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FEDERAL E-DISCOVERY

Non-US Subsidiaries' E-Discovery Is Out of Scope, Court Finds


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One of the key changes to the Federal Rules of Civil Procedure that went into effect over a year ago was the updated definition of the scope of permissible discovery under Rule 26(b)(1). While there have been a number of court decisions that have interpreted this new language, some practitioners—and courts—still continue to cite to the old version of the Rule. In a recent decision, Judge David G. Campbell of the U.S. District Court of Arizona, who was the chair of the Advisory Committee on Civil Rules during the drafting and enactment process for the amended Rules, analyzed and applied the new version of Rule 26(b)(1) in finding requested e-discovery from a party's non-U.S. subsidiaries to be out of scope. He also used the decision as an opportunity to remind the bench and bar that the Rule changed on Dec. 1, 2015 and that they should not rely on the old version of the Rule.

In *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562 (D. Ariz. Sept. 16, 2016), a products liability multidistrict litigation regarding allegedly malfunctioning inferior vena cava (IVC) Filter medical devices, the plaintiffs and the defendants, particularly defendant medical device manufacturing company C.R. Bard, disagreed over the discoverability of electronically stored information (ESI) from Bard's subsidiaries or divisions located overseas. Specifically, the plaintiffs sought communications related to the Bard IVC Filters between non-U.S. regulators and Bard's non-U.S. entities selling these medical devices abroad.

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Standards for Scope

Judge Campbell started his discussion by examining the new legal standards that govern the scope of discovery. He cited amended Rule 26(b)(1), which now limits the permissible scope of discovery to "any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." He noted that, prior to the amendment, the Rule had provided that even inadmissible evidence was discoverable if it "appears reasonably calculated to lead to the discovery of admissible evidence." Judge Campbell referred to the Advisory Committee Note to the amended Rule, which stated that the phrase "has been used by some, incorrectly, to define the scope of discovery."

Under the new Rule, the "reasonably calculated" phrase was replaced with what Judge Campbell called "a more direct declaration of the phrase's

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original intent," that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." However, "[d]espite this clear change, many courts continue to use the phrase. Old habits die hard." Underscoring his view, Judge Campbell wrote that "the 2015 amendment effectively abrogated cases applying a prior version of Rule 26(b)(1). The test going forward is whether evidence is 'relevant to a party's claim or defense,' not whether it is 'reasonably calculated to lead to admissible evidence.'"

Continuing his analysis of the current legal standards relating to the permissible scope of discovery, Judge Campbell next addressed the issue of proportionality, stating, "[t]he 2015 amendments also added proportionality as a requirement for permissible discovery. Relevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case." Amended Rule 26(b)(1) provides proportionality factors for consideration, including "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."

Applying the Legal Standards

Applying the new legal standards under amended Rule 26(b)(1) to the question of whether the requested ESI was within the permissible scope of discovery in this matter, Judge Campbell first tackled whether the requested ESI was relevant. He determined that "most of Defendants' regulatory communications, including communications with foreign regulators, are generated by Defendants' United States operations, which have been and continue to be subject to extensive discovery." While some of Bard's non-U.S. entities may communicate directly with non-U.S. regulators, the "regulatory communications are largely controlled from within the United States," and, therefore, "will be captured by the ESI searches currently underway." Moreover, none of the MDL plaintiffs were from non-U.S. countries and the requested ESI had a "narrow purpose—to determine if any of those communications have been inconsistent with Defendants' communications with American regulators. It is inconsistency that Plaintiff's seek to discover." As such, Judge Campbell found the requested discovery "only marginally relevant."

Next, Judge Campbell assessed whether the plaintiffs' request for ESI from non-U.S. locations was proportional to the needs of the case. Referring to some of the proportionality factors in Rule 26(b)(1), the judge noted that "the 'importance of the discovery in resolving the issues,' as the Court has explained, appears marginal. The parties 'relative access to relevant information' favors Plaintiffs, but only in Defendants' possession of possibly relevant information." He then moved into a more detailed analysis of "whether the burden or expense of the proposed discovery outweighs its likely benefit."

> "Relevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case."

The plaintiffs sought all communications regarding the Bard IVC filters between Bard's non-U.S. entities and non-U.S. regulators from 2003 to the present. Given "that Bard has entities in Canada, Korea, Australia, India, Singapore, Malaysia, Italy, Ireland, the United Kingdom, Denmark, the Netherlands, Sweden, Norway, Finland, Mexico, Chile, Brazil, and China[,] … they would be required to identify the applicable custodians from these foreign entities for the last 13 years, collect ESI from these custodians, and search for and identify communications with foreign regulators." In light of these burdens and given the considerable amount of U.S.-based discovery, Judge Campbell determined "that the burden and expense of searching ESI from 18 foreign entities over a 13-year period outweighs the benefit of the proposed discovery—a mere possibility of finding a foreign communication[] inconsistent with United States communication."

Having found the proposed discovery only marginally relevant and not proportional to the needs of the case, Judge Campbell denied the plaintiffs' request, ruling that Bard did not need to search the ESI of their non-U.S. entities.

Conclusion

Judge Campbell's decision is a clear reminder to practitioners and judges alike to follow amended Federal Rule of Civil Procedure 26(b)(1). The decision is especially relevant to those litigations presenting the potential for discovery outside of the United States. Many decisions relating to discovery motions focus on a "possession, custody, or control" analysis under Rule 34(a); Bard helps show that, in some cases, such an analysis may not be necessary if the requested discovery itself is not in the permissible scope of Rule 26(b)(1).