Trial-Ready In 180 Days: Prepare For SDNY's Rocket Docket

Law360, New York (July 23, 2014, 10:35 AM ET) -- A shareholder has just filed a class action lawsuit against your company and you have hired outside counsel, sent out your document-hold notice, and informed senior management of next steps. You can now sit back and wait to see how the case plays out at the motion-to-dismiss stage, right? Not quite.

There is a growing trend in the Southern District of New York, akin to a sua sponte rocket docket. With a number of judges in the SDNY, you should anticipate a sprint to trial in the event your motion to dismiss is denied. While a speedy docket is often terrifying to a class action defendant faced with the daunting task of collecting, reviewing and producing hundreds of thousands of pages of documents and preparing senior executives for depositions, it could be used to your advantage if you prepare accordingly.

This article will discuss the new crop of judges' rules that require parties, in some cases, to be trial-ready in approximately 180 days, and will explain how class action defendants can prepare themselves to efficiently and effectively use the rocket docket schedule to their advantage.

The Growing Trend — Be Trial-Ready In 180 Days

The Benchbook for U.S. District Judges, a handbook published by the Federal Judicial Center and provided to all new judges, advises judges to "meet their own responsibility for the efficient resolution of cases both by guiding the parties to sound self-management and by intervening to impose effective management when necessary."[1] To meet their case management responsibilities and to expeditiously resolve the cases before them, a number of SDNY judges impose case management orders which, absent special circumstances, require fact discovery to be completed within 120 days (or less) following the initial pretrial conference, and expert discovery to be completed within a short period thereafter, in one instance, a mere 25 days following the close of fact discovery.[2]

Although the deadlines set forth in the judges' form case management orders are often extended in complex litigation, parties must prepare for the possibility that the pace of discovery will move more quickly than what parties may have been accustomed to in the SDNY. Further, once the scheduling order is in place, parties should not expect to extend those deadlines through stipulation alone. Pursuant to Rule 16, extensions to discovery deadlines may only be granted by the judge and only where good cause is shown.[3]

How the Rocket Dockets Can Benefit Defendants

In complex litigation, both parties may prefer a schedule that affords greater time to formulate discovery requests and responses and, in the case of defendants, to establish a discovery process that allows efficient and effective document review and production. However, the "rocket dockets" of the SDNY can provide defendants with an opportunity to use their inherent informational advantage to set the tone of discovery and shift the burden and risks of the schedule to their adversaries. To do this, however, counsel and clients must be proactive earlier in the lifespan of the case in several key areas.

Be Proactive

Prepare Your Client. As soon as possible, discuss with the leaders of the business units at issue the need for early and comprehensive discovery work. Large-scale litigation always presents a burden, and often proves irritating, to the nonlawyers who are subject to document collection, attorney interviews, and depositions. This can be exacerbated by a truncated discovery schedule that puts pressure on employees, in-house counsel and outside counsel.

While unlikely to make discovery any less burdensome, scheduling an early discussion with key business unit leaders regarding the schedule, the need to be proactive, counsel's discovery plan, and often most importantly an agreed-upon protocol for contacting employees for information, can avoid miscommunication and frayed relationships between client and counsel.

Learn the Facts and Understand the Scope of Evidence Early. While it is tempting to relax if discovery is stayed pending a motion to dismiss, as is the case in securities litigation, use the time to learn as much as possible about the personnel, data and documents that are likely to be at issue if the case proceeds to discovery.

- *Identify and Speak with Relevant Personnel Early.* In the course of preserving documents soon after the initial complaint is filed, counsel likely will have identified a universe of potentially relevant current and former employees. Don't stop there. In addition to senior management who plaintiffs will ultimately target as sources of documents and testimony, identify other individuals who may have discoverable information. Speak with as many key individuals as possible and understand their responsibilities and the responsibilities of those senior and junior to them.

- *Identify and Review a Handful of Key Documents.* Identifying and collecting earlier than you otherwise might the key documents relied upon by the plaintiffs or otherwise referenced in the complaint gives you an advantage. For example, do plaintiffs cite to sales reports that were created on a monthly basis in support of the allegations? Even before the motion to dismiss is penned, gather those reports and understand the mechanics of how the reports are created. Knowing what is in the reports and how they were generated will not only help you identify useful search terms in the event of discovery, it will help you understand the strengths and weaknesses of plaintiffs' claims.

- *Investigate the Confidential Witnesses.* Complaints that rely on confidential witnesses, like many securities class action complaints, often provide information about the witnesses, such as their business unit, particular titles, geographic location and dates of employment. Rather than wait until plaintiffs are required to disclose the names of confidential witnesses, work with business unit leaders (and human resources personnel) to identify potential CWs. Doing so, allows you to gather files and emails from those individuals and to prepare for their depositions promptly after plaintiffs confirm their identity. Moreover, narrowing the field of potential CWs provides a preview of where plaintiffs will likely begin their discovery efforts — i.e., with the CW's co-workers, supervisors and reports.

- *Identify Relevant Former Employees.* In the typical case, defendants often wait until notice of service of a subpoena to identify and reach out, as appropriate, to relevant former employees. When facing an expedited discovery schedule, doing so risks that you will not have adequate time to contact the former employee and ensure that they are appropriately prepared. To avoid this, create a list of likely former employees, speak with business unit leaders about those individuals, understand their current location and their relationship with the client, and gather from the client information about their termination, such as termination or severance agreements, etc. Based on this investigation, consider whether to reach out to former employees before they are actually identified by plaintiffs.

Seize the Initiative on Document Discovery

- *Establish Your Own Protocol.* Rather than wait until after discovery requests are served, objections are drafted, and you have engaged in a series of meet and confers with plaintiffs to determine the scope of discovery, formulate your own protocol and begin implementing it. Because you have already investigated the scope of relevant evidence and commenced the document review, you will be in a stronger position to identify, among other details, a reasonable universe of custodians, date range and appropriately limited search terms. Consider providing the protocol to plaintiffs' counsel along with your responses and objections to the document requests or soon thereafter. If you have crafted the discovery protocol in good faith, keeping discovery deadlines in mind, you shift the burden to plaintiffs to explain to the court why discovery should be broader.

- *Produce Early and Regularly.* Consider making an initial significant production at the time you serve responses and objections, rather than waiting for the meet and confer process. It is a rare case where there are no significant categories of documents that both parties agree are discoverable. Identify those categories, prioritize them, begin production, and continue producing on a regular schedule (shared with opposing counsel). This creates a record of responsiveness and good faith that may help you in later disputes before the court. It also increases the burden on plaintiffs' counsel to review the documents and base any proposed changes to your discovery protocol on what they see, rather than what they imagine you might have.

- *Pursue Affirmative Discovery Aggressively.* When the discovery period spans only a few months, you do not have the luxury of focusing on defensive discovery. Before discovery begins, identify potentially necessary discovery that is outside of your control. In addition to the typical discovery requests to lead plaintiffs, consider whether you will need information from financial advisers, absent class members, confidential witnesses, former employees or other relevant third parties. Serve those requests early and be aggressive in following up. Doing so has the obvious benefit of avoiding the need to seek an extension from the court, but may also require plaintiffs to divert resources from their affirmative discovery of you.

Create a Compelling Record. With respect to each and every discovery issue (with your adversaries and third parties), it is essential to have a written record demonstrating your proactive conduct, reasonableness and responsiveness. Judges that impose relatively expedited schedules often admonish the parties to raise issues promptly and warn the parties that the deadlines will not be lightly extended.

In many courts, the downside of losing a motion to compel may be an extension of the deadline and, of course, the production of the challenged information. In the rocket docket courts, a party risks being ordered to produce documents and/or witnesses in a matter of days, which can lead to increased costs, a higher potential for errors, and irritation of employees that must be deposed on short notice. A clear written record of responsiveness significantly reduces the risk of a punitive ruling and increases the chances that plaintiffs' motion is denied as a result of their own delay in raising the issue.

Discuss Potential Resolutions with Your Client. Discuss potential exposures and resolution strategies early and often with business unit leaders and any insurance carriers. In the context of securities class actions, 73 percent of cases are settled or dismissed before a motion for class certification is ever filed.[4] Additionally, studies show that the earlier the settlement, the lower the settlement figure.[5]

When the overall case schedule is expedited, time for responding to (or making) settlement proposals will also be expedited. Client decision makers that have been "in the loop" throughout the early stages of the case, will be in a better position to make reasonable and informed decisions. Likewise, taking the initiative to inform carriers about the case schedule, key factual and legal issues, and the settlement dynamics can help overcome any institutional resistance the carriers may have toward early resolution.

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[1] FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 6.01 (6th ed. 2013).

[2] See, e.g., Hon. Katherine Forrest, Scheduling Order, available at http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=980 (fact discovery to close within 120 days of initial pretrial conference, expert discovery complete within 25 days of close of fact discovery); Hon. Jed Rakoff, Individual Rules of Practice § 3(b), available at http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=832 ("At the initial conference, the Court will issue a binding Case Management Order that, in most cases, will

require the case to be ready for trial within five months of the date thereof."); Hon. Valerie Caproni, Civil Case Management Plan and Scheduling Order § 5(a), available at http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=1035; Hon. Vernon Broderick, Case Management Plan and Scheduling Order §§ 7, 12, available at http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=982.

[3] FED. R. CIV. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent.").

[4] Dr. Renzo Comolli & Svetlana Starykh, Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review 19 (Jan. 21, 2014), available at http://www.nera.com/nera-files/PUB_2013_Year_End_Trends_1.2014.pdf.

[5] Laarni Bulan, Ellen Ryan, & Laura Simmons, Securities Class Action Settlements—2013 Review and Analysis 20 (Mar. 27, 2014), available at http://www.cornerstone.com/getattachment/e1800abc-dc50-4df3-b7a9-cf8ee3fea116/Securities-Class-Action-Settlements%e2%80%942013-Review-an.aspx.