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Changing Times – A Guide to the Proposed Amendments to the Federal Rules of Civil Procedure

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Over the past two years, litigants have faced significant changes to the Federal Rules of Civil Procedure that are critical to navigating the federal litigation landscape, including rules covering discovery, case management, and preservation of electronically stored information ("ESI"). These changes, which the Judicial Committee on Civil Rules ("Advisory Committee") first explored at a May 2010 conference at the Duke University School of Law, are arguably the most monumental modifications to discovery since the 1993 amendments requiring initial disclosures. From May 2010 to April 2013, the Advisory Committee developed the proposed changes, which are designed to reach the goal of the FRCP as codified in Rule 1—"[securing] the just, speedy, and inexpensive determination of every action and proceeding."[1] These amendments realize this goal by expediting the early stages of each matter, ensuring that discovery is proportional and limited to the claims and defenses at issue in the litigation, and providing that parties are not subjected to unnecessary costs related to an overly broad scope of discovery or document preservation obligations.

The amendments were open for public comment from August 2013 to February 2014 and the Advisory Committee reported receiving more than 2,300 comments, which ran the gamut from eagerly welcoming the changes as crucial to sharply condemning them as unnecessary and unfair.[2] After careful review of the comments the Judicial Conference's Committee of Rules of Practice and Procedure (the "Standing Committee") revised the proposed rules and submitted the changes to the Judicial Conference in September 2014. The Judicial Conference recommended the changes to the U.S. Supreme Court, which has the authority to promulgate the FRCP under the Rules Enabling Act of 1934. The U.S. Supreme Court is currently considering the revised rules and can promulgate them on or before May 1, 2015. Any such rules would take effect on December 1, 2015, unless Congress enacts legislation to reject, modify, or defer them. As a result, the earliest any changes could take effect is December 1, 2015.

Generally, the proposed amendments focus on three issues: early case management, proportionality, and preservation. The early case management changes accelerate the earliest stages of litigation, while the proportionality proposals balance discovery's scale and scope to the matter's specific needs in an effort to curtail related costs. The preservation changes encourage litigants to preserve discoverable information while harmonizing the substantial jurisdictional differences of over-preservation related sanctions. These changes reduce unnecessary costs and burdens associated with over-preservation or spoliation that is not in bad faith or

not willful.

The remainder of this post will delve into some of the noteworthy changes regarding early case management. Many of these changes aim to reduce the delay at the beginning of litigation. The revised Rule 4(m) decreases the time period for serving a defendant from 120 days to 90 days. If service has not occurred at that point, the judge may dismiss the action. However, the Court would retain the right to extend the amount of time in which the Plaintiff must effectuate service if the Plaintiff shows good cause.

Rule 16(b) has also been overhauled. Currently, Rule 16(b)(2) provides that the Court must issue the scheduling order within the earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared. Revised Rule 16(b)(2) mandates that a judge issue the scheduling order within the earlier of "90 days after any defendant is served or 60 days after any defendant appears" although the judge may extend the time on finding good cause for delay. Rule 16(b)(1) currently authorizes the issuance of a scheduling order after receipt of the parties' Rule 26(f) report or after consulting "at scheduling conference by telephone, mail, or other means."[3] The proposed amendment strikes "mail, or other means" and instead requires direct simultaneous communication between parties, at an in-person scheduling conference. Finally, the proposed amendments include adding a new Rule 16(b)(3)(v), permitting a scheduling order to require a discovery conference before a party may move for a discovery order. While many judges employ similar provisions in their individual rules, this amendment would balance the authority of the federal bench to direct such a conference which, it is believed, could eliminate unnecessary, time-consuming, and costly motion practice.

Rule 26 is also subject to numerous amendments including proposed Rule 26(d)(2), which permits a party to serve Rule 34 document requests prior to a Rule 26(f) conference, but no earlier than 21 days after the receiving party was served in the litigation. The requests will be deemed served as of Rule 26(f) conference. This is in stark contrast to the current rule which forbids serving any request for production prior to the Rule 26(f) conference. This change is among changes intended to facilitate a more meaningful, informed, and focused conversation at the 26(f) conference.

In our next post, we will explore the proposed amendments regarding the proportionality realm of the rules. If you or your institution has any questions regarding federal practice issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750 or Dina Demosthenous at ddemosthenous@cullenanddykman.com or at 516-357-3756.

[1] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure—Request for Comment* (2013), *available at* http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf.

[2] The end date was an extension from the original February 15, 2014 deadline.

[3] Fed. R. Civ. P. 16(b)(1)(B).