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Hot Issues Alerts – Law Firms

E-Discovery: Opt For Major Changes Rather Than Tinkering At The Edges Of The Rules

*The Editor interviews **Beth S. Rose**, Member of the firm of Sills Cummis & Gross P.C. and nationally known for her defense of pharmaceutical and medical device companies in complex product liability litigation.*

Editor: Are your corporate counsel clients concerned about litigation costs?

Rose: Litigation costs are a major concern to all of my clients. Given the current economic climate, there is a renewed focus on litigation budgets and controlling costs. Clients are looking for certainty. In that respect, e-discovery is a particular challenge in that both its scope and the costs are often unpredictable.

Editor: Are high e-discovery costs attributable to notice pleading?

Rose: To a certain extent, I would say yes. Notice pleading rules allow plaintiffs to make very broad allegations. In the New Jersey state and federal courts where I practice, the standard for discovery can be quite liberal. The test is not admissibility at trial, but rather, whether the material is reasonably calculated to lead to the discovery of admissible evidence. A defendant faced with broad allegations in the initial pleading coupled with a liberal discovery standard may have a difficult time successfully resisting broad e-discovery demands on the grounds that the information is not relevant.

Editor: Do you feel that e-discovery costs and disclosures of confidential data as a result of e-discovery intimidate corporations into settlement of otherwise meritorious cases?

Beth S. Rose

Rose: It really depends on the size of the claim. Where there is complex litigation with billions of dollars at stake, it would be quite surprising if any party were intimidated by a few million dollars in e-discovery costs. It gets trickier when e-discovery costs begin to approach (or even exceed) the value of the amount in dispute. In either scenario, it would not be unreasonable for a party to consider the costs of e-discovery when evaluating its overall strategy, including whether or not to settle a claim.

Editor: Do you find that the amount of new information uncovered by e-discovery justifies the cost?

Rose: No. My experience has been just the opposite. For example, I was recently involved in mass tort litigation where hundreds of plaintiffs claimed that their ingestion of a drug caused a variety of injuries**.** The defendants produced millions of pages of documents during discovery. During the first trial, there were approximately 250 exhibits moved into evidence. A large portion of the documents were "learned treatises," which under Rule 803(18) were not provided to the jury during their deliberations. Another large chunk of documents consisted of plaintiffs' medical records. In other words, very little of the information generated through a massive e-discovery effort was used at trial.

Editor: Is the justice system undermined by the fact that many meritorious cases are settled because of the burden of e-discovery?

Rose: It's difficult to say to what extent the burdens of e-discovery have reduced the number of cases that go to trial. Even before the advent of e-discovery, the number of cases tried was on the decline. That being said, the costs of e-discovery can be staggering and in certain cases, those costs may be part of a party's evaluation regarding whether or not a case is defended through verdict. All parties should be concerned if meritorious cases are being settled solely on the basis of e-discovery costs.

Editor: Have *Twiqbal* changed the outcome of many cases in the federal courts in New Jersey?

Rose: It is difficult to say whether the plausibility standard articulated in *Twombly* and *Iqbal (Twiqbal)* has changed the outcome of cases in federal court. I am not aware of any empirical data on this question. Most of the judges I have appeared before are reluctant to dismiss a complaint on a motion to dismiss, and I believe that reluctance continues in the face of *Twiqbal*.

On the other hand, I do believe that *Twiqbal* should have incentivized the

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plaintiffs' bar to conduct greater due diligence before (rather than after) a complaint is filed. Similarly, *Twiqbal* has given federal judges the ability to insist on factually plausible pleadings before discovery costs are incurred.

Editor: Have *Twiqbal* narrowed the scope of e-discovery by virtue of requiring a focus on the facts pleaded in the complaint?

Rose: That has not been my experience. While *Twiqbal* has the potential to be helpful in that regard, it is unlikely that the scope of e-discovery will be narrowed in the absence of significant changes in the approach to discovery, especially in complex litigation.

I was particularly impressed with the recommendations in the White Paper, *Reshaping the Rules of Civil Procedure for the 21st Century*, and the related Comment discussed in the cover story by Dan Troy in the July 2010 issue of *The Metropolitan Corporate Counsel*. The White Paper made four recommendations for changes in the federal rules, namely the implementation of the pleading standards in *Twiqbal*; limitations on the scope of discovery; explicit guidance on the preservation of information; and approaches to reducing discovery costs. The implementation of these recommendations or a variation of them would help to address current problems with e-discovery.

Editor: So you're talking about the codification of those four principles in the federal rules.

Rose: Yes. I agree with Dan Troy that the White Paper and the Comment "offer a compelling rationale for opting for major changes rather than continuing to tinker at the edges of the Rules."

Editor: So you don't view *Twiqbal* as the complete answer?

Rose: Correct. I believe *Twiqbal* are excellent cases that move us in the right direction, but they need to be coupled with other reforms, including the ones advocated in the White Paper and Comment.

Editor: How does *Twiqbal* affect the scope of litigation holds and the preservation obligation?

Rose: While an argument could be made that an outgrowth of *Twiqbal* is a more limited litigation hold, a litigant's conduct is more likely to be evaluated in the context of recent case law regarding the duty to preserve e-discovery and other documents and the implications when a party fails to do so. Judge Shira Scheindlin's 2010 opinion in the *Pension Committee* case, followed by Judge Lee Rosenthal's opinion in the *Rimkus* case a few months later, provided important guidance to plaintiffs and defendants alike. Both decisions evaluated whether or not sanctions were appropriate by virtue of a party's alleged failure to preserve relevant e-discovery. In both cases, the courts found that there had been a failure to preserve e-discovery and awarded sanctions and imposed other penalties. These opinions make clear that a litigant should take a broad approach to the preservation of evidence to reduce potential exposure to sanctions and other penalties as the litigation progresses.

Editor: Under *Twiqbal*, if you plead that a product caused an injury, do you have to include facts that show that the product caused the injury?

Rose: Yes. It is not sufficient to allege merely that a plaintiff took a drug, suffered an injury and that therefore, the drug caused the injury. Under *Twiqbal*, those allegations would not meet the plausibility standard, but rather would be viewed as formulaic and conclusory. This result is quite reasonable – a plaintiff must be able to articulate the factual basis for his/her cause of action *before* the complaint is filed and discovery begins.

Unfortunately, notice pleading in state courts sometimes allows plaintiffs to use discovery to try to develop the facts they should have had before they brought the case. Plaintiffs in state court vigorously resist the teachings of *Twiqbal* and are quick to point out that the cases simply do not apply. My experience has been that state court judges often give plaintiffs multiple attempts to re-plead conclusory causes of action. If the same matter were pending in federal court, under *Twiqbal,* there is a much better chance that the complaint would be dismissed in its entirety.

Editor: Do you think there is a role for nonprofit foundations to file amicus briefs pointing out faulty science in establishing a chain of causation?

Rose: That is an intriguing idea. To be sure, to survive a *Twiqbal* challenge, a complaint must articulate some plausible, scientific basis of a causal relationship between the product and the injury. Nevertheless, the utility of an amicus brief at the pleading stage to demonstrate "faulty science" seems remote. Assuming the court permitted and considered the submission, the introduction of facts outside of the pleadings would transform a motion to dismiss into one for summary judgment. A summary judgment motion would likely be denied as premature since no discovery would have been conducted.

Editor: H.R. 4115 is pending in the House of Representatives. It prohibits a federal judge from dismissing a case unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim, which would entitle the plaintiff to relief. How would the passage of this bill affect e-discovery costs?

Rose: The standard proposed in H.R. 4115 is extremely troubling, especially the phrase "beyond doubt." It would enable a plaintiff to submit wholly conclusory statements that would survive a motion to dismiss. If the standards suggested in H.R. 4115 were employed, certain judges may feel reluctant to dismiss any kind of complaint, even if it appeared the complaint were being brought solely for investigative purposes. All a plaintiff would have to do is leave open some possibility that he or she might establish some set of undisclosed facts in the future that support recovery. That would be a terrible result for our justice system.

It would be extremely difficult to get a complaint dismissed at the early stages of discovery and would open the floodgate for meritless claims. Unfortunately, the fallout from a standard like that would be ever-increasing and out-of-control e-discovery costs.

The views and opinions expressed in this interview are those of the interviewee and do not necessarily reflect those of Sills Cummis & Gross, P.C. or the firm's clients.