

ARTICLES

The Federal Mandatory Initial Discovery Pilot Project—18 Months In

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The [Judicial Conference of the United States](#) is considering drastic changes to the Federal Rules of Civil Procedure that could result in significantly accelerated time frames for the commencement of discovery. The Judicial Conference began testing these changes in a pilot program, and the experience of parties in the pilot through 2019 may shape future changes to the Federal Rules.

The Mandatory Initial Discovery Pilot Project

Beginning as early as May 1, 2017, federal courts in the Northern District of Illinois, the District of Arizona, and one judge in the Southern District of Texas undertook the federal [Mandatory Initial Discovery Pilot Project](#) (MIDP). The MIDP was approved by the Judicial Conference in September of 2016 with the purpose of testing whether early substantial disclosure of information can reduce litigation costs and shorten the time for case resolution. While the MIDP modifies the [Federal Rules of Civil Procedure](#) in a number of ways, there are two that are most significant and potentially shocking to litigators in federal court—especially defense counsel.

The MIDP Increases the Burdens Regarding Responsive Pleading and Initial Discovery

First, under the MIDP, a motion to dismiss does not stay the deadline for a defendant to answer the complaint. The defendant must file a simultaneous answer along with its motion to dismiss, unless the motion is based on a lack of subject matter or personal jurisdiction. This significantly accelerates the time frame in which a defendant must answer the complaint compared with the practice under the Federal Rules of Civil Procedure, which do not require a responsive pleading before the court issues an order on the motion to dismiss (which can take months, if not a year or more, depending on the circumstances). Under standard rules, if the motion to dismiss is granted in part or in whole and the plaintiff is allowed to re-plead, the process could continue to drag out. The MIDP shortens that process significantly.

Second, the MIDP requires the production of *all relevant* documents 70 days after the defendant answers the complaint. The MIDP outlines a process for this production. Thirty days after the defendant has answered the complaint, the parties must submit their initial discovery responses. These responses are similar to the initial disclosures required by [Federal Rule of Civil Procedure 26](#), with some significant alterations. Under Rule 26, a party must disclose only those documents that it may use to support its claims or defenses. However, the MIDP requires the disclosure of documents that may be relevant to *any party's* claims or defenses, meaning disclosure of documents is required whether favorable or unfavorable, *without waiting for any document requests*. Finally, within 40 days of these initial disclosures, parties must produce the documents they disclosed that are within their possession, custody, or control.

The project's Working Group of the Civil Rules Advisory Committee has identified as a basis for these changes the facts that “[d]iscovery costs have long been recognized as one of the primary sources of civil litigation expense, and the discovery process often complicates and

prolongs civil litigation.” [Introduction to the Mandatory Initial Discovery Pilot \(Video Transcript\)](#), Apr. 6, 2017. The MIDP seeks “to test whether early substantial disclosure of information can reduce litigation costs and shorten the time for case resolution consistent with the goals of Rule 1.” *Id.* To meet the goals of [Federal Rule of Civil Procedure 1](#), the working group saw the accelerated disclosures as a way to allow “the parties . . . to make an early assessment of the strengths and weaknesses of their positions.” *Id.* Some states, such as Colorado and Arizona, already impose a similar disclosure of all relevant documents and information at an early stage, whether favorable or not, in pursuit of this goal. See [Colo. R. Civ. P. 26](#); [Ariz. R. Civ. P. 26.1](#).

These Pilot Project Rules Arguably Benefit Plaintiffs More Than Defendants

These rule changes under the MIDP can be seen as a significant advantage for plaintiffs over defendants. Traditionally, if a plaintiff survived a motion to dismiss and it was clear that the case would proceed to discovery, defendants often could expect a settlement demand that at least reflected the cost of expected discovery. Under the MIDP (as currently in effect in the District of Arizona and the Southern District of Texas, and as in effect in the Northern District of Illinois up to December 1, 2018), that cost has to be immediately factored in upon filing of the case. As a result, defendants with meritorious motions to dismiss are required to engage in unnecessary discovery.

This effect is not limited to defendants who have meritorious arguments for dismissal, in full, of a complaint. A defendant could have arguments that significantly limit the claims or potential damages in a case, even if some claims could withstand a motion to dismiss. Under Rule 26 of the Federal Rules of Civil Procedure, the scope of traditional discovery is limited to “nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Imagine a defendant that faces a complaint alleging \$10 million in damages. The defendant brings a partially successful motion to dismiss, limiting the potentially available damages to a much lower \$500,000. The amount of discovery that is proportional to the needs of that case ought to change significantly (compared with a \$10 million case).

Some Courts Have Allowed Exceptions to the MIDP Requirements

Perhaps in recognition of the burden on defendants, there is some indication that courts operating under the MIDP will grant relief where necessary while parties adjust to the accelerated MIDP timeline. In one case out of the Northern District of Illinois, *Insight Global, LLC v. Borchartt*, No. 18 C 00628, 2018 WL 2267810 (N.D. Ill. May 17, 2018), the court granted procedural leniency to amend pleadings in the face of the MIDP’s strict requirements. Specifically, the defendant, Borchartt, was permitted by the court to file an amended answer because, as the court acknowledged, the defendant filed his original answer only because the project required him to do so in conjunction with his motion to dismiss. *Id.* at *5.

Further, the Northern District of Illinois recently announced a modification to the MIDP in that district effective December 1, 2018. For cases filed after that date, defendants no longer will have to file a simultaneous answer if they file a motion to dismiss under Rule 12(b)(6). Thus, the filing of a Rule 12(b)(6) motion would toll the beginning of the discovery obligations that

previously were imposed under the MIDP. The court made this change in response to comments that the MIDP imposed unnecessary costs on defendants who ultimately prevailed on their Rule 12 motions.

Similarly, a case out of the District of Arizona indicates that court's willingness to depart from the MIDP in certain circumstances. In *Salt River Project Agriculture Improvement & Power District v. Trench France SAS*, 303 F. Supp. 3d 1004 (D. Ariz. 2018), the district court was faced with an MIDP-related decision pertaining to the scope of discovery and its intersection with the Hague Convention. As stated above, the MIDP requires disclosure of all relevant information in the possession of each party, which here included information that was maintained by the defendant in France. *Id.* at 1006–7. However, here there was a blocking statute enacted in France that prohibits certain disclosures outside specified international discovery norms (the Hague Convention procedures). *Id.* Considering the issues of comity, the District of Arizona was required to evaluate whether the MIDP could function in conjunction with the French blocking statute and determine an appropriate remedy in the face of the more stringent Hague Convention requirements and the MIDP goal of quick production. *Id.* The court ultimately concluded that the MIDP did not trump the Hague Convention and that the Hague Convention would govern production of material held by a party in France. *Id.* at 1010. Accordingly, the MIDP may give way when a case has international discovery.

Conclusion

Defense counsel and parties likely to be defendants in cases with potentially asymmetric discovery, such as parties potentially subject to consumer class actions, should follow these developments closely. As originally proposed and currently still in effect in the District of Arizona and the Southern District of Texas, the MIDP increases the burden on defendants who otherwise have meritorious dismissal arguments, and on all parties in cases involving significant or complex discovery. It is encouraging that some cases indicate a willingness by the affected courts to address that burden on a case-by-case basis and that the Northern District of Illinois shows a willingness to address the project as a whole. Over the last half of the project, those parties and counsel most likely to be affected by the project (if it were to become the new standard under the Federal Rules) should monitor cases closely and look for an opportunity to provide feedback on the project.

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