Tax/Commercial/Bankruptcy Law

Recent Amendments to the Commercial Division Rules

The last twelve months have seen a great deal of change to the rules of practice in the Commercial Division. These rules are intended to streamline cases, reduce costs, and encourage parties to explore opportunities for settlement early in the litigation. This article summarizes those changes and highlights the differences from prior practice.

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The new rules have their origins in the recommendations proposed by The Chief Judge's Task Force on Commercial Litigation in the 21st Century. In the years since the Commercial Division was founded in 1995, the number and complexity of commercial cases have grown dramatically, while the judiciary has been continually hampered by budget cuts and reduced staff. Chief Judge Lippman recognized that reforms were necessary if New York State were to remain the preeminent forum to resolve commercial cases. The Task Force was commissioned to ensure that the judiciary remains at the forefront of how commercial cases are resolved.

The Commission was chaired by Judith S. Kaye, the former Chief Judge, and Martin Lipton, Senior Partner at Wachtell, Lipton, Rosen & Katz, and comprised of leading commercial practitioners, law professors, business executives, and former and current judges (including Nassau County's three Commercial Division justices).

Over the course of many months, the Task Force examined all phases of litigation, and in June 2012 issued a thorough and analytical report recommending a series of procedural and structural reforms intended to ensure the prompt and efficient resolution of commercial cases. In that report, the Task Force endorsed the Chief Judge's legislative proposal to establish a new class of Court of Claims judges to be appointed by the Governor for designation to the Commercial Division, recommended an increase in the monetary threshold and adjustment of the types of cases to be assigned to the Commercial Division, and encouraged an array of procedural reforms designed to reduce delay and eliminate unnecessary costs.

Among the procedural reforms recommended by the Task Force were new rules requiring the earlier assignment of cases to the Commercial Division, expanding the scope of expert disclosure, limiting privilege logs, standardizing practice across counties, reducing the burdens of e-discovery, and improving courtroom efficiency.

Chief Administrative Judge A. Gail Prudenti and the Unified Court System have taken the advice of the Task Force to heart and approved several new Commercial Division rules that improve the manner in which commercial cases are litigated. Below is a summary of the significant recent amendments:

New Rule 11-a: Imposing Limitations on the Number and Type of Interrogatories (effective June 2, 2014)

Under the prior rule, parties had the discretion to serve a virtually limitless number of burdensome interrogatories. Commentators criticized this practice as "a game," whereby parties expended significant amounts of time and money preparing interrogatories that resulted in the exchange of little, if any, useful information.

The new rule is meant to curb such gamesmanship and reduce litigation costs. It imposes a presumptive limit of 25 interrogatories, including subparts, per side. This numerical limitation is based on FRCP 33(a)(1). However, commercial litigants in state court are faced with a further limitation on the subject matter of those 25 interrogatories.

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Unless otherwise ordered by the court, the permissible topics are names of the witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damages alleged, and the existence, custodian, location, and general description of documents and other physical evidence. Contention interrogatories, those seeking the factual basis of the opposing party's claims or defenses, may only be served at the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date.

New Rule 11-b: Limiting Privilege Logs (effective September 2, 2014)

CPLR 3122 requires that any party withholding a document on the ground of privilege must separately list each document withheld and for each identify the sender, recipient, and subject matter of the document, among other things. In commercial cases, this is often a herculean task, and highly expensive for parties.

Under the new rule, the Commercial Division departs from the document-by-document approach and directs the parties to meet and confer early and often to agree on a procedure for handling privileged documents. The preference is for a categorical listing of privileged documents. For each category, the

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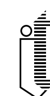

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producing party must provide a certification setting forth with specificity those facts supporting the privilege or protected status of the information and describing the steps taken to identify the documents.

Parties not willing to abide by this categorical approach must be prepared to put their money where their mouth is. The new rule allows the Court to direct the party insisting upon a document-by-document log to pay the producing party's costs of production, including attorney's fees.

New Rule 11: Governing Discovery of Electronically Stored Information from Nonparties (effective September 2, 2014)

E-discovery practice is expensive. For parties to a litigation, those costs are bad enough. For non-parties who are dragged into others' dispute, bearing those costs is even worse.

To address this situation, a new rule was passed that governs the manner in which parties obtain e-discovery from non-parties. The rule requires parties and non-parties to adhere to the Commercial Division's Guidelines for Discovery of Electronically Stored Information ("ESI") from Nonparties, which are found in Appendix A to the Rules. Those seeking ESI from non-parties are encouraged to reasonably limit the requests so as not to impose any undue burden on the producing non-party. All involved are advised to engage in discussions as early as possible to limit any disputes concerning the requests or manner of production. Motion practice should be a matter of "last resort."

While much of the Guidelines are written as recommendations, the drafters specifically imposed cost-shifting by directing that the "requesting party shall defray the nonparty's reasonable production expenses," which may include counsel and consultant fees, business disruption costs, and other costs.

New Preliminary Conference Form (effective June 2, 2014)

The new Preliminary Conference form that has been adopted for use in the Commercial Division contains more robust sections dealing with e-discovery and expert discovery. For example, counsel must certify that they have fulfilled their meet-and-confer obligations imposed by Rule 8 and indicate that they have a plan in place for preserving and producing electronically stored information. The new form includes additional time for parties to identify experts, exchange reports, and depose experts.

This is a drastic change from prior practice, which only provided for limited (and mainly useless) expert discovery authorized by CPLR § 3101(d). The new rule brings the Commercial Division in line with federal practice and provides parties with an opportunity to meaningfully educate themselves as to the adversary's expert testimony in advance of trial.

Amendment to 22 NYCRR § 202.70(d)-(e): Assignment and Transfer of Cases to the Commercial Division (effective September 2, 2014)

Previously, a party wishing to have a case assigned to the Commercial Division simply had to submit a request with the RJI – whenever that occurred. Now, parties must be more pro-active when seeking assignment to a commercial part. This rule recognizes the benefits that came with early judicial involvement and enforcement of the Commercial Division rule.

22 NYCRR 202.70(d) requires that any party seeking assignment of a case to the Commercial Division must do so within 90 days following service of the complaint. Failure to meet this deadline precludes a party from seeking assignment of the case to the Commercial Division, except a party may request that the Administrative Judge assign a case to the Commercial Division after this period upon a showing of "good cause." The determinations of the Administrative Judge are final and not subject to further review or appeal.

For cases not initially assigned to the Commercial Division, but where the RJI was filed within the 90 day window, a party has ten days from receipt of the RJI to request assignment to a commercial justice.

New Rules to Promote Early Resolution of Disputes

Recognizing that the overwhelming majority of commercial cases settle before trial, the Commercial Division has adopted several new rules that are intended to bring about early, or at least quicker, resolutions of disputes.

First, a pilot program is currently underway in New York County (Rule 3) that automatically refers every fifth case filed to mediation, unless all parties stipulate that mediation should not proceed or any party make a "good cause" showing as to why mediation would be ineffective or unjust. The rule requires that the mediation take place within 180 days of assignment to a Commercial Division justice. This pilot has been underway in New York County only a few months. Practitioners in Nassau County should be on the lookout to see if it crosses the river in the near future.

The Commercial Division recognizes that limited discovery is oftentimes necessary to facilitate a settlement. Therefore, Rule 8(a) has been amended effective as of September 2, 2014 to require parties to consult prior to both preliminary and compliance conferences about "any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case."

Finally, where an early settlement is not achieved, the Commercial Division has adopted a voluntary accelerated adjudication procedure (Rule 9, effective June 2, 2014). All non-class action commercial cases are eligible, provided all parties consent.

A case proceeding through the accelerated process must be trial ready within 9 months of the filing of the RJI. To facilitate that, the parties further agree to a waiver of numerous substantive rights, such as the right to a trial by jury, claims for punitive or exemplary damages, and the right to interlocutory appeal. Discovery in an accelerated action is also limited. No more than seven interrogatories and five requests to admit may be served, and absent a showing of good cause, no more than seven depositions limited to seven hours in length per side may be conducted.

Furthermore, documents requested by the parties are limited to those relevant to a claim or defense in the action and will be further restricted in terms of time, subject matter, and persons or entities to which the requests pertain. Unless the parties agree otherwise, electronic discovery should be in a searchable format and the description of custodians from whom electronic discovery is sought must be narrowly tailored to include "only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute."

The rule also permits the court to deny requests when the costs and burdens of e-discovery are disproportionate to the nature of the dispute, the amount in controversy, or to the relevance of the materials requested. The court may also order disclosure on the condition that the requesting party advance the reasonable cost of production to the other side.

Conclusion

These new rules demonstrate that the Court System is dedicated to ensuring a first-rate Commercial Division. As commercial cases continue to grow, look for further alterations and additions to the Rules to meet the changing environment of commercial litigation.

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