Alerts and Updates

FEDERAL RULE CHANGES TO IMPACT TIMING REQUIREMENTS, INDICATIVE RULINGS, SUMMARY JUDGMENTS AND AMENDING OF PLEADINGS

November 9, 2009

Many of the Federal Rules of Civil Procedure ("F.R.C.P.") will effectively change by the end of 2009, including provisions that impact timing requirements, indicative rulings, summary judgment and amending of pleadings. The Judicial Conference of the United States—through its Time-Computation Subcommittee and Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees—issued proposed amendments to the Federal Rules of Civil Procedure, which the U.S. Supreme Court approved on March 26, 2009, to be effective on December 1, 2009. In addition, the Civil Rules Advisory Committee of the Judicial Conference of the United States has proposed recommendations to amend F.R.C.P. Rule 26 in 2010, with respect to discovery of expert witnesses and expanded work-product protections.

Rule 6(a): "Time-Computation Project"

When word came down that the timing requirements of 91 provisions of the F.R.C.P. were set to change on December 1, 2009, it likely generated a collective sigh of relief from law firms, both big and small. Under the new "days are days" approach, calculating deadlines will become far less difficult. Lawyers no longer have to determine whether to include or exclude weekends, or which holidays a considered as such, when calculating federal court deadlines. Until now, such issues have, at times, caused discrepancies between court clerks' calculations and those of the lawyers.

As part of an overall "Time-Computation Project," F.R.C.P. 6(a), which is the rule that governs computing and extending time, has been modified to make the method of computing time consistent and clear. Presently, the computation of rules involving periods under 11 days are typically different than those for longer periods—intermediate weekends and holidays are usually omitted when computing shorter periods, but included for longer periods. This discrepancy has led to unnatural results, as it has not been uncommon for a 10-day period and a 14-day period that began the same day to also end on the same day due to intervening weekends and holidays.

Under the revised counting rules, intermediate weekends and holidays will be counted, regardless of the length of the specified counting period. A notable exception is when the counting period ends on a weekend or legal holiday, in which case, the deadline falls on the next business day that is neither a weekend nor a legal holiday. To compensate for the new

time-computation methods, the Advisory Committee of the Judicial Conference of the United States reviewed every rule to make sure that shorter deadlines would still be reasonable. To that end, most five-day deadlines will be extended to seven days and most 10-day deadlines will be extended to 14 days. The revised rules also implement seven-, 14-, 21- and 28-day periods as often as possible—so that deadlines will almost always fall on weekdays.

F.R.C.P. 6 will include a new subdivision (a)(2), which deals with the computation of time periods that are measured in hours. These deadlines begin to run immediately on the occurrence of an event and will naturally end when the allotted time expires. If the period ends on a weekend or legal holiday, however, the deadline is extended to the same time on the first business day that is not a weekend or legal holiday. For example, if a deadline is set to expire at 11:23 a.m. on a Saturday, it will actually expire at 11:23 a.m. on the following Monday. Another new provision has been added to address the timing of electronic filings: In the absence of a statute, local rule or court order providing otherwise, the last day of a period for an electronic filing ends at midnight—giving litigators who are pressed for time a few extra hours of leeway.

Although most of the deadline changes are minor, a couple of revisions are important to note. First, the deadlines for a Rule 50(b) renewed motion for judgment as a matter of law, a Rule 52 motion for amendment of the court's findings, and a Rule 59 motion for a new trial will be extended from 10 days to 28 days. These extensions flow from the recognition that the existing time lines are too short. The increased time to file such motions is intended to provide ample time to prepare satisfactory and complete post judgment motions.

Second, the timing provisions in Rules 56(a) and (c) have been replaced by new provisions that will allow a motion for summary judgment to be made at any time, from as early as the commencement of the action until 30 days after the close of discovery, unless a local rule or court order provides otherwise. If a motion for summary judgment is filed before a responsive pleading is due from the nonmoving party, the nonmoving party has 21 days after the responsive pleading is due to respond to the motion. The Advisory Committee noted that although the rule establishes the default-timing deadlines, those deadlines may be altered by court order or by local rule—and in most cases, are likely to be superseded by scheduling orders.

Significant Non-Time-Computation Amendments

Proposed F.R.C.P. 62.1 is an entirely new provision that codifies the common practice of indicative rulings presently followed in many circuits, although in differing formats. Indicative rulings arise when a motion is made on a matter that the

district court is in a better position to decide than the court of appeals, but the district court may not rule because an appeal has been filed. Rule 62.1 will allow the district court to defer ruling, deny the motion, or either indicate that it would be inclined to grant the motion if the case were remanded or state that the motion raises a substantial issue. This situation typically arises when a party files a Rule 60(b) motion to vacate a judgment after an appeal has been filed.

The use of indicative rulings can alleviate the squandering of judicial resources, but the Advisory Committee noted that it has been underutilized due to a lack of awareness. The enactment of Rule 62.1 is intended to make the practice of indicative rulings consistent where it is presently used and make more litigants and judges aware of its existence where it is not.

Although Rule 62.1 applies only when an appeal deprives the district court of authority to grant relief without appellate permission, the rule does not attempt to define the circumstances in which that occurs. To facilitate cooperation between the district courts and the courts of appeals and enable them to determine whether it is better to decide the appeal before deciding the motion, new Federal Rule of Appellate Procedure 12.1 has been added to work in tandem with Rule 62.1. Rule 12.1 facilitates remand for a ruling on a motion if the district court has indicated that the motion raises a substantial issue or that the district court would grant the motion if the court of appeals remanded for that purpose.

Another key change will be ushered in under F.R.C.P. 15, which governs the right to amend a pleading as a matter of course. Under the existing language of Rule 15(a), the right to amend a pleading to which a responsive pleading was required depended on whether a responsive pleading or an F.R.C.P. 12 motion had been served—a responsive pleading terminated the right to amend as a matter of course, whereas a motion did not. Under the revised version of F.R.C.P. 15, that distinction has been abandoned. A party will now have 21 days to amend once as a matter of course after an F.R.C.P. 12(b), 12(e) or 12(f) motion and the associated responsive pleading. However, the periods are not cumulative and, if a responsive pleading is served after a motion, no new 21-day period commences. Leave to amend can still be sought under Rule 15(a)(2).

On the Horizon: 2010 Changes

The Civil Rules Advisory Committee of the Judicial Conference of the United States has recommended two significant additional changes to the Federal Rules of Civil Procedure for adoption in 2010. First, changes are proposed to F.R.C.P. 26, which would impact the discovery of expert witnesses. Currently, testifying witnesses are required under F.R.C.P. 26(a)(2)(B) to provide a written report detailing the expert's expected opinion and the basis for it, only if the expert is

"retained or specially employed to provide expert testimony" or if the expert's duties "regularly involve giving expert testimony." Testifying experts outside of these two categories are exempt from filing a detailed written report, an exemption that the 2010 proposal would continue. Proposed F.R.C.P. 26(a)(b)(C), however, would require testifying experts that are exempt from F.R.C.P. 26(a)(2)(B)'s requirements to disclose both the subject matter of their testimony and a summary of facts and opinions to which the expert will testify.

The other substantial proposed change to F.R.C.P. 26 will extend work-product protection to drafts of the new (a)(2)(C) disclosure as well as (a)(2)(B) expert reports. Additionally, in recognizing the need for full and complete communication between an attorney and the expert, the new rule will extend work-product protection to *all* communications between an attorney and an expert, unless the communication falls into one of three categories: (1) communications about the expert's compensation; (2) communications of facts and data that the party's attorney has provided and that the expert considered in forming his opinions; and (3) assumptions provided by the party's attorney to the expert upon which the expert relied in forming his opinion.

Another significant change scheduled for 2010 is to F.R.C.P. 56, which would be completely revamped to bring the rule up to date with current practice, without changing the underlying summary judgment standard. Under current practice, courts routinely grant partial summary judgment or grant summary judgment outside of a motion for summary judgment, even though neither procedure has support in the present text of F.R.C.P. 56. The new rule would allow a court—after giving parties notice and a reasonable time to respond—to grant summary judgment for a nonmovant, grant the motion on grounds not raised by the parties or "consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." The new rule would additionally provide textual support for the common practice of partial summary judgments under subdivision 56(a). The committee has noted that the underlying standard would not be changed, and that the overhaul of Rule 56 "will not affect continuing development of the decisional law construing and applying these phrases."

For Further Information

If you have any questions regarding the upcoming changes to the Federal Rules of Civil Procedure or would like more information, please contact any member of the Trial Practice Group or the attorney in the firm with whom you are regularly in contact.