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Expert Analysis

Continued Efficiencies In the Commercial Division

New York's Commercial Division recently initiated changes that continue its focus on utilizing efficiency, innovation and agility to attract high-stakes complex commercial cases.

Since Jan. 1, 2018, 10 new Commercial Division rule amendments or measures have come into effect, underscoring the dynamic nature of the jurisdiction. The most recent changes are aimed at early disposition of material aspects of a case, using technology during discovery, and even cracking down on perceived gamesmanship with respect to brief length. Through these developments, the Commercial Division continues to evolve to address the complexity and costs associated with high-stakes business litigation, and to maintain its position as a forum prepared



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to hear such cases, like the U.S. District Court for the Southern District of New York, the Delaware Court of Chancery and the Commercial Court in London.

Rule Amendments

Three new rules became effective on Oct. 1, 2018.

Streamlining Issues Early. To narrow the issues in a given litigation, new Rule 9-a encourages parties to take advantage of existing New York Civil Practice Law and Rules (CPLR) provisions that allow for pre-trial evidentiary hearings or immediate trials to resolve factual issues that could dispose of a material aspect of the case. Rule 9-a further provides that parties may seek limited expedited discovery targeted at the factual

issue to be tried. These procedures may be helpful to address dispositive defenses earlier in a case and thereby resolve the matter more efficiently, even though other material issues of fact may have otherwise 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

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delay and inefficiency, it reiterates existing options under the CPLR, including certain types of available motions that may be particularly useful for these purposes.

Technology in Discovery. Moving to the discovery phase, Rule 11-e(f) codifies support

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for using technology-assisted review (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 aligns the Commercial Division’s approach to e-discovery with that of other courts that 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 e-discovery.

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 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.

Brief Length. Finally, a new amendment to Rule 17 changes the way in which permitted brief length is calculated, substituting word limits for page limits. The former rule set a limit of 25 pages for opening memoranda of law, affidavits and affirmations, and 15 pages for reply memoranda. The amendment replaces these page limits with maximums of 7,000 words and 4,200 words respectively (subject to exclusion for certain mandated sections of the brief, such as the caption and table of contents).

Recognizing the role of technology in facilitating what may be perceived as gamesmanship with respect to brief length, this substitution of word counts is intended to reduce incentives for

attorneys to fit more text within the allotted pages through, for example, formatting modifications or excessive footnotes. The supporting explanatory memorandum also noted this change is intended to encourage attorneys to focus on their strongest arguments and increase the readability of their papers, thus decreasing time spent by judges and opposing counsel reviewing “meandering, repetitious briefs.”

This change is consistent with similar rules adopted by the First and Second Departments of the Appellate Division of the Supreme Court, the New York Court of Appeals, the U.S. Court of Appeals for the Second Circuit and the Delaware Court of Chancery.

The Large Complex Case List

The new rule amendments are of a piece with another development in the Commercial Division that became effective in January of this year: the pilot program for “large complex cases” that affords litigants in New York County certain 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; hyper-linked 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 responds to the 2015 introduction of the “Financial List,” a specialized list of cases that may be commenced in the UK’s Commercial Court or Chancery Division. The Financial List generally covers cases that

meet a \$50 million threshold and relate to the domestic and international financial markets. The LCC List is not limited to the financial services sector, however, and sufficiently complex cases involving other types of issues may be eligible for inclusion.

Implications

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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 issues sooner than is customary but also serve as a mechanism for phasing or staging targeted discovery. However, given, among other things, 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 Commercial Division website has yet to list a case assigned to the LCC List, so it is unclear whether or how the creation of this special docket will enhance the process for these types of cases. Conversely, it also is uncertain whether providing extra attention to cases on the LCC List will divert resources from other complex commercial cases heard in the Commercial Division.