

Chief Judge Connolly Issues New Standing and Form Scheduling Orders

Client Alert

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In the last couple of weeks, Chief Judge Connolly has issued four new standing orders, as well as new form scheduling orders for Hatch-Waxman and non-Hatch-Waxman patent cases. Summarized below are some highlights from these new orders. At the outset, it is important to note these orders only apply to cases assigned to Chief Judge Connolly.

NEW HATCH-WAXMAN SCHEDULING ORDER

The most significant additions to Chief Judge Connolly's Hatch-Waxman Scheduling Order relate to case narrowing from the outset and reversing the order of contentions. Within seven days of the date the scheduling order is entered, plaintiff shall serve defendant with a "Preliminary Disclosure of Asserted Claims," which should list each claim of each patent alleged to be infringed. Plaintiff is limited to ten claims per patent and no more than 32 claims total against any one defendant. No later than 30 days after service of this disclosure, the defendant shall serve Noninfringement Contentions and Invalidity Contentions/Preliminary Disclosure of Asserted Prior Art. The Noninfringement Contentions should identify any claim limitations that defendant contends are literally absent from the ANDA or NDA accused of infringement. Meanwhile, the Invalidity Contentions should identify no more than 12 prior art references per patent and no more than 30 prior art references in total. The Scheduling Order provides that the addition or substitution of asserted claims/prior art and the amendment of the Preliminary Disclosure of Asserted Claims, Preliminary Disclosure of Asserted Prior Art, Noninfringement Contentions, Invalidity Contentions, and Infringement Contentions may be made only by order of the Court upon a showing of good cause. Chief Judge Connolly notes that a proposed addition of a claim or prior art reference will likely only be granted if a previously asserted claim or prior art reference is dropped.

After the Court issues a claim construction order, the Scheduling Order provides that defendant shall serve, no later than 28 days later, a "Final Election of Asserted Prior Art," limited to no more than six prior art references per patent and no more than a total of 20 references. No more than 14 days after service of the Final Election of Asserted Prior Art, plaintiff shall serve a "Final Election of Asserted Claims," limited to no more than five asserted claims and no more than a total of 16 claims.

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NEW NON-HATCH-WAXMAN PATENT SCHEDULING ORDERS

Chief Judge Connolly's new Scheduling Orders for other patent cases also include a number of substantive changes. View the Form Scheduling Order for cases in which infringement is alleged here, and cases involving invalidity only here.

First, absent party agreement or an order to the contrary, the Court will phase trials, such that willful infringement and damages will be tried only after a finding of infringement.

Next, Chief Judge Connolly incorporated his summary judgment ranking procedure, issued last summer, into his form scheduling order. He also clarified that *Daubert* motions are subject to the same ranking procedure, whereby a party filing multiple *Daubert* motions must rank them, and if the Court denies the first ranked motion, the Court will not review the remaining *Daubert* motions. The Scheduling Orders also include a provision stating that a party that loses a *Daubert* motion and then decides not to cross-examine the expert at trial on the matters raised in the *Daubert* motion will have its trial time "reduce[d] by an appropriate amount." Finally, the Court included a section providing that stipulations extending the deadline for reply briefs to dispositive motions will result in the parties "los[ing] their trial date upon the Court's granting the extension, and no new trial date will be given until the dispositive motion(s) has(have) been decided."

Regarding claim construction, the Court offered some additional guidance on the timing of pre-*Markman* hearing meet and confers, as well as timing for the filing of the Joint Claim Construction Brief. Similar to the Court's new dispositive motion procedures, parties that agree to extend the deadline of the Joint Claim Construction Brief "will presumptively lose" their *Markman* hearing date.

Along with these substantive revisions, the Scheduling Orders also include some new administrative procedures, including requiring the covers of all briefs, except for motions *in limine* included in a pretrial order, to be color coded.

STANDING ORDER REGARDING CORPORATE DISCLOSURE STATEMENTS

This Standing Order requires that any joint venture, limited liability corporation, partnership, or limited liability partnership include in its Fed. R. Civ. P. 7.1 disclosure statement "the name of every owner, member, and partner of the party, proceeding up the chain of ownership until the name of every individual and corporation with a direct or indirect interest in the party has been identified."

STANDING ORDER REGARDING HATCH-WAXMAN CASES IN WHICH INFRINGEMENT IS ALLEGED

This Standing Order requires that defendants in Hatch-Waxman cases produce, upon the filing of a responsive pleading to the complaint, the entire ANDA or NDA that forms the basis of any alleged

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infringement. This Standing Order is incorporated into Judge Connolly's new Scheduling Order for Hatch-Waxman cases.

STANDING ORDER REGARDING DISCLOSURE OF CITIZENSHIP

This Standing Order requires that within 14 days of filing an action in the District of Delaware or removing an action to the Court based on diversity, the party shall file a "Certification of Diversity Jurisdiction" identifying the name and citizenship of every owner, member, and partner of every party to the case that is a joint venture, limited liability corporation, partnership, or limited liability partnership.

STANDING ORDER REGARDING THIRD-PARTY LITIGATION FUNDING

This Standing Order requires that a party receiving litigation financing from a third-party funder file a statement including the following: (1) the identity, address, and place of formation, if any, of the funder, (2) whether the funder's approval is required for litigation or settlement decisions, and if so, the terms and conditions surrounding that approval, and (3) a brief description of the nature of the funder's financial interest. The statement should be filed by the later of June 2, 2022, or 30 days from the filing of an initial pleading or transfer.

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PRACTICE AREAS

Intellectual Property Litigation

