge Ward's notable cases included the abortion case *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989), *modified by* 886 F.2d 1339 (2d Cir. 1989), in which he issued an injunction that ordered Operation Rescue, an anti-abortion group, to cease blocking the entrances to abortion and family planning clinics during protests.

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⁴⁸ Each member of the Report Subcommittee contributed to writing and/or editing of the Retrospective. Special thanks to Timothy Dougherty of Dunnington, Bartholow & Miller for the preliminary editing and organizational structure of the Report. Also, thanks to the law firms of Arnold & Porter LLP; Dunnington Bartholow & Miller LLP; Friedman Kaplan Seiler & Adelman LLP; Seward & Kissel LLP; and Wollmuth Maher & Deutsch LLP, as well as the NYCLA library staff, for their assistance in finalizing this Retrospective.

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APPENDIX⁴⁹

Chief Judges of the U.S. District Court for the Southern District of New York (2000 to 2010)

Hon. Thomas P. Griesa (1993 to 2000)

Judge Griesa was born in Kansas City, Missouri in 1930. He received his undergraduate degree from Harvard University (A.B., 1952) and his law degree from Stanford Law School (LL.B., 1958). He was appointed to the Southern District in 1972 by President Nixon after being in private practice at Davis Polk & Wardwell (1960-72). Judge Griesa also served in the U.S. Coast Guard (1952-54) and in the Admiralty and Shipping Section of the Department of Justice (1958-60). Judge Griesa assumed senior status in 2000.

Hon. Michael B. Mukasey (2000 to 2006)

Judge Mukasey was born in the Bronx, New York in 1941. He received his undergraduate degree from Columbia University (B.A., 1963) and his law degree from Yale Law School (LL.B., 1967). He began his career in private practice in 1967, when he joined the firm of Webster, Sheffield, Fleischmann, Hitchcock & Brookfield. In 1972, Judge Mukasey joined the U.S. Attorney's Office for the Southern District, Criminal Division; from 1975 to 1976, he served in that office as Chief of the Official Corruption Unit. Judge Mukasey returned to private practice in 1976, working at the firm of Patterson, Belknap, Webb & Tyler until his 1987 appointment to the Southern District by President Reagan. Upon retiring from the court, Judge Mukasey returned to private practice at Patterson, Belknap, Webb & Tyler. Judge Mukasey served as Attorney General of the United States under President George W. Bush from 2007 to 2009, and currently is a partner at Debevoise & Plimpton.

Hon. Kimba M. Wood (2006 to 2009)

Judge Wood was born in Port Townsend, Washington in 1944. She graduated from Connecticut College (B.A., 1965), the London School of Economics (M.Sc., 1966), and Harvard Law School (J.D., 1969). Prior to her appointment to the bench by President Reagan in 1988, Judge Wood was associated with Steptoe & Johnson (1969-70). She then served in the Special Counsel's Office of the Office of Economic Opportunity Legal Services Program (1970-71) and in private practice with LeBoeuf, Lamb, Leiby & MacRae (1971-88), where she became a partner in 1978. Judge Wood was the second female Chief Judge for the Southern District. She assumed senior status in 2009.

Hon. Loretta A. Preska (2009 to present)

Judge Preska was born in 1949 in Albany, New York. She graduated from the College of St. Rose (B.A., 1970), Fordham University School of Law (J.D., 1973), and New York University School of Law (LL.M. in Trade Regulation, 1978). Prior to her appointment to the bench by President George H.W. Bush in 1992, Judge Preska was in private practice for over 20 years, first with Cahill Gordon & Reindel (1973-82) and then with Hertzog, Calamari & Gleason, where she became a partner in 1983. Judge Preska was a member of the New York County Lawyers' Association and, before becoming a

⁴⁹ Information for the judicial biographies that follow is drawn primarily from two sources: the Federal Judicial Center (www.fjc.gov) and the Second Circuit Redbook series published by the Federal Bar Council. The Committee wishes to thank the Federal Bar Council for providing this valuable resource.

District Judge, served on the Association's Federal Courts Committee. In 2001, Judge Preska received the Edward Weinfeld Award in recognition of her years of dedicated service to the Southern District.

Active Judges of the U.S. District Court for the Southern District of New York

Hon. Deborah A. Batts

Judge Batts was born in 1947 in Philadelphia, Pennsylvania. She was appointed to the Southern District in 1994 by President Clinton. She received her undergraduate degree from Radcliffe College (A.B., 1969) and her law degree from Harvard Law School (J.D., 1972). Judge Batts began her legal career clerking for the Hon. Lawrence W. Pierce of the Southern District (1972-73). She was in private practice with Cravath, Swaine & Moore in New York City (1973-79) and then served as an Assistant U.S. Attorney, Criminal Division, in the Southern District (1979-84). She was also Special Associate Counsel in the Department of Investigation of the City of New York (1990-91). Prior to her 1994 appointment to the bench, Judge Batts served as an Associate Professor of Law at Fordham University School of Law (1984-94).

Hon. Vincent L. Briccetti

Judge Briccetti was born in 1954 in Mount Kisco, New York. He was appointed to the Southern District in 2011 by President Obama. He received his undergraduate degree from Columbia (A.B., 1976) and his law degree from Fordham University (J.D., 1980). Judge Briccetti clerked for the Hon. John Matthew Cannella of the Southern District from 1980 to 1982. He worked over two decades in private practice prior to his judicial appointment, mostly for the firm he started and eventually named Briccetti, Calhoun & Lawrence (1992-2011). He also served four years as an Assistant U.S. Attorney in Manhattan (1985-89).

Hon. Andrew L. Carter

Judge Carter was born in 1969 in Albany, Georgia. He was appointed to the Southern District by President Obama in 2011. He graduated from the University of Texas (B.A., 1991) and Harvard Law School (J.D., 1994). Judge Carter served a legal fellowship with the Ford Foundation after law school before working for The Legal Aid Society of New York (1996-2005) and the Federal Defenders of New York (2005-2009), where he became Supervising Attorney. Prior to his recent appointment, Judge Carter was a Magistrate Judge for the Eastern District of New York (2009-2011).

Hon. Kevin P. Castel

Judge Castel was born in 1950 in Jamaica, New York. He was appointed by President George W. Bush to the Southern District in 2003. He received his undergraduate and law degrees from St. John's University (B.S., 1972; J.D., 1975). Judge Castel clerked for Judge Kevin Thomas Duffy of the Southern District after law school before practicing law at Cahill Gordon & Reindel in New York from 1977 to 2003.

Hon. Paul A. Crotty

Judge Crotty was born in Buffalo, New York in 1941. He was appointed to the Southern District in 2005 by President George W. Bush. Judge Crotty graduated from the University of Notre Dame (B.A., 1962) and Cornell Law School (LL.B., 1967). He clerked for Judge Lloyd F. MacMahon of the Southern District (1967-69) before practicing law at Donovan, Lesiure, Newton & Irvine in

New York as an associate (1969-76) and partner (1976-84, 1988-93). He also served as Commissioner of New York City's Office of Financial Services (1984) before becoming Commissioner of Finance (1984-86) and later Commissioner of Housing Preservation and Development (1986-88). Judge Crotty later served as New York City's Corporation Counsel (1994-97) before becoming Verizon's Regional President of New York and Connecticut (1997-2005). He also served on active duty in the U.S. Navy from 1962 to 1968.

Hon. George B. Daniels

Judge Daniels was born in 1953 in Allendale, South Carolina. He was appointed to the Southern District by President Clinton in 2000. He received his undergraduate degree from Yale University (B.A., 1975) and his law degree from the University of California at Berkeley, Boalt Hall School of Law (J.D., 1978). Judge Daniels began his legal career as a criminal defense attorney for The Legal Aid Society of New York (1978-80) and then served as law clerk to Chief Justice Rose E. Bird of the California Supreme Court (1980-81), before entering private practice with Skadden, Arps, Slate, Meagher & Flom in New York. He then served as an Assistant U.S. Attorney in the Eastern District of New York (1983-89), and held several judicial posts, as a Judge in the Criminal Court of the City of New York, first in New York County (1989-90) and then in Bronx County (1993-95), and a Justice of the Supreme Court of the State of New York (1995). He was an Adjunct Professor at Brooklyn Law School and a trial advocacy instructor at Hofstra Law School, Benjamin N. Cardozo School of Law, and the National Institute for Trial Advocacy. In addition, Judge Daniels co-authored a book entitled *NEW YORK CRIMINAL LAW* (West Publishing Co. 1996).

Hon. Paul A. Engelmayer

Judge Engelmayer was born in 1961 in New York, New York. He was appointed to the Southern District in 2011 by President Obama. He worked as a staff reporter for the *Wall Street Journal* in between receiving his undergraduate degree from Harvard College (A.B., 1983) and his law degree from Harvard Law School (J.D., 1987). Judge Engelmayer served as law clerk to the Hon. Patricia Wald of the U.S. Court of Appeals for the District of Columbia Circuit (1987-88) and to U.S. Supreme Court Justice Thurgood Marshall (1988-89). He worked as an Assistant U.S. Attorney (1989-94), Deputy Chief Appellate Attorney (1994), and Chief of the Major Crimes Unit (1996-2000) in the Office of the U.S. Attorney. He also was assistant to the U.S. Solicitor General Drew S. Days, III from 1994 to 1996. Prior to his judicial nomination, Judge Engelmayer was a partner at Wilmer Cutler Pickering Hale and Dorr in Manhattan (2000-2011).

Hon. Katherine B. Forrest

Judge Forrest was born in New York, New York in 1964. She was appointed in 2011 by President Obama. She earned her undergraduate degree from Wesleyan University (B.A., 1986) and her law degree from New York University (J.D., 1990). Judge Forrest worked in private practice for Cravath, Swaine & Moore (1990-2010), before becoming a Deputy Assistant Attorney General in the Antitrust Division of the Department of Justice.

Hon. Jesse M. Furman

Judge Furman was born in 1972 in New York, New York. He was appointed to the Southern District by President Obama in 2012. Judge Furman graduated from Harvard University (A.B., 1994), was a Henry Fellow at Oxford University (1994-95), and received his law degree from Yale University (J.D., 1998). He clerked for the Hon. Michael B. Mukasey of the Southern District (1998-99); the Hon. José A. Cabranes of the U.S. Court of Appeals for the Second Circuit (1999-2000); and the Hon. David H. Souter of the U.S. Supreme Court (2002-03). Prior to taking the bench, Judge

Furman was an Associate at Wiggin & Dana, LLP (2000-02 and 2003-04), an Assistant U.S. Attorney in the Southern District of New York (2004-07), Counselor to U.S. Attorney General Michael B. Mukasey (2007-09), and Deputy Chief of Appeals for the U.S. Attorney's Office for the Southern District's Criminal Division (2009-12).

Hon. Paul G. Gardephe

Judge Gardephe was born in Fitchburg, Massachusetts in 1957. He was appointed by President George W. Bush to the Southern District in 2008. He graduated from the University of Pennsylvania (B.A., 1979; M.A., 1979) and from Columbia Law School (J.D., 1982) before clerking for the Hon. Albert J. Engel of the U.S. Court of Appeals for the Sixth Circuit from 1982 to 1983. Judge Gardephe served as an Assistant U.S. Attorney in the Southern District (1987-96), holding the position of Chief Appellate Attorney, Criminal Division, from 1992 to 1995. He left the U.S. Attorney's Office in 1998 to join Time Inc., where he served as Vice President and Deputy General Counsel. Judge Gardephe was an associate at Patterson, Belknap, Webb & Tyler between 1983 and 1987 and a partner at that firm from 2003 to 2008, where he served as chair of the litigation department.

Hon. Barbara S. Jones

Judge Jones was born in 1947 in Inglewood, California. She was appointed to the Southern District by President Clinton in 1995. She received her undergraduate degree from Mount St. Mary's College (B.A., 1968) and her law degree from Temple University School of Law (J.D., 1973). Judge Jones began her legal career in the Department of Justice Honors Program as a Special Attorney in the Organized Crime and Racketeering Criminal Division, and served as a Special Attorney for its Manhattan Strike Force Against Organized Crime and Racketeering (1973-77). She was an Assistant U.S. Attorney in the Southern District (1977-87) and in 1984, she became the first woman to be appointed Chief of an Organized Crime Strike Force in that office. In addition, Judge Jones served as Chief of the General Crimes Unit (1983-84) and Chief of the Organized Crime Unit (1984-87) in the Southern District. From 1987 until January 1996, she was the Chief Assistant District Attorney to Robert M. Morgenthau, District Attorney of New York County. She has been an Adjunct Associate Professor of Law at Fordham University School of Law since 1985.

Hon. Kenneth M. Karas

Judge Karas was born in Colorado Springs, Colorado in 1964. He was appointed by President George W. Bush to the Southern District in 2004. Judge Karas graduated from Georgetown University (B.A., 1986) and Columbia Law School (J.D., 1991). Judge Karas served as a law clerk for the Hon. Reena Raggi of the U.S. District Court for the Eastern District of New York in 1992. He was also an Assistant U.S. Attorney in the Southern District of New York (1992-2004) before taking the bench.

Hon. John G. Koeltl

Judge Koeltl was born in 1945 in New York, New York. He was appointed to the Southern District by President Clinton in 1994. He received his undergraduate degree from Georgetown University (A.B., 1967) and his law degree from Harvard Law School (J.D., 1971). Judge Koeltl then clerked for the Hon. Edward Weinfeld of the Southern District (1971-72), followed by the Hon. Potter Stewart of the U.S. Supreme Court (1972-73). Judge Koeltl spent nearly 20 years in private practice with the law firm of Debevoise & Plimpton in New York (1975-94), where he became a partner in 1979. He was also an Assistant Special Prosecutor on the Watergate Special Prosecution Force in the

Department of Justice (1973-74). Judge Koeltl is a member of the New York County Lawyers' Association.

Hon. Colleen McMahon

Judge McMahon was born in 1951 in Columbus, Ohio. In 1998, she was appointed to the Southern District by President Clinton. She received her undergraduate education at Ohio State University (B.A., 1973) and her legal education at Harvard Law School (J.D., 1976). After a few years in private practice at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, Judge McMahon served as Speechwriter and Special Assistant to the Hon. Donald McHenry, U.S. Mission to the United Nations (1979-80). She then returned to Paul, Weiss, where, in 1984, she became the first woman litigator to be elected as a partner of that firm. Judge McMahon served as a Judge of the New York Court of Claims (1995) and as an Acting Justice of the Supreme Court of New York (1995-98).

Hon. Alison J. Nathan

Judge Nathan was born in Philadelphia, Pennsylvania in 1972. She was appointed to the Southern District in 2011 by President Obama. Judge Nathan earned her undergraduate and law degrees from Cornell University (B.A., 1994; J.D., 2000) before clerking for the Hon. Betty B. Fletcher of the U.S. Court of Appeals for the Ninth Circuit (2000-01) and U.S. Supreme Court Justice Paul Stevens (2001-02). She worked at Wilmer Cutler Pickering Hale and Dorr in New York and in Washington, D.C. from 2002 to 2006 before serving for several years as a Visiting Associate Professor at Fordham University School of Law and then as a Fellow at New York University School of Law. She also served as a Special Assistant to President Obama and as Associate White House Counsel (2009-10) and as Special Counsel to the New York State Solicitor General in 2010.

Hon. J. Paul Oetken

Judge Oetken was born in 1965 in Louisville, Kentucky. He was appointed to the Southern District in 2011 by President Obama. Judge Oetken graduated from the University of Iowa (B.A., 1988) and Yale Law School (J.D., 1991) before clerking for the Hon. Richard D. Cudahy of the U.S. Court of Appeals for the Seventh Circuit (1991-92), the Hon. Louis F. Oberdorfer of the U.S. District Court for the District of Columbia (1992-93), and U.S. Supreme Court Justice Harry A. Blackmun (1993-94). Between stints in private practice, Judge Oetken worked in the Department of Justice's Office of Legal Counsel (1997-99) and in the Office of the White House Counsel under President Clinton (1999-2001). Prior to his judicial appointment, Judge Oetken was Associate General Counsel and Senior Vice President to Cablevision Systems Corp. He has been referred to by the *New York Times* as the first openly gay man to serve on the federal bench.

Hon. William H. Pauley III

Judge Pauley was born in 1952 in Glen Cove, New York. He was appointed to the Southern District by President Clinton in 1998. Judge Pauley graduated from Duke University (A.B., 1974) and received his law degree from Duke University School of Law (J.D., 1977). Thereafter, he worked for the Nassau County Attorney's Office (1977-78). Judge Pauley was in private practice for approximately 20 years, primarily at the law firm Snitow & Pauley (1978-98).

Hon. Edgardo Ramos

Judge Ramos was born in 1960 in Ponce, Puerto Rico. He was appointed to the Southern District in 2011 by President Obama. Judge Ramos graduated from Yale University (A.B., 1982) and Harvard Law School (J.D., 1987), after which he worked in private practice at Simpson Thacher &

Bartlett until 1992. He then served as an Assistant U.S. Attorney in the Eastern District of New York for ten years. From 2002-11, Judge Ramos was a partner at Day Pitney LLP. He also served as commissioner on the New York City Commission to Combat Police Corruption.

Hon. Cathy Seibel

Judge Seibel was born in West Islip, New York in 1960. She was appointed by President George W. Bush to the Southern District in 2008. Judge Seibel graduated from Princeton University (B.A., 1982) and Fordham University School of Law (J.D., 1985). Following graduation, Judge Seibel worked as a law clerk for the Hon. Joseph M. McLaughlin of the U.S. District Court for the Eastern District of New York (1985-87). From 1987 to 1991, she was an Assistant U.S. Attorney for the Southern District. Judge Seibel served as Special Assistant U.S. Attorney for the Western District of Washington (1991-93). She returned to the U.S. Attorney's Office for the Southern District in 1993 and served as Chief of General Crimes (1993-95), Assistant U.S. Attorney-in-Charge of the White Plains Branch (1997-99), Senior Trial Counsel (1999-2005), and Deputy U.S. Attorney (2005-08).

Hon. Richard J. Sullivan

Judge Sullivan was born in Manhasset, New York in 1964. He was appointed by President George W. Bush to the Southern District in 2007. Judge Sullivan is a graduate of the College of William and Mary (B.A., 1986) and of Yale Law School (J.D., 1990). Prior to his appointment to the bench, Judge Sullivan was a law clerk for the Hon. David Ebel of the U.S. Court of Appeals for the Tenth Circuit (1990-91). Judge Sullivan was in private practice in New York from 1991 to 1994. He then served as an Assistant U.S. Attorney for the Southern District (1994-2005). From 2005 to 2007, Judge Sullivan was Deputy General Counsel for Marsh & McLennan Companies, Inc. and General Counsel for Marsh Inc. from 2006 to 2007.

Hon. Laura Taylor Swain

Judge Swain was born in Brooklyn, New York in 1958. She was appointed in 2000 to the Southern District by President Clinton. She graduated from Harvard-Radcliffe College (B.A., 1979) and Harvard Law School (J.D., 1982). Judge Swain was a law clerk for the Hon. Constance Baker Motley of the Southern District (1982-83), was in private practice with Debevoise & Plimpton (1983-96), and served as a U.S. Bankruptcy Judge in the Eastern District of New York (1996-2000). Judge Swain was also a member of the New York State Board of Law Examiners from 1986-96.

Senior Judges of the U.S. District Court for the Southern District of New York

Hon. Harold Baer, Jr.

Judge Baer was born in 1933 in New York, New York. He was appointed to the Southern District by President Clinton in 1994. He received his undergraduate degree from Hobart College (B.A., 1954) and his law degree from Yale Law School (LL.B., 1957). Judge Baer was an Assistant U.S. Attorney for the Southern District (1961-67), leaving in 1967 as Chief of the Special Prosecutions Unit and returning from 1970 to 1972 as First Assistant U.S. Attorney. He was in private practice twice (1968-70, 1972-82), both times with the law firm of Guggenheimer & Untermeyer in New York. Judge Baer served as President of the New York County Lawyers' Association (1979-81) and was a Justice in the Supreme Court of the State of New York, New York County (1982-92). Just prior to his appointment to the Southern District, he served as a member of the Mayoral Commission to Investigate Alleged Police Corruption (the Mollen Commission, 1992-94). At the same time, he was the Executive Judicial Officer of JAMS, an entity specializing in mediation and arbitration. Judge Baer is a member of the New York County Lawyers' Association. Judge Baer assumed senior status in 2004.

Hon. Richard M. Berman

Judge Berman was born in 1943 in New York, New York. He was appointed to the Southern District by President Clinton in 1998. Judge Berman received his undergraduate degree from the Cornell University School of Industrial and Labor Relations (B.S., 1964) and his law degree from New York University School of Law (J.D., 1967). He received a Diploma of Comparative Law (1968) and a Diploma of International Law (1970) from the University of Stockholm Faculty of Law, as well as a master's degree from the Fordham University Graduate School of Social Science (M.S.W., 1996). Judge Berman began his legal career in private practice, as a litigation associate at Davis Polk & Wardwell (1970-74). He then served as the Executive Assistant to U.S. Senator Jacob K. Javits (1974-77), Executive Director of the New York Alliance to Save Energy, Inc. (1977-78), and General Counsel and Executive Vice President at Warner Cable Corporation (1978-86) and MTV Networks (1983-86). He was a partner at LeBoeuf, Lamb, Greene & MacRae (1986-95) and served as a Judge in the Queens County Family Court (1995-98). Judge Berman is a member of the New York County Lawyers' Association. Judge Berman assumed senior status in 2011.

Hon. Naomi Reice Buchwald

Judge Buchwald was born in 1944 in Kingston, New York. She was appointed to the Southern District by President Clinton in 1999. She received her undergraduate degree from Brandeis University (B.A., 1965) and her law degree from Columbia University School of Law (LL.B., 1968). Judge Buchwald started her career in private practice as a litigation associate in Marshall, Bratter, Greene, Allison & Tucker in New York (1968-73). She then spent seven years at the U.S. Attorney's Office in the Southern District, first as an Assistant U.S. Attorney (1973-76), then as Deputy Chief of the Civil Division (1976-79), and finally as Chief of the Civil Division (1979-80). She served as a Magistrate Judge in the Southern District (1980-99), and as Chief Magistrate. Judge Buchwald assumed senior status in 2012.

Hon. Miriam Goldman Cedarbaum

Judge Cedarbaum was born in 1929 in New York, New York. She was appointed to the Southern District by President Reagan in 1986. She received her undergraduate degree from Barnard College (B.A., 1950) and her law degree from Columbia University School of Law (LL.B., 1953). Upon graduating from law school, Judge Cedarbaum served as a law clerk for the Hon. Edward Jordan Dimock

of the Southern District (1953-54). She has served the public in numerous capacities: as an Assistant U.S. Attorney for the Southern District (1954-57); as an attorney in the Department of Justice in Washington, D.C. (1958-59); as First Assistant Counsel for the New York State Moreland Commission on the Alcoholic Beverage Control Law (1963-64); and as Acting Village Justice (1978-82) and Village Justice of Scarsdale, New York (1982-86). In addition, Judge Cedarbaum was Associate Counsel to the Museum of Modern Art in New York (1965-79). Judge Cedarbaum has also served as a part-time legal consultant to law firms advising on litigation matters (1959-62) and was in private practice at Davis Polk & Wardwell (1979-86). She is the recipient of the Barnard Medal of Distinction on May 14, 1991, the Riot Relief Fund Medal of Honor on November 9, 2010 and the Columbia Law Women's Association Myra Bradwell Distinguished Alumna Award on March 26, 2012. Judge Cedarbaum also serves as trustee emerita of Barnard College; Chairman of the 2003 and 2004 New York State Selection Committee for the Rhodes Scholarship; and member emerita of the Board of Visitors of Columbia Law School. She served as a member of the Judicial Conference Committee on Defender Services from 1993 to 1999. Judge Cedarbaum assumed senior status in 1998.

Hon. Denise Cote

Judge Cote was born in 1946 in St. Cloud, Minnesota. She was appointed to the Southern District by President Clinton in 1994. She received her undergraduate degree from St. Mary's College (B.A., 1968) and her law degree from Columbia University School of Law (J.D., 1975). She also has a graduate degree from Columbia University Graduate Facilities in History (M.A., 1969). Judge Cote served as a law clerk to the Hon. Jack B. Weinstein of the Eastern District of New York (1975-76). She was a federal prosecutor for a large part of her legal career, working as an Assistant U.S. Attorney (1977-83) and as Deputy Chief in the Criminal Division of the Southern District (1983-85). In 1991, she became the first woman to serve as Chief of the Criminal Division for the U.S. Attorney's Office for the Southern District (1991-94). Judge Cote has worked in private practice with two different firms: Curtis, Mallet-Prevost, Colt & Mosle and Kaye, Scholer, Fierman, Hays & Handler, where she became a partner in 1988. Judge Cote assumed senior status in 2011.

Hon. Kevin Thomas Duffy

Judge Duffy was born in 1933 in New York, New York. He was appointed to the Southern District by President Nixon in 1972. He received both his undergraduate (A.B., 1954) and law (LL.B., 1958) degrees from Fordham University. Judge Duffy was a clerk for the Hon. J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit (1955-58). He then served as an Assistant U.S. Attorney in the Southern District (1958-59) and then became Assistant Chief of the Criminal Division (1959-61). Judge Duffy worked in private practice, as an associate at Whitman, Ransom, & Coulson (1961-66) and as a partner at Gordon and Gordon (1966-69). He then served as the New York Regional Director for the Securities and Exchange Commission (1969-72). Judge Duffy is the recipient of the Fordham Alumni Gold Medal for Excellence in the Law (1984), a Distinguished Public Service Award from the New York County Lawyers' Association (1994), the William O. Douglas Award for Lifetime Achievement (1995), and the Fordham Law Gavel and Shield Association's first annual Thomas F. Murphy Award (1999). Judge Duffy was honored in 1998 by both the Respect for Law Alliance and the Federal Law Enforcement Foundation for presiding over the trials of the individuals involved in the first attack on the World Trade Center. Judge Duffy assumed senior status in 1998.

Hon. Thomas P. Griesa

Judge Griesa, a former Chief Judge of the Southern District, assumed senior status in 2000. His biography appears in the Chief Judges section.

Hon. Charles S. Haight, Jr.

Judge Haight was born in 1930 in New York, New York. He received both his undergraduate (A.B., 1952) and law (LL.B., 1955) degrees from Yale University. Prior to his appointment to the bench by President Ford in 1976, he served as a trial attorney in the Admiralty and Shipping Section, Civil Division, Department of Justice (1955-57), and was in private practice at Haight, Gardner, Poor & Havens, where he became a partner in 1968. He is a director of the Kennedy Child Study Center and a member of the Board of Managers of the Havens Relief Fund Society. Judge Haight assumed senior status in 1995.

Hon. Alvin K. Hellerstein

Judge Hellerstein was born in 1933 in New York, New York. He was appointed to the Southern District by President Clinton in 1998. He received both his undergraduate (B.A., 1954) and law (LL.B., 1956) degrees from Columbia University. Judge Hellerstein was in private practice for nearly 40 years with the firm of Stroock & Stroock & Lavan LLP of New York City, where he co-founded Stroock's Litigation Department. He began his legal career by clerking for the Hon. Edmund L. Palmieri of the Southern District (1956-57). He also served as a First Lieutenant in the Judge Advocate General's Corps in the U.S. Army (1957-60). Judge Hellerstein assumed senior status in 2011.

Hon. Lewis A. Kaplan

Judge Kaplan was born in 1944 in Staten Island, New York. He was appointed to the Southern District by President Clinton in 1994. He received his undergraduate degree from the University of Rochester (A.B., 1966) and his law degree from Harvard Law School (J.D., 1969). He served as a law clerk for the Hon. Edward M. McEntee of the U.S. Court of Appeals for the First Circuit (1969-70). Judge Kaplan spent most of his legal career in private practice at the firm of Paul, Weiss, Rifkind, Wharton & Garrison (1970-94), where he became a partner in 1977. He also served as a Special Master in the Westway Litigation in the Southern District from 1982 to 1983. Judge Kaplan assumed senior status in 2011.

Hon. John F. Keenan

Judge Keenan was born in 1929 in New York, New York. He was appointed to the bench in 1983 by President Reagan. He graduated from Manhattan College (B.B.A., 1951) and Fordham University School of Law (LL.B., 1954), and served in the U.S. Army (1954-56). Judge Keenan began his legal career in the New York County District Attorney's Office as an Assistant District Attorney (1956-73), Administrative Assistant District Attorney (1974), and Chief Assistant District Attorney (1974-76). He was Special Prosecutor (Deputy Attorney General) in the Investigation into Corruption in the Criminal Justice System of New York City (1976-79), as well as Chairman and President of the New York City Off-Track Betting Corporation (1979-82), and Criminal Justice Coordinator for the City of New York (1982-83). Judge Keenan assumed senior status in 1996.

Hon. Victor Marrero

Judge Marrero was born in 1941 in Santurce, Puerto Rico. He was appointed by President Clinton in 1999 to the Southern District. He received his undergraduate degree from New York University (B.A., 1964), studied as a Fulbright Scholar at the University of Sheffield School of Law (1966-67), and received his law degree from Yale Law School (LL.B., 1968). Following law school, he was Assistant to Mayor John V. Lindsay in New York City (1968-70) and served in New York City

government until 1977, as Assistant Administrator and Neighborhood Director for the Model Cities Administration (1970-73), Executive Director for the Department of City Planning (1973-74), Special Counsel to the Comptroller (1974-75), and Chairman of the City Planning Commission (1976-77). Judge Marrero was also First Assistant Counsel to New York State Governor Hugh Carey (1975-76), Commissioner of the New York State Division of Housing and Community Renewal (1978-79), and U.S. Undersecretary of Housing and Urban Development (1979-81). Judge Marrero was in private practice for over a decade (1981-93) and then served as U.S. Ambassador to the Economic and Social Council of the United Nations (1993-97) and Ambassador to the Organization of American States (1997-99). Judge Marrero assumed senior status in 2010.

Hon. Lawrence M. McKenna

Judge McKenna was born in 1933 in New York, New York. He received his undergraduate degree from Fordham College (A.B., 1956) and his law degree from Columbia Law School (LL.B., 1959). Prior to being appointed to the bench by President George H.W. Bush in 1990, he was in private practice in New York City at the law firm of Simpson Thacher & Bartlett, and had been a partner at the law firm Wormser, Kiely, Alessandroni, Hyde & McCann and its successor, Wormser, Kiely, Galef & Jacobs for over 30 years (1959-90). Judge McKenna assumed senior status in 2002.

Hon. Richard Owen

Judge Owen was born in 1922 in New York, New York. He graduated from Dartmouth College (A.B., 1945) and Harvard Law School (LL.B., 1950). Prior to his appointment to the Southern District by President Nixon in 1973, Judge Owen served in the U.S. Army Air Corps (1942-45), for which he received the Distinguished Flying Cross with Oak Leaf Cluster, and was an Assistant U.S. Attorney in the Southern District (1953-55), a Special Assistant U.S. Attorney General (1954), and a Senior Trial Attorney in the Antitrust Division, U.S. Department of Justice (1955-58), before returning to private practice (1958-73). He was also an Assistant Professor at New York University School of Law (1951-53). Judge Owen assumed senior status in 1989.

Hon. Robert P. Patterson, Jr.

Judge Patterson was born in 1923 in New York, New York. He graduated from Harvard University (B.A., 1947) and Columbia Law School (LL.B., 1950); he also served in the U.S. Army Air Corps (1942-46) as a Lead Navigator in Liberators and Flying Fortresses, where he received the Distinguished Flying Cross with Cluster and Air Medal. Prior to his appointment to the Southern District by President Reagan in 1988, Judge Patterson held several positions in state and federal government, including Assistant Counsel for the New York State Crime Commission (1952-53); Assistant U.S. Attorney in the Southern District, where he served as Attorney-In-Charge of the Narcotics and Special Investigation Unit (1953-56); Assistant Counsel to the Senate Banking and Currency Committee (1954); member of the U.S. House of Representatives' Special Committee on H.R. 1 (Powell investigation) (1967); and Special Hearing Officer for Conscientious Objectors for the Department of Justice (1961-68). He practiced in the private sector with Patterson, Belknap & Webb (1956-1988), where he became partner in 1960. Judge Patterson served as a court-appointed Special Master in *Flateau v. Anderson*, redistricting New York State legislative districts (1982). He has held several professional and pro bono positions, some of which include: Vice President of the Association of the Bar of the City of New York (1974-75), President of the New York Bar Association (1978-79), and President of the Legal Aid Society (1967-71). He also served on the Executive Committee for the Lawyers Committee for Civil Rights Under Law (1968-88), Goldman Panel on Attica Disturbance (1971), Executive Committee of the New York County Lawyers Association (1971-77), and Executive Committee for the New York Vietnam Veterans

Memorial Commission (1982-85). He served as a trustee for the Vera Institute of Justice (1981-99) and the George Marshall Foundation (1987-90). Judge Patterson assumed senior status in 1998.

Hon. Jed S. Rakoff

Judge Rakoff was born in 1943 in Philadelphia, Pennsylvania and was appointed in 1996 by President Clinton to the Southern District. He attended Swarthmore College (B.A., 1964), Oxford University, Balliol College (M.Phil., 1966), and Harvard Law School (J.D., 1969). Judge Rakoff clerked for the Hon. Abraham Freedman of the U.S. Court of Appeals for the Third Circuit (1969-70). He was in private practice for two years before serving as an Assistant U.S. Attorney for the Southern District (1973-80), where he was Chief of the Business and Securities Fraud Prosecutions Unit. Judge Rakoff then returned to private practice as a partner at the law firms of Mudge, Rose, Guthrie, Alexander and Ferdon, and Fried Frank Harris Shriver & Jacobsen. Judge Rakoff assumed senior status in 2010.

Hon. Leonard B. Sand

Judge Sand was born in 1928 in New York, New York. He attended New York University School of Commerce (B.S., 1947) and Harvard Law School (LL.B., 1951). Prior to his appointment to the bench by President Jimmy Carter in 1978, Judge Sand served as a law clerk in the Department of Justice (1952-53), as an Assistant U.S. Attorney in the Southern District (1953-54), and as an Assistant to the U.S. Solicitor General (1956-59). Judge Sand was in private practice with Rosenman, Goldmark, Colin & Kaye (1954-56) and Robinson, Silverman, Pearce, Aronsohn, Sand & Berman (1959-78). He was elected as a Delegate to the New York State Constitutional Convention in 1967 and has served as Adjunct Professor of Law at New York University School of Law. In addition, Judge Sand has authored numerous volumes of the highly influential treatises on federal jury instructions that bear his name. Judge Sand assumed senior status in 1993.

Hon. Shira A. Scheindlin

Judge Scheindlin was born in 1946 in Washington, D.C. She attended the University of Michigan (B.A., 1967), Columbia University (M.A., 1969) and Cornell Law School (J.D., 1975). Prior to her appointment to the bench by President Clinton in 1994, Judge Scheindlin clerked for the Hon. Charles Briant of the Southern District (1976-77) and held various positions in federal and local government (1977-82), including a four-year stint as an Assistant U.S. Attorney in the Eastern District of New York (1977-81). She was a Magistrate Judge in the Eastern District of New York (1982-86) before entering private practice as a partner at the law firm of Herzfeld & Rubin (1986-94). Judge Scheindlin was a member of the Advisory Committee on Civil Rules of the Judicial Conference of the United States. Since 1983, Judge Scheindlin has also been an Adjunct Professor of Law at Cardozo School of Law and Brooklyn Law School. Judge Scheindlin received the Weinfeld Award in 2005 and currently is a member of the New York County Lawyers' Association. She assumed senior status in 2011.

Hon. Louis L. Stanton

Judge Stanton was born in New York, New York in 1927. He was appointed to the Southern District in 1985 by President Reagan. He graduated from Yale University (B.A., 1950) and the University of Virginia School of Law (LL.B., 1955). He served in the U.S. Merchant Marine Cadet Corps (1945-47) and was on active duty as a Lieutenant in the U.S. Marine Corps (1950-52). Judge Stanton was in private practice in New York City with Davis Polk & Wardwell (1955-66) and Carter, Ledyard & Milburn (1966-85), where he became a partner in 1967. Judge Stanton assumed senior status in 1996.

Hon. Sidney H. Stein

Judge Stein was born in 1945 and graduated from Princeton University (A.B., 1967) and Yale Law School (J.D., 1972). He was appointed to the Southern District by President Clinton in 1995. He served in the New York Army National Guard (1969-75), and began his legal career as a law clerk for the Hon. Stanley H. Fuld, Chief Judge of the New York Court of Appeals and Chief Judge of the State of New York (1972-73). He spent more than 20 years in private practice with Paul, Weiss, Rifkind, Wharton & Garrison (1974-81) and as a founding partner of Stein, Zauderer, Ellenhorn, Frischer & Sharp (1981-95). Judge Stein is a member of the New York County Lawyers' Association. Judge Stein assumed senior status in 2010.

Hon. Robert W. Sweet

Judge Sweet was born in Yonkers, New York in 1922. He was appointed to the Southern District by President Carter in 1978. He graduated from Yale University (B.A., 1944; LL.B., 1948). He served as a Lieutenant in the U.S. Navy Reserve (1943-46). Judge Sweet was in private practice (1948-53, 1955-65, 1970-78) and served as an Assistant U.S. Attorney for the Southern District (1953-55), Executive Assistant to the Mayor of the City of New York (1966), and Deputy Mayor for the City of New York (1966-69). He was a partner in the law firm Casey, Lane and Mittendorf (1957-65) and Skadden, Arps, Slate, Meagher & Flom (1970-78). Judge Sweet assumed senior status in 1991.

Hon. Kimba M. Wood

Judge Wood, a former Chief Judge of the Southern District, assumed senior status in 2009. Her biography appears in the Chief Judges section.

Magistrate Judges of the U.S. District Court for the Southern District of New York

Hon. Kevin Nathaniel Fox (Chief Magistrate Judge)

Judge Fox graduated from Columbia College (B.A., 1978), and from Brooklyn Law School (J.D., 1981). Prior to his appointment to the bench in 1997, Judge Fox served in the Criminal Defense Division of The Legal Aid Society of New York (1981-87), was Executive Director of Governor Mario Cuomo's Task Force on Bias-Related Violence (1987-88), and worked as an attorney in the Law Department of the New York City Transit Authority (1989). Judge Fox then served as Deputy City Personnel Director and General Counsel for the New York City Department of Personnel (1990-94), and in the Law Department of the Triborough Bridge and Tunnel Authority (1994-97). Judge Fox was appointed Chief Magistrate Judge in 2012.

Hon. James L. Cott

Judge Cott graduated from Harvard College and Northeastern University School of Law. Prior to his appointment as Magistrate Judge for the Southern District, Judge Cott had been Chief of the Civil Division of the U.S. Atty's Office, Southern District since 2003. He had previously served that office as Deputy Chief from 1996 to 2000 before taking a position as Associate Director of Litigation for the NAACP Legal Defense and Educational Fund, Inc. Judge Cott is a recipient of the Public Service Award from the New York County Lawyers' Association.

Hon. Paul Davison

Judge Davison graduated from Harvard College in 1980 and received his J.D. from New York University School of Law. Prior to his appointment as Magistrate Judge, Judge Davison worked as a public defender in the federal courts for more than 20 years. After a year working for a Boston firm, he joined the Federal Defenders of New York as an appeals attorney. In 1987, he transferred to the Southern District trials office, and in 1995 he was named Attorney-in-Charge of the Federal Defenders branch in White Plains. During his career with Federal Defenders, Judge Davison represented more than 2,000 criminal defendants and tried about 40 federal court cases to verdict.

Hon. Michael H. Dolinger

Judge Dolinger graduated from Columbia College (B.A., 1968), and from Columbia Law School (J.D., 1972). Prior to his appointment as Magistrate Judge for the Southern District in 1984, he was a law clerk for the Hon. Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit, was associated with the law firm of Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soli, and served from 1976 until 1984 as an Assistant U.S. Attorney in the Civil Division for the Southern District.

Hon. Ronald L. Ellis

Judge Ellis was born in LaFourche, Louisiana in 1950. He was appointed Magistrate Judge for the Southern District in 1993 and was the District's Chief Magistrate Judge. He graduated from Manhattan College with a Bachelor of Chemical Engineering degree and from the New York University School of Law. Prior to becoming a judge, he served as an Adjunct Professor of Law at the New York University School of Law and at the New York Law School, and in various leadership capacities at the NAACP Legal Defense and Educational Fund, including as Director of the Poverty and Justice Program.

Hon. James C. Francis IV

Judge Francis graduated from Yale College (B.A., 1974), the John F. Kennedy School of Government at Harvard University (M.P.P., 1978), and Yale Law School (J.D., 1978). Following graduation from law school, Judge Francis clerked for the Hon. Robert L. Carter in the Southern District. He then joined the Civil Appeals and Law Reform Unit of the Legal Aid Society, where he conducted impact litigation in the areas of housing and education and served as director of the Disability Rights Unit. He continued in this capacity until his appointment to the bench in 1985. Judge Francis is an Adjunct Professor at the Fordham University School of Law, where he teaches Constitutional Torts.

Hon. Deborah Freeman

Judge Freeman was born in Jamaica, New York in 1957. She graduated from Yale College (B.A., 1979) and from the New York University School of Law (J.D., 1986). Prior to her appointment to the bench in 2001, she was associated with the law firm of Parker Auspitz Neesemann & Delehanty P.C. (1986-87) and then worked at the New York office of Morrison & Foerster LLP as an associate (1987-95) and a litigation partner (1995-2001). From 1993 to 1999, Judge Freeman was a Director of The Legal Aid Society of New York.

Hon. Martin R. Goldberg

Judge Goldberg was born in the Bronx, New York in 1945. He graduated from Fairleigh Dickinson University (B.A., 1966) and from New York Law School (J.D., 1969). Prior to his appointment to the Southern District in 1992, he was engaged in private practice (1981-92), served as Chief Assistant District Attorney and Acting District Attorney for the Orange County District Attorney's Office (1972-80), and worked at The Legal Aid Society of New York (1970-72).

Hon. Gabriel Gorenstein

Judge Gorenstein was born in New York City in 1957. He graduated from Yale University (B.A., 1979) and Columbia Law School (J.D., 1984). Judge Gorenstein clerked for the Hon. Spottswood W. Robinson, III, Chief Judge of the U.S. Court of Appeals for the D.C. Circuit. From 1985 to 1987, Judge Gorenstein was an associate with Debevoise & Plimpton in New York City. In 1987, he became an Assistant U.S. Attorney in the Southern District, Civil Division, and in 1990, was named Chief of the Civil Rights Unit. He was named Chief Appellate Attorney in 1991. In 1994, Judge Gorenstein was appointed General Counsel of the New York City Human Resources Administration, and he served as Acting First Deputy Commissioner of the HRA from 1996 to 1997. From 1998 to his appointment in 2001, Judge Gorenstein served as a New York City Criminal Court Judge. Since 1997, Judge Gorenstein has served as an Adjunct Professor of Law at Brooklyn Law School.

Hon. Theodore H. Katz

Judge Katz was appointed as a Magistrate Judge in the Southern District in 1991 and has served as the District's Chief Magistrate Judge. Judge Katz was born in Brooklyn, New York in 1947. He graduated from Brandeis University (B.S., 1968) and Columbia Law School (J.D., 1973). After graduation, Judge Katz served as law clerk to the Hon. Robert L. Carter of the Southern District. Prior to his appointment to the bench, he worked as a staff attorney at the New York City Human Rights Commission and as a staff attorney and director of the Prisoners' Rights Project of The Legal Aid Society of New York.

Hon. Frank Maas

Judge Maas was born in New York, New York in 1950. He graduated from Harpur College, State University of New York at Binghamton (B.A., 1972) and New York University School of Law (J.D., 1976). Prior to his appointment to the bench in 1999, Judge Maas was law clerk to the Hon. Henry F. Werker of the Southern District (1976-78); Assistant U.S. Attorney, Criminal Division, Southern District (1980-86); Deputy Commissioner and First Deputy Commissioner, New York City Department of Investigation (1995-99); and Deputy Commissioner and Special Counsel, New York City Department of Business Services. He was in private practice at the law firms of Curtis, Mallet-Prevost, Colt & Mosle (1978-80) and Phillips, Lytle, Hitchcock, Blaine & Huber (1986-95).

Hon. Andrew J. Peck

Judge Peck was born in New York, New York in 1953. He graduated from Cornell University (A.B., 1974) and Duke University Law School (J.D., 1977). Prior to his appointment to the bench in 1995, Judge Peck was a law clerk to the Hon. Paul Roney of the U.S. Court of Appeals for the Fifth Circuit (1977-78) and was in private practice with Paul, Weiss, Rifkind, Wharton & Garrison (1978-95).

Hon. Henry Pitman

Judge Pitman was born in 1953 in Brooklyn, New York. He graduated from Fordham University (B.A., 1975; J.D., 1978). Prior to his appointment to the bench in 1995, Judge Pitman was a law clerk to the Hon. Lloyd F. McMahon of the Southern District (1978-79), and an Assistant U.S. Attorney for the Southern District (1985-90). Judge Pitman was also in private practice with the law firms Chadbourne & Parke; Hall, McNicol, Hamilton & Clark; and Lieberman & Nowak.

Hon. Lisa Margaret Smith

Judge Smith was born in 1955 in Hamilton, New York. She graduated from Earlham College (B.A., 1977) and Duke University School of Law (J.D., 1980). Prior to her appointment to the bench in 1995, Judge Smith was an Assistant District Attorney, Kings County (1980-85); Assistant Attorney General, New York State Department of Law (1985-86); Supervising Senior Assistant District Attorney, Kings County (1986-87); and Assistant U.S. Attorney for the Southern District (1987-95).

Hon. George A. Yanthis

Judge Yanthis was born in 1948 in Rome, New York. He graduated from Kent State University (B.B.A., 1970) and Syracuse University College of Law (J.D., 1974). He served as a Lieutenant Colonel in the New York Army National Guard and a Staff Judge Advocate for the 42nd Infantry Division. Prior to his appointment to the bench in 1997, Judge Yanthis was a staff attorney for the New York State Urban Development Corporation, Radisson Development Office (1974-75); the New York State Assembly (1975-76); and the Office of the New York State Secretary of State (1976-80). Judge Yanthis also served for nearly 17 years as an Assistant U.S. Attorney for the Northern District of New York (1980-97). Judge Yanthis served as Chief Magistrate Judge (2010-12).

**Former Judges of the U.S. District Court for the
Southern District of New York (2000 to 2010)**

Hon. Denny Chin

Judge Chin was born in 1954 in Kowloon, Hong Kong. He was appointed to the Southern District by President Clinton in 1994. Judge Chin was the first judge of Asian-American descent to be appointed to a federal court in the Second Circuit. He received his undergraduate degree from Princeton University (B.A., 1975) and his law degree from Fordham University School of Law (J.D., 1978). Judge Chin began his legal career by clerking for the Hon. Henry F. Werker of the Southern District (1978-80). He served as an Assistant U.S. Attorney in the Southern District (1982-86). He has worked in private practice at Davis Polk & Wardwell; Campbell, Patrick & Chin; and Vladeck, Waldman, Elias & Engelhard, P.C. Judge Chin is a member of the New York County Lawyers' Association. Judge Chin was elevated to the U.S. Court of Appeals for the Second Circuit in 2010.

Hon. Gerard L. Goettel

Judge Goettel was born in New York, New York in 1928. He was appointed to the Southern District in 1976 by President Ford and assumed senior status in 1993. He received his undergraduate degree from Duke University (B.A., 1950) and his law degree from Columbia University (LL.B., 1955). He was a Lieutenant in the U.S. Coast Guard (1951-53) and an instructor in the U.S. Coast Guard Reserve (1953-61). He served as an Assistant U.S. Attorney in the Southern District (1955-56) and as a Deputy Chief of the Attorney General's Special Group on Organized Crime, Department of Justice (1958-59). He was associated with the law firms Lowenstein, Pitcher, Hotchkiss, Amann and Parr (1959-62) and Natanson and Reich (1968-69), and was Associate General Counsel for The Overmyer Company (1969-71). In addition, Judge Goettel has served as an Adjunct Professor of Law at Fordham University Law School and Pace University Law School, and as a Magistrate Judge for the Southern District (1971-76). Judge Goettel retired in 2010.

Hon. Richard J. Holwell

Judge Holwell was born in 1946 in New York, New York. He was appointed by President George W. Bush to the Southern District in 2003. Judge Holwell graduated from Villanova University (B.A., 1967) and Columbia University School of Law (J.D., 1970) before studying at the Cambridge University School of Criminology in 1971. He was in private practice in New York from 1971 to 2003, serving as a partner at White & Case LLP and concentrating on securities, antitrust, and bankruptcy matters, including in civil and criminal investigations before government executive agencies. Judge Holwell retired in 2012.

Hon. Peter K. Leisure

Judge Leisure was born in 1929 in New York, New York. He graduated from Yale University (B.A., 1952) and the University of Virginia School of Law (LL.B., 1958). Prior to his appointment to the Southern District by President Reagan in 1984, Judge Leisure served as a Lieutenant in the U.S. Army Reserve, Artillery (1953-55) and as an Assistant U.S. Attorney, Criminal Division, in the Southern District (1962-66). In addition, he spent many years in private practice with Breed, Abbott & Morgan and as a partner with Curtis, Mallet-Prevost, Colt & Mosle and with Whitman Ransom (1966-84). He was a member of the Judicial Conference Committee on Judicial Ethics (1990-94). Judge Leisure assumed senior status in 1997 and retired in 2011.

Hon. Gerard E. Lynch

Judge Lynch was born in 1951 in Brooklyn, New York. He was appointed to the bench by President Clinton in 2000. He graduated from Columbia College (B.A., 1972) and from Columbia University School of Law (J.D., 1975). Afterwards, he served as a law clerk to the Hon. Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit (1975-76) and to U.S. Supreme Court Justice William Brennan, Jr. (1976-77). Judge Lynch then joined the faculty of the Columbia University School of Law in 1977, later serving as Vice Dean from 1992 to 1997. He also served in numerous government positions, including as an Assistant U.S. Attorney in the Southern District (1980-83) and as Chief of the Criminal Division of that office (1990-92). He was Associate Counsel for the Office of the Independent Counsel for Iran/Contra (1988-90). In addition, he was of counsel in the law firm of Howard, Darby & Levin, now Covington and Burling (1992-2000). Judge Lynch was elevated to the United States Court of Appeals for the Second Circuit in 2009.

Hon. John S. Martin, Jr.

Judge Martin was born in 1935 in Brooklyn, New York. He was appointed to the Southern District by President George H.W. Bush in 1990. He graduated from Manhattan College (B.A., 1957) and Columbia Law School (LL.B., 1961). Judge Martin began his legal career as a law clerk to Hon. Leonard P. Moore of the U.S. Court of Appeals for the Second Circuit (1961-62). Judge Martin then served as an Assistant U.S. Attorney in the Southern District (1962-66) and an Assistant to the U.S. Solicitor General (1967-69). He was in private practice from 1969 to 1980, with the law firms Martin, Obermaier & Morvillo and Schulte Roth & Zabel. Judge Martin served as the U.S. Attorney for the Southern District (1980-83) and then returned to private practice with Schulte Roth & Zabel from 1983 until his judicial appointment. Judge Martin assumed senior status in 2003 and retired soon thereafter.

Hon. Michael B. Mukasey

Judge Mukasey, former Chief Judge of the Southern District, retired in 2006. His biography appears in the Chief Judges section.

Hon. Barrington D. Parker, Jr.

Judge Parker was born in 1944 in Washington, D.C. He was appointed to the Southern District in 1994 by President Clinton. He received his undergraduate degree at Yale College (B.A., 1965) and his law degree from Yale Law School (LL.B., 1969). He then served as a law clerk to Hon. Aubrey E. Robinson, Jr. of the U.S. District for the District of Columbia (1969-70). Judge Parker was in private practice in New York City for over 20 years with Sullivan & Cromwell (1970-77), Parker Auspitz Neesemann & Delehanty, P.C. (1977-87), and Morrison & Foerster (1987-94). He was elevated to the U.S. Court of Appeals for the Second Circuit in 2001 by President George W. Bush.

**Former Magistrate Judges of the U.S. District Court for the
Southern District of New York (2000 to 2010)**

Hon. Douglas F. Eaton

Judge Eaton was born in Plainfield, New Jersey in 1942. He graduated from Harvard College (B.A., 1963) and Harvard Law School (J.D., 1966). Judge Eaton was appointed to the Southern District in 1996 following 20 years as a solo practitioner in Manhattan. Prior to that, Judge Eaton was a law clerk to a U.S. District Judge, served as a member of the U.S. Coast Guard Reserve, was an attorney in the New York City Department of Investigation, worked at the firm of Hughes Hubbard & Reed, and from 1971 until 1975 was an Assistant U.S. Attorney in the Criminal Division of the U.S. Attorney's Office for the Southern District. Judge Eaton retired in 2010.

Hon. Mark D. Fox

Judge Fox was born in the Bronx, New York in 1943. He attended the State University of New York at Buffalo (B.A., 1964) and Brooklyn Law School (J.D., 1967) and served in the U.S. Army until 1970 in the Criminal Investigation Division. From 1970 to 1973, Judge Fox was an Assistant District Attorney, first in Bronx County and then in Orange County. He then took a position as Chief Trial Attorney with the Orange County Legal Aid Society, followed by stints as Chief Attorney and Public Defender for Orange County. From 1977 until his full-time appointment in 1991 (he was appointed a part-time Magistrate Judge in 1988), Judge Fox was in private practice with Bravoso, Fox and Coffill in Port Jervis, New York. In 2000, Judge Fox served as a visiting lecturer in trial practice at the Harvard Law School. Judge Fox retired in 2008.

Hon. Sharon Ellen Grubin

Judge Grubin received a bachelor's degree from Smith College and a law degree from Boston University School of Law. She worked at the law firm White & Case until she became a Magistrate Judge in 1984. She has taught seminars and conducted lectures at New York University School of Law, Yale Law School, and Brooklyn Law School. Judge Grubin retired from the bench in 2000 when she accepted a position as General Counsel to the Metropolitan Opera in New York.

