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FEDERAL RULE CHANGES: WHAT'S AT STAKE

When the rights of the injured or violated are vindicated in court, we all benefit. Not only do individuals get justice, but also future violations are prevented, and internal information about corporate wrongdoing is disclosed. This disclosure comes not only from public trials, but also from evidence collected during pre-trial "discovery" and made public.

The Judicial Conference of the United States is proposing to change drastically the Federal Rules of Civil Procedure to significantly limit discovery. These changes would benefit corporate wrongdoers trying to hide information in a case. The result would be not only that victims might be unable to build needed evidence to prove their case, but also that the wider public, including policy and advocacy groups, might never learn core facts about corporate wrongdoing.

On August 15, 2013, a six-month public comment period will open on the proposed rule changes. Here is why it is vital to comment in opposition to on these proposed rule changes.

These proposals will give wrongdoers new tools to avoid providing information to the plaintiff-victim – information that is not only relevant but possibly critical to their case.

- Contrary to Federal Rules that have been in place for 75 years, these proposed rule changes give wrongdoers the ability to argue that information, which is solely in their control, is too expensive or burdensome to produce even though this information may be critical to the victim's case.[1]
- Specific rule changes also include setting artificial limitations on how much information a victim can ask of a wrongdoer during discovery.[2]
- Other provisions would weaken rules meant to ensure that wrongdoers do not destroy documents, and would invite corporate wrongdoers to "ignore their affirmative duties to preserve evidence."[3] This should be of special concern now that many records are stored electronically, digitally or in "clouds," which could disappear in an instant simply by not paying a monthly "cloud" bill.
- The proposals, ostensibly meant to cut costs in civil cases, will have the opposite effect by increasing the time spent sorting out disputes that are resolved with the current rules.
- While these rule changes would specifically impact cases in federal court, they would also likely impact state court rules as well, as states frequently adopt the Federal Rules as their own.

Especially hurt will be plaintiff-victims in fact-intensive cases like civil rights and employment discrimination, as well as cases involving product liability, bank fraud, environmental violations,

and other complex cases like anti-trust, *where evidence vital to proving the case is often in the sole possession of the wrongdoer(s)*.

- A wrongdoer who controls the evidence already has an enormous built-in advantage and these rules would strengthen this advantage. As Public Justice explains, "The longstanding understanding underlying the rules has been that the party in control of documents and information is in the best position to produce them. Shifting the expense to the requesting party, which has no control over the way the responding party chooses to maintain its information, facilitates discovery evasion and encourages producing parties to generate inflated estimates of the cost of making evidence available."[4]
- Among the kinds of cases that could be hurt by these rules are employment discrimination cases. The decision to fire a victim who has been sexually harassed at work, for example, may involve several people (a boss, human resources, etc.). Employees are often prohibited from taking emails and documents with them, no matter how important they are to proving the employer violated the law. Witnesses in such cases often refuse to speak to an employee's attorney without being forced to testify under oath. The discovery limitations under these rule proposals would provide many opportunities for the employer to "hide the ball" and prevent the victim from proving their case.
- Similarly, in complex antitrust cases, the companies "have the bulk of the relevant information regarding the market, the product, and the alleged conduct, while plaintiffs tend to be on the outside looking in at the outset of a case."[5]

The problem isn't overuse of or overbroad discovery by victims, but rather defendants trying to "hide the ball" by refusing to provide relevant discovery and deliberately burying key documents.[6]

- Much of the discovery "costs" of which corporate wrongdoers complain are due to their applying resources to hide information or preventing the disclosure of documents. This should not be a basis to make it even harder to get information out.
- There is no empirical data from the Federal Judicial Center justifying these changes.[7]

PLEASE SUBMIT COMMENTS ON THE FOLLOWING WEBSITE: www.regulations.gov

We also encourage you to reach out to other organizations and interested parties to urge them to submit comments.

PUBLIC HEARINGS

In addition to the public comment period, the Judicial Conference will hold three public hearings. The first one will be in Washington, DC on November 7, 2013. Two additional hearings in other parts of the United States will be held in early winter.

NOTES

[1] See, e.g., Comments of Public Justice, P.C. and the Public Justice Foundation to the Advisory Committee on the Civil Rules on the Draft Proposals To Amend Discovery Rules, March 1, 2013. Also, writes *Trial Magazine*, "The new rule would require that discovery 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 discovery in resolving the issues, and, most significantly, whether the burden or expense of the proposed discovery outweighs its

likely benefit. This new standard essentially gives defendants the specific tools to avoid producing relevant information that is necessary for the plaintiffs to prove their case." Elisabeth M. Stein, Proposed Changes to Discovery Rules Loom, *Trial Magazine* (forthcoming September 2013).

[2] Rules 30 and 31 relating to depositions would be significantly changed. Current rules allow for 10 depositions, each of which may take seven hours. The new rules limit the number of depositions to five of each, while limiting the number of hours for oral depositions to six, cutting the current amount of time for oral depositions by *more than half*. Rule 33 relating to the number of interrogatories would also be changed. Current rules allow for 25 interrogatories. The new rule would cut that to 15, including all discrete subparts. Rule 36 would create a limit of 25 Requests for Admissions, including all discrete subparts. This is a major change since it adds a limit where one currently does not exist. The changes are presumptive, meaning that courts will presume they should apply unless an appeal is made otherwise. So while it may be technically possible to overcome these limits, this will be difficult and therefore they will apply in many important cases.

[3] See., e.g., Nineteenth Century Rules For Twenty-First Century Courts? An Analysis and Critique of 21st Century Civil Justice System: A Roadmap For Reform Pilot Project Rules (Implementing The Final Report On The Joint Project Of The American College Of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System) Analysis and Critique Prepared by Center for Constitutional Litigation, PC, Washington, DC March, 2010. (This proposal "radically alters the standard by which spoliation of evidence is judged. Currently, a duty to preserve arises when litigation is reasonably anticipated, and even negligent breach of the duty can be sanctioned. *Pension Plan v. Banc of Am. Sec., LLC*, No. 05-civ-9016, 2010 WL 184312, *12 (S.D.N.Y. Jan. 15, 2010) (Shira A. Scheindlin, D.J.) (emphasis added). Under the existing regime, the level of culpability (negligence, recklessness, intentional conduct) affects the degree of sanction, not the possibility of it. *Id*. The existing regime is deeply grounded in the protection of the integrity of judicial processes. *Id*. at *12 & n.24.") Writes *Trial Magazine*, "[T]he Judicial Conference recently added a change to Rule 37(e) dealing with sanctions for failure to preserve. This rule change completely replaces the "safe harbor" provision for preservation of electronically stored information with a set of standards for when a court may cure or sanction failure to preserve any evidence, not just electronically stored information. The change would specifically place limitations on an adverse inference jury instruction as a cure for negligent failure to preserve evidence, even though numerous states specifically permit it. The rule change also allows the court to consider 'proportionality' of the preservation efforts, likely as an appeal to defendants who do not want to preserve large amounts of information." Elisabeth M. Stein, Proposed Changes to Discovery Rules Loom, Trial Magazine (forthcoming September 2013).

[4] Comments of Public Justice, P.C. and the Public Justice Foundation to the Advisory Committee on the Civil Rules on the Draft Proposals To Amend Discovery Rules, March 1, 2013.

[5] Letter from Eric Cramer, President, Committee to Support the Antitrust Laws, to Advisory Committee on Civil Rules, March 22, 2013. ("Antitrust conspiracies and cartels, by their nature, are secretive and sometimes can only be proven by putting together strands of direct evidence of agreement from multiple sources, by assembling circumstantial evidence from a variety of sources and means, or both. Second, anticompetitive schemes are often hatched and executed deep within the workings of complex businesses and industries. Taking a single antitrust case from motion practice to a jury trial can require proving relevant markets, proving anticompetitive conduct, showing impact and damages flowing from the challenged conduct, and refuting procompetitive justifications. The evidence vital to each of these elements and issues is regularly in the sole possession of the defendants, or sometimes dispersed amongst a variety of far flung third parties. For antitrust plaintiffs facing information asymmetry, the discovery rules must provide fair access to defendants' and third parties' information and documents—or the antitrust laws cannot be effectively enforced through private civil litigation.")

[6] See, e.g., David Halpern, Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence , Public Citizen (July 1997), http://www.citizen.org/congress/article_redirect.cfm?ID=918. Examples of typical discovery abuses include providing misleading responses to discovery requests – responses that obscure the fact that the defendant is deliberately withholding documents sought by the plaintiff; shielding mountains of documents behind the attorney-client privilege without demonstrating or even confirming that all such documents are subject to the privilege; seeking elaborate protective orders aimed at hiding damaging product information from the public, the media and government agencies – as well as from others who claim injury from the same product; and finally, forcing plaintiffs to agree to forever seal the records of a case – including, sometimes, the transcripts of a public trial. Some cases involved defendants refusing to comply even after judicial orders were issued. In other cases, defendants blatantly concealed and destroyed documents relevant to their defective products – often while denying that such records ever existed. These problems are certainly continuing and could become worse under new e-discovery rules. See also, for example, "Court Awards $750,000 as Civil Contempt Sanction For Discovery Abuse," E-discovery Case Law Update , April 15, 2011.

[7] See, Comments of Public Justice, P.C. and the Public Justice Foundation to the Advisory Committee on the Civil Rules on the Draft Proposals To Amend Discovery Rules, March 1, 2013. ("[T]he empirical work of the Federal Judicial Center … supports the conclusion that the rules are working. Indeed in its presentation at the Standing Committee's January 2013 meeting, the Federal Judicial Center Research slide presentation showed that the large majority of practitioners believed discovery costs were in fact proportional to the stakes in the litigation.")