Colorado Defense Lawyers Association
The Civil Defense Bar

August 31, 2017

Via E-mail: Cheryl.Stevens@judicial.state.co.us
Cheryl Stevens,
Chief Deputy Clerk of the Supreme Court,
2 East 14th Avenue,
Denver, CO 80203

RE: PROPOSED CHANGES TO C.R.C.P. 16.1

Dear Ms. Stevens:

On behalf of the Colorado Defense Lawyers Association, I would like to share the following concerns regarding proposed amendments to Rule 16.1. The CDLA consists of over 700 Colorado lawyers who primarily defend civil lawsuits. A principal mission of the organization includes promoting the highest standards of professionalism in the conduct of civil litigation and jury trials. I currently serve as the President of the CDLA.

First and foremost, the reader should know that defendants, and their counsel, value access to the courts as much or more than plaintiffs. At the same time, while discovery is not free, most defense lawyers, including myself, will tell you that pennies spent on discovery often save dollars on settlements and judgments, and avoid unnecessary trials. With this in mind, the CDLA believes comment #8 to the proposed revision is misguided. It now reads:

Because of the limited discovery, it is particularly important to the just resolution of cases under Simplified Procedure, that parties honor the requirements and spirit of full disclosure. Parties should expect courts to enforce disclosure requirements and impose sanctions for the failure to comply with the mandate to provide full disclosures.

With due respect to the drafters of this comment, it should read:

It is particularly important to the just resolution of cases that parties honor the requirements and spirit of full disclosure in all cases. Courts should enforce disclosure requirements and impose sanctions for the failure to comply with the mandate to provide full disclosures.

Seriously limiting a defendants' ability to obtain discovery in exchange for a firm damages cap of $100,000 is often a very difficult sell to a client. An exposure

of six figures is not insubstantial to most clients, self-insureds, and even insurance carriers. Under the current rule, however, defendants at least have the assurance of receiving a firm damages cap in exchange for voluntarily giving up their right to full discovery. The proposed revised rule would remove a critical safeguard to defendants, while significantly limiting the ability of defense counsel to obtain information critical to a determination of whether a case actually presents an exposure of six figures or more.

Requiring that a party who seeks a monetary judgment, and that party's attorney, to certify, in compliance with C.R.C.P. 11, that the value of a claim exceeds $100,000, seems appropriate, given that plaintiffs (and their counsel) often have years to gather information and documents and evaluate a case before the statute of limitations expires. However, requiring a defending party and their counsel to sign a motion to certify that the value of a newly filed case is reasonably believed to exceed $100,000, based upon information "voluntarily" disclosed within approximately two months of suit being filed, simply to obtain the discovery needed to determine the true value of the suit, is patently unfair. In addition to the fact that defendants are rarely on an equal footing as plaintiffs respecting damages at the outset of a case, such a filing could be used as an admission against interest for the certifying party regarding the value of a case.

In summary, while the CDLA appreciates the desire to limit the cost of discovery to litigants, it also is concerned about the fact that defense lawyers "don't know what they don't know." Discovery affords the members of the CDLA the opportunity to find out what they don't know about a particular claim so as to competently and objectively advise their clients of the risks of trial. Limiting that opportunity, without providing any incentive in return (such as the existing damages cap), unless defense counsel and his or her client are willing to certify that an opposing party's case is worth at least $100,000, puts all defendants and the lawyers who represent them in a no-win situation. They must either accept limited discovery, while hoping that the "requirements and spirit of full disclosure" are being honored by the other side, or certify the value of an opposing party's case simply to permit counsel to utilize all of the tools available to discern the true value of the case.

For the above-stated reasons, the CDLA has serious reservations regarding the proposed changes to CRCP 16.1 making limited discovery the norm, eliminating the damage cap imposed in cases with limited discovery, and requiring that defendants and their counsel certify the value of a new case in order to obtain the full discovery permitted by the Colorado Rules of Civil Procedure.

Very truly yours,

/s/John R. Chase

John R. Chase
President
Colorado Defense Lawyers Association