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Senate Panel Weighs Changes To Discovery Rules

By **Kelly Knaub**

Law360, New York (November 05, 2013, 5:02 PM ET) -- Supporters of changes to civil rules that would limit the scope of discovery argued at a Senate committee hearing Tuesday that the amendments would reduce unnecessary court costs, while critics contended that they would make it harder for plaintiffs to obtain justice.

Sen. Christopher Coons, D-Del., chair of the bankruptcy and the courts subcommittee, led the hearing, which addressed changes proposed in August by the Judicial Conference Advisory Committee on the Civil Rules.

The proposed amendments would allow responding parties to determine which discovery requests are proportional to the needs of a case, increase the frequency with which courts assign the costs of discovery to the requesting party rather than the producing party, place stricter presumptive limits on depositions, and limit interrogatories and requests for admission.

Coons said that although it is the role of the judiciary to propose — and for Congress to review — any changes to the rules governing litigation in federal courts under the Rules Enabling Act, courts have typically avoided this mechanism over the past three decades and instead used decisional law to reinterpret the rules.

New York University School of Law professor Arthur Miller, who opposes the changes, told the panel that the pretrial landscape in federal courts over the past 25 years has been littered with "stop signs" that prevent Americans from getting meaningful days in court, undermine congressional and constitutional policies, and have resulted in the deformation of the Federal Rules of Civil Procedure.

"What we have seen are paper cuts perhaps, but death by 1,000 procedural paper cuts is still death to the system as we've known it," Miller said.

But Andrew Pincus, a partner at Mayer Brown LLP, disagreed, saying that litigation takes too long and is too expensive. He cited a study by the American College of Trial Lawyers that

concluded that the tremendous growth in electronically-stored information combined with discovery rules formulated for the typewriter and paper era have significantly increased discovery-related legal costs.

Another study conducted by the Rand Institute for Civil Justice found a median cost of $1.8 million per case just for producing electronically-stored information, he said.

Pincus added that the proposed amendments represent moderate change and that although the Judicial Conference Advisory Committee didn't decide to do nothing, it also didn't adopt proposals that were advanced by some in the defense bar.

“It steered a middle course,” he said. “The principal proposed amendment relating to the scope of permissible discovery simply moves a standard already in the rule requiring that discovery be proportional to the needs of the case in order to give that standard added emphasis.”

But Sherrilyn Ifill, president and director-counsel of the NAACP Legal Defense and Educational Fund Inc., countered that the cases with real discovery problems and exorbitant costs are not the majority of cases. No study has supported the idea that litigation has run amok either from costs or from overburdensome discovery, she said.

Ifill argued that summary judgment has become “the name of the game” over the past 30 to 40 years, which has put pressure on the front end of litigation.

She also said that the information that would support a claim of discrimination is often within the possession of the defendant, and the only way to get that information is through the discovery process.

“This is information that people recognize that they have to hide, and so what we have to do in the discovery process is dig even deeper than we ever had to do in the past to ensure that we can gather this information and use it for our claims.”

Sen. Sheldon Whitehouse, D-R.I., said he felt that some of the questions as well as Pincus' testimony at the hearing were one-sided by implying that plaintiffs are the ones who abuse the defense bar when there are discovery problems.

“That runs very contrary to my experience,” Whitehouse said. “My experience has been that plaintiffs want to get to court as fast as they possibly can. They want to get that case into court.”

Speaking from his experience on the defense bar, Whitehouse said that the defense's number one goal is to delay the trial, burning up the plaintiffs' money and starving out the case before it ever makes it to trial. Discovery is often extended by defendants, he said.

As the hearing neared an end, Miller suggested that using technological solutions to bring down the cost of electronic discovery was preferable to adopting the proposed changes and argued that the rules should not be “tinkered” with.

“Do not make proposals until you have a demonstrated need for one and make sure it is the least draconian of all the possibilities,” he said.

Public comment on the proposed amendments will be accepted until Feb. 15. If the changes are approved by the relevant committees, the Judicial Conference Advisory Committee, the Supreme Court and Congress, they will become effective on Dec. 1, 2015.

--Editing by Andrew Park.