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Massachusetts high court's civil rules revision rejects the federal rules' proportionality principles

By Jonathan Sablone and Ronaldo Rauseo-Ricupero

In a move that indicates scepticism on the state level about the heavy emphasis on proportionality found in the 2015 revisions to the Federal Rules of Civil Procedure, the Massachusetts Supreme Judicial Court has recently rejected a proposal to adopt the sweeping federal proportionality language into its own civil discovery rules, opting instead for more **limited adjustments** to the rules concerning protective orders.

In 2015, amendments to the Federal Rules of Civil Procedure made substantial changes to the very nature of civil discovery by injecting into the scope of permissible discovery the concept of proportionality: limiting amount of discoverable material to be requested or produced, eliminating the previous standard of "reasonably calculated to lead to the discovery of admissible evidence," and instead requiring that parties establish that the discovery is "proportional to the needs of the case". This bold change was intended to limit the burden and expense of discovery, in response to the spiralling costs and widespread overproduction resulting from the explosion in volume of electronic discovery. Those new rules sought to limit overly broad requests, and to prevent discovery requests and productions that were unreasonable or unduly burdensome or expensive when balanced against factors such as the amount in controversy or the importance of the issues at stake in the action.

When the Massachusetts Supreme Judicial Court considered proposals to adopt this proportionality provision into their own rules, as well as to narrow the standard of relevance from "the subject matter of the action" to "claims and defences," it balked, and maintained its own broader standards. According to the Committee Notes, the Court determined that it would take a "wait and see" approach to the federal rules language in order to gauge their impact, and was swayed by claims that the new federal rule changes were presently "unnecessary" for Massachusetts.

Instead, the Court amended only Mass. R. Civ. P. 26(c), expanding the factors to be considered by a judge when considering whether to issue a protective order to include some elements of proportionality: "(1) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive; (2) whether the discovery sought is unreasonably cumulative or duplicative; and (3) whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt, taking into account the parties' relative access to the information, the amount in controversy, the resources of the parties, the

importance of the issues, and the importance of the requested discovery in resolving the issues." The new provisions become effective July 1, 2016.

The Committee Notes' claim that a stronger emphasis on proportionality would be "unnecessary" may either reflect the reality that state court cases typically involve much less electronic discovery than federal court cases, or a belief by the Massachusetts Committee that the federal rule changes may not ultimately have the desired effect of substantially limiting the scope of material actually exchanged by the parties.

Massachusetts' reluctance to embrace proportionality at the same level as the federal courts may embolden plaintiffs in asymmetrical litigation to forum shop, and try to keep cases in state court to take advantage of the broader scope of discovery. It is yet to be seen whether this is illustrative of a trend among other state courts taking a more reserved approach as compared to the strong federal proportionality push.

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