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Client Alert | E-Discovery

Winning Your Discovery Disputes – How to Tailor Your Arguments to the New Rule 26(b)(1) Proportionality Test in the Third Circuit

"This case provides a classic example of how discovery gamesmanship can backfire…[a]fter the Pughs first requested hospital records in April 2020, the Northampton Defendants stonewalled, blanketly asserting that the straightforward interrogatories were somehow 'vague, ambiguous, overly broad and unduly burdensome.'" – Pennsylvania Magistrate Judge Timothy R. Rice, *Pugh v. Community Health Sys., et al.*, No. 5:20-cv-00630 (E.D. Pa. Jan. 8, 2021).

Litigators know that cases are rarely won at trial; they are won and lost on the discovery battlefield. In federal court, the traditional notion of relatively unconstrained discovery has given way to the explicit "proportionality" test of Fed. R. Civ. P. 26(b)(1), a rule that was most recently amended in 2015. While the scope of discovery under the Federal Rules of Civil Procedure is "unquestionably broad,"[1] federal district courts must balance a party's right to relevant information against the possibility of wasteful and abusive discovery. The tension between knowledge and efficiency is addressed by Fed. R. Civ. P. 26(b)(1), which provides that a party may obtain discovery on any matter that is both "relevant to any party's claim or defense" and "proportional to the needs of the case." As one court stated, "The district court's role under Rule 26, then, is to discern that middle ground between two countervailing pressures, the optimal solution to the information-cost equations."[2] This article analyzes how district courts within the Third Circuit have treated the "proportionality" issue in the wake of the 2015 amendments to Rule 26(b)(1).

Renewed Emphasis on Proportionality

Maintaining proportionality has taken on greater importance since Rule 26(b)(1) was amended in 2015. Significantly, the Advisory Committee added the proportionality clause to the first sentence, taking a provision that it had previously located – with almost identical language – in Fed. R. Civ. P. 26(b)(2)(C)(iii). The Advisory Committee stated that the amendment "restores the proportionality factors to their original place in defining the scope of discovery" and "reinforces" the parties' obligation to consider proportionality factors.[3] Although the Advisory Committee emphasized that the amendment did not change the duties of the parties and court, the change was widely viewed as an effort to restrain excessive and wasteful discovery and encourage judges to be more aggressive in policing discovery.[4] Chief Justice John Roberts wrote in his 2015 year-end report that the amended Rule 26(b)(1) "crystallizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of

1 *United States v. Nobel Learning Communities*, 329 F.R.D. 524, 527–28 (D.N.J. 2018).
2 *Fassett v. Sears Holdings Corp.*, 319 F.R.D. 143, 153 (M.D. Pa. 2017).
3 Advisory Committee's Note on the 2015 Amendment.
4 26 A.L.R. Fed. 3d Art. 2.

proportionality" and "states, as a fundamental principle that lawyers must size and shape their discovery requests to the requisites of a case."[5]

Third Circuit judges agree that the amendments were intended to promote greater judicial involvement in the discovery process and have complied accordingly. In *Fassett*, the court applied a "sliding scale analysis" to discovery in a product liability case, whereby the most relevant material "should be discoverable in the greatest quantities and for the most varied purposes," while less important information "should be incrementally less discoverable."[6] This, the court continued, was consistent with the amended rule's "renewed proportionality mandate."[7] In a rare appellate opinion, the Third Circuit noted the difficulty of managing discovery in a False Claims Act case. The court quoted Chief Justice Roberts' comment, "[t]he key here is careful and realistic assessment of actual need that may 'require the active involvement of a neutral arbiter – the federal judge – to guide decisions respecting the scope of discovery.'"[8] The Third Circuit ruled in another case that the need to circumscribe jurisdictional discovery was "all the more true after the 2015 amendments to the Federal Rules of Civil Procedure."[9]

Applying the Proportionality Test

Cases within the Third Circuit illustrate how courts are emphasizing the proportionality principles after the 2015 amendments. The revised Rule 26(b)(1) provides six proportionality factors for the court to consider:

- The importance of the issues at stake
- The amount in controversy
- The parties' relative access to information
- The parties' resources
- The importance of discovery in resolving the issues
- Whether the burden or expense of discovery outweighs its likely benefits

In evaluating proportionality, a court "looks initially to the pleadings."[10] This means, as one judge stated, "[T]hat it is often the plaintiff's complaint which defines both what is relevant and what is proportionate in discovery."[11]

The Importance of the Issues at Stake

Courts are split on whether the "importance of the issues at stake" refers to the magnitude of the litigation from the parties' perspective or its larger societal significance. In *First Niagara Risk Mgmt., Inc. v. Folino*, a company sued its former employee, claiming breach of contract and fiduciary duty after the employee established a competing company.[12] The company made a broad request for communications

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5 Chief Justice John Roberts, "2015 Year–End Report on the Federal Judiciary," Dec. 31, 2015 (Roberts Report), at 6-7, available at http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf).

6 319 F.R.D. at 147.

7 *Id.* at 153; *see also Westfield Ins. Co. v. Icon Legacy Custom Modular Homes,* 321 F.R.D. 107, 118 (M.D. Pa. 2017) (applying the same test).

8 *United States ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co*., 839 F.3d 242, 259 (3d Cir. 2016) (Chief Justice John Roberts, "2015 Year–End Report on the Federal Judiciary," Dec. 31, 2015 (Roberts Report), at 4, available at https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf).

9 *Shuker v. Smith & Nephew*, PLC, 885 F.3d 760, 782 (3d Cir. 2018).

10 *Fassett,* 319 F.R.D. at 149.

11 *P.H. Glatfelter Co. v. Babcock & Wilcox Power Generation Grp., Inc.,* No. 1:19-CV-2215, 2021 WL 3403531, at *3 (M.D. Pa. Aug. 4, 2021).

12 317 F.R.D. 23 (E.D. Pa. 2016).

between the employee and various other individuals.[13] The court held that the first factor favored the company, as the allegations concerned an issue of "grave importance" to the company.[14]

Penn Eng'g & Mfg. Corp. v. Peninsula Components, Inc. interpreted the term "issues at stake" differently.[15] There, the court's analysis focused on "the significance of the substantive issues, as measured in philosophic, social, or institutional terms."[16] While the party seeking discovery stressed the severity of its allegations, the court concluded that the unlawfulness of the opposing party's actions was unlikely to "have an impact beyond the parties involved."[17] Other courts have applied the same analysis,[18] while still others implicitly sidestep the issue by considering both definitions of "issues at stake."[19] Given the unresolved split, attorneys should consider both private and public importance in making their arguments.

The Amount in Controversy

For the second factor, courts will compare the cost of discovery with the amount in controversy.[20] As a result, the party seeking discovery stands a better chance of prevailing if it has alleged extensive damages. In *Penn Eng'g*, the burdens of production were "nowhere close to the millions of dollars potentially at issue in this matter."[21] By contrast, in *First Niagara,* the court found that this factor favored the party resisting discovery because the actual amount in controversy was still unknown.[22] Thus, parties seeking discovery stand a better chance of prevailing if they can put a high and specific dollar-value on the dispute.

The Parties' Relative Access to Information

The third factor was intended to address "information asymmetry"; that is, situations where one party possesses far more information than its opponent, such as a personal injury lawsuit against a large corporation.[23] In those cases, it is unavoidable that the party who possesses the relevant information will have a greater burden in propounding discovery.[24] Judges are unlikely to be moved by a party's protest that it has to produce far more than an opponent who has little access to information. In *Penn Eng'g*, the party that had access to nearly all of the relevant documents was required to make further productions, even though it had already produced over 68,000 documents.[25] Note, however, that the existence of publicly available information weighs against compelling discovery, a fact often raised by the resisting party.[26]

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13 *Id*.

14 *Id*.; see also *Fassett*, 319 F.R.D. at 150 ("Although this is not a case involving, for instance, constitutional rights or matters of national significance, to these particular litigants, it is a matter of grave import.").

15 No. 19-CV-513, 2021 WL 4037857 (E.D. Pa. Sept. 3, 2021).

16 *Id.* at *3 (quoting Advisory Committee's Note on the 2015 Amendment).

17 *Id.* (quoting *Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC*, No. 5:15-CV-37-FL, 2017 WL 876266, at *4 (E.D.N.C. May 3, 2017)).

18 *See Lakeview Pharmacy of Racine, Inc. v. Catamaran Corp.,* No. CV 3:15-290, 2019 WL 587296, at *3 (M.D. Pa. Feb. 13, 2019) ("claims for breach of contract and breach of the implied duty of good faith and fair dealing" did not deal with "vitally important personal or public values").

19 *See Hurley v. BMW of N. Am., LLC,* No. 18-CV-05320-JD, 2021 WL 1628128, at *2 (E.D. Pa. Apr. 27, 2021) (the first factor favored disclosure because "the issues at stake in this litigation are important to the parties and to the wider public") (emphasis added).

20 *See Bell v. Reading Hosp.,* No. CV 13-5927, 2016 WL 162991, at *3 (E.D. Pa. Jan. 14, 2016).

21 2021 WL 4037857 at *3.

22 317 F.R.D. at 328.

23 Advisory Committee's Note on the 2015 Amendment.

24 *Bell*, 2016 WL 162991, at *4 ("There is no requirement that parties have to spend equal amounts on the discovery, or that a party who has less to produce, be somehow limited in what it can request as a result."); see also *Hurley*, 2021 WL 1628128, at *2 ("[Defendant] has access to the documents, and Plaintiffs do not.").

25 2021 WL 4037857 at *4.

26 *See Royal Mile Co., Inc. v. UPMC & Highmark Inc.,* No. 2:10-CV-01609-JFC, 2016 WL 6915978, at *15 (W.D. Pa. June 24, 2016).

The Parties' Resources

Like factor three, which protects parties with little access to information, the fourth factor favors individuals and smaller entities in disputes with deep-pocketed corporations. For example, in *Lakeview Pharmacy,* the court emphasized that the party resisting discovery served over 65 million customers annually and had recently acquired another company for $4.4 billion.[27] Smaller parties, however, should recognize that this imbalance does not necessarily militate against production. As the Advisory Committee stated, "[C]onsideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party."[28] In *Niagara,* the court discounted the individual's complaints about costs, noting that he had recently sold two companies for over $5 million.[29] Similarly, in *Royal Mile*, the party resisting discovery leaned heavily on its status as a nonprofit organization, an argument that the court dubbed a "weak showing."[30] By contrast, a government agency in a non-Third Circuit case successfully resisted discovery by showing that it would take nearly a year to comply even if it reassigned every available attorney.[31]

The Importance of Discovery in Resolving the Issues

The fifth factor considers the discovery's centrality to the overall dispute, an issue closely tied to the question of relevance. The Advisory Committee wrote, "A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them."[32] Some courts will apply a broad definition of "importance" and require discovery so long as there is some relation to a central issue. In *P.H. Glatfelter Co.*, the plaintiff alleged that the defendant had made fraudulent and negligent misrepresentations about a product whose deficiencies caused considerable damages at the plaintiff's facility.[33] The plaintiff subsequently sold the facility, and the defendant propounded discovery about the plaintiff's marketing efforts. The court agreed that this factor favored the defendant since the discovery requests "relate to an issue that [plaintiff] has defined as a question of central importance to this case."[34]

The breadth of a request, however, may undermine an argument asserting its importance. In *Seven Z Enterprises, Inc. v. Giant Eagle, Inc*., the plaintiffs issued subpoenas to several third-party companies, seeking, in the court's words, "nearly every document remotely related to the companies' business relationship with [Defendant]."[35] The court criticized the discovery requests as "neither targeted nor precise, instead seeking vast amounts of information" and concluded, "The sheer scope of the subpoenas speaks to their disproportionality.[36] Parties resisting discovery should emphasize their opponents' failure to make narrow, targeted requests that advance the issues.

Whether the Burden or Expense of Discovery Outweighs Its Likely Benefits

Some courts view the final factor as the most important of the six, with one stating that it "essentially combines the above factors" and requires the court "to consider the overall burden versus benefit."[37] Analyzing the final factor weighs the burden (as addressed by factors 2, 3 and 4) against its benefit (as

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27 2019 WL 587296, at *4; *see also Pegley v. Roles,* No. CV 17-732, 2018 WL 572093, at *2 (W.D. Pa. Jan. 26, 2018) (stating, in personal injury case against trucking company, that "[d]efendants have greater resources").

28 Advisory Committee's Note on the 2015 Amendment.

29 317 F.R.D. at 28.

30 2016 WL 6915978, at *14.

31 *Lamaute v. Power*, 339 F.R.D. 29, 37 (D.D.C. 2021) ("The Court finds that the other proportionality factors do not outweigh these substantial concerns."); *see also Briggs v. Adel,* No. CV-18-02684-PHX-EJM, 2020 WL 4003123, at *11 (D. Ariz. July 15, 2020) (discovery requests placed an undue burden on a "nonprofit organization with limited resources").

32 Advisory Committee's Note on the 2015 Amendment.

33 2021 WL 3403531, at *1.

34 *Id.* at *3.

35 No. 2:17-CV-740, 2020 WL 7240365, at *2 (W.D. Pa. Mar. 6, 2020).

36 *Id.* at *3.

37 *Lakeview*, 2019 WL 587296, at *4; *see also Penn Eng'g,* 2021 WL 4037857 at *6.

addressed by factors 1 and 5). The party seeking discovery must demonstrate its benefit, while the resisting party is required to explain why it would be unduly burdensome.[38] In *Lakeview,* the resisting party made no effort to estimate "the cost or man hours" necessary to comply.[39]

Like the fifth factor, this issue also implicates the relevance question. In *Royal Mile,* the resisting party's ability to comply with certain discovery requests was outweighed by the irrelevance of the information sought.[40] Consequently, parties making disproportionality objections should attempt to describe and quantify the burden and contrast it with the relative unimportance of the requested discovery.

Practice Tips for Avoiding or Overcoming Proportionality Disputes

- ***Recognize the public and private issues in your case.*** Depending on whether you are seeking or defending discovery, be prepared to argue the public and private importance of the issues at stake in your litigation (Factor #1).
- ***Provide concrete figures***. A party stands a better chance of prevailing if it can give monetary estimates regarding the benefits and burdens that are rooted in the actual facts. This includes the total amount of money at stake in the litigation (Factor #2), the parties' resources (Factor #4) and the cost of complying in both dollars and time (Factor #6).
- ***Emphasize importance (or lack thereof)***. Even though the relevance inquiry is separate from proportionality, there is a considerable amount of overlap. Factors #1, #5 and #6 look to both the importance of the issues and the information in question.
- ***Focus on whether the requests have been narrowly tailored.*** In light of the renewed mandate to consider proportionality, courts are more skeptical of broad requests. A party stands a better chance of prevailing if it can show how it has taken steps to limit the responding party's burden. Conversely, a resisting party should emphasize its opponent's inability or unwillingness to make compliance more manageable.

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38 Advisory Committee Notes.
39 *Lakeview*, 2019 WL 587296, at *4.
40 2016 WL 6915978, at *16 ("Accordingly, even in light of Highmark's minimal showing regarding burden, the showing of relevance is so low that any burden outweighs Plaintiff's relevancy showing.").