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Broad Civil Discovery Protects Us From Deadly Products

Proposed rule changes could allow corporations to hide evidence

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Takata, the supplier of millions of defective air bags that are prone to fragment and send shards of metal flying through the cabin of the cars in which they are installed, recently denied a report that it had carried out secret tests (after normal work hours, and on weekends and holidays) on this defect and covered up the results. Two former employees, one of whom was a senior member of its testing lab, said that the secret tests in 2004 revealed the possible danger but that Takata executives discounted the results, ordered deletion of the test data, and did not alert federal safety regulators.

Meanwhile, details continue to emerge in the General Motors ignition switch crisis. Last month, it was reported that GM bullied one of its suppliers, in 2005, to continue producing a substandard ignition switch and leaned on the company to improve it even though it could not be fixed. The email emerged as part of the discovery process in a multidistrict litigation case against GM. that involves more than 100 lawsuits bundled together in federal court in New York. Other GM emails to the same supplier show that it placed an urgent order for 500,000 replacement ignition switches in December 2013 even though it took the company nearly two more months to recall cars with the defective part.

These two instances of large corporations covering up very significant safety hazards with their products highlight the critical importance of broad civil discovery to meaningful access to justice. Indeed, broad discovery as a means of allowing for a fair trial on the merits was one of the fundamental goals of the Federal Rules of Civil Procedure. In recent years, however, that purpose has been undermined by certain rule changes making it more difficult for a variety of plaintiffs, including those in product liability cases, to get their day in court. The stage is now set for even more restrictive changes—many limiting discovery—to take effect next year.

In September, the Judicial Conference of the United States approved, without debate, an extensive set of amendments to Rule 1 and Rules 26 through 37 of the Federal Rules of Civil Procedure, dealing with pretrial case management and discovery. The amendments are now before the Supreme Court, which is expected to officially propose them to Congress by May 1. Unless Congress acts to block adoption of these amendments, they will go into effect next Dec. 1. (For a detailed description of the proposed amendments, see "The Civil Rules Package as Approved by the Judicial Conference (September 2014)," by Thomas Y. Allman, from which much of the information herein was derived.)


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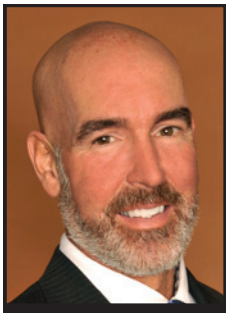
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Rule 26(b)(2)(C)(iii) (the "proportionality rule") provides that the court may act to limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit," considering "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues."

In 2013, the Rules Committee initially recommended modifying Rule 26(b)(1) so as to "limit the scope of discovery to what is proportional to the needs of the case." As noted in the comment submitted by the American Association for Justice, this would have represented a fundamental tilting of "the scales

of justice in favor of well-resourced defendants," in that a producing party could "simply refuse reasonable discovery requests and force the requesting party to prove that the requests are not unduly burdensome or expensive." (The current form of Rule 26(b)(1) provides that a party may obtain discovery of "nonprivileged matter that is relevant to any party's claim or defense" while authorizing, for good cause, a court to order "discovery of any matter relevant to the subject matter involved in the action." It also provides for discovery that is "reasonably calculated to lead to the discovery of admissible evidence.")

Part of the 2013 proposal also included provisions to lower the presumptive limits for discovery under Rules 30, 31, 33, and 36 that would have reduced the number of oral and written depositions, the time for oral depositions, and the number of interrogatories, and would have introduced a limit on requests for admission under the auspices of "decreasing the cost of civil litigation, making it more accessible for average citizens." These changes, along with the 2013 proposal to incorporate "proportional" and move the factors from Rule 26(b)(2)(C)(iii) into Rule 26(b)(1) were strongly opposed by the American Association for Justice, the Center for Constitutional Litigation, and other groups.

Lobbying Interests

First, these types of changes are patently unfair to product liability plaintiffs in that corporate defendants are typically in control of most, if not all, of the pertinent information as to liability. In a product claim, for instance, the defendant is often in exclusive possession of the information as to what it knew and when, what it did with that knowledge, and how many people the alleged defect has affected.

Changes like those proposed would increase the ability of corporate defendants to hide relevant evidence (which is directly contrary to the spirit of the rules of discovery, but is the sole reason these changes are being proposed by big corporate lobbying interests). This is contrary to the fundamental principle that the parties should have equal access to all relevant information. As one judge has noted, lawsuits are supposed to be decided by what the facts reveal, not by what facts are concealed. Impeding meaningful citizen access to our justice system is not a proper purpose of the rules.

Second, these types of changes would increasingly overburden judges and the judiciary, and cause even more expensive and protracted litigation. This is because the proposed changes would likely result in discovery disputes in more cases, as the defense will increasingly assert that the burden of producing the discovery outweighs any benefit forcing litigants and to litigate such discovery disputes. Further overburdening the courts certainly does not advance a fair and expeditious resolution of claims, and would be a giant step backward from the very reason broad discovery rules were adopted in the first place. Rule 1 of the Federal Rules of Civil Procedure states that the goal of the rules is "the just, speedy, and inexpensive determination of every action and proceeding."

The Rules Committee ultimately withdrew the proposed amendments to Rules 30, 31, 33, and 36 (and agreed to revise other proposed rule changes), but decided to approve the relocation of the proportionality factors in Rule 26(b)(2)(C)(iii) (with certain modifications) to Rule 26(b)(1) as well as the proposed deletions from Rule 26 (i.e. the list of examples of types and locations of evidence that is discoverable in Rule 26(b)(1) and the statement in that same provision that "relevant information need not be admissible at trial if it is reasonably calculated to lead to the discovery of admissible evidence") relating to the scope of discovery.

Accordingly, barring unexpected action from Congress before Dec. 1, 2015, Rule 26(b)(1) will permit a party to "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." The Committee Note was revised to expressly state that the relocation of the proportionality factors "does not place on the party seeking discovery the burden of addressing all proportionality considerations," and asserts that the change is "not intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional."

Still, even as modified, these changes reflect an effort to limit discovery. As such, these changes (and similar efforts to limit discovery at the state level) represent an effort to limit access to justice. They will allow companies like Takata and GM to have a greater chance in successfully hiding dangerous product defects from the public. This is contrary to the ethos on which the rules are based—the belief in citizen access to the courts and in the resolution of disputes on their merits.

There is no need for these changes as there are plenty of provisions in the current form of the rules which allow a court to limit discovery where appropriate. If and when they go into effect late next year, these changes are virtually certain to increase the number of discovery disputes and increase the courts' burden in managing discovery. We will also be more exposed to the dangers of secret product defects. ■

Michael A. D'Amico is a cofounder and Brendan Faulkner is a trial attorney at D'Amico, Griffin and Pettinicchi in Watertown. The firm focuses on personal injury, medical malpractice, nursing home negligence and product liability cases. For more on the proposed rule changes (as well as other dramatic shifts in the federal procedural system that disadvantage many categories of plaintiffs), see Professor Arthur Miller's article "Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure," 88 NYU L. Rev. 286 (2013).