Important Changes in Litigating Oil and Gas Cases in Federal Court: What the 2015 Amendments to the Federal Rules Mean for Oil and Gas Companies

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INTRODUCTION

Many oil and gas disputes are litigated in federal court. In recent years, federal litigation has undergone significant changes in discovery practices and rules. For example, with the increase in electronically stored information, like emails and text messages, the federal and local rules have changed to ensure that such electronically stored information, or “ESI,” is preserved and disclosed. The problem that many companies face, however, is that the costs of preserving, collecting, reviewing, and producing ESI as part of federal litigation can be extraordinarily high. This is particularly acute in cases against oil and gas companies that involve historical information, payment information, and large numbers of plaintiffs or claimants (e.g., payment, royalty, class actions, and mass contamination cases).1 Similarly, even in “routine” cases—like oil and gas lease disputes—where the collection of ESI may extend to email accounts and text messages of personnel and agents in the field (sometimes on non-company servers), e-discovery costs can be disproportionate to the issues at stake.2

The high costs of e-discovery in federal litigation recently spurred the Supreme Court of the United States to amend the federal rules in a manner that has the potential to narrow the scope and limit the cost of expensive e-discovery. This has the potential of assisting those oil and gas companies that litigate in federal court in reducing and managing their defense costs, particularly in this challenging economic environment.

Below is a summary of the proposed amendments (which would go into effect on December 1, 2015, absent congressional legislation opposing or altering them), and the potential effect of the changes on oil and gas litigation in federal court.

SUMMARY OF THE AMENDMENTS

The proposed amendments can be grouped into three categories: (i) early case management; (ii) proportionality of discovery; and (iii) preservation of ESI.

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1 In a recent study of Fortune 500 companies, the RAND Institute found that the median total cost for ESI production among participants reached the astounding sum of $1.8 million dollars per case. Nicholas Pace & Laura Zakaras, Rand Institute for Civil Justice, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery, 28 (2012).

2 In a “survey of the ABA Section of Litigation, 78% of plaintiffs’ attorneys, 91% of defense attorneys, and 94% of mixed-practice attorneys agreed that litigation costs are not proportional to the value of small cases, with 33% of plaintiffs’ lawyers, 44% of defense lawyers, and 41% of mixed-practice lawyers agreeing that litigation costs are not proportional in large cases.” See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Report of the Judicial Conference Committee on Rules of Practice and Procedure, at B-6, B-7 [hereinafter Final Report], available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf.
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The early case management amendments are largely designed to spur “earl[y] and more active judicial case management.” They include an amendment that decreases the deadline to serve a complaint and summons (from 120 days to 90 days), in order to expedite the start of a case. They also include changes in the sequencing and manner of early conferences with the court, and the manner in which objections to discovery can be stated.

Of greater consequence, the second category of changes is designed to eliminate disproportionality between what is at stake in litigation and discovery. For example, new Rule 26 recognizes that “the costs of discovery in civil litigation are too often out of proportion to the issues at stake in the litigation.” With that in mind, the new rule limits the scope of discovery to that which is “proportional to the needs of the case.” Importantly, this means that the new Rule 26(c)(1) will be amended to include “the allocation of expenses” among the terms that may be included—in other words, if certain ESI must be produced by a company, the other side may have to pay for the expense involved.

The final category of changes is designed to clarify the law regarding the spoliation of discoverable information. The new Rule 37(e)—a complete rewrite of the rule—was developed to “establish[] greater uniformity in how federal courts respond to the loss of ESI.” The new rule only allows serious sanctions for spoliation (i.e. the intentional, reckless, or negligent withholding, hiding, altering, or destroying of evidence relevant to a legal proceeding) where the spoliating party “acted with the intent to deprive another party of the information’s use in the litigation.”

A FEW KEY EFFECTS OF THE AMENDMENTS ON FEDERAL LITIGATION

The most important effects of the amendments concern those related to the proportionality of discovery and preservation of ESI.

First, the scope of discovery is now limited to that which is “proportional.” In other words, courts will not permit discovery into expensive ESI, without a cost-benefit analysis. Before initiating discovery, courts are likely to hear conflicting estimates of the costs and the benefits of discovery. Using “extrinsic information,” such as “whether the requested information was created by ‘key players,’” and evidence samples will likely be important to a cost-benefit analysis. Further, where expensive e-discovery is required from an oil and gas company, that company may have the ability to allocate the costs to the other side.

Second, while it still remains critical to preserve potentially relevant ESI, the new changes to the rules are more forgiving when a party has inadvertently failed to do so. In the past, failure to preserve certain ESI could lead to sanctions, including preventing a party from...
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introducing certain evidence or permitting the jury to infer an adverse fact simply because evidence was not preserved. The new rule would appear to prohibit such a severe result for inadvertent mistakes.

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The creative oil and gas litigator will leverage the new changes to the rules so that oil and gas litigation in federal court—particularly during the discovery stage—will be more proportional and less costly. For those companies in the industry that face litigation that involves ESI (e.g., payment, royalty, class actions, and mass contamination cases) the changes may be beneficial in managing and defending litigation in a cost-effective manner.

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