Contention Interrogatories

by Gianfranco A. Pietrafesa

There have been few court decisions, articles or other materials addressing contention interrogatories. The goal of this article is to consolidate the available information on contention interrogatories, particularly the information that may be used in federal and state courts in New Jersey. The article attempts to explain and provide examples of contention interrogatories and identify the types of information that may and may not be obtained through their use.

©Greg Hargreaves/Artville

What are Contention Interrogatories?

The term "contention interrogatory" may seem unfamiliar. However, most attorneys have probably drafted such interrogatories as well as answered (or objected to) them.

"[C]ontention interrogatories seek to discover the factual basis for the allegations raised in the [pleadings]."[1] They are often directed towards specific allegations in a pleading, including vague and general allegations.[2] For example, such an interrogatory may seek all facts supporting a defendant's contention (i.e., affirmative defense) that the plaintiff's claims are barred by the statute of limitations.[3]

Contention interrogatories require the answering party to state its legal contentions and theories, and the facts supporting them.[4] They differ from fact or identification interrogatories, which seek facts known by the answering party or the identity of documents or individuals having knowledge of facts.[5]

Contention interrogatories ...require an answering party to disclose its position on the issues in the case and to disclose the basis for the positions taken in the pleadings.

A contention interrogatory may request whether the answering party makes a certain contention and, if so, requests state the facts supporting the contention. For example, such an interrogatory may inquire whether the answering party is contending a violation of a law or statute has occurred. If so, the interrogatory would request the identity of the law or statute and the facts supporting the contention of a violation.[6]

Contention interrogatories also seek "to determine the theory of a party's case."[7] They require an answering party to disclose its position on the issues in the case and to disclose the basis for the positions taken in the pleadings.[8] For example, contention interrogatories may inquire whether the answering party is contending undue influence,[9] the existence of a contract[10] or the breach of a contract.[11]

To summarize, contention interrogatories may be used to ask a party to:

1. State what it contends;
2. State whether it makes a specific contention;
3. State all facts and evidence upon which it bases a contention;
4. Take a position and explain or defend the position with respect to how the law applies to the facts; and
5. State the legal or theoretical basis for a contention.[12]

Court Rules Authorizing Contention Interrogatories

Contention interrogatories are explicitly authorized by Federal Rule of Civil Procedure 33(c), which provides that "[a]n interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, ..."[13] The advisory committee's note to the 1970 amendment to Rule 33 states that "requests for opinions or contentions that call for the application of law to fact ... can be most useful in narrowing or sharpening the issues, which is a major purpose of discovery."[14]

By contrast, the New Jersey Court Rules do not include any specific language authorizing the use of contention interrogatories.[15] However, the scope of discovery under the New Jersey Court Rules is broad: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, ..."[16] This scope of discovery is incorporated into the court rule authorizing the use of interrogatories: "Any party may serve upon any other party written interrogatories relating to any matters which may be inquired into under R. 4:10-2."[17]

Notwithstanding the absence of explicit authority under the New Jersey Court Rules, contention interrogatories are frequently used in state court litigation. Their use is implicit in the court rules and the broad scope of discovery.

New Jersey Case Law

Research has not revealed any New Jersey state court case discussing or even mentioning contention interrogatories.[18] Moreover, there are few federal court cases containing any significant discussion of such interrogatories.[19] The existing New Jersey case law that appears to discuss the subject matter of contention interrogatories provides very little guidance. The cases will be briefly noted for purposes of completeness.

In *Schwartz v. Public Service Coordinated Transport*,[20] the defendant contended that the plaintiff's negligence contributed to the subject accident. The plaintiff served interrogatories requesting the defendant to describe: (1) the negligence of the plaintiff allegedly contributing to the accident, (2) the careless, negligent and reckless manner in which the plaintiff allegedly conducted himself, and (3) the alleged unlawful acts of the plaintiff.[21] The defendant objected to the interrogatories on the grounds that they called for opinions and conclusions.[22] The court, however, without much analysis on the issue, held that the interrogatories called for facts, not mere opinions or conclusions, and were proper.[23]

In *William v. Marziano*,[24] the court held that an interrogatory calling for a legal conclusion was improper. It also held that an interrogatory requesting the contention of the defendant was improper.[25] Unfortunately, the court's opinion neither sets forth the interrogatories nor discusses its decision in this regard. Therefore, it is of little or no value on the issue. Moreover, that aspect of the decision concerning the interrogatory requesting the defendant's contention can no longer be considered good law.

Finally, in *Meyers v. St. Francis Hospital*,[26] the defendant objected to certain interrogatories on the grounds that they called for conclusions, opinions or contentions. The court held that it was proper to ask the defendant what he did and why, as well as what he observed. The court further held that the

defendant could not object if the answers called for an expression of opinion.[27] The court did hold that other interrogatories, requesting whether the defendant acted as an employee of the hospital and whether the burns could have been incurred in the absence of negligence, were improper as calling for legal conclusions.[28]

The absence of any specific authority in the New Jersey Court Rules, the sparse case law on the issue, and the potential for discovery disputes on the use of such interrogatories may suggest a need for an amendment to the New Jersey Court Rules to explicitly authorize and govern the use of contention interrogatories.

Information that May and May Not be Requested

Some examples of the type of information that may or may not be requested will lead to a better understanding of contention interrogatories. First, assume a lawsuit where the parties dispute whether a product was merchantable and fit for a particular purpose. A party serves a contention interrogatory asking the product manufacturer whether it believes the subject product was merchantable and fit for a particular purpose and, if so, to state the factual basis supporting its contentions. The manufacturer may object to the interrogatory on the grounds that it calls for a legal conclusion. However, the interrogatory is permissible.[29]

The answer to the interrogatory requires a recital of facts supporting the contentions and an application of law to fact. In other words, it requires a party to relate facts to legal theories by setting forth the facts in support of the contentions that the product was merchantable and fit for a particular purpose.[30]

An interrogatory seeking facts underlying a contention or allegation is also permissible, even though it calls for a legal conclusion. The reason it is permissible is because it really requires the application of law to fact.[31] For example, an interrogatory requesting a party to describe the standard of care it contends is applicable does not involve a question of pure law or impermissibly call for a legal conclusion. Rather, the interrogatory seeks facts supporting the alleged standard of care.[32]

By contrast, an interrogatory calling for a legal conclusion or a statement of pure law only is not permissible. That is, an interrogatory calling for "legal issues unrelated to the facts of the case" is not permissible.[33] For example, in *O'Brien v. International Brotherhood of Electric Workers,*[34] a union was not required to answer an interrogatory requiring it to explain why provisions of its constitution were not superceded by federal statute.[35]

It has been noted that the distinction between a contention interrogatory properly seeking to identify the legal theory of a claim or defense and an interrogatory improperly seeking an answer to a pure question of law is often unclear. For example, in *O'Brien,* the court held that an interrogatory requesting a party to disclose why certain acts were illegal was improper.[36] Yet, in *Kendrick v. Sullivan,*[37] the court held that an interrogatory requesting a party to identify allegedly illegal portions of an agency regulation and describe how they were illegal was proper.[38]

This suggests that a party must carefully draft contention interrogatories so that they require only the disclosure of facts by an answering party. It also requires an answering party to carefully review the interrogatories to determine whether it can answer the question by providing facts. This mutual effort will avoid unnecessary and time-consuming objections to interrogatories, responses to the same and the eventual motion practice.

Timing

In light of the great usefulness of such discovery, the court has the discretion to delay answers to contention interrogatories until after certain designated discovery is completed.[39] The rationale for delaying answers is that an answering party may not have had the opportunity to discover the facts necessary to answer the contention interrogatories in an early stage of the litigation.[40] Otherwise, a party may be forced to articulate a theory of its case which is not fully developed on the facts.[41]

Yet, it has been noted that Rule 11, for example, requires counsel to know what his or her client contends the other party did or did not do as soon as a pleading is filed with the court. Therefore, if a party cannot provide answers to contention interrogatories shortly after the pleading is filed, it is questionable whether the party had a proper basis to make the contention in the pleading.[42] The decision on when contention interrogatories must be answered should be left to the sound

An interrogatory seeking facts underlying a contention or allegation is...permissible, even though it calls for a legal conclusion. The reason it is permissible is because it really requires the application of law to fact.

discretion of the court, determined on a case-by-case basis.

Conclusion

Contention interrogatories can be used to determine whether a party makes specific contentions and to obtain the facts supporting contentions. They can also be used to determine whether a party takes a certain position, and to require the party to explain the position with respect to how the law applies to the facts. As a result, properly drafted contention interrogatories can be very useful tools in the discovery process. A review of the authorities cited in this article will give an attorney a sound foundation on the proper use of contention interrogatories. ⚖

Endnotes

1. Iain D. Johnston and Robert G. Johnston, "Contention Interrogatories in Federal Court," 148 F.R.D. 441, 442 (1993) [hereinafter Johnston & Johnston].
2. Johnston & Johnston, 148 F.R.D. at 443 (citations omitted). See also 2 Robert L. Haig, *Business and Commercial Litigation in Federal Courts,* §21.6 at 423 [hereinafter Haig].
3. *See* S. Robert Allcorn, 42 *New Jersey Practice-Discovery,* §2.47 (1998) [hereinafter Allcorn].
4. *See, e.g.,* Allcorn, §§1-12 and 2.47.
5. *See id.* §1.12; Johnston & Johnston, 148 F.R.D. at 442.
6. *See* Allcorn, §2.47. *See also id.* Form 2.212.
7. Johnston & Johnston, 148 F.R.D. at 442 (citations omitted).
8. *See* Kenneth R. Berman, "Q: Is This Any Way To Write An Interrogatory? A: You Bet It Is," Vol. 19 No. 4 Litigation 42 (Summer 1993) [hereinafter Berman]. *See also Nestle Foods Corp. v. Aetna Cas. & Surety Co.,* 135 F.R.D. 101, 110 (D.N.J. 1990) (citation omitted) (a party may use contention interrogatories to inquire into a party's contentions in a lawsuit).
9. Myron J. Bromberg, "Cutting Through Discovery With Precision Tools," 164 N.J.L.J. 270, 271 (April 23, 2001) [hereinafter Bromberg].
10. Haig, §21.6 at 423.
11. Allcorn, Form 2.212.
12. Johnston & Johnston, 148 F.R.D. at 442-43 (citing, among others, *In re Convergent Technologies Securities Litigation,* 108 F.R.D. 328, 332 (N.D. Cal. 1985)). *Accord Conopco, Inc., etc. v. Warner-Lambert Co.,* 2000 WL 342872 (D.N.J. Jan. 26, 2000).
13. Fed. R. Civ. P. 33(c).
14. 48 F.R.D. 502.
15. *See* Bromberg, 164 N.J.L.J. at 271.
16. R. 4:10-2(a).
17. R. 4:17-1(a). *See also* Bromberg, 164 N.J.L.J. at 271 (suggesting that the inclusion of factual and legal contentions in pretrial orders pursuant to R. 4:25-1(b)(3), (4) & (7) also implicitly authorizes the use of contention interrogatories).
18. A Westlaw search of "contention interrogator!" revealed that the term has not been used in any state court opinion in New Jersey.
19. *See, e.g., Convergent Technologies,* 108 F.R.D. 328, for a good discussion of contention interrogatories, particularly on the issue of when to answer such interrogatories.
20. 64 A. 2d 477 (Essex Cty. Ct. 1949).
21. *Id.* at 478.
22. *Id.*
23. *Id.* at 480.
24. 78 N.J. Super. 265, 271 (Law Div. 1963).
25. *Id.* (*citing* R.R. 4:16-2; 2 Morris M. Schnitzer and Julius Wildstein, *New Jersey Rules Service,* A IV-659; Schwartz, 64 A. 2d 477).
26. 91 N.J. Super. 377, 389 (App. Div. 1966).
27. *Id.* It should be noted that this aspect of the court's decision may be based on the fact that the defendant was a physician in a medical malpractice action. As the court noted, "we are dealing within the area of defendant's specialty and, in particular, with his operative procedures and treatment." *Id.*
28. *Id.*
29. *See Schaap v. Executive Industries, Inc.,* 130 F.R.D. 384, 388 (N.D. Ill. 1990).
30. *See* 7 Moore's Federal Practice 3d, §33.78 at 33-63 [hereinafter Moore's]; 8A Charles A. Wright, Arthur R. Miller and Richard L. Marcus, Federal Practice & Procedure, §2167 at 248 n.37 [hereinafter Wright, Miller & Marcus] (both *citing* Schaap, 130 F.R.D. 384).
31. *See* Moore's, §33.79 at 33-64 (*citing Sargent-Welch Scientific Co. v. Ventron Corp.,* 59 F.R.D. 500, 502 (N.D. Ill. 1973); *Coles v. Jenkins,* 179 F.R.D. 179, 181 (W.D. Va. 1998)).
32. *See* Moore's, §33.79 at 33-64 n.3 (*citing Coles,* 179 F.R.D. at 181).
33. Moore's, §33.79 at 33-64 (*quoting* advisory committee's note to 1970 Amendment to Rule 33).
34. 443 F. Supp. 1182, 1187 (N.D. Ga. 1977).
35. *See* Wright, Miller & Marcus, §2167 at 249 n.39 (*citing O'Brien*).
36. 443 F. Supp. 1182.
37. 125 F.R.D. 1 (D.D.C. 1989).
38. *See* Johnston & Johnston, 148 F.R.D. at 443-44 (*discussing O'Brien and Kendrick*).
39. Fed. R. Civ. P. 33(c). *See also Nestle Foods,* 135 F.R.D. at 110-11.
40. *See* Johnston & Johnston, 148 F.R.D. at 445 (*citing,* among others, *Nestle Foods,* 135 F.R.D. at 110-11).
41. *See id.* (*citing Storie v. U.S.,* 142 F.R.D. 317, 319 (E.D. Mo. 1992)). *See also* advisory committee's note to 1970 Amendment to Rule 33.
42. *See* Berman at 42-43.

Gianfranco A. Pietrafesa *is a partner in the firm of Cooper, Rose & English, LLP, in Summit, and a member of the firm's litigation and corporate groups.*