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Will e-discovery get squeezed?

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New proposed amendments to the Federal Rules of Civil Procedure would limit discovery of electronic data and give defendants more opportunities for obstruction.

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The quest for proof in products liability cases might remind us of two rhetorical gems of 1960s pop culture. In 1965, Bob Dylan advised us with impeccable logic that “when you got nothing, you got nothing to lose.”¹ Two years later, chain-gang prisoner Paul “Cool Hand Luke” Newman made some of us feel a bit better by assuring us that “sometimes nothin’ can be a real cool hand.” Neither Bob nor Luke was a products liability lawyer.

If there are situations in which “nothin’ can be a real cool hand,” proving liability in the courtroom is not among them. In court, “when you got nothing” by way of evidence of liability, you and your client have everything to lose—and you will.

It is hardly surprising, then, that there are squads of lawyers whose main occupation is ensuring that plaintiff lawyers with products liability cases have nothing in the way of proof—or as close to nothing as can be achieved. It’s their job, and many of them are very good at it.² Lately they’ve been getting too good at it for comfort, and the ever-increasing contraction of discovery rights through court rule amendments helps them to keep secret information that will prove the products liability case.

For at least the past 15 years, the ability of requesting parties—which, in products liability cases, usually means the plaintiffs—to use the broad discovery rights originally envisioned in the Federal Rules of Civil Procedure, and the notice-pleading regime they complement, has been steadily curtailed.³ Similar developments have been seen in state courts, owing to the trickle-down effect of the federal rules on their state counterparts.

In major part, discovery rights have been truncated through neither the intransigence of opposing parties nor the rulings of judges—but through amendments to the rules themselves by the federal courts’ own official rule-makers,⁴ urged on by the lobbying of tort “reform” advocates.⁵

During that period, federal court liti-

gants have lost at least the following:

- the right to obtain information through lawyer-managed discovery, not through mandatory, limited disclosure requirements

- the right to determine how many interrogatories and depositions are necessary to develop adequate proof

- the right to depose a witness for as long as it takes to get answers to relevant questions

- the right to get all relevant information, not merely what the opposing party decides is supportive of claims and defenses

- the right to complete discovery without repeated hearings before judges or discovery masters, with the attendant cost in time and money.

Throughout this period, for every de jure right lost, an opposite de facto right has been created for defendants. Most of this occurred in the rule amendment cycles of 1993 and 2000.

The 1993 discovery amendments.

The 1993 amendments established the federal courts' current system of initial disclosure, which relieved federal judges of some of their discovery workload. The amendments also established presumptive limits of 25 interrogatories⁶ and 10 depositions⁷ per side in each case. Escape from the presumptive limits requires at least one motion by a requesting party and a decision by a judge, magistrate judge, or discovery referee. The net effect has been increased time and money spent on discovery—a change that has benefited defendants more than plaintiffs.

The 2000 discovery amendments.

These changes included proposals long advocated by both the American Bar Association's Section of Litigation and the American College of Trial Lawyers—organizations that, while nominally neutral, are populated largely by corporate and insurance defense counsel.

The rule-makers made initial disclosure mandatory for nearly all cases, in all courts; limited the required disclosure to information supporting the disclosing party's claim rather than requiring

disclosure of all information relevant to the case; established a presumptive limit of "one day of seven hours"⁸ for depositions; and—most critically—narrowed the scope of discovery defined in Rule 26(b)(1) from "the subject matter involved in the action" to "the claim or defense of any party."

What—or who—drives this curtailment of discovery rights? The public comments on the 2000 amendments show clearly the interests that promote this kind of rule-making: A number of the proposals that led to the 2000

amendments were supported by officers of, or advocates for, business and defense bar organizations. Among them were the Chemical Manufacturers Association, the Defense Research Institute, Dow Chemical Co., the Federation of Insurance and Corporate Counsel, Ford Motor Co., the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Manufacturers, the Product Liability Advisory Council, Roche Pharmaceuticals, Shell Oil Co., and various defense bar organizations.

Several proposals were opposed by consumer, public interest, and trial lawyer organizations, and by academics. Among the groups were the Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense Fund, the National Association of Consumer Advocates, the New York State Bar Association's Commercial and Federal Litigation Section, and ATLA. And both the scope-of-discovery amendment and a cost-shifting proposal (which the Judicial Conference later rejected) were opposed by the U.S. De-

partment of Justice.⁹

At its September 1999 meeting, the Judicial Conference handed the rule-makers a victory, approving all but one of the discovery amendments.

Targeting e-discovery

The latest phase of the campaign to curtail discovery rights began officially in August 2004 with the publication of a new set of proposed amendments to the rules, directed at perceived problems of electronic discovery and privilege waiver. The proposals are published

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to elicit comments from the judiciary, the bar, and the public on whether they should be adopted formally.

Where did the latest proposed rule amendments come from? While the 2000 amendments were being developed, a lobbyist for several business organizations urged the rule-makers to address problems related to inadvertent production of privileged materials. The Defense Research Institute made more extreme suggestions, including putting presumptive time limits on discovery of documents and electronic materials, and treating e-mail messages like telephone conversations rather than written memoranda.¹⁰

On its face, the analogy between sending e-mail and communicating by telephone not only is absurd, but flies in the face of modern business practices: E-mail has become the primary mode of

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