

Ad Hoc Committee on Rules and Procedures
United States District Court for the Southern District of Florida

COMMENT OF THE FEDERAL TRADE COMMISSION

June 4, 2019

The Federal Trade Commission (“FTC” or “Commission”) submits this comment to express concern over the December 3, 2018 change to the local rules for the U.S. District Court for the Southern District of Florida.¹ As amended, Local Rule 26.1(i) requires notice to parties upon receipt of “documents . . . from a non-party in response to a subpoena.”² In contrast, the Federal Rules of Civil Procedure requires notice to parties only for subpoenas issued “before trial.”³ This amendment has and will continue to significantly impair the ability of the Federal Trade Commission (“FTC”) to collect on our consumer protection judgments and to monitor compliance with court orders.

The FTC works tirelessly to protect consumers from deceptive and unfair business practices. Our work does not end once we obtain federal court orders. The Commission tries to redress injured consumers to the full extent possible by collecting on our judgments whenever possible. Not surprisingly, judgment debtors, particularly those who have engaged in fraudulent practices, frequently refuse to pay and hide assets, making judgment collection extremely difficult.

One of the most effective ways to pursue these outstanding debts is to serve post-judgment subpoenas on third parties who are holding our defendants’ assets. Providing a judgment debtor with notice that the FTC is conducting such an investigation, however, gives the debtor the opportunity to dissipate those assets before the FTC is able to secure them.

In addition to judgment collection, the agency conducts a robust compliance program to ensure it protects the public from future violations. To monitor compliance with FTC orders, our Enforcement Division often conducts undercover investigations. Notice of third-party subpoenas to the targets of those investigations impairs this important work. Once alerted to the existence of an investigation, offenders are likely to alter their patterns of deceptive behavior or temporarily cease the fraudulent activity to avoid detection.

¹ In re: Amendments to the Local Rules Notice of Proposed Amendments of Opportunity for Public Comments and of Hearing to Receive Comments, Administrative Order 2018-61, September 12, 2018, <http://web.flsd.uscourts.gov/uploads/adminorders/2018/2018-61.pdf>; *see also* In re: Amendments to the Local Rules, Administrative Order 2018-81, October 22, 2018, at 49, <http://web.flsd.uscourts.gov/uploads/adminOrders/2018/2018-81.pdf>.

² U.S. District Court for the Southern District of Florida, Local Rule 26.1(i).

³ Fed. Rule Civ. Proc. 69(a)(2) provides that post-judgment discovery is available to judgment creditors. Fed. Rule Civ. Proc. 45(a)(4) requires notice to parties of subpoenas issued “before trial.”

Notably, in 2013, the Judicial Conference Committee on Rules of Practice and Procedure amended Federal Rule of Civil Procedure 45. The Committee considered the importance of the notification distinction between trial subpoenas and post-judgment subpoenas and maintained that distinction within the Rules.⁴ Specifically, the Committee Report discusses comments submitted by the Department of Justice,⁵ which emphasized that “[g]iving advanced notice . . . could frustrate enforcement of judgments or make it considerably more cumbersome.”⁶ In its comment, the Department of Justice stated that “[t]he concerns that relate to fairness and avoiding surprise at trial support prior notice to parties of third-party subpoenas. Any such concerns in the post-judgment context would be outweighed by the potential for dissipation of assets by a judgment debtor who receives notice of post-judgment asset discovery in the form of third-party subpoenas.”⁷ We share this view.

The current language of Local Rule 26.1(i) has and will continue to disrupt the FTC’s work and impede the agency’s ability to protect consumers in the Southern District of Florida as well as across the United States.

For these reasons, the Commission urges you to reconsider this issue, and amend Local Rule 26.1(i) at your earliest opportunity. Specifically, we suggest that the following language be incorporated into the Local Rule to restore the ability to serve post-judgment subpoenas without providing post-production notice to parties: “Whenever a party, *before trial*, receives objections, documents, electronically stored information, or other things from a non-party in response to a subpoena, the party receiving same shall promptly notify all other parties of such receipt, and shall, upon request, make the materials available for inspection to all other parties in the same form or format as received from the non-party.”

By Direction of the Commission.

April Tabor
Acting Secretary

⁴ *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, September 2012, at 23, https://www.uscourts.gov/sites/default/files/fr_import/ST09-2012.pdf [hereinafter “Committee Report”].

⁵ Tony West, U.S. Department of Justice comment on proposed amendments to the Federal Rules of Civil Procedure (Letter to Administrative Office of the U.S. Courts dated February 15, 2012), https://www.uscourts.gov/sites/default/files/fr_import/11-CV-021-Comment-West_DOJ.pdf [hereinafter “Department of Justice Letter”].

⁶ Committee Report at 23.

⁷ Department of Justice Letter at 3.