

Delaware's Newest Court Division: An Alternative to Chancery with Added Benefits

The Delaware Superior Court's new division for handling complex corporate litigation rolls up on its first anniversary on May 1, 2011. The Division has had about 40 cases on its docket and appears to be meeting the expectation of both the litigants and the Court. The Complex Commercial Litigation Division judges have remained highly flexible in their case-by-case approach to case management and process. Cases assigned to the Division have been given early trial dates with scheduling priority. Motions in cases assigned to the Division have received priority scheduling as well.

Three standing orders have been entered already on case procedures. The most significant order, entered on October 19, 2010, permits full briefing on case dispositive motions and broader discovery motions. These provisions allow fuller presentation of issues than is permitted in regular civil cases. The orders can be viewed on the Court's website <http://courts.delaware.gov/Superior/complex.stm>.

Complex Commercial Litigation Division

The Division was established to meet the needs of sophisticated litigants involved in cases outside the jurisdiction of the Delaware Court of Chancery and to provide the option of jury trials, a remedy not generally available in the Court of Chancery. Cases with more than \$1 million at issue and declaratory judgment actions with a potential value of \$1 million or more are also within the jurisdiction of the Division. Personal injury actions are excluded.

The Division has a dedicated judicial and clerical staff and resources is in keeping with Delaware's tradition of providing efficient resolution of business disputes. Staffed by a panel of three judges appointed for a term of three years, the current members have extensive experience managing and trying complex commercial and other civil cases. Cases are assigned on a rotating basis, and once assigned, the judge will retain a case for the duration of the matter, even if he or she rotates out of the Division. Two additional judges may be added to the panel over the next two years. Current panel members are Judge Fred S. Silverman, Judge Joseph R. Slight III and Judge Jan R. Jurden.

March 2011

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Here is how the process works:

- Assigned judge holds an early conference pursuant to Delaware Superior Court Civil Rule 16(a), after all responsive pleadings have been filed
- Assigned judge sets firm dates and prompt pretrial and trial dates, subject to the individual circumstances of the case, which will not be continued due to scheduling conflicts with other civil cases on that judge's docket
- Absent agreement to modify the schedule, parties proceeding with a case before the Complex Commercial Litigation Division understand that they, and the Court, will be held to the timeline established

ESI and Other Discovery

The Complex Commercial Litigation Division has its own procedures governing the discovery of ESI. The Division placed an emphasis on business practices and needs of parties when the procedures were developed. The procedures were set with the ever-increasing cost of discovery of electronic materials in mind. The Division attempted to strike a balance between the need for discovery and the cost in both time and finances for both parties.

In most cases, parties must meet at least 21 days before the first scheduling conference to discuss ESI issues and develop a plan. The Court must receive this plan and information as to any disputes between the parties regarding ESI discovery within 14 calendar days of the meeting. The Court is expected to enter a detailed order on the preservation and production of ESI, including scope of discovery, privilege, confidentiality, form of production of ESI, and allocation of the expense of production among the parties, and is given flexibility in establishing these procedures.

Guidelines for the Division allow parties to object to discovery of ESI that is not reasonably accessible because of undue burden or expense. The assigned judge in a case has broad powers in the discovery area, and may set conditions on any ESI discovery, including allocation of expense. The Court can allocate expense, limit discovery if the information is more easily available from a different source, and can consider cost burden versus value of the information sought.

The Court can also consider a party's regular document destruction process. Compliance with an e-discovery order from the Court will give a party a safe harbor to destroy documents outside the scope of such an order. Inadvertent production of ESI or other documents will not waive attorney-client privilege or work product protection if the producing party takes prompt recovery steps. Case management orders issued by panel judges will require early mandatory disclosures such as those established in Federal Rule of Civil Procedure 26(a).

The Court, in establishing the Division, also dealt with discovery related to experts in Division cases. There are protocols addressing the location of expert depositions, responsibility for and costs relating to expert depositions and production of documents, and documents to be identified or produced by a party 14 days before the deposition of that party's expert. Parties are not required to produce communications and work product between counsel and expert witnesses.

Going Forward

The Superior Court is presently reviewing the procedures and practices of the Division to determine if any modifications to the Division and its procedures are necessary. In keeping with their stated intentions, the Court and the Division have advised the Delaware State Bar that there will be regular reviews of the Division's practices and procedures by the Court and its Committee on Complex Litigation.