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Financial, Corporate Governance And M&A Litigation Alert - The New Rules Of The Delaware Court Of Chancery: ESI, Form Of Production, And Non-Party Subpoenas

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Beginning on Jan. 1, 2013, the Delaware Court of Chancery implemented a series of amendments to its rules (the “Chancery Rules”) with the following results: (a) electronic documents and electronically stored information (commonly known as “ESI”) are now specifically listed as types of information and documents that are discoverable from parties and non-parties; (b) new rules governing the form of production of documents or ESI; and (c) clarifying the protections related to unreasonable discovery requests directed to non-parties. The amended Chancery Rules are: 26, 30, 34, and 45.

Discovery of Electronic Documents and ESI

Prior to the 2013 amendments, electronic documents and ESI were discoverable in practice from parties and non-parties, despite their absence in the Chancery Rules. Thus, their inclusion in the 2013 amendments likely will not cause a substantive change in the types of information or documents that are discoverable. However, concomitant with these changes are additional provisions related to the form and manner of the production of ESI and documents generally.

The Form of Production from Parties and Non-Parties

Chancery Rules 34(d) and 45(d)(1) provide a set of rules guiding the form for producing documents or ESI. Chancery Rule 34(d), a new addition to the Chancery Rules, reads as follows:

(d) **Requests for Production of Documents or Electronically Stored Information.** A party may state in its request the form for producing documents or electronically stored information. The response may state an objection to a requested form for producing documents or electronically stored information. If the responding party objects to a requested form, the party must state the form or forms it intends to use. If a request does not specify a form for producing documents or electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in which it is reasonably usable. Absent a showing of good cause, a party need not produce the same documents or electronically stored information in more than one form.

This new provision, taken in large part from Federal Rule of Civil

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Procedure 34(b)(2)(E), should reduce conflicts that arise from party disputes over the form of production. To begin, the requesting party should, as a best practice, request a specific form of production. If the requesting party, however, does not specify the form of production, the producing party is not free to choose any form of production. Rather, Chancery Rule 34(d) is specific that the form of production must be one in which it is ordinarily maintained or in which it is reasonably usable. Thus, this new provision ensures that the form of production is either the form specified by the requesting party or, at a minimum, a form that should be otherwise reasonable.

Further, new provisions in Chancery Rule 45(a)(2) and 45(d)(1) apply the general framework established in Rule 34(d) for parties to the form of production of documents or ESI requested from a non-party.

In addition to facilitating a more efficient production process, these provisions apply to and should reduce instances of spoliation. By restricting the form of production to the three categories described above, it is more difficult for a party to produce documents or information in a form that the producing party contends is reasonable but where the production form contains alterations or changes, raising concerns regarding the integrity, veracity, and accuracy of the produced documents or information.

For example, in a recent case litigated by Barnes & Thornburg LLP before the Delaware Court of Chancery, the defendant produced evidence that had been admittedly altered by the defendant and reflected the mass deletion of data. The defendant insisted that any alterations and deletions were without ill intent and did not affect any substantive information. Regardless of the veracity of the defendant's representations, his production would clearly violate the 2013 amendments, specifically Chancery Rule 34(d). In this manner, the new rules should facilitate the efficient exchange of productions and provide an additional tool to ensure the integrity of produced documents or information.

Protections regarding Discovery Requests Directed to Non-Parties

The 2013 amendments to the Chancery Rules include three new protections related to discovery directed at non-parties. The first, contained in Rule 26(c), protects a party in the litigation, and consequently provides indirect protection to the non-party. It provides that a "party has standing to move for a protective order with respect to discovery directed at a non-party on the basis of annoyance, embarrassment, oppression, or undue burden or expense that the moving party will bear." (emphasis added.) For example, if a plaintiff vendor requests documents from a non-party related to the defendant's contract breaches with other vendors, the defendant could move for a protective order on the basis that the discovery sought by the plaintiff is not relevant to its breach of contract claim in the instant case but requested solely for the purposes of annoyance and embarrassment of the defendant.

The second and third protections accrue to the non-party itself. Rule 26(c) clarifies that a "non-party from another state from whom discovery is sought always may move for a protective order from the court in the state where discovery is sought or, alternatively, from [the Court of Chancery] provided the non-party agrees to be bound by the decision of [the Court

of Chancery] as to the discovery in question.” For the third, Chancery Rule 45(d)(1) now provides protections for a non-party where the requested documents or ESI are not reasonably accessible because of undue burden or cost. While these three protections may have been implemented by the courts prior to the 2013 amendments, their inclusion secures these important protections and provides further defense against abusive and unreasonable discovery requests commonly directed at non-parties.

For more information, contact the Barnes & Thornburg attorney with whom you work or one of the following attorneys in the firm’s Financial, Corporate Governance and M&A Litigation group: Anne N. DePrez at 317-231-7264 or anne.deprez@btlaw.com; and Vincent P. (Trace) Schmeltz at 312-214-4830 or tschmeltz@btlaw.com.

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