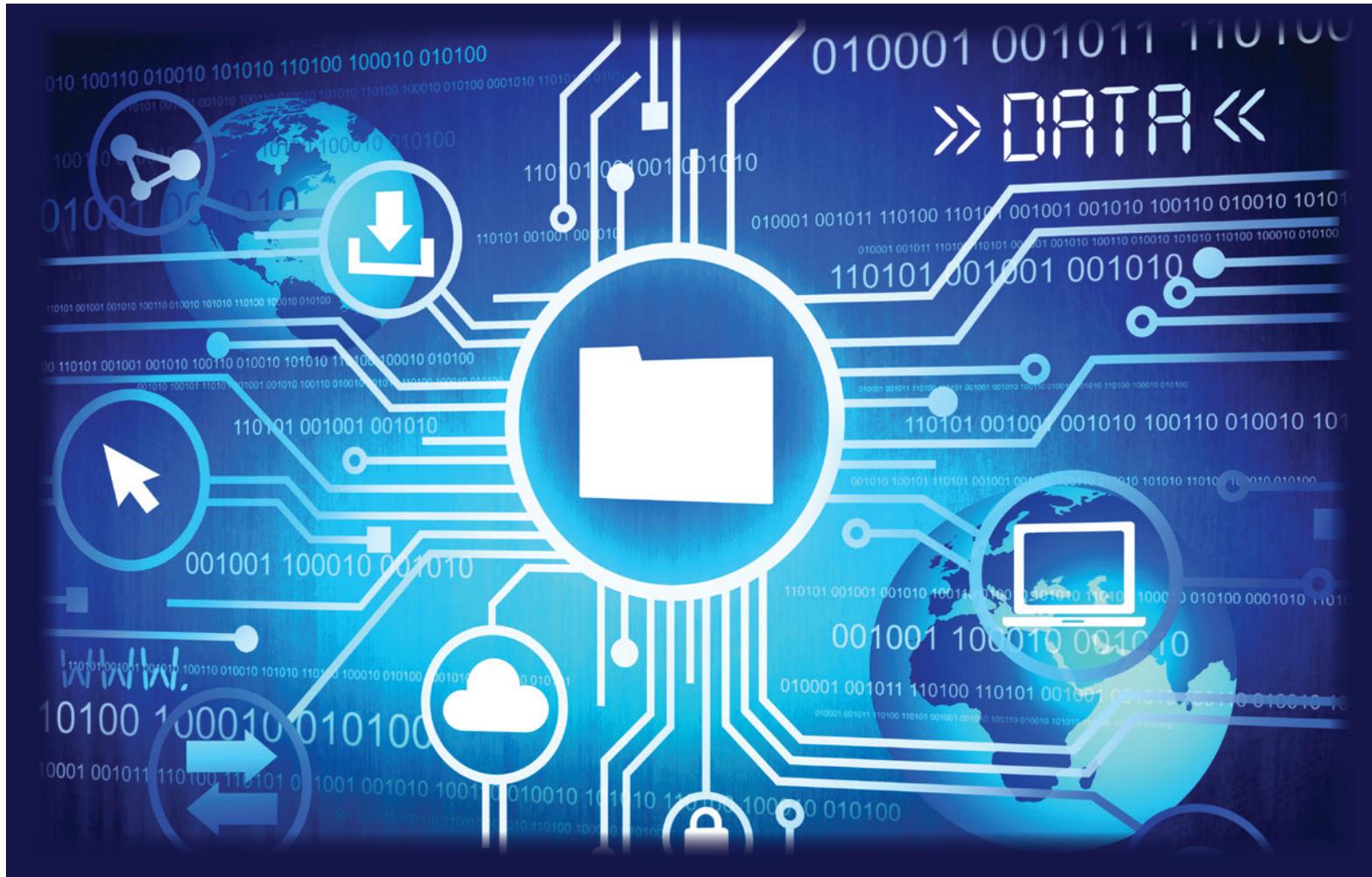


# Litigation

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## Handling Foreign Plaintiffs' Requests For **Access to U.S. Discovery**

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It is increasingly common for companies to be subject to lawsuits in multiple countries involving similar underlying

facts, brought by different plaintiffs. For example, companies may be alleged to have engaged in malfeasance abroad, and subject to lawsuits in both the United States by a U.S.-based plaintiff and the country in which the alleged conduct occurred by a plaintiff in that country.

One aspect of such multinational litigation is the impact that discovery

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in one jurisdiction can have on the proceedings in another. Discovery in U.S. courts is often broader than in foreign courts, where applicable rules on discovery limit parties' ability to obtain documents and other evidence. In some cases, however, foreign plaintiffs have successfully been able to obtain access to discovery produced in related U.S. proceedings by filing motions to intervene under Fed. R. Civ. P. 24(b). This article discusses such motions to intervene in order to gain access to U.S. discovery and provides strategic guidance for dealing with such motions.

### Motions to Intervene to Gain Access

Motions for permissive intervention under Rule 24(b), which provides that a court may allow "anyone" to intervene who "has a claim or defense that shares with the main action a common question of law or fact," are typically used to allow a party to join an existing litigation in order to bring related claims. Although the rule does not on its face appear intended to facilitate third-party discovery, courts have permitted such motions to be used for that purpose. Indeed, one court has observed that "every circuit court that has considered the question has come to the conclusion" that motions for intervention can be used to allow non-parties to intervene for the sole purpose of obtaining discovery, even if they have no stake in the litigation itself.<sup>1</sup> Courts, particularly courts outside the Second Circuit, have adopted "generous interpretations" of Rule 24(b) to allow these motions to proceed, citing the need for "an effective mechanism for third-party claims of access to information generated through judicial proceedings."<sup>2</sup>

Courts generally require an intervenor to show: "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between movant's claim or defense in the main action."<sup>3</sup> However, when the intervenor is seeking discovery rather than to join the case as a party, some courts ignore elements of the standard, concluding that the first element is "not required" because the intervenors do not seek to litigate a claim on the merits (and so there is no need for the court to have jurisdiction over that claim),<sup>4</sup> and the third element only requires a small degree of factual overlap.<sup>5</sup> For example, in *Beckman Industries*, the Ninth Circuit found that documents related to interpretation of similar insurance policies were sufficient enough to raise a "common question of law or fact." The court reasoned that "there is no reason to require such a strong nexus of fact or law," when the intervenor seeks only discovery.<sup>6</sup> Some courts have gone so far as to hold that the issue of the validity of the confidentiality order that prevents intervenors from obtaining access to discovery is *itself* a sufficiently common question of law or fact to support a motion to intervene.<sup>7</sup> This standard makes it difficult for parties opposing intervention for discovery.

The Second Circuit, however, has phrased the test in a way that is less sympathetic to intervenors. Here, an applicant for permissive intervention must "(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action."<sup>8</sup> Analysis

of these elements is "fact-intensive," and even if the elements of the test are fulfilled, the trial court retains broad discretion<sup>9</sup> to grant or deny a motion to intervene.<sup>10</sup> By requiring intervenors to show an interest in the litigation—an element which is not required in other circuits—the Second Circuit has made it harder for intervenors to obtain discovery.

### Opposing the Motions

Courts have ample discretion in considering motions for permissive intervention. None of the elements is rigidly applied, and courts in the Second Circuit have placed a particular emphasis on the effect that intervention would have on each proceeding.

Courts are sometimes reluctant to take action that would undermine foreign courts' discovery rules. If the defendant can show that a "limitation on discovery in the collateral litigation would be substantially subverted by allowing access to discovery material," the court "should be inclined to deny modification."<sup>11</sup> For example, in *AT&T v. Sprint*, the court denied a motion to intervene because it appeared to be "an attempt to circumvent the close of discovery" in the foreign action.<sup>12</sup> Similarly, in *In re Silvercorp Metals*, the court noted that the foreign plaintiff's motion was an attempt to "bypass the ordinary Canadian discovery procedures" because the Canadian system specifically disallowed production at that early point in the case.<sup>13</sup> In a legal framework ruled largely by judicial discretion, pointing out that the intervenor's motion is a tactical ploy to obtain an unfair advantage in the foreign litigation resonates with courts. U.S. counsel should collaborate with foreign counsel

to investigate factual bases for arguments that intervention will disrupt the proceedings abroad.

In the Second Circuit, prejudice to a party is the “principal consideration” when ruling on a motion for permissive intervention.<sup>14</sup> Because intervenors who seek discovery are typically trying to modify a protective or confidentiality order entered in the main action, parties are likely to have relied on this order in some way, and therefore may be prejudiced by its modification. In cases in which there has already been a settlement approved by a court, courts consider “the extent to which the order induced the party to allow discovery or to settle the case” when evaluating whether that order should be modified.<sup>15</sup> This is most common when a confidentiality order is granted as part of a settlement. Where intervention would prejudice the U.S. parties by threatening to “unravel” or “undermine” the settlement, courts sometimes deny motions to intervene.<sup>16</sup> Parties facing litigation in the United States and elsewhere, and settling their U.S. litigation, should be mindful of making such a record when negotiating settlement agreements and related confidentiality orders, if applicable and appropriate to the case, by including: (1) text in the settlement agreement that confidentiality is an important part of the consideration for the settlement; (2) explicit prohibitions on the parties distributing discovery from the case to third parties; and (3) language that the confidentiality provisions may only be overridden by the court on a showing of good cause.

Parties should take advantage of a requirement found in Second Circuit

jurisprudence, but not other circuits: the requirement that the intervening plaintiff has a “direct, substantial, and legally protectable” interest in the lawsuit that may be impaired by its resolution.<sup>17</sup> Although very few discovery cases have been decided on this element, its presence opens the doors for many potential arguments. Notably, the fact that the defendant will likely have an obligation to preserve (and potentially hand over) documents in the foreign litigation provides an interesting argument that the intervenor’s interest will not be impaired absent intervention—the intervenor can wait and obtain the documents in the foreign litigation, through the normal discovery available in that jurisdiction. In the only case dealing with intervention for discovery we have found where this argument was made, the court found that the intervening foreign defendant “clearly failed to meet his burden to demonstrate an ‘interest’ in this action” because he failed to show that the documents would not be available when the foreign proceeding reached the discovery stage.<sup>18</sup>

### Conclusion

Any company that transacts business internationally, or is traded on multiple stock exchanges, could potentially have to deal with foreign parties intervening to obtain discovery in the United States. Given the flexible and highly discretionary inquiry courts undertake in analyzing motions to intervene, reliance on bright-line rules is misplaced, and attorneys should craft their arguments to the facts of their case. Coordinating with foreign defense counsel to understand the nature and procedural posture of the foreign case and highlighting the

need for a strong confidentiality order in agreements with opposing counsel can prove helpful in prevailing if and when a motion to intervene is made.

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1. *EEOC v. National Children’s Ctr.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998).
2. *Public Citizen v. Liggett Group*, 858 F.2d 775, 783 (1st Cir. 1988).
3. *Beckman Indus. v. International Ins.*, 966 F.2d 470, 473 (9th Cir. 1992); see also *EEOC*, 146 F.3d at 1046.
4. See *EEOC*, 146 F.3d at 1046.
5. *Beckman*, 966 F.2d at 474-74.
6. *Id.*
7. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777-78 (3d Cir. 1994).
8. *Floyd v. City of New York*, 770 F.3d 1051, 1057 (2d Cir. 2014).
9. Appellate review of a motion for permissive intervention is “particularly deferential” and such a determination “has virtually never been reversed.” *AT&T v. Sprint*, 407 F.3d 560, 561 (2d Cir. 2005).
10. *Floyd*, 770 F.3d at 1057.
11. *AT&T v. Sprint*, 407 F.3d 560 (2d Cir. 2005) (citing 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Civil* 2d §2044.1 (2d ed. 1994)).
12. *Id.* at 562.
13. *In re Silvercorp Metals Securities Litigation*, No. 12-cv-9456, Dkt. 80, at 3 (S.D.N.Y. Feb. 6, 2015).
14. *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978). However, a simple desire to make it more burdensome to pursue collateral litigation does not constitute prejudice. *United Nuclear v. Cranford Ins.*, 905 F.2d 1424, 1428 (10th Cir. 1990).
15. See *Beckman*, 966 F.2d at 475-76.
16. See *Griffith v. Univ. Hosp.*, 249 F.3d 658, 663 (7th Cir. 2001); *Empire Blue Cross & Blue Shield v. Janet Greeson’s A Place for Us*, 62 F.3d 1217, 1219 (9th Cir. 1995).
17. *Bridgeport Guardians v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010).
18. *Silvercorp Metals*, No. 12-cv-9456, Dkt. 80, at 3.