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Will The Proposed Changes To The Federal Rules Of Civil Procedure Stifle Discovery?

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The Federal Rules of Civil Procedure were first adopted by the United States Supreme Court in 1937, becoming effective on September 16, 1938. Since then, the Rules have been amended numerous times to accommodate changes in the nature of federal litigation and to address perceived shortcomings, most recently in 2010. Over the last few years, a number of organizations have clamored for additional rule changes to limit discovery in numerous respects, contending that discovery has become too much of a weapon in and of itself and that justice requires limiting the ability of parties – particularly plaintiffs – to seek and require the production of expansive amounts of discovery. The changes to the Rules currently proposed would do precisely that, curtailing the use of the fundamental discovery mechanisms provided by the Rules.

Although the proposed changes impact a number of Rules, a few are worth particular mention. The most dramatic change is to Rule 26 itself, which proscribes the scope of material discoverable under the Rules. The proposed Rule mandates that any given discovery request must be "proportional" before the discovery may be had. The proposed Rule provides:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Prop. Fed. R. Civ. P. 26(b)(1). Furthermore, although courts have previously held that they had the authority to shift the economic burden of discovery from the producing to the requesting party, a proposed change to Rule 26(c)(1)(B) would explicitly vest courts with this power. See Prop. Fed. R. Civ. P. 26(c)(1)(B) ("The Court may, for good cause, issue an order to protect a party from…undue burden or expense, including…specifying terms, including time and place or the allocation of expenses, for the production of discovery.") (emphasis added).

In addition to implementing this new proportionality standard, the proposed Rule changes would also implement across-the-board reductions in the presumptive limit for written discovery and depositions, including imposing, for the first time, a presumptive limit on the number of requests for admission served pursuant to Rule 36. The proposed reductions include:

- Reducing the presumptive limit of oral depositions from 10 to 5 (Prop. Fed. R. Civ. P. 30(a)(2)(A)(i));
- Reducing the presumptive time for each deposition from 7 hours to 6 hours (Prop. Fed. R. Civ. P. 30(d)(1));

- Reducing the presumptive limit of written depositions from 10 to 5 (Prop. Fed. R. Civ. P. 31(a)(2)(A)(i));
- Reducing the presumptive limit of interrogatories from 25 to 15, including all discrete subparts (Prop. Fed. R. Civ. P. 33(a)(1)); and
- Imposing a presumptive limit of requests for admission to 25, including all discrete subparts (but not including requests for admission as to the genuineness of documents) (Prop. Fed. R. Civ. P. 36(a)(2)).

A reasonable threshold question is whether these changes are necessary. While the reduction of litigation expense is a laudable goal, the Rules already provide numerous mechanisms by which courts can tailor or limit the scope of discovery in a given case. Most notably, Rule 26(c) expressly empowers parties to seek an order that protects them from "annoyance, embarrassment, oppression, or undue burden or expense" in discovery by, among other methods, "forbidding the disclosure or discovery" or "limiting the scope of disclosure or discovery to certain matters." Fed. R. Civ. P. 26(c)(1)(A), (D). While detailed statistics on this issue are scant, anecdotal evidence and practitioner commentary would indicate that relatively few litigants attempt to invoke the protection afforded by this Rule. Furthermore, many courts provide for informal resolution of discovery disputes among the parties, and many disputes regarding the breadth of discovery – if they exist – are quickly and efficiently resolved in these conferences or other fora.

It is important that we not evaluate the impact of these proposed changes in a vacuum. In recent years, numerous court decisions, such as *Bell Atlantic v. Twombly*, 55 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) have arguably heightened pleading requirements for federal litigants. Numerous other statutory provisions and rules impose higher burdens of production and proof on parties seeking to bring certain types of claims, including Rule 9(b) of the Federal Rules of Civil Procedure. While one of these changes, standing alone, might not impose a substantial limitation on a party's ability to amass the information necessary to support its claims, the sum total of the proposed limits, when combined with adoption of the proportionality standard in Rule 26 and the imposition of higher pleading standards, raises the spectre that parties may find it increasingly difficult, if impossible, to advance even the most meritorious of certain types of claims, such as smaller consumer protection claims or allegations of fraud.

Much commentary has been written on these proposed changes, with much more likely to be written before the final draft of the changes – if any – is adopted. Of course, even if some or all of these changes are adopted, it remains to be seen how dramatic their impact will be in practice. Presumably, courts will recognize that our adversarial system depends upon the right to substantive and meaningful discovery and interpret the new Rules so as to provide it. Indeed, many of the committee notes accompanying the proposed changes make clear that the courts should continue to ensure that the parties are afforded appropriate discovery in each case. See, e.g., Committee Note, Prop. Fed. R. Civ. P. 30 ("Just as cases frequently arise in which one or all sides reasonably need more than 10 depositions, so there will be still more cases that reasonably justify more than 5…. [I]f the parties fail to agree, the court is responsible for identifying the cases that need more, recognizing that the context of particular cases often will justify more.") (emphasis added). What does seem clear, however, is that these proposed changes pose a real threat of *increasing* discovery disputes and associated motions practice, rather than reducing it. For example, if the reductions in the number of presumptive written discovery requests are adopted, requests for additional discovery – if not addressed by the court at the beginning of the litigation – may become the rule rather than the exception, particularly as discovery proceeds and

unforeseen or additional issues are discovered and developed. As a result, courts may have to become more, rather than less, involved in discovery disputes and issues in each case, straining already precious judicial resources and imposing additional expense on the litigation.

It is reasonable to suggest that outlandish or overly expansive discovery requests be limited. It is, however, unreasonable – and arguably unconstitutional – to impose a draconian system where parties must justify even the most reasonable requests for information from an opposing party, particularly when one of the parties holds most, if not all, of the relevant information and the relative economic power. If the right to discovery is not protected, the potential exists to devolve to a point where parties are left to shoulder ever-increasing burdens of allegation and proof while the very mechanisms provided to satisfy these burdens are whittled away. While there is broad ground for disagreement on these issues, we can all agree that no one is served by an outcome resulting in the effective loss of the fundamental right to trial. As long as this principle guides our decisions on these issues, we shall likely end up on reasonable and common ground.