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Justice Delayed is Justice Denied: The Northern District of Illinois' Mandatory Initial Discovery Pilot Program

Chief Justice Roberts, like many in the legal profession, has expressed an interest in exploring ways to reduce the time and cost associated with litigation. However, unlike the common practitioner, when the Chief Justice of the United States Supreme Court takes specific interest in a legal topic, members of the bar are wise to take notice, as changes affecting the practice of law are likely to follow. This is especially true when that interest manifests as a pilot program in one of the busiest districts in the federal court system. Esoteric high court policy considerations quickly become the trial court's practical reality. The United States District Court for the Northern District of Illinois is embracing Chief Justice Roberts' vision by participating in a Mandatory Initial Discovery Pilot Program (MIDP). *See* http://www.ilnd.uscourts.gov/Pages.aspx?jYyawIFLXKMJrmXzxFk8lw==. The MIDP builds on the initial disclosure requirements already present in Federal Rule of Civil Procedure 26(a)(1). This article explores the backstory and rationale behind MIDP and practical considerations as the program gets underway.

Overview

Effective June 1, 2017, almost all new complaints filed in the United States District Court for the Northern District of Illinois will be subject to MIDP. Exceptions to MIDP's otherwise universal application will be made for patent cases, actions under the Private Securities Litigation Reform Act, cases transferred for consolidation by the Judicial Panel on Multidistrict Litigation, and proceedings which are otherwise exempt from initial disclosure requirements under Federal Rule of Civil Procedure 26(a)(1)(B). Those Rule 26 exempted cases are:

i. Actions for review on an administrative record;
ii. Forfeiture actions *in rem* which arise from a federal statute;
iii. Petitions for *habeas corpus* or any other proceedings utilized to challenge a criminal conviction or sentence;
iv. *Pro se* actions brought by persons in the custody of the United States, a state, or a state subdivision (*e.g.*, prisoners);
v. Actions to enforce or quash an administrative summons or subpoena;
vi. Actions by the United States to recover benefit payments;
vii. Actions by the United States to collect on a student loan guaranteed by the United States;
viii. Proceedings ancillary to a proceeding in another court; and
ix. Actions to enforce an arbitration award.

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Fed. R. Civ. P. 26(a)(1)(B).

Other details of the MIDP program will be explored further, *infra*. However, what is perhaps most important for attorneys to know is that nearly every judge in the Northern District of Illinois will be participating in the pilot program, including all magistrate judges in the Eastern Division. At a MIDP workshop in late May 2017, attorneys were warned that only a few judges in the entire District are abstaining. As it is unclear which judges are not participating in the pilot program, counsel should review the assigned judge's standing order or contact their deputy to determine whether a case will be subject to MIDP.

History and Rationale

A similar MIDP program is already under way in the United States District Court for the District of Arizona. At a recent MIDP workshop hosted by the Northern District of Illinois, it was noted that a survey found that prior to MIDP's recent implementation in Arizona, practitioners preferred litigating in Arizona state court rather than in Arizona's federal district court by a two-to-one margin. This preference was largely attributed to the Arizona state courts' utilization of mandatory initial discovery. Neighboring states Utah and Colorado have similar MIDP procedural requirements in their state courts. Contrast that with Illinois state courts which have no such requirement. Judges in the Motion Section of the Law Division of the Circuit Court of Cook County often require an initial list of treaters to be provided to defendants, but that is the extent of any initial discovery requirements.

The Northern District of Illinois is only the second federal jurisdiction to adopt the MIDP pilot program. Information gathered from Arizona, Illinois, and any other jurisdictions which adopt MIDP protocols will be used to determine whether the pilot program should be permanently codified in the Federal Rules of Civil Procedure. As seen with Illinois' adoption of rules expanding discovery requirements to tackle issues related to electronic discovery, if such rules are adopted at the federal level, practitioners can expect that some iteration of MIDP is likely to be implemented in Illinois state courts. The MIDP program's stated goal is to reduce litigation time and its attendant discovery costs by encouraging a more active role for federal judges at the outset of litigation.

However, involvement can only be achieved if the parties have a similar level of active engagement. This would seem a far more precise manner to effectuate such a goal than the patently unfair, and now largely abandoned, effort to require simultaneous expert disclosures in Circuit Court of Cook County. Instead, and as discussed further below, MIDP uses the blunt instrument of requiring answers to complaints and the robust initial disclosures, even in situations in which the defendant has moved to dismiss the complaint under Rule 12(b)(6).

Comparing Mandatory Initial Discovery with Rule 26(a)(1) Disclosures

At its core, MIDP is, quite simply "Court-Ordered Discovery." If this sounds familiar, the court concedes that there is significant overlap between MIDP and Rule 26(a)(1) disclosures with which federal court practitioners are already familiar. However, not only does MIDP supersede the already-existing disclosure demands of Rule 26(a), but MIDP has several key differences. The MIDP pilot program will be administered by General Order No. 17-0005, which directs the Clerk of Court to enter the MIDP Standing Order in all applicable civil assigned to judges participating in the MIDP pilot program.

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The most significant difference between Rule 26 and the MIDP pilot program is in its scope. While Rule 26 only requires disclosure of documents and witnesses "that the disclosing party may use to support its claims or defenses," MIDP requires disclosure of all documents and witnesses "likely to have discoverable information relevant to any party's claims or defenses." Standing Order Regarding Mandatory Initial Discovery Pilot Project, at ¶ B(1), *available at* http://www.ilnd.uscourts.gov/_assets/_documents/MIDP%20Standing%20Order.pdf (MIDP Standing Order) (emphasis added). The MIDP's mandate means that parties must put their cards on the table and disclose that knowledge—regardless of how adverse it may be.

Another notable difference between MIDP and Rule 26 is its consistent enforcement. Unlike Rule 26, parties are not allowed to "opt out" of MIDP by stipulation. *See* Fed. R. Civ. P. 26(a)(1)(A); MIDP Standing Order, at p. 1. Allowing parties to opt out of the pilot program would undercut not only the pilot program's policy aims, but would also compromise the reliability of the collected data. Despite the existence of the MIDP Standing Order, judges will continue to exercise their own discretion as circumstances require. Attorneys should be cautioned that while judges will not enforce MIDP "unreasonably," the pilot program will be enforced "rigorously."

Required Disclosures

Under MIDP, parties must now disclose the following information without awaiting a formal discovery request from the other party:

i. Names, addresses, and telephone numbers of all witnesses believed to likely have discoverable information relevant to any party's claims or defenses;
ii. Names, addresses, and telephone numbers of all persons who have given written or recorded statements, unless statement is subject to work product protection or privilege;
iii. Documents, ESI, etc. that the party knows to exist, which may be relevant to any party's claims or defenses;
iv. A statement of facts relevant to each claim or defense the party intends to advance, and the legal theories upon which each claim or defense is based;
v. Computation of each category of damages claimed by the party, along with a description of the evidentiary support for the calculation; and
vi. Specific identification of any insurance or other agreement under which an insurance business or other entity may be liable to satisfy all or part of a judgment.

MIDP Standing Order, at ¶ B(1)-(7) (emphasis added).

Some of these requirements create a set of problems that will need to be addressed. There are likely to be disputes over which documents are relevant to the other side's claims or defenses and the failure to produce documents that the opposing side believes are relevant will likely be a frequently-encountered issue.

In addition, the sufficiency of, and what exactly constitutes, "the facts relevant to a claim/defense and the legal theories upon which it is based" is likely to be subject to frequent motion practice. This MIDP requirement is essentially a contention interrogatory on every party at the outset of the case. It has often been held that for the purposes of judicial economy and party convenience (the very reasons the MIDP is being implemented) contention interrogatories are best delayed to the end of discovery. *Edward Lowe Indus. v. Oil-Dri Corp. of Am.*, 94 C 7568, 1995 WL 399712, at *3 (N.D.

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Ill. July 11, 1995) (citing *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 111 (D.N.J. 1990)). This argument may fall on deaf ears under the MIDP, which will likely benefit defendants.

From a purely procedural perspective, the actual documents being disclosed do not need to be filed with the court; just the parties. MIDP Standing Order, at ¶ A(5). A certificate of service is sufficient for the court's purposes. Hard copy documents must be produced as they are kept in the usual course of business. When ESI is disclosed or discovered, parties must promptly confer and attempt to agree on matters relating to the ESI's disclosure and production. *Id.* at ¶ C(2). If the parties are unable to resolve any dispute regarding ESI production, the parties must present the dispute to the court in a single joint motion, or, if the court directs, in a conference call. *Id.* at ¶ C(2)(b). If a party believes that the MIDP disclosures are deficient or incomplete, parties may request a more detailed or thorough response from a disclosing party. Accordingly, parties should make disclosures with an eye towards providing sufficient detail so as to avoid unnecessary work, or an uncomfortable court hearing.

Timeline for Disclosures

Disclosures under the MIDP program (as may be expected), are temporally tied to the parties' respective pleadings. A party seeking affirmative relief must serve its MIDP no later than 30 days after the first pleading filed in response to its complaint, counterclaim, crossclaim, or third-party complaint. *Id.* at ¶ A(4). A party filing a responsive pleading, regardless of whether it seeks affirmative relief, must serve its MIDP no later than 30 days after it files its responsive pleading. *Id.* The swiftness of this requirement should be kept in mind particularly in removal cases, as the responsive pleading is due 7 days after removal, which would make the initial disclosures under the MIDP due 37 days after removal. *See* Fed. R. Civ. P. 81(c)(2)(C).

Nothing in the MIDP program alters the responsive pleading deadlines in Rule 12(a)(1-3). However, the court may defer the responsive pleading deadlines for good cause if a party files a motion to dismiss based on lack of personal jurisdiction, subject matter jurisdiction, or a motion to dismiss premised upon sovereign immunity, absolute immunity, or qualified immunity of a public official. MIDP Standing Order, at ¶A(3).One of the most important changes imposed by the MIDP is that even in cases in which a defendant has filed a Rule 12(b)(6) motion, the defendant must still answer the complaint. This is a sea change.

The parties are ordered to provide MIDP before initiating any further discovery in the case. *Id.* at ¶ A(1)(a). Parties still have the ability to propound their own discovery under Federal Rules 33 through 36. However, the goal is that by providing an early accounting of all available evidence, any additional discovery can be more targeted than current discovery practice of requesting "any and all" documents. Further discovery will proceed under the auspices of the Federal Rules of Civil Procedure, and the court's case management order, as usual.

Parties should be prepared to discuss their MIDP responses with the court at the case management conference. Accordingly, parties are to include a description of their discussions of the MIDP responses in their 26(f) report to the court. A party is not excused from providing its response because it is "still investigating," because a party is challenging the sufficiency of another party's response, or if another party has not provided a response. *Id.* at ¶ A(1)(b). Unless ordered otherwise, ESI must be produced within 40 days of serving the producing party's initial response. *Id.* at ¶ C(2)(c). There is, of course, a continuing duty to supplement. *Id.* at ¶ A(6). Supplemental disclosures must be made within 30 days of the information/document's discovery.

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Proportionality is also a concern—the MIDP program's goal is to reduce the cost of litigation. Thus, there is no reason to produce volumes upon volumes of documents in a dispute with relatively modest damages.

It remains to be seen how long the pilot program will proceed before final decisions are made regarding its potential impact on the Federal Rules of Civil Procedure. In the meantime, attorneys should be aware of MIDP and consider its potential impact on each case they file, defend, or remove.

Tips for Practitioners

For defendants, the most important change effectuated by the MIDP is that, irrespective of the filing of a motion to dismiss under Rule 12(b)(6), the defendant must answer the complaint and comply with the mandatory initial disclosure requirements. Defendants will be required to provide documents, facts, and legal theories to plaintiffs while motions to dismiss are pending. In certain circumstances, this could provide the plaintiff with a roadmap to responding to the motion or amending the complaint. Under the current Rules, motions to dismiss are ruled upon and, if denied, the parties then proceed to conduct discovery, beginning with initial disclosures. Under the MIDP, motions to dismiss and discovery proceed simultaneously.

The application of the MIDP will likely increase the early costs of litigating in federal court. As the documents requested and information required to be provided would ultimately be provided in the course of discovery under the current rules, the MIDP is not likely to increase the overall cost of litigation. It also likely that there will be some variance in how the MIDP is applied by individual judges, so attention should be paid to how each judge is handling particular requirements and to review any changes in standing orders to deal with any new requirements.

Those that regularly practice in federal court should advise their clients of the MIDP prior to initiating or removing litigation so that their clients are prepared when counsel makes early requests for extensive discovery. Timing of removal in particular should be carefully calculated to prepare for a shortened period of initial significant disclosure, especially in cases in which ESI is expected. As the timing for production of the initial documents is so short, the additional time provided by waivers of service becomes more valuable than ever and should be seriously considered in almost every case except those where it is believed that the plaintiff will have a very difficult time serving the defendant.

As we do not have information from the Arizona pilot project, how the MIDP will affect individual cases and classes of cases is hard to divine at this point. However, what is clear is that under the MIDP, counsel and their clients will have to be focused on production of documents and answers to contention interrogatories from the very outset of the case.

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Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

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