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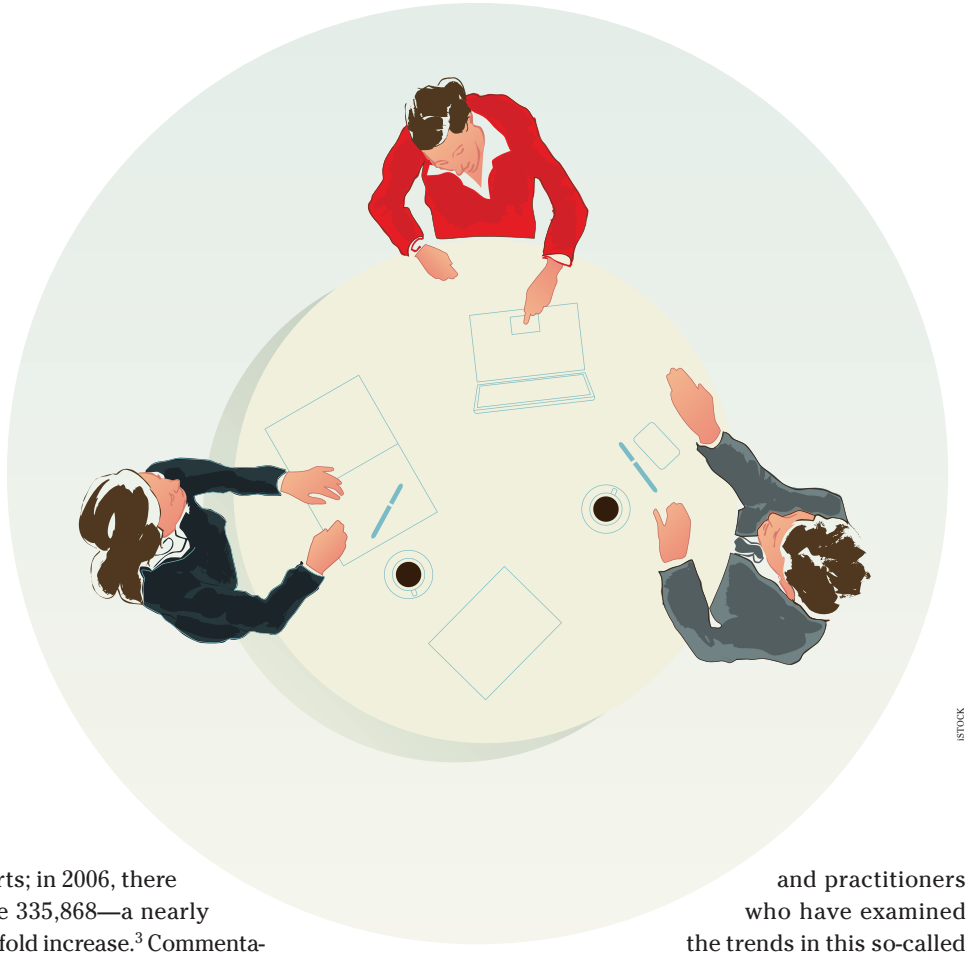
Is There A Fundamental Right To Take A **Plaintiff's Deposition**?



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BY JULIA TARVER-MASON WOOD

FOR MOST CIVIL LITIGATORS, the right to take the deposition of the person or entity who has sued your client seems unassailable. Yet recent trends in large, non-class-action, multi-plaintiff litigation may be eroding this assumption. As multi-district litigation has proliferated in recent years and as Congress has tried to funnel class actions into federal courts (and as plaintiffs' lawyers have resisted this trend by strategically crafting multi-plaintiff litigations that will remain in state court, where the substantive law or jury pools may be perceived as more favorable), individual judges—exercising their prerogative as case managers to impose limits on the scope and duration of discovery—have begun to impose significant limitations on the ability of defendants to take pretrial discovery, including depositions of plaintiffs.[1] Surprisingly, defendants who find themselves in such situations have few concrete legal guide posts with which to challenge a restriction on their "right" to take depositions of the plaintiffs.

Litigation Trends

There is little debate that the last half-century has seen a "litigation explosion" of sorts in the United States.[2] In 1940, shortly after the passage of the Federal Rules of Civil Procedure, there were 68,136 cases filed in the U.S. district courts; in 2006, there were 335,868—a nearly five-fold increase.[3] Commentators have attributed the proliferation of litigation to several factors, including the creation of new substantive civil rights by Congress, the expansive federalization of criminal laws, large-scale litigation involving nationwide antitrust and securities fraud schemes, as well as massive mass tort litigation arising from scientific and industrial innovations.[4] Academics and practitioners who have examined the trends in this so-called "mega litigation" contend that these mega cases have fundamentally impacted our legal system, particularly in the area of pretrial practice. It is evident that the courts and Congress have responded to the proliferation of litigation by enacting rules that both restrict parties' rights to unfettered discovery and impose greater responsibility on judges to

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serve as case managers promoting prompt and efficient "resolutions" of cases. While it used to be that the primary role of the bench was to resolve questions of substantive law and to oversee the trying of cases, the modern judge today spends a greater percentage of his or her time serving a largely managerial function—overseeing pretrial discovery. Add to these trends the fact that taking a civil case to trial is an increasingly rare event,[5] and one can see how pretrial proceedings, including discovery, are being curtailed at a time when they are arguably more important than ever.[6]

One ever-increasing area of "mega litigation" in the last half-century is securities litigation. In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA) in order to curb the filing of purportedly frivolous securities lawsuits. Among other things, the PSLRA requires plaintiffs to meet a higher pleading burden before their cases may proceed to costly discovery.[7] Similarly, just three years later, Congress passed the Securities Litigation Uniform Standards Act (SLUSA), which was intended to channel all securities class actions into federal courts, where they would be subject not only to the heightened pleading standards referenced above, but also to the more stringent case management of active federal court judges.[8] Ironically, these attempted legislative remedies may have had the unintended consequence of propelling more complex, multi-plaintiff actions into state court. There is a growing trend among plaintiffs' counsel to pursue large, multi-plaintiff action in state courts, where they avoid these more stringent pleading requirements (and benefit from more favorable substantive laws and possibly more favorable jury venires).[9]

Courts Tackle Depositions

Of course, large, multi-plaintiff, non-class-action litigations are not new. Yet what is new is the confluence of an environment in which large, non-class-action litigations are proliferating at the same time that courts—both state and federal—are clamping down on broad discovery rights, including but not limited to the right to take party depositions prior to trial. Courts in such situations often view discovery in general, and depositions in particular, with a jaundiced eye. Particularly when the litigation is sprawling, judges are more likely to place limits on even the most fundamental discovery techniques, including depositions of party-plaintiffs. Despite the fact that it is plaintiffs (or their lawyers) who institute these multi-party cases, and despite the fact that such litigations are, by definition, not representative actions, courts nonetheless tend to view them through a "class action" prism.

Accordingly, judges often question the defendant's need to take every plaintiff's deposition, and are usually content to allow defense counsel the opportunity to conduct some "sampling" of plaintiffs' testimony. While such restrictions are virtually unheard of in a "normal" civil case, where the right to take your "accuser's" deposition typically is afforded as a matter of course (even under today's more restrictive discovery rules), in large litigations, the goals of efficiency and expediency often trump the countervailing goal of affording litigants full and fair discovery of their adversary.

The Federal Rules of Civil Procedure

Interestingly, prior to the passage of the Federal Rules of Civil Procedure in 1938, the taking of pretrial depositions was an exceedingly rare and narrowly circumscribed practice.[10] In federal court, pretrial depositions were strictly limited to circumstances in which there was a reasonable fear that relevant testimony would be lost before trial of a case. Only a handful of states permitted the use of depositions to conduct discovery into the parties' claims and defenses. With the passage of the rules in 1938, all of that changed. The rules ushered in a civil procedure "revolution" that was designed to avoid "trial by ambush" and to eliminate gamesmanship from the adversarial system of justice by allowing both sides of a litigation unfettered access to discovery of the relevant facts and circumstances underlying the parties' respective claims and defenses.[11]

The original Rule 26 simply yet boldly proclaimed that "[a] party may, by oral questions, depose any person, including a party, without leave of court." According to the contemporaneous Advisory Committee Notes, "[t]his rule freely authorizes the taking of depositions… whether for the purpose of discovery or for the purpose of obtaining evidence." As the broad text implies, parties to litigation were entitled to take depositions as a matter of right, with no judicial review. The Advisory Committee notes characterized the new federal deposition rules as giving an "unlimited right of discovery."[12] With the passage of the rules in 1938, there was a tremendous faith in the adversarial system of justice, and a belief that attorneys for both sides should be given unrestricted access to discovery from both opposing and third parties. As civil procedure scholar Judith Resnik has described it:

> These men spoke as if they had a belief, fairly termed "faith," in adversarial exchanges as an adequate basis for adjudication, in adjudication as the essence of fair decisionmaking, and in fair decisionmaking as essential for legitimate government action. The rules that they crafted were to enable attorneys, facing off within the tradition of adversarial encounters, to provide information to judges who would, in turn, produce acceptable (indeed perhaps good) outcomes.[13]

This broad approach to pretrial discovery has long separated the U.S. legal system from its continental counterparts.[14] As one legal scholar characterized it, "discovery is the American alternative to the administrative state.… Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy."[15] In more modern times, however, the question must be asked whether we are trending away from these historical roots. It would appear that as litigation has evolved and expanded in the years since 1938, so have society's views of the appropriateness of broad discovery.

In the mid-1970s, for example, practitioners began agitating for change in the broad, largely lawyer-controlled, U.S. discovery regime. Many participants in the process began to believe that discovery in general, and depositions in particular, had become too costly, burdensome, and aggressive.[16] The American Bar Association, among others, suggested that federal judges step in to play a greater role in reining in the excesses of discovery. As Judge William Schwarzer of the Northern District of California explained:

> The staggering increase in the volume and complexity of cases has thrust case management on judges and has involved them deeply in controlling the scope and pace of litigation. Discovery, originally conceived as the servant of the litigants to assist them in reaching a just outcome, now tends to dominate the litigation and inflict disproportionate costs and burdens. Often it is conducted so aggressively and abusively that it frustrates the objectives of the Federal Rules. It has been said that now lawyers must try their cases twice, once before trial and once at trial.[17]

In 1980, the rules were amended to include Rule 26(f), which effectively codified district court judges' new role as case manager, not

just neutral arbiter. Rule 26(f) provided for mandatory discovery conferences, and later, in 1983, the idea was broadened by amendments that permitted greater judicial control over discovery, including the imposition of sanctions for discovery abuses. This trend toward greater judicial review of the discovery process continued with the 1993 amendments to the Rules, which for the first time imposed a limit on the number of depositions the parties may take, absent leave of court or stipulation of the parties.

As the Advisory Committee explained: "One aim of this revision is to assure judicial review…[and a] second objective is to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case." The rule was also added "to dispel any doubts regarding the power of the court by order or local rule to establish limits on the length of depositions." In 2000, the rules' drafters modified this section once again and codified a presumptive limit of seven hours for any deposition, while emphasizing that a court still "may enter a case-specific order directing shorter depositions for all depositions in a case or with regard to a specific witness."

The Present State of Depositions

Given that only an estimated 6 percent of cases, or fewer, actually make it to trial,[18] depositions may represent the last vestige of what remains of the traditional adversarial system of justice. In the 94 (or greater) percent of cases that are resolved prior to trial, depositions represent the only opportunity for adversaries to confront witnesses directly and probe the claims and defenses in the case, unmediated by opposing counsel's careful wordsmithing seen in written discovery tools such as interrogatory responses and answers to depositions on written questions. That said, now is not a popular time to be a proponent of depositions. The trend in modern courts is to view depositions as a necessary evil that must be carefully limited and controlled. Indeed, the Manual for Complex Litigation, chides that "[d]epositions are often overused and conducted inefficiently, and thus tend to be the most costly and time-consuming activity in complex litigation." Manual for Complex Litigation, Fourth, at §11.45. Thus, the Board of Editors recommends that courts "should manage the litigation so as to avoid unnecessary depositions, limit the number and length of those taken, and ensure that the process of taking depositions is as fair and efficient as possible." The manual also emphasizes what every civil litigator knows: "The court has broad authority to limit depositions." Id. at §11.451.

In that sense, what modern civil litigators are witnessing is a progressive unraveling of the fundamental thesis behind the "revolutionary" 1938 Federal Rules of Civil Procedure—that discovery methods generally, and depositions in particular, should be freely granted. Apparently, the law giveth, and the law taketh away. Yet the question remains: at what cost to traditional notions of adversarial justice?

1. See, e.g., Kathie Marchlewski, "Judge: Dow Can Depose 50 Plaintiffs," *The Midland Daily News*, Dec. 23, 2003 (explaining that defendant can depose 50 out of 174 plaintiffs in dioxin litigation).

2. Noted scholar of civil procedure, Arthur R. Miller, described it this way:

> Civil litigation has long been criticized as costly and inefficient. The contemporary perception of a crisis in the judicial system first became prominent in the 1970s. Alternately characterized as "hyperlexis," the "adversary society," and now, most popularly, the "litigation explosion," the phenomenon described in the literature involves increasing rates of litigation.… The recent outcry in this country over the social costs of civil litigation is unprecedented in its decibel level and sense of urgency, bringing together a coalition of politicians, lawmakers, business people, and scholars that often bridges traditional lines between conservative and liberal ideologies. It has engaged the attention of all three branches of the federal government as well as many state legislatures.

Arthur R. Miller, "The Pretrial Rush to Judgment: Are the 'Litigation Explosion,' 'Liability Crisis,' and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?," 78 N.Y.U. L. Rev. 982, 985-86 (2003) (Miller, "The Pretrial Rush to Judgment").

3. Rex R. Perschbacher & Debra Lyn Bassett, "The Revolution of 1938 and Its Discontents," 61 Okla. L. Rev. 275, 276 (2008) (citations omitted) (Perschbacher & Bassett, "The Revolution of 1938").

4. See, e.g., Miller, "The Pretrial Rush to Judgment"; Richard L. Marcus, "Reassessing the Magnetic Pull of Megacases on Procedure," 51 DePaul L. Rev. 457 (2001).

5. Perschbacher & Bassett, "The Revolution of 1938," at 279 (noting that over 22 percent of federal civil cases were tried in 1938, compared to only 1.3 percent in 2006).

6. The most distinctive difference between federal litigation practice in 1938 and federal litigation practice today is the change in the ultimate goal of federal litigation: a change from deciding cases on the merits to merely disposing of cases as expeditiously as possible—which runs counter to, and may even preclude a court from, determining the case on the merits. In sharp contrast to Judge Clark's statement that "the objective of litigation is a judgment settling rights after the process of fair trial," the remarkably small percentage of cases progressing to trial suggests that the objective of litigation today is the resolution of the parties' dispute, with the odds heavily stacked in favor of the resolution occurring privately and short of actual trial.

Id. at 286-87 (citations omitted).

7. 15 U.S.C. §78u.

8. Id. at §78bb(f)(2).

9. See, e.g., Jeffrey Cook, "Recrafting the Jurisdictional Framework for Private Rights of Action under the Federal Securities Laws," 55 Am. U. L. Rev. 621, 647 (2006); *Newby v. Enron*, 302 F.3d 295, 302 (5th Cir.2002); *In re WorldCom Sec. Litig.*, 294 F. Supp. 2d 431, 434-435, n.1 (S.D.N.Y. 2003).

10. E. Stewart Moritz, "The Lawyer Doth Protest Too Much, Methinks: Reconsidering the Contemporaneous Objection Requirement in Depositions," 72 U. Cin. L. Rev. 1353, 1357-63 (2004) (Moritz, "The Lawyer Doth Protest"); Jay S. Goodman, "On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend," 21 Suffolk L. Rev. 351, 360 (1987).

11. Moritz, "The Lawyer Doth Protest," at 1367; Judith Resnik, "Failing Faith: Adjudicatory Procedure in Decline," 53 U. Chi. L. Rev. 494, 522 (1986) (Resnik, "Failing Faith").

12. Moritz, "The Lawyer Doth Protest," at 1370 (citing Fed. R. Civ. P. 30, advisory committee's notes to subdivisions (b) and (d) (1937) and Edson R. Sunderland, "The New Federal Rules," 45 W. Va. L.Q. 5, 22 (1938) ("What the federal rules have done has been to remove practically all restrictions as to the right of discovery")).

13. Resnik, "Failing Faith," at 505.

14. See, e.g., John Langbein, "The German Advantage in Civil Procedure," 52 U. Chi. L. Rev. 823 (1985)

15. Paul D. Carrington, "Renovating Discovery," 49 Ala. L. Rev. 51, 54 (1997).

16. William W. Schwarzer, "The Federal Rules, the Adversary Process, and Discovery Reform," 50 U. Pitt. L. Rev. 703, 703-05 (1989).

17. Id. at 703.

18. Miller, "The Pretrial Rush to Judgment," at 1004. Other scholars believe the percentage of cases tried today may be even lower. See Perschbacher & Bassett, "The Revolution of 1938," at 279 (estimating only 1.3 percent of federal civil cases went to trial in 2006).

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