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Can E-Discovery Violate Due Process? Part 2

Proposed amendments to the Federal Rules of Civil Procedure for e-discovery don't go far enough.

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The rule that a defendant bears all of the costs of responding to the other side's discovery requests also implicates important constitutional issues. Specifically, forcing a defendant to pay significant discovery expenses (without any contribution from the plaintiff) absent any finding of liability arguably infringes the defendant's right to due process. The due process clause of the Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law."[21] A defendant's bank accounts fall squarely within the category of property protected by this provision, as the Supreme Court has recognized.[22] Such property cannot be deprived "except pursuant to constitutionally adequate procedures"[23] — for example, "notice and opportunity for hearing."[24]

wch party pays the costs of the discovery it requests, subject to adjustments by the court.[37] As one professor explained in supporting this approach: "placing the costs of discovery provisionally on the person asking for it, but allowing for judicial involvement to make adjustments, may both generally give incentives for the optimal production of information and permit a safety valve in the unusual case."[38] Some of the factors a court might consider include whether the party from whom the discovery is sought retained information in a manner that makes retrieval particularly expensive or cumbersome, failed to provide relevant information during initial disclosures, thereby drawing out discovery, or otherwise drove up the price of discovery through its litigation strategies. Such an approach would help ensure that discovery is used to obtain legitimately needed information and that neither side uses discovery as a strategic ploy. In addition, it would protect a defendant's due process rights by ensuring that a defendant is not forced to spend huge amounts of money producing discovery even though no court has ever found that it engaged in improper conduct. Finally, such an approach would facilitate greater and more direct court involvement in discovery, which is a principal purpose behind the Duke Conference Rules Package amendments, by giving courts a very direct role in balancing the burdens of discovery between the parties.

A more modest step would be to expand cost shifting for electronic discovery, since that is one of the driving forces behind abusive and expensive discovery requests. While some courts have sanctioned cost-shifting for electronic discovery in their courtrooms, the rules currently do not require that courts consider cost-shifting when overseeing discovery.[39] An amendment mandating that courts consider the use of cost-shifting when a party seeks electronic discovery would place the onus of bur-

densome discovery requests on the party making the requests, reducing the prospect for the impermissible deprivation of property without due process and encouraging requests that are more narrowly tailored to obtaining relevant evidence. Moreover, because cost-shifting is largely guided by a checkerboard of nebulous standards that vary from court to court, the Committee should consider establishing clearer guidelines for the practice. A sensible starting point for these guidelines are the seven factors enunciated by Judge Shira Scheindlin in Zubulake v. UBS Warburg LLC: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.[40] In addition, the American Bar Association has also articulated sixteen factors a court should apply when considering cost shifting.[41] Incorporating the Zubulake and ABA factors — several of which overlap — into the civil discovery rules would mark a significant advancement over prior efforts to curtail abusive and costly discovery.

In sum, the Committee's efforts to reform the rules governing civil discovery are welcome news for defendants seeking relief from onerous and costly discovery. However, the proposals currently under consideration do not address due process problems with our producer-pays system. Thus, the Committee should go one step further and impose at least some of the burdens of discovery on the party making the request to help mitigate abusive discovery and, in the process, guarantee that a defendant's constitutionally protected property interests are not deprived without due process of law.

::::ENDNOTES::::

21. U.S. Const. amend. V.

22. See N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975) (bank account is "surely a form of property").

23. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

24. Bell v. Burson, 402 U.S. 535, 542 (1971).

25. Redish & McNamara, supra note 5, at 807-08.

26. See id. at 806 (citing Fed. R. Civ. P. 37).

27. Connecticut v. Doehr, 501 U.S. 1, 5 (1991).

28. Id. at 13-14.

29. Fuentes v. Shevin, 407 U.S. 67 (1972).

30. Id. at 69.

31. Id. at 83.

32. Id.

33. See Twombly, 550 U.S. at 563 n.8 (courts must carefully scrutinize motions to dismiss because "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct"), and Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009).

34. See Redish & McNamara, supra note 5, at 809-10.

35. Id. at 810 (quoting Doehr, 501 U.S. at 14).

36. Id.

37. See Lawyers for Civil Justice, Comment to the Civil Rules Advisory Committee and the Discovery Subcommittee: The Un-American Rule: How the Current "Producer Pays" Default Rule Incentivizes Inefficient Discovery, Invites Abusive Litigation Conduct and Impedes Merits-Based Resolutions of Disputes, at 6, Apr. 1, 2013.

38. Ronald J. Allen, How to Think About Errors, Costs, and Their Allocation, 64 Fla. L. Rev. 885, 894 (2012).

39. James Pooley & Vicki Huang, Multi-National Patent Litigation: Management of Discovery and Settlement Issues and the Role of the Judiciary, 22 Fordham Intell. Prop. Media & Ent. L.J. 45, 55 (2011) (courts have "discretion to shift a portion of the costs onto the requesting party to protect the responder from 'undue burden or expense'") (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978)).

40. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

41. See ABA Section of Litig., Civil Discovery Standards (2004) (PDF). These factors include: "A. The burden and expense of the discovery, considering among other factors the total cost of production ... compared to the amount in controversy; B. The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; C. The complexity of the case and the importance of the issues; D. The need to protect the attorney-client privilege or attorney work product ... ; E. The need to protect trade secrets, and proprietary or confidential information; F. Whether the information or the software needed to access it is proprietary or constitutes confidential business information; G. The breadth of the discovery request; H. Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; ... J. Whether the requesting party has offered to pay some or all of the discovery expenses; K. The relative ability of each party to control costs and its incentive to do so; L. The resources of each party as compared to the total cost of production; M. Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information; ... O. Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and [is] not justified by any legitimate personal, business, or other non-litigation-related reasons; and P. Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable[.]" Id. at Standards 29b.iv.A-P.

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