

Delaware Court Division Focuses on Complex Commercial Cases

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The Delaware Superior Court recently established a new division for complex commercial litigation to address the needs of sophisticated litigants bringing cases that fall outside the jurisdiction of the Delaware Court of Chancery and/or in which one or both parties requests a jury trial. The new Complex Commercial Litigation Division will hear qualifying commercial cases with more than \$1 million at stake. With specific provisions addressing case management and discovery issues, the new division will streamline the process for handling high-stakes cases. Given the incorporation of many U.S. companies in Delaware, this development will be of interest to many general counsel.

In addition to new procedures tailored specifically for these types of cases, the division will provide dedicated judicial staff and resources in keeping with Delaware's tradition of providing efficient resolution of business disputes. It will be staffed by a panel of judges appointed for terms of three years. The initial members of the panel are Judge Fred S. Silverman, Judge Joseph R. Slight III and Judge Jan R. Jurden, three judges with extensive experience managing and trying complex commercial cases. It is anticipated that two additional judges will be added to the panel during the next two years. Judges will hear cases on a rotating basis, and the assigned judge will retain a case for the duration of the matter. The court already has added information about the division to its Web site and intends to provide regular updates.

FOCUS ON CASE MANAGEMENT

The assigned panel judge will hold an early conference pursuant to Delaware Superior Court Civil Rule 16(a) at the outset of a qualifying case after all responsive pleadings have been filed. At that conference, the panel judge will set firm and prompt pretrial and trial dates, which will not be continued due to scheduling conflicts with other civil cases. It is important, then, that parties proceeding with a case before the Complex Commercial Litigation Division understand they, and the court as well, will be held to the timeline established by the panel judge, absent agreement to modify the schedule.

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The division has already issued sample case-management orders, protocols for expert witnesses discovery and to address inadvertent production of privileged documents, and guidelines for an electronic discovery plan. All of these documents are available on the court's Web site, <http://courts.delaware.gov/Courts/Superior Court/>. In addition, case management orders will address alternative dispute resolution procedures, which are mandated by Delaware Superior Court in all proceedings. Mediation is the default procedure if the parties cannot agree on the ADR format.

Addressing a subject of significant concern to businesses and their counsel, the Complex Commercial Litigation Division has new procedures and deadlines governing the discovery of electronically stored information (ESI). In most cases, parties must meet at least 21 days before the first scheduling conference with the court to discuss ESI issues and develop a plan. The court must receive this plan within 14 days of that meeting, along with information as to any disputes between the parties regarding ESI discovery. The court will then 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.

Guidelines for the division include new limitations on discovery of ESI; they also allow parties to object to discovery of ESI that is not reasonably accessible because of undue burden or expense. The panel judge has unique powers in this area and may set conditions on any ESI discovery, including allocation of expense. The court may limit discovery if the information is more easily obtained from another source, the burden of discovery exceeds the likely benefit or the discovery of ESI would be unreasonably cumulative or duplicative. Confidentiality of documents and ESI will also be protected. In making its decision on objections, the court will consider the cost of the discovery sought, the resources of the parties, the importance of the issues and the importance of the requested discovery.

Parties that comply with an e-discovery order from the court receive a safe harbor and may apply regular document-destruction procedures to any ESI not ordered to be produced. The inadvertent production of ESI will not waive attorney-client privilege or work-product protection if the producing party takes prompt recovery steps. These procedures were added in recognition of the costs and other problems of discovery of ESI.

OTHER DISCOVERY PROVISIONS

Case management orders issued by panel judges will require early mandatory disclosures such as those stipulated by Federal Rule of Civil Procedure 26(a). There are also protocols to deal with recovery of inadvertently produced privileged documents.

For expert discovery, there are protocols addressing the location of expert depositions; responsibility for and costs relating to 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.

In sum, the new Delaware Superior Court's Complex Commercial Litigation Division is the result of a collaborative effort by judges and lawyers who examined the litigation process in Delaware courts and recommended improvements in procedures for complex commercial cases. The mandate of the Complex Commercial Litigation Division is to resolve business disputes in an efficient, timely manner. This is reflected in the rules and procedures developed for the court and in the case management, e-discovery and other protocols used by panel judges. Litigants prepared to meet the scheduling requirements of the new division can look forward to efficient resolution of disputes.