Morris James DELAWARE

A GUIDE TO THE

COMPLEX COMMERCIAL LITIGATION DIVISION

OF THE SUPERIOR COURT

OF THE STATE OF DELAWARE

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INTRODUCTION

Civil litigation in the United States is at a crisis point. As costs have risen dramatically, the number of business disputes litigated has fallen steadily. Chief among the causes are the costs of discovery into electronically stored information, litigation delay, attorney-client privilege disputes and inconsistent case management by the courts. Delaware, as the Nation's leading business dispute forum as recognized by the U.S. Chamber of Commerce for the last seven years, has now provided a solution to all of these problems.

On April 26, 2010, the Honorable James T. Vaughn, Jr., President Judge of the Delaware Superior Court, issued Administrative Directive No. 2010-3 (the "Directive"), which established a Complex Commercial Litigation Division (the "CCLD"). The CCLD, which commenced on May 1, 2010, is a welcomed addition to the Delaware Superior Court and is authorized to adjudicate specific categories of complex business disputes, including cases with an amount in controversy of at least One Million Dollars. The CCLD provides yet another option for the resolution of complex business disputes within Delaware's highly regarded court system.

Prior to issuing the Directive, Judge Vaughn appointed a nine-lawyer committee to explore and investigate the Superior Court's management of complex commercial litigation matters and to make recommendations regarding how such matters should be handled in the future. After evaluating the Superior Court's operations, and considering the unique requirements of business litigants, the committee recommended the establishment of a separate division within the Superior Court to handle complex business disputes. The committee based its recommendations on the need 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. To address these concerns, among others, the CCLD is governed by a number of important case administration principles.

First, each CCLD case will remain with the same Panel 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 Panel 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.

As the CCLD is a new addition to the Superior Court, this guide is designed to summarize the operation of the CCLD as set forth in the Directive. The Directive, and the related forms that will govern CCLD cases, are reproduced in their entirety at the end of this guide.

SUMMARY OF THE COMPLEX COMMERCIAL LITIGATION DIVISION

A. Qualification for the CCLD

To qualify for the CCLD, the case must: (1) include a claim asserted by any party with an amount in controversy of at least One Million Dollars, or (2) involve an exclusive choice of court agreement or a judgment resulting from an exclusive choice of court agreement or (3) be designated by the President Judge. (Dir. at 2.) The following types of cases may not be filed in the CCLD: any case containing a claim for personal, physical or mental injury; mortgage foreclosure actions; mechanics' lien actions; condemnation proceedings; and any case involving an exclusive choice of court agreement where a party to the agreement is an individual acting primarily for personal, family or household purposes or where the agreement relates to an individual or collective contract of employment. (*Id.*)

B. The CCLD Panel Judges

The President Judge appoints the Panel Judges from among the Judges of the Superior Court, and each Panel Judge shall serve a term of three years unless earlier replaced by the President Judge. (Dir. at 4.) The initial Panel Judges are: (1) The Honorable Fred S. Silverman, (2) The Honorable Joseph R. Slights, III and (3) The Honorable Jan R. Jurden. (Administrative Directive No. 2010-4).

C. Procedure for Selecting the CCLD and Challenges to the CCLD Designation

If a case meets the requirements set forth above, counsel may select participation in the CCLD on the Case Information Statement (the "CIS") filed with the Complaint. (Dir. at 3.) On the CIS, counsel should state the letters "CCLD" for the Civil Case Code and "Complex Commercial Litigation" for the Civil Case Type. (*Id.*) If the plaintiff does not initially select the CCLD, a defendant may do so by following the above procedure with respect to its CIS. (Dir. at 4.)

A party that opposes designation of a case as qualifying for the CCLD may file an appropriate motion before the Rule 16 conference or at such other time directed by the Panel Judge. (Dir. at 5.) The filing of such a motion will not affect deadlines for filing any pleadings, motions or required responses under the Superior Court Rules. (*Id.*) If the Panel Judge grants

such motion and determines that a case does not qualify for the CCLD, the Judge will notify the Prothonotary who will reassign the case to the appropriate Civil Case Type Category. (*Id.*)

D. Case Administration Forms, Protocols and Guidelines

To assist with efficient and uniform case administration, the Directive includes forms, protocols and guidelines to guide practitioners in litigating cases in the CCLD. The forms and protocols are as following: (1) a form Case Management Order; (2) Protocol for the Inadvertent Production of Documents; (3) Protocol for Expert Discovery; and (4) E-Discovery Plan Guidelines. Each of these documents is discussed below.

1. CCLD Case Management Order

The form Case Management Order includes all appropriate case deadlines and provides the framework for an orderly completion of all case tasks. Initially, the Case Management Order requires any party adding a new party to serve the Case Management Order along with the pleading joining such new party to the case. The Case Management Order also states a procedure for assigning certain matters to a Special Master or Commissioner. Any party may simply request that the Court issue an Order of Reference directing a Special Master or Commissioner to handle the matters set forth in the Order of Reference.

With respect to document discovery, the Case Management Order provides specific deadlines for the service of document requests, production of responsive documents and service of privilege logs. 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 Inadvertent Production of Documents protocol. The Court will decide any inadvertent disclosure issue the parties are unable to resolve.

The Case Management Order also includes some unique limits and deadlines for fact discovery. Unlike previous Superior Court Case Management Orders, the parties are required 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. 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*.

An important distinction provided by 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 are governed by any Order of Reference to Special Discovery Master. Hearings on discovery motions may also governed by an Order of Reference, if one is entered.

2. Protocol for the Inadvertent Production of Documents

The Protocol for the Inadvertent Production of Documents expressly applies in instances where the parties have not entered into an applicable protective order. The protocol requires a party in receipt of inadvertently produced privileged or confidential information either to "immediately" return such information or notify the producing party of the apparent inadvertent production.

A party who inadvertently produced privileged or confidential information may, within 120 days of production, provide written notice stating the claim of inadvertent production and the nature of the privilege asserted. Upon receipt of such notice, all parties who have received copies of the produced documents shall promptly return them to the producing party or destroy them or, if the basis for claiming privilege is challenged, file a motion for the Court to determine if the claim is well founded. Until the Court rules on the motion, no party may make any use of the allegedly privileged material. After the provision of timely notice, parties are also precluded from filing motions to compel that rely on an allegation that any protection as to particular documents was waived by their inadvertent production.

After 120 days from production, a party may provide notice of inadvertent production not later than 30 days prior to trial. Within ten days of the provision of such notice, the parties are to meet and confer in an effort to reach agreement on the handling of the alleged inadvertent production. If the parties are unable to reach agreement, the producing party shall file an appropriate motion for protective order. The protocol makes clear that the inadvertent production of privileged material, the return of which is requested under the protocol, shall not be considered a waiver of any claim of privilege.

3. Protocol for Expert Discovery

In addition to providing deadlines for identifying expert witnesses and scheduling expert witness depositions, the Protocol for Expert Discovery provides detailed guidelines for conducting expert discovery in the CCLD. The provisions require that, within ten days of designating a testifying expert, the designating party must produce the expert's curriculum vitae and identify the expert's prior testimony in the past four years. The list of prior testimony must identify the matter, the court or other public body, the parties and their attorneys, whether the expert or the proffering party has a copy of the testimony and the nature of the proceeding. In response to this list, the opposing party may request similar information for a longer period not to exceed ten years and may apply to the Court for relief if the request is denied.

Additionally, the protocol promotes cooperation among counsel in scheduling testifying expert depositions and producing documents relied upon by such experts. With respect to expert depositions, parties are to provide good faith estimates of how long an expert deposition will take, make a good faith effort to schedule expert depositions at convenient locations and produce their experts without the necessity of a subpoena. Each party must pay its own expert witness fees and expenses incurred in connection with the depositions and, if the parties are not able to agree on a convenient location, the expert depositions are to take place in Wilmington, Delaware.

At least 14 days before the testifying expert's deposition, the party proffering the expert must produce a list of the documents reviewed by such expert, which includes, for each document, the Bates or deposition exhibit numbers, the date and a brief description. Also at least

14 days before the deposition, the proffering party must produce the following documents relied upon by the testifying expert: (1) documents obtained from a third party and not produced to the other side; (2) documents for which there is no common Bates number or deposition exhibit number; (3) documents prepared by a non-testifying expert (relied upon by the testifying expert); and (4) publications of any type, including "learned treatises" under D.U.R.E. 803(13), except that only relevant portions of readily accessible publications need be produced. The protocol makes clear that no communications between counsel for a party and the party's expert are to be produced, nor is any work product between the expert witness and the proffering party's counsel. As with the expense of expert depositions, the party producing the documents bears the cost of production.

4. E-Discovery Plan Guidelines

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.

Initially, the parties are to hold a meet and confer session at least 21 days before the first scheduling conference to discuss discovery of ESI. At that session, the parties are to discuss the following issues that will serve as the basis for the Court's e-discovery order: (1) any issues relating to preservation of ESI; (2) the form of ESI production and any problems relating thereto; (3) the scope of production, including custodians, time period, file types and search protocol; (4) the method for asserting or preserving claims of privilege or of protection of ESI as trial-preparation materials, including whether such claims may be asserted after production; (5) 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; (6) whether preservation and production expenses should be allocated among the parties; and (7) any other issue relating to the discovery of ESI.

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 seven issues listed above and establish the permissible scope of ESI discovery. Under the order, a party may object to discovery of ESI from sources not reasonably accessible because of undue burden or expense. On a subsequent motion to compel or for protective order, the Court may order production if the need for the discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues and the importance of the requested discovery in resolving the issues. Even where the requested ESI is not from a source that is not reasonably accessible, the Court may limit such discovery where: (1) it is possible to obtain the information from a more convenient, less burdensome or less expensive source; (2) the discovery sought is unreasonably cumulative or duplicative; (3) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or (4) the likely burden or expense outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues and the importance of the requested discovery in resolving the issues.

Lastly, the Court's e-discovery order will provide certain safe harbors with respect to document destruction policies and the inadvertent production of privileged material. The guidelines provide that a party who is subject to an e-discovery order and complies with such order may thereafter apply its regular document destruction procedures to any ESI that has not been ordered to be produced without being subject to subsequent sanctions. The guidelines also provide that the production of ESI will not constitute a waiver of the attorney-client privilege or work-product doctrine if the disclosure was inadvertent and the producing party "promptly takes reasonable steps to recover the ESI."

E. Further Information

For further information on Delaware's newest business court, please contact any of the following Morris James attorneys:

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