

Litigation Department of the Year — Commercial Litigation (Finalist)



PHOTO BY CARMEN NATALE

Left to right, Herrick, Feinstein's Paul Schafhauser, Scott Tross, Ronald Levine and David King

H E R R I C K

Flexibility Is Key to Setting the Fee

Herrick, Feinstein LLP's use of alternative fee arrangements helps fuel success

Though part of an AmLaw 200 firm, Herrick, Feinstein LLP's New Jersey litigation department represents the full spectrum of clients in commercial litigation, including complex class action suits and title insurance and real estate disputes.

And the litigators in Newark and Princeton have the advantage of being able to draw on the 85-year-old New York-based firm's depth and breadth of experience.

Built for litigation, the firm prides itself on nimble negotiating techniques and flexible fees. Alternative fee arrangements (AFAs) have been in use at Herrick for the past three decades. Tailor-made solutions — such as a fee cap or time limit followed by discount, a deferred percentage with a risk-sharing premium and a fee cap or lump sum by phase — help hedge clients' risk and allow for cost-effective pursuit of legal remedies that might otherwise be unavailable.

Herrick says it has used AFAs regularly and to great effect in traditional litigation. For example, when Winstar Communications Inc.'s Delaware bankruptcy court proceeding was converted from Chapter 11 to Chapter 7, the trustee hired Herrick to review an adver-

sarial proceeding that Winstar had commenced against Lucent Technologies Inc. The firm agreed to cap its fee through trial and take a contingency on top of the fee cap if it obtained a successful result.

Herrick has substantial experience in matters related to electronic discovery and litigation and in fact has an in-house department to provide support to its attorneys. The firm routinely advises clients on all facets of e-discovery, document review management, litigation support applications and discovery issues. Its overarching goal, it says, is to turn electronic data into an advantage, rather than a liability.

Major Litigators:

- Ronald Levine, co-chair, Litigation Department; chair, Best Practices Committee — concentrates his practice on complex corporate litigation with a focus on class-action defense in the consumer products field. He has defended and resolved consumer-fraud and breach-of-warranty actions against leading products manufacturers in New Jersey and New York. He regularly advises clients on social media strategies and crisis management and prevention.

- Scott Tross, partner — concentrates his practice in the areas of real estate, creditor's rights and securities litigation. An experienced trial and appellate lawyer, he has tried over two dozen cases to verdict and has argued a like number of appeals. He is also engages in foreclosure practice, claiming to have foreclosed more than \$1 billion in mortgages for banks, insurance companies, hedge funds, investment banks and servicers of securitized debt.

- Paul Schafhauser, partner — focuses his practice on complex commercial litigation and litigation of matters involving real estate,

insurance, banking, business dissolutions and general contract disputes, among others. The firm prides him as a practical problem-solver, helping clients succeed in their commercial disputes, title insurance claims, foreclosures, trademark disputes, insurance coverage actions, and construction and redevelopment matters.

- David King, partner — concentrates his practice in complex commercial litigation, including real estate and construction litigation and securities litigation. He is an experienced insurance coverage and reinsurance litigator, having represented both insureds and insurance companies in coverage matters and in pursuing reinsurance claims.

Cases of Note:

- *Marcus v BMW of North America LLC and Bridgestone Americas Tire Operations LLC*, U.S. Court of Appeals for the Third Circuit — Herrick successfully represented the Bridgestone companies in defending a series of class actions involving an innovative tire design that allows a tire to be operated for up to 50 miles after it has suffered a complete loss of air.

Last August, in a decision that could have a far reaching impact on certification of class actions, the Third Circuit Court of Appeals vacated a district court's certification of a limited New Jersey sub-class of plaintiffs who claimed to have been harmed by their purchase or lease of certain BMW's equipped with Bridgestone run flat tires. The plaintiffs sued under the New Jersey Consumer Fraud Act and asserted common law claims for breach of warranty, breach of contract and breach of the warranty of good faith and fair dealing.

The Court of Appeals ruled that common law claims, where the product at issue can fail

Top to bottom, Herrick's Jaimee Katz Sussner and Jennifer Smith Finnegan.



Herrick, Feinstein LLP by the Numbers

	Firm-wide	N.J. Office
Department size	81	16
Department as percentage of firm (head-count)	48%	46%
Department as percentage of firm (revenue)	48%	46%

for a myriad of reasons unrelated to defect, could not be tried as a class action due to the inability to establish causation by common proof. As for the CFA claims, the court held the district court abused its discretion in finding a presumption of causation without making key factual findings to support it.

(Lead attorneys, Ronald Levine, David King, Susan Dwyer)

• *Agresti v. First American Title Insurance*, Superior Court of New Jersey, Sussex County — Herrick represented First American Title Insurance Company in winning dismissal of a suit by two home buyers. Angelo and Erin Agresti procured a mortgage loan in which their lender requested and received a title insurance commitment from First American's agent, Clear Advantage Title, Inc. Shortly before the closing, First American learned Clear Advantage had engaged in fraud and defalcation in other matters, prompting Herrick to obtain an order enjoining Clear Advantage from further activity and freezing its bank accounts.

As a consequence of the injunction, the loan proceeds transmitted to Clear Advantage by the Agrestis' new lender were not available to satisfy existing liens encumbering the real property, and Clear Advantage was not authorized to close or to insure the transaction at the time that it purportedly did so anyway.

The victory not only avoided protracted and complex litigation but also resulted in a sanctions award in favor of First American that could help it recover a portion of the litigation costs expended in the proceedings.

(Lead attorney, Jaimee Katz Sussner)

• *Wells Fargo Bank, N.A. v. Wayne Towne Center Assoc.*, New Jersey Superior Court, Passaic County — Herrick advised Wells Fargo which held a \$63 million loan secured by ground leases on a shopping center located in New Jersey. The loan went into default after a Fortunoff store located at the center went dark. The ground leases were appraised as having a negative value.

Herrick negotiated an assignment of the ground leases to Wells Fargo in order to avoid New Jersey's lengthy foreclosure process. Wells Fargo was then able to market the ground leases and to sell them for around \$10 million.

Herrick also sued various guarantors of the loan for the resulting deficiency. On the first day of trial in New Jersey, Herrick resolved the dispute in favor of its client.

(Lead attorney, Scott Tross)

• *Liberty Harbor North Urban Renewal v. Tungar LLC*, Superior Court of New Jersey, Hudson County — Herrick advised a company, Tungar LLC, that had signed a lease for restaurant space at Gulls Cove in Hudson County. Tungar attempted to terminate the lease by reason of certain misrepresentations made by the landlord before the lease was executed. The landlord sued, seeking a declaration that the lease was valid and damages for breach of contract. Herrick counterclaimed, seeking rescission of the lease and damages for fraudulent and other wrongful conduct.

After mediation failed, Herrick negotiated a settlement whereby the lease was terminated

and the client recovered a substantial sum that had been deposited with the landlord as security. As a result of the settlement, the landlord's action has been dismissed.

(Lead attorney, Scott Tross)

• *Lake Gerard LLC v. Barrett*, Superior Court of New Jersey, Sussex County — Herrick represented William and Ellen Barrett in a dispute involving a lease for a parcel of land on the 95-acre Lake Gerard. The parties had been involved in tenancy disputes since the early 1990s, which were resolved in 2010 when the parties executed a settlement agreement and release adopting a memorandum of understanding after mediation, entered by a mediator/arbitrator, former judge William Dreier. In the summer of 2011, the Barretts asked Dreier to address two new issues at the property. Lake Gerard LLC notified Dreier that they would not appear for the scheduled arbitration hearing on these issues, and then filed a complaint asserting claims against Herrick's clients for declaratory judgment and breach of contract.

Herrick argued the plaintiff was required to arbitrate any lease disputes before Dreier, in accordance with the memorandum of understanding, and that plaintiff's claims against the clients should be dismissed for lack of jurisdiction. Herrick's motion to dismiss for lack of jurisdiction was granted and the court approved its request for counsel fees incurred in defending the claims.

(Lead attorney, Paul Schafhauser) ■

The *New Jersey Law Journal* has recognized Herrick, Feinstein as the Commercial Litigation Department of the Year - Finalist.

The profile in the April 1, 2013 issue of the Journal describes Herrick's winning qualifications as "built for litigation, the firm prides itself on nimble negotiating techniques and flexible fees. Herrick, Feinstein's New Jersey Litigation department represents the full spectrum of clients in commercial litigation, including complex class action suits and title insurance and real estate disputes."

Congratulations to all members of Herrick's Commercial Litigation Department!

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