SELECT DECISIONS APPLYING DECEMEBER 2015 F.R.C.P. AMENDMENTS

Rule 26(b)(2) – Amendment may not make it easier for a party to resist discovery

- *Carr v. State Farm Mut. Auto. Ins., Co.*, 312 F.R.D. 459 (N.D. Tex. 2015) (Horan, J.)

    - "[The] amendments to Rule 26 raise the possibility that the burdens imposed on the party resisting discovery…must fundamentally change as well. *The Court concludes that is not so*." *Id.* at 465.

    - "[A] party seeking to resist discovery…still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b)…." *Id.* at 468.

    - *See also N.U. v. Wal-Mart Stores, Inc.*, 2016 WL 3654759, at *6 (D. Kan. July 8, 2016) (reaching same conclusion).

Rule 37(e)

- "Intent to deprive" required for adverse inference instruction

    - *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016)

        - Dispute over deleted text messages. Deleting party admitted negligence resulted in deletion. *Id.* at *3.

        - Court undertook step-by-step analysis of Rule 37(e) in resolving motion for sanctions. *Id.* at *3-*6.

        - Court concluded that the "amended Rule 37(e) does not permit an adverse inference instruction or other severe sanctions for negligence." *Id.* at *6.

        - Court further noted that "[t]he remedy should fit the wrong" under amended Rule 37(e). *Id.* at *6 n.5.

- Amended Rule 37(e) may be used to avoid sanctions under prior Rule 37(e)
    - *NuVasive, Inc. v. Madsen Med., Inc.*, 2016 WL 305096 (S.D. Ca. Jan. 26, 2016)
        - The court had ordered an adverse inference instruction concerning lost text messages in the upcoming February 2016 trial. *Id.* at *1.
        - The court granted a Rule 60(b) motion vacating its prior order directing an adverse inference instruction at trial, explaining "that the adverse inference instruction the Court was going to give falls within the measures [of amended Rule 37(e)] that are not permissible absent a finding of intent." *Id.* at *2.
- Amended Rule 37(e) is likely to apply to proceedings initiated prior to December 1, 2015
    - The December 2015 amendments may, in the court's discretion, govern all proceedings then pending "insofar as is just and practicable." 2015 US ORDER 0017 (C.O. 0017)
    - The consensus appears to be that the amended rules apply to pending cases filed prior to December 1, 2015:
        - *Applebaum v. Target Corp.*, --- F.3d ---, 2016 WL 4088740, at *4 (6th Cir. 2016) (applying standard in December 2015 amendments to case filed in 2011);
        - *Konica Minolta Bus. Solutions v. Lowery Corp.*, 2016 WL 4537847, at *3-4 (E.D. Mich. Aug. 31, 2016) (referencing "just and practicable" language and applying December 2015 standard).