The "Proportionality" Amendment to Fed. Civ.R. 26(B) and its Effect on Product Liability Cases

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Given that the majority of defective product cases arise from consumer goods manufactured by out-of-state or foreign defendants, these cases tend to be filed in (or removed to) federal court far more often than most other personal injury claims. A federal forum can alter the progression of a case in a number of respects, perhaps none more significant than differences in the rules of discovery.

Ohio's product liability statutes require that a plaintiff prove that an item deviated from "design specifications, formula, or performance standards of the manufacturer," that the foreseeable risks associated with the design outweighed its benefits, or that a manufacturer knew or should of known of risks requiring adequate warning to consumers.[i] These cases are almost always document-intensive, and the ability to prove any of these factors almost always centers on materials in the sole possession of the defendant. As such, the recent 2015 amendment of Fed.Civ.R. 26(b)(1) and its increased emphasis on "proportionality" can play a key role in the early stages of a products case proceeding in federal court.

Prior to December 1, 2015, the language of Fed.Civ.R. 26(b)(1) tracked closely with that found in the Ohio Rules of Civil Procedure, permitting discovery of matters "reasonably calculated to lead to the discovery of admissible evidence." In what was initially thought to be significant victory for corporate defendants and the defense bar, the 2015 Amendment qualified that parties may obtain discovery regarding any relevant, non-privileged matter that is "proportional to the needs of the case," with six factors to be taken into account:

> "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, 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."

The Amendment represented a stark contrast in language outlining that seemed to suggest that the party seeking discovery would now bear the burden of proving that commonplace, boilerplate objections (i.e., "unduly burdensome" or "undue expense") were inapplicable to the matter at hand. However, the committee expressly noted that such a result was not intended, and that the parties' respective responsibilities for demonstrating the factors pertinent to a proportionality analysis would essentially remain the same as they have since earlier amendments dating to at least 1983. For example, "A party claiming undue burden or expense ordinarily has far better information-perhaps the only information-with respect to that determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them."[ii]

Boilerplate objections continue to be seen in discovery responses in federal actions, and now often include a generic statement that the interrogatory/document request seeks information that is "not proportional to the needs of the case." However, another 2015 amendment to

Fed.R.Civ. 34(b)(2)(B) that took effect at the same time intended to curb this practice, replacing the general term "objection" with a requirement that a party "state with specificity the grounds for objecting" to document requests, and to "state whether any responsive materials are being withheld on the basis of that objection." These provisions were added to put to an end the confusion that can often arise when boilerplate objections are left standing alone or accompanied by only a partial production of sought-after documents.[iii]

These "proportionality" objections can arise in a number of different scenarios in defective product cases. Examples include incident reports for the subject product and "similar, if not identical [product] models" over the product development time period;[iv] e-discovery of product testing and hazard data; marketing materials related to the subject product; and electronic communications compiled throughout the research, design, manufacturing and/or marketing processes. When faced with a corporate manufacturer's attempts to shield itself from discovery of such materials, a plaintiff's motion to compel should focus on the six factors outlined in the updated language of Fed.R.Civ. 26(b)(2).

First and foremost among these considerations is the "importance of the issues" involved in the litigation, which according to the Advisory Committee was listed first to "add[] prominence to the importance of the issues and [to] avoid any implication that the amount in controversy is the most important concern."[v] These issues would include "the private and public values at issue in the litigation – values that cannot be addressed by a monetary award."[vi] In product cases, these would typically include the plaintiff's physical injuries and emotional repercussions that go beyond mere dollars and cents, as well as the general public safety concerns that are typically at stake.

Two of the listed factors contained within Fed.R.Civ. 26(b)(2), the "parties' relative access to relevant information [and] the parties' resources" will almost always weigh in favor of a plaintiff's argument for access to materials like that listed above. In order to develop an argument as to "access," however, it is often beneficial to include "discovery on discovery" of corporate representatives most knowledgeable as to the manufacturer's document retention policies, server and database search capabilities, or other issues involved early in a particular case. If the subject matter is highly technical, hiring a consultant to guide one through the issues can often be beneficial as well. Developing a record in this regard at the early stages of litigation can be very helpful to counter arguments not only as to "relative access" of vital documentation, but also to show that "the burden or expense of the proposed discovery" factor does not weigh in a defendant's favor. Indeed, a number of district courts have recognized that affidavit and deposition testimony as to the time and expenses associated with a defendant's search for responsive information is paramount to this inquiry. Forcing corporate defendants to demonstrate these concerns with specificity can often reveal "undue burdens" or "expense" are not as significant as initially claimed, and that the requests are therefore not out of "proportion" to the needs of the case.[vii]

While Federal Rule 26(b) now appears much different than its counterpart found in the Ohio Rules, the case law available since its amendment does not suggest the seismic shift in favor of corporate defendants that was initially feared. By crafting a focused discovery plan and creating a record geared toward the factors outlined in the new Rule, attorneys can increase their

chances of ensuring that vital documentation as to a defective product's history can be obtained and brought to light so that manufacturers can continue to be held accountable.

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[i] See O.R.C. §§ 2307.74-.76

[ii] Fed.R.Civ.P. 26 Advisory Comm. Note (2015).

[iii] Fed.R.Civ.P. 34 Advisory Comm. Note (2015).

[iv] *See Tolsith v. L.G. Elecs., USA, Inc.*, No. 2:07-cv-582, 2009 WL 43564, at *5 (S.D. Ohio Feb. 20, 2009); *Holfer v. Mack Trucks, Inc.*, 981 F.2d 377, 380-81 (8th Cir. 1992).

[v] See Memorandum of Committee on Rules of Practice and Procedure, June 14, 2014, https://www.ned.uscourts.gov/internetDocs/cle/2015-09/2014-Report-to-Standing-Committee.pdf

[vi] *Id.*

[vii] *See Labrier v. State Farm Fire & Cas. Co.*, 314 F.R.D. 637, 641 (W.D.Mo. 2016) 9 ("State Farm has not identified with specificity and coherence why it cannot now, after many months of discovery, use a [] method to provide highly relevant discovery"); citing *Cincinnati Ins. Co. v. Fine Home Mgers., Inc.*, No. 4:09-cv-00234, 2012 U.S. Dist. LEXIS 130952 (E.D. Miss. July 27, 2010) ("as no estimated number of hours or monetary cost to plaintiff is provided . . . the Court is not persuaded that the . . . requests will be unduly burdensome."); *Asberry v. Cate*, No. 11-2462, 2014 u.S. Dist. LEXIS 46334 (E.D. Cal. Mar. 31, 2014)("Moreover, if the responding party would necessarily have to gather the requested information to prepare its own case, objections that it is too difficult to obtain the information for the requesting party are not honored."); *see also McKinney/Pearl Rest., LP v. Metro. Life Ins. Co.*, 322 F.R.D. 235, 242 (N.D. Tex. 2016)("A party resisting discovery must ... submit[] affidavits or offering evidence revealing the nature of the burden."); *Doe v. OSU*, No. 2:16-cv-171, 2018 U.S. Dist. LEXIS 176752 (S.D. Ohio Oct. 15, 2018) ("Although [defendant's] $50,000 cost estimate [for responding] is not insubstantial, the Court questions whether [defendant] could provide an accurate estimate while at the same time being unsure of how to go about identifying responsive documents.")