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ORIGINAL

October 27, 2023

VIA U.S. MAIL AND EMAIL
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FILED

OCT 27 2023

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Honorable D. Jeremy Whitmire
Clerk of Mississippi Appellate Courts
Gartin Justice Building
P. O. Box 249
Jackson, MS 39205

89-R-99001

Re: Proposed Amendment to M. R. Civ. P. 26 regarding rebuttal experts

Dear Mr. Whitmire:

As an attorney who primarily represents American and foreign manufacturers in litigation in Mississippi and elsewhere, I write to express opposition to the referenced proposed amendment. In doing so, I have before me the October 23, 2023, letter of Ms. Penny B. Lawson, in which I join, and the letters of Mr. David Pitre and Mr. Lance L. Stevens, with which I respectfully disagree. I request this letter be filed in this matter.

The notion expressed by others that the new language is patterned after the corollary Federal Rule of Civil Procedure is questionable. There is a reference in Fed. R. Civ. P. 26(a)(2)(D) to disclosures that are "intended solely to contradict or rebut evidence on the same subject identified by another party." As a practical matter, however, in Mississippi's federal courts, this rarely occurs, as evidenced by the form Case Management Order, a copy of which is attached hereto. See Form 1. Case Management Order, Local Rules of United States District Court for the Northern and Southern Districts of Mississippi. As shown in Section 7.E., rebuttal disclosures are not contemplated as a matter of right. Conversely, the proposed amendment would make rebuttal disclosures a matter of right in state court.

There are some federal courts in other states with a controlled manner of allowing rebuttal disclosures, involving simultaneous disclosure of expert witnesses by both parties, followed by simultaneous disclosure of rebuttal disclosures by both parties. While this procedure is not recommended by the undersigned, it does reflect an effort to avoid the prejudice and "sandbagging" that could result from an amendment that, as a practical matter, allows only the plaintiff to have rebuttal disclosures as a matter of right.

The proposed amendment raises other concerns. First, what is a "rebuttal opinion"? This language is certain to generate unnecessary litigation regarding the meaning of this phrase. For

Attachment
MOTION: 7018 2403

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example, does this contemplate a new expert who expresses only “rebuttal opinions” or just a previously disclosed expert with new “rebuttal opinions”? And what constitutes a rebuttal opinion and distinguishes it from an untimely expert disclosure? The proposed amended “Comment” provides little substantive guidance on these and other questions.

Finally, the proposed amendment will add a minimum of 30 days to already potentially lengthy litigation. The reality is that it will be longer, since, one would assume, typically the trial court will allow a deposition regarding the rebuttal opinions, although neither the proposed amendment to the rule nor the comment address that.

In short, matters such as this are better left to the trial judge, whose discretion in the conduct of expert discovery, within the confines of the existing rules, should remain undisturbed.

Thank you for this opportunity to comment.

Sincerely yours,


David L. Ayers

DLA/cj
Enclosure

Last Updated: Jan 2022

FORM I (ND/SD MISS. JAN 2022)

**UNITED STATES DISTRICT COURT
CHOOSE DISTRICT: DISTRICT OF MISSISSIPPI
CHOOSE DIVISION:**

Enter Plaintiff(s) here:

PLAINTIFF

v.

**CIVIL ACTION
No.**

Enter Defendant(s) here:

DEFENDANT

CASE MANAGEMENT ORDER

This Order, including all deadlines, has been established with the participation of all parties and can be modified only by order of the Court on a showing of good cause supported with affidavits, other evidentiary materials, or reference to portions of the record.

IT IS HEREBY ORDERED:

1. ESTIMATED DAYS OF TRIAL: _____

ESTIMATED TOTAL NUMBER OF WITNESSES: _____

EXPERT TESTIMONY EXPECTED: Yes

NO. OF EXPERTS:

Enter explanation (if necessary) here:

2. ALTERNATIVE DISPUTE RESOLUTION [ADR]. (Pick one)

Alternative dispute resolution techniques appear helpful and will be used in this civil action as follows:

3. CONSENT TO TRIAL BY UNITED STATES MAGISTRATE JUDGE. (Pick one)

The parties consent to trial by a United States Magistrate Judge.

4. DISCLOSURE. (Pick one)

The following additional disclosure is needed and is hereby ordered:

5. MOTIONS; ISSUE BIFURCATION. (Pick one)

Staged resolution/bifurcation will assist in the prompt resolution of this action. The Court orders that:

Early filing of the following motion(s) might significantly affect the scope of discovery or otherwise expedite the resolution of this action:

6. DISCOVERY PROVISIONS AND LIMITATIONS.

- A. Interrogatories are limited to _____ succinct questions.
- B. Requests for Production are limited to _____ succinct questions.
- C. Requests for Admissions are limited to _____ succinct questions.
- D. Depositions are limited to the parties, experts, and no more than _____ fact witness depositions per party without additional approval of the Court.

E. The parties have complied with the requirements of Local Rule 26(f)(2)(B) regarding discovery of electronically stored information and have concluded as follows:

F. The court imposes the following further discovery provisions or limitations:

- 1. The parties have agreed that defendant may obtain a Fed.R.Civ. P. 35 (L.U.Civ.R. 35) medical examination of the plaintiff (within subpoena range of the court) by a physician who has not examined the plaintiff, and that defendant may arrange the examination without further order of the court. The examination must be completed in time to comply with expert designation discovery deadlines.
- 2. Pursuant to FED.R.EVID. 502(d), the attorney-client privilege and the work-product protections are not waived by any disclosure connected within this litigation pending before this Court. Further, the disclosures are not waived in any other federal or state proceeding.
- 3. Plaintiff must execute an appropriate, HIPAA-compliant medical authorization.
- 4. The court desires to avoid the necessity of filing written discovery motions where court participation in an informal discussion of the issue might resolve it, even after the parties have been unsuccessful in a good faith attempt to do so. Consequently, before a party may serve any discovery motion, counsel must first confer in good faith as required by Fed. R. Civ. P. 37(a)(1). If the attorney conference does not resolve the dispute, counsel must contact the chambers of the magistrate judge to request a telephonic conference to discuss the issue as contemplated by Fed. R. Civ. P. 16(b)(3)(B) (v). Only if the telephonic conference with the judge is unsuccessful in resolving the issue may a party file a discovery motion.
- 5. Other:

Additional information:

7. SCHEDULING DEADLINES

A. Trial. This action is set for Choose Type:

beginning on: _____, at 9:00, a.m., in Choose City:,
Mississippi, before United States District Judge _____.

THE ESTIMATED NUMBER OF DAYS FOR TRIAL IS _____. ANY CONFLICTS WITH
THIS TRIAL DATE MUST BE SUBMITTED IN WRITING TO THE TRIAL JUDGE
IMMEDIATELY UPON RECEIPT OF THIS CASE MANAGEMENT ORDER.

B. Pretrial. The pretrial conference is set on: _____, at 9:00, a.m.,

in Choose City:, Mississippi, before United States District
Judge _____.

C. Discovery. All discovery must be completed by: _____.

D. Amendments. Motions for joinder of parties or amendments to the pleadings must be
filed by: _____.

E. Experts. The parties' experts must be designated by the following dates:

1. Plaintiff(s): _____.

2. Defendant(s): _____.

8. MOTIONS. All dispositive motions and *Daubert*-type motions challenging another party's expert must be filed by: _____ . The deadline for motions *in limine* is twenty-one (21) calendar days prior to the pretrial conference; the deadline for responses is fourteen (14) calendar days before the pretrial conference.

9. SETTLEMENT CONFERENCE.

Early Settlement Conference and additional Settlement Conference

10. REPORT REGARDING ADR. On or before (7 days before FPTC) _____ , the parties must report to the undersigned all ADR efforts they have undertaken to comply with the Local Rules or provide sufficient facts to support a finding of just cause for failure to comply. *See L.U.Civ.R.83.7(f)(3).*

SO ORDERED:

DATE

UNITED STATES MAGISTRATE JUDGE