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THE DISCOVERY PROCESS

After a lawsuit is filed, the search for evidence begins. In civil litigation, a party has the right to obtain “discovery” of any matter that is not privileged and that is relevant to the subject matter of the lawsuit. Discovery is a phase of the pre-trial litigation process during which each party will attempt to “discover” pertinent facts, information, and documents from the other party. Often discovery is the longest and most expensive phase. Five common discovery tools are: (1) requests for production; (2) interrogatories; (3) requests for admission; (4) document subpoenas to third parties; and (5) depositions.

A request for production seeks potentially relevant documents. Interrogatories are written questions posed by a party that the other party must answer in writing and under oath. A request for admission is a list of key facts that one party asks the other to either admit or deny in the context of the lawsuit. Subpoenas are similar to requests for production but are used by the parties to compel entities that are not parties to the suit to produce documents or provide testimony. Finally, depositions are inquiries in which a witness is required to attend and answer questions under oath before a court reporter.

Both sides depend to some extent on discovery to pursue or defend a lawsuit. Court rules are designed to make this process wide-ranging and straightforward. Many litigants, however, do not understand how intrusive and expensive discovery can be. As a result, they are resistant to requests that they think are unreasonable and prying. Parties rarely see eye-to-eye about what the other side is entitled to “discover.” If the parties cannot work out their discovery dispute, then one side typically files a motion with the court seeking an order resolving the dispute prior to trial. Four recent cases involving typical discovery disputes between civil litigants are discussed below.

COURT WEIGHS COMPETING INTERESTS IN DISCOVERY REQUESTS

Usually, courts will deal with discovery disputes by balancing a party’s need for information against the intrusiveness of the request. In Biomet, Inc. v. Fleury, the issue was whether the discovery requested was overbroad and unduly burdensome. Norman C. Fleury, Jr. and his wife filed a lawsuit against Biomet, Inc. for an allegedly defective prosthesis used as a knee replacement for Mr. Fleury. After the knee prosthesis disintegrated, Mr. Fleury had to undergo a second knee replacement surgery. The Fleurys believed that the prosthesis originally used was improperly manufactured and past its shelf life.

The Fleurys served a request to produce on Biomet seeking all documents relating to any claims between 1990 and 1997 that had involved polyethylene components similar to those in Mr. Fleury’s knee prosthesis. Biomet objected to the Fleurys’ request, arguing that the request sought far too many claims. Biomet also pointed out that it had a database of 4,200 reports that it would have to go through in order to determine which reports were relevant. Each report had a coversheet but the backup documents were stored elsewhere. To obtain all the records requested, Biomet explained that it would have to hire three full-time employees.

Biomet accordingly refused to comply with the Fleurys' request to produce. In response, the Fleurys filed a motion to compel. The trial court granted the Fleurys' motion and ordered Biomet to produce all relevant documents. Biomet appealed that order to the Florida Second District Court of Appeal.

The Second District sought to balance the competing interests. It weighed the Fleurys' need for the documents against Biomet's right to be free from burdensome discovery requests. The appellate court held that Biomet need only produce the 4,200 cover sheets for each report. The Fleurys' counsel could then examine those sheets to identify any relevant reports. Backup documents for those reports could then be produced. This meant Biomet would not have to hire additional personnel, because the Fleurys' counsel would perform the inspection. The court balanced the competing interests of the parties and crafted a solution that was an appropriate compromise to facilitate the parties' search for relevant evidence and information.

A PARTY RESPONDING TO REQUESTS TO ADMIT MUST CONDUCT ITS OWN REASONABLE INVESTIGATION OR POTENTIALLY FACE HARSH SANCTIONS

A party responding to discovery requests has a duty to make reasonable investigation into relevant facts and is obligated to respond within the time required under the applicable rules of civil procedure. Harsh sanctions may be imposed against a party that ignores these obligations. However, before imposing sanctions, courts will generally first give the responding party an opportunity to amend or supplement its responses.

In Essex Builders Group, Inc., and Travelers Casualty & Surety Co. v. Amerisure Insurance Company and OneBeacon Insurance Co., a defendant, OneBeacon, served interrogatories and requests for admission on plaintiff Travelers. Plaintiff served its responses late. Beacon moved the Court to deem the plaintiff's requests for admissions admitted.

In considering the matter, the U.S. District Court for the Middle District of Florida noted that plaintiff's late responses to Beacon's requests for admission should result in those requests being deemed admitted by operation of law. The Court also recognized that, under the federal rules, the plaintiff could withdraw or amend its admissions if the admissions greatly interfered with presentation of the case on the merits and if withdrawal would not prejudice the other party.

The Court then applied this test to the admissions served upon plaintiff. With respect to one admission, it held that the admission would eliminate presentation of the merits and would allow Beacon to escape liability because of plaintiff's mere inadvertence. The Court found this to be a "grossly unjust" result. According to the Court, allowing an amendment would not be prejudicial, because the original answer had only been a few days late.

The Court also refused to deem as admitted other requests as to which the plaintiff had claimed to lack information necessary to either admit or deny the requests. The Court did find the plaintiff had improperly restricted its answers to matters within its personal knowledge. The plaintiff had not made reasonable inquiry of the third-party that had assigned it the claim and who would have had more knowledge. However, the Court said the sanction of deeming the

response to be an admission was “a severe one.” Instead, the Court ordered the plaintiff to make a reasonable inquiry and then amend its answers.

THIRD PARTIES RESPONDING TO DOCUMENT SUBPOENAS ARE ENTITLED TO “REASONABLE COMPENSATION”

Under some circumstances, a party seeking discovery must pay for expenses incurred in responding to the discovery. At times, this even includes payment for the value of the information or materials produced. In Klay v. Humana, Inc., numerous physicians brought a class action against many of the nation’s largest managed care providers. They alleged a racketeering conspiracy involving systematic underpayment for healthcare services. The managed care providers served the physicians with an interrogatory that required the physicians to identify all evidence supporting their allegations. In their answer, the physicians identified statistical reports compiled by the American Medical Association that purported to show doctors’ income had generally declined as a result of the managed care providers’ actions. The AMA licenses that data to any person or corporation willing both to pay a substantial license fee and to agree not to disseminate the data to any other person without the AMA’s consent. The physicians had paid the license fee to obtain the Reports.

After the physicians identified the reports, the managed care providers served a subpoena on the AMA seeking both the reports and the raw data that underlay those reports. The AMA objected to the subpoena under Federal Rule of Civil Procedure 45(c)(3)(b). That rule permits a district court to invalidate a subpoena in whole or in part, if the subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, as necessary to protect the property rights of the person being subpoenaed. The court may order production of the requested documents only upon specified conditions, including reasonable compensation for the producing party.

The U.S. District Court for the Southern District of Florida held that the managed care providers had shown a substantial need for the Reports, and therefore ordered the AMA to produce them. The Court imposed the express condition, however, that only the managed care providers’ outside counsel, experts and litigation personnel could view the material, and only for purposes of the litigation. The AMA had also argued that the managed care companies should have to pay the AMA its customary license fee of \$195,000 as reasonable compensation for the reports. The Court denied this request and only awarded the AMA its expenses actually incurred in complying with the subpoena, not its ordinary license fee.

On review, as an issue of first impression, the Eleventh Circuit Court of Appeals considered the meaning of “reasonable compensation” under Federal Rule of Civil Procedure 45(c)(3)(b). It looked to see whether the license fee sought by the AMA was reasonable. The Court held that reasonable compensation should be based upon what the party producing documents has lost, not what the subpoenaing party has gained. In considering whether compliance with the subpoena caused a loss to the AMA, the Court gave great weight to the strict limitations placed on the managed care providers’ use of the data. It held that the confidential nature of the data was not threatened. Moreover, the AMA did not suffer a loss in the commercial value of the Reports, for it could still sell the Reports to any willing buyers.

Requiring the managed care providers to pay for information vital to their defense would, under these circumstances, have provided an improper windfall to the AMA. Therefore, the appellate court concluded that the district court did not abuse its discretion when it required the managed care providers to pay the AMA only its production costs and not its ordinary license fee for the data.

COURTS CANNOT ALLOW UNFETTERED ACCESS TO A LITIGANT'S COMPUTER

“Electronic” discovery, involving the uncovering of relevant electronic and computer files, has become a hot topic. In Menke v. Broward County School Board, the issue of how far “electronic” discovery should proceed came to dominate the dispute between the parties. The Broward County School Board filed a complaint against one of its teachers, David Menke. Menke had been suspended from his teaching position for “misconduct in office.” He had allegedly exchanged sexually explicit e-mails with minor students and had made derogatory comments regarding school personnel and operations with students. The case was forwarded to the Florida Division of Administrative Hearings for resolution by an administrative law judge. Although this action proceeded under administrative law, the same general rules apply to civil litigation.

Instead of making specific requests for e-mails or instant messages in which Menke may have communicated with his students, the Board sought to have its expert inspect everything on the computers in Menke’s household. Menke objected to such an intrusive inspection on the grounds that it would violate his Fifth Amendment rights and his right to privacy. Menke argued that the Board was only entitled to discover information that was *relevant* to the lawsuit. As such, the Board’s request was too broad and had not been sufficiently focused on the facts of the lawsuit. Menke further objected that such an inspection could potentially reveal privileged communications between Menke and his wife, attorneys, accountants, clergy and doctors. The Board was not entitled to examine any of these communications and therefore Menke asserted that the Board’s request to see everything was improperly overbroad.

The administrative law judge acknowledged that privacy issues existed. He nevertheless entered an order allowing the Board to have its expert search all of Menke’s household computers, including Menke’s personal computer, his wife’s, and his children’s. The judge sought to protect Menke’s rights by ordering the Board’s expert not to retain, provide or discuss with the Board, or the Board’s counsel, any communications which might be deemed privileged. The judge further allowed Menke to have his own expert present during the inspection. Menke’s expert could then object and mark any documents or files that Menke believed the Board was not entitled to inspect. The judge provided that he would personally first examine any objected to documents to ensure that they were proper before the documents were turned over to the Board.

Menke appealed the administrative law judge’s ruling to the Fourth District Court of Appeal. The Fourth District agreed with Menke. The appellate court stated that it was improper for the judge to allow the Board to comb through “every byte, every word, every sentence, every data fragment, and every document, including those that are privileged or that may be part of privileged communication, [while] looking for ‘any data’ that may evidence communications

between Menke and his accusers.” In today’s world, the Court observed that “instead of filing cabinets filled with paper documents, computers store bytes of information in an ‘electronic filing cabinet.’” Noting that a litigant cannot normally have free access to its adversary’s business or personal filing cabinets to see if the cabinets contain any information useful to that litigant, the Court stated electronic records are no different. It emphasized that a litigant may only make specific requests for production and may only ask the party to produce copies of relevant and non-privileged information. Computers retain much more information about parties, such as what Internet sites an individual has visited or the amount of time spent in Internet chat rooms. Under these circumstances, the appellate court found the possibility of egregious discovery abuse to be heightened.

Accordingly, the Fourth District Court of Appeal held that the judge should not have allowed the Board virtually unfettered access to all of Menke’s household computers. The judge should have required the Board to employ a less intrusive means of discovery. The proper initial step would have been for the Board to serve a request to produce for hard copies of all the relevant documents. After this initial request, if the Board could show that Menke was deleting and/or destroying electronic evidence, then the judge might exercise the power to order a broader inspection into Menke’s computer. The appellate court observed that the Board had not proven or even alleged that Menke was destroying any evidence or thwarting discovery. As a result, the Board should have initially used the least intrusive means of discovery first – a request for production.