

Trial Practice: New York Commercial Division vs. Delaware Court of Chancery

By Lori Marks-Esterman

Introduction

New York's Commercial Division and the Delaware Court of Chancery are each niche forums hearing only business disputes. If given the choice—which is better a forum for your litigation matter? As with most things litigation, the answer is, “it depends.”

I've been a litigator for my entire 20+ year career, and spent most of my early years litigating in New York's Commercial Division. Over the latter half of my career, I've also had significant experience litigating in the Delaware Court of Chancery, and I've gone to trial in both forums.

Read on to understand differences—and similarities—between the two, which types of matter are better suited to each forum, and what a New York litigator brings to Delaware litigation.

A Brief Introduction to the Courts

New York's Commercial Division

New York's Commercial Division was created in 1995. At the time, it was one of the first state court trial divisions devoted exclusively to business cases.

Today, New York's most complex, business cases are assigned to the Commercial Division within New York Supreme Court. In total, there are currently 28 commercial division judges throughout the state of New York, of which eight are in New York County.

Litigation practice in the Commercial Division is governed by both the New York's Civil Practice Law and Rules (CPLR), and a separate set of Commercial Division rules that specifically govern the process and procedure within the Commercial Division. The Commercial Division rules address which types of cases qualify (i.e., commercial lease disputes qualify, but actions for failure to pay rent do not), and the minimum amount in controversy required (i.e., New York County has a \$500k minimum amount in controversy).

Additionally, most Commercial Division judges have their own set of individual rules, and like many courts, have “unwritten rules” as well.

Delaware Court of Chancery

The Delaware Court of Chancery was created more than 200 years ago in 1792. It was founded as and remains a court of equity, and has jurisdiction to hear all matters and causes in equity. Being a court of equity, the



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Court of Chancery has no juries; all cases are bench trials.

Today, the Court of Chancery consists largely of corporate matters, commercial and contractual matters, as well as matters involving trusts and estates, and other fiduciary matters.

The Court of Chancery had five judges for many years, until two years ago, when two judges were added to fill out the bench to seven. Judges in the Court of Chancery are referred to as Chancellors and Vice Chancellors. The Chancellor is the equivalent of the chief judge, and there are six Vice Chancellors. The Chancellor and Vice Chancellors serve for a term of 12 years.

The Nuts and Bolts of Each Forum

Expedited Proceedings

Many commercial matters start with seeking expedited relief at the outset of the case. While both forums provide for this, New York's approach is more practical and streamlined. The court clerks process these requests quickly, and if you file in the morning, you will very often get heard by a judge that same day—even today, during COVID.

Most TRO applications will be heard extemporaneously, before the other side submits opposition papers. If

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granted the TRO will remain in effect until a decision is made on the preliminary injunction, which if granted will remain in effect throughout the duration of the litigation, until a final decision on the merits is reached. Most PI's are decided through oral argument.

Unlike in New York, PI applications in Delaware will almost always be accompanied by a request for expedited discovery, and expedited discovery will often consist of not only core files, but also emails and depositions. And, the PI hearing will typically be an evidentiary hearing, not just argument. Thus, PI applications resemble and require the work—and cost—associated with a trial.

And, expedited full, plenary trials, while not frequent, are not unusual in Delaware. I recently had a matter that proceeded to trial on an expedited basis. We went from filing of the complaint to a full trial on the merits in 24 days! We conducted full discovery—hundreds of thousands of documents, 10+ depositions, expert reports, and full pre-trial exchanges. The extraordinary part was that not only did the army of lawyers get the job done—the court was fully up to speed *every* step of the way, and rendered a decision—a nearly 100 page decision—three days after the trial concluded.

This would almost certainly never happen in New York.

Discovery

In general, discovery in Delaware will be more involved, and thus more expensive—than in New York. Delaware Chancery judges tend to view discovery more expansively than in New York, where the judges are more mindful of balancing cost as against scope of production.

This is evident in every step of the discovery process—from document collection, e-discovery protocols, to review and production.

Delaware courts also view the scope of attorney-client privilege far more narrowly. This requires a most exacting privilege review, and will result in a broader scope of documents. Another key difference is in the treatment of privilege logs. The New York Commercial Division Rules were recently amended to permit and encourage categorical privilege logs. By contrast, the Delaware Court of Chancery not only requires document-by-document review, but also requires extremely detailed and exacting information in the Privilege Log.

Summary Judgment

New York's Commercial Division judges generally view summary judgment motions as a tool to narrow the issues before trial.

In Delaware, absent a very compelling case, the judges generally do not favor summary judgment motions. They'd rather hear the witnesses live, and examine their credibility, than review their affidavits in a summary

judgment motion. The obvious down-side of this is cost, as putting together a summary judgment motion costs significantly less than preparing a case for trial.

Trial Practice

This is where the biggest differences play out.

New York Commercial Division cases can be bench or jury trials. Trials can last weeks, and largely resemble federal trials, although slightly less formal. Evidentiary objections to both testimony and documentary evidence are very much in play throughout the trial.

In the Court of Chancery, there are virtually no objections to trial exhibits or testimony. For example, the hearsay objection—a major obstacle to both testimonial and record evidence in most other forums—is all but non-existent.

The joint trial exhibit list is also significantly larger than in New York, with typically between 500 and 1,000 trial exhibits. Any objections to trial exhibits is reserved for post-trial briefing.

Finally, the starkest difference is that trials in Delaware Chancery are timed. Regardless of who has the burden of proof at trial, each side gets equal time, and that time is quite literally, timed. As a result, trials generally are much shorter, and much more efficient. A trial longer than five days in Delaware Chancery is unusual.

The Decision-Making Process

Many believe that judges decide how they want the case to end, and then reason backwards to get to that conclusion. Whether that happens or not—and I think as trial lawyers we all think that happens at least some of the time—the conclusion the judge “wants” to reach is driven by different things in New York and Delaware.

New York judges are primarily focused on the claims and the parties in the case at hand. In Delaware, the judges are focused not only on the parties, but also on how the decision affects the overall law in the state, and in particular how it affects corporate law and issues relating to public companies.

Conclusion

Both forums require seasoned practitioners with substantial, hands-on experience.

If you need to get to the finish line quickly, Delaware is the place to be. In addition to being able to hold full, expedited proceedings, the entire process in Delaware is overall faster. Discovery deadlines are usually adhered to without too much delay (by contrast, litigation in New York—even in the Commercial Division—is often dragged out), and cases get to trial in Delaware much more quickly.

For large M&A litigation, Delaware judges have the most experience, and the process and outcome will be more predictable in Delaware. However, for the reasons outlined above, Delaware will usually be much more expensive.

For other complex financial matters, commercial contract disputes or smaller transactions, New York is a better forum. New York is the financial capital of the world and the practical sensibilities of New York commercial division judges can be a great asset.

Either way, New York trial attorneys do well litigating in Delaware. New York litigation can often feel like a street fight; navigating the New York process makes New York litigators well-equipped to handle the sophisticated questioning from the Delaware Chancery Court judges. New York commercial litigators also bring specific expertise to the underlying business issues typically at play in Delaware litigation.

The Corporate Counsel Section Welcomes New Members

The following members joined between Sept. 19, 2020 and Dec. 14, 2020.

Janeen Nadua Aljadir
Betania Allo
Gina Antoun
Matthew Raymond Auten
Pamela D. Baird
Robert W. Bartels
Jilsime Beciri
Kristina Bekker
Mateo Bervejillo
Alison B. Bianchi
Lourdes J. Blanco
Keith Russell Bloyd
Harel Zohar Reuven Bocobza
Katherine Bonnet
Ryan Brown
Alison T. Burrows
Jon Marc Bylsma
Mathias Cabour
Sherell Carter
Angelo Cerimele
Amy Chen
Queenie Chen
Bida Chen
Hallie R. Cohen
Chazz Coleman
Billie Colombaro
Joseph F. Danowsky
Daswell Davis
Stefano De Conciliis
Noah Devaney
Edward E. Dillon
Tara Draï
Aral Egilmez
Stephanie Espada
Peter J. Farrell
Jeffrey A. Fiarman
Eugene M. Fisher-Haydis

Alyssa Ann Forslund
Bradley Friedman
Amanda Steck Fuhrman
Frederick B. Galt
Jasmine Brianna Gaspie
Diego Gomez
Timothy E. Gorman
Muhammed Fethullah Gulen
Pablo Adam Haspel
Austin Hinel
Timothy Ho
Jennifer Hodkinson
Jinbao Hu
Eronmulon Joyce Irogur
Cortez Dupree Johnson
Garima Joshi
Kavaruganda Julien-Gustave
Michael F. Kashtan
Yuichi Katsuta
Eric L. Keltz
Erol Kilikcier
David Kinnear
Robert B. Krieger
Marek Krizka
Michael Lam
David Lamb
Stephanie LaSala
Mengying Li
Yang Li
Zhixin Liu
Cristina Lombardi
Mary Mathwich
Kenneth Miao
Yan Mo
Mark D. Nielsen
Clara A. O'Brien
Cecilia Ayodeji Oyediran
Kerry Pace

Steve Sangrok Park
Maryana Pavlyshyn
Teresa Piccolo
Matthew Scott Poulin
Sean F Reid
Abigail Grace Riddle
Gregory A. Robbins
Kristin Russo
Justin M. Rutherford
Christopher J. Ryan
Alexis Saenz
Jose G. Santiago
Brian Sarfo
Gad Yigal Sassi
Philip Sivin
Motti Slomovics
Chelsea Lynn Snyder
Hankyul Song
Rebecca Helene Sussman
Pooja Vijay Tolani
Lori Tripoli
Tran Anh Tuan
Winter Vega
Leslie Veloz
Xuan Xiao
Yan Yan
Caner Yesil
Yun Ying
Nicola Young
Ning En Jasmine Mild Zee
Xiaoyue Zhang