

## Discovery Update

The Commercial Division of the Supreme Court of New York continues to innovate in the discovery arena with new steps to streamline the process and reduce the burden on commercial defendants. The Commercial Division discovery process (as detailed in Rule 11 of the Rules for Practice) is more closely regulated than it is in other parts of the Supreme Court, and is specifically attuned to the needs of sophisticated parties involved in the “challenging commercial cases” in which the Division specializes. Rule 11 sets out specific procedures for, and limits on, many areas of discovery including, e.g., interrogatories (Rule 11-a), privilege logs (Rule 11-b), Electronically Stored Information or ESI (Rule 11-c), and depositions (Rule 11-d). Advances like these make the Commercial Division “a recognized leader in court system innovation” that has “demonstrat[ed] an unparalleled creativity and flexibility in development of rules and practices.” AO/270/2020. Other New York courts have followed the Commercial Division’s lead by adopting its discovery practices for use in their own cases. *See, e.g.*, 22 NYCRR § 202.20-j (adopting the Commercial Division’s ESI guidelines for non-commercial civil cases).

On May 16, 2022, the Chief Administrative Judge signed Administrative Order 117/22 amending Rule 11. The Order takes effect on May 31, 2022, and makes two changes aimed at further “streamlining the discovery process” in order to “lessen the amount of time required to complete discovery and to reduce the cost of conducting discovery.” First, a new Preamble to Rule 11 makes the goal of streamlining discovery explicit in the rules themselves, while also reaffirming that discovery requests, including those for depositions, must be “both proportional and reasonable in light of the complexity of the case and the amount of proof that is required for the cause of action,” a concern also expressed in other areas of the Rules. *See, e.g.*, Rule 11-c(d) (providing that “costs and burdens of discovery of [Electronically Stored Information] shall be proportionate to its benefits, considering the nature of the dispute, the amount in controversy, and the importance of the materials requested to resolving the dispute.”).

New subdivisions a and b of Rule 11 give Commercial Division judges a new tool to encourage parties to narrow and focus their discovery requests. Subdivision a provides that the court “may direct” parties asserting claims or counterclaims to produce “a document stating clearly and concisely the issues in the case prior to the preliminary conference.” Similarly, the court may direct the parties to “produce a document stating each of the elements in the cause of action at issue and the facts needed to establish their case.” Subdivision b empowers the court to require the parties to produce updated versions of these statements if portions of claims are later dismissed.

Requiring parties to lay out the elements and issues of proof early in the case should help both sides craft discovery requests that are targeted to “matter material and necessary in the prosecution or defense” of the action. CPLR 3101(a). However, new subdivision c makes clear that statements of issues, elements or facts produced pursuant to Rule 11(a) or (b) are “not binding” on the parties and do “not limit the scope of a party’s pleadings.” That proviso is consistent with an intent to provide parties with a “mechanism for streamlining the discovery process” without precluding them from pursuing issues, claims, or facts that may become clear only after disclosure is made. Once the order goes into effect on May 31, parties should consider requesting that the court require production of Rule 11(a) statements where an early outlining of issues, elements, and facts will assist the discovery process by allowing parties to narrow and refine discovery requests. Parties should also be aware that they may be ordered to produce such statements during discovery and prepare to state their case accordingly.

\*\*\*

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

# quinn emanuel trial lawyers

quinn emanuel urquhart & sullivan, llp

**Julia Beskin**

Email: [juliabeskin@quinnemanuel.com](mailto:juliabeskin@quinnemanuel.com)

Phone: 212-849-7482

**Casey Adams**

Email: [caseyadams@quinnemanuel.com](mailto:caseyadams@quinnemanuel.com)

Phone: 212-849-7177

To view more memoranda, please visit [www.quinnemanuel.com/the-firm/publications/](http://www.quinnemanuel.com/the-firm/publications/)

To update information or unsubscribe, please email [updates@quinnemanuel.com](mailto:updates@quinnemanuel.com)