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DISCOVERY

Wave or Ripple? Assessing the Impact of 'Brugaletta v. Garcia'

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In the 2000 film The Patriot, which (spoiler alert) depicts the American victory over the British during the Revolutionary War, General Cornwallis looks out at the surging American Army before surrendering at Yorktown and mutters, "Everything will change. Everything *has* changed."

Commercial litigators might mutter the same when reviewing the New Jersey Supreme Court's recent decision, *Brugaletta v. Garcia*, ___ N.J. ___ (2018) (slip op.). On the one hand, *Brugaletta* seems to usher in a new world order governing litigants' discovery obligations. On the other hand, *Brugaletta* might be narrower than meets the eye.

This article examines *Brugaletta*, a medical-malpractice case, from the perspective of a commercial litigator. It begins with a quick overview of certain discovery concepts pre-*Brugaletta*, including obligations to supply narrative interrogatory responses. It then walks through a summary of *Brugaletta*, focusing on the interesting discovery disputes facing the Supreme Court. The article concludes by analyzing *Brugaletta*'s potential impact on discovery disputes in commercial litigations, first examining arguments in favor of a momentous change and then examining arguments against same.

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Discovery Background

Under New Jersey law, a party can serve interrogatories upon another to glean discoverable information. R. 4:17-1(a). The scope of interrogatories is limited only by the broad scope of discovery generally. See R. 4:10-2.

This broad scope notwithstanding, answering parties can take legitimate shortcuts. An answering party need not waste time typing what is already memorialized in its document production, and can reference its production provided the burden of ascertaining responsive information is substantially the same for the party serving its interrogatory. R. 4:17-4(d).

Interrogatory answers that merely reference documents are seemingly redundant to responses to document demands, and narrative responses are

seemingly redundant to depositions. That is perhaps why interrogatories are disfavored in in federal courts. *See, e.g., E*Trade Fin. Corp. v. Deutsche Bank,* 05 Civ. 902, 2006 U.S. Dist. LEXIS 82428, at *4 (S.D.N.Y Nov. 13, 2006) ("To the extent that Plaintiffs seek long narrative explanations of underlying assumptions and methodologies, they have not shown that interrogatories are a more practical means of discovery than depositions.").

The Southern District of New York's local rules generally restrict interrogatories to certain subjects, including witness names and damages computations. The State of New York imposes similar restrictions for actions within the Commercial Division. New Jersey, by contrast, had not taken a strong position on narrative interrogatories generally or Rule 4:17-4(d) specifically. That changed with *Brugaletta*.

Summary of 'Brugaletta'

Brugaletta sued the defendant-hospital for malpractice in treating her infection. The parties disputed whether the hospital could withhold certain documents as privileged self-critical analysis. The trial court ordered one of the documents to be produced in redacted form. The Appellate Division granted leave to appeal and then reversed the trial court's decision. The Supreme Court granted certification, affirmed in part and reversed in part, and ultimately ruled that the document should not be produced at all.

One would reasonably wonder at this point: How can this have any impact on a discovery dispute in a garden-variety commercial litigation? The (potential) impact comes from what the Supreme Court went on to rule. The court held that, while the document itself was privileged, the underlying information had to be provided in a narrative interrogatory response because that information was not plain from the hospital's 4,500-page production.

The reasonable wondering now shifts to General Cornwallis's muttering, because narrative interrogatory responses and thousand-page document reviews are recurring players in discovery disputes within commercial litigations. How did that issue come before the *Brugaletta c*ourt, in a dispute seemingly focused upon the privilege of self-critical analysis?

The court ruled that a general reference to the entire 4,500-page production ... failed to satisfy the obligation to fully answer interrogatories.

As the court explained, the plaintiff had served an interrogatory requesting information on any "statement regarding the lawsuit." The court deemed that interrogatory to encompass information regarding adverse incidents related to the plaintiff's care, which both encompassed the privileged document and required the document's underlying facts to be disclosed even if the document itself was withheld.

The court ruled that a general reference to the entire 4,500-page production, which is what the hospital had supplied, failed to satisfy the obligation to fully answer interrogatories. While Rule 4:17-4(d) allows parties to reference documents where responsive information can be derived, the court held that requiring the plaintiff to extract this information from a 4,500-page production poses an undue burden. More specifically, it poses a greater burden on the plaintiff than the hospital, thus precluding the hospital's ability to call upon Rule 4:17-4(d).

Why 'Brugaletta' Changes Everything

Brugaletta will long reign as commanding New Jersey authority, because it is the first time the Supreme Court addresses Rule 4:17-4(d) in extensive and comprehensive detail.

The case law discussing Rule 4:17-4(d) is a veritable desert. Prior to *Brugaletta*, subsection (d) had only been cited in three other decisions. One of those—the only published decision of the three—appears to have cited it in error. *See, In re Pelvic Mesh/Gynecare Litig.,* 426 N.J. Super. 167, 196 (App. Div. 2012) (Sabatino, J.A.D., concurring) (citing subsection (d) though the context suggests an intent to have cited subsection (e)). The remaining two cases do not provide nearly the level of commanding authority as does *Brugaletta*.

The reason for the lack of authority, and the reason why *Brugaletta* is so important, is that discovery disputes are rarely resolved with lengthy Supreme Court discussion. Many discovery disputes are resolved via good-faith negotiations. Those that survive a meet-and-confer

are summarily addressed in a concise motion and resolved by the trial court in a succinct order. The litigation is expected to proceed to the merits, unless the losing party refuses to go quietly into the night and instead seeks leave for an interlocutory appeal. If leave is denied, it will almost always be without written opinion.

Even if authority on Rule 4:17-4(d) did exist, it would likely not compare to the clear and direct findings made by the *Brugaletta* court. The court called out the document production by number, and ruled that 4,500 pages was too much for one party to review in lieu of a narrative interrogatory response.

Finally, *Brugaletta* is in keeping with New Jersey's fundamental goal of liberally construing discovery rules so that fair decisions on the merits can be made. "[W]e adhere to the belief that justice is more likely to be achieved when there has been full disclosure and all parties are conversant with all available facts." *In re Liquidation of Integrity Ins. Co*., 165 N.J. 75, 82 (2000). As the *Brugaletta* court noted when reviewing the ex parte privilege arguments made to the trial court, the hospital's attorney had summarized the hospital's document production to argue that the privileged document's underlying facts were already disclosed. Justice is better served, per the Supreme Court, if this summary is provided to the plaintiff as a narrative interrogatory response.

Why 'Brugaletta' Changes Nothing

Brugaletta's reign will be short-lived, because it can be easily distinguished from most commercial litigations.

First, the court's ruling on Rule 4:17-4(d) arose from its decision on self-critical analysis. The court expressly said as much, in finding that the narrative response "would have allowed the court to balance the litigation interests of the parties, to avoid transgressing the privilege and the salutary purposes it is intended to achieve." Though one cannot know whether the court would have so liberally viewed Rule 4:17-4(d) if the challenged document was going to be produced, that this is even a question is a basis for doubting *Brugaletta*'s reach. That privilege has no place in commercial litigations, and *Brugaletta* should be discounted accordingly.

Second, the *Brugaletta* court limited its holding at every opportunity. *See, supra*, slip op. at 39-40 ("[W]here records are 'well-organized, clear and straightforward,' a court usually will find that the burden on the requesting party is equal to that of the responding party and, therefore, permit a responding party to answer an interrogatory by mere reference to business records."); *id.* at 41 ("We do not mean to suggest that such a narrative is to be routinely provided in discovery, but it is within the range of court-ordered remedies that may be required to resolve a discovery dispute."); *id.* at 41-42 ("Notwithstanding that this setting is different from most in which an order compelling a narrative usually arises … we highlight this power of the courts under the Court Rules as a means for balancing the litigation interests in this matter, promoting a fair trial, and securing the public policies inherent in the maintenance of a strong self-critical-analysis privilege under the [Patient Safety Act].").

Third and finally, even with its lengthy legal discussion *Brugaletta* provides little insight on the facts specific to its discovery dispute. The court does not describe the hospital's 4,500-page production much farther than noting the number of pages. Were the documents produced in electronic form? Even if produced as papers, can those papers be scanned and made searchable via optical character recognition (OCR)? Or are all papers handwritten? This absence of detail is curious, because the Third Circuit case *Brugaletta* cites as leading authority ruled on documents that were "handwritten, and apparently difficult to read." *Al Barnett & Son v. Outboard Marine Corp*., 611 F.2d 32, 35 (3d Cir. 1979). If the discovery-specific facts in *Brugaletta* are murky, then it becomes difficult to determine whether *Brugaletta* aligns with whatever facts are present wherever *Brugaletta* is sought to be applied.

Conclusion

There are sound arguments for either side of the debate regarding *Brugaletta*'s application to discovery disputes within commercial litigations. Though General Cornwallis's 1781 surrender at Yorktown is remembered as the Revolutionary War's climactic end, the British Army remained in New York City until 1783. The debate regarding narrative interrogatory responses will most certainly continue just as long, and likely longer. ■