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(Pro)portion Control of Discovery in 2015

By Kristen E. Polovoy

"Portion control" is often a popular topic as each new year commences, with folks resolving to eat healthier, lose weight and get in shape. But in 2015, another kind of "(pro)portionality" will likely last longer than most diet resolutions: the new paradigm for discovery's scope under the Federal Rules of Civil Procedure.

In August 2013, the Civil Rules Advisory Committee for Rules of Practice and Procedure approved the "Duke Package" - the rule proposals that came out of the May 2010 conference of judges, lawyers and academics to address costs and burdens of discovery. In September 2014, the U.S. Judicial Conference accepted the Committee's recommendations and submitted them to the Supreme Court for approval. If adopted by the Court and approved by Congress, the rules would take effect on December 1, 2015 (in the absence of legislation rejecting, modifying or deferring them).

Among the several proposed changes to discovery under F.R.C.P. 26 and 37(e), a shift from the "reasonably calculated to lead to admissible evidence" standard under current Rule 26(b)(1) to a "proportionality" paradigm under the new Rule perhaps holds the greatest potential impact for one genre of voluminous Garden State litigation unique to New Jersey law: consumer product class actions under our Consumer Fraud Act, N.J.S.A. 56:8-1, et seq. ("NJCFA").

Under current Rule 26(b)(1), parties may obtain discovery regarding any non-privileged matter "that is relevant to any party's claim or defense[,] [and it] need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Under proposed new Rule 26(b)(1), the scope of discovery is scaled back to non-privileged matters that are not only relevant to any party's claim or defense but are also:

> 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.

In other words, new Rule 26(b)(1): (A) eliminates the current Rule's "reasonably calculated to lead to discovery of admissible evidence" standard; and (B) incorporates current Rule 26(b)(2)(C)(iii)'s six cost-benefit factors (which courts presently use when considering whether to limit the frequency or extent of discovery) to delineate what is "proportional" (i.e., discoverable).

Although the pending Federal Rules changes aimed to address (among other things) complaints about costs, delays and burdens, "proportional" discovery puts several potholes on that path when it comes to consumer fraud class actions under the NJCFA.

Consumer protection class actions regarding selected language on food labels (e.g., "natural," "fresh," "pure," etc.) climbed nationally from roughly 19 in 2008 to over 150 in 2014. The NJCFA's aggressive pro-consumer stance has made New Jersey fertile ground for these suits in the past several years. Many industry commentators have questioned whether claims in these suits truly comport with the spirit of the law: i.e., protecting purchasers from actual losses due to fraudulent practices. Some courts have even chimed in, including the infamous Crunchberry case. Sugawara v. Pepsico, No. 08-01335, 2009 WL 1439115 (E.D. Cal. May 21, 2009) ("This Court is not aware of, nor had Plaintiff [Cap'n Crunch cereal purchaser] alleged the existence of, any actual fruit referred to as a 'crunchberry.' Furthermore, the 'Crunchberries' depicted are round, crunchy, brightly-colored cereal balls, and the [box] clearly states both that the Product contains 'sweetened corn & oat cereal' and that the cereal is 'enlarged to show texture.' Thus, a reasonable

consumer would not be deceived into believing that the Product contained a fruit that does not exist").

To state a claim under the NJCFA, a plaintiff must allege that "the defendant engaged in an unlawful practice that caused an ascertainable loss to the plaintiff." N.J.S.A. 56:8-19. The NJCFA does not define "ascertainable loss", but the term has been variously formulated in caselaw as "out-of-pocket loss" (misrepresented product's purchase price), (2) "loss-in-value" / "benefit-of-the-bargain" (quantifiable value difference between merchandise as advertised and as delivered), and (3) nominal overcharge. Smajlaj v. Campbell Soup Co., No. 10-1332, 2011 WL 1086764 (D.N.J. March 23, 2011).

Under proposed new Rule 26(b)(1), it is not difficult to imagine food manufacturers opposing discovery requests in food labeling class actions under the NJCFA on the grounds that, for example, the burden of producing defendant's six year product sales records does not "outweigh its likely benefit" in resolving consumers' claims they believed a sugary snack they bought were, as claimed on the front of the label, "healthy." Likewise, does the statutorily-undefined nature of "ascertainable loss" still consistently throw open the floodgates to discovery costs and time when parties dispute whether document requests regarding alleged losses in advertised products' value are "proportional" to the needs of the case?

It is similarly not difficult to imagine consumer-plaintiffs advocating for the discoverability of defendant-manufacturers' in-house scientific testing results to support "clinically proven" product label claims, on the grounds that "the parties' relative access to" the requested information is unequal. But would this "relative access" argument not prejudicially tip the scales in favor of plaintiff-consumers in nearly every consumer fraud product labeling class action? Such an imbalanced scorecard could not have been what the Duke Conference intended, but new Rule 26(b)(1)'s proportionality factors do conceivably set the stage post-Duke for just as much quibbling about the "proportional scope" of discovery as about Crunchberry claims (metaphorically speaking) as existed under "reasonably calculated."

But the likely bumps on the road ahead don't mean we shouldn't give it a try. "Progress is not accomplished in one stage" (Victor Hugo), and litigants on both sides of the Food Court aisle seem hungry for a discovery menu change. Maybe "(pro)portion control" will be 2015's new diet fad for food labeling class action discovery.