Gordon Arata
MONTGOMERY BARNETT

New Federal Discovery Rules Tilt to Defendants

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Discovery in federal court should get less burdensome and expensive for defendants, thanks to upcoming changes in the Federal Rules of Civil Procedure.

The Federal Judicial Conference Committee on Rules of Practice and Procedure proposed the amendments to the Federal Rules of Civil Procedure, and, on April 29, 2015, the United States Supreme Court approved the changes. The amendments have been sent to Congress and, absent congressional intervention, which is not expected, the rules will become effective December 1, 2015. As the rules are procedural and not substantive, they will apply immediately to every case pending before United States federal district courts.

The amendments include various changes, including to Rule 1 governing cooperation between the parties; Rule 4 governing the length of time a plaintiff has to effect service of process, and Rule 37 governing e-discovery. Here, I focus on Federal Rule of Civil Procedure 26 governing the scope of discovery. In particular, amended Rule 26(b)(1) will read as follows, with the additions underlined and the former rule struck through:

> **Scope in General**. 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 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.* ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to~~

~~lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

This amendment enacts two changes particularly important to defendants. First, the scope of discovery is narrowed, eliminating that discovery may be obtained merely so long as "the discovery appears **reasonably calculated** to lead to the discovery of admissible evidence." Instead, discovery is permitted only if it is "relevant to any party's claim or defense."

Second, the amendment (re-)introduces proportionality as a factor to consider in ordering discovery, stating that parties "may obtain discovery … proportional to the needs of the case, considering 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 Committee Note acknowledges that similar proportionality factors were present in Rule 26(b)(2)(C)(iii) but were eliminated in 1993.

These amendments are seen as part of a general pro-defendant movement to change the Federal Rules of Civil Procedure to reign in some of the excesses in the existing system. In line with the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), these amendments are designed to protect defendants' due process rights not to have expensive discovery imposed on them without adequate judicial oversight, including consideration of whether the costs imposed by the discovery are warranted.

These changes should be welcome to large defendants; however, as has been seen with previous rules changes, their practical effect will depend on defendants' use of them, and particularly on defendants' ability to secure favorable judicial precedent regarding their practical operation. Accordingly, defendants should be aware of these rules and prepared to invoke them where appropriate. More importantly, if you are in a position to think strategically about the long-term benefit of the industry, you should be on the lookout for potential test cases that can be used to secure favorable judicial precedent – particularly broad and / or burdensome discovery requests, for particularly non-meritorious or minor claims – to ensure these amendments have the beneficial effect the Rules Committee and Supreme Court intend.