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COMMERCIAL LAW

Delaware Superior Court's Complex Commercial Litigation Division



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Delaware corporations comprise more than 60 percent of the Fortune magazine list of the 500 largest companies in the United States.¹ More than half a million Delaware LLCs have been formed since the adoption of the Delaware Limited Liability Company Act some 19 years ago.² Delaware policymakers have long understood the importance of developing courts with the expertise and flexibility necessary to address the needs of the state's business and commercial constituents.

The Delaware Court of Chancery thus has long been recognized as among the leading business courts in the

¹ Richards, Layton & Finger, *DELAWARE: Laws and Programs Affecting Business* (Third Edition, July 2011) at 3.

² See *id.* at 47.

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United States. However, jurisdiction in the Court of Chancery is generally limited to matters in equity. While equitable doctrines exist that permit Chancery to consider and resolve matters arising at law when joined with equitable claims, absent the equitable "hook," litigants have found themselves unable to access the established Delaware business court. Understanding the importance of providing an appropriate analogue to Chancery on the "law side" of the law and equity split, Delaware's general trial court recently has acted to fill the gap.

On May 1, 2010, the Superior Court of the State of Delaware established a Complex Commercial Litigation Division for the resolution of certain business disputes where equitable jurisdiction is lacking. In so doing, Delaware has joined states such as Massachusetts and North Carolina that also have established specialized divisions organized for business and commercial litigation within their existing court systems.³ The CCLD aims to give parties increased access to judges experienced in complex commercial litigation while providing greater flexibility in scheduling and case management, along with prompt and firm trial dates.⁴ Since its inception, the CCLD has attracted dozens of commercial cases not otherwise eligible for disposition in Chancery.

Subject Matter of CCLD

An administrative directive of the Delaware Superior Court formally established the CCLD and set forth the details of the new Complex Commercial Litigation Division, including the criteria for eligibility.⁵ Three kinds of cases may be filed in the CCLD: those involving a claim by any party of \$1 million or more; cases where an exclusive choice of court agreement exists; or any case that the president judge of the Superior Court des-

³ Massachusetts has established the Business Litigation Session of the Superior Court of Massachusetts, and the North Carolina Business Court is a forum within the North Carolina State Courts' trial division.

⁴ See Hon. Fred S. Silverman, et al., *The Superior Court Complex Commercial Litigation Division* (May 20, 2011) (slides accompanying presentation at the spring meeting of the United States Law Firm Group's Litigation Practice Committee) [hereinafter USLFG Presentation].

⁵ See Admin. Directive No. 2010-3 (Del. Super. Apr. 26, 2010), available at http://courts.delaware.gov/Superior/pdf/Administrative_Directive_2010-3.pdf (last visited Sept. 28, 2011).

ignates for the CCLD.⁶ Consumer and class action cases, assuming they can satisfy one of these criteria, are not excluded. Cases with claims for personal, physical, or mental injury, mortgage foreclosure actions, mechanics' liens, and condemnation proceedings are ineligible.⁷ To gain initial entry into the division, plaintiffs mark "CCLD" as the case type on the case information statement filed with their complaint; defendants can file a motion opposing CCLD status, or can themselves request that a non-CCLD case be assigned to the division when filing their case information statement.

Cases are distributed among the judges assigned to the CCLD panel on a rotating basis. Superior Court Judges Jan R. Jurden, Fred S. Silverman, and Joseph R. Slight III were the first three judges appointed to three-year terms with the division.⁸ As of May 1, 2011, Judge Mary M. Johnston was added as a fourth judge to the panel.⁹ Each of these judges has extensive experience with complex civil litigation; the CCLD's website highlights a number of decisions rendered by each judge in complex commercial matters.¹⁰ Once a case is assigned to a judge, that judge will oversee the matter through final disposition, regardless of whether he or she rotates off the panel.¹¹

By creating a division that is managed by standing orders and directives within an existing court, the rules particular to the Complex Commercial Litigation Division can change and respond to the needs of litigants.

Trial dates are firmly fixed and will not be continued owing to scheduling conflicts with other civil cases. The panel judges will attempt to schedule cases so as not to create conflicts with their criminal docket. Both jury and bench trials are available in the CCLD.

Practice in federal district court appears to have been the model for early case management in the CCLD. Once the pleadings are closed, the assigned CCLD judge schedules a Rule 16 conference with the parties to discuss the case management order. At the conference, the parties discuss electronic discovery, expert discov-

⁶ See *id.*

⁷ See *id.*

⁸ See Admin. Directive No. 2010-4 (Del. Super. Apr. 26, 2010), available at http://courts.delaware.gov/Superior/pdf/Administrative_Directive_2010-4.pdf (last visited Sept. 28, 2011).

⁹ See Admin. Directive No. 2011-3 (Del. Super. May 1, 2011), available at http://courts.delaware.gov/Superior/pdf/Administrative_Directive_2011_3.pdf (last visited Sept. 28, 2011).

¹⁰ See *Special Judges Panel*, SUPERIOR COURT OF DELAWARE COMPLEX COMMERCIAL LITIGATION DIVISION, http://courts.delaware.gov/superior/complex_judges.stm (last visited Sept. 28, 2011).

¹¹ See Admin. Directive No. 2010-3 (Del. Super. Apr. 26, 2010), available at http://courts.delaware.gov/Superior/pdf/Administrative_Directive_2010-4.pdf (last visited Sept. 28, 2011).

ery, dispositive and *Daubert* motion practice, interim dates and deadlines, and pretrial and trial matters to the extent possible at that stage. The influence of federal practice is explicit in the section of the administrative directive stating that case management orders should "require early mandatory disclosures such as those contemplated by Federal Rule of Civil Procedure 26(a)."¹²

Standing Orders and Protocols Emphasize Flexibility

By creating a division that is managed by standing orders and directives within an existing court, the rules particular to the CCLD can change and respond to the needs of litigants without undergoing the procedure necessary to alter a Delaware Superior Court Civil Rule—though the protocols developed for the CCLD are always subordinate to the civil rules.

Flexibility and access have been the characteristics of the standing orders issued thus far for the CCLD. For instance, the New Castle County Case Management Plan limits routine motions filed in Superior Court to four pages, and parties must seek leave of court for page extensions. CCLD Standing Order No. 1, however, allows parties litigating in the CCLD to exceed this limit without requesting permission to do so, up to the full 35 pages for opening and answering briefs and 20 pages for reply briefs permitted by Superior Court Civil Rule 107(h); discovery motions and responses may extend to 10 pages.¹³ CCLD Standing Order No. 2 establishes a procedure for litigants to draw the court's attention to a substantive matter ready for court action by so certifying and providing an index of the relevant docket entries.¹⁴ Like the protocols discussed below, the "CCLD Standing Orders are default standards. Orders are flexible and adjustments may be made as agreed upon by the parties."¹⁵

Discovery disputes are heard on weekly motion calendars, though the panel judges are accessible for expedited discovery motions.¹⁶

The division's three protocols—electronic discovery, expert discovery, and inadvertent production—also embody flexibility in that they apply unless the parties arrive at another agreement:

*E-Discovery Plan Guidelines*¹⁷: Three weeks before the first scheduling conference with the court, the parties must meet and confer to discuss electronic discovery, as they would in federal court; the electronic discovery plan itself is due two weeks before the Rule 16 conference. The expert discovery protocol serves as a

¹² *Id.*

¹³ See Standing Order No. 1, *In re* Complex Commercial Litigation Division (Del. Super. Oct. 19, 2010), available at http://courts.delaware.gov/superior/pdf/CCLD_standing_order_1.pdf (last visited Sept. 28, 2011).

¹⁴ See Standing Order No. 2, *In re* Complex Commercial Litigation Division (Del. Super. Nov. 10, 2010), available at http://courts.delaware.gov/superior/pdf/CCLD_standing_order_2.pdf (last visited Sept. 28, 2011).

¹⁵ *Special Judges Panel*, SUPERIOR COURT OF DELAWARE COMPLEX COMMERCIAL LITIGATION DIVISION, http://courts.delaware.gov/superior/complex_judges.stm (last visited Sept. 28, 2011).

¹⁶ See USLFG Presentation.

¹⁷ Available at http://courts.delaware.gov/Superior/pdf/cclد_appendix_b.pdf (last visited Sept. 28, 2011).

default standard—parties can alter it by agreement to fit the contours of the dispute, or even eliminate it entirely if the court permits.

The electronic discovery protocol also includes two safe harbors: first, once an electronic discovery plan is in place, a party can resume any regular document destruction procedures that apply to electronically stored information not covered by the electronic discovery plan. Second, inadvertent production of electronically stored information that is protected under the work-product or attorney client privilege will not result in a waiver if reasonable steps are promptly taken to recover it.

*Expert Discovery Protocol*¹⁸: The CCLD's expert discovery protocol sets dates for the identification and disclosure of expert testimony and depositions. Expert depositions take place in Wilmington, Del., if the parties are unable to agree on the location. No later than 14 days before an expert deposition, the party proffering a testifying expert must provide a list of the documents reviewed, and produce those that were either obtained from third parties and not previously produced or prepared by a non-testifying expert and reviewed by the testifying expert, as well as publications and treatises on which the testifying expert relies.

*Protocol for the Inadvertent Production of Documents*¹⁹: A party who receives a document that appears to have been inadvertently produced must return the document or notify the other party. Within 120 days of production, a producing party who has inadvertently produced a privileged document may give notice to all other parties, who must immediately return or certify the destruction of the document. Beyond 120 days and up to 30 days before trial, the producing party must give notice of any inadvertent production, then meet and confer with recipients to discuss the privilege. If they cannot resolve the matter among themselves, the producing party must file a motion for a protective order.

CCLD, Court of Chancery, and Separation of Law and Equity

In a presentation this past spring, the CCLD panel judges observed that one of the purposes of the CCLD is to “accent” the Court of Chancery,²⁰ which raises the question of the effect that the CCLD may have on the split between law and equity. Delaware maintains the distinction by assigning law and equity to separate courts. By statute, the Court of Chancery has jurisdiction over all matters in equity,²¹ and “shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State.”²² The Delaware Superior Court, on the other hand, is the state’s law court and lacks the power to award equitable relief, such as an injunction or the reformation of a contract. Under 10 *Del. C.* § 1902, an action wrongly filed in either court can be transferred to the court of appropriate jurisdiction.

¹⁸ Available at http://courts.delaware.gov/Superior/pdf/cclcd_appendix_a2.pdf (last visited Sept. 28, 2011).

¹⁹ Available at http://courts.delaware.gov/Superior/pdf/cclcd_appendix_a1.pdf (last visited Sept. 28, 2011).

²⁰ USLFG Presentation.

²¹ See 10 *Del. C.* § 341.

²² *Id.* Section 342.

This is not the end of the story, however. Chancery recognizes the “clean-up” doctrine, by which it may exercise jurisdiction over legal disputes if it has equitable jurisdiction over at least part of the controversy. The Delaware Constitution even allows a judge of one court to be temporarily appointed as a judge (or vice chancellor) of the other, though this is an infrequent occurrence.²³

Whether the existence of CCLD will cause members of the Court of Chancery to give greater scrutiny to the bases for equitable jurisdiction over claims pending in that court or to grow more reluctant to retain a case under the “clean-up” doctrine after equitable claims are dismissed remains to be seen. To date, however, at least three cases have been transferred from the Court of Chancery to the Superior Court in which the existence of the CCLD has been a factor.

In *Cornell Glasgow LLC v. LaGrange Properties LLC*,²⁴ the plaintiff withdrew its request for the equitable remedy of specific enforcement, decided instead to seek only damages, and moved to transfer the case to the CCLD. In granting the motion, then-Chancellor Chandler declined to retain the case under the clean-up doctrine and noted that the defendants would not be prejudiced by the transfer, since the CCLD “can expedite and accelerate proceedings if needed.”²⁵

After the court’s ruling on a motion to dismiss eliminated the basis for equitable jurisdiction, on June 11, 2010, Vice Chancellor Strine issued an order transferring the insurance coverage case of *Viking Pump Inc. v. Century Indemnity Co.*²⁶ from the Court of Chancery to the Superior Court with instructions that the parties immediately request that the president judge of the Superior Court designate the matter for the CCLD. The request was promptly granted, and the case was filed in Superior Court as a CCLD matter several days later.²⁷

In *Massachusetts Mutual Life Insurance Co. v. Certain Underwriters at Lloyd’s of London*,²⁸ Vice Chancellor Laster transferred to the Superior Court another complex insurance coverage dispute, this one stemming from the Bernard Madoff scandal. The parties had asserted equitable apportionment as the basis for Chancery jurisdiction, but the court’s “foray into the merits revealed a docked equitable apportionment tail wagging a large and complex insurance coverage dog.”²⁹ Among other reasons for transferring the case, the vice chancellor wrote that “the availability of the Superior Court’s Complex Commercial Litigation Division further ensures that a remedy in that court will be as practical to the ends of justice and to its prompt administration as the remedy in equity,” since the CCLD “offers special procedures designed to ensure that cases are handled expeditiously.”³⁰ As in *Viking Pump*, however, Vice Chancellor Laster did not transfer the case directly to the CCLD—10 *Del. C.* § 1902 provides for transfer only to another court, not to a specific division within a court. The vice chancellor noted that he would not “pre-

²³ See *Del. Const.* art. IV, § 13.

²⁴ 2011 WL 1451840 (Del. Ch. Apr. 4, 2011).

²⁵ *Id.* at *2.

²⁶ C.A. No. 1465-VCS (Del. Ch.).

²⁷ See *Viking Pump Inc. v. Century Indemnity Co.*, C.A. No. N10C-06-141 (Del. Super.).

²⁸ 2010 WL 3724745 (Del. Ch. Sept. 24, 2010).

²⁹ *Id.* at *2.

³⁰ *Id.* at *4 (internal quotation marks omitted).

sume to pre-empt the [Superior Court] President Judge's discretionary decision over how to assign the case."³¹

If the CCLD dependably displays the two virtues that have made the Court of Chancery a forum of international renown for corporate matters—speed and sophisticated, consistent rulings—then it may buttress the wall separating law from equity in Delaware.

Caseload, Time to Trial, and Decisions

Over the past fifteen months, 68 cases have found their way into the CCLD, whether originally, by transfer from the Court of Chancery, or by designation of the president judge. Of these, six were cases that had been filed before the CCLD opened for business and later designated for the division by President Judge James Vaughn.

Currently, the CCLD appears capable of assigning trial dates approximately one year from the filing of the action. For example, *Leon v. Coinstar E-Payment Services Inc.*³² was filed on July 6, 2010, and scheduled for trial on June 8, 2011. *BLGH Holdings v. enXco*³³ was filed on Oct. 13, 2010, and is currently scheduled for trial to start on Oct. 3, 2011. More recently, *SBD1 LLC v. Anguilla Holdings Corp.*³⁴ was filed in April of 2011 and has received a trial date of April 30, 2012.

The CCLD has attracted a wide variety of matters over the past year and a half, as the decisions issued so far reveal. As of the date of this writing, a search on Westlaw for Superior Court cases assigned to the CCLD turns up eight written opinions on motions: *Brevet Capital Special Opportunities Fund LP v. Fourth Third LLC*,³⁵ a breach of contract and fraud case arising from the sale of an interest in a loan facility; *Hudson's Bay Co. Luxembourg S.A.R.L. v. JZ LLC*,³⁶ a dispute arising from the alleged breach of representations and warranties in a securities purchase agreement; *Alta Berkley VI C.V. v. Omneon Inc.*,³⁷ in which the court interpreted a certificate of incorporation to determine whether a group of stockholders was entitled to a liquidation preference upon a merger; *Exposoft Solutions USA Ltd. v. Coca-Cola Co.*,³⁸ a breach of contract dispute complicated by bankruptcy issues; *Stratton v. American Independent Insurance Co.*,³⁹ a class action automobile insurance coverage case; *Textron, Inc. v. Acument Global Technologies Inc.*,⁴⁰ a controversy over a tax benefit offset arising out of a private equity company's purchase of a business; *Allen Family Foods Inc. v. Capitol*

Carbonic Corp.,⁴¹ in which the court recognized for the first time in Delaware a claim for intentional interference with another's performance of his own contract; and *Blueberry Sales LLP v. Bridge Opportunity Finance LLC*, a case concerning the alleged breach of a consulting agreement.⁴²

Mediation and Arbitration

As an adjunct to its judicial services, the CCLD is also available for mediation. CCLD judges will serve as mediators for cases to which they are not assigned as the trial judge, and at least one of the panel judges has expressed a willingness to appoint a non-lawyer to mediate a dispute if the controversy would benefit from mediation by someone with specialized knowledge of the subject matter.⁴³ The panel judges are also available for mediation and arbitration under 10 *Del. C. § 546*, Delaware's new business dispute mediation and arbitration statute (consumers are excluded from proceeding under this statute, however).

Future of CCLD

Whether because of the promise of a prompt trial date or the openness to tailoring case management orders to best fit the dispute, the CCLD has in a short time attracted a steady flow of new cases each month. Though managing growth could pose a challenge, the ability to increase the number of panel judges as needed serves as a safety valve for any pressure that may come from crowded dockets.

Prompt trial dates and the ability to expedite litigation also bear on the interesting matter of the interrelationship between Chancery and the CCLD. Thus far, members of the Court of Chancery have credited the stated goals of the CCLD as a reason for concluding that it can provide a remedy at law "as practical to the ends of justice and to its prompt administration as the remedy in equity."⁴⁴ As the division continues to achieve its goals, the Court of Chancery may demonstrate greater reluctance to retain cases that lack viable, equitable claims, opting instead to transfer such disputes to the division.

The procedures adopted for the new division appear to have been adapted from the best of the federal system, while the Delaware court has retained the flexibility to respond to and creatively address any shortcomings. Given Delaware's large and growing corporate and other business constituencies, and as the flow of cases increases, the division should quickly smooth over any rough spots and emerge, as has its sister Court of Chancery, as among the preeminent jurisdictions in the country for the resolution of business and commercial disputes.

³¹ *Id.*

³² 2010 WL 4397068 (Del. Super. Nov. 5, 2010).

³³ C.A. No. N10C-10-116 [CCLD].

³⁴ C.A. No. N11C-05-016 [CCLD].

³⁵ 2011 WL 3452821 (Del. Super. Aug. 5, 2011).

³⁶ 2011 WL 3082339 (Del. Super. July 26, 2011).

³⁷ 2011 WL 2923884 (Del. Super. July 21, 2011).

³⁸ 2011 WL 2685956 (Del. Super. July 9, 2011).

³⁹ 2011 WL 2083933 (Del. Super. May 11, 2011).

⁴⁰ 2011 WL 1326842 (Del. Super. Apr. 6, 2011).

⁴¹ 2011 WL 1205138 (Del. Super. Mar. 31, 2011).

⁴² 2010 WL 4409986 (Del. Super. Oct. 27, 2010).

⁴³ USLFG Presentation.

⁴⁴ *Mass. Mut. Life Ins. Co. v. Certain Underwriters at Lloyd's of London*, 2010 WL 3724745, at *4 (Del. Ch. Sept. 24, 2010) (internal quotation marks omitted).

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The United States Law Week (ISSN 0148-8139) is published weekly, except for the last week of July, the first week of September, and the last week of December at the annual subscription rate of \$1,909 per year, for a single print copy, by The Bureau of National Affairs, Inc., 1801 S. Bell St., Arlington, VA 22202-4501. **Periodicals Postage Paid** at Arlington, VA and at additional mailing offices. **POSTMASTER:** Send address changes to The United States Law Week, BNA Customer Contact Center, 3 Bethesda Metro Ctr Suite 250, Bethesda, MD 20814.