

Application of the New “Proportionality” Discovery Rule in Class Actions: Much Ado About Nothing

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The “proportionality” amendment to the federal discovery rules, which went into effect on December 1, 2015, was greeted with panic by the plaintiffs’ bar (and the academy) and euphoria by the defense bar. Both sides predicted that the impact would be profound and immediate. Some predicted that the impact would be especially great in class actions. To examine whether the predictions have been correct, I have reviewed every published judicial opinion (approximately 135) between December 1, 2015 and April 30, 2018 that applied the new proportionality rule in the class action context. The analysis is necessarily anecdotal rather than empirical. Nonetheless, the results are striking. At bottom, the proportionality amendment has had little impact, at least in the class action context. Courts have generally indicated that the new rule does not fundamentally change the governing principles. In ruling on discovery disputes in class actions, courts continue to conduct nuanced, highly fact-specific analyses with results that differ little from pre-amendment case law. The courts are especially liberal in allowing discovery that is relevant to class certification. In short, the class action discovery decisions thus far do not support the predictions that the proportionality rule would lead to a sea change.

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INTRODUCTION

On December 1, 2015, changes to the Federal Rules of Civil Procedure (“Rules”) governing discovery became effective.¹ Most importantly, those rules make “proportionality” front and center in defining the scope of discovery.² In drafting the new rules, the Advisory Committee on Rules of Civil Procedure (“Advisory Committee”) followed its normal practice of preparing explanatory notes (“Committee Notes”).³ Those notes reflect that the purpose of the changes was not to overhaul existing discovery practices, but to fine-tune existing limitations on discovery to deter serious abuse. In those notes, the Advisory Committee emphasized that the amendments merely return proportionality to its original role as an “express component of the scope of discovery” and do “not change the responsibilities of the court and the parties to consider proportionality.”⁴

Notwithstanding the Advisory Committee’s comments about the focused and nuanced nature of the amendments, the response from the bar and the academic community has been strident and hyperbolic. It is no exaggeration to say that there has been panic on the plaintiffs’ side and euphoria on the defense side. Indeed, rarely have proposed procedural rules resulted in so many submissions by members of the bar. The proposed rule change resulted in 2,345 written submissions.⁵ In addition, more than 120 witnesses testified live before the Advisory Committee at hearings designed to elicit input and concerns from the

1. John G. Roberts, *Transmittal of the Amended Federal Rules of Civil Procedure to Congress*, SUP. CT. U.S. 1, 1 (Apr. 29, 2015), [https://www.supremecourt.gov/orders/courtorders/frev15\(update\)_1823.pdf](https://www.supremecourt.gov/orders/courtorders/frev15(update)_1823.pdf) [<https://perma.cc/42JT-64GR>].

2. See FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is . . . proportional to the needs of the case . . .”).

3. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2015 amendment.

4. *Id.*

5. See *Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=USC-RULES-CV-2013-0002> (last visited May 16, 2018) [<https://perma.cc/M747-FPQQ>] (listing 2,343 comments submitted in response to the Proposed Amendments).

bar and the academy.⁶ Similarly, the proposals generated a myriad of articles and blog posts.⁷ By way of contrast, a recent proposed amendment to the Federal Rules of Civil Procedure, which included the changes to the class action rule (Rule 23), resulted in ninety-one written submissions.⁸

Both supporters and opponents of the discovery amendments agreed that the changes would be sweeping, differing only on whether that result would be good or bad for the legal community and the public at large. Members of the plaintiffs' bar (and most of the comments from the academy) expressed concern that the new rules—especially with respect to the proportionality changes—would devastate plaintiffs' discovery efforts, require more frequent motions to compel, and offer defendants an unfair advantage by depriving plaintiffs of discovery necessary to pursue their claims.⁹ Members of the defense bar, by contrast, applauded the amendments and predicted that the new rules would lead to significantly less burdensome discovery obligations on defendants.¹⁰ Both sides agreed that plaintiffs would be disproportionately harmed—and defendants would be disproportionately helped—even though the Rules, by their terms, apply to discovery sought by both sides.

The plaintiffs' bar, the defense bar, and the academy are not alone in viewing the new discovery rules as representing an important change. The Chief Justice of the United States, in his 2015 annual

6. JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1, 5 (2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [<https://perma.cc/D6PH-GDD8>].

7. See, e.g., Amii N. Castle, *Rule 26(B)(1) Proportionality Amendment: Three Outcomes Will Be Contrary to the Advisory Committee's Stated Intent, Including Who Bears the Burden of Proving Proportionality*, 38 N.C. CENT. L. REV. 32 (2015); Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Procedure and its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455 (2014); David M. Arbogast, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Feb. 18, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-2199&attachmentNumber=1&contentType=pdf> [<https://perma.cc/V5QG-RBRC>]; Randall C. Berg, Jr., Fla. Project Dir. Ass'n, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Feb. 14, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-1235&attachmentNumber=1&contentType=pdf> [<https://perma.cc/3TWJ-XUJA>]; Marc A. Goldich, David R. Cohen & Emily J. Dimond, *FRCP Amendments Could Change Discovery As We Know It*, LAW360 (June 4, 2013, 2:51 PM), <https://www.law360.com/articles/447209/frcp-amendments-could-change-discovery-as-we-know-it> [<https://perma.cc/993W-ERKR>]; Moshe Z. Marvit, *Roberts Rules for Protecting Corporations*, AM. PROSPECT (Nov. 14, 2016), <http://prospect.org/article/roberts-rules-protecting-corporations> [<https://perma.cc/ST7E-RLME>].

8. See *Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=USC-RULES-CV-2016-0004> (last visited Aug. 17, 2018) [<https://perma.cc/7T46-3RCN>].

9. See *infra* Section II.A.1.

10. See *infra* Section II.A.2.

report, devoted special attention to the new rules. He portrayed them as “mark[ing] [a] significant change, for both lawyers and judges, in the future conduct of civil trials.”¹¹ He noted that “[t]he amendments may not look like a big deal at first glance, but they are.”¹² He explained, however, that the amendments were not designed to prevent legitimate discovery but instead were focused on curtailing “creatively burdensome requests” and preventing parties from “evading legitimate requests through dilatory tactics.”¹³

With almost three years of experience, it is worth examining the initial impact of the new rules. There are already several thousand cases discussing the new rules. Virtually all of these opinions are by district judges and magistrate judges. Analysis of this case law would be beyond the scope of a single article for this symposium. Thus, I focus on a subset of the cases: post-amendment class actions. Given the vast scope of many class actions, discovery expectations on both sides are at their zenith. If defendants were going to reap substantial benefits from the proportionality amendment, one would presumably see such benefits in cases in which plaintiffs are seeking the most extensive and burdensome discovery. Indeed, as discussed below, a number of commenters predicted that the impact of the proportionality rule would be especially great in the class action context. At the same time, given that class actions involve claims from a large number of people, it would seem that proportionality would be easier to establish than if the same discovery were being propounded in a traditional individual-plaintiff case. Given these conflicting pressures, class actions provide an excellent subset for an initial focus on the impact of the proportionality amendment.

I have reviewed every published putative class action case from December 1, 2015—the effective date of the amendments—through April 30, 2018, in which either the plaintiff or the defendant moved to compel discovery. This represents about 135 decisions by federal district judges and federal magistrate judges. That relatively small number, standing alone, is significant. With thousands of new federal court class actions filed every year,¹⁴ and with potentially many

11. ROBERTS, *supra* note 6, at 5.

12. *Id.* (emphasis added).

13. *Id.* at 11.

14. See Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 308 n.7 (2011) (“I estimate that, in recent years, about 7500 class actions have been filed annually in the United States”); Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, FED. JUD. CTR. 1, 3, 19 (2008), <https://dlbjbjzgnk95t.cloudfront.net/0053000/53273/Report.pdf> [<https://perma.cc/GM3F-U2AY>] (finding that 2,354 class actions were filed in or removed to federal court during the first six months of 2007).

discovery disputes possible within a single case, this number belies the assertion of many objectors—at least for class actions—that the new rules will cause an avalanche of motions to compel. Of course, many class action discovery disputes during that time frame were presumably resolved in unpublished orders; yet the number of reported decisions reveals that the new rules have prompted only a small number of class action discovery disputes that the courts deemed worthy of detailed written opinions. Moreover, a number of the cases (approximately fifteen percent) involve attempts by *defendants* seeking to compel discovery from *plaintiffs*—a scenario that neither critics nor proponents of the new rules considered.

This study, by its very nature, is anecdotal and not empirical. I recognize that the new discovery rules may impact discovery in ways that cannot be ascertained merely by reading the published court decisions. First, it is possible that plaintiffs are now more reluctant to file lawsuits in the first place, deterred by concerns that they will not be able to pursue the necessary discovery. Second, in light of the proportionality amendment, plaintiffs might be making compromises during meet and confer sessions—or during discovery hearings—that they would not have made prior to the new rule. Third, plaintiffs may be scaling back their discovery requests from what they would have filed prior to the proportionality amendment, anticipating that broader requests would be opposed by defendants and rejected by courts. Thus, this Article provides only one piece of a complicated puzzle.¹⁵ But it is an important piece: given the predictions by both the plaintiffs' and defense bars, one would expect to see fairly dramatic rulings by district courts—unlike pre-amendment cases—vastly curtailing discovery by plaintiffs. However, that has not been the case.

15. Similar issues have arisen in studies involving the impact of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009). See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1214 (2013) (suggesting that “many or most of the [empirical] studies do not generate—and, indeed, are not designed to generate—a useful, policy-analytic estimate of [*Twombly/Iqbal*]’s effect on plaintiffs’ access to the legal system”); Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2274–75 (2012) (arguing that “simply comparing the Rule 12(b)(6) motion-to-dismiss grant rate under *Conley* with the Rule 12(b)(6) motion-to-dismiss grant rate under *Twombly/Iqbal* is of limited use in evaluating whether pleading standards have changed”); Lonny Hoffman, *Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 31 (2012):

One difficulty in assessing *Twombly* and *Iqbal*’s effects is that a study comparing pre-*Twombly* and post-*Iqbal* filing rates and movant success rates does not tell us how many prospective claimants were deterred from seeking legal relief because of the Court’s more exacting pleading standard. Indeed, it is not clear how any empirical study could measure the deterrent effect of the Court’s decisions.

Part I of this Article summarizes the text of the proportionality amendment as well as the Advisory Committee Notes. Part II examines the reactions by the plaintiffs' bar, the defense bar, and the academy. Part III analyzes the approximately 135 class action cases under the proportionality amendment. As I discuss in Part III, my review of the cases reveals several conclusions:

- Courts have made clear that the proportionality amendment does not materially change the governing principles.
- Courts have generally conducted nuanced, fact-specific analyses designed to yield discovery that is important and meaningful.
- Courts frequently invoke common pre-amendment techniques of meet and confer and sampling to resolve discovery disputes.
- Courts are especially liberal in allowing discovery relevant to class certification.
- As with many pre-amendment cases, the outcomes in many cases denying discovery can be explained by ineffective lawyering.

In sum, courts are generally doing an excellent job in mediating discovery disputes in class actions, and the rulings belie the predictions of the plaintiffs' bar, the defense bar, and the academy that the consequences of the proportionality amendment would be dramatic. In the cases I reviewed, the courts have strived to be fair to both sides. The outcome in virtually every case is heavily fact-specific, and almost certainly would have been the same under the pre-amendment rule.

I. OVERVIEW OF NEW PROPORTIONALITY AMENDMENT

A. *Changes to the Text Regarding Proportionality*

The new discovery rules make a variety of changes.¹⁶ Most of the bar's attention, however, has focused on Rule 26, which was amended

16. For instance, as amended in 2015, Rule 1 of the Federal Rules of Civil Procedure provides that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. The phrase "employed by the court and the parties" was added to emphasize that *the parties* as well as the courts have a duty to facilitate the timely and fair resolution of discovery disputes. The recent amendments also address electronically stored information. See FED. R. CIV. P. 16(b)(3)(B)(iii); FED. R. CIV. P. 26(f)(3)(C); FED. R. CIV. P. 37(e).

Amended Rule 26 continues to permit discovery of certain evidence whether or not it is admissible at trial, but it no longer suggests that discovery is appropriate whenever it is "reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26 advisory committee's note to 2015 amendment. Rather the amended rule states simply that "[i]nformation

to emphasize proportionality limits in discovery and to list the factors that should be used to measure proportionality. The revised language provides:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.¹⁷

As the above-quoted language reveals, the rule lists six (unnumbered) factors for measuring proportionality. Importantly, all but one of those factors were simply relocated from the pre-amendment version of Rule 26(b)(2) and thus already served as limitations on the scope of discovery.¹⁸

Indeed, long before the 2015 amendment, various proportionality factors had been listed as part of the certification requirements for every discovery request, response, or objection. Thus, since 1983, Rule 26(g)(1)(B) has required the attorney (or party, if unrepresented) to verify with a signature that each discovery request, to the best of the signer's knowledge and belief, is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."¹⁹

within this scope of discovery need not be admissible in evidence to be discoverable." FED. R. CIV. P. 26(b)(1). The amended rule also eliminates the provision "authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action" FED. R. CIV. P. 26 advisory committee's note to 2015 amendment. It does, however, permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." FED. R. CIV. P. 26(b)(1).

Amended Rule 26(c)(1)(B) also clarifies courts' authority to allocate expenses for good cause to "protect a party or person from annoyance, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1). Despite that amendment, however, the principle that the responding party normally bears the cost of discovery has not been eliminated. FED. R. CIV. P. 26(b)(1) advisory committee's note to 2015 amendment.

Early versions of the proposed amendments would have cut back on the presumptive number of interrogatories (from twenty-five to fifteen) and the presumptive number of depositions (from ten to five). See *Preliminary Draft of Proposed Amendment to the Federal Rules of Civil Procedure*, REGULATIONS.GOV 1, 268 (Aug. 15, 2013), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0001&contentType=pdf> [<https://perma.cc/PX7T-HLLR>]. In addition, prior proposals would have imposed a cap of twenty-five on the number of requests for admission (excluding requests to admit the genuineness of documents). *Id.* at 264. The Advisory Committee abandoned those limitations based on objections raised during the notice and comment period. *Id.*

17. FED. R. CIV. P. 26(b)(1) (emphasis added).

18. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

19. FED. R. CIV. P. 26(g)(1)(B)(iii).

In an earlier version of the 2015 amendments, the Advisory Committee listed “the amount in controversy” as the first proportionality factor, but it revised the list to put as the first factor “the importance of issues at stake” in the action.²⁰ That change was prompted by comments suggesting that placing too much emphasis on the amount in controversy could negatively impact discovery in cases such as civil rights actions, where the value of the proceedings may not be reflected in monetary terms.²¹

The one new proportionality factor—focusing on “the parties’ relative access to relevant information”—was derived from the Utah state discovery rules and implemented by the Advisory Committee to address instances where asymmetric distribution of information imposes a greater burden on one party than another.²² For example, in employment cases, employers have access to company documents unavailable to employees, and that fact should arguably make it easier for employees to obtain such information.

B. The Committee Notes

As previously mentioned, the Advisory Committee offers guidance on the new proportionality rule in its Committee Notes. Throughout the Committee Notes, the Advisory Committee emphasizes that the amended rule is not designed to effect wholesale changes to a party’s ability to prove its case or mount a defense. Rather, consistent with the Chief Justice’s comments,²³ the purpose is to highlight concepts that judges can utilize to deter abusive practices. Thus, the Committee Notes point out that “[r]estoring the proportionality calculation to Rule 26(b)(1) *does not change the existing responsibilities of the court and the parties to consider proportionality.*”²⁴ The Committee Notes further point out that “[t]he direction to consider the parties’ relative access to relevant information adds new text to provide explicit focus on *considerations already implicit in present Rule*

20. HON. DAVID G. CAMPBELL, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 8 (May 2, 2014) http://www.uscourts.gov/sites/default/files/fr_import/CV05-2014.pdf [<https://perma.cc/M2U9-T5DP>].

21. *See id.* (“This rearrangement . . . avoid[s] any possible implication that the amount in controversy is the first and therefore most important concern. In addition, the Committee Note is expanded to address in depth the need to take account of private and public values that cannot be addressed by a monetary award.”).

22. *Id.*

23. *See* ROBERTS, *supra* note 6, at 10–11 (noting that judges “who are knowledgeable, actively engaged, and accessible *early* in the [discovery] process” can better “curtail dilatory tactics, gamesmanship, and procedural posturing”).

24. FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment (emphasis added).

26(b)(2)(C)(iii).”²⁵ In addition, the Committee Notes explain that “[r]estoring proportionality as an express component of the scope of discovery warrants *repetition* of parts of the 1983 and 1993 Committee Notes that must not be lost from sight,” including: the need “for greater judicial involvement in the discovery process,” the fact that “monetary stakes are only one factor,” the need for courts to apply the standards “in an evenhanded manner,” and the view that discovery should not be used as “an instrument for delay or oppression.”²⁶

The Committee Notes make clear that amended Rule 26 does not require the requesting party to *prove* proportionality. As they note, the amendment “does *not* place on the party seeking discovery the burden of addressing all proportionality considerations.”²⁷ By the same token, the amendment is not “intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional.”²⁸ Rather, “[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.”²⁹

The Committee Notes also offer guidance on weighing the various proportionality factors. As they state, “[M]onetary stakes are only one factor,” and “consideration of the parties’ resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party.”³⁰ The Committee Notes emphasize that the amendments are “intended to encourage judges to be more aggressive in identifying and

25. *Id.* (emphasis added).

26. *Id.* (quoting 1983 and 1993 committee notes) (emphasis added).

27. *Id.* (emphasis added).

28. *Id.*

29. *Id.* The Committee Notes suggest that other changes to the discovery rules are also nuanced and not game changers. With respect to the deletion of the language authorizing “discovery of relevant but inadmissible information that appears ‘reasonably calculated to lead to the discovery of admissible evidence,’” the Committee Notes indicate that such language had “been used by some, incorrectly, to define the scope of discovery.” *Id.* (quoting FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment) (noting that “[t]he 2000 amendments sought to prevent such misuse”). Thus, the Advisory Committee replaced that language with “the direct statement that ‘[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable.’” *Id.* (quoting FED. R. CIV. P. 26 advisory committee’s note to 2000 amendment). Under the amendments, “[d]iscovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.” *Id.* With respect to the amendment to Rule 1, the Committee Notes explain that the purpose was to “emphasize” that “the parties share [with the court] the responsibility to employ the rules” to “secure the just, speedy, and inexpensive determination of every action” FED. R. CIV. P. 1 advisory committee’s note to 2015 amendment. The Committee Notes emphasize, however, that the “amendment does not create a new or independent source of sanctions” and does not “abridge the scope of any other of these rules.” *Id.*

30. FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment.

discouraging discovery overuse.”³¹ The court must make case-specific determinations “using all the information provided by the parties.”³²

II. REACTIONS BY THE PLAINTIFFS’ BAR, THE DEFENSE BAR, AND THE ACADEMY

As noted in the Introduction, both the plaintiffs’ and defense bars (as well as the academy) predicted that the proportionality amendment would have profound consequences. Moreover, virtually all authors of numerous articles and blogs on the topic similarly predicted that the impact of the amendment would be dramatic because plaintiffs would have a much harder time securing essential discovery.

The following sections summarize written comments to the Advisory Committee, law review articles, and blogs that have opined on the impact of the proportionality amendment. Section A describes comments on the general impact of the amendment. Section B features comments that focus specifically on class actions and comments (whether specifically addressing class actions or not) by leading class action practitioners. Section C discusses comments received in connection with a congressional hearing on the proposed discovery amendments. Finally, Section D surveys reactions to the Chief Justice’s comments in his annual report. In many instances, the comments discussed below focused solely on the proportionality amendment. In other instances, proportionality was discussed, although the comments discussed the discovery amendments as a package. (As noted above, the amendments made a number of changes in addition to those relating to proportionality.)

A. General Reactions

Both the plaintiffs’ and defense bars invoked strong language about the likely impact of the new proportionality rule. Members of the plaintiffs’ bar stressed the unfairness of the proposed amendment, while the defense bar praised the changes for *improving* fairness in discovery. Objections from the academy, on the whole, were similarly strident, with most scholars vehemently opposed to the proportionality amendment.

31. *Id.*

32. *Id.*

1. Plaintiffs' Perspective

A pervasive theme from the plaintiffs' bar and the academy was that the proposed proportionality amendment would be a dramatic and undesirable change. For instance, one article characterized the proportionality rule and other changes as "the most significant changes to discovery since the 1993 amendments requiring initial disclosures."³³ Another objection submitted to the Advisory Committee predicted that the amendment would "lead to rulings that are highly subjective, variable, and unpredictable."³⁴

Many of the comments by the plaintiffs' bar expressed concern that the amendments would not only target abusive discovery tactics but would prevent plaintiffs from obtaining legitimate and necessary discovery to prove their claims. One critic stated that "defendants under the new rule will be handed an enormous advantage,"³⁵ while another worried about the "fundamental shift in the burden of discovery and its disparate impact on consumers/plaintiffs."³⁶ The former critic went so far as to predict that the amended rule would "forc[e] plaintiffs to move to compel *in every case and in every instance*."³⁷ Indeed, some objectors predicted that the amended rule would be so consequential as to deny access to justice in many instances. One commenter asserted that the amendment would "place justice out of the reach of many deserving individuals whose injuries are not considered serious enough by the trial court."³⁸ Another critic noted, "[I]n the classical David-and-Goliath lawsuit brought by an individual person against an institutional defendant, these pending amendments hurt David and help Goliath *more than any previous round of amendments to the FRCP*."³⁹ Numerous other members of the plaintiffs' bar raised similar concerns.⁴⁰

33. Goldich et al., *supra* note 7.

34. Berg, *supra* note 7, at 3.

35. Arbogast, *supra* note 7, at 1.

36. Ira Rheingold, Nat'l Consumer Law Ctr. & Nat'l Ass'n of Consumer Advocates, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 2 (Feb. 18, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-1913&attachmentNumber=1&contentType=pdf> [<https://perma.cc/M36N-CWMR>].

37. Arbogast, *supra* note 7, at 1–2 (emphasis added).

38. Brian D. Rogers, Ga. Trial Lawyers Ass'n, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 4 (Feb. 18, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-2119&attachmentNumber=1&contentType=pdf> [<https://perma.cc/LXS7-K9QU>].

39. Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1085 (2015) (emphasis added).

40. See, e.g., J. Bernard Alexander III & Wendy Musell, Cal. Emp't Lawyers Ass'n, Comment Letter on Proposed Amendments to Federal Rules of Bankruptcy and Civil Procedure 3 (Feb. 10,

Much of the criticism from the plaintiffs' bar and the academy stressed that the discovery amendments were unnecessary.⁴¹ Members of the plaintiffs' bar also believed that the changes would increase discovery costs.⁴² A number of comments from the plaintiffs' bar expressed concern that the amended rule would inevitably favor well-heeled defendants.⁴³ Indeed, the thesis of one article was captured by

2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0785&attachmentNumber=3&contentType=pdf> [<https://perma.cc/G88D-89ER>] (opining that the proportionality requirement would “thwart efficiency by expending the court’s and plaintiffs’ limited resources on gateway issues” and that “[l]ow wage workers would be effectively denied access to justice in employment cases”); Fred Goldsmith, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 3 (Mar. 5, 2013), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0145&attachmentNumber=1&contentType=pdf> [<https://perma.cc/J3DG-HUS4>] (claiming that the amended rules would make the courts a “place of refuge where defendants can go to avoid having to be exposed to the appropriate and reasonable discovery mechanisms that will allow the light of day to shine on their conduct”); Roger Mandel, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 3 (Feb. 18, 2014), <https://www.regulations.gov/document?D=USC-RULES-CV-2013-0002-1878> [<https://perma.cc/LX7Y-VTX6>] (fearing that the amendment would mean that “many cases with significant merit will be defeated before they ever started”); *Federal Rule Changes: What’s At Stake*, CTR. FOR JUST. & DEMOCRACY 1–2 (July 26, 2013) <http://centerjd.org/system/files/CJDFederalRulesF3.pdf> [<https://perma.cc/XW6B-S2NE>] (viewing the amendment as erecting a fatal barrier to the prosecution of claims because “evidence vital to proving the case is often in the sole possession of the wrongdoer(s)”); Marvit, *supra* note 7 (stating that the amendment “formalized and codified . . . class disparities . . .”).

41. See, e.g., Malveaux, *supra* note 7, at 517 (claiming that “concerns over the magnitude and pervasiveness of expensive discovery have proven to be overblown”); Marvit, *supra* note 7 (arguing that there “was hardly evidence of a system out of control” and claiming the Advisory Committee was “tak[ing] their cues from anecdotes and horror stories rather than the facts”).

42. See, e.g., Jennie Anderson, Am. Ass’n for Justice, Class Action Litig. Grp., Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 3–4 (Dec. 23, 2013), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0375&attachmentNumber=1&contentType=pdf> [<https://perma.cc/LP9H-U28Y>] (claiming the rule would “significantly increase the costs of discovery by sparking time-consuming and costly disputes regarding the content of the discovery sought and the burden of producing it”); Castle, *supra* note 7, at 39–40 (predicting that “the amendment[s] [would] result in proportionality objections, proportionality hearings, and increased litigations costs for parties requesting discovery”); J. Douglas Richards & Michael Eisenkraft, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Feb. 18, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-2142&attachmentNumber=2&contentType=pdf> [<https://perma.cc/L2TF-4ZGK>] (claiming that the proposed revisions to Rule 26 would likely require additional briefing, expert testimony, and fact-finding, thus “adding yet another hugely expensive and duplicative exercise to the existing repetitive and duplicative processes that are increasingly being required in nearly any substantial civil case”).

43. See, e.g., Will Atkinson, “Requester–Pays” Changes to the Federal Rules Will Devastate Plaintiffs and Trial Lawyers, NAT’L TRIAL LAW. (Apr. 25, 2014), <http://www.thenationaltriallawyers.org/2014/04/requester-pays/> [<https://perma.cc/SU7T-JDBD>] (predicting that proportional discovery would limit access to courts because plaintiffs “lack the armies of attorneys and resources of large corporate defendants”); P.J. D’Annunzio, *What Does Proportionality Mean for the ‘Little Guy’?*, LEGAL INTELLIGENCER (Feb. 13, 2016), <https://www.law.com/thelegalintelligencer/almID/1202749689173/what-does-proportionality-mean-for-the-little-guy/> [<https://perma.cc/SA8F-MP9L>] (claiming “that [under the new rule] ‘the little guy’ has less of a chance to obtain materials needed to advance a case”); Mason Kerns, *What*

its title: *Roberts Rules for Protecting Corporations*.⁴⁴ Other critics expressed concern—despite direct language to the contrary in the Committee Notes—that the adoption of the proportionality amendment would “result in a shifting of the burden [of proportionality] from responding party, who is in the possession of the very information sought, to the requesting party, who is likely unable to meet that burden.”⁴⁵

2. Defendants’ Perspective

By contrast, the defense bar praised the proportionality amendment as a panacea for reining in out-of-control discovery, lowering the cost of litigation, and encouraging greater judicial oversight. One supporter predicted that the amendment would remedy the current tendency of courts to “ignore[]” or “marginalize[]” the pre-amendment proportionality language.⁴⁶ Another supporter opined that the amendment would promote more decisions on the merits because “all too often it is the necessity of avoiding the cost of defense—of discovery—that drives defendants to settle otherwise meritorious

the New Rule 26 “Proportional Discovery” Requirement Means for Federal Court Practitioners, MASE MEBANE & BRIGGS, <http://www.maselaw.com/new-rule-26-proportional-discovery-requirement-means-federal-court-practitioners/> (last visited May 16, 2018) [<https://perma.cc/F98G-4SCE>] (arguing that “[b]ecause defendants, particularly corporate defendants, have bigger haystacks in which to find the opposing party’s needle, the new proportionality rules benefit them”).

44. Marvit, *supra* note 7.

45. Ariana Tadler, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 4 (Feb. 18, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-2173&attachmentNumber=1&contentType=pdf> [<https://perma.cc/LA7K-SHX6>]; *accord* Alexander Blewett IV, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Feb. 16, 2014), <https://www.regulations.gov/document?D=USC-RULES-CV-2013-0002-1693> [<https://perma.cc/MLV7-PWXH>] (claiming that the amendment would “shift the burden of proof to [p]laintiffs, despite the defendant controlling most of the information related to the proportionality inquiry”); J. Burton LeBlanc, Am. Ass’n for Justice, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 24 (Dec. 19, 2013), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0372&attachmentNumber=1&contentType=pdf> [<https://perma.cc/9YEQ-DY4X>] (asserting that the new rule would “fundamentally shift the burdens . . . of litigation” and require “plaintiffs [to] prove that discovery is necessary beyond the presumptive limits”); Gordon Leech, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 2 (Feb. 18, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-2170&attachmentNumber=1&contentType=pdf> [<https://perma.cc/CM9B-Z6WM>] (predicting that the amended rule would be an “additional obstacle” and require plaintiffs to “argue the relative value of the evidence before even being able to see it”).

46. Cory Andrews & Richard Samp, Wash. Legal Found., Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Oct. 7, 2013), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0285&attachmentNumber=1&contentType=pdf> [<https://perma.cc/G9BA-LLAB>].

cases.”⁴⁷ Members of the defense bar considered the proportionality amendment a “welcome[] change” because the “proportionality standard [could be used] to even the discovery-playing-field, and hopefully recapture some of the leverage the old rule’s unreasonably broad standard reserved to individual plaintiffs.”⁴⁸ Along those same lines, a comment submitted by 309 corporations—which criticized the cost of overbroad discovery under the former rule—supported the proportionality amendment and predicted that the amendment would help to “reverse the trend favoring resolution of cases based on costs, rather than on the merits.”⁴⁹ Another commenter, in praising the proportionality amendment, claimed that the prior rule incentivized “a party seeking discovery to ask for the moon and stars, safe in the knowledge that, by the time the matter reaches the Court, the moon will have already been provided and the fight will consider only how many stars must be turned over.”⁵⁰ And another opined that the proportionality amendment is part of a “sea change in how federal courts are to approach discovery issues.”⁵¹

The defense bar also expressed the view that the proportionality amendment would streamline litigation. One commenter wrote that the amendment “[would] have the salutary effect of making discovery disputes easier to resolve, and reduce costs by reducing the amount of superfluous material produced in discovery with no meaningful potential to affect the outcome of the case.”⁵² Another argued that the

47. Jim Mackie, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Feb. 18, 2014), <https://www.regulations.gov/document?D=USC-RULES-CV-2013-0002-1948> [<https://perma.cc/G263-AFF3>].

48. Karen A. Henry & Diana Palacios, *Proportionality: Finally, a Tool to Help Media Defendants Achieve Rule 1’s Promise*, 32 COMM. LAW. 24, 25 (2016) (specifically referencing Rule 26’s use by media defendants).

49. 309 Companies in Support of the Proposed Amendments to the Federal Rules, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Feb. 14, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-1269&attachmentNumber=1&contentType=pdf> [<https://perma.cc/9JBE-MVBG>].

50. Michael C. Drew, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 1 (Feb. 15, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-1903&attachmentNumber=1&contentType=pdf> [<https://perma.cc/QK76-T8WG>].

51. Martin J. Healy & Joseph D. Fanning, *Using the New Federal Rules to Rein in Discovery*, LAW360 (Apr. 28, 2016, 2:55 PM), <https://www.law360.com/articles/789862/using-the-new-federal-rules-to-rein-in-discovery> [<https://perma.cc/92JB-U45C>].

52. Richard Pianka, Am. Trucking Ass’n, Inc., Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 2 (Feb. 14, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-1466&attachmentNumber=1&contentType=pdf> [<https://perma.cc/ZY6X-F6DU>].

amendment was “needed to check unnecessary and inefficient costs and burdens to the parties and the system.”⁵³

Members of the defense bar also predicted that the emphasis on proportionality would encourage parties to “openly discuss and weigh proportionality considerations before any discovery is even commenced.”⁵⁴ Proponents wrote that “for the first time, there is a road map regarding how to best negotiate the scope of discovery, largely because of the focus on proportionality.”⁵⁵ Defense attorneys also asserted that the amendments would “shift[] [proportionality requirements] from the reactive to the prospective”⁵⁶ because parties would be forced to consider proportionality from the outset of a case. In the view of the defense bar, the amendments offered a “powerful new weapon” for attacking disproportionate discovery and “onerous fishing expeditions,”⁵⁷ and would ensure that discovery would be “tightly controlled by the court.”⁵⁸

B. Reactions in the Class Action Context

This subsection first discusses comments and articles that focus on the impact of the proportionality amendment in class actions. It then discusses commentary on the amendment (not focused specifically on class action) written by renowned class action lawyers and scholars.

53. Edward T. Collins, Allstate Ins. Co., Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 4 (Feb. 14, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-1446&attachmentNumber=1&contentType=pdf> [<https://perma.cc/9AN9-TXNS>]; *accord*, e.g., Kurt W. Hansson, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 1 (Feb. 18, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-2164&attachmentNumber=1&contentType=pdf> [<https://perma.cc/HW6D-7WH3>] (asserting that the new rules would modify the current system, which was “dictated, not by the quest for truth and justice, but by the massive costs and delays associated with e-discovery”); Brian K. Cifuentes, *Proportionality: The Continuing Effort to Limit the Scope of Discovery*, CORP. COUNS. BUS. J. 44 (Apr. 2015), <http://ccbjournal.com/pdf/2015/April/43.pdf> [<https://perma.cc/N6WG-DB3V>] (claiming that the amendments “can only be seen as a good thing” given the rising costs of discovery).

54. Cifuentes, *supra* note 53, at 44.

55. Scott Y. Stuart, *The Power and Pitfalls of Amended FRCP 26*, 35-9 AM. BANKR. INST. J. 34, 39 (2016).

56. Michael Thomas Murphy, *Occam’s Phaser: Making Proportional Discovery (Finally) Work in Litigation By Requiring Phased Discovery*, 4 STAN. J. COMPLEX LITIG., 89, 98–99 (2016); *see also Adjunct Faculty*, DREXEL U. THOMAS R. KLINE SCH. L., <https://drexel.edu/law/faculty/adjunct/> (last visited Oct. 14, 2018) [<https://perma.cc/JSU9-6ABT>] (identifying Murphy as a general counsel who previously served as a complex litigation attorney with a major defense firm).

57. David D. Leishman, *Attacking Disproportionate Discovery with New Rule 26(b)*, LAW360 (Nov. 4, 2015, 10:56 AM), <https://www.law360.com/articles/722174> [<https://perma.cc/YLA9-9GH2>] (discussing discovery costs prior to class certification).

58. Richard T. Moore, *Amended Rule 26 Limits Precertification Discovery*, LAW360 (Dec. 15, 2015, 10:34 AM), <https://www.law360.com/articles/736148/amended-rule-26-limits-precertification-discovery> [<https://perma.cc/SY6W-HDDH>].

1. Impact on Class Actions

In the context of class action suits, critics on the plaintiffs' side expressed concern that the proportionality amendment would deter plaintiffs with limited resources from pursuing classwide claims against wealthy defendants. One comment noted that, in class actions, the Rules would disproportionately “pile all of the burdens on the plaintiff, leaving the defendant shouldering none.”⁵⁹ That expected shift would “disparately impact plaintiffs, strip judges of the flexibility and discretion to manage discovery as they find appropriate for the circumstances of each case, and raise procedural hurdles to justice.”⁶⁰ As a result, the amendments would place an “unbearable burden for plaintiffs at the outset of a case, and deny plaintiffs access to the discovery tools they need to carry their burden of proof at class certification and trial.”⁶¹

The defense bar similarly opined that the amendment's impact in class actions would be substantial. One defense lawyer noted that the amendments were “an important new tool in seeking to limit the scope of the discovery [that defendants] are burdened with in class actions.”⁶² Still another noted that in class actions, the new rules will “provide[] an additional tool to ‘control’ the scope of precertification discovery.”⁶³ That attorney wrote that, “[a]ppplied properly, this proportionality standard should prevent excessive precertification discovery and facilitate informed decisions on class certification.”⁶⁴ Yet another defense lawyer claimed that proportionality considerations “offer employers another arrow in their quiver to help manage class action defense costs.”⁶⁵

2. Comments by Leading Class Action Practitioners and Scholars

In addition to the comments above, which directly addressed class actions, a number of class action attorneys (and professors with class action expertise) submitted comments that addressed the

59. Anderson, *supra* note 42, at 4 (discussing proposed changes to Rule 26(b)).

60. *Id.* at 1 (discussing proposed changes to Rules 26, 30, 33, and 36).

61. *Id.* at 3 (same).

62. Wystan Ackerman, *2015 Amendments to Federal Rules – Impact on Class Actions*, CLASS ACTIONS INSIDER (Nov. 20, 2015), <https://www.classactionsinsider.com/2015/11/2015-amendments-to-federal-rules-impact-on-class-actions/> [<https://perma.cc/D8VZ-KYE6>].

63. Moore, *supra* note 58.

64. *Id.*

65. Timothy J. Domanick, *Upcoming Amendments to the FRCP and Implications on Class Action Defense Costs*, JACKSON LEWIS: EMPLOYMENT CLASS AND COLLECTIVE ACTION UPDATE (Sept. 16, 2015), <https://www.employmentclassactionupdate.com/2015/09/upcoming-amendments-to-the-frcp-and-implications-on-class-action-defense-costs/> [<https://perma.cc/KY82-FXV7>].

proportionality amendment generally—without focusing specifically on class actions.

a. Plaintiffs' Perspective

Plaintiffs' attorneys with class action expertise—and various academics specializing in class actions—opined that the proportionality amendment would substantially impact discovery practices to the detriment of plaintiffs. One prominent plaintiffs' lawyer predicted that the proportionality amendment and other changes would “lead to more time consuming and costly discovery disputes and collateral litigation—at least in complex cases, for which discovery costs are highest.”⁶⁶ A leading public interest class action lawyer called the amendment a “wholesale re-write” that would be used “to promote discovery evasion, and will result in a new wave of motions practice.”⁶⁷ Other well-known plaintiffs' class action lawyers offered similar concerns.⁶⁸

Additionally, plaintiffs' class action attorneys expressed fear that the judge's discretion to extend the scope of discovery would be replaced “with a mandatory duty to foreclose it if all of the

66. Joseph M. Sellers, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 2 (Nov. 8, 2013), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0325&attachmentNumber=1&contentType=pdf> [<https://perma.cc/GK88-4V6D>].

67. F. Paul Bland, Jr., Pub. Justice Found. & Pub. Justice, P.C., Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 8 (Mar. 1, 2013), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0164&attachmentNumber=1&contentType=pdf> [<https://perma.cc/T7MW-RDTK>]; *see also* Henry J. Kelston, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 2, 4 (Feb. 16, 2013), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-1708&attachmentNumber=1&contentType=pdf> [<https://perma.cc/78XF-JXD9>] (stating that the discovery amendments were “widely viewed as sacrificing just results on the altar of speedy and inexpensive results for corporate defendants” and that “any benefits the proposals confer on large corporate litigants will come at the direct expense of the plaintiffs”).

68. *See, e.g.*, Stephen J. Herman, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 2 (Sept. 30, 2013), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0286&attachmentNumber=1&contentType=pdf> [<https://perma.cc/V7FL-MKSZ>] (asserting that the amendment would lead to satellite “preliminary discovery regarding defendant's claims of burden or expense, adding yet another layer of time, expense, and delay”); Thomas M. Sobol et al., Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 3 (Mar. 1, 2013), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0205&attachmentNumber=1&contentType=pdf> [<https://perma.cc/HU7Z-EPJL>] (predicting that the amendment would “harm plaintiffs—the victims of wrongdoing—who [would be] prevented from exploring and presenting their cases in full,” thus leading to the disposition of cases with “less and less information regarding facts and merits”); David Sugerman, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure (Feb. 14, 2014), <https://www.regulations.gov/document?D=USC-RULES-CV-2013-0002-1250> [<https://perma.cc/U6ED-NGGM>] (predicting that the amendment would “further erode the right to trial by jury”).

proportionality requirements of 26(b) are not met.”⁶⁹ And a class action civil rights attorney feared that the amendment would harm cases seeking systemic reform, which “often challenge a well-accepted status quo and, at first blush, may appear to lack merit.”⁷⁰

Many members of the academy similarly expressed deep concern about the impact on plaintiffs in a host of civil cases. For instance, New York University Law Professor and class action expert Arthur Miller testified that “[i]f promulgated [the proportionality amendment and other] changes may well deter the institution of potentially meritorious claims for the violation of statutes enacted by Congress or state legislatures or established by the courts.”⁷¹

b. Defendants’ Perspective

The class action defense bar similarly viewed the proportionality amendment as likely to have a major impact. For example, class action defense attorney John Beisner, chair of the class action practice at Skadden Arps, opined that the amendment would replace the “anything goes” approach that “drives up the costs of litigation for defendants.”⁷² According to Beisner, the amendment would “help winnow overboard discovery requests and curtail abuse, resulting in less expensive discovery production and affording courts more time to focus on the substance of parties’ claims and defenses.”⁷³ Charles Abbott and Rick

69. Sobol, *supra* note 68, at 2.

70. Jocelyn D. Larkin, Impact Fund, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 4 (Feb. 14, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-1413&attachmentNumber=1&contentType=pdf> [<https://perma.cc/5GBL-9K7W>].

71. Arthur Miller, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 11 (Jan. 9, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0386&attachmentNumber=1&contentType=pdf> [<https://perma.cc/B8A8-UY53>]; see also Suzette M. Malveaux, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 3 (Feb. 14, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-1650&attachmentNumber=1&contentType=pdf> [<https://perma.cc/5HG2-WB7Z>] (testifying that “plaintiffs bringing civil rights and workplace discrimination claims will be more likely to be denied relief because of their inability to obtain crucial information”); Alan B. Morrison, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 2 (Dec. 31, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0383&attachmentNumber=1&contentType=pdf> [<https://perma.cc/3NWX-V9M4>]**Error! Hyperlink reference not valid.** (asserting that “[a]ll of the changes move in one direction — less discovery” and “cumulatively they will have a very negative impact on many plaintiffs”).

72. John H. Beisner, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 3 (Jan. 2, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-0382&attachmentNumber=1&contentType=pdf> [<https://perma.cc/SLV5-Z9RN>] (quoting John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 583 (2010)).

73. *Id.* at 3.

Richmond, who defend class actions at Jenner & Block, claimed that the proposed proportionality amendment would “help restore balance, reasonableness, and fairness to the civil-discovery process.”⁷⁴ They noted that the amendment would result in “a reduction in the time and resources spent gathering, reviewing, and producing only tangentially relevant documents.”⁷⁵

The Washington Legal Foundation, a public interest organization that frequently files amicus briefs on behalf of defendants in class actions, noted that the discovery amendments were necessary because the “injustice[s]” under then-current discovery rules were “chiefly visited on litigants with a high net worth,” and that courts have “routinely allowed” discovery that is “overly broad . . . [in] scope.”⁷⁶ Likewise, a submission by several Arnold & Porter lawyers, including class action specialist Daniel Pariser, noted that the proportionality amendment was necessary “to restor[e] a balanced approach to discovery.”⁷⁷

C. Congressional Hearing on Proposed Rule Changes

Because of concerns within the plaintiffs’ bar that the proposed discovery changes would deprive plaintiffs of discovery necessary to prove their claims, the Senate Judiciary Committee’s Subcommittee on Bankruptcy and the Courts held a hearing on the subject. The title of the hearing makes clear this concern: “Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?”⁷⁸ It is, of course, highly unusual for proposed rule changes to generate congressional hearings. Most of the work of the various rules committees occurs with little or no congressional interest.⁷⁹

74. Rick Richmond & Charles H. Abbott, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 1 (Feb. 14, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-2100&attachmentNumber=1&contentType=pdf> [<https://perma.cc/R7P8-WJSS>].

75. *Id.* at 3.

76. Andrews & Samp, *supra* note 46, at 5–6.

77. Arnold & Porter LLP, Comment Letter on Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 2 (Feb. 14, 2014), <https://www.regulations.gov/contentStreamer?documentId=USC-RULES-CV-2013-0002-1615&attachmentNumber=1&contentType=pdf> [<https://perma.cc/MV2K-HX7T>].

78. *Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?: Hearing Before the Subcomm. on Bankr. & the Courts of the S. Comm. on the Judiciary*, 113th Cong. 1 (2014), <https://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg89395.pdf> [<https://perma.cc/6PJ5-DE4X>] [hereinafter *Hearing*].

79. It is not entirely clear why the Committee chose to get involved in scrutinizing a proposed rule change.

In his opening statement, Rhode Island Senator Sheldon Whitehouse echoed many of the comments by the plaintiffs' bar and the academy. He noted that "[i]n cases involving employment discrimination, product liability, and consumer rights, the proposed changes could prevent plaintiffs from ultimately obtaining the information that they need to advance their cases to the trial phase and win."⁸⁰ In Whitehouse's view, the proposed rule changes "could burden individual plaintiffs while benefiting large corporations."⁸¹ Vermont Senator Patrick Leahy, in a prepared statement, characterized the proposed amendments as "some of the most significant changes to the rules of civil discovery in decades."⁸² He expressed concern that "[w]ithout strong discovery obligations deserving litigants [would] be left in the dark."⁸³

Witnesses were divided in their sympathies, some favoring plaintiffs' interests and others favoring those of defendants. Supporters of plaintiffs argued that the proportionality amendment and other changes to the discovery rules would severely impede the ability of plaintiffs to prove their cases. For example, NAACP Legal Defense and Educational Fund President and Director-Counsel Sherrilyn Ifill testified that "for civil rights claimants, this is not modest. It is a potential death knell for a whole variety of claims."⁸⁴ Similarly, Professor Arthur Miller noted in a prepared statement that the proposed amendments were "the latest impediment to citizen access to meaningful civil justice in our federal courts."⁸⁵ He argued that the rulemaking process should not be used "to obstruct citizen access to our justice system or to impair the enforcement of important public policies by constructing a procedural wall of stop signs around our court houses."⁸⁶ Likewise, the Alliance for Justice asserted in a written statement that the proportionality standard "will upset decades of precedent and invite disputes and uncertainty regarding the meaning

80. *Id.* at 6 (statement of Sen. Sheldon Whitehouse).

81. *Id.*

82. *Id.* at 38 (statement of Sen. Patrick J. Leahy, Chairman, Subcomm. on Bankr. & the Courts, S. Comm. on the Judiciary).

83. *Id.*

84. *Id.* at 22 (statement of Sherrilyn Ifill, President and Director-Counsel, NAACP Legal Def. & Educ. Fund, Inc.). In her prepared testimony, she noted that "these proposed changes . . . will, if adopted, undermine the ability of many Americans, and especially plaintiffs in civil rights cases, to obtain relief through the federal courts." *Id.* at 69. She also explained that the proportionality language "would wholly impede the ability of plaintiffs in civil rights actions to obtain necessary and vital discovery." *Id.* at 72. In her view, the proposals "will not equally burden plaintiffs and defendants in civil rights cases . . . [rather,] it is plaintiffs who will be stymied from obtaining discovery." *Id.* at 73.

85. *Id.* at 42 (statement of Arthur R. Miller, Univ. Professor at N.Y. Univ. Sch. of Law).

86. *Id.* at 48.

of the new language.”⁸⁷ And, Professor Paul Carrington asserted in his written submission that the proposed changes would “weaken the private enforcement of laws governing the conduct of employers, franchisors and big marketing firms.”⁸⁸

Interestingly, the principal defense witness, Mayer Brown partner Andrew Pincus, did not take the position that the proportionality amendment would be a home run for defendants. Instead, he emphasized that “[t]he principal proposed amendment relating to the scope of permissible discovery simply moves a standard already in the rule, requiring that discovery be proportional to the needs of the case in order to give that standard added emphasis.”⁸⁹

D. Reactions to the Chief Justice’s Commentary

As noted,⁹⁰ the Chief Justice viewed the discovery amendments as a “big deal.”⁹¹ He proclaimed that the new rules “mark a significant change,” and he asserted that the amendments were “a major stride toward a better federal court system.”⁹² As previously indicated, however, his focus was on the impact of the amendments in deterring abusive conduct, not on cutting back legitimate discovery requests or preventing plaintiffs from proving their cases.

Nonetheless, many scholars criticized the Chief Justice’s remarks. One article stated that “Chief Justice Roberts added his voice to the effort to ensure that [the amendments] would not be ignored, and to influence their interpretation.”⁹³ Another article claimed that Chief Justice Roberts “is giving the lower courts their marching orders. So now those rewordings and relocations likely will have a big effect. Roberts thereby amends the amendments.”⁹⁴

87. *Id.* at 91 (statement of Alliance for Justice).

88. *Id.* at 94 (statement of Paul D. Carrington).

89. *Id.* at 10 (statement of Andrew Pincus, Partner, Mayer Brown LLP). In his prepared testimony, Mr. Pincus called the proposal “modest” and asked: “Does anyone seriously believe that significant discovery burdens should be imposed on a party even when that discovery is disproportional to the needs of the case . . . ?” *Id.* at 58–59. In his view, “[t]he only basis for such a conclusion would be the view that every plaintiff in every case is entitled to the full range of permissible discovery – even if the demand cannot be justified on any rational basis.” *Id.* at 59.

90. *See supra* notes 11–12 and accompanying text.

91. ROBERTS, *supra* note 6, at 5.

92. *Id.* at 5, 9.

93. Stephen B. Burbank & Sean Farhang, *Rulemaking and the Counterrevolution Against Federal Litigation: Discovery*, POUND CIV. JUST. INST. 4 (2016), <http://www.poundinstitute.org/sites/default/files/docs/2016%20Forum/burbank-farhang-paper-6-30-16.pdf> [<https://perma.cc/665W-KY88>].

94. Michael Dorf, *Chief Justice Roberts Takes a Fourth Bite at the Apple*, DORF ON LAW (Jan. 4, 2016), <http://www.dorfonlaw.org/2016/01/chief-justice-roberts-takes-fourth-bite.html> [<https://perma.cc/ML5Q-QY23>].

Several critics seized upon the Chief Justice's comments to argue that the Advisory Committee was being dishonest in portraying the amendments as incremental. According to those critics, "[T]he statement [by the Advisory Committee] that the amendments will simply 'restore' proportionality to its former place is disingenuous."⁹⁵ Several other critics raised similar concerns.⁹⁶

III. ANALYSIS OF CASE LAW UNDER THE NEW RULES

As the discussion in Part II revealed, the plaintiffs' bar, the defense bar, and the academic community all believe that the new proportionality rule will severely restrict plaintiffs' efforts to obtain discovery—only disagreeing about whether that impact is good or bad. Both sides believe that the proportionality amendment will impact a huge percentage of cases, not just the cases in which the parties are engaging in abusive conduct.⁹⁷

This Part explores whether, in the context of class action discovery rulings from December 1, 2015 to April 30, 2018, those concerns are reflected in the case law. In particular, this Part analyzes class action cases under the amended proportionality rule and, where appropriate, makes comparisons to pre-amendment case law. As the discussion shows, the amended rule has not fundamentally changed the governing principles. Courts have continued to engage in a nuanced, fact-specific approach to analyzing discovery requests, frequently resort to meet and confer and sampling to resolve disputes, and are especially liberal in allowing discovery on class certification issues. Finally, many

95. Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1116 (2015).

96. As one author stated, "[T]he strongest response to Chief Justice Roberts is to stress the disconnect between the position articulated in the Year-End Report and the text, structure, and declared purpose of the 2015 amendments themselves." Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 52 (2016). Another writer stated that "[u]pon examination, [the] Advisory Committee[s] representations to the contrary [of the Chief Justice's Report] constitute knowing efforts to deny radical intents." Richard Briles Moriarty, *And Now for Something Completely Different: Are the Federal Civil Rules Moving Forward into a New Age or Shifting Backward into a "Dark" Age?*, 39 AM. J. TRIAL ADVOC. 227, 229 (2015). That author argued that "the Advisory Committee should have been forthright about the intent and effect of the 2015 Rule changes." *Id.* at 230.

97. See, e.g., Collins, *supra* note 53 (claiming that the emphasis on proportionality will help to "curb unnecessary and wasteful discovery"); Domanick, *supra* note 65 (noting that proportionality will assist in "convinc[ing] adversaries and courts that the cost of certain discovery should not be incurred based on the estimated value of the case"); Pianka, *supra* note 52 (stating that the proportionality amendment will help tie discovery "more closely to the claims and defenses relied upon by the parties, in contrast to the broad, amorphous subject-matter relevancy standard embodied in the current Rule").

of the decisions denying discovery can be explained by attorney error or ineffectiveness rather than by changes to the discovery rules.

A. Courts Have Made Clear That the Proportionality Amendment Does Not Materially Change the Governing Principles

Significantly, despite the above-noted concern of the plaintiffs' bar (and the exuberance of the defense bar), many federal district courts applying the proportionality amendment in the trenches do not view the amendment as being transformational, at least not in the class action context. First, numerous courts emphasize that the basic overarching principles existed prior to the amendment. Second, a number of courts continue to rely heavily on pre-amendment case law in resolving discovery disputes. Third, contrary to the fears of many plaintiffs' attorneys and academics, the amendment has not shifted the burden of proof to the party seeking discovery to prove proportionality.

1. Courts Have Noted That the Basic Principles Existed Pre-Amendment

A number of courts have indicated that the proportionality amendment involves primarily a reemphasis, not a wholesale change, in how discovery disputes should be resolved. For instance, in *Landry v. Swire Oilfield Services, LLC*, the district court noted that the proportionality requirement was a "relocation—rather than [a] substantive change."⁹⁸ The court was thus "skeptical that the 2015 amendments will make a considerable difference in limiting discovery or cutting costs."⁹⁹ According to the court, "*Courts have been bringing common sense and proportionality to their discovery decisions long before the 2015 amendments.*"¹⁰⁰

98. 323 F.R.D. 360, 380 n.16 (D.N.M. 2018).

99. *Id.*

100. *Id.* (emphasis added). In making this determination, the court quoted the Chief Justice's Year-End Report that described the addition of proportionality as "crystaliz[ing] the concept of reasonable limits on discovery through increased reliance on the common sense concept of proportionality." *Id.* at 380 (quoting ROBERTS, *supra* note 6, at 6). For other cases that cited the Chief Justice's report in the application of the proportionality, see *Medina v. Enhanced Recovery Co.*, No. 15-14342-CIV-MARTINEZ/MAYNARD, 2017 WL 5196093, at *2 (S.D. Fla. Nov. 9, 2017), which states that Rule 26 relies on the "common-sense concept of proportionality"; and *Guttormson v. ManorCare of Minot ND, LLC*, No. 4:14-cv-36, 2016 WL 3853737, at *6-7 (D.N.D. Jan. 6, 2016), which encourages counsel to "carefully consider the Chief Justice's viewpoint" to determine a cost-effective plan for discovery.

Similarly, in *Ossola v. American Express Co.*, the court noted that “[p]rior to the 2014 Amendments . . . the requirement of proportionality was implicit. Now it is express.”¹⁰¹ Likewise, in *In re Symbol Technologies Inc. Securities Litigation*, the court noted that “Rule 26(b)(1), as amended, although not fundamentally different in scope from the previous version ‘constitute[s] a reemphasis on the importance of proportionality in discovery *but not a substantive change in the law.*’”¹⁰² That court indicated that “[i]n general, ‘[a] district court has broad latitude to determine the scope of discovery and to manage the discovery process.’”¹⁰³ Likewise, in *Milliner v. Mutual Securities, Inc.*, the court stated that “the amendment does not change the existing responsibilities of the court and the parties to consider proportionality”¹⁰⁴ And in *Fosbre v. Las Vegas Sands Corp.*, the court noted that the amendment merely “reinforce[s] the obligation of the parties to consider [the proportionality] factors in making discovery requests, responses or objections.”¹⁰⁵

Where courts *have* noted the significance of the discovery amendments, they have generally focused on the need to deter egregious discovery abuse, not the need to change discovery practices in the typical case. For instance, in *Cole’s Wexford Hotel, Inc. v. Highmark Inc.*, the court explained that the amendments were aimed at “concerns about the abuse of discovery, which stem back to the 1980 amendment to Rule 26.”¹⁰⁶ And in *In re Namenda Direct Purchaser Antitrust Litigation*, the court quoted the Committee Notes for the proposition that the purpose of the rule changes is to “encourage judges to be more aggressive in identifying and discouraging discovery overuse.”¹⁰⁷ Likewise, in *Fisher v. MJ Christensen Jewelers LLC*, the court quoted the Committee Notes to emphasize that the amendments “reflect[] the need for continuing and close judicial involvement in the

101. 149 F. Supp. 3d 934, 936 n.3 (N.D. Ill. 2015).

102. No. CV 05-3923 (DRH)(AKT), 2017 WL 1233842, at *7 (E.D.N.Y. Mar. 31, 2017) (emphasis added).

103. *Id.* (citation omitted).

104. No. 15-cv-03354-TEH, 2017 U.S. Dist. LEXIS 43614, at *7 (N.D. Cal. Mar. 24, 2017); *see also* *Ireland v. Anderson*, No. 3:13-cv-3, 2015 WL 12843761, at *2 n.1 (D.N.D. Dec. 15, 2015) (stating that even if the court did not apply the amended rule, the proportionality factors would still be evaluated pursuant to former Rule 26(b)(2)(C)(iii)).

105. No. 2:10-cv-01210-APG-GWF, 2016 WL 54202, at *4 n.2 (D. Nev. Jan. 5, 2016) (emphasis added). The court conducted its hearing prior to the effective date of the new discovery rules, even though it issued its opinion on January 5, 2016. *Id.* at *1, *4 n.2. Although it applied the pre-amendment rules, it made clear that the outcome would not have changed under the new rules. *Id.* at *4, n.2.

106. 209 F. Supp. 3d 810, 823 (W.D. Pa. 2016); *see also* *Fisher v. MJ Christensen Jewelers LLC*, No. 2:15-cv-358-RFB-NJK, 2016 WL 8735670, at *3 (D. Nev. Sept. 2, 2016).

107. No. 15 Civ. 7488 (CM)(JCF), 2017 WL 2693713, at *3 (S.D.N.Y. June 21, 2017).

cases that do not yield readily to the ideal of effective party management.”¹⁰⁸

2. Courts Have Continued to Rely on Pre-Amendment Cases

The plaintiffs’ bar, the defense bar, and the academy all argue that the new proportionality language represents a paradigm shift for evaluating discovery disputes and that earlier case law is now essentially irrelevant. In fact, courts have continued to rely heavily on pre-amendment case law.

For instance, in *Nicholes v. Combined Insurance Co. of America*, the court cited *2010 and 2012 cases* for the proposition that the Rule “cautions that all permissible discovery must be measured against the yardstick of proportionality.”¹⁰⁹ Similarly, in *Lieber v. Wells Fargo Bank, N.A.*, the court cited pre-amendment case law holding that the scope of discovery “is traditionally quite broad”¹¹⁰ and ordered the defendant to respond to four interrogatories seeking a wide range of information. And in *Infinity Home Collection v. Coleman*, the court refused to quash numerous subpoenas served on a third party prior to class certification, citing a Tenth Circuit case from 1995 for the proposition that the “scope of discovery under the federal rules is broad.”¹¹¹ Even though the subpoenas were served prior to class certification, the court permitted requests for both class certification and merits discovery, holding that “pre-certification discovery is not limited to class-certification issues unless the discovery would pose an undue burden on the responding party.”¹¹²

In *Miner v. Government Payment Service, Inc.*, a putative class alleged that fees charged by a credit-card processor (which was retained by the Cook County government for bail and bonds services) violated Illinois statutory and contract law.¹¹³ The plaintiff sought to represent a statewide class because the defendant allegedly had separate, similar contracts with various counties in addition to Cook County. The court, under Judge Dow, a current member of the Advisory Committee, refused to allow broad statewide discovery. Instead, the court ordered

108. *Fisher*, 2016 WL 8735670, at *3.

109. 5:16-CV-10203, 2018 WL 1098246, at *2 (S.D. W. Va. Feb. 28, 2018) (citing *Lynn v. Monarch Recovery Mgmt., Inc.*, 285 F.R.D. 350, 355 (D. Md. 2012) (quoting *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010))).

110. No.1:16 CV 2868, 2017 WL 3923128, at *2 (N.D. Ohio Sept. 7, 2017) (quoting *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998)).

111. No. 17-mc-00200-MSK-MEH, 2018 WL 1733262, at *1–2 (D. Colo. Apr. 10, 2018) (quoting *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995)).

112. *Id.* at *2.

113. No. 14-cv-7474, 2017 WL 3909508, at *1–2 (N.D. Ill. Sept. 5, 2017).

the defendant to produce contracts (during the time frame at issue) that the defendant had with any Illinois county but ruled that other discovery involving counties other than Cook County would be denied.¹¹⁴ The court indicated that, after reviewing those contracts, plaintiff's counsel could submit additional discovery requests.¹¹⁵ In reaching its decision, the court noted that "the proportionality standard . . . supports the notion that pre-certification discovery should not exceed what is necessary . . . to make an informed decision on class certification."¹¹⁶ Importantly, while referencing proportionality, the court quoted *pre-amendment case law* stating that "[d]iscovery must be sufficiently broad . . . to meet the requirements of class certification, but at the same time, a defendant should be protected from overly burdensome or irrelevant discovery."¹¹⁷

As another example, in *Ortolani v. Freedom Mortgage Corp.*, the court refused to grant the plaintiff's request for an additional thirty to forty depositions of class members to establish commonality and typicality, reasoning that the plaintiff had failed to show that a less onerous approach (that is, questionnaires) would be insufficient.¹¹⁸ The court cited pre-amendment case law from 1975 holding that "[w]here the necessary factual issues may be obtained without discovery, it is not required."¹¹⁹ Numerous other examples of courts relying on pre-amendment case law can be cited.¹²⁰

114. *Id.* at *4–5.

115. *Id.* at *5.

116. *Id.* at *4.

117. *Id.* (alteration in original) (quoting *Loy v. Motorola, Inc.*, No. 03-C-50519, 2004 WL 2967069, at *3 (N.D. Ill. Nov. 23, 2004)).

118. No. EDCV 17-1462-JGB (KKx), 2018 WL 1662510, at *5 (C.D. Cal. Apr. 4, 2018).

119. *Id.* at *2 (quoting *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975)). Although the court also referenced the proportionality amendment in discussing the general law, *see id.* at *1, the outcome would likely have been the same under pre-amendment case law. *See, e.g., In re Weatherford Int'l Secs. Litig.*, No. 11 Civ. 1646(LAK)(JCF), 2013 WL 5762923, at *3–4 (S.D.N.Y. Oct. 24, 2013) (denying plaintiffs' request for thirty depositions and instead granting sixteen depositions that defendants conceded were relevant); *Lampkin ex rel. D.L. v. Youth Servs. Int'l, Inc.*, No. 10-61902-Civ-MOORE/TORRES, 2011 WL 13214123, at *2 (S.D. Fla. Apr. 26, 2011) (denying plaintiffs' request for up to fifteen additional depositions prior to certification because "the burden involved in such an effort far outweighs the benefits" and the scope of deposition discovery should only be expanded in "extraordinary cases").

120. *See, e.g., In re Intuit Data Litig.*, No. 15-cv-01778-EJD (SVK), 2017 WL 3616592, at *2 (N.D. Cal. Aug. 23, 2017) (granting plaintiffs' request for documents regarding the claims of a subclass and citing pre-amendment case law holding that the denial of discovery "necessary to determine the existence of a class or set of subclasses would be an abuse of discretion"); *Solo v. UPS Co.*, No. 14-12719, 2017 WL 85832, at *3 (E.D. Mich. Jan. 10, 2017) (quoting *Quintana v. Claire's Boutiques, Inc.*, No. 5:13-cv-00368-PSG, 2014 WL 234219, at *2 (N.D. Cal. 2014) (holding that "[i]n the specific context of class action discovery, sampling advances the goal of proportionality")); *Halvorsen v. Credit Adjustments Inc.*, No. 15-cv-6228, 2016 WL 1446219, at *2 (N.D. Ill. Apr. 11, 2016) (quoting *Bayer v. Gildea*, 2008 WL 4911267, at *5 (N.D. Ind. Nov. 13, 2008) (holding that "[t]he mere fact that [a party] will be required to expend a considerable amount of

3. Courts Have Not Placed the Burden on the Proponent of Discovery to Prove Proportionality

As noted,¹²¹ numerous commenters from the plaintiffs' bar expressed the fear that, under the new proportionality test, the burden would shift to *plaintiffs* to justify proportionality. In fact, however, courts have made clear that the burden is *on the party asserting lack of proportionality* to demonstrate that discovery should not be ordered.

For example, in *Medina v. Enhanced Recovery Co.*, a Telephone Consumer Protection Act ("TCPA") case, the court noted that the "onus is on the *objecting party* to demonstrate with specificity how the objected-to request is unreasonable or otherwise unduly burdensome."¹²² Likewise, in *Nelson v. American Family Mutual Insurance Co.*, the plaintiffs alleged American Family Mutual Insurance used inflated home appraisals conducted by a survey company to overcharge customers on insurance premiums.¹²³ Plaintiffs requested data stored in the survey company's mainframe database that documented discussions and decisions related to home valuations and all email correspondence between the defendant and the company. Defendant conceded that the discovery sought was relevant but objected to the requests as unduly burdensome and disproportional to the needs of the case. In ruling on the dispute, the court noted that "a party which withholds discoverable electronic information *bears the burden* of showing its basis for doing so."¹²⁴

Similarly, in *Meredith v. United Collection Bureau, Inc.*, the plaintiffs in a TCPA suit moved to compel the production of data showing "wrong number" call recipients from the defendant's automated calling system.¹²⁵ The defendant objected to the request on the ground that extraction of the relevant data would require writing a new software program, which would take many days to complete. In ordering the production of the data, the court held that although the defendant had "shown there w[ould] be some burden to it in responding

time, effort, or expense in answering . . . [discovery requests] is not a sufficient reason to preclude discovery" (first, second, and fourth alterations in original) (internal quotation marks omitted)); *Prime Healthcare Centinela, LLC*, No. CV 14-8390-DMG (PLAx), 2016 WL 7045608, at *2 (C.D. Cal. Mar. 23, 2016) (citing and quoting pre-amendment case law for the proposition that "Rule 26(b) is to be liberally interpreted to permit wide-ranging discovery of information," that discovery should not be "a fishing expedition," and that discovery should be denied if the request is "unduly burdensome or oppressive" or if the information sought is "tangential if not irrelevant").

121. See *supra* notes 41–44 and accompanying text.

122. No. 15-14342-CIV-MARTINEZ/MAYNARD, 2017 WL 5196093, at *2 (S.D. Fla. Nov. 9, 2017).

123. No. 13-cv-607 (SRN/SER), 2016 WL 3919973, at *1 (D. Minn. July 18, 2016).

124. *Id.* at *6.

125. 319 F.R.D. 240, 241–42 (N.D. Ohio 2017).

to Plaintiff's request, the burden d[id] not outweigh the likely benefit of production."¹²⁶

B. Courts Conduct Nuanced, Fact-Specific Analyses

Both the plaintiffs' and defense bars believed that the proportionality amendment would lead to a fundamental shift in how courts approach discovery disputes. Indeed, the plaintiffs' bar feared that the amendment would result in a dramatic shift in favor of wealthy corporate defendants.¹²⁷ However, in the class action cases that I have reviewed, courts have continued the pre-amendment practice of conducting nuanced, fact-specific analyses of the discovery requests to determine whether the information sought is reasonably sought to prove the claims or defenses. In so doing, courts pay close attention to the time frames, theories, and other allegations of the complaint. Moreover, even when courts identify proportionality concerns, they often provide the requesting party with substantial discovery. And interestingly, the courts' nuanced, fact-intensive approach sometimes favors plaintiffs when they are attempting to resist unduly burdensome discovery by defendants.

1. Careful Judicial Analysis of the Requests in Light of the Precise Allegations of the Complaint

Numerous post-amendment class action discovery cases illustrate the detailed and nuanced analysis noted above. For instance, in *Mbazomo v. ETourandTravel, Inc.*, a TCPA case, the court analyzed ten separate discovery disputes (with one issue being mooted by the

126. *Id.* at 244; *accord, e.g.*, *Murillo v. Kohl's Corp.*, No. 16-CV-196-JPS, 2016 WL 4705550, at *2 (E.D. Wis. Sept. 8, 2016) (holding that the objecting party bears the burden of showing why the discovery is improper); *Hopkins v. Green Dot Corp.*, No. SA-16-CA-00365-DAE, 2016 WL 8673861, at *2, *10 (W.D. Tex. Aug. 16, 2016) (holding that a party seeking to resist discovery bears the burden of making specific objections and showing the discovery fails the discovery factors from Rule 26(b)(1)); *Stoba v. Saveology.com, LLC*, No. 13cv2925 BAS (NLS), 2016 WL 3356796, at *2 (S.D. Cal. June 3, 2016) (holding that the party opposing discovery bears the burden of clarifying, explaining, or supporting reasoning for prohibiting discovery); *see also Frieri v. Sysco Corp.*, No. 3:16-cv-01432-JLS-NLS, 2017 WL 3387713, at *1 (S.D. Cal. Aug. 4, 2017) (citing pre-amendment case law that held the "party who resists discovery . . . has the burden of clarifying, explaining, and supporting its objections"); *Halvorsen v. Credit Adjustments Inc.*, No. 15-cv-6228, 2016 WL 1446219, at *2 (N.D. Ill. Apr. 11, 2016) (relying on pre-amendment cases for proposition that the defendant has burden of proof in arguing that the plaintiff's discovery would be burdensome); *Labrier v. State Farm Fire & Casualty Co.*, 314 F.R.D. 637, 641 (W.D. Mo. 2016) (citing pre-amendment case law holding that "the burden is typically on the party resisting discovery to explain why discovery should be limited").

127. *See supra* notes 41–45 and accompanying text.

parties' stipulation).¹²⁸ The court rejected virtually all of the defendant's objections based on proportionality, relevance, and lack of clarity and ordered production of almost all discovery sought by the plaintiffs.¹²⁹ In *Labrier v. State Farm Fire & Casualty Co.*, a putative class action challenging State Farm's method of depreciating labor costs under homeowner policies, the court rejected the defendant's proportionality argument relating to information in the databases of State Farm and its vendor.¹³⁰ The court reasoned that the plaintiff "does not have access to the information she seeks, other than through the discovery," and the "[defendant] is a corporation with a national presence, [and] with sophisticated access to data."¹³¹ The court also noted that "[t]he issues at stake are at the very heart of this litigation."¹³²

In some cases, the courts limited the plaintiffs' requests to make them correspond more closely to the allegations in their complaints. But there is no reason to believe that the outcomes in these cases would have been different prior to the proportionality amendment. For example, in *Waldrup v. Countrywide Financial Corp.*, a case alleging fraudulently inflated home appraisals, the court conducted a detailed analysis of each discovery request.¹³³ In its meticulous analysis, the court limited the discovery period requested (seven or more years past the close of the class period), denied some discovery requests without prejudice (where the documents concerned appraisals two years after the class period and the plaintiff had made no showing with respect to relevance or proportionality), and ordered production of nonprivileged documents responsive to fourteen document requests (but limited as noted above).

Likewise, in *Fegadel v. Ocwen Loan Servicing, LLC*, a class action under the Florida Consumer Collections Practices Act, the court conducted a detailed analysis of the defendant's objections to multiple discovery requests, agreeing with some objections but disagreeing with others.¹³⁴ For instance, the court narrowed the time period to correspond with the class definition and deferred discovery (at the class certification stage) relating to damages, but ordered the defendants to respond to numerous interrogatories and document requests. The court rejected defense objections that certain interrogatories called for

128. No. 2:16-cv-02229-SB, 2017 WL 2346981 (E.D. Cal. May 30, 2017).

129. *Id.* at 11.

130. 314 F.R.D. at 643.

131. *Id.*

132. *Id.*

133. CV 13-8833-CAS (AGR), 2016 WL 6668941 (C.D. Cal. Jan. 6, 2016).

134. No. 8:15-cv-2228-T-17JSS, 2016 WL 6893971 (M.D. Fla. Nov. 23, 2016).

opinions or contentions and that various interrogatories and document requests were not relevant.

Even when courts in class actions have found proportionality problems, they have frequently given the party seeking the discovery much of what it sought. For example, in *Kilby v. CVS Pharmacy, Inc.*, the plaintiff filed a class action alleging that her employer failed to provide class members with suitable places to sit as required by the California Labor Code.¹³⁵ Plaintiff requested information related to the cashier stands at the defendant's 870 California stores to prove the class certification elements of commonality and predominance.¹³⁶ Plaintiff rejected a proposal by the defendants to provide a sample size in lieu of the full 870 stores.¹³⁷ The court denied the request as overly broad and disproportional to the needs of the case, but it ordered the defendant to provide information on twenty stores chosen by the plaintiff.¹³⁸

In *Fejzulai v. Sam's West, Inc.*, the plaintiffs filed a nationwide putative class action claim against Sam's Club for failing to provide sufficient refunds in compliance with a freshness guarantee.¹³⁹ Plaintiffs sought the contact information for twenty individuals from each state (those with the largest returns under the guarantee) to establish commonality and predominance for class certification.¹⁴⁰ Overruling the defendant's objection, the court ruled that "disclosure of a certain limited subset of customers' personal information will facilitate an understanding of the true contours of this case, [and] is proportional to the issues at hand."¹⁴¹ The court thus ordered the identification of twenty customers from three states for certification purposes.¹⁴²

Similarly, in *In re Allergan, Inc.*, a putative class action securities suit, plaintiffs sought, inter alia, the production of communications between opposing counsel's firm and investors or potential investors for Allergan.¹⁴³ Defendant objected that the request was unduly burdensome because it included communications protected by attorney-client privilege and because the term "potential investors" could apply to any person or entity.¹⁴⁴ The court ruled that the request

135. No. 09cv2051-MMA(KSC), 2017 WL 1424322, at *1 (S.D. Cal. Apr. 19, 2017).

136. *Id.* at *3.

137. *Id.* at *4.

138. *Id.*

139. No. 6:14-3601-BHH, 2016 WL 7497235, at *1 (D.S.C. Sept. 20, 2016).

140. *Id.* at *5.

141. *Id.* at *7.

142. *Id.*

143. No. 14-cv-02004-DOC (KES), 2016 WL 5922717, at *9 (C.D. Cal. Sept. 23, 2016).

144. *Id.* at *10.

was not proportional to the needs of the case but nonetheless ordered meaningful discovery.¹⁴⁵ Thus, the court limited the request to nonprivileged communications with *actual* investors in Allergan for a six-month time frame, eliminated potential investors from the request, and limited the request to three custodians from the firm.¹⁴⁶

Likewise, in *Sharma v. BMW of North America*, the plaintiffs—purchasers of BMW vehicles—brought a putative class action claiming that a design defect made the vehicle’s electrical equipment prone to water damage and failure. Plaintiffs sought discovery related to “electronic components in the low points of the class vehicle trunk compartments.”¹⁴⁷ When asked by the defendant to identify the components at issue, the plaintiffs produced “a 160 page manual reflecting thousands of components located everywhere in the vehicle.”¹⁴⁸ The court held the plaintiffs had “not sufficiently defined the term electronic components,” and that “allowing the overbroad discovery . . . would not be proportional to the needs of the case.”¹⁴⁹ Again, although that court invoked amended Rule 26’s proportionality standard, the same result almost certainly would have occurred under the pre-amendment case law, which likewise limited or precluded overly broad discovery.¹⁵⁰ Indeed, numerous courts prior to the

145. *Id.* at *5, *10.

146. *Id.* at *10; *see also* Cabot E. Broward 2 LLC v. Cabot, No. 16-61218-CIV-DIMITROULEAS/Snow, 2017 WL 4877035, at *3 (S.D. Fla. Oct. 27, 2017) (denying the plaintiff’s motion to compel a substantive answer to an extensive interrogatory requesting detailed information (spanning a period of fourteen years) regarding the breach of fiduciary claim, but leaving discovery open so that plaintiffs could “re-formulate the Interrogatory as a direct question regarding the basis for [defendant’s] claims”); Harris v. Best Buy Stores, No. 4:17-cv-00446-HSG (KAW), 2017 WL 3948397, at *3–4 (N.D. Cal. Sept. 8, 2017) (denying plaintiff’s request to compel the production of documents relating to termination dates of more than ten thousand putative class members because production would require manual review of employee records, but ordering that “to the extent . . . that [defendant] has access to any such responsive information . . . in a searchable, electronic format—database or otherwise—that information shall be produced”).

147. No. 13-cv-02274-MMC (KAW), 2016 WL 1019668, at *1, *7 (N.D. Cal. Mar. 15, 2016).

148. *Id.*

149. *Id.* at *7.

150. *See, e.g.*, St. Gregory Cathedral Sch. v. LG Elecs., Inc., No. 6:12-cv-739, 2013 WL 12214144, at *1, *4 (E.D. Tex. Nov. 25, 2013) (denying as vague and unduly burdensome a discovery request—in a case for allegedly defective HVAC units—for all testing information for all HVAC products); Griffin v. Home Depot USA, Inc., No. 11-2366-RDR, 2013 WL 1304378, at *5 (D. Kan. Mar. 28, 2013) (limiting precertification discovery geographically because request as written was overly broad and unduly burdensome for class certification); Apsley v. Boeing Co., No. 05-1368-MLB, 2007 WL 163201, at *1, *5 (D. Kan. Jan. 18, 2007) (denying as “overly broad . . . on its face” discovery seeking the identification of every meeting where executives discussed the sale of a plant in a case alleging a manufacturer made discriminatory firings before selling the plant); Thompson v. Jiffy Lube Int’l, Inc., 2006 WL 3388502, at *5, *6–7 (D. Kan. Nov. 21, 2006) (denying discovery of “store visitation reports” from all two thousand of defendant’s stores—in a case involving deceptive business practices by a car repair service—as unduly burdensome).

amendments had specifically invoked proportionality concepts in ruling on discovery disputes.¹⁵¹

2. Plaintiffs' Invocation of the Amended Rule

Although the vast majority of comments on the proportionality amendment focused on the impact on *plaintiffs*, discovery is obviously a two-way street. Thus, plaintiffs have invoked the amendments in several class actions when they deemed discovery by defendants to be unfair or abusive. As with the case law involving discovery by plaintiffs, most of the rulings in connection with plaintiffs' invocation of the amended rules likely would have been the same under the old rules.

For example, in *O'Connor v. Uber Technologies Inc.*, a wage and hour case, the plaintiffs objected to requests for the identities and communications of class members on the ground that the discovery was not proportional to the needs of the case.¹⁵² The dispute arose in the context of class certification briefing. After the plaintiffs moved for class certification, Uber opposed the motion with a submission of four hundred declarations from Uber drivers stating that the plaintiffs did not represent the interests of absent class members.¹⁵³ In response to those declarations, the plaintiffs submitted a declaration stating that more than seventeen hundred Uber drivers had contacted the firm to “express interest in this case and share information.”¹⁵⁴ Following the plaintiffs' submission, Uber served the plaintiffs with discovery seeking identification of the seventeen hundred plus putative class members and all communications related to the plaintiffs' declaration.¹⁵⁵ The court ruled that the “wildly overbroad” discovery sought by the

151. See, e.g., *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 303–08 (S.D.N.Y. 2012) (applying proportionality analysis to request for electronically stored information (“ESI”) stored in defendant’s databases); *Olivo v. Crawford Chevrolet*, 10-782 BB/LFG, 2011 WL 12687969, at *3–4 (D.N.M. Apr. 20, 2011) (using proportionality test to determine that discovery for a three-year time period was sufficient for the needs of the case); *Wood v. Capitol One Servs. LLC*, No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *13 (N.D.N.Y. Apr. 15, 2011) (holding that proportionality factors weigh against a discovery request for ESI); *Yazzie v. Law Offices of Farrell & Seldin*, No. 10-292 BB/LFG, 2010 WL 11450784 (D.N.M. Oct. 1, 2010) (applying proportionality analysis to a number of interrogatory requests and requests for production); *Quinby v. WestLB AG*, 245 F.R.D. 94, 106–11 (S.D.N.Y. 2006) (using proportionality analysis to shift thirty percent of the cost of restoring backup tapes to plaintiffs); *Hagemeyer N. Am., Inc.*, 222 F.R.D. 594, 599–603 (E.D. Wis. 2004) (using proportionality analysis to limit discovery of backup tapes to a sample of tapes); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003) (applying proportionality analysis in granting discovery of emails on backup tapes); *Bowers v. NCAA*, No. Civ. 97-2600(SMO), 1998 WL 35180779, at *2 (D.N.J. Sept. 17, 1998) (denying request for additional interrogatories where that request did not address proportionality factors).

152. No. 13-cv-03826-EMC(DMR), 2016 WL 107461, at *2 (N.D. Cal. Jan. 11, 2016).

153. *Id.* at *1.

154. *Id.*

155. *Id.* at *2.

defendant failed to satisfy Rule 26(b)'s proportionality requirements.¹⁵⁶ Given the lack of justification for Uber's discovery, it is almost certain that the court would have reached the same conclusion under the pre-amendment rule.

Similarly, in *Meyers v. Nicolet Restaurant of de Pere, LLC*, the plaintiff claimed that the defendant printed expiration dates of credit and debit cards on receipts and by doing so violated the Fair and Accurate Credit Transactions Act ("FACTA").¹⁵⁷ The defendant moved to compel the production of the plaintiff's personal computer for information to impeach the plaintiff regarding his deposition testimony about his knowledge of FACTA's requirements.¹⁵⁸ The court refused to compel the production of the computer, reasoning that the computer was irrelevant to the case and was "designed to harass [the] [p]laintiff."¹⁵⁹ As the court noted, the *plaintiff's* knowledge of the requirements was not at issue; rather, "[t]he primary issue in this case is . . . *Defendant's* knowledge of FACTA's requirements."¹⁶⁰

In *Carlin v. DairyAmerica, Inc.*, a case involving allegations that a marketer artificially depressed prices for raw milk, the court denied the defendants' motion to compel the plaintiffs' retainer agreements between class counsel and class representatives (sought for the purpose of searching for improper incentive agreements).¹⁶¹ The court noted that plaintiffs' counsel, as officers of the court, repeatedly represented to the court that no incentive agreement existed.¹⁶² Furthermore, the defendants failed to offer any evidence to support the speculative allegations that there were, in fact, any incentive agreements.¹⁶³

As another example, in *Prime Healthcare Centinela, LLC v. Kimberly-Clark Corp.*, a putative class action suit alleging that the defendant fraudulently concealed the danger of its surgical gowns, the

156. *Id.* at *4 (noting the "lack of importance of the discovery to the resolution of the issues in the case, as well as the enormous burden such discovery would place on the attorney-client relationship between class members and class counsel").

157. No. 15-C-444, 2016 WL 1275046, at *1 (E.D. Wis. Apr. 1), *vacated*, 843 F.3d 724 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2267 (2017); *see also*, 15 U.S.C. § 1681c(g)(1) (2012) ("[N]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.").

158. *Meyers*, 2016 WL 1275046, at *9.

159. *Id.* at *1.

160. *Id.* (emphasis added).

161. No. 1:09-cv-00430-AWI-EPG, 2017 WL 4224940, at *1, *5 (E.D. Cal. Sept. 22, 2017).

162. *Id.* at *3.

163. *Id.* at *4. Although the court made this ruling utilizing Rule 26 proportionality, the court cited pre-amendment case law opposing the discovery of fee agreements where there was no "reason to think there [was] a potential conflict." *Id.* at *5 (quoting *In re Google AdWords Litig.*, No. C08-03369 JW (HRL), 2010 WL 4942516, at *4 (N.D. Cal. Nov. 12, 2010)).

plaintiffs objected to substantial discovery sought by the defendants.¹⁶⁴ The court carefully analyzed the defendant's fifty-five interrogatories and document requests, denying or tailoring discovery when the requested information was privileged, redundant, or outside the scope of the complaint.¹⁶⁵

C. Courts Frequently Invoke Common Pre-Amendment Techniques of Meet and Confer and Sampling to Resolve Discovery Disputes

Many of the post-amendment class action discovery cases invoke two techniques that courts have used for decades in resolving discovery disputes: (1) ordering meet and confer sessions, and (2) ordering a sample of the discovery sought. The continued use of these accepted approaches belies the contentions of the plaintiffs' bar, the defense bar, and the academy that the amendments would lead to a sea change in how courts resolve discovery disputes.

1. Meet and Confer

Prior to the discovery amendments, a common judicial approach for addressing discovery disputes was to order the parties to meet and confer (or engage in successive meet and confer sessions).¹⁶⁶ That salutary practice of encouraging cooperation has remained common in post-amendment class actions.

For example, in *Nelson v. American Family Mutual Insurance Co.*, the plaintiffs alleged that the defendant overcharged clients for

164. No. CV 14-8390-DMG (PLAx), 2016 WL 7045608, at *1 (C.D. Cal. Mar. 23, 2016).

165. *Id.* at *2-4.

166. *See, e.g.*, *Griffin v. Home Depot USA, Inc.*, No. 11-2366-RDR, 2013 WL 1304378, at *8 (D. Kan. Mar. 28, 2013) (ordering parties "to meet and confer regarding the use of metadata and the form of production for ESI"); *Romo v. GMRI, Inc.*, NO. EDCV-12-0715-JLQ, 2013 WL 11310656, at *7 (C.D. Cal. Jan. 1, 2013) (ordering parties to meet and confer to design keyword searches for ESI); *Daugherty v. Encana Oil & Gas (USA), Inc.*, 838 F. Supp. 2d 1127, 1134 (D. Colo. 2011) (ordering meet and confer to frame discovery of putative class members); *Am. Fed'n of State Cty. & Mun. Emps. v. Ortho-Mcneil-Janssen Pharms., Inc.*, No. 08-cv-5904, 2010 U.S. Dist. LEXIS 135371, at *15, *17 (E.D. Pa. Dec. 21, 2010) (ordering parties to immediately meet and confer to narrow disputes in overly broad requests); *Watts v. Allstate Indem. Co.*, No. 2:08-cv-01877 LKK KJN, 2010 U.S. Dist. LEXIS 115387, at *7-10, *16 (E.D. Cal. Oct. 19, 2010) (ordering parties to meet and confer a second time because the parties failed to form agreements for discovery); *Yingling v. eBay, Inc.*, No. C 09-01733 JW (PVT), 2010 WL 373868, at *5 (N.D. Cal. Jan. 29, 2010) (ordering meet and confer to discuss sample size and whether a sample may be sufficient production); *Embry v. Acer Am. Corp.*, No. C09-01808 JW (HRL), 2010 U.S. Dist. LEXIS 6866, at *6-7 (N.D. Cal. Jan. 28, 2010) (ordering meet and confer to determine protective order to apply to discovery); *Beauperthuy v. 24 Hour Fitness USA, Inc.*, No. 06-0715 SC, 2007 U.S. Dist. LEXIS 21315, at *31 (N.D. Cal. Mar. 6, 2007) (ordering meet and confer to resolve as many issues as possible regarding opt-in process); *Smith v. Lowe's Home Ctrs., Inc.*, 236 F.R.D. 354, 358 (S.D. Ohio 2006) (ordering parties to meet to determine method to calculate representative sample ordered by the court).

insurance premiums based on inflated valuations of property.¹⁶⁷ The parties failed to resolve a dispute over the plaintiffs' request for discovery involving the defendant's mainframe database despite a previous meet and confer session.¹⁶⁸ Although the court discussed and quoted the amended proportionality rules, it did not rule on the merits of the plaintiffs' motion to compel.¹⁶⁹ Instead, the court ordered the parties to again meet and confer to determine "the appropriate scope of production," the burden the defendant would incur, how that burden might be minimized, how the parties could avoid privilege concerns, and what a reasonable timeline for production would be.¹⁷⁰

Similarly, in *Wilson v. MRO Corp.*, a case alleging that patients were overcharged for medical records, the defendant objected to producing eighty thousand individual invoices to verify the accuracy of a summary of data previously provided to the plaintiffs.¹⁷¹ The court ordered the parties to meet and confer to "determine whether they can compromise this dispute."¹⁷²

Courts in post-amendment cases have been especially likely to order meet and confer sessions when electronically stored information ("ESI") is at issue. For instance, the court ordered a meet and confer in *Grayson v. General Electric Co.* because the parties disagreed with respect to applicable ESI protocol.¹⁷³ The court noted that it was "difficult to imagine" that the parties would not reach an agreement.¹⁷⁴ Similarly, the court ordered a meet and confer in *Tillman v. Ally Financial, Inc.* to "discuss the technical issues surrounding the discovery of Defendant's database."¹⁷⁵ Likewise, in *Rosinbaum v. Flowers Foods, Inc.*, a wage and hour case, the defendants objected to the production of documents and ESI (estimated to cost \$230,000) on the basis of proportionality.¹⁷⁶ The plaintiffs offered to narrow the

167. No. 13-cv-607 (SRN/SER), 2016 WL 3919973, at *1 (D. Minn. July 18, 2016).

168. *Id.* at *3.

169. *Id.* at *6–7.

170. *Id.* at *8.

171. No. 2:16-cv-05279, 2017 WL 561333, at *3 (S.D. W. Va. Feb. 10, 2017).

172. *Id.*; accord, e.g., *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, 2016 U.S. Dist. LEXIS 170945, at *23–24 (N.D. Ala. Oct. 18, 2016) (ruling that dual meet and confers (one with the parties and another with the recipient of a subpoena) were appropriate to "promote judicial economy and foster efficiency" when serving third-party subpoenas to unnamed class members); *Siriano v. Goodman Mfg. Co.*, 2:14-cv-1131, 2015 WL 8259548, at *7 (S.D. Ohio Dec. 9, 2015) (directing the parties to "engage in further cooperative dialogue in an effort to come to an agreement regarding proportional discovery").

173. No. 3:13-cv-1799 (WWE)(WIG), 2016 WL 1275027, at *3 (D. Conn. Apr. 1, 2016).

174. *Id.*

175. No. 2:16-cv-313-FtM-99CM, 2017 WL 73382, at *6.

176. 238 F. Supp. 3d 738, 749–50 (E.D.N.C. 2017).

search terms for the request, and the court ordered the parties to meet and confer to “settle upon an acceptable set of search terms.”¹⁷⁷

In sum, the proportionality amendment has not altered the common judicial approach of ordering cooperative meetings to address difficult discovery issues. The continuation of a common pre-amendment practice for managing discovery can hardly be deemed the major consequence that both the plaintiffs’ and defense bars predicted would result from the proportionality amendment.

2. Sampling

Another common approach for dealing with discovery disputes prior to the proportionality amendment was to require the objecting party to produce a *sample* of the requested documents, data, or other information.¹⁷⁸ That practice has remained common; courts have used a sampling technique in numerous post-amendment class action cases.

For example, in *Solo v. UPS Co.*, a case involving alleged overcharging of customers for shipping, the court ordered a statistical sample of a massive data set.¹⁷⁹ Because of the large quantity of transactions involved in the nationwide suit and the company’s data-storage policies, production of the requested data set would have taken an estimated six months to prepare at a cost of \$120,000 (not including

177. *Id.* at 750.

178. *See, e.g.*, *Nance v. May Trucking Co.*, No. 11–cv–0537–LAB (DHB), 2012 WL 1598070, at *4 (S.D. Cal. May 7, 2012) (granting discovery for twenty percent of putative class members in California); *Soto v. Castlerock Farming & Transp., Inc.*, 282 F.R.D. 492, 504 (E.D. Cal. 2012) (ordering defendant “to produce a random sample of 50% of the timekeeping and payroll records” for employees “unless the parties agree[d] to a different sampling method”); *Seabron v. Am. Family Mut. Ins. Co.*, 862 F. Supp. 2d 1149, 1166 (D. Colo. 2012) (granting sample of claims from potential class members); *Kaminske v. JP Morgan Chase Bank N.A.*, No. SACV 09-00918 JVS (RNBx), 2010 WL 5782995, at *5 (C.D. Cal. May 21, 2010) (ordering defendant to provide contact information for ten percent of the putative class members); *Kingsberry v. Chicago Title Ins. Co.*, 258 F.R.D. 668, 671 (W.D. Wash. 2009) (ordering ten percent random sample of reported insurance policies for a given time period); *Burkhart-Deal v. Citifinancial, Inc.*, No. 8–1289, 2009 WL 1750915, at *2, *6 (W.D. Pa. June 19, 2009) (ordering defendant to provide responses to request for production for thirty additional branches located in Pennsylvania, where plaintiffs were employed); *Hill v. Eddie Bauer*, 242 F.R.D. 556, 565 (C.D. Cal. 2007) (ordering a sample of employee clock data from every fourth month during class period from eight stores owned by defendant); *Barrus v. Dick’s Sporting Goods, Inc.*, 465 F. Supp. 2d 224, 232 (W.D.N.Y. 2006) (limiting “post notice discovery to a reasonable sampling of defendants’ stores or to a limited number of regions”); *Smith v. Lowe’s Home Ctrs., Inc.*, 236 F.R.D. 354, 358 (S.D. Ohio 2006) (ordering parties “to confer with each other with a view to formulating an appropriate methodology for arriving at a meaningful sampling of the opt-in class for purposes of discovery”).

179. No. 14-12719, 2017 WL 85832, at *4 (E.D. Mich. Jan. 10, 2017). In this case, the court ordered the parties to meet and confer to determine a “mutually agreeable methodology for obtaining a sampling” with the alternative that if the parties failed to do so, the plaintiff could bear the cost and have UPS produce the entirety of the data set.

the cost of analyzing the data).¹⁸⁰ The court ruled that “the appropriate balance between the Plaintiff’s need for information and the burden of producing it may be struck through statistical sampling.”¹⁸¹ The parties were ordered to meet and confer to agree upon a sampling methodology.

Similarly, in *Klein v. TD Ameritrade Holding Corp.*, a case involving alleged wrongdoing in stock trades, the lead plaintiff appealed the magistrate’s denial of classwide discovery of trading data.¹⁸² If granted, that request would have consisted of hundreds of millions of orders to prove economic loss for class certification.¹⁸³ The district court upheld the magistrate’s determination that the sample offered by the defendant, which included 11,491 equity orders with more than 470,000 pieces of information, was sufficient.¹⁸⁴ Although the plaintiff alleged that “no sample could precisely demonstrate economic loss on a class wide basis,”¹⁸⁵ the plaintiff’s own expert agreed that this sample was sufficient to make “approximate assessments” for class certification.¹⁸⁶ Numerous other examples of sampling can be found in the post-amendment class action context.¹⁸⁷

180. *Id.* at *2.

181. *Id.* at *3.

182. No. 8:14CV396, 2017 WL 1316944, at *1 (D. Neb. Apr. 7, 2017).

183. *Id.*

184. *Id.* at *2.

185. *Id.*

186. *Id.*

187. *See, e.g.*, *Cabot E. Broward 2 LLC v. Cabot*, No. 16-61218-CIV-DIMITROULEAS/Snow, 2017 WL 4877035, at *2 (S.D. Fla. Oct. 27, 2017) (noting that “discovery on putative class members is the exception rather than the rule,” but permitting the defendant to serve subpoenas to twenty-five randomly selected putative class members because there were no other known sources to obtain the information to substantiate a statute of limitation argument that would impact the certification of a class); *Martin v. Sysco Corp.*, No. 1:16-cv-00990-DAD-SAB, 2017 WL 4517819, at *4 (E.D. Cal. Oct. 9, 2017) (ordering the defendant in a wage and hour case to produce a twenty percent sampling of putative class members from all of defendant’s California locations to give the plaintiff an opportunity to substantiate claims, while recognizing that the “speculative class allegations [were] not yet supported by solid evidence”); *Harris v. Best Buy Stores, LP*, No. 4:17-cv-00446-HSG (KAW), 2017 WL 3948397, at *4 (N.D. Cal. Sept. 8, 2017) (ordering the defendant to produce the identity and contact information for a random sampling of five hundred employees in an action with more than ten thousand putative class members); *Talavera v. Sun Maid Growers of Cal.*, No. 1:15-cv-00842-AWI-SAB, 2017 WL 495635, at *4 (E.D. Cal. Feb. 6, 2017) (holding in a wage and hour case that “a ten percent random sampling [was] proportional to the needs of the case” and ordering the production of records for the 142 employees who opted into the suit as well as an additional ten percent of the more than five thousand putative class employees); *B&R Supermarket, Inc. v. Visa, Inc.*, No. 16-cv-01150-WHA (MEJ), 2017 WL 235182, at *4–5 (N.D. Cal. Jan. 19, 2017) (ordering the parties to meet and confer to determine an appropriate sample size after determining that the “discovery requests can be tailored further to reduce the burden on [defendant] while still providing sufficient information to analyze damages for class certification purposes” when plaintiffs requested information regarding “tens of millions of transactions” to establish a damages model for class certification).

*D. Courts Have Been Liberal in Allowing Discovery Relevant to
Class Certification*

A number of courts applying the proportionality amendment have been especially reluctant to deny discovery when the information or material sought relates to class certification.¹⁸⁸ To illustrate, in *Medina v. Enhanced Recovery Co.*, the court granted broad discovery to the plaintiffs to substantiate class claims, holding that “it strikes this [c]ourt as untenable to rule at this stage that Plaintiff’s class certification motion fails and, at the same time, Plaintiff is not entitled to the very discovery that may establish an essential element of the class.”¹⁸⁹ The court granted the plaintiffs’ requests for call logs and information for a dialing system despite the defendant’s objections that the system was not an “automated telephone dialing system” regulated by TCPA and that the call logs should be limited to the dialing systems used to call the named plaintiffs. The court ruled that “Plaintiffs are entitled to the opportunity to explore and obtain information relevant to the Rule 23 requirements . . . in order to meet their burden on these issues,”¹⁹⁰ and that the information was necessary so that the plaintiffs “[could] prove or disprove whether each system is covered by the TCPA.”¹⁹¹ The court noted that the “question . . . is whether Plaintiffs are entitled to discovery on class certification issues, not whether Plaintiffs’ class certification motion will ultimately succeed.”¹⁹²

Similarly, in *Gordon v. Aerotek, Inc.*, a wage and hour case, the court granted the plaintiff’s motion to compel a wide range of discovery requests, including class-member contact information, compensation policies, performance reports, timesheet and wage statements, and overtime-exemption documents that the plaintiffs sought to determine various class certification requirements.¹⁹³ The court held that time sheets and wage statements could help establish commonality of the failure to pay overtime wages,¹⁹⁴ while contact information of class members could be used to “determine, at a minimum, the commonality

188. As noted, *see supra* notes 182–187, some courts, such as *Klein*, use sampling or meet and confer even in the context of class certification. Yet, many other courts (as discussed herein) are receptive to broad discovery when the purpose is to establish the elements of class certification.

189. No. 15-14342-CIV-MARTINEZ/MAYNARD, 2017 WL 5196093, at *2 (S.D. Fla. Nov. 9, 2017) (quoting *Manno v. Healthcare Revenue Recovery Grp., LLC*, No. 11-61357, 2012 WL 4192987, at *3 (S.D. Fla. Sept. 18, 2012)).

190. *Id.* at *4.

191. *Id.* at *6.

192. *Id.* at *7.

193. No. EDCV 17-0225-DOC (KKx), 2017 WL 4351744, at *4–7 (C.D. Cal. Sept. 29, 2017).

194. *Id.* at *6.

and typicality prongs of Rule 23.”¹⁹⁵ Numerous other recent cases have likewise ordered broad class certification discovery.¹⁹⁶

Interestingly, post-amendment courts have favored broad plaintiff discovery on class certification issues even though numerous cases quote *Mantolete v. Bolger*,¹⁹⁷ a 1985 decision, for the proposition that “the plaintiff [seeking class certification discovery] bears the burden of advancing a prima facie showing that the class action requirements of Fed. R. Civ. P. 23 are satisfied or that discovery is likely to produce substantiation of the class allegations.”¹⁹⁸

195. *Id.* at *4.

196. *See, e.g.*, *Mbazomo v. Etourandtravel, Inc.*, No. 2:16-cv-02229-SB, 2017 WL 2346981, at *6 (E.D. Cal. May 30, 2017) (holding that the production of an estimated three million phone numbers in the action “may be burdensome,” but the information was relevant to class certification and thus the request was “a proportional one”); *Doherty v. Comenity Capital Bank*, No. 16cv1321-H-BGS, 2017 WL 1885677, at *4 (S.D. Cal. May 9, 2017) (finding that outbound call lists were relevant to numerosity and commonality); *Murray v. Marchbanks*, No. 4:16-CV-199 SNLJ, 2017 WL 1365452, at *3 (E.D. Mo. Apr. 14, 2017) (holding that a discovery request regarding how the defendant obtained the plaintiff’s and others’ information from the DMV was “directly relevant to class certification”); *Mora v. Zeta Interactive Corp.*, No. 1:16-cv-00198-DAD-SAB, 2017 WL 1187710, at *5 (E.D. Cal. Feb. 10, 2017) (holding that call logs from the defendant were discoverable “to determine whether a class action is maintainable”); *In re Coca-Cola Prods. Mktg. & Sales Practices Litig.*, No. 14-md-02555-JSW (MEJ), 2016 WL 6245899, at *3 (N.D. Cal. Oct. 26, 2016) (granting plaintiffs’ motion to compel, inter alia, communications between the defendant, the FDA, and other government entities because such information “may be useful common proof to determine what consumers were likely to understand” and “could be persuasive evidence supporting commonality and predominance”); *In re Riddell Concussion Litig.*, No. 13-7585 (JBS/JS), 2016 WL 4119807, at *3 (D.N.J. July 7, 2016) (ordering discovery related to the performance of the helmets at issue because it was “relevant to the commonality and predominance requirements of Rule 23(a)(2) and Rule 23(b)(3)”; *Sinanyan v. Luxury Suites Int’l, LLC*, No. 2:15-cv-225-GMN-VCF, 2016 WL 1171504, at *3–4 (D. Nev. Mar. 24, 2016) (granting a motion to compel discovery of documents relating to alleged rental revenue and agreements between defendants and condominium owners and noting that a plaintiff is “entitled to reasonable, pre-certification discovery as she has made a prima facie case for class relief”); *Charvat v. Plymouth Rock Energy, LLC*, No. 15-CV-4106 (JMA)(SIL), 2016 WL 207677, at *2 (E.D.N.Y. Jan. 12, 2016) (holding that the defendant’s telemarketing scripts, policies, and contracts were “relevant to both the class and individual claims”); *cf. Ortolani v. Freedom Mortg. Corp.*, No. EDCV 17-1462-JGB (KKx), 2018 WL 324813, at *2 (C.D. Cal. Jan. 8, 2018) (denying contested class discovery because plaintiff could not explain how sought-after records were relevant to numerosity or commonality); *Tillman v. Ally Fin. Inc.*, No. 2:16-cv-313-FtM-99CM, 2017 WL 73382, at *2 (M.D. Fla. Jan. 6, 2017) (finding discovery request “overly broad” given defendant’s claim that production would take “millions of hours,” but permitting plaintiff to file amended discovery requests).

197. 767 F.2d 1416, 1424 (9th Cir. 1985).

198. For cases ordering class certification discovery despite quoting *Mantolete*, see, e.g., *Kimble v. Specialized Loan Servicing, LLC*, No. 16cv2519-GPC (BLM), 2018 WL 1693197, at *4 (S.D. Cal. Apr. 6, 2018) (rejecting defendant’s argument that discovery requests are disproportional due to plaintiffs’ alleged lack of standing because “merits objections do not relieve [the defendant] of its burden to produce relevant, discoverable materials”); *Ahmed v. HSBC Bank USA, Nat’l Ass’n*, No. ED CV 15-2057-FMO (SPx), 2017 WL 4325587, at *2 (C.D. Cal. Sept. 25, 2017) (granting discovery of defendant’s policies and instructions related to consent because discovery is “likely warranted” for issues that are “necessary for the determination of whether the action may be maintained as a class action”); *Nguyen v. Baxter Healthcare Corp.*, 275 F.R.D. 503, 506–07 (C.D. Cal. 2011) (granting plaintiff’s request for discovery because the plaintiff alleged

Notably, the *defendants* have also been successful in pursuing discovery relating to class certification. For instance, in *Milliner v. Mutual Securities, Inc.*, a case challenging a “one size fits all” approach of investment advice, the court compelled *plaintiffs* to produce various financial documents because defendants claimed that the information was relevant to establish lack of typicality and adequacy.¹⁹⁹ In response to the plaintiffs’ claim that the request failed on proportionality grounds, the court emphasized that the proportionality amendment “does not change the existing responsibilities of the court and parties” but rather “simply reinforces this obligation.”²⁰⁰

As noted,²⁰¹ courts have been very attentive to the needs of plaintiffs to develop evidence in support of class certification. But even if courts occasionally approve of efforts by the defendant to curtail class certification discovery, such rulings may sometimes work to the benefit of plaintiffs. An example is *Agerbrink v. Model Service LLP*, an action brought against a modeling agency for alleged misclassification of employees as contractors in violation of the Fair Labor Standards Act.²⁰² There, the plaintiff sought broad discovery of documents regarding contracts and compensation for all models employed by the defendant. The defendant provided responses for fifteen exemplar models and offered to produce the same information for fifteen more models chosen by the plaintiff. The defendant, however, refused to accept any grouping as a representative sample of the class. In responding to the defendant’s tactics, the court stated:

The problem is that the defendants adamantly decline to accept any sample as representative. But the defendants cannot have it both ways: they cannot refuse discovery that is necessary to demonstrate prerequisites for class certification such as commonality and typicality and at the same time argue (as they do) that the uniqueness of each model’s situation precludes certification. The plaintiff must be permitted to take discovery that will potentially show that the models are sufficiently similarly situated to warrant class certification.²⁰³

Thus, if a defendant is successful in curtailing discovery relevant to class certification, a plaintiff may be able to use the discovery limits to argue that the defendant is thereby estopped from claiming that the plaintiff failed to marshal adequate evidence bearing on class certification.

“sufficient facts to state a plausible state-wide claim,” and many class certification motions cannot be decided on the pleadings alone).

199. No. 15-cv-03354-TEH, 2017 U.S. Dist. LEXIS 43614, at *5 (N.D. Cal. Mar. 24, 2017).

200. *Id.* at *7.

201. See Section III.D.

202. 14 Civ. 7841 (JPO)(JCF), 2017 WL 933095 (S.D.N.Y. Mar. 8, 2017).

203. *Id.* at *3.

E. As with Many Pre-Amendment Cases, the Outcomes in Many Cases Can Be Explained by Ineffective Lawyering

In many of the post-amendment class action cases, the denial of discovery can be explained by ineffective lawyering, as opposed to any rule change. For example, in *Frieri v. Sysco Corp.*, a wage and hour case, the plaintiff moved to compel the production of documents concerning the defendant's meal-period calculation policies.²⁰⁴ Yet the plaintiff never responded to the defendant's offer to meet and confer. The court thus had no difficulty denying the plaintiff's motion to compel.²⁰⁵ In *Wilson v. MRO Corp.*, a case alleging that the defendant overcharged patients for copies of their medical records, the court denied the plaintiffs' motion to compel because the plaintiffs did not justify their request for a time period that exceeded the relevant statute of limitations.²⁰⁶

Likewise, in *Lieber v. Wells Fargo Bank, N.A.*, the court denied the plaintiffs' motion to compel certain discovery because the motion was untimely under the local rules.²⁰⁷ In *Carlin v. DairyAmerica Inc.*, the court denied the defendant's motion to compel former class representatives to respond to written discovery requests, reasoning that those individuals "have no current obligation . . . to respond . . . because they are no longer parties in the case."²⁰⁸ According to the court, such discovery may only be obtained by serving a Rule 45 subpoena. And in *Gordon v. Aerotek, Inc.*, a wage and hour case, the court denied a discovery request for payroll records because the plaintiff merely made the conclusory statement that "time and wage records are discoverable" but failed to "explain[] how [such records] w[ould] assist in establishing numerosity or commonality."²⁰⁹

Lawyers who fail to substantiate or defend discovery requests or fail to show up for a meet and confer have only themselves to blame. The adoption of the proportionality amendment has nothing to do with the outcomes in such cases.

204. No. 3:16-cv-01432-JLS-NLS, 2017 WL 2908777, at *7 (S.D. Cal. July 7, 2017).

205. *Accord, e.g.*, *Boehm v. Scheels All Sports, Inc.*, 15-cv-379-jpd, 2015 WL 8516825, at *1 (W.D. Wis. Dec. 11, 2015) (denying a defendant's motion to compel because the defendant failed to confer in good faith with the plaintiffs as required by both the Federal Rules of Civil Procedure and Seventh Circuit Standards of Professional Conduct).

206. No. 2:16-cv-05279, 2017 WL 561333, at *2 (S.D. W. Va. Feb. 10, 2017).

207. No. 1:16 CV 2868, 2017 WL 3923128, at *6 (N.D. Ohio Sept. 7, 2017).

208. No. 1:09-cv-00430-AWI-EPG, 2017 WL 4410107, *3 (E.D. Cal. Oct. 3, 2017).

209. No. EDCV 17-0225-DOC (KKx), 2017 WL 4351744, at *5 (C.D. Cal. Sept. 29, 2017); *see also* *Ortolani v. Freedom Mortg. Corp.*, No. EDCV 17-1462-JGB (KKx), 2018 WL 324813 (C.D. Cal. Jan. 8, 2018) (denying a motion seeking thirty to forty additional depositions instead of, for example, three or four).

CONCLUSION

The class action discovery cases do not support the hysteria by the plaintiffs' bar or the euphoria by the defense bar. At least in the class action context, the proportionality amendment thus far does not appear to have had a major impact. Despite references to proportionality in various post-amendment cases, the analyses in the pre- and post-amendment cases are largely the same. In both, the courts have engaged in nuanced, fact-based analyses; focused on the relevance of discovery to class certification; and used approaches such as meet and confer and sampling to narrow the disputes. Most importantly, the proportionality amendment does not appear to have undermined legitimate efforts of plaintiffs to secure necessary discovery, as least in the class action context.

Of course, the proportionality amendment has been in effect for less than three years, so it is too soon to draw definitive conclusions. Moreover, the impact of the proportionality amendment may be different in smaller, non-class cases. Nonetheless, given the views expressed that the amendment would have especially serious impacts on plaintiffs *in class actions*,²¹⁰ the findings in this Article suggest that such concerns were overblown.

These initial findings should not be interpreted to suggest that the proportionality amendment is futile. In the first place, the amendment reflects the salutary goal of encouraging district judges to be more actively involved in discovery disputes. As one court noted, the new rule will “encourage district judges to take a firmer grasp on the discovery’s scope.”²¹¹ To that extent, the proportionality language provides a useful tool for judges to rein in abusive discovery. Also, judges can use the proportionality rule to encourage the parties to work out more of their disputes, with the implication that the new language might provide a basis to curtail excessive demands. And, finally, both sides will almost certainly reflect on the scope of their own discovery requests as they seek discovery in the context of the new rule.

210. See *supra* Section II.A.1.

211. *Landry v. Swire Oilfield Servs., LLC*, 323 F.R.D. 360, 381 (D.N.M. 2018).