Opinion

A Rare Chance to Lower Litigation Costs

A federal committee wants to hear your ideas on the subject. Speak up.

By
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Nothing provokes as much dread in the mind of a CEO or general counsel as the words, "We've been sued in federal court." Once they hear an estimate of the litigation costs, many executives say, "I don't care if we're right, settle the case."

Beyond this injustice, excessive litigation costs erode U.S. companies' ability to compete in world markets and make foreign companies reluctant to invest here. As a member of the U.S. Senate Judiciary Committee for 18 years, I became aware of the growing frustration of the business community with the costs of litigation in federal courts and the inordinately long time it takes to resolve cases.

The primary culprit for excessive cost and delay is "discovery"—the process of preserving, reviewing and disclosing vast amounts of corporate information. A 2010 survey of Fortune 200 companies by Lawyers for Civil Justice, the Civil Justice Reform Group and the U.S. Chamber Institute for Legal Reform found that in 2006-08 companies at the low end of the range were paying $620,000 per case, and those at the high end were paying almost $3 million per case in discovery costs. And for what purpose? According to the survey, only one-tenth of 1% of the material produced in discovery was used at trial.

Since 2010, discovery expenses have risen sharply; the median cost is now $1.8 million per case, according to research by the RAND Institute for Civil Justice. The rapid escalation is due largely to court rules that require preserving and accessing vast amounts of irrelevant electronic information. For example, in a case involving mortgage giant Fannie Mae, FNMA -3.66%Fannie MaeOTCBB$3.16 -0.12 -3.66% Jan. 17, 2014 3:59 pm Volume (Delayed 15m) : 13.09M AFTER HOURS$3.18+0.02 +0.48% Jan. 17, 2014 4:37 pm Volume (Delayed 15m): 12.61M P/E Ratio N/A Market Cap $3.66 Billion Dividend Yield N/A Rev. per Employee $17,017,200 01/15/14 BofA Earnings Surge After Year... 01/13/14 U.S. Posts December Budget Sur... 01/02/14 How the Fannie, Freddie Settle...More quote details and news »**FNMA** **IN** Your Value Your Change Short position the Office of Federal Housing Enterprise Oversight—a government agency that wasn't even sued—had to spend over $6 million, more than 9% of its annual budget, accessing electronic data to respond to defendants' subpoenas.

Fortunately, there's now a chance for some relief. The federal Advisory Committee on Civil Rules is considering amendments to discovery rules that would reduce the cost and burdens. The three most important committee proposals are: (1) a clear national standard

that says companies could be punished for discarding information only if they did so in bad faith to hamper litigation; (2) a narrower scope of discovery that focuses on the claims and defenses of each case rather than any information that might lead to admissible evidence; and (3) confirming judicial authority under Rule 26(c) of the Federal Rules of Civil Procedure to allocate the costs of discovery to the party requesting discovery rather than the party responding. A "requester-pays" system lets a party decide to pay and get certain information if it really needs it. It also eliminates the temptation to make overly broad requests to impose costs on the other side to coerce a settlement.

On Jan. 9, I testified before the committee and supported the proposed changes, which I believe are an important first step toward more robust reform. The committee's effort to revise the discovery rules is now at a decisive point. It is seeking input during a public comment period through Feb. 15. For the business community and others who care about civil litigation, it is essential to provide the committee with meaningful comments explaining how the current discovery system needs to be improved.

Defenders of the status quo are denouncing any modification and attempting to delay the process. Those favoring change cannot sit back and expect to see something positive emerge. If companies commit a tiny percentage of the time and money they spend on nonproductive discovery for participation in the committee's work, the benefits could be substantial.

If those favoring change do not come forward to support modifications, the committee may fail to produce meaningful reforms. Congress could decide to legislate a solution. The judges and lawyers involved in the committee deal with the rules of civil procedure on a daily basis. They better understand the ramifications of any changes.

The American civil justice system is in crisis. Litigants are fleeing U.S. courts for other forums of dispute resolution, or if they are unable to do so, settle cases for strictly economic reasons no matter the merits.

Companies that do business in the U.S. are losing their competitive advantage because the costs of resolving disputes here are needlessly inflated. The committee's proposals are a step forward and should be embraced and supported.

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