Federal Discovery Rules Create Insurance Litigation Tools

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Litigators who practice in federal court are aware of the Dec. 1, 2015, changes to the Federal Rules of Civil Procedure. The amendments made a number of changes to discovery practice, but two in particular have wide-ranging implications: the changes to the scope of permissible discovery and the new requirements for formal discovery responses and objections. A number of articles in this publication and others have reminded practitioners to adapt to the new rules.

Federal district courts, for their part, have begun to reject discovery requests that do not comply, and even to sanction lawyers who make noncompliant requests and responses. One prime example is Judge Mark W. Bennett's opinion in Liguria Foods Inc. v. Griffith Laboratories Inc., No. C 14-3041-MWB, 2017 WL 976626 (N.D. Iowa Mar. 13, 2017) in which Judge Bennett directed both parties to file all their written responses to each other's discovery requests, then entered an order advising the parties that virtually all of the responses — of the typical broad variety, such as general objections to obligations beyond the Federal Rules of Civil Procedure and nonspecific objections to vagueness and overbreadth — were improper. Judge Bennett even itemized the problematic objections by response and cited the new rule each violated. A warning that such responses would be met with sanctions in the future was issued in stark terms. Similar cases are cited in this edifying Law360 article.

Insurance coverage litigators, representing both insurers and policyholders, will not be exempt, of course. And since the scope of discovery determines which facts are to be at issue in trial, the new rules will have implications for how coverage cases play out substantively. As in any other litigation, insurance coverage cases have certain recurring discovery requests and scenarios that come about frequently. Those situations, and in turn the discovery strategy they implement, are bound to be changed by the new rules.

Discovery Objections

Rule 34(b)(2)(B) was amended to require objections to discovery requests to be stated "with

specificity." An objection now must address the substance of the request, rather than the prior practice of simply reciting a broad ground. Characterizing requests as "overbroad and unduly burdensome" is a classic of the genre, but in Fischer v. Forrest, No. 14 Civ. 1304 (PAE) (AJP), 2017 WL 773694, at *3 (S.D.N.Y. Feb. 28, 2017) Magistrate Judge Andrew J. Peck succinctly explained that the December 2015 amendments require litigants to explain "Why is it burdensome? How is it overly broad?"

Also, Rule 34(b)(2)(C) now requires that an objection "state whether any responsive materials are being withheld on the basis of that objection." This provision is expressly intended by the Advisory Committee to function hand-in-glove with the "objection with specificity" requirement. When objections are specific, they will frequently apply to only some documents sought by a request. Now, the objecting party must explain the scope of what they withhold for such objections.

Several possibilities emerge for coverage litigation. In situations where the carrier asserts multiple coverage defenses or a policyholder asserts multiple legal arguments justifying coverage, clever litigants may sometimes be able to use this new requirement to suss out how much documentary support each one has. For example, a set of discovery requests seeking documents related to each individual coverage defense is a standard tool of insured-side lawyers. The insurer may assert similar objections to the scope of each of the requests. But if the insurer withholds documents on some of those objections but not others, that may be a significant clue to which defenses the insurer believes have documentary support. Carrier-side lawyers will need to think ahead if they wish to avoid tipping their hand.

The need for specific objections and to disclose whether documents have been withheld should also, in general, promote earlier exchange of documents because blunderbuss objections can no longer be used to stiff-arm production until the last minute. That may in turn lead to quicker settlements, especially in the coverage world, where insureds may assert baseless bad faith claims and insurers may include coverage defenses which are not central to their case.

Scope of Discovery

For many years, Rule 26 had provided in substance that relevant material was discoverable if it were either admissible or reasonably calculated to lead to the discovery of admissible

evidence. Despite the advisory committee's insistence otherwise in multiple comments to the rule, lawyers (and sometimes courts) had a tendency to ignore the 'relevant' limitation and assume that the 'reasonably calculated to lead to admissible evidence' qualifier itself defined the scope of discovery. With the 2015 amendment, the rule now defines the scope of discovery as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

The deletion of the "reasonably calculated" language, now rephrased and moved to the end of Rule 26(b)(1), re-alerts the bar and district courts to the relevancy limitation. In other words, "[t]he test going forward is whether evidence is 'relevant to any party's claim or defense,' not whether it is 'reasonably calculated to lead to admissible evidence.'" In re Bard IVC Filters Prods. Liab. Litig., 317 F.R.D. 562, 564 (D. Ariz. 2016). Moreover, the new proportionality requirement imposes a limitation on the scope of discovery which seeks to reduce the proverbial "fishing expedition."

The narrower scope of — or, at least, renewed attention to the proper scope of discovery — will affect the discovery strategies of both insurers and insureds.

Carriers, for their part, are likely to enjoy a new tool to resist extracontractual discovery. Policyholders frequently propound broad requests for the claim files of unrelated matters which have similar issues to the claim being litigated. A similar mode of discovery demand — or, from the perspective of carriers' counsel, another common category of irrelevant request — seeks documents regarding the carriers' prior interpretation of key policy terms.

In Dobro v. Allstate Insurance Co., No. 16cv1197-AJB (BLM), 2016 WL 4595149 (S.D. Cal. Sept. 2, 2016), Judge Barbara L. Major decided against discovery on the carrier's treatment of similar claims based in part on the new discovery rules. Plaintiffs sought to compel the production of a list of names and addresses for thousands of third-party insureds whose water damage claims had been denied based on the same exclusion as their own, and the

court's approval for a form letter to those insureds seeking information. The carrier produced an affidavit from its claims adjuster attesting to its inability to search across claim files in the manner requested.

Citing the new Rule 26 scope of discovery language and emphasizing the proportionality requirement, Judge Major held that while under California law, discovery regarding other claims is appropriate if properly limited, the proposed procedure would include irrelevant information and was disproportionate to the case. The insureds' demand in Dobro may have been unusually aggressive, and litigation outcomes are of course always fact-dependent, but Dobro does show that federal judges may use new Rule 26 to limit discovery that would go beyond the policy's application to the claim at hand.

Insureds have their own discovery pet peeves. Renewed attention to the relevancy limitation may at times limit inquiry into issues of prior knowledge, mitigation of risk, culpable or intentional conduct, or other coverage defenses that require an inquiry into the insured's activities. While wide-ranging discovery on these issues is surely necessary when they are raised, at the margins, insureds may attempt resistance on relevance grounds.

Conclusion

The alterations to the discovery rules may not quite create a brave new litigation world by themselves, but all litigants will have to shift their thinking. The paradigm of broad discovery characterized by boilerplate objections is changing. Coverage disputes in particular, which typically involve multiple overlapping legal and factual issues, will probably experience a focusing of discovery in light of the new rules.

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