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THE 2015 REVISIONS TO THE FEDERAL RULES OF CIVIL PROCEDURE: IMPACT ON BANKRUPTCY MATTERS

Focusing on the management of e-discovery in bankruptcy, the authors discuss the 2015 amendments to the Federal Rules (incorporated in Bankruptcy Rules) and include discovery under Bankruptcy Rule 2004. The principal subjects are proportionality, objections to requests, and failure to preserve electronically stored information. They close with suggested best practices for debtor's and creditor's counsel.

By Matthew Brooks, Jeffery Cavender, and Alison Grounds *

The successful resolution of a bankruptcy case demands careful planning for how often very limited resources will be allocated. In the context of resource allocation, one area frequently overlooked or underestimated is how to keep discovery costs in check – an increasing challenge in an era of exponential data growth. Recent amendments to the Federal Rules of Civil Procedure (the "Federal Rules") – if applied as intended – should help keep e-discovery scope and costs proportional to the discovery issues and available resources in any given bankruptcy proceeding. However, in the year that has passed since their enactment, courts have shown mixed results in applying the amended rules.

Managing e-discovery in the bankruptcy context may present unique challenges where proportionality may directly impact potential distributions to creditors. For example, bankruptcy cases do not originate with a complaint like traditional litigation. Therefore, framing the issues subject to discovery can be difficult, particularly early in the bankruptcy process where certain disputes with creditors or other parties may not be readily known. Also, preservation obligations may be less clear, and personnel with knowledge about electronically stored information ("ESI") sources and systems may no longer be available.

Key federal rule amendments enacted at the end of 2015 include changes to ensure the scope of discovery considers proportionality;[1] require more specific objections and responses to document requests;[2] and clarify the standard for applying sanctions for failure to preserve ESI through a totally revamped Rule 37(e) (as made applicable to bankruptcy proceedings through Federal Rule of Bankruptcy Procedure Rule ("Bankruptcy Rule") 7037). Other rule changes were

[1] Rule 26(b)(1).

[2] Rule 34.

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intended to encourage cooperation,[3] promote active case management,[4] and force earlier consideration of e-discovery issues.[5]

If these goals all sound familiar, that is because many of these same goals inspired the first round of e-discovery revisions to the Federal Rules in 2005. Because the costs and burdens associated with preserving, collecting, processing, analyzing, and producing ESI have continued to increase as the volume of data, and potential sources of data, have continued to expand at an exponential pace, further ESI-related amendments to the rules were necessary. Achieving an effective and efficient discovery process under these recently amended rules requires addressing issues proactively and involving appropriately knowledgeable professionals in the process.

PROPORTIONALITY: WILL THE COURTS HEAR THE CALL THIS TIME?

Proportionality is not a new concept in the realm of discovery. References to proportionality concepts in the Federal Rules date back to the 1983 amendments.[6] Rule 26(b) (as incorporated in Bankruptcy Rule 7026) was amended again in 2006, to respond to the prevalence of e-discovery and ESI, by adding limitations on the discovery of ESI.[7]

The most recent 2015 revisions relocated the proportionality factors from Rule 26(b)(2)(C) to Rule 26(b)(1) – signaling that such factors should be an initial consideration concerning the scope of discovery. As revised, Rule 26(b)(1) allows a party to "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and 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."

Consideration of "the parties' relative access to the information"[8] is a new proportionality factor not previously included in the Federal Rules. This factor is intended to address the "information asymmetry" that often occurs where one party (often an individual plaintiff) may have very little discoverable information as compared to another party (often a corporate defendant) that may have vast amounts of discoverable information.[9] In practice, these circumstances often mean that the burden of responding to discovery lies more heavily on the party that has more information. Bankruptcy cases vary not only in the chapter under which they are filed (7, 11, 12, 13, or 15) but also in size and complexity. For example, in a large, complex chapter 11 bankruptcy case, the debtor may be the most

[3] Rule 1 was amended to state that the federal rules themselves should be construed, administered "*and employed by the court and the parties*" to achieve the "just, speedy, and inexpensive determination of every action." (emphasis added).

[4] Amendments to Rule 16 expressly allow scheduling orders to include e-discovery issues that many courts and practitioners were adding in their own active case management orders, including discussion of preservation of ESI and inclusion of Rule 502 non-waiver provisions. The Amendments may also require parties to request a conference with the court before moving for an order related to discovery.

[5] Amendments to Rule 26 allow the service of Rule 34 document requests before the Rule 26(f) conference in order to facilitate a focused discussion about discovery during the conference, which may ultimately produce changes in the requests.

[6] In 1983, the Supreme Court amended Rule 26(b) to require that courts limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

[7] "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery." Fed. R. Civ. P. 26(b)(2)(B).

[8] Rule 26(b)(1)(B).

[9] Rule 26 Advisory Committee Note.

critical source of information. On the other hand, in a consumer bankruptcy filed under chapter 7, 11, or 13, the debtor may be looking to other constituents in the case for discoverable information, such as financial institutions or loan servicers.

The amended rules' emphasis on proportionality was inspired by many thought leaders and practitioners who felt that proportionality considerations were being underutilized or ignored. The Advisory Committee expressed that the 1983 and 2006 amendments to Rule 26(b) were not having their desired effect of reducing the burden and expense of discovery.[10]

Another way the rules drafters attempted to further the goal of reducing burden and expense was to remove the phrase from Rule 26(b)(1) that was most often cited in support of broad discovery: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The rules committee noted that this language was intended to be a statement about admissibility, not scope, and refined the amended rules in an attempt to correct this misuse. The revised version states that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."[11]

Despite these changes, some courts continue to rely on the deleted "reasonably calculated" language and the prior line of cases interpreting that language to allow broad discovery.[12] Other courts have rejected that approach and noted that cases relying on the "reasonably calculated" language to define scope broadly are no longer good law.[13]

More minor revisions are also reflected in the amendment. For example, the "amount in controversy" factor now appears after the "importance of the issues at stake in the action" factor. Also, the examples of types of discoverable information, such as the location of discoverable matter and the identity of the parties who know about it, were deleted.

According to the Advisory Committee Note, the amendment "does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations." The parties and the court have a "collective responsibility" to consider the proportionality of all discovery in resolving discovery disputes.

Despite this language, some observers have questioned whether this change will be used to shift to requesting parties the burden of proving the proportionality of requests. In practice, courts have taken a practical and balanced approach, and looked to both parties to present information regarding proportionality of a disputed request.[14]

Proportionality considerations were also incorporated by reference into Rules 30 (Depositions by Oral Examination), 31 (Depositions by Written Questions), and 33 (Interrogatories to Parties) via Bankruptcy Rules 7030, 7031, and 7033, respectively. Under the amended rules, parties and courts must consider the factors set forth in Rule 26(b)(2)(C) *and* proportionality in resolving disputes concerning motions for leave to (1) take a deposition by oral examination (Rule 30(a)(2)); (2) take a deposition by oral examination for more than one day of 7 hours (Rule 30(d)(1)); (3) take a deposition by written questions (Rule 31(a)(2)); and (4) serve more than 25 written interrogatories, including all discrete subparts (Rule 33(a)(1)).

PROPORTIONALITY AND SECTION 2004 REQUESTS

Unlike civil litigation under the Federal Rules, bankruptcy cases present another avenue of broad discovery under Bankruptcy Rule 2004. The rule provides, in pertinent part, that upon the motion of any party-in-interest, "the court may order the examination of any entity." The scope of the examination is far reaching. Pursuant to Rule 2004(b), the examination "may relate . . . to the acts, conduct, or property . . . of

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[10] *Id.*

[11] Rule 26(b)(1).

[12] *See, e.g., Tinsley v. Henderson Cty. Det. Ctr.*, No. 4:16CV-P27-JHM, 2017 U.S. Dist. LEXIS 76279, at *2 (W.D. Ky. May 19, 2017); *Twitch Interactive, Inc. v. Johnston*, No. 16-cv-03404-BLF, 2017 U.S. Dist. LEXIS 44863, at *4 (N.D. Cal. Mar. 27, 2017).

[13] *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016) ("Despite this clear change, many courts continue to use the phrase. Old habits die hard.") (citations omitted).

[14] *See, e.g., Sperling v. Stein Mart, Inc.*, No. EDCV 15-1411-BRO (KKx), 2017 U.S. Dist. LEXIS 3668, at *4 (C.D. Cal. Jan. 10, 2017); *Salazar v. McDonald's Corp.*, No. 14-CV-02096-RS (MEJ), 2016 U.S. Dist. LEXIS 23293 2016 WL 736213, at *2 (N.D. Cal. Feb. 25, 2016); *Goes Int'l, AB v. Dodur Ltd*., No. 14-cv-05666-LB, 2016 U.S. Dist. LEXIS 13748, at *12 (N.D. Cal. Feb. 4, 2016).

the debtor, or to any matter which may affect the administration of the debtor's estates . . . ." The purpose of a Rule 2004 examination is to assist a party-in-interest in determining the nature and extent of the bankruptcy estate, revealing assets, examining transactions, and assessing whether wrongdoing has occurred.[15] "Rule 2004 permits the broadest kind of deposition."[16] Indeed, in authorizing often broad discovery under Rule 2004, courts have referred to the expansive reach of Rule 2004 as akin to a "fishing expedition."[17]

Although Bankruptcy Rule 2004 was not revised to include proportionality factors, a recent decision by the Southern District of New York Bankruptcy Court cited the proportionality consideration of amended Rule 26(b)(1) in limiting a party's Rule 2004 requests to the Debtor. The case, *In re SunEdison, Inc.,*[18] involved Rule 2004 requests served by a creditor of both a debtor and non-debtor subsidiary regarding obligations owing under a lease and lease guaranty, and the sale of certain assets of the non-debtor. In response to the Rule 2004 requests, the debtor began producing responsive documents on a rolling basis. Ultimately, the requesting party was not satisfied with the debtors' informal production efforts. A dispute arose and the debtors filed a formal objection to the Rule 2004 application.

The *SunEdison* Court began its discussion by noting that a party seeking Rule 2004 discovery must demonstrate "good cause," and that the "spirit of proportionality is consistent with the historic concerns regarding the burden on the producing party and isrelevant to the determination of cause."[19] In applying these considerations, the bankruptcy court concluded that the creditor's requests should be limited because (1) the requests were not proportionate to the needs of the case when considered in light of the chapter 11 case and (2) the requesting party failed to establish cause for most of the information it sought. The requesting party's claims, the bankruptcy court stated, "while significant in face value, are small when viewed in the context of chapter 11cases involving over $5 billion in debt with little prospect of anything more than a small recovery for unsecured creditors."[20] For debtors, the opinion presents a welcomed limitation on Rule 2004 requests, which often have been subject to few restraints. Whether *SunEdison* will serve as a catalyst for similar Rule 2004 objections in future bankruptcy cases remains to be seen. Even so, creditors and other parties-in-interest should consider the proportionality considerations discussed in *SunEdison* and work collaboratively with the debtor in addressing any related objections to avoid court intervention.

In the bankruptcy context, parties seeking discovery should consider drafting requests in a manner that limits potential challenges on proportionality grounds – such as by avoiding requests for "any and all" documents on broad topics.[21] Responding parties should be careful not to rely on generic objections based on proportionality. The Advisory Committee Notes specifically state that the amended rule is not intended to permit responding parties to refuse discovery "simply by making a boilerplate objection that it is not proportional."

To make specific objections related to proportionality, counsel will need to engage in early discussions regarding potential sources of information (custodians, systems, devices, etc.) and the scope of discovery, including relevant date ranges, topics, and the identification of sources that may be inaccessible due to undue cost or other burdens. This type of advanced planning was a goal of the earlier rules amendments intended to address e-discovery. However, in practice, many practitioners have failed to embrace the proactive early planning for e-discovery issues contemplated by the rules. These latest proposals are partially intended to further push parties into proactive case management on these issues.

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[15] *See Cameron v. United States*, 231 U.S. 710, 717 (1914).

[16] *In re Stewart*, No. 5:95-CV-235-4, 1995 U.S. Dist. LEXIS 22333, at *4 (Bankr. M.D. Ga. June 7, 1995) (internal cites omitted).

[17] *See, e.g., In re Drexel Burnham Lambert Grp., Inc*., 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991).

[18] 562 B.R. 243 (Bankr. S.D.N.Y. 2017).

[19] *Id.* at 250.

[20] *Id.*

[21] *Id.* at 250 ("Rule 2004 has not been similarly amended but the spirit of proportionality is consistent with the historic concerns regarding the burden on the producing party and is relevant to the determination of cause."); *Ye v. Cliff Veissman, Inc*., No. 14-cv-01531, 2016 WL 950948 (N.D. Ill., Mar. 7, 2016) (denying request for "full archive of any documents …from any social media account held by decedent" and next of kin); *Caves v. Beechcraft Corp.,* Case No. 15-CV-125-CVE-PJC, 2016 WL 355491 (N.D. Okla., Jan. 29, 2016) (denying motion to compel document requests seeking "any and all" testimony concerning "other litigation"); *Morgan Hill Concerned Parents Assoc. v. Cal. Dep't of Ed*., No. 2:11-cv-3471-KJM-AC, 2016 WL 304564 (E.D. Cal., Jan. 26, 2016) (denying motion to compel document request for "all documents constituting or describing communications" between various entities).

AMENDMENTS GOVERNING PRODUCTION REQUESTS AND OBJECTIONS

1. Former Rule 32(b)(2)(B)

Former Rule 32(b)(2)(B) (as incorporated in Bankruptcy Rule 7032) required a party responding to a document/inspection request to state either that the documents/inspection will be provided or an objection, including the reasons for the objection. Litigators frequently engaged in discovery disputes concerning whether an opposing party was withholding any documents or ESI based on written objections. For example, a party may respond to a document request by objecting on the basis of scope and burden, but then state that, subject to the objections, responsive documents will be produced, if any exist. The requesting party is then left to wonder whether its adversary is withholding non-privileged documents based on such objections.

2. Amendments to Rule 34(b)

Under the amendments, an objection to a request made under Rule 34 (as incorporated in Bankruptcy Rule 7034) must state: (1) "with specificity the grounds for objecting" to the request, including the reasons *and* (2) whether anything is being withheld on the basis of the objection.[22] These changes are intended to "end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections."[23]

The Advisory Committee Note suggests that, where an objection recognizes that some part of the request is appropriate, then the objection should identify the portion that is proper.[24] The Advisory Committee Note addresses objections based on scope specifically, but practitioners are well-advised to apply this logic to all types of objections.

The revised rules do not require a detailed description or log of all documents withheld.[25] Rather, a party needs to alert other parties to the fact that documents have been withheld to facilitate an informed discussion of the objection.[26]

An objection that states the limits that have controlled the search for responsive and relevant materials (*e.g*., temporal or source limitations) qualifies as a statement that materials have been "withheld."[27] The statement of what has been withheld can identify as any matters "withheld" beyond the scope of the search specified in the objection.[28]

The amendments also permit parties to state whether they will produce copies of documents or ESI, instead of permitting an inspection. The production must then be completed no later than the time for inspection specified in the request *or another reasonable time specifically identified in the response*.[29] The Advisory Committee Note clarifies that, when it is necessary to make the production in stages, the response should specify the beginning and end dates of the production.[30]

The reasonableness standard is undefined and thus prone to disputes. Providing a set production date or even beginning and end dates for productions will require actual knowledge of the universe of potential production documents – including the volume that remains after ESI is collected, de-duplicated, processed, filtered, reviewed, and converted to the agreed-upon production format. Practitioners must understand their clients' information systems, and data with sufficient detail to develop a plan for collection and production within a specific time frame in response to Rule 34 requests. In complex matters with diverse ranges of potentially relevant sources, these issues will likely need to be addressed *before* discovery requests are served to allow sufficient time to gather the required details and data.

In the bankruptcy context, it may be difficult to obtain information about a debtor's systems and document locations when IT personnel or other relevant employees are no longer employed with the company. Further, pre-bankruptcy financial constraints may have resulted in the debtor significantly restricting its document backup systems or no longer retaining backup tapes or paper documents due to costs associated with storage and

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[22] Fed. R. Civ. P. 34(b)(2)(B)-(C).

[23] Rule 34 Advisory Committee Note.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id*.(*emphasis added*).

[30] *Id.*

maintenance. Lack of knowledgeable people to focus collection efforts often leads to more expensive and less targeted searches for ESI responsive to requests. As a result, in order to limit or avoid duplicative search and collection efforts well into the bankruptcy case, early investigative work regarding key institutional resources and potential sources of data is important.

RULES GOVERNING FAILURE TO PRESERVE ESI AND SPOLIATION

Former Rule 37 (as incorporated in Bankruptcy Rule 7037) provided relatively little guidance to courts and litigants concerning duties and failures to preserve ESI. The rule stated that, absent exceptional circumstances, a court may not impose sanctions for a party's failure to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.[31] This "safe harbor" failed to provide the protections originally envisioned – allowing for routine deletion of data – because of a notable exception which undercut the rule. The safe harbor provided no protection against broad preservation requirements once litigation was reasonably anticipated.

The changes to Rule 37 were intended to address the divergent Federal case law that caused litigants to expend excessive effort and money on preservation to avoid severe sanctions. The amendments provide that if ESI that should have been preserved in anticipation or conduct of litigation is lost "because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery," then the court may employ different measures depending on findings concerning the loss, as set forth below.

If the court finds prejudice to another party from loss of the information (Rule 37(e)(1)), available measures should be no greater than necessary to cure the prejudice.

Advisory Committee Note:

- much is entrusted to the court's discretion;
- there is no all-purpose hierarchy of various measures;
- the court is not required to cure every possible prejudicial effect; and
- the measures should not have the effect of Subdivision (e)(2) measures.

If the court finds that the party acted with the intent to deprive another party of the information's use in the litigation (Rule 37(e)(2)), available measures are:

- presume that the lost information was unfavorable to the party;
- instruct the jury that it may or must presume the information was unfavorable to the party; or
- dismiss the action or enter a default judgment.

Advisory Committee Note:

- courts should exercise caution and are not required to adopt any of the measures;
- the remedy should fit the wrong (*e.g.*, should not be used when the lost information was relatively unimportant or lesser measures are sufficient);
- does not prohibit a court from allowing the parties to present evidence concerning the loss; and
- does not prohibit traditional missing evidence instructions.

The new rule applies only to ESI and only when it is lost; loss from one source may be harmless if the ESI can be found elsewhere.[32] Efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information.[33] Substantial measures should not be used to restore or replace information that is marginally relevant or duplicative.[34]

Notably, the new rule does not apply if the information is lost before a duty to preserve arises.[35] The fact that a party had an independent obligation to preserve information (*e.g.*, pursuant to statute) does not necessarily mean that it had such a duty with respect to the litigation.[36] The party's failure to observe another preservation obligation does not itself prove that its efforts were unreasonable.[37]

[31] Fed. R. Civ. P. 37(e).

[32] Rule 37 Advisory Committee Notes.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

The new rule applies only if the information was lost because the party failed to take reasonable steps to preserve the ESI after it had a duty to do so; it does not call for perfection.[38] The new rule is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve it (*e.g.*, "cloud" service failures, malignant software attacks).[39]

The Advisory Committee Note sets forth detailed guidance concerning how courts should evaluate the "reasonable steps," "prejudice," and "intent" standards, as summarized below:[40]

Reasonable Steps – the factors for evaluation are:

- routine, good-faith operation of an electronic information system;
- a party's sophistication;
- proportionality (*e.g.*, the court should be sensitive to the party's resources); however, a party urging that preservation requests are disproportionate may need to provide specifics; and
- less costly forms of preservation are reasonable, if substantially as effective as costlier forms.

Note: The Committee Note states that it is important for counsel to become familiar with their clients' information systems and data – including social media – to address these issues.

Prejudice – the factors for evaluation are:

- judges have discretion to determine how best to assess prejudice;
- the information's importance is a necessary consideration; and
- the rule does not place a burden of proving/disproving prejudice on either party.

Intent – Factors to be considered are:

- may be made by the court on a pretrial motion, at bench trial, or when considering an adverse inference instruction at trial and
- prejudice to the party deprived of the information is not required.

Often, the biggest preservation challenge in the bankruptcy context is identifying when the obligation to preserve is triggered, as well as the scope of the obligation. With respect to the debtor, the duty to preserve documents may arise prior to the formal filing of the bankruptcy petition when the filing or other litigation becomes reasonably anticipated. At a minimum, counsel for the debtor should become familiar with the debtor's document retention policies and relevant debtor personnel, and develop a plan of action consistent with potential anticipated litigation and available resources.

Once a plan is developed, counsel should establish benchmarks during the bankruptcy case to evaluate whether any revisions are appropriate in light of, for example, discovery requests formally or informally served by creditors, the appointment of a committee, or other significant events. Counsel should consider whether the potential discovery in the case warrants the entry of an appropriate ESI protocol order approved by the bankruptcy court, and whether the bankruptcy local rules mandate any additional considerations or mechanisms to address e-discovery.

SUGGESTED BEST PRACTICES

Debtor's Counsel

The duty to begin preserving evidence may arise prior to the filing of the bankruptcy petition if the filing or potential litigation is reasonably anticipated. This duty also extends to representatives and affiliates of the debtor, and the debtor is responsible for notifying these third parties of their duties to preserve. However, the duty to preserve generally only extends to evidence that will be needed in connection with the bankruptcy proceeding or any disputes that might arise within the bankruptcy.

As noted earlier, Debtor's counsel should take time to understand the debtor's electronic storage systems, and the types and locations of ESI. In preserving the debtor's ESI, debtor's counsel should keep in mind the proportionality rules – understanding that it may be unnecessary or impossible to retain every document that passes through the debtor. The documents preserved and produced should correspond with the sophistication of the debtor and complexity of the issues that are expected to arise in the bankruptcy.

[38] *Id.*

[39] *Id.*

[40] *Id.*

At the time of filing, debtor's counsel should evaluate whether discovery requests, either formal or informal, are pending or anticipated. If so, counsel should begin discussions with the appropriate parties, including the United States Trustee and any committee appointed in the bankruptcy case, to agree on the form of an interim ESI protocol to be filed with the bankruptcy court. When dealing with individual debtors, debtor's counsel should pay particular attention to how personal information will be treated. If the debtor is a business, then debtor's counsel should undertake similar precautions to protect trade secrets or other valuable internal information, and may consider entering a confidentiality agreement prior to exchanging discovery, or consolidating confidentiality provisions in an ESI protocol agreement.

Creditor's Counsel

The time at which a creditor's duty to preserve documents and ESI varies tremendously among cases. If a creditor files a proof of claim, then the duty likely arises at the time of filing or when the filing of the proof of claim is reasonably anticipated if a dispute regarding the claim is likely. However, the debtor's duty to preserve evidence related to that claim may not arise until an objection to the claim is reasonably anticipated. Additionally, the time to preserve arises when litigation, an adversary proceeding, or other dispute is reasonably anticipated. Also, a creditor may have a duty to preserve evidence once it becomes involved in a Rule 2004 examination or receives a subpoena.

The creditor's duty to preserve does not include all documents but generally must be proportionate to the expected scope of the dispute. A creditor will clearly want to preserve all documents related to its claim, particularly if a claim has been scheduled as disputed, contingent, or unliquidated, indicating that litigation is possible. Creditor's counsel should consult with appropriate in-house counsel or IT personnel early in the bankruptcy case regarding documents or information necessary to support the creditor's claim in order to evaluate and address any limitations or gaps. Creditors should also look to preserve information pertaining to possible preference or fraudulent conveyance claims and any possible defenses thereto.

CONCLUSION

The latest changes to the Federal Rules emphasize case management and proportionality, and will require practitioners to address e-discovery issues early and proactively, if they are not already doing so. Pushing back discussions and decisions regarding substantive discovery issues (with both clients and adversaries) or delaying the collection and analysis of potential document and data sources will put counsel (and their clients) at risk of violating their duties under the rules.

Fortunately, the rule changes also should bring greater continuity in the application of the most severe sanctions for failure to preserve ESI, and provide tools and guidance for remedial measures to balance against any prejudice created by lost data. The actual impact of the rules will take years to unfold. But proactive and efficient e-discovery practices can help parties and their counsel reach the merits of their disputes and reduce the chances of a discovery side-show, even without changes to the rules. The most common errors and issues in the e-discovery space arise from failures to understand the technical issues and to manage the discovery process proactively and efficiently. Hopefully, these amendments will improve the emphasis placed on discovery planning and management. ■