

New York's Commercial Division Continues Its Efforts to Increase Efficiencies

09 / 25 / 18

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Patrick G. Rideout

Partner / New York
212.735.2702
patrick.rideout@skadden.com

Giyoung Song

Counsel / New York
212.735.2564
giyoung.song@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

The Commercial Division of the New York State Supreme Court recently initiated changes that reflect its focus on utilizing efficiency, innovation and agility to attract high-stakes complex commercial cases to the New York state courts. First, two rule amendments, effective October 1, 2018, encourage parties to (i) use technology-assisted review (TAR) during discovery in appropriate cases and (ii) seek pretrial evidentiary hearings or immediate trials to dispose of certain material issues early in the proceedings. Second, the court instituted a pilot program for “large complex cases” in New York County on January 1, 2018, that affords designated matters additional case management resources to facilitate effective adjudication and earlier resolution.

Through these changes, the Commercial Division continues to refine its procedures to further attract the kinds of high-stakes commercial cases that also are heard in the U.S. District Court for the Southern District of New York, the Delaware Court of Chancery and the Commercial Court in London.

Background

In 1995, the New York state court system established a special Commercial Division, concentrating complex commercial litigation in one division of the court. This change aimed to improve efficiency and enhance the quality of judicial treatment of the state’s most high-stakes litigation. The Commercial Division has expanded over time and now spans 10 jurisdictions with 28 justices. The Commercial Division has its own set of practice rules, including a monetary threshold of \$500,000 in New York County (which includes Manhattan). Since its inception, the Commercial Division rules have been revised as appropriate to respond to the evolving needs and concerns of business litigants and to maintain the court as a national and international center for resolving complex disputes.

Rule Amendments

The rules becoming effective next month continue the court’s tradition of addressing the complexity and associated cost of litigating cases within its jurisdiction.

First, a new amendment codifies support for using TAR, including predictive coding, during discovery in appropriate cases. Specifically, the new Rule 11-e(f) encourages parties to “use the most efficient means to review documents, including electronically stored information (ESI), that is consistent with the parties’ disclosure obligations ... and proportional to the needs of the case. Such means may include technology-assisted review, including predictive coding, in appropriate cases.” In addition, the parties are encouraged to confer at the outset of discovery and throughout the discovery period on these issues.

The new rule is a proactive step that swiftly aligns the Commercial Division’s approach to e-discovery with that of other courts that also hear complex commercial cases, such as the Southern District of New York and the Delaware Chancery Court, which have developed jurisprudence over time related to the use of TAR. By codifying support for TAR, the Commercial Division similarly has signaled that it is receptive to technological innovations that reduce the cost and burden of discovery while simultaneously producing defensible results. The supporting explanatory memorandum stated that, in considering appropriate discovery techniques for ESI, the court and parties should include practices such as keyword searching, concept searching, email threading, near-duplicate identification, clustering and predictive coding. Although the new language does not

New York's Commercial Division Continues Its Efforts to Increase Efficiencies

mandate any particular search method, it is unique in that other procedural rules do not affirmatively address technological innovations litigants should consider using to comply with their disclosure obligations.

The second amendment encourages parties to take advantage of existing New York Civil Practice Law and Rules (CPLR) provisions that allow for pretrial evidentiary hearings or immediate trials to resolve factual issues that could dispose of a material aspect of the case. Rule 9-a further allows parties to seek limited expedited discovery targeted at the factual issue to be tried. These procedures may be helpful to more quickly address dispositive defenses and thereby resolve a case early, even where there may be material issues of fact that traditionally may have precluded early resolution. This amendment does not expand or modify the court's existing authority. Rather, in a specific effort to conserve judicial and litigant resources and avoid delay and inefficiency, it reiterates existing options under the CPLR that may be underutilized.

Large Complex Case List

Under the pilot program for "large complex cases," litigants may be afforded additional procedural tools and resources. The Large Complex Case List (LCC List) is a special docket of cases where a minimum of \$50 million is at stake (exclusive of punitive damages, interest, costs, disbursements and counsel fees) or the issues are sufficiently complex and important as to warrant augmented case management.

Cases may be designated for the LCC List by application of a party (subject to judicial review) or by the presiding justice. Once on the list, a case may have access to procedural enhancements including special referees experienced in discovery disputes, similar to federal magistrate judges; mediators and "back-up" settlement judges with expertise in large, complex cases; technology to streamline document discovery and filing; hyperlinked briefs; and active case management aimed at reducing delay.

The LCC List was instituted, in part, because of competition the Commercial Division faces from other state courts (for example, Delaware's Chancery Court) as well as the Commercial Court in London. As many large institutions have a significant presence in both New York and London and could potentially have a choice in forum selection for certain disputes, the LCC List is meant to be a response to the 2015 introduction of the "Financial List," a specialized list of cases that may be commenced in the Commercial Court. Unlike the Financial List, however, the LCC List is not limited to the financial services sector; sufficiently complex cases involving other types of issues may be eligible for inclusion.

Implications

By adopting efficient and enhanced case management techniques, as well as technological advances and practices, the Commercial Division continues to seek to elevate its status as an attractive forum for domestic and international institutional clients litigating high-stakes complex disputes.

Rule 11-e, as amended, addresses the exponential growth in the amount and types of ESI as well as litigants' use of technology to handle voluminous discovery. While the amendment could, when applied in appropriate cases, help litigants more efficiently review and produce fewer documents, protracted negotiations or motion practice relating to TAR could undermine its benefit.

Moreover, the new Rule 9-a could not only help dispose of cases sooner than is customary but also could serve as a mechanism for phasing or staging targeted discovery. However, given, among other issues, the complexity of many cases within the Commercial Division, it is unclear whether litigants will take advantage of the opportunity to seek early evidentiary hearings or immediate trials on material aspects of their cases.

The extent to which litigants will invoke the new rules and the LCC List remains to be seen. Nonetheless, these innovations represent proactive steps in addressing the particular concerns of clients litigating large-scale commercial disputes, including a focus on efficiency, reduced costs and the quality of judicial treatment of those cases.

Associate Mina Chang contributed to this article.