

Delaware – Law Firms

The Delaware Superior Court Establishes A Complex Commercial Litigation Division To Address The Concerns Of The Business Litigant

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Introduction

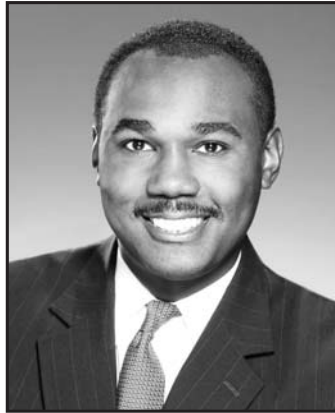
Due primarily to the high cost of electronic discovery, delay in reaching a final resolution and uncertainty as to the outcome, there is a consensus that civil litigation must be reformed. To address the concerns of business litigants, and to provide yet another option for the resolution of complex business disputes within Delaware's highly regarded court system, the Delaware Superior Court has established a Complex Commercial Litigation Division (CCLD) effective May 1, 2010. To promote prompt and efficient disposition of complex matters, the CCLD will include a special assignment of experienced judges, tight case management orders to move cases to conclusion, special e-discovery orders to limit expense and avoid disputes and protocols to control expert witness and fact discovery.

Not every business dispute is eligible for the CCLD. To qualify, a case must: (1) include a claim with an amount in controversy of at least one million dollars, (2) involve an exclusive choice of court agreement or a judgment resulting from an exclusive choice of court agreement or (3) be so designated by the presiding judge. Cases that meet one of these criteria can be brought in the CCLD – a forum that is focused on addressing what matters to parties who file and litigate complex commercial disputes.

The CCLD was designed to address two principal concerns of business litigants: (1) the need for predictable procedures to control the course of the proceedings and to bring such proceedings to a prompt conclusion and (2) the need for reasonable control over the cost of discovery, including e-discovery. The CCLD addresses these concerns by following three primary case administration principles.

First, each CCLD case will remain with the same judge from start to finish. Second, each CCLD case will be administered pursuant to uniform procedures, including the requirement of an early Rule 16 scheduling conference for counsel to meet and confer with the judge. At the Rule 16 conference, a case management order will be entered that covers all phases of the case, including the handling of discovery disputes and dispositive motions, early mandatory disclosures and the exchange of electronic discovery. Third, each CCLD case will be assigned firm pretrial and prompt trial dates that will be given priority as among the panel judges' other trial assignments.

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Important E-Discovery Guidelines

Probably the most valuable aspect of the CCLD is its E-Discovery Plan Guidelines. It is well-documented that business litigants struggle to strike an appropriate balance between conducting necessary e-discovery and covering the significant expense such discovery often entails. Parties often have to consider whether the likelihood of prevailing, and the likely amount of recovery, justify the cost and uncertainty of embarking on the e-discovery process. To address these very real concerns, the E-Discovery Plan Guidelines allow for meaningful input by counsel into the e-discovery process and call for the entry of an e-discovery order to govern how electronically stored information (ESI) will be preserved, produced and protected. The order is to be entered early in the case and should guide the parties as they proceed to conduct e-discovery. The order also will allow for reasonable restrictions on the scope of e-discovery where a party can show production of certain ESI will subject it to undue burden or expense.

At least 21 days before the first scheduling conference, the parties are to hold a meet and confer session to discuss discovery of ESI. The E-Discovery Plan Guidelines list specific e-discovery issues to be discussed at that session, including the form of ESI production and any problems relating thereto; the scope of production, including custodians, time period, file types and search protocol; the method for asserting or preserving confidentiality and proprietary status of ESI relating to a party or a person not a party to the proceeding; and whether preservation and production expenses should be allocated among the parties. The meet and confer session allows the parties to air their positions regarding the scope and structure of e-discovery in advance of entry of the e-discovery order.

Based on the information exchanged at the meet and confer session, the parties are to develop an e-discovery plan and, within 14 days, submit to the Court a written report summarizing the plan

and stating each party's position with respect to any unresolved issues. After submission of the written report, the Court will enter the e-discovery order, which will address the relevant e-discovery issues and establish the permissible scope of ESI discovery. The e-discovery order will also provide certain safe harbors with respect to document destruction policies and the inadvertent production of privileged material. By allowing the parties to drive the e-discovery process, the E-Discovery Plan Guidelines afford business litigants the chance to build on what works and to eliminate what does not in the interest of getting a handle on e-discovery practices and procedures and reducing unnecessary costs.

Sensible Case Management Orders

CCLD cases are also governed by a form Case Management Order that includes all appropriate case deadlines and provides the framework for an orderly completion of all case tasks. As a new approach to controlling document discovery, the Case Management Order provides specific deadlines for the service of document requests, production of responsive documents and service of privilege logs. Under these deadlines, parties are provided certainty as to when responsive discovery will be requested and produced. Where a party inadvertently produces a privileged or confidential document, the Case Management Order requires the parties to undertake to resolve the inadvertent disclosure issue through a protective order entered in the case or, in the absence of such an order, the guidelines set forth in the CCLD's Inadvertent Production of Documents Protocol. The Court will decide any inadvertent disclosure issue the parties are unable to resolve.

The Case Management Order also proposes to reign in deposition discovery by requiring the parties to confer and agree upon appropriate limits and deadlines. For instance, the parties are to state the number of fact depositions they will each take and are bound to such number unless the Court, for good cause shown, extends the limit. The Case Management Order also limits depositions to seven hours unless extended by agreement or Court order. The parties are also to propose dates for the commencement and completion of depositions of record custodians followed by dates for the commencement and completion of non-expert depositions. Under this unique and orderly approach, litigants will know very early in the case the number of depositions to be taken and can avoid multiple deposition notices served on the eve of the discovery cut-off date. For both written and deposition fact discovery, the Case Management Order provides a level of certainty that allows the parties to plan their discovery activities and develop more accurate budgets for the cost of such discovery.

After the fact discovery cut-off date, the Case Management Order includes dates for the commencement and completion of expert discovery, the filing of dispositive motions, the submission of the pretrial stipulation and jury instructions (if appropriate) and the filing of motions *in limine*. Expert discovery is also addressed in the CCLD Expert Discovery Protocol. That Protocol seeks to standardize what information will be produced in the course of expert discovery and when it will be produced. The Protocol also promotes cooperation among counsel in scheduling testifying expert depositions and producing documents relied upon by such experts. For instance, parties are to provide good faith estimates of how long an expert deposition will take, attempt to schedule the depositions at convenient locations and produce, at least 14 days in advance of an expert deposition, documents relied upon by the expert, but not otherwise produced in the litigation. As with fact discovery, these guidelines provide for a greater degree of certainty and predictability as to how discovery will proceed.

An important distinction under the Case Management Order relates to the filing, scheduling and disposition of motions. Unlike the existing Superior Court practice, motions in the CCLD will be heard at the Court's convenience and, as a matter of course, are to be fully briefed. All briefs are to conform to Superior Court Civil Rule 107, except that the length of briefs on discovery motions may be governed by an Order of Reference to a Special Discovery Master. Hearings on discovery motions may also be governed by an Order of Reference, if one is entered. With the addition of briefing as a matter of course and flexible scheduling of hearings, litigants enjoy a full and complete opportunity to be heard on all motions.

Conclusion

Delaware has consistently been at the forefront of corporate and business litigation and, for the past seven years, has been ranked by the U.S. Chamber of Commerce as the Nation's leading business dispute forum. The Complex Commercial Litigation Division of the Delaware Superior Court builds on this tradition by establishing a system that addresses the present concerns of the business litigant and promotes certainty, predictability and efficiency in the litigation of complex business disputes. In deciding where to file a business dispute, or in selecting a court to identify in a forum selection clause, we recommend you give serious consideration to the advantages offered by the new CCLD.

For a complete guide to the CCLD, please visit <http://www.morrisjames.com/news/xprNewsDetail.aspx?xpST=NewsDetail&news=120>. To view the Superior Court Administrative Directive that established the CCLD, please visit http://courts.delaware.gov/Courts/Superior_Court/pdf/?Administrative_Directive_2010-3.pdf.

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