

Judge Stark Issues New Case Management Procedures

The District of Delaware initiated a Patent Study Group (“PSG”) in January 2014 to address the District’s impressive patent caseload and to improve overall efficiency in patent litigation. At a May 13, 2014 CLE program, Judge Stark provided an update on the results of the PSG and previewed procedures that he intended to adopt in an effort to streamline patent cases on

his docket.¹ On June 17, 2014, Judge Stark formally adopted Revised Procedures for Managing Patent Cases, which will be implemented in all non-ANDA patent cases assigned to him filed on or after July 1, 2014. The [Revised Procedures](#), [Form Scheduling Order](#), and [Case Management Checklist](#) are linked, along with Judge Stark’s new form [Pretrial Order](#).

Revised Case Management Practices

Referral Order: Within seven days of the assignment of a case to Judge Stark, the Court will issue an Order referring (1) scheduling matters, and (2) motions to dismiss, stay and transfer to Magistrate Judge Burke.

Discovery Disputes and Motions to Amend and Strike: Within seven days after the Referral Order, a Plaintiff will be required to file a form “Procedures Order” governing proceedings on discovery disputes, motions to amend and motions to strike. Under the revised discovery dispute procedure, parties will now be required to submit a joint letter, rather than calling chambers, to request a discovery dispute teleconference. That letter must be preceded by verbal communications among Delaware and lead counsel in an attempt to resolve the dispute. Additionally, motions to amend a pleading or to strike any document will be submitted on a condensed schedule using letter briefs rather than full briefs, as with discovery disputes.

Case Management Conference and Related Filings: Within ten days after any defendant files a responsive pleading or motion, the Court will enter a Case Management Order requiring the parties to file a proposed schedule and Judge Stark’s new

Case Management Checklist within 30 days. The Case Management Checklist requires counsel to certify that they have made good faith efforts to verbally discuss a variety of topics that they will be prepared to discuss at the Case Management Conference (“CMC”), including:

- Core Technical Documents;
- Any party’s intent to seek production of emails or source code;
- The one or two most important claim terms requiring construction and whether the court should consider a “super-early” claim construction hearing on those terms;
- Timing for reducing accused products, asserted claims and prior art references;
- Related cases or Plaintiff’s plans to file additional related cases;
- Timing for plaintiff’s production of related settlement agreements;
- Timing and scope of initial damages disclosures (type of damages or other relief sought, smallest saleable unit, etc.); and
- Possibility of early dispositive motions.

¹ A summary of Judge Stark’s presentation may be found in Morris, Nichols, Arshat & Tunnell’s May 16, 2014 Delaware Intellectual Property NewsFlash. www.mnat.com/attachment/233/IP+NEWSFLASH+FINAL+May+2014.pdf

Although the Court will normally proceed with scheduling after any defendant has filed a responsive pleading, any party may request that the Court defer setting a CMC when Plaintiff has filed multiple related cases. Judge Stark, however, will generally not defer the CMC and scheduling process solely due to the pendency of a motion to dismiss, transfer or stay.

Contentions: Judge Stark's new Scheduling Order requires plaintiff to provide a damages model and defendant to produce sales figures for the accused product(s) in addition to the usual disclosures pursuant to paragraph 4 of the Delaware Default Standard for Discovery. In addition, the Court will set dates for final infringement and invalidity contentions.

Narrowing the Case: Judge Stark will be "highly receptive" to reasonable proposals to reduce, at appropriate stages, the number of patents and claims, accused products, prior art references and claim construction disputes.

Claim Construction: Judge Stark has set an "aspirational goal" to issue a claim construction ruling within 60 days after the hearing. Although

he anticipates holding only one claim construction hearing in each case or group of related cases, he will consider whether cases would be more efficiently handled with an earlier claim construction on certain limited terms.

Summary Judgment and *Daubert* Motions: Each side will have a combined total of 100 pages of briefs (40+40+20) for summary judgment motions or 125 pages (50+50+25) if there are summary judgment and *Daubert* motions. Judge Stark will set hearing dates for these motions in the Scheduling Order, typically two months prior to the pretrial conference. Argument will be limited to forty-five minutes per side.

Trial Dates: Finally, Judge Stark will set trial dates in the Scheduling Order in all but the rare case. Previously, it had been his frequent practice to wait until later in a case to set trial dates. The Court, however, will wait until later in the case (possibly at the pretrial conference) to determine which defendant will go to trial first when there are multiple, related cases.

Revised Pretrial Order

Judge Stark also issued a revised form pretrial order. Among other changes, the pretrial order now expressly delineates a "presumptive order of proof" at trial as follows:

- Phase I:** Plaintiff's case-in-chief on infringement and damages
- Phase II:** Defendant's response on infringement and damages, and case-in-chief on invalidity
- Phase III:** Plaintiff's rebuttal on infringement and damages, and response on invalidity
- Phase IV:** Defendant's rebuttal on invalidity

Judge Stark also altered his procedures for expert witness testimony. Specifically, each party must now state "the precise subject matter" of an expert witness's

expertise, and "no deviations as to the described subject matter will be permitted without approval of all parties or the Court, on good cause shown." The parties will also be required to provide the Court with their positions on whether the Court should: (1) rule during trial on objections that expert testimony is beyond the scope of prior disclosures; or (2) defer ruling on such objections unless the objector renews the objection in writing after trial. If the Court defers ruling on objections to expert testimony until after trial, the prevailing party will be entitled to have all of its costs for a new trial paid by the party that elicited improper expert testimony.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP is active in patent infringement and other intellectual property litigation in the District of Delaware and elsewhere, serving as lead counsel in many cases, and assisting as co-counsel in other cases brought to Delaware by patent litigators from around the country. In one role or the other, the firm is counsel in nearly half of the intellectual property cases pending in the District of Delaware.

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