The Final Pretrial Order—Case Law and Consequences

by Benjamin E. Widener and Cory A. Rand

After the filing of the complaint, beyond the initial case management conference, through discovery, past mediation and having survived motions for summary judgment, the joint final pretrial order (FPTO) awaits federal court litigants as they approach trial. Perhaps no clearer, more definitive statement can be made concerning the FPTO than that provided by the *Instructions and Directives for the Assistance of Counsel in Preparing the Joint Final Pretrial Order in the United States District Court for the District of New Jersey, Camden Vicinage*:

> The Joint Final Pretrial Order is the most important order that is submitted to the court prior to trial.

Without question, the FPTO is the single most important document an attorney will submit to the court when litigating in the District of New Jersey.

Simply put, the FPTO is the embodiment of a litigant's case.[1] A review of Rule 16(c) of the Federal Rules of Civil Procedure reveals the breadth of the matters presented by the parties to the court in the FPTO. It is sweeping and comprehensive. It is the parties' roadmap to trial. It requires the good faith cooperation and contributions of all parties to a case. A party can suffer significant consequences as a result of the failure to properly prepare or comply with the FPTO, and the modification of or deviation from the FPTO will be permitted only upon a showing of exceptional circumstances "to prevent manifest injustice."[2]

This article discusses the FPTO, its purpose and requirements, the differences from New Jersey state court practice, and the consequences that flow from the final pretrial order once it is entered.

The Joint Final Pretrial Order: What is it?

State court practitioners beware: The FPTO is not the equivalent of the New Jersey State Court Rule 4:25-1(b) pretrial order or Rule 4:25-7(b) exchange of information. At face value, the components of the FPTO are not too dissimilar from those recited in New Jersey Court Rule 4:25-1(b). The similarities, however, end at face value. There is no comparison between the two documents, and state court practitioners should not be misled to believe the two documents are analogous.

As a preliminary matter, practitioners unfamiliar with federal court practice in the District of New Jersey should note that the FPTO varies by vicinage and then, to some extent, by judge. Camden's form and instructions are available on the court's website. In Trenton, a form of FPTO is available online for certain judges. In Newark, the form of order varies from judge to judge. Local Civil Rule 16.1(b) also references a proposed form of pretrial scheduling order. Often, the magistrate judge assigned to manage a civil case will provide a copy of the applicable form of FPTO after, or in conjunction with, the initial Rule 16 conference. If not provided, it should be requested.

The FPTO serves many purposes. First, it streamlines the dispute by defining and, typically, narrowing the issues to be adjudicated at trial. The FPTO requires the parties to set forth all witnesses, exhibits, legal issues, claims and defense, and obligates the parties to discuss and agree to stipulations of fact and law, as well as joint exhibits. This, of course, can save substantial trial time and expense. Additionally, and through its preparation, the FPTO reduces—if not eliminates—any element of surprise at trial. Full disclosure is expected. Critically, once entered, the pretrial order "limits the issues for trial and in substance takes the place of pleadings covered by the pretrial order."[3] Because the FPTO supersedes the pleadings, the order may result in the trial of claims not included in the original pleadings or, conversely, could result in the waiver or dismissal of claims originally alleged but not included in the order.

By its nature, the FPTO also forces a party to fully prepare for trial. It is a blueprint of a party's case. It forces the parties to think through the claims and defenses, identify all evi-

dence, and evaluate all arguments well in advance of trial, to ensure an orderly trial. Just as many trial lawyers will review and prepare jury instructions at the outset of a case, revising and supplementing them as the case moves toward trial, federal court practitioners are wise to do the same with the FPTO. Even though the FPTO will enter at the end of the final pretrial conference,[4] a prudent litigant will be thinking about it long before the final pretrial conference takes place. Regardless, if a litigant does not know the case forwards and backwards and inside and out before preparing the FPTO, it will upon completion of the document.

One additional purpose of the FPTO is to promote settlement.[5] By obligating the parties to fully cooperate in the preparation of the order; stipulate to facts and joint exhibits where possible and appropriate; identify all contested facts, witnesses and evidence; eliminate claims or defenses that cannot be sustained; define and explain all legal issues; and identify all pretrial *in limine* motions and objections (*i.e.*, to expert qualifications and the authenticity of exhibits),[6] the court, through the FPTO and final pretrial conference, puts the parties in the most ideal situation to negotiate a settlement. The FPTO obligates the parties to show their hands; it puts an end to any poker played prior to its preparation and entry.

Lastly, unlike the New Jersey state court pretrial memorandum and exchange of information, in which cooperation is appreciated but not required, the FPTO—as indicated above—obligates the parties to collaborate and work together. The order must be prepared jointly by counsel. The Camden instructions plainly provide that the final pretrial order "shall be signed by all counsel and shall reflect the effort of *all* counsel" (emphasis in original). The Camden instructions discuss the potential consequences of the failure of the parties to comply with this directive, indicating:

> Attorneys who submit a proposed [FPTO] to the court that indicates they have not followed the form and instructions that are provided herewith greatly impede the processing of litigation in this court and create burdens for the court and its staff which are unnecessary. A persistent pattern of conduct in this regard by any attorney will result in the imposition of sanctions.[7]

Indeed, Rule 16(e) of the Federal Rules of Civil Procedure specifically calls for the imposition of sanctions against a party "or its attorney" for failing to obey a scheduling or other pretrial order, or for being "substantially unprepared to participate—or does not participate in good faith—in the conference."[8]

Sanctions may be imposed for the unexcused failure of counsel to cooperate in submitting the FPTO when due or for failing to obey it once entered. These sanctions go beyond the other repercussions parties may face for failing to comply with the FPTO, discussed below, which include the preclusion of evidence, the prohibition against prosecuting claims or making arguments at trial, or barring counsel from raising issues on appeal.

Suffice it to say, the FPTO is of paramount importance given its breadth, the impact it can have on substantive matters on trial, and the consequences that flow from it.

Recent Case Law and the Consequences of the Final Pretrial Order

Under Rule 16(e), the FPTO may be amended only "to prevent manifest injustice." As a general matter, the court has discretion to construe the pretrial order liberally, and the FPTO is "to be liberally construed to embrace all legal and factual theories inherent in the issues defined therein."[9] In determining whether a final pretrial order should be amended to prevent manifest injustice, or in determining whether a party has waived its right to introduce claims, defenses, witnesses or exhibits at trial under the FPTO, courts will focus on the effective role the pretrial order plays in narrowing the issues of the case.[10]

Several cases illustrate the importance of the FPTO. As indicated above, the FPTO supersedes the pleadings. It is well-settled that the FPTO "when entered limits the issues for trial and in substance takes the place of the pleadings covered by the pretrial order."[11] For example, in *Logan v. Potter*[12] the plaintiff filed an action for discrimination against the United States Postal Service. Though the plaintiff originally included claims for sex discrimination as a basis under which the defendant's conduct was discriminatory, the court, noting that the FPTO supersedes the pleadings, observed "there is no claim of gender discrimination under Title VII of the Civil Right Act before this Court" because the plaintiff, in the final pretrial submissions, advanced discrimination claims based only on his alleged disability.[13]

While it may seem counterintuitive that parties, through the FPTO, may assert claims not originally advanced in the litigation, the ability of a party to use the FPTO as a means to supersede the pleadings is not unfettered or absolute. Where a party seeks to assert new claims or identify new evidence in the FPTO, the court serves as a gatekeeper to ensure fair play; it may bar claims or prohibit the introduction of such evidence on the basis of delay or prejudice to the other party. For example, in *Toscano v. Case*[14] the defendants moved *in limine* to preclude at trial two witnesses listed by the plaintiff in the FPTO, arguing the plaintiff should be barred from calling the witnesses because the plaintiff never previously listed or iden-

tified them as potential witnesses.[15] The court granted the defendants' motion because the witnesses were never identified in discovery and, therefore, the defendants were deprived of the opportunity to depose them.[16] The court found this "created unfair surprise for [d]efendants that cannot be remedied at this late date."[17]

Similarly, in *Interlink Group Cor. USA, Inc. v. Am. Trade & Financial Corp.*,[18] the court barred two witnesses *in limine* from testifying at trial because the plaintiff failed to identify them as potential trial witnesses prior to the submission of the FPTO. The court found the defendants "clearly" had been unfairly surprised by the naming of the witnesses at the 11th hour. The court acknowledged it could provide the defendants leave to conduct a last-minute deposition of the witness, but found this was "certainly not the same as being able to evaluate the matter from an early point in time with full notice that [the witness] may be a key witness at trial."[19] The court also highlighted the "distinct possibility that reopening discovery, even for a discrete deposition, may result in a disruption or postponement of the trial...currently scheduled to commence in just a few weeks."[20]

Just as the FPTO may result in the preclusion or, in some cases, admission of new claims, evidence or witnesses, it also may operate to bar parties from asserting claims or defenses at trial on the basis of waiver. For example, in *Dinenno v. Lucky Fin Water Sports, LLC*[21] the court, citing *Basista v. Weir* and commenting that "a pretrial order when entered limits the issues for trial and in substance takes the place of pleadings," determined that, notwithstanding an expert's testimony, the plaintiff had waived a negligent entrustment claim.[22] Following *Petree v. Victor Fluid Power, Inc.*,[23] in which the Third Circuit found no abuse of discretion where a trial court refused to allow a plaintiff in a products liability suit to amend the pretrial order to include negligent failure to warn as a theory of liability, the court in *Dinenno*, finding the plaintiff's negligent entrustment claim was not included in the trial brief and the plaintiff never moved to amend the final pretrial order, and that the plaintiff merely presented rebuttal expert testimony concerning negligent entrustment, concluded the plaintiff

could not revive his negligent entrustment claim, which was extinguished by its exclusion from the FPTO.[24]

As the *Dinenno* case reflects, parties may be precluded from litigating substantive claims originally advanced in the case if not raised in a FPTO. Similarly, in *Janssen Products, L.P. v. Lupin Limited*,[25] a patent infringement action, the court, following a bench trial on the validity of certain patents, rejected certain arguments raised by the defendant in its post-trial submissions as being untimely.[26] The court held that the defendant's non-enablement argument was not identified before trial or mentioned in the pretrial order, and that under the express terms of the pretrial order and in accordance with Rule 16(e) the defendant could not raise issues not disclosed in the pretrial order unless it could show manifest injustice (which it could not). The court similarly found the defendant could not raise an additional invalidity theory, having failed to do so in the FPTO.[27]

The dangers of failing to identify or include issues/arguments, evidence (or objections thereto), witnesses, claims or defenses in a FPTO are self-evident. So, too, is the danger of relying on the court to exercise its discretion to modify the pretrial order once it has been entered. However, in *Hill v. Commerce Bancorp, Inc.*[28] the Third Circuit affirmed a finding that manifest injustice would result if the plaintiff was not permitted to use certain new exhibits at trial. Referencing the applicable standard under Rule 16(e), the Third Circuit expressed that "[t]he burden is on the moving party to demonstrate that a refusal to amend the order will result in manifest injustice."[29] The court noted the burden is stringent, and that whether to permit the amendment is "entirely within the discretionary power of the trial court."

Citing *Scopia Mortg. Corp. v. Greentree Mortg., Co., L.P.*,[30] the court identified the following factors to consider: 1) prejudice or surprise in fact to the nonmoving party; 2) ability of that party to cure the prejudice; 3) extent to which waiver of the rule would disrupt the orderly and efficient trial of the case; 4) bad faith or willfulness on the part of the movant; 5) the importance of the evidence, and; 6) whether the decision to amend to include new evidence is a matter of new strategy or tactic.[31]

In deciding to allow the plaintiff to introduce new exhibits at trial, the *Hill* court found persuasive the following: the plaintiff recently deposed several witnesses despite earlier efforts to depose them; the significance of the new exhibits did not crystallize until the depositions were taken; the plaintiff should not be penalized because it was

not known until recently that the defendant intended to call at trial witnesses whose depositions it successfully quashed in 2011; the defendant could not demonstrate prejudice; and allowing the plaintiff to introduce the new exhibits would not result in additional discovery, lengthen the trial, or delay the scheduled start of the trial.[32]

Petree, supra, of course, is at the opposite end of the spectrum, in which the Third Circuit upheld a trial court's refusal to amend the FPTO to permit an additional negligence claim where there was no "compelling" reason why the claim was not presented at the final pretrial conference but was presented at trial.[33]

Given the importance of the final pretrial order, the consequences that can flow from it, and the fact that the FPTO summarizes and establishes all of the issues, evidence, witnesses, motions, arguments, claims and defenses to be heard and received at trial, it is imperative federal court practitioners familiarize themselves with Federal Rule 16 and the judges' preferences (and proposed forms of order) when navigating their way toward trial in this district.

Benjamin E. Widener *is a shareholder in the litigation and employment practice groups at Stark & Stark. He is the chair of the firm's employment law group and concentrates his practice in employment litigation and counseling, as well as general business and civil litigation.* ***Cory A. Rand*** *is an associate at the firm who focuses his practice in civil and employment litigation.*

ENDNOTES

1. The *Instructions and Directives for the Assistance of Counsel in Preparing the Joint Final Pretrial Order in the United States District Court for the District of New Jersey, Camden Vicinage* (hereinafter, *Camden Instructions*), further provide that the FPTO is "the document that members of the court use for immediate reference to determine the nature of your case."
2. Fed.R.Civ.P. 16(e). The annotations to Rule 16(e) further provide, in relevant part: "[i]n the case of the final pretrial order [ ] a more stringent standard is called for and the words "to prevent manifest injustice," which appeared in the original rule, have been retained."
3. *See Basista v. Weir*, 340 F.2d 74, 85 (3d Cir. 1965) ("It is, of course, established law that a pretrial order when entered limits the issues for trial and in substance takes the place of pleadings covered by the pretrial order.").
4. Fed.R.Civ.P. 16(d).
5. For example, the *Camden Instructions* specifically provide that "[a]nother purpose of the Final Pretrial Order is to attempt to settle the action."
6. Unlike state court practice, *in limine* applications, including those relating to the qualifications of expert witnesses, generally must be raised in the FPTO to allow the court to address those issues at a pretrial conference, whether through formal pretrial motion practice or otherwise.
7. *See Camden Instructions*, ¶3.
8. Fed.R.Civ.P.16(f)(1)(B) & (C).
9. *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 218 (3d Cir. 1999) (*citing United States Gypsum Co. v. Schiavo Bros.*, 668 F.2d 172, 181 n. 12 (3d Cir.1981)).
10. *Shell Petroleum*, 182 F.3d at 218 (*citing Keenan v. City of Philadelphia*, 983 F.2d 459, 471 (3d Cir. 1992)).
11. *Basista*, 340 F.2d at 84.
12. *Logan v. Potter*, No. 06-297, 2007 U.S. Dist. LEXIS 41056 (D.N.J. June 6, 2007).
13. *Id.* at *7n. 2.
14. *Toscano v. Case*, No. 11-4121 (FSH), 2013 U.S. Dist. LEXIS 135918 (D.N.J. Sept. 20, 2013).
15. *Id.* at *15.
16. *Id.* at *16.
17. *Id.*
18. *Interlink Group Cor. USA, Inc. v. Am. Trade & Financial Corp.*, No. 12-6179 (JBC), 2014 U.S. Dist. LEXIS 99132 (D.N.J. July 18, 2014).
19. *Id.* at *23-24.
20. *Id.* at *24.
21. 837 F. Supp. 2d 419 (D.N.J. 2011).
22. *Id.* at 423.
23. 831 F.2d 1191 (3d Cir. 1987).
24. *Id.* at 423-24.
25. *Janssen Products, L.P. v. Lupin Limited*, No. 2:10-cv-05954 (WHW), 2014 U.S. Dist. LEXIS 155110 (D.N.J. Sept. 23, 2014).
26. *Id.* at *53-54.
27. *Id.* at *57.
28. *Hill v. Commerce Bancorp, Inc.*, No. 09-3685 (RBK/JS), 2013 U.S. Dist. LEXIS 56340, at *8-9 (D.N.J. April 19, 2013), *aff'd*, 586 Fed. App'x 874 (3d Cir. 2014).
29. *Quay Corp. v. Micro Tech. of Iowa Co.*, No. 87-108 (CSF), 1989 U.S. Dist. LEXIS 13362, at *4 (D.N.J. 1989).
30. 184 F.R.D. 526, 528 (D.N.J. 1998).
31. *Hill*, 2013 U.S. Dist. LEXIS 56340, at *9.
32. *Id.* at *9-10.
33. *Petree v. Victor Fluid Power, Inc.*, 831 F.2d at 1194.