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Professor Marcus

I am chief counsel for litigation at CIGNA, an employee benefits company with business in 50 states. I've been litigating for over 20 years. Electronic discovery has created a different landscape for the business community, and CIGNA, when we are named as defendants--which happens with some frequency. The burdens of electronic discovery in a class action, for example, are huge. CIGNA currently is involved in an MDL proceeding in Miami, which has been brought against the managed care industry by a large group of plaintiffs attorneys, purportedly on behalf of approximately 700,000 physicians. While the 11th Cir. is considering whether the class should have been certified, tremendously burdensome discovery may force all defendants to settle, and settlement will have nothing to do with the merits of the claims. One company, Aetna, has settled for $170 million ($50 million is attorneys fees and $120 million may go to a foundation, or alternatively, the class members may get checks for about $150 each). CIGNA is in mediation (this is public). Why would defendants not wait to settle until after the 11th Circuit has ruled on whether there is even a class ? The burdens of discovery, particularly e-discovery, have a great deal to do with this result.

Even in a meritless suit, or one that may have colorable claims but still deserves defending, settlement is often the only economically rational choice when a defendant is faced with many millions of dollars in e-discovery costs, concern about spoliation accusations, and unpredictability as to how a court might address the e-discovery issues if we raise them. So its a few million here, and a few million there to settle, but the suits just keep coming in, and why not? We are feeding the beast. And if the cases are settled, the problems are never addressed in trial court or appellate opinions.

Some of the problems with e-discovery could be alleviated if the FRCP contained specific guidance regarding a "safe harbor" and shifting the cost of producing information that is not reasonably available in the ordinary course of business. The Discovery Subcommittee Report discusses these concepts. Rule changes providing specific guidance would be very helpful. Thank you for your time and hard work.

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