Inside Counsel

Inside two litigation tools: Confidential witnesses and cloned discovery

Confidential witnesses and “cloned discovery” can both present challenges for plaintiff and defense counsel

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Plaintiffs in securities and other litigation commonly employ two tools to develop evidence — confidential witnesses and so-called “cloned discovery.” Both present challenges for plaintiff and defense counsel.

Confidential witnesses

Securities complaints often rest on allegations on unnamed “confidential” witnesses (usually current or former employees of defendants), whether voluntary “whistleblowers” or people located by plaintiffs’ private investigators. Some may testify, but others are cited to get past the pleading standards so that plaintiffs can develop evidence in discovery.

Parties in litigation debate whether and when confidential witnesses need to be identified, as well as whether lawsuits can be maintained when such witnesses turn out not to know or to refute what was attributed to them in pleadings. With respect to identifying confidential witnesses, most courts, following the 2nd Circuit in *Novak v. Kasaks*, have stopped short of requiring names in a complaint, but some courts, most rigorously the 7th Circuit in *Higginbotham v. Baxter International, Inc.*, have discounted allegations based on anonymous witnesses, particularly where there are no corroborating facts about the witness’ proximity to their allegations.

What can defendants do, facing witnesses they cannot identify? They can seek discovery of unnamed witnesses *before* a motion to dismiss in order to let the court assess the allegations. The 2nd Circuit, in *Campo v. Sears Holdings Corp.,* approved depositions for “the limited purpose of determining whether the confidential witnesses acknowledged the statements attributed to them in the complaint,” concluding that “anonymity . . . frustrates the requirement” of the Supreme Court’s decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*that courts weigh competing inferences from allegations.

Once a complaint survives a motion to dismiss, the case for identifying confidential witnesses shifts to whether their identities are protected by the attorney work product doctrine. Courts are split, but the trend has been to allow discovery of the identity of witnesses quoted in a pleading, as the Southern District of New York held in *Fort Worth*

Employees' Retirement Fund v. J.P. Morgan Chase & Co., Plumbers and Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Arbitron, Inc., and *In re Bear Stearns Companies, Inc. Securities, Derivative, and ERISA Litigation.*

Obviously, there are good reasons why defendants generally want to identify plaintiffs' "confidential" witnesses. Anonymous witnesses may, on further inspection, turn out not to know or even to recant what plaintiffs claim they knew. That was the case in *City of Livonia Employees Retirement Fund v. Boeing Co.*, wherethe 7th Circuit dismissed the suit and the district court sanctioned the plaintiffs' firm for filing a complaint before interviewing a confidential witness who turned out not to have been in position to know the facts supporting his allegations; in *Belmont Holdings Corp. v. SunTrust Banks, Inc.*, where the witness similarly lacked the knowledge attributed to him in the complaint; and *City of Pontiac General Employees' Retirement System v. Lockheed Martin Corp.*, where some of the witnesses denied at a hearing that they had made the statements in question at all.

Cloned discovery

"Cloned" or "piggyback" discovery refers to efforts in litigation to obtain and use copies of discovery, including testimony, produced or received in other litigations or investigations. The "primary" litigation in which discovery is sought is often a follow-on class action trailing a "target" government investigation or case with prior discovery.

Cloned discovery has become more prevalent with the rise of multiple parallel litigations and investigations, the growing complexity of electronic discovery, and class action plaintiffs' need to play "catch-up" due to stays resulting from bankruptcy or securities laws. Cloned discovery presents strategic concerns for both sides and a dilemma for courts. Denying requests can risk limiting the record or requiring the duplication of efforts from a target proceeding. But agreeing to this type discovery can risk metastasizing the record and multiplying discovery costs without actually eliminating duplication. Parties and courts thus remain divided on cloned discovery.

Parties facing multiple litigations may be cautious about producing cloned discovery — not only out of a strategic desire to force opposing counsel to "do its job" with specific requests rather than rely on the work done by others, but also to avoid duplicative inefficiencies and confidentiality concerns. However, blindly resisting cloned discovery requests may not be the best approach: Courts may be unsympathetic, and the producing party may forgo some strategic advantages. For example, agreeing to voluminous cloned discovery can also force the requesting party to expend additional resources reviewing volumes of potentially irrelevant documents.

Also, if a party resists producing cloned discovery, it may be foreclosed later from relying on helpful materials from the target case. For example, in *Federal Housing Finance Agency v. HSBC North America Holdings* (*FHFA*), after the end of "substantial" document discovery, the defendants sought to introduce documents in their possession produced by the plaintiff in a related case but not in *FHFA*. The court denied this, reasoning that allowing one side to use unproduced documents would encourage "trial by ambush."

Cloned discovery's benefits can include reducing duplication in negotiating search terms and custodians, in deposing the same individuals multiple times on the same subject matter, and in producing multiple redundant expert reports. Counsel seeking cloned discovery can increase their likelihood in getting it by tailoring specific requests, rather than merely seeking all related discovery from any target cases; articulating similarities to the primary litigation; demonstrating how cloned material will save time and expense without undue burden; and offering a plan for complying with prior confidentiality orders.

Cloned discovery's downsides can be significant too. Counsel resisting cloned discovery can increase their likelihood of stopping it by drawing meaningful distinctions between the primary and target litigations; illustrating specific burdens; explaining the rationale behind governing confidentiality agreements; and considering agreeing to provide some discovery in exchange for limiting other burdensome requests, such as, for example, agreeing to reproduce some specific materials and prior relevant deposition transcripts in return for an agreement not to re-depose the witnesses in the primary litigation.

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