

From Sword to Shield

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What a plaintiff wields as a sword against a defendant could actually prove to be a powerful shield against further burdensome discovery.

Precluding, Limiting, and Benefitting from Cloned Discovery

When a defendant manufacturer of a product successfully defeats the formation of a multidistrict litigation (MDL) or a class action (or where a request for such coordination is never made), the manufacturer has good reason to believe

it will be named as a defendant in single-plaintiff lawsuits in various jurisdictions. Despite the single-plaintiff litigation that ensues, it is likely that the manufacturer will receive a discovery request stating:

As to any prior or current lawsuit against the defendant or related entity involving a product liability action, produce the following: (1) all Rule 26(a)(1) initial disclosures; (2) all responses to written discovery requests, including but not limited to past Answers to Interrogatories, Answers to Requests for Admissions, Responses to Requests for Production, and any supplements thereto; (3) all discovery responses resulting from any motion to compel or order to produce; (4) all transcripts taken by any party of any agent, employee or representative of a manufacturing entity, any prescribing or treating doctor, and any expert who

expressed an opinion on the performance, failure, design, manufacture, distribution, sale, or labeling of the device at issue in that litigation; and (5) all expert reports.

This type of request is known as cloned or “piggyback” discovery.

Cloned discovery is an overly broad and inappropriate way to conduct discovery, and it can be tricky to oppose if you do not have sound arguments upon which to rely when responding to such requests. Not surprisingly, these requests are common in drug and medical device cases, where multiple lawsuits may involve the same or similar products. By serving these types of requests, plaintiffs seek potentially voluminous information in an inexpensive manner without consideration of the relevance to the facts and issues of their specific case. This article outlines some of the most effective strategies to counter this



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plaintiff tactic, provides nationwide case law from courts precluding or limiting this type of discovery, and presents the best ways to respond if a court appears inclined to allow this type of discovery in whole or in part.

Opposing Requests for Cloned Discovery

A defendant manufacturer has multiple arguments when it comes to opposing cloned discovery requests. First, the 2015 amendments to Federal Rule of Civil Procedure 26 provide far greater limits on discovery than the old rules and should arguably foreclose cloned discovery. Second, confidentiality orders should be vigorously enforced, and under principles of comity, courts should respect prior court orders placing limits on discovery and the use of discovery material. Finally, to the extent possible, cloned discovery requests should be opposed for lack of substantial similarity.

Courts Rules

For decades, Federal Rule of Civil Procedure 26 was interpreted to allow broad discovery. Specifically, the rule provided: “Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense.... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1) (repealed 2015). While courts had discretion to place limits on the scope of discovery, more often than not, sweeping discovery was permitted. However, even under the old standard, courts routinely limited cloned discovery. *See, e.g., Midwest Gas Servs., Inc. v. Indiana Gas Co.*, 2000 WL 760700 (S.D. Ind. Mar. 7, 2000); *Chen v. Ampco Sys. Parking*, 2009 WL 2496729, at *2 (S.D. Cal. Aug. 14, 2009).

In 2015, Rule 26 changed in a significant way. Now discovery must be relevant to a party’s claim or defense, and it also must be proportional to the needs of the case, considering 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. Fed. R. Civ. P. 26(b)(1).

First, a plaintiff will be hard pressed to explain how a blanket demand for all prior discovery in other actions is relevant:

“Cloned discovery,” requesting all documents produced or received during other litigation or investigations, is irrelevant and immaterial unless the fact that particular documents were produced or received by a party is relevant to the subject matter of the instant case. The plaintiffs in this Cause have not shown that the fact that any particular document was produced... [in another case]... is relevant to the subject matter of this Cause. Instead, the plaintiffs are interested in the content of documents and for that they must make proper requests describing the information in which they are interested. The plaintiffs’ counsel must do their own work and request the information they seek directly.

Midwest Gas Servs., Inc. v. Indiana Gas Co., 2000 WL 760700, at *1. Cases such as *Midwest Gas* place a higher burden on a plaintiff seeking cloned discovery to establish a nexus between his or her case and the other case or cases from which the plaintiff seeks prior discovery.

Second, “undue burden” objections have been strengthened under the new version of Rule 26(b)(1). The Federal Rules of Civil Procedure always provided that a party may seek protection against “undue burden or expense.” Fed. R. Civ. P. 26(c)(1). Now that the rules provide an explicit proportionality requirement, however, an undue burden objection should have even greater force. *See Town of Westport v. Monsanto Co.*, 2015 WL 13685105, at *3 (D. Mass. Nov. 5, 2015) (“[Plaintiff’s] requests for all discovery and deposition testimony from all [prior] litigation [involving the same chemical compounds] is overly broad.”); *Yu Cheng Chen v. Cincinnati Inc.*, 2007 WL 1191342, at *1 (E.D.N.Y. Apr. 20, 2007) (finding the “burden” of 150 hours of work outweighs the marginal assistance provided by “transcripts of depositions taken in some 70 lawsuits in which plaintiffs were injured under circumstances alleged to be similar to those that caused the [plaintiff’s] injuries in this action.”).

In short, a defendant opposing cloned discovery should cloak itself in the limitations and protections found in Rule 26. It will help, however, to voice objections that go beyond generic labels such as “overly broad” and “unduly burdensome.” Often, prior discovery includes confidential information about another individual, including the medical care and treatment of that indi-

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vidual. Being able to explain to a court the cost involved in reviewing prior discovery, redacting confidential and private information about a third party, and the time needed to accomplish such a Herculean task, will significantly strengthen an undue burden objection and make it more likely that a court will preclude cloned discovery.

Protective or Confidentiality Orders

In almost every product liability action, and particularly ones involving drugs or medical devices, the defendant manufacturer will insist on a confidentiality order to protect its trade secret and other sensitive business information. To help protect against cloned discovery requests, a typical protective order should contain language substantially similar to the following:

Confidential Information shall not be used or shown, disseminated, copied or in any way communicated to any person for any purpose whatsoever, other than as required for the preparation and trial of this action, including any appeals,

and only in compliance with this Order. Use of such information in any other litigation or for any other purpose is expressly prohibited.

Additionally, protective orders often demand that at the conclusion of a matter, all confidential documents will be destroyed or returned to the producing party. In some jurisdictions, courts do

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not particularly like blanket protective orders, but the parties are free to enter into confidentiality agreements among themselves. When at all possible, litigating parties not only should stipulate or agree to such orders, but they should also be entered by the court.

Having a protective order entered by the court in one case can be useful in opposing cloned discovery requests. The United States Supreme Court has recognized that there is no right to use pretrial discovery from one case for another purpose. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32–34 (1984). Courts must balance disclosure with reasonable protection. And “[d]uring the discovery phase, courts possess greater latitude to take reasonable steps to ensure that the private interest in maintaining the confidentiality of trade secrets or other sensitive information is not unnecessarily impaired litigation-related disclosure.” *Beam Sys. v. Checkpoint Sys.*, 1997 WL 364081, at *1 (C.D. Cal. Feb. 6, 1997). Further, “one of the principal tools enabling courts to strike an appropriate balance is a protective order.” *Id.* The Ninth Circuit, for example, has recognized that such document sharing permits a party to circumvent discovery rules and procedures in the party’s own jurisdiction. In *Foltz v.*

State Farm Mutual Automobile Insurance Company, 331 F.3d 1122 (9th Cir. 2003), interveners sought to modify the existing protective order to obtain documents in a collateral litigation. The court held:

[A] court should not grant a collateral litigant’s request for such modification automatically. As an initial matter, the collateral litigant must demonstrate the relevance of the protected discovery to the collateral proceedings and its general discoverability therein. Requiring a showing of relevance prevents collateral litigants from gaining access to discovery materials merely to subvert limitations on discovery in another proceeding.

Id. at 1332. See also *In re Remington Arms Co.*, 952 F.2d 1029, 1033 (8th Cir. 1991) (noting, where proprietary and trade secret business information is involved, the “use of the discovered information should be limited to the particular lawsuit in which it has been shown to be both relevant and necessary to the prosecution of the case”).

Once a protective order is entered in one case limiting the use of discovery materials to that case, the next step is convincing a subsequent court to honor that prior order. In this regard, the best argument is one based on judicial comity, which has been explained this way: “In general, [the] principle of ‘comity’ is that courts of one state or jurisdiction will give effect to [the] laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect.” *In re Joint E. & S. Districts Asbestos Litig.*, 800 F. Supp. 643, 646 (C.D. Ill. 1992) (citation omitted) (alterations in original). See also *Inventio AG v. Thyssenkrupp Elevator Ams. Corp.*, 662 F. Supp.2d 375, 384 (D. Del. 2009) (“[T]his Court is without authority to alter the Protective Order entered by another court by ordering production of any documents within the scope of the Protective Order.”). Courts’ confidentiality concerns are heightened when plaintiffs creatively seek cloned discovery from a receiving party in a prior litigation, rather than from the direct source of the information.

Here, [the plaintiff] is attempting to gain disclosure from the “receiving party”, [sic] in that he is attempting to gain information and materials not from the source of the information. The Plaintiff

is essentially trying to obtain deposition transcripts and information stemming from the [defendant’s] employees, not from the [defendant] but from the plaintiff in [a prior] lawsuit.

Barrella v. Vill. of Freeport, 2012 WL 6103222, at *3 (E.D.N.Y. Dec. 8, 2012) (denying objections to an order quashing a subpoena).

Having a previously entered protective order limiting the use of discovery, however, is not a foolproof way to preclude cloned discovery. Some courts are willing to compel the production of information from prior cases, despite a previously entered order. Nonetheless, the entry of a protective order and a request that another court enforce and honor such orders can provide some limitations on cloned discovery.

Lack of Substantial Similarity

Some courts will permit cloned discovery in the limited circumstance where the present lawsuit and the prior lawsuit involve substantially similar claims, products, and alleged failures. Courts caution, however, that mere “surface similarities” between cases are insufficient to warrant cloned discovery. See *Oklahoma v. Tyson Foods, Inc.*, 2006 WL 2862216, at *1–2 (N.D. Okla. 2006) (denying motion to compel production of documents made available “in a similar poultry waste pollution lawsuit previously brought in this Court” absent a showing of more than “surface similarities” between the cases).

In a drug or medical device case, plaintiffs often argue that the product is the same, justifying cloned discovery. In this regard, it is incumbent on the defendant to identify any differences. Did a prior case involve a plaintiff with a particular underlying condition distinct from the present case? Did the drug differ in any way in the different cases? Were there different warnings? With implantable medical devices, the cases often involve different treating surgeons, with different skills, and patients who vary in weight, activity level, and lifestyle. Further, implantable medical devices often come in different sizes and models. Moreover, experts routinely describe the human body as a “hostile environment.” Each person is unique, and when it comes to implantable devices, the differences outweigh the similarities. The more differ-

ences a defendant can show between two actions, the less likely a court is to permit cloned discovery.

Potential Upside to Limited Cloned Discovery

Despite the many reasons to oppose cloned discovery, there may be some benefits to permitting limited cloned discovery, particularly if you are dealing with a reasonable opposing counsel. Moreover, a court may be inclined to permit it, despite your best arguments in opposition, and thus, finding a compromise could prove the best course of action.

Despite issuing their own interrogatories, requests for production, and deposition notices, plaintiffs routinely make cloned discovery requests demanding answers to interrogatories, document productions, and deposition transcripts from prior cases. It is in these circumstances that courts are most likely to be persuaded by the defendant's requests to rein in a plaintiff.

The federal rules place limits on the number of interrogatories (twenty-five), the number of depositions (ten), and the duration of depositions (seven hours). Courts have found it persuasive when a defendant argues that a plaintiff is tacitly trying to circumvent those limits by seeking cloned discovery *and* also wanting to proceed with ordinary discovery in the present matter. In this regard, a plaintiff could be limited in the discovery that he or she may pursue in the present action if materials from a prior action are produced. There are two areas where this could prove most beneficial to a corporate defendant: discovery of electronically stored information (ESI) and corporate depositions.

As for ESI, every defendant knows that the process to identify and produce it can be exceedingly burdensome and expensive. The process often requires hundreds of hours, months of time, and potentially millions of dollars. If the defendant has gone through that burdensome process in one case, it may be to its benefit to agree to produce some or all of that material in exchange for the plaintiff agreeing that he or she is not entitled to further ESI discovery. Besides the obvious cost saving, the defendant's counsel is familiar with the materials, has reviewed them in detail, and is aware of the good, the bad, and the ugly.

On the other hand, a plaintiff's counsel may not have such familiarity and will be forced to review thousands or millions of pages.

Often, plaintiffs will seek cloned discovery through depositions. It is not unusual for plaintiffs to serve a corporation with a demand for all prior deposition testimony taken in any other action and also serve a broad corporate deposition notice in the action. In this situation, having detailed objections coupled with a robust meet and confer are particularly wise. Doing so will help prevent the manufacturer from being bullied by such requests, and when the inevitable motion to compel or the motion for protective order follows, the manufacturer will earn credibility with the court, demonstrate the plaintiffs' unreasonableness, and limit the scope of any further depositions, protecting the manufacturer.

Here's an anecdote illustrating the approach: several years ago, we had a case involving a plaintiff's counsel who demanded all prior deposition transcripts. In an effort to reach consensus, we offered to agree, but only on the condition that he could not re-depose individuals for whom deposition transcripts were produced. For some witnesses, there were multiple prior transcripts. The plaintiff's counsel insisted on receiving all prior deposition transcripts *and* on taking whatever additional depositions he desired. A motion to compel was filed, and a hearing was held.

During the hearing, the magistrate judge immediately made clear that she was inclined to order the defendant to produce the prior transcripts. We explained our position and our willingness to compromise, and that our side, under the compromise, would produce more than thirty deposition transcripts because for some witnesses, there would be multiple transcripts. When the plaintiff's counsel argued that this did not satiate his appetite and that he also wanted to take his own depositions, the magistrate judge lost all patience. She told the plaintiff's counsel that his position demanding thirty-plus transcripts and also expecting to depose the same people again was "ridiculous." After further back and forth, this is what happened:

- The magistrate judge ordered the production of the transcripts;
- she informed the plaintiff's counsel that if he wanted to depose individu-

als whose transcripts he had, such depositions would be limited to topics not already covered by those transcripts;

- she informed him that if he had multiple transcripts for a witness, she found it hard to believe that there would be any other topics to cover, and thus any need for further depositions;
- she ordered him to identify in advance any topics that he wanted to cover with any witness; *and*
- she cautioned him that she would not permit a deposition of any witness for seven hours if he already had transcripts for that witness, and she would not hesitate to issue sanctions if he pursued any such deposition in derogation of her order.

This ruling proved quite helpful because corporate witnesses did not have to appear again, it saved the client time and money, and the process leading to it informed the court that the plaintiff's attorney was engaging in improper discovery tactics. At that point, the magistrate judge had the impression that the plaintiff was being unreasonable, which would only inure to the benefit of the defendant the next time there was a dispute about discovery or otherwise.

Conclusion

Cloned discovery is an inappropriate way to conduct discovery, particularly under the auspices of the new rules limiting discovery to what is proportional to a particular case. The key to opposing it, however, is for a defendant manufacturer to proceed thoughtfully at every step, leading to the potential motion to compel or motion for protective order. Objections should be tailored and specific, not limited to catch phrases such as "unduly burdensome." The meet and confer process should be robust, and offers to compromise, where possible, should be made. The more reasonable the defendant appears, the more unreasonable an "I want it all" plaintiff appears. While cloned discovery is a poor way to conduct discovery, there are potential benefits to a defendant that should be explored. In the end, what a plaintiff wields as a sword against a defendant could actually prove to be a powerful shield against further burdensome discovery. 