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Procuring Third Party Document Discovery under the Federal Arbitration Act

Late last year the Ninth Circuit Court of Appeals issued an opinion restricting the ability to compel document discovery from third parties in arbitration proceedings. In *CVS Health Corp. v. Vividus, LLC,* 878 F.3d 703 (9th Cir. 2017), the Ninth Circuit followed what the Second Circuit has called "the emerging majority" of courts holding that section 7 of the Federal Arbitration Act ("FAA") does *not* empower arbitrators to issue subpoenas to non-parties for the production of documents.

Adam Trigg

Relying largely on then-judge Samuel Alito's opinion for the Third Circuit in *Hay Group, Inc. v. E.B.S. Acquisition Corp.,* 360 F.3d 404 (3d Cir. 2004), the Ninth Circuit held that the "clear statutory language" limits an arbitrator's subpoena power to only those subpoenas that require third parties to

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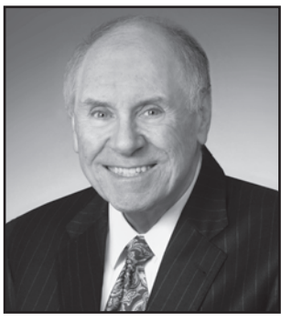
The Bay Area Complex Litigation Superior Courts Part II

Class Certification

All Judges agree that class certification should normally be adjudicated before summary judgment (per *Fireside Bank*). As part of class certification many Judges have the parties submit a trial plan focusing on manageability and evidentiary issues and how the evidence presented by the class representative will prove the claims of absent class members, plus a discussion of how class damages will be proven.



Frank Burke

The Judges have different procedural requirements for scheduling class certification deadlines and hearings. Judge Hernandez will specially set class certification motions as outlined in his Department 17 Guidelines. Judge Smith generally does not determine the appropriate time for filing a class certification motion, relying on the parties to decide and alert Judge Smith during a CMC or status conference. For Judge Seligman, prior to filing a class certification motion, the parties should meet and confer and the motion itself should include a trial plan. Judge Kuhnle typically sets a class certification hearing well in advance of any certification briefing and adopts an extended briefing schedule. Judge Walsh usually sets the time for the class certification 6 months out and encourages a longer, non-statutory briefing schedule. For Judge Weiner, the parties will discuss certification and summary judgment timing at the CMC. Judge Goode specially sets class certification motions after discussing with counsel how much time they need for

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response and reply, and whether they need to exceed the usual page limits. He prefers to have 2-4 weeks between the reply brief and the hearing depending on the filing volume. Judges Walsh and Hernandez have a similar approach. Judge Wiss asks the parties to give her 10 days between the filing of the last paper and the hearing date.

Judge Karnow provides parties with a document entitled "Complex Litigation – Class Action Materials," available on the Court's website, which provides a checklist for class certification issues and also a checklist for obtaining preliminary approval of class settlements. Judge Smith also has separate procedural guidelines for preliminary approval and final approval of class action settlements.

Chandra Russell

The types of evidence the Judges find compelling on class certification depends on the case. But, regarding declarations, Judges Seligman, Walsh, and Weiner view quality as more important than quantity, and find multiple identical declarations less persuasive. Deposition transcripts and documents, on the other hand, can be quite helpful. Several Judges note that statistics or surveys can be helpful in certain circumstances, though Judge Weiner notes they are more commonly appropriate for damages purposes than liability. Judge Weiner also states that experts proffering statistics or surveys are likely to be subject to a Section 402 pretrial hearing. Judges Karnow and Smith are likely to subject the statistical evidence to the standards set forth in *Duran*.

Related Cases

All Judges prefer to address related cases as soon as possible, both because the existence of related cases factors into whether a case will be treated as complex, and so that the related cases can be adequately coordinated in different jurisdictions. Related cases are joined upon notice and motion and are governed by CCP 1048 and CRC 3.350 and 3.500 for consolidation and CCP 403-404 and CRC 3.501-3.550 for coordination. The procedure varies depending on whether the cases are non-complex or complex and whether the actions are pending in the same or different counties.

Special Procedural Requirements

Most of the Judges stated that they recognize that the complex litigation cases present cutting edge issues which may require briefing beyond the statutory page limits. On the other hand, Judge Goode stated that he "appreciates concision. Do not repeat things and do not bury adverse authority or difficult points in footnotes. Double space your briefs." Judge Hernandez noted that counsel is doing something wrong if he or she cannot get it under the page limit. Judge Walsh notes that brevity is the best way to keep the reader's attention. "Get it down to the heart of the issues. Put your best arguments up front, and keep them concise and clean. Footnotes are fine and have a different grammatical purpose than text." Judge Weiner requests a table of contents and a table of authorities in every brief, even if less than 10 pages. Judge Smith urges parties to be reasonable in seeking extended briefs, do not sneak in extra pages, and notes that footnotes with long string cites are ineffective.

Because most of the complex litigation Judges hold CMCs periodically and frequently, there appears to be less of a need for ex parte discovery motion practice. Judge Walsh notes that Santa Clara County has a 24 hour rule on expedited motions, and complex court practitioners must secure a time for an expedited hearing. Judge Weiner sets aside two afternoons per week for potential ex partes, on Tuesdays and Thursdays, with notice by 10 a.m. the previous day.

Most of the Courts, except Alameda County, have e-filing in the complex litigation courts. In cases with a voluminous record, Judge Goode may request hyperlinked briefs. The Alameda County Judges request courtesy copies to be delivered to chambers. E-filing is permissive but encouraged by Judge Weiner, who also requires courtesy copies to be e-mailed to the Complex Civil Department.

Judge Goode is unlikely to grant a motion to exclude expert testimony under *Kennemur* unless the moving party can show that the expert was asked for all of his or her opinions and the bases for them. On apex depositions, Judge Walsh requires that the party seeking the deposition must show that they have exhausted discovery of subordinates, and that the apex deponent is critical on a central issue. He sometimes also imposes time limits.

Judges Goode and Hernandez report that they are amenable to special hearings or "science days" to educate them on technology issues or environmental issues in their cases.

Motions for Summary Judgment/Adjudication

The Judges all encourage parties to avoid voluminous statements of fact which are likely to raise factual disputes. They also strongly discourage scattershot

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objections to every statement of fact submitted, whether or not material and in dispute, which are unlikely to be dispositive and are extremely time consuming for the Judges. They may be stricken or lead to sanctions if abused. Judge Smith encourages parties to use excerpts of exhibits where possible, and discourages including arguments in briefs that are not necessary for decision.

Judge Seligman encourages the parties to meet and confer before filing a dispositive motion. Judges Hernandez and Weiner have no unique rules around page limits, and if a party requests to file an overlength brief, it is generally granted.

Judges Hernandez, Goode, Karnow, Wiss, and Weiner view CCP 437c(t), stipulations to adjudicate sub-issues, as an underutilized statute that can be highly effective as part of the summary judgment/adjudication process.

Judge Walsh believes that the complex department is more open to motions for summary judgment/adjudication than typical unlimited jurisdiction courts, although Judge Goode observes that few motions for summary judgment are granted. Motions for summary adjudication fare slightly better, but not much. Judge Karnow expects the parties to understand the shifting burdens of proof, as well as the sometimes technical procedures required for such motions.

Several of the Judges suggest that counsel look for other methods to resolve dispositive issues, such as bench trials on stipulated facts, early motions in limine on key expert issues, early jury instructions to settle the law, or expedited jury trials.

Settlement Conferences

Generally, the complex Judges do not act as settlement Judges in their own cases, but some may act as a settlement Judge for other cases in the complex litigation department. Most Judges observe private mediation as the most common ADR approach among complex litigants.

In Alameda there are 3-4 settlement Judges. All asbestos and other types of cases go to them, unless the parties use an outside mediator, which they often do. If the parties request a judicial settlement conference, they are sent to one of the dedicated settlement departments utilized in Alameda County.

In Santa Clara, a Mandatory Settlement Conference occurs 1-2 weeks prior to trial, usually on a Wednesday. MSCs are typically handled by Temporary Judges, mediators who have been involved previously in the cases, and other sitting Judges. Judges Kuhnle and Walsh may be involved in a settlement conference if the case involves a jury trial and the parties agree to their involvement, but typically do not participate in cases going to bench trial.

There is an assigned settlement Judge in San Mateo whom Judge Weiner may send the parties to if they cannot reach agreement before trial.

The San Francisco Superior Court has a panel of judicial mediators and there are about 12 Judges on the panel. If Judge Wiss determines a settlement conference is needed, Judge Wiss will try to facilitate a settlement conference with a sitting Judge of the parties' choice.

Judge Goode will not normally act as a settlement Judge on matters he oversees, asking other colleagues to sit in if needed, except in rare cases upon request of all parties.

Trial Management Issues

Many complex litigation Judges conduct final pretrial conferences 2-3 weeks before trial. Santa Clara and Contra Costa Counties have the most specific rules. The Santa Clara County Complex Litigation Guidelines require a joint statement of the case and controverted issues, stipulation to all facts amenable to stipulation, and exchange of in limine motions, exhibits, voir dire questions, proposed jury instructions, deposition designations, and a grid listing all proposed witnesses with estimated times for direct and cross examination and redirect examination and subject matter. Contra Costa County local rules require a final Issue Conference. Judge Goode's Issue Conference Order requires a statement of the case, voir dire questions, filed motions in limine, and exhibit numbering before the conference. It also includes a list of sua sponte rulings for which in limine motions need not be filed. Judge Goode also uses a mandatory witness grid system. In both Santa Clara and Contra Costa, a final witness time estimate is established, which the Judges use to keep counsel on track for the trial end date provided to the jury.

Judges Seligman, Karnow and Weiner also establish time limits for each side at trial, pursuant to discussions with counsel. Judge Smith only asks for a time estimate. Judge Karnow strongly encourages the parties to develop a trial management plan. Once the time limits are established, he uses a chess clock and strictly enforces the total time limit. When a party's time is up, it is deemed to have rested.

Judges Wiss, Weiner and Seligman also report using final pretrial conferences to cover witness and exhibit

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lists and objections, in limine motions and jury instructions. Judge Weiner also addresses jury questionnaires and motions to bifurcate, and requires counsel to meet and confer regarding exhibits and submit a stipulation regarding admissibility and authentication as well as deposition designations and objections. Judge Smith holds her pretrial conferences on the first day of trial, and requests parties to file only motions in limine on issues that will arise early in the trial, and generally file only motions, objections and other trial documents that are going to be used.

Judges Walsh, Wiss and Weiner prefer to pre-instruct the jurors at the outset of the trial on standard CACI elements of the main claims and defenses, so the jurors will have a roadmap of what they are to decide. Most of the rest pre-instruct the jurors before closing arguments, though Judge Weiner instructs after closing arguments.

Judge Goode has allowed witnesses to testify via Skype upon stipulation of the parties.

All of the Judges require some form of notice of witnesses to be called in advance of the day they will be called.

Most of the Judges are used to the parties bringing computerized presentation systems to trial, though many require the parties to agree upon and use the same system. Many of the complex courts have high-tech equipment in them. The Judges are amenable to the parties using realtime transcripts and like to have realtime on the bench. Some of the Counties have cut funding for Court reporters, so the parties must bring private reporters. In those cases, the Judges appreciate having realtime also.

All of the Judges allow juror notetaking and most allow juror questions, though the manner in which the questions are asked varies. The Judges are generally amenable, if the parties stipulate, to other trial methods such as juror notebooks, interim summations, and use of full or partial deposition summaries in lieu of reading transcripts. Judge Smith does not allow interim summations and probably would not allow deposition summaries.

Frank Burke handled complex litigation in state and federal courts for 42 years, and now serves as a full time neutral at ADR Services, Inc. and a Pro Tem Settlement Judge in the Santa Clara and San Francisco County Superior Courts.

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Defend Trade Secrets Act

242 F. Supp. 3d 789, 798-799 (W.D. Wis.2017) (plaintiff "offers vague, generalized descriptions of its purported trade secrets without demonstrating that any specific piece of information meets the statutory definition of trade secret"). The Eastern District of Michigan rejected general descriptions of trade secrets as insufficient. *Ukrainian Future Credit Union v. Seikaly*, No. 17-cv-11483, 2017 U.S. Dist. Lexis 194165, *20 -*22 (E.D. Mich. November 27, 2017).

As with the inevitable disclosure doctrine, federal courts have followed state law precedents as to trade secret pleading in their respective jurisdictions. Practitioners should consult such precedents when determining how to plead trade secrets under the DTSA.

B. Interstate Commerce

The DTSA expressly applies only to trade secrets that are "related to a product or service used in, or intended for use in, interstate or foreign commerce." 18 U.S.C. §1836(b)(1). Courts have dismissed complaints that fail to allege a sufficient nexus between the trade secrets at issue and products or services used in interstate commerce, including in Delaware (*Hydrogen Master Rights, Ltd. V. Weston*, 228 F. Supp. 3d 320, 338 (D. Del. 2017), the Eastern District of Pennsylvania (*Gov't Emples. Ins. Co. v. Nealey,* No. 17-807, 2017 U.S. Dist. Lexis 91219, *34-*35 (E.D. Pa. June 13, 2017), and Minnesota *(Search Partners, Inc. v. MyAlerts, Inc.*, No. 17-1034, 2017 U.S. Dist. Lexis 102577, *4 (Minn. June 30, 2017).) However, the Northern District of Illinois questioned whether interstate commerce allegations were required in *Wells Lamont Indus. Grp. LLC v. Mendoza,* No. 17 C 1136, 2017 U.S. Dist. Lexis 119854, *7-*8 (N.D. Ill. July 31, 2017). Assuming, without deciding, that such pleading was required, the court found that the allegations allowed it to "reasonably infer" that the products at issue were used in interstate commerce. Other courts may not be as forgiving, however, so plaintiffs are advised to make sure to plead this element of a DTSA claim.

Instead of creating a uniform body of federal trade secret law, federal courts have relied upon decisions interpreting analogous state laws and reflected the diversity of their jurisdictions. Federal courts have also fallen back on the familiar remedies allowed under F.R.C.P. 65 rather than employ the new seizure act provisions. Practitioners can expect these tendencies to continue as DTSA law develops.

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