



NEW JERSEY STATE BAR ASSOCIATION

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Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments on Proposed Rules for Complex Business Litigation Program

Dear Judge Grant:

Thank you for providing the New Jersey State Bar Association (NJSBA) with the opportunity to submit its views to the Court on the proposed court rules in connection with the Complex Business Litigation Program (CBLP), and for extending the time to comment to allow the NJSBA Board of Trustees an opportunity to adequately review and discuss the report. Because of the wide-ranging and complicated nature of the cases being addressed through this innovative Court program, in addition to providing these written comments, I would be grateful for the opportunity to meet with you, or your designee, to engage in more meaningful discussions about the practical challenges these rules raise.

The NJSBA appreciates the considerable effort and thought invested by the Committee of Complex Litigation Judges in the development of the proposed CBLP Rules and commends the Committee for its thoughtful and comprehensive proposal. The association believes, however, that the proposals would benefit from the input and perspective of practitioners, as well.

As a general commentary, the NJSBA supports the development of new rules that will make the adjudication of complex commercial disputes more efficient and cost-effective for all parties without compromising the fundamental goal of administering justice fairly for all litigants. Our members, though, are concerned about the presumptive constraints contained in the proposals. Of chief concern are the proposals with regard to time and discovery limitations, as they are unrealistic and will impair the fair prosecution of the complex cases to which they are meant to apply. The NJSBA is supportive of active case management designed to ensure a case moves forward but asserts that judges need to be able to have discretion to work with attorneys

to develop a case management plan that is appropriate for the intricacies of the specific case, as they do in the federal courts. Because of the strict timelines contained in these proposed rules, the NJSBA asserts that they may actually drive parties to seek resolution of their matters outside of the courthouse. Recognizing that is not the intention of the proposal, the NJSBA urges the Court to conduct further study and consider changes to the proposal before it adopts final rules. To aid that effort, the NJSBA offers the following specific comments:

1. R. 4:102-2(c) – It is important to ensure that only appropriate matters are assigned to the CBLP, and that most cases where equitable relief is sought continue to be assigned to General Equity. Therefore, the NJSBA suggests that the following be added at the end of this provision:

These rules are not intended to override the general venue rules under Part IV, specifically R. 4:3-1. Therefore, any case in which the primary relief sought is equitable in nature is to be presumptively assigned to General Equity and not the CBLT.

2. R. 4:102-4(a) – The NJSBA recognizes that most complex business and construction matters involve sums well in excess of \$200,000 and including that sum might eliminate appropriate cases from being considered for the CBLP. Therefore, the NJSBA suggests that the reference to \$200,000 be changed to \$500,000, so parties can file a motion for inclusion in the CBLP where a case involved complex business issues and the amount in controversy is less than \$500,000.

3. R. 4:102-4(b) – The NJSBA believes that a determination to assign a matter to the CBLP should be one that is made with input from all affected parties, with the parties retaining an ability to have the decision reviewed by motion afterward. Therefore, the NJSBA suggests that the following be added at the end of this provision:

Upon review the Assignment Judge, or CBLP judge, who determines a case is appropriate for placement in the CBLP court shall convene a conference with the counsel of record to determine whether it shall be assigned or removed prior to a motion being filed. If any party has an issue with the outcome of the hearing, an appropriate motion shall be filed within 14 days.

4. R. 4:103-2(a)(1)(A)(iii): The NJSBA submits that this rule is not realistic when applied to complex cases, particularly construction defect matters. As practitioners in this area well know, the expert investigative work takes at least a year, if not longer. This process can also be delayed because of the schedules of experts and multiple attorneys, and, in construction default cases, the inevitable problems with gaining access to property for the inspections. The inspections themselves are often far-ranging in size and scope and frequently require multiple visits to properties containing hundreds of residential units. Sometimes weather delays inspections or invasive testing, especially during the winter months. The resulting reports that identify and quantify those damages are often hundreds if not thousands of pages long. For all of these reasons, it is the rare, indeed almost non-existent, case where the disclosures on damages contemplated by this proposed rule can be made at such an early stage.

5. R. 4:103-3 – As the issues in these complex cases seem to be constantly evolving and new information frequently becomes available over time, the NJSBA suggests that an affirmative provision be added to require the parties to continuously update any discovery responses within the time for expiration of the discovery period.

6. R. 4:103-4(a)(3): The limitation imposed by the rule will be exceedingly problematic in the types of cases that will be assigned to the CBLP. Setting a time limit for adding parties is simply unfair to all parties, but particularly so to plaintiffs. The typical claimant in a residential construction defect case, for example, is a homeowners' association that had no involvement in construction of the project and no access to records related to the construction until after litigation has commenced. There are often multiple layers of contractors involved in large construction projects and it typically takes several years of discovery to identify them all. In many instances, a plaintiff's counsel will get initial discovery responses from a general contractor and developer which only disclose primary subcontractors. Only after the subcontractors are named will plaintiff then learn of sub-layers of additional critical subcontractors who actually performed the defective work.

A presumptive artificial time limit for adding parties without any recognition of the challenges of determining all of the appropriate parties has the substantial potential to deprive litigants of a fair opportunity to pursue those responsible for their damages in one lawsuit and will promote, by necessity, serial litigation of what should be a single controversy. While this is permissible in a number of circumstances in our federal courts, it is severely constrained in our state courts by virtue of the entire controversy doctrine. If the Court is inclined to consider such a limitation it should be coupled with an initial disclosure requirement that requires a party to identify all potential responsible individuals and entities, including all subcontractors and their insurance carriers. If a responsible party is not timely identified then the rules should include a presumption in favor of adding that party when they are ultimately identified.

7. R. 4:103-4(a) – The NJSBA believes that many of the cases assigned to the CBLP may benefit from the appointment of special masters to address specific issues in a matter, and from submitting certain or all issues to mediation. Such considerations should be explored by and be made available to the parties in the early stages of case management. Therefore, the NJSBA suggests that a new #6 be added to the issues to be addressed at the Initial Case Management Conference:

(6) The parties should discuss the need for the appointment of any special master to address outside issues. The Court and the parties shall also consider the readiness for mediation and the selection of a mediation.

8. R. 4:103-4(c)(2)(O): It takes a considerable amount of time to present the evidence necessary to make out the claims in a complex commercial or construction defect case. Putting restrictions on the amount of time to "present evidence" will harm predominately the party with the burden of proof (most often, in construction defect cases, an association, a developer, or a general contractor). Parties such as subcontractors, who will frequently be focused on defending against a single area of criticism will unfairly benefit from such restrictions. Thus, the impact of this rule will be to change what is now a level playing field in favor of particular parties.

9. R. 4:104-3(a)(1): The types of cases that will be assigned to the CBLP usually involve scores of named defendants and could total more than 50 distinct parties. Imposing a presumptive limit of 10 depositions per side is simply unrealistic for these cases. The NJSBA notes that, under this proposal, more depositions would be permitted in an automobile case or a slip-and-fall case than in the complex cases destined to be handled by the CBLP. While this presumptive number can be modified by agreement of the parties, a defendant has little, if any, incentive to agree. As a practical matter, the limit will have to be modified by the managing judge in virtually all of these cases, so setting such a limit only to see it modified in every case promotes neither efficiency nor fairness. Consideration could be given to imposing an initial presumption of at least two or three depositions of party witnesses, per party. That at least allows for a deposition of the person with the most knowledge and two other critical witness.

10. R. 4:104-3(a)(2): A seven-hour time limit "per deponent" is unrealistic for complex commercial and construction defect cases. As noted above, it is commonplace for there to be dozens of parties in these cases. Each party has the right to question witnesses. Important fact and expert witnesses are often deposed for three, four or more days. Our members advise that every one of these cases is characterized by multiple instances of depositions which require several days to complete. The primary reason this occurs is because many of the parties are exposed on claims that do not have overlapping interests (for example, plumbing claims versus electric claims). Each of these claims standing alone likely satisfy the complexity and damage value necessary to be considered a complex claim. The interests of justice for the litigants are not promoted by this level of micro management of depositions. If limits must be included, the NJSBA urges the court to consider language that allows for a more liberal standard that can be relaxed, pursuant to R. 1:1-2, as the case demands. Furthermore, the NJSBA suggests that the commentary note that the parties are strongly encouraged to find consensus about how to procedurally move the case forward, as cooperation among counsel is key to the expeditious resolution of a matter.

The NJSBA also notes some technical clarifications that are needed: (1) in R. 4:103-2 (B) and (C), reference is made to a "Rule 103-3(f) conference" but there is no Rule 103-3(f); and (2) in R. 4:103-3(a), reference is made to the parties conferring before a scheduling order is due under Rule 103-4(b), but that rule refers to subsequent case management conferences after a scheduling order is issued (presumably under Rule 103-4(a)).

Finally, the NJSBA offers several additional thoughts for the Court's consideration that are not tied to a particular proposed rule:

The presumptive confidentiality order in a construction defect case must include insurance company representatives for the parties as permissible recipients. The tri-partite relationship recognized by our courts is greatly impaired if the entity who must evaluate the case and receive recommendations from counsel, cannot review the discovery bearing on an issue. In our members' experience, this provision is routine in cases with confidentiality orders.

Consideration should be given to requiring a party to provide three proposed dates for which that party's expert and counsel are available for depositions at the time the expert's report is served. This imposes no undue burden and would assist in streamlining the scheduling of expert depositions which frequently number in the dozens.

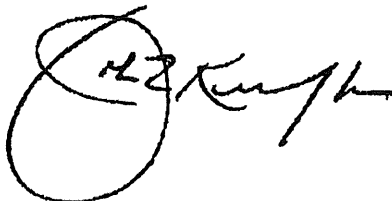
Risk transfer issues, such as contractual indemnification claims, are almost always purely legal issues involving judicial interpretation of an indemnity clause where no parol evidence is permitted. Decisions on these issues drive settlements. Our members advise that judges are often reluctant to address these issues, if at all, until the end an expensive litigation process. While designating certain judges to develop expertise in that area will likely foster a more proactive approach, these dispositive motions should rarely, if ever, need to await the completion of discovery.

The success of the CBLP will be dependent on the ability of the judges assigned to the program to understand and manage the complex cases assigned to the program. The NJSBA therefore urges the Court to make every effort assign to judges who already possess the specialized background, knowledge and skills to meet the goals of the program.

In summary, I thank the Court for considering the NJSBA's thoughts on the proposed rules and ask that these comments not be construed as a comprehensive criticism of the proposed CBLP Rules. On the contrary, the NJSBA applauds the effort to establish more active case management procedures, such as mandatory initial case management conferences accompanied by the development of a discovery plan in advance of those conferences. We believe, though, that the decisions about the management of the actual case, such as any limits on discovery and the presentation of evidence, should be committed to the discretion of the managing judge with an expectation that such discretion will be exercised to accomplish the goals that formed the foundation for the creation of the CBLP.

Again, the NJSBA urges the Court to engage the perspective of practicing attorneys in addition to the judges' perspective reflected in these rules and requests the opportunity to meet in person to discuss the practical challenges these rules raise.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. E. Keefe Jr.", written over a large, loopy circular flourish.

John E. Keefe Jr.
President

/sab

cc: Evelyn Padin, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director