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FINANCIAL SERVICES LITIGATION
ALERT

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Proposed Changes to Federal Rules Would Place New Limits on Discovery

By Monica C. Platt

Proposed changes to the Federal Rules of Civil Procedure would significantly affect the scope of discovery. The modifications arise from concern about the long life of a case before trial or settlement and a worry that discovery is not proportional to the needs of a case — perceived as the result of both attorney attitudes (a need to know absolutely every fact about the case and an overly adversarial approach) and lack of court involvement. The hope is that the proposed rules will foster greater efficiency and cooperation between attorneys, lead to early and frequent management by the court, and encourage lawyers and courts to think about proportionality of discovery.

Proposed changes to Rule 26(b) require discovery to be "proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, 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 new requirement would mean that a responding party could object based on proportionality and the burden would be on the requester to demonstrate proportionality.

There are also new rules dealing with the preservation of evidence. Under proposed Rule 16(b)(3), the scheduling order may provide for the preservation of electronically stored information (ESI). Additionally, whereas Rule 37(e) currently addresses the failure to *provide* ESI, proposed Rule 37(e) would extend the possibility of sanctions to the failure to *preserve* discoverable evidence. The proposed rule lays out in detail the scope of possible sanctions. If a party fails to preserve discoverable evidence that should have been preserved in anticipation or conduct of litigation, the court may permit additional discovery, order curative measures, or order the party to pay reasonable expenses caused by the failure. If a failure caused substantial prejudice and was willful or in bad faith, or if it irreparably deprived a party of a meaningful opportunity to present or defend against claims and was negligent or grossly negligent, the court may also give an adverse inference jury instruction or impose any of the various sanctions currently in Rule 37(b)(2)(A). As a practical matter, the proposed rule change would require attorneys to focus even more heavily than they already do on issuing prompt litigation hold memos.

Among the other proposed changes, notable modifications include a reduction in the number of allowed depositions from 10 to five and a reduction in the maximum length of depositions from seven hours to six hours. The proposed rules limit interrogatories to 15, rather than 25. Proposed Rule 26(d)(2) also allows parties to make requests under Rule 34 (relating to the production of documents, ESI, and tangible things, and the entry on to land) 21 days after service of the summons and complaint. Such requests would be considered served on the date of the first Rule 26(f) conference.

Reactions have been mixed. In particular, some have noted that attorneys and judges already have

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the power through active case management to keep discovery under control and proportional to the case, and that it does not make sense to make new rules applying limits to all cases where complex litigation might be better served through an individualized approach. One federal judge has responded to these criticisms by explaining that the proposed rules would provide the default, and that a judge can always remove the case from the micromanagement of the rules if necessary. Lawyers can also accommodate one another's requests when the case warrants broader discovery. The proposed rule changes may also be beneficial where a judge does not take an active approach to case management.

The new rules will not take effect until December 2015 at the earliest, and there is still potential for further modification. There will be three more hearings — one in D.C., one in the Midwest, and one in the West — between now and February 2014 before the new rules are finalized. ◆

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