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FEDERAL RULES

MASS TORTS

The 2015 amendments to the Federal Rules of Civil Procedure contain a number of significant changes regarding how discovery is to be conducted under the Federal Rules, attorney William J. Beausoleil says. The author focuses on mass tort litigation, and examines whether federal courts applying the new rules are becoming ''more receptive to putting reasonable limits on discovery in mass tort litigation in the future, particularly discovery that is targeted at corporate defendants.''

Impact of the Federal Rules Amendments on Mass Tort Litigation

BY WILLIAM J. BEAUSOLEIL

More than six months have passed since the most recent amendments to the Federal Rules of Civil Procedure were put into effect.

The December 2015 amendments contain a number of significant changes regarding how discovery is to be conducted under the Rules, including revisions to Rule 26(b)(1) that now emphasize that discovery should be proportional to the needs of the case.

William J. Beausoleil is a litigation partner and a member of the Product Liability & Toxic Torts group at Hughes Hubbard & Reed. He also served as a team member on the Duke Law Judicial Studies Center 'Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality.'

This article examines whether newly minted decisions discussing the recently amended Rule 26(b)(1) have signaled whether federal courts might be more receptive to putting reasonable limits on discovery in mass tort litigation in the future, particularly discovery that is targeted at corporate defendants.

Proportionality has been a part of the Federal Rules in some manner since 1983, but the December 2015 amendments have provided increased emphasis on the proportionality factors. Conceptually, putting proportionality concepts front and center should favor reining in discovery costs. The specific proportionality factors in new Rule 26(b)(1) are:

- Importance of the issues at stake in the case;
- Amount in controversy;
- The parties' relative access to relevant information;
- Parties' resources;
- Importance of the discovery in resolving the issues; and
- Whether the expense of the proposed discovery outweighs the likely benefit.

Applying these proportionality factors is easier in some contexts than it is in others. Unlike in a two-party contract dispute where the measure of recovery may be

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relatively defined, application of these factors in the mass tort context will usually be more difficult. Looking just at the first four factors listed above, the plaintiffs' attorneys in mass torts actions usually argue that: 1) their cases involve public health and safety issues surrounding, e.g., whether a widely distributed product causes injury; 2) each of the hundreds or even thousands of plaintiffs, or possible plaintiffs, will allege injuries, including pain and suffering–type damages, that may reach or even exceed seven figures, individually; 3) that the company that, e.g., developed or sold the product necessarily possesses essentially all of the relevant information regarding the product in dispute; and 4) that the corporate defendant has resources that vastly exceed those of the typical individual tort plaintiffs.

Corporate defendants and their counsel should recognize that the individualized facts of specific mass torts might allow these contentions to be put under close scrutiny and either limited or even debunked. For example, mass torts actions are almost invariably populated by some level of inarguably non-meritorious claims, and varying degrees of injury, which plaintiffs' attorneys would like to ignore. Further, the presence and involvement of well-funded plaintiffs' bar driving the litigation should also be considered, as should the fact that not all evidence sought will necessarily be ''importan[t] . . . in resolving the issues.''

Although the new discovery rules have barely been in effect for six months, there have been positive signs proportionality may be working to the benefit of corporate defendants facing expansive discovery requests. For example:

■ In March 2016 the federal court managing the Takata Airbag Multi District Litigation (''MDL'') held that the defendants in that matter were entitled to redact certain financial and marketing information from their production after applying the proportionality analysis to the dispute. *In re Takata Airbag Prods. Liab. Litig.*, No. 15-2599-MD-MORENO, 2016 BL 107916 (S.D. Fla. Feb. 29, 2016). In so ruling, the MDL court cited a statement made in the 2015 Year-End Report on the Federal Judiciary that the December 2015 amendments ''crystalize[] the concept of reasonable limits on discovery through increased reliance on the commonsense concept of proportionality.'' Id.

■ A month earlier, in January 2016, the federal court assigned to the Xarelto MDL denied Plaintiffs' request for production of personnel files, citing the newly amended proportionality factors contained in Rule 26(b)(1), as well as prior Circuit law that considered the production of such materials. *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 313 F.R.D. 32 (E.D.La. Jan. 26, 2016).

■ Finally, although not in a mass tort context, in Douglas v. Kohl's Dep't Stores, Inc., a federal court considering a discovery dispute in consumer protection litigation rejected four motions to compel discovery and held that the plaintiff's discovery requests were not proportional to the needs of the case. *Douglas v. Kohl's Dep't Stores, Inc.*, No. No: 6:15-cv-1185, 2016 BL 131074 (M.D. Fla. Apr. 26, 2016) (finding that the requests for production of all e-mails containing a specific term (''TCPA'') from the defendant's senior management was disproportionate to the needs of the case).

As more decisions applying the newly amended rules are issued, we will know better whether the federal courts will consider challenges to discovery differently than they had prior to the Federal Rules amendments. However, these cases, and others, undoubtedly provide some positive signs that the federal courts will be more amenable to limiting discovery to only that which is proportionate to the reasonable needs of the parties involved in mass tort litigation.

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Class Action Litigation Report®

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