New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 239—NO. 26 THURSDAY, FEBRUARY 7, 2008 ALM

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY EDWARD M. SPIRO

Uses, Limitations, Pitfalls of Routine Discovery Devices

Attorneys often conduct discovery based on habits and assumptions that generally go untested, some of which might not stand up under judicial scrutiny.

For example, can a defendant pose an interrogatory seeking all the facts upon which the plaintiff will rely to prove a particular claim? What protections, if any, does a high-ranking corporate, government or other official who denies relevant knowledge have against submitting to a deposition? Are nonparties entitled to greater protection against burdensome discovery than parties are? And to what extent can an attorney obtain documents through a trial subpoena after the close of discovery?

This article discusses a number of recent decisions from the U.S. District Court for the Southern District of New York addressing these practical problems faced in everyday practice.

Interrogatories

Responding to interrogatories can be onerous and extremely time-consuming. The Federal Rules of Civil Procedure have put an end to the automatic service of voluminous interrogatories by limiting parties to 25 interrogatories each (including subparts) absent a court order or stipulation authorizing a greater number.[1] In addition, much of the information once sought through interrogatories is now exchanged automatically, pursuant to the mandatory disclosure provisions of Rule 26(a).

The Southern District of New York has further curtailed the use of interrogatories through Local Civil Rule 33.3. Rule 33.3(a) restricts interrogatories served at the beginning of discovery "to those seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents" and other physical evidence.[2] For interrogatories served later, during discovery, Rule 33.3(b) provides that interrogatories may only be served if "they are a more practical method of obtaining the information sought than a request for production or a deposition." Finally, Rule 33.3(c) authorizes the service of "contention interrogatories" only at the conclusion of other discovery, at least 30 days prior to the discovery cut-off date. Although all three of these limitations can be varied by court order, they do offer substantial protection against burdensome interrogatories which can be generated in minutes and require countless hours of time and effort for response.

In a decision filed in *Clean Earth Remediation and Construction Services Inc. v. American International Group Inc.*,[3] Southern District Magistrate Judge Henry Pitman relied on Local Civil Rule 33.3 in declining to compel plaintiff to respond more fully to defendant's interrogatories, and suggested that the work product doctrine may impose additional limitations on interrogatories aimed at uncovering evidentiary support for specific claims.

The defendant had propounded a series of interrogatories requesting identification of "each fact upon which Plaintiff will rely to support the allegations" of various paragraphs in the complaint, as well as the identification of each person with knowledge of, and any documents containing, those facts. The plaintiff responded to those interrogatories first by objecting to the extent that they attempted to "elicit trial or litigation strategy" protected by the work-product doctrine, and on various other grounds including vagueness and overbreadth, but went on to identify individuals and documents responsive to each request.

Magistrate Judge Henry Pitman found that these interrogatories went beyond the limited interrogatories authorized by Local Civil Rule 33.3(a) and noted that a number of decisions, from both within and outside the Southern District of New York, have held that interrogatories seeking all facts supporting a particular allegation are "inherently improper."[4] He went on to observe that courts which have permitted such interrogatories have characterized them as contention interrogatories, which under Local Civil Rule 33.3(c) may not be served until the conclusion of discovery.

Deposition on Written Questions

In a decision filed in *Bouchard v. New York Archdiocese*,[5] Southern District Judge Charles S. Haight Jr. approved the seldom-used discovery device of depositions on written questions authorized by Federal Rule of Civil Procedure 31 as a means of accommodating the competing interests of protecting the witness (a high official of the Catholic Church) from extensive discovery on a subject he claimed to know nothing about, and permitting the plaintiff to engage in legitimate discovery on her claims. This tension is a recurring problem in discovery where plaintiffs seek to depose senior officials (be they religious, corporate or governmental), who in turn disclaim any knowledge of the matter at issue.

The plaintiff had previously sought to depose Cardinal Egan in her suit against the New York Archdiocese and others arising out of the alleged sexual assault of plaintiff by a Catholic priest. Magistrate Judge Pitman granted the Cardinal's motion for a protective order, but only to the extent that any questioning of the Cardinal be done through a total of no more than 25 written questions. Cardinal Egan objected to that order, arguing that he should not be deposed at all because the plaintiff had not come forward with any evidence to rebut his assertion that he lacked relevant information. In affirming Magistrate Judge Pitman's order, Judge Haight noted with approval Magistrate Judge Pitman's observation that "parties to an action are ordinarily entitled to test a claim by a potential witness that he has no knowledge," observing that "[t]he discovery rules furnish the tools for testing."[6]

Subpoenas: Burdensomeness and Relevance

The question of whether, and the extent to which, a nonparty is entitled to some heightened consideration of the burdens imposed by a Rule 45 subpoena is surprisingly unsettled. Some courts have found that "the obligations of a nonparty under Rule 45…are equivalent to the duties of parties responding to discovery under other rules," while others "suggest that weight should be given to nonparty status in assessing the burden of compliance."[7] The latter view has resulted

Edward M. Spiro *is a principal of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, concentrating in commercial litigation. Mr. Spiro is the coauthor of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson West 2007).* **Judith L. Mogul** *assisted in the preparation of this article.*

in some courts being "particularly sensitive to weighing the probative value of the information sought against the burden of production on the non-party."[8]

In a recent decision filed in *Bridgeport Music Inc. v. UMG Recordings Inc.*,[9] Magistrate Judge James C. Francis IV adopted somewhat of a middle ground in this debate, requiring the nonparty witness to respond to a document subpoena, but leaving open the possibility that the witness could shift some of the expense to the requesting party if the cost of compliance became too onerous. The subpoena in that copyright infringement case was directed toward an attorney who had represented the plaintiffs more than 15 years earlier in negotiating the licensing agreement giving rise to the suit. The witness had testified at deposition that the term "records" as used in this contract had not been intended to encompass "new media," which he testified, based on his experience with other agreements, was always addressed separately. Defendants then sought production of other licensing agreements negotiated or drafted by the attorney during that time period.

Magistrate Judge James V. Francis rejected the plaintiffs' argument that the subpoena was unduly burdensome because it would require the witness to search hundreds of files now in storage that were not indexed by date. He observed that the attorney could likely narrow his search to encompass only the files of his music industry clients, and restrict his search within those files to the two years identified in the subpoena. He stressed that the materials sought were relevant, particularly as a possible means of impeaching the attorney's testimony based on his experience in the industry and his role in negotiating other contracts. He found that their relevance was undiminished by their age, inasmuch as they were to be used to interpret a contract of the same vintage. In light of the relevance of the materials sought, Magistrate Judge Francis rejected the plaintiff's contention that the attorney's status as a nonparty rendered the burden imposed by the subpoena unreasonable.

'Biovail'

Although courts are willing to weigh a nonparty's burden of production against the relevance of material sought in a subpoena, on occasion they find that as a threshold matter, the requested information is not relevant to a claim or defense of any party under Rule 26(b)(1). That is precisely what Judge Richard Owen appears to have done in *In re Biovail Corp. Securities Litigation*.[10] Biovail, the defendant in that securities fraud case arising out of fluctuations in its stock price, had taken the position in separate federal and state court litigation in New Jersey that the drop in its stock price actually resulted, not from any fraud on its part, but rather from a conspiracy of stock research firms and short-selling hedge funds to drive down the price of Biovail stock.

Through third-party subpoenas in the New York action, Biovail sought discovery from the alleged members of that conspiracy, defendants in the New Jersey cases, arguing that the information sought was necessary to prove the conspiracy and exonerate itself in the New York action. Among other documents, the subpoenas requested any and all documents concerning Biovail, its subsidiaries, and current or former employees or shareholders, "including, but not limited to, communications relating to…Biovail, any transaction in Biovail stock, or any draft or final versions of research reports, analyst reports or bulletins." The subpoenas also requested "any and all documents concerning or reflecting communications" with 39 separate companies.[11]

Judge Richard Owen found that although the requested information might be relevant in the New Jersey actions (in which discovery had been stayed), he concluded that for the purposes of the New York action in which the subpoenas were issued, "the virtually limitless financial and other information" Biovail sought was "unnecessary and irrelevant." He went on to hold that the "burden these demands place[d] on the subpoenaed non-parties and diversion of their staff to provide it far outweigh[ed] any probative value of the information." He reasoned that to prove its defense, Biovail did not need to prove the existence of a conspiracy, but only needed to show that the statements of outsiders caused the drop in its share price, a contention it could prove from its own records. Because Biovail did not "need" the requested discovery, Judge Owen concluded that the burden of production outweighed any probative value of the requests.[12] Although not central to his holding, Judge Owen did observe that Biovail had previously violated a protective order in that action by using documents obtained through discovery and designated for use only in the New York action to initiate and pursue the New Jersey litigations.[13]

Subpoena Timeliness

As a reminder that a court-ordered discovery schedule applies with equal force to third-party discovery as to discovery among the parties, Southern District Judge Richard J. Sullivan quashed a subpoena issued to the plaintiff's employer five months after the close of discovery in *McKay v. Triborough Bridge and Tunnel Authority*.[14] The defendants conceded that some of the information sought through the subpoena should have been requested during discovery, but argued that they only realized that they did not have the information, and that it might be relevant, during a postdiscovery court-ordered mediation. They urged the court to exercise its discretion to order compliance with the subpoena because it sought documents that would be used as trial exhibits and that went to the reasonableness of plaintiff's conduct.

Citing *Dodson v. CBS Broadcasting Inc.*,[15] Judge Sullivan drew a distinction between Rule 45 trial subpoenas that seek documents for "last-minute trial needs (such as for originals of documents where copies were produced in discovery…)" and subpoenas that are clearly designed for discovery purposes. He rejected the defendants' suggestion that the subpoena in this case should be enforced as a trial subpoena, noting that its use as a discovery device was "evidenced by the fact that the subpoena [was] returnable to Defendants' counsel's law firm."[16] Judge Sullivan held that service of the subpoena after the close of discovery was improper, and admonished defendants for not having sought to reopen discovery prior to issuing the subpoena.

Treating the defendants' opposition to the plaintiff's motion to quash as a motion to reopen discovery, he held that defendants had failed to show why they could not have appreciated the relevance of the subpoenaed documents during the discovery period. He also observed that to the extent the requested documents were covered by a previous, timely discovery request, defendants' recourse for plaintiff's noncompliance should have been a motion to compel rather than the post-discovery subpoena.

Conclusion

These decisions reflect an increasing trend in the Southern District of New York to regulate discovery to avoid unnecessary expense and burden. This renewed vigor in policing discovery may in part be a response to the explosion of potential discovery materials generated by electronically created and stored documents and the prospect that discovery will impose ever greater burdens on the system if it is not properly controlled.

Whatever the explanation, it seems clear that many judges in this district are prepared to take a more active hand in keeping discovery reasonable and manageable.

1. Fed. R. Civ. P. 33(a).
2. The information a party may initially seek through the interrogatories authorized under Local Civil Rule 33.3(a) is somewhat broader than Rule 26(a)'s mandatory disclosure requirements under which a party must only disclose evidence that it may use to support its claims or defenses, as distinct from evidence that is relevant to the subject matter of the action.
3. 245 F.R.D. 137 (S.D.N.Y. 2007).
4. 245 F.R.D. at 141 (citing, inter alia, *Grynberg v. Total S.A.*, 2006 WL 1186836, at *6-7 (D. Col. May 3, 2006); *Convolve Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 173 (S.D.N.Y. 2004) (Francis, M.J.); *Thompson v. United Transp. Union*, 2000 WL 1375293 (D. Kan. Sept. 15, 2000)).
5. 2007 WL 4563492 (S.D.N.Y. Dec. 18, 2007).
6. Id., at *1.
7. *Wertheim Schroder & Co. v. Avon Prods. Inc.*, 1995 WL 6259, at *6 (S.D.N.Y. Jan. 9, 1995) (Francis, M.J.). Compare *Castle v. Jallah*, 142 F.R.D. 618, 620 (E. D. Va. 1992) with *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 48-9 (S.D.N.Y. 1996) (Edelstein, J.); *Travelers Indem. Co. v. Metropolitan Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005).
8. *Fears v. Wilhelmina Model Agency Inc.*, 2004 WL 719185, at *1 (S.D.N.Y. April 1, 2004) (Pitman, M.J.).
9. 2007 WL 4410405 (S.D.N.Y. Dec. 17, 2007).
10. 2007 WL 4302727 (S.D.N.Y. Nov. 30, 2007).
11. 2007 WL 4302727, at *2.
12. 2007 WL 4302727, at *1.
13. 2007 WL 4302727, at *3.
14. 2007 WL 3275918 (S.D.N.Y. Nov. 5, 2007).
15. 2005 WL 3177723 (S.D.N.Y. Nov. 29, 2005) (Peck, M.J.).
16. 2007 WL 3275918, at *2 n.2.