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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Practical Observations by Judges On the Scope of Discovery

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In the last several months, judges of the U.S. District Court for the Southern District of New York have issued a number of rulings on discovery disputes that offer both pragmatic resolution of the dispute at hand and broader, instructive commentary on the scope of permissible discovery. These rulings make clear that Southern District judges are increasingly losing patience with discovery for discovery's sake. Perhaps in recognition of the proposed amendments to the Federal Rules of Civil Procedure designed to reduce discovery burdens (expected to take effect in December 2015), those judges are taking to heart Rule 1's admonition that the Federal Rules should be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." This column discusses several of those opinions.

Relevance

Relevance objections to discovery requests rarely get much traction, given the expansive reach of Rule 26(b)(1), which defines relevant information for purposes of discovery to include not just admissible evidence but evidence that "appears reasonably calculated to lead to the discovery of admissible evidence." For this reason, courts and litigants alike generally view the scope of discovery as broader than the scope of admissibility under the Federal Rules of Evidence. However, Southern District Judge Lewis A. Kaplan recently granted a protective order barring, on relevance grounds, the depositions of certain witnesses while recognizing that their testimony might be relevant "in the capacious sense" of both Federal Rule of Evidence 401 and Federal Rule of Civil Procedure 26(b)(1).

Relying on Rule 26(b)(2)(C), Kaplan found that the evidence that could be obtained from the witnesses was sufficiently unimportant that discovery should be circumscribed, notwithstanding that the evidence sought was relevant.

Kaplan issued his decision in *In re Bank of New York Mellon Corp. Forex Transactions Litigation*,[1] a multi-district litigation consisting of multiple private actions and a government action brought against the Bank of New York Mellon arising out of the bank's foreign exchange execution. The bank sought to depose 19 members of a plaintiff customer class beyond the named plaintiffs who had already been deposed. Kaplan had earlier entered an order providing that discovery in the private actions could be used in the government's case, and vice versa, and permitting the government and the private plaintiffs, on the one hand, and the bank on the other, each to take up to 150 fact witness depositions.

The bank argued that the testimony of the 19 absent consumer class members was critical to its defense of the government's claim that the bank had engaged in a massive scheme to defraud its customers by giving them misleading and confusing information related to its foreign exchange execution. It asserted that the witnesses might reveal disagreement in the industry about the meaning of certain key terms and also show that certain customers were not actually misled.

Kaplan prefaced his decision with a number of general observations about discovery, including that: "[d]iscovery is a means of obtaining evidence that is important to the resolution of cases—ideally in a 'just, speedy, and inexpensive' manner," and "[b]lindly focusing on the universe of relevant information can lead to a very expensive discovery process.'" Noting that Rule 26(b)(2)(c) requires the court to '"limit the frequency or extent of discovery otherwise allowed by these rules' [i.e., discovery of information that is relevant in the broadest sense]" where the burden of discovery outweighs its likely benefit, Kaplan instructed that "courts must exercise practical judgment in defining the scope of pretrial discovery lest a vehicle intended to facilitate just, speedy and inexpensive determinations become an obstacle to accomplishing any of those goals."[2]

With that introduction, Kaplan went on to find that despite the complexity of the litigation, and the "vast amounts of money at stake," the bank had overreached in seeking to depose the 19 absent class members. Although the plaintiffs and bank alike focused only briefly on the question of relevance, Kaplan held that relevance was the "issue at the heart of [the] matter." Specifically, he found that because the government's fraud claims did not require the government to show either that the victim was actually deceived or even harmed, the testimony of customer witnesses was only tangentially relevant at best. Kaplan concluded that while the testimony sought "might be relevant, in the broad Federal Rule of Evidence 401 sense," the chain of relevance was so attenuated that it did not justify the burden and expense of the requested information.[3]

The bank might have fared better had it focused more attention on the question of relevance in opposing the protective order. After losing the motion, the bank moved for reconsideration, offering four additional relevance

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arguments not raised initially, because it did not perceive "the relevance of the disputed depositions…[to be] primarily at issue." Kaplan declined to reconsider his decision holding that after "giv[ing] short shrift to that issue in its original opposition, the bank may not use a motion for reconsideration as a ploy to get a second bite at the apple."[4]

Discovery on Discovery

Judge Kaplan, Judge Katherine B. Forrest and Magistrate Judge James C. Francis IV each issued decisions on the question of "discovery on discovery." Kaplan and Forrest considered the extent of permissible inquiry into deposition preparation, and Francis addressed the showing needed to probe the adequacy of document collection efforts.

Deposition Preparation

Kaplan's decision was in the context of an earlier dispute in *In re Bank of New York Mellon Corp. Forex Transactions Litigation*. In that instance, the customer class plaintiffs sought an order compelling deposition witnesses to testify as to the number of documents they reviewed in preparation for their depositions, whether they were videotaped during preparation, and, if so, whether they had viewed those videotapes prior to testifying. In a brief decision denying that request, Kaplan observed that "[t]he Court well understands that the extent and manner of the preparation of witnesses is an appropriate subject bearing on credibility and thus for cross-examination." He nevertheless held that "[t]he intrusion of this subject into a litigated motion with respect to deposition testimony… seems unnecessary and unreasonable."[5]

Quoting Kaplan's observation that the "extent and manner of the preparation of witnesses is an appropriate subject bearing on credibility and thus for cross-examination," Forrest held that the plaintiff's lawyer in *Estate of Jaquez v. City of New York* could inquire of deposition witnesses as to whether their attorneys had shared with them the substance of earlier witnesses' testimony.[6] Forrest reasoned that although much of witness preparation is shielded from disclosure by the attorney-client privilege and the work-product doctrine, counsel taking a deposition is entitled to inquire of a witness whether his recollection was refreshed by a specific document shown to the witness during preparation.

She rejected the distinction, relied upon by many practitioners, between showing a witness a document and sharing its substance with the witness. Observing "in for a penny, in for pound," she held that "[a]n attorney cannot shield from disclosure that he or she has shared the substance of a witness's testimony, which has refreshed the deponent's recollection, simply by reading or summarizing it to the witness instead of having the witness read it him or herself."[7]

Forrest suggested a detailed road map to questioning designed to elicit the extent to which a witness's recollection was refreshed by other witness testimony while avoiding intrusion into attorney-client communications protected by privilege or the work-product doctrine. Specifically, she posited that counsel could first ask the deponent if he or she had read, or had read to or summarized for the deponent, the testimony of other witnesses, the answer to which, she held, was "in no way privileged."

If the answer to that inquiry was affirmative, Forrest suggested the next follow-up question should be whether the testimony refreshed the deponent's recollection. If the deponent responds to that question with a "yes," then the next question should seek a list of the depositions that refreshed the deponent's recollection, followed by questions seeking to establish the topics on which the deponent's recollection was refreshed by each witness, if the deponent recalls. Forrest concluded that inquiry into the content of discussions with counsel about those topics would be off limits as such discussions are privileged.[8]

These rulings make clear that Southern District judges are increasingly losing patience with discovery for discovery's sake.

Document Production

Judge Francis issued a pair of decisions in *Freedman v. Weatherford International*,[9] declining to order production by the defendant of reports comparing the results of electronic searches for the litigation to results from prior searches in connection with internal investigations of the defendant corporation. The underlying litigation was a securities fraud class action brought after Weatherford issued multiple earnings restatements. Weatherford had one law firm conduct an internal investigation prior to issuing the second restatement, and another firm conduct a separate investigation after it issued a third restatement only four months later.

In *Weatherford I*, Francis denied the plaintiffs' motion to compel production of a report comparing the results of the electronic searches conducted in the litigation with the searches conducted in the internal investigations, holding that the plaintiffs' request was "outside the bounds of Rule 26…." He reasoned that while there are "circumstances where such collateral discovery is warranted," the plaintiffs had not shown an adequate factual basis for their belief that the current production was deficient.[10]

On reconsideration, plaintiffs attempted to make the required showing by submitting 18 emails from Weatherford custodians that were produced by third parties and not by the defendant. Reiterating that discovery designed to test discovery is permissible in some circumstances, Francis in *Weatherford II* cautioned that such "meta-discovery" "should be closely scrutinized in light of the danger of extending the already costly and time consuming discovery process ad infinitum."[11]

Francis observed that the comparison reports requested by plaintiffs would not have contained most of the 18 emails "omitted" by Weatherford's production, rendering the remedy sought by the plaintiffs ill-suited to the task of testing the adequacy of defendant's production. Francis then admonished that the Federal Rules of Civil Procedure "do not require perfection." Noting that Weatherford had reviewed millions of documents and produced hundreds of thousands of documents, consisting of more than four million pages, he concluded that "[i]t is unsurprising that some relevant documents may have fallen through the cracks." For that reason, and because the reports sought by the plaintiff were of "dubious value," he declined to compel production of the reports.[12]

Conclusion

The opinions discussed above reflect a pragmatic approach to discovery disputes, focused on obtaining relevant information to facilitate the timely resolution of litigation as well as permitting discovery to test the sources and truthfulness of witness recollection. These decisions also reflect an increasing judicial impatience with discovery requests at the edges of relevance, particularly when the discovery is aimed at the discovery process itself.

1. 2014 WL 5392465 (SDNY Oct. 9, 2014).
2. Id. at *2 (internal citations omitted).
3. Id. at *6.
4. *In re Bank of New York Mellon*, 2014 WL 6879835 (SDNY Nov. 6, 2014).
5. *In re Bank of New York Mellon*, 2014 WL 4827945 (SDNY Sept. 22, 2014).
6. 2014 WL 5369091 SDNY Oct. 10, 2014).
7. Id. at *4.
8. Id. at *3.
9. 2014 WL 3767034 SDNY July 25, 2014) (*Weatherford* I); 2014 WL 4547039 (SDNY Sept. 12, 2014) ((*Weatherford II*).
10. 2014 WL 3767034, at * 3.
11. 2014 WL 4547039, at *3 (internal citation omitted).
12. Id. at *4.