

# One-Way Fee Shifting After Summary Judgment

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## INTRODUCTION

New, defendant-friendly amendments to the Federal Rules of Civil Procedure took effect in December 2015.<sup>1</sup> Included in the amendments were several provisions designed to curb the cost of discovery.<sup>2</sup> Although modest, the discovery-related provisions created more controversy than perhaps anything the rulemakers have done in recent memory.<sup>3</sup>

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1. Thomas Y. Allman, *Applying the 2015 Civil Rules Amendments*, LAW. FOR CIV. JUST. 1 (Jan. 23, 2016), [http://www.lfcj.com/uploads/3/8/0/5/38050985/2016applyingtherulespackage\\_jan23\\_.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/2016applyingtherulespackage_jan23_.pdf) [https://perma.cc/4JRB-XN4M].

2. See, e.g., FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

3. See 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*

Yet the new amendments were only part of what corporate defendants asked the rulemakers to do. Left undone was a much more ambitious proposal: to outright *flip* who pays for discovery, from the party who produces the discovery to the party who requests it.<sup>4</sup> To the surprise of many commentators, the rulemakers placed this “requester-pays” proposal on their agenda for serious study.<sup>5</sup> But scholarly commentary has been very critical,<sup>6</sup> and the rulemakers have tabled the proposal indefinitely.<sup>7</sup> It is unclear whether the rulemakers will take up this proposal again.

But reform is necessary. Although requester-pays might be too extreme, its motivations are right. The current regime—known as “producer-pays”—is problematic because it encourages litigants to run up each other’s discovery costs. This happens because if the other side is paying the bill, you have no reason not to request as much as you can. In fact, you have every reason to request as much as you can: driving up the other side’s discovery costs creates pressure to settle with you on more favorable terms. These incentives not only make litigation more expensive, but because defendants usually possess more discoverable

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*Committees*, 83 U. CIN. L. REV. 1083, 1086–87 (2015) (noting “polarized public reaction to the proposed amendments . . . with plaintiff’s lawyers almost unanimously against most of the amendments and defendant’s lawyers almost unanimously in favor”); Henry J. Kelston, *FRCP Discovery Amendments Prove Highly Controversial*, LAW360 (Feb. 27, 2014, 5:06 PM), <http://www.law360.com/articles/512821/frcp-discovery-amendments-prove-highly-controversial> [<https://perma.cc/F5TL-SBZ2>] (“When the public comment period for the proposed Federal Rules amendments closed on Feb. 18, 2014, more than 2,200 written comments had been submitted . . . [T]he proposed amendments to Rules 26, 30, 31, 33 and 36 reducing the scope and amount of discovery, have proven to be highly controversial.”).

4. See, e.g., *Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure*, U.S. CHAMBER INST. FOR LEGAL REFORM 2 (Nov. 7, 2013), [https://www.instituteforlegalreform.com/uploads/sites/1/FRCP\\_Submission\\_Nov.7.2013.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf) [<https://perma.cc/3H7P-JVXQ>] (“[T]he Committee should consider, over the longer term, an amendment requiring each party to pay the costs of the discovery it requests . . .”); *The Un-American Rule: How the Current “Producer Pays” Default Rule Incentivizes Inefficient Discovery, Invites Abusive Litigation Conduct and Impedes Merits-Based Resolutions of Disputes*, LAW. FOR CIV. JUST. 1 (Apr. 1, 2013), [http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj\\_comment\\_the\\_un-american\\_rule\\_040113.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_the_un-american_rule_040113.pdf) [<https://perma.cc/478C-S98Z>] [hereinafter *The Un-American Rule*] (“[LCJ] respectfully writes to engage the Civil Rules Advisory Committee . . . on what we consider to be the ‘third pillar’ of needed discovery reform: a ‘requestor pays’ default rule requiring the party that asks for discovery to pay the costs of its requests.”).

5. See DAVID G. CAMPBELL, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 27 (May 5, 2015), [http://www.uscourts.gov/sites/default/files/cv05-2015\\_0.pdf](http://www.uscourts.gov/sites/default/files/cv05-2015_0.pdf) [<https://perma.cc/47VZ-RFFW>] (explaining that “[t]he Advisory Committee had an initial discussion of [requester-pays] at its November, 2013, meeting,” and that “[t]he Discovery Subcommittee continues to have the ‘requester pays’ topic on its agenda”).

6. E.g., A. Benjamin Spencer, *Rationalizing Cost Allocation in Civil Discovery*, 34 REV. LITIG. 769 (2015).

7. *Discovery Subcommittee Report: Requestor Pays*, in AGENDA BOOK OF THE ADVISORY COMMITTEE ON CIVIL RULES 327, 327–29 (Nov. 5–6, 2015), [http://www.uscourts.gov/sites/default/files/2015-11-civil-agenda\\_book.pdf](http://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf) [<https://perma.cc/A2FV-YPPR>].

information than plaintiffs, they also lead defendants to overpay to settle cases. Overpayment, in turn, leads to overdeterrence and exacts negative costs on society. The incentives problem created by producer-pays is well known in the U.S. litigation system and has been for some time. And the proposed requester-pays rule would admittedly solve the problem full stop: parties would no longer ask for discovery unless they thought it was justified by the cost.

Still, requester-pays has serious drawbacks. For one, it gives defendants every incentive to respond extravagantly to discovery requests in order to drive down the settlement value of cases. For another, requester-pays increases plaintiffs' price of admission to court. Some plaintiffs would be priced out of court altogether—namely, those whose discovery costs plus other litigation expenses exceed the value of their claim. Of course, *defendants* are currently priced out of court under the producer-pays regime; they often settle claims to avoid discovery costs and other litigation expenses even if they might win on the merits. Nonetheless, it must be admitted that requester-pays means more misconduct by defendants would go uncompensated and undeterred.

The new amendments to the Federal Rules attempt to split the baby between producer-pays and requester-pays: they permit courts to shift some discovery expenses to requesters on a case-by-case basis. Like those who have proposed requester-pays, however, I am not optimistic that the case-by-case approach will change much. Judges who know very little about a case are not in the best position to decide whether discovery is worth it or which litigant should pay for it. The case-by-case approach is also inefficient because it requires satellite litigation about whether costs should be shifted and by how much. I suspect the case-by-case approach will only slightly push the needle away from plaintiffs and toward defendants.

In my view, there is a better way to split the baby. Based on my earlier work,<sup>8</sup> I propose a one-way fee-shifting rule that would kick in after summary judgment. Here is how it would work: if the plaintiff's entire case is dismissed at summary judgment, she must pay the difference between the defendant's discovery expenses and her own. My proposal is a bright-line rule. It does not require litigation over who pays or how much. And it does not require judges to guess whether discovery will be valuable or not. Under my rule, requesting parties could still access any relevant discovery, and producing parties would still cover the cost of responding. But if the plaintiff's case is later

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8. See Cameron T. Norris, *Drugs, Devices & Discovery: Using Fee-Shifting to Resolve the Twombly/Iqbal Problem for Parallel Claims Under the FDCA*, 70 FOOD & DRUG L.J. 187 (2015).

dismissed at summary judgment, then she must repay the difference between the defendant's discovery expenses and her own discovery expenses. This rule will curb the incentive to run up discovery costs because in many cases plaintiffs will not know for sure whether discovery will reveal any incriminating evidence. Moreover, unlike requester-pays, my proposal will not cause defendants to respond extravagantly to discovery requests because defendants will likewise not know whether the plaintiffs will find something incriminating. Finally, although my rule will increase the price of admission somewhat for plaintiffs because they must factor in the probability of repayment if they lose at summary judgment, it does not increase the price nearly as much as requester-pays.

One might ask why I stop at summary judgment and do not embrace a wholesale switch to the English Rule, which requires every losing party to repay every winning party for all fees and costs. The answer is twofold. First, the problem I am trying to solve is the problem of discovery. My proposal homes in on discovery expenses and, thus, kicks in at summary judgment—when discovery is over. The English Rule, by contrast, shifts *all* fees and costs, whether incurred in discovery or not. I am not sure that the other costs of litigation suffer from the same incentives problem that discovery does. Most of the incentives problem in discovery stems from the asymmetric quantities of discoverable information that plaintiffs and defendants possess; it is unclear whether similar asymmetries exist in other stages of litigation. Moreover, because the goal is to correct asymmetries, my rule shifts fees only to the extent that they are asymmetric—that is, only to the extent that the defendant incurred greater fees than the plaintiff. Second, the English Rule is a two-way fee shifting rule—both plaintiffs and defendants have to pay if they lose—and, as such, it comes with additional problems that my one-way rule does not. Specifically, theoretical models and natural experiments have shown that two-way fee shifting leads to an *increase* in overall litigation expenses because both sides think there is a good chance the other side will end up picking up their tab. But the goal should be to *reduce* litigation expenses, not increase them. This same pathology does not affect one-way fee shifting; it makes plaintiffs only less eager to impose litigation expenses.

The final question I address is whether my proposal can be adopted by the rulemakers or whether it needs action by Congress to become law. While this is a close question, there are plausible arguments that the rulemakers can adopt my proposal on their own.

## I. DISCOVERY AND ITS DISCONTENTS

A. *The Problem with Discovery*

Discovery in the United States is typically producer-pays: when one party requests information, the other party must produce it and cover the associated costs.<sup>9</sup> Producer-pays is often described as a corollary to the “American Rule”—the tradition in this country of requiring all parties, win or lose, to cover their own litigation expenses.<sup>10</sup> But producer-pays has a major incentives problem. Because the requesting party does not foot the bill, she has little reason to tailor her discovery requests or to otherwise limit the cost of discovery.<sup>11</sup> In fact, she has every reason to *increase* the cost of discovery because doing so makes it more likely that the producing party will settle on favorable terms.<sup>12</sup> This latter dynamic can be illustrated mathematically.

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9. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (“Under th[e] [discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests . . .”).

10. See Karel Mazanec, Note, *Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse*, 56 WM. & MARY L. REV. 631, 643 (2014) (“The American rule requires that each party to a lawsuit pays its own litigation expenses, including discovery costs.”).

11. See Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 452 (1994) (“If the parties act noncooperatively and each bears his own cost of complying with discovery requests, then the plaintiff will conduct discovery whose incremental cost exceeds the expected increase in the value of the legal claim . . .”); E. Donald Elliott, *Twombly in Context: Why Federal Rule of Civil Procedure 4(b) Is Unconstitutional*, 64 FLA. L. REV. 895, 953–54 (2012) (“[Under producer-pays,] a plaintiff’s lawyer may externalize a substantial portion of the costs . . . but . . . obtain all of the benefits if the venture is successful. . . . [T]his incentive structure . . . has been criticized by economists for creating runaway speculation.”); Bruce H. Kobayashi, *Law’s Information Revolution as Procedural Reform: Predictive Search as a Solution to the In Terrorem Effect of Externalized Discovery Costs*, 2014 U. ILL. L. REV. 1473, 1491–92 (“[U]nder the traditional discovery cost-allocation rule . . . [t]he incentives of the plaintiff are to only consider the costs of request and review in determining the size of his search, and to ignore the cost of response.”); Martin H. Redish, *The Allocation of Discovery Costs and the Foundations of Modern Procedure*, in *THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 207* (F.H. Buckley ed., 2013) (“[W]hen the responding party, rather than the requesting party, bears the costs of the process, the requesting party has absolutely no economic disincentive not to make the request, regardless of its costs.”); Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 801 (2011) (“The externalization of discovery costs, accomplished through the de facto hidden litigation subsidy caused by our current model of cost allocation, incentivizes what can most appropriately be called excessive discovery.”); Spencer, *supra* note 6, at 803 (“[M]aking it free to request information from one’s adversary does nothing to incentivize requesting parties to limit their requests to the information they truly need.”).

12. See Edward R. Finch, *Some Fundamental and Practical Objections to the Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States*, 22 A.B.A. J. 809, 810 (1936) (complaining that, under the discovery rules, “it will be cheaper and more to the self interest of the defendant to settle for less than the cost to resist”); Redish, *supra* note 11, at 204 (“The very threat of costly discovery likely induces rationally self-interested defendants to settle even non-meritorious suits for an amount smaller than the projected costs of discovery.”); Redish & McNamara, *supra* note 11, at 802 (“Because a party’s opponent is the source of the litigation

Assume there are two parties, Plaintiff and Defendant, who are rational economic actors with perfect information.<sup>13</sup> Plaintiff sues Defendant for \$100,000 and has a 50% chance of prevailing. The expected value of the litigation to Plaintiff—and the expected cost to Defendant—is

$$\$100,000 \times 50\% = \$50,000.$$

Of course, litigation is not free and, under the American Rule, the parties must pay for their own litigation expenses. Those costs must be factored into the parties' calculations. Assume the litigation will cost each party \$20,000. The expected value of the lawsuit to Plaintiff is now

$$\$50,000 - \$20,000 = \$30,000$$

and the expected cost to Defendant is

$$\$50,000 + \$20,000 = \$70,000.$$

Given these values, Defendant would be better off if he could avoid litigation and settle with Plaintiff for any amount less than \$70,000. Likewise, Plaintiff would be better off if she could settle with Defendant for any amount greater than \$30,000. Accordingly, Plaintiff and Defendant would likely settle for an amount between \$30,000 and \$70,000.<sup>14</sup>

Now assume Defendant's litigation expenses are \$40,000 instead of \$20,000. Then, Defendant is willing to settle for up to \$90,000. The same is true for Plaintiff: if her litigation expenses

subsidy, the requesting party also has a perverse incentive to make the request as broad and expensive as possible in order to impose costs on its opponent."); Spencer, *supra* note 6, at 803 ("[R]equesting parties have an incentive . . . to request more information of little to no utility[,] given[] that such requests impose costs on the adversary—costs that can alter the calculus of whether to proceed with or to settle a case." (citation omitted)).

13. By "rational economic actors," I mean that the parties are risk neutral and seek to maximize their economic gains and minimize their economic losses. Of course, these assumptions do not always hold up in real-world litigation. But they usually do, and they are in any event useful to help explain particular litigation dynamics. By "perfect information," I mean that the parties know, and agree on, the plaintiff's damages and likelihood of success at trial. I make this assumption in order to isolate the effect of discovery costs on the parties' propensity to settle. This basic effect would not change if I incorporated uncertainty into my models.

14. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 402 (2004) ("[I]f the plaintiff's minimum acceptable amount is less than the defendant's maximum acceptable amount, a mutually beneficial settlement is possible—a settlement equal to any amount in between these two figures would be preferable to a trial for each party." (emphasis omitted)); Cooter & Rubinfeld, *supra* note 11, at 440 n.5 ("[T]he difference between the expected loss of defendant and the expected net gain of plaintiff, must be positive" for the parties to settle).

increased to \$40,000, she would now accept as little as \$10,000. Thus, the mutual settlement range depends on the sum of the parties' litigation expenses.<sup>15</sup> As litigation expenses increase, the parties become more likely to settle.<sup>16</sup> And the more one party can increase the other side's litigation expenses, the more likely she can negotiate a settlement on better terms.<sup>17</sup>

This result is remarkable. It means there are cases in which a rational defendant would settle with a rational plaintiff even though the plaintiff's suit has *zero* chance of success. Indeed, it is rational for a plaintiff to file such a case whenever her litigation expenses are less than the defendant's litigation expenses.<sup>18</sup>

The plaintiff's expenses are usually less than the defendant's when it comes to discovery<sup>19</sup>—perhaps the biggest overall driver of litigation expenses.<sup>20</sup> Discovery costs fall disproportionately on defendants, rather than plaintiffs, for several reasons. In every case, the plaintiff alleges wrongdoing by the defendant, and the best evidence of that wrongdoing (assuming it occurred) is usually in the defendant's possession.<sup>21</sup> The plaintiff therefore wants more information from the

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15. See SHAVELL, *supra* note 14, at 403 (“[A] mutually beneficial settlement exists as long as the plaintiff's estimate of the expected judgment does not exceed the defendant's estimate by more than the sum of their costs of trial.” (emphasis omitted)).

16. See *id.* at 406 (“The larger are the legal expenses of either party, the greater are the chances of settlement . . .”).

17. See Cooter & Rubinfeld, *supra* note 11, at 453 (“[A] credible threat by the plaintiff to impose discovery costs on the defendant will increase the rational settlement value . . .”); D. Rosenberg & S. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 10 (1985) (“[W]henever a party is able to impose significant [discovery] costs on the other, he should be able to bargain for a relatively advantageous settlement.”).

18. See Cooter & Rubinfeld, *supra* note 11, at 447:

A rational plaintiff files a complaint and pursues it when the cost of doing so is less than the expected value of the claim. . . . [T]he expected value of the claim at time 1 is the net payoff that settlement or trial yields to the plaintiff, adjusted for the probability of each, less the cost of bearing risk.;

Rosenberg & Shavell, *supra* note 17, at 5 (explaining that a rational plaintiff will sue “whenever the cost of filing is less than the defense costs plus his expected judgment”).

19. Brian T. Fitzpatrick, Twombly and Iqbal Reconsidered, 87 NOTRE DAME L. REV. 1621, 1638–43 (2012); Norris, *supra* note 8, at 206.

20. See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (“[D]iscovery costs now comprise between 50 and 90 percent of the total litigation costs in a case.”). The disappearance of the civil trial might explain why discovery costs constitute such a large portion of overall litigation costs. See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 142 n.127 (2002) (“[T]he civil trial has all but disappeared.”); *Table C-4. U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2014*, ADMIN. OFF. U.S. COURTS (2014), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/C04Mar14.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/C04Mar14.pdf) [<https://perma.cc/QB4R-Y9CP>] (calculating that 1.2 percent of all federal civil cases reached trial from March 2013 to March 2014).

21. Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 115 (2009).

defendant than the defendant wants from the plaintiff.<sup>22</sup> Generally speaking, it is far cheaper to request information than to produce it.<sup>23</sup> Although plaintiffs incur some costs in reviewing the information they request, those costs are dwarfed by the costs incurred by the defendant (who must review the information *and* produce it).<sup>24</sup> Plaintiffs can also control their costs by simply declining to request certain information or declining to review the information they receive. Defendants, by contrast, must produce and review whatever the plaintiff requests—subject to a minimal standard of relevance<sup>25</sup>—or face sanctions for noncompliance.<sup>26</sup> Finally, plaintiffs are often individuals and defendants are often companies.<sup>27</sup> Companies possess far more discoverable information (records to review, databases to search, employees to interview, etc.) than individuals do.<sup>28</sup>

The cost of discovery is often exorbitant, creating immense pressure on defendants to settle in order to avoid it. The United States has the most liberal discovery rules in the world.<sup>29</sup> Their stated purpose

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22. See *Swanson v. Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010) (Posner, J., dissenting):

In most suits against corporations or other institutions . . . the plaintiff wants or needs more discovery of the defendant than the defendant wants or needs of the plaintiff, because the plaintiff has to search the defendant's records (and, through depositions, the minds of the defendant's employees) to obtain evidence of wrongdoing.

Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1674 (2017) (“Changes in the litigation environment since 1938 have produced substantially greater variance in pretrial cost asymmetries that disproportionately disadvantage defendants in many types of cases.”).

23. Redish & McNamara, *supra* note 11, at 800.

24. Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481, 500–01 (1994).

25. See FED. R. CIV. P. 26(b)(1) (“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 . . . . Information within this scope of discovery need not be admissible in evidence to be discoverable.”).

26. FED. R. CIV. P. 37.

27. Jonathan T. Molot, *Fee Shifting and the Free Market*, 66 VAND. L. REV. 1807, 1808 (2013).

28. See Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 643 (1989) (“[I]n a fight between the big and the small, the big are more likely to be the targets of impositional discovery requests . . . .”); Molot, *supra* note 27 (“[L]arge, deep-pocketed businesses so often are targeted as defendants and bear a disproportionate share of litigation’s burdens.”); Stancil, *supra* note 22, at 1674 (explaining that the “growth in the quantum of potentially relevant and discoverable information has not been symmetrical between plaintiffs and defendants” because plaintiffs “possess relatively little discoverable information” and “likely ha[ve] not seen [their] relevant digital file room[s] expand in proportion to [defendants]”).

29. See Eric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT’L L. & POL. 1001, 1080 (2001) (“U.S. courts also allow extraordinarily broad pretrial discovery—broader than any other country . . . .”); see also Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 11 (1959) (“The system . . . envisaged by [the original federal discovery rules] had no counterpart at the time . . . .”); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward A New World Order?*, 7 TUL. J. INT’L & COMP. L. 153, 157 (1999) (“[T]his country still

is “to allow a broad search for . . . any . . . matters which may aid a party in the preparation or presentation of his case.”<sup>30</sup> To achieve this goal, the rules provide litigants with a “veritable arsenal of discovery weapons”—document requests, interrogatories, depositions, and the like.<sup>31</sup> The breadth of this arsenal, combined with the growth of globalization and e-discovery, has made the cost of responding to discovery requests skyrocket in recent years.<sup>32</sup>

Few practitioners would dispute that discovery has become prohibitively expensive.<sup>33</sup> Yet some scholars have argued that actual discovery *abuse*—plaintiffs intentionally threatening defendants with exorbitant discovery expenses—is rare.<sup>34</sup> I am less sanguine. I doubt that lawyers are abstaining from a practice that is easy to do, is difficult

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provides, as a matter of right, discovery opportunities that the rest of the world would view as unduly intrusive, or at least extravagant . . .” (internal quotation marks omitted).

30. FED. R. CIV. P. 26 advisory committee’s notes to 1946 amendment; *see also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (describing the discovery rules as “liberal”); Hickman v. Taylor, 329 U.S. 495, 507 (1947) (explaining that the discovery rules should be “accorded a broad and liberal treatment”); Joe E. Estes, *Discovery, in Proceedings of the Seminar on Procedures for Effective Judicial Administration*, 29 F.R.D. 280, 280–81 (1961) (“The scope and spirit of the federal discovery rules are so broad and liberal that today complete discovery is virtually assured. . . . Even fishing expeditions are permitted . . .”).

31. Estes, *supra* note 30, at 280; *see also* Hickman, 329 U.S. at 501 (“The various instruments of discovery [allow] the parties to obtain the fullest possible knowledge of the issues and facts before trial.”). Edson Sunderland, the original drafter of the federal discovery rules, “included every type of discovery that was known in the United States and probably England up to that time . . . : oral and written depositions; written interrogatories; motions to inspect and copy documents and to inspect tangible and real property; physical and mental examination of persons; and requests for admissions.” Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 718 (1998).

32. *See* Fitzpatrick, *supra* note 19, 1638–40 (explaining how federal civil discovery has become a multimillion dollar enterprise).

33. *See* ABA SECTION OF LITIG., MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 151 (2009) (finding that 89.3 percent of lawyers who represent both plaintiffs and defendants agree that “discovery is too expensive”); Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 234 (“[V]irtual consensus [exists] among larger case lawyers that the discovery system as they experienced it would not fare well in a rigorous cost-benefit analysis: many such lawyers apparently believe that the expense the process generates is often disproportionate to the value of the information it yields.”); Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 263 (1992) (“In private conversations with lawyers and judges, I find precious few ready to argue that pretrial discovery involves less than considerable to enormous waste.”).

34. *E.g.*, Amelia F. Burroughs, *Mythed it Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(b)(1)*, 33 MCGEORGE L. REV. 75, 97–98 (2001); Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY. U. CHI. L.J. 629, 639 (2010); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1238 (2008); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684 (1998).

to detect,<sup>35</sup> and increases their prospects of getting paid quickly and handsomely. The general sense of both practitioners and jurists is that discovery abuse happens, and it happens a lot.<sup>36</sup> Even assuming intentional discovery abuse is rare, producer-pays still threatens distortions in every case because it removes the parties' incentives to keep discovery costs low. This moral hazard problem is reason enough to dispose of producer-pays, regardless of the frequency of intentional, bad-faith discovery abuse.<sup>37</sup>

For all these reasons, producer-pays makes for poor public policy. A system of civil litigation should strive to fully deter illegal behavior and fully compensate injured individuals. Such a system

35. See Easterbrook, *supra* note 28, at 64:

When our system of legal rules induces lawyers to make requests that are extensive but justified, and therefore cannot be called abusive, it also offers the perfect "cover" for making requests designed only to impose costs (or to impose costs excessive in relation to the gains). A judicial officer cannot separate one from the other either *ex ante* or *ex post*. Indeed, many lawyers do not know whether their own discovery requests are proper or impositional; it is almost impossible to tell one from the other, and both are in the interests of the lawyer's client.;

Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 279 (1979):

A party that is determined to abuse the judicial process can generally do so successfully. The court and the opposing party may have a pretty good idea when a party or his attorney abuses the judicial process, but their inability to prove it makes them unable to do anything about it.

36. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 n.4 (1980) ("[M]any actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for pretrial discovery."); Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 66 (1995) ("[R]esearchers who look for abuse apparently have no trouble finding it. The scholarly literature contains numerous impressions by experienced practitioners and limited data on the discovery process."); Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 183 (2013) ("Discovery abuse frequently is cited as a principle cause for escalating litigation costs and the concomitant delay in resolving lawsuits. . . . Plaintiffs and defendants accuse each other . . . while simultaneously accusing judicial officers of failing to play an active role in managing the discovery process.").

37. See Cooter & Rubinfeld, *supra* note 36, at 69 ("[C]ost-shifting eliminates the incentives for abusive discovery requests while not requiring judges to determine case-by-case whether discovery abuse has occurred."); Easterbrook, *supra* note 28, at 638:

[B]oth normal and impositional [discovery] requests may inflict on the responding party costs substantially greater than the social value of the information. They may inflict costs greater than the private value of the information . . . . From the perspective of the producing party, normal and impositional requests are hard to distinguish—and for the producing party's purposes the difference is immaterial, because they have identical effects.;

Redish, *supra* note 11, at 206–07:

[E]xcessive discovery . . . includes discovery that, while not consciously interposed for purposes of delay or harassment, nevertheless gives rise to costs greater than its benefits in finding the truth. . . . While th[e] more judicially driven practices are more likely to punish or deter *abusive* discovery, the self-executing shift in discovery cost allocation is far more likely to deter the practice of *excessive* discovery.

would minimize the cost of illegal behavior to society in the most efficient manner.<sup>38</sup> The current discovery rules, however, lead to *overdeterrence* and *overcompensation*: they require defendants to settle when they did nothing wrong, or to pay more than necessary to achieve full compensation and full deterrence. In this way, discovery serves as a kind of “litigation tax” on U.S. businesses—a tax that provides no corresponding benefits to the public.<sup>39</sup> The negative consequences of this tax extend far beyond the immediate defendants. The high cost of discovery may require businesses to raise the price of goods and services on consumers, forgo socially beneficial activities, or close up shop altogether.<sup>40</sup>

People from all walks of the legal profession agree that civil discovery in the United States is flawed.<sup>41</sup> Tellingly, discovery reform has been a target of the rulemakers’ efforts for the last thirty years.<sup>42</sup> The Supreme Court has recognized the problem too.<sup>43</sup> The high cost of

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38. See Norris, *supra* note 8, at 199; A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 878–87 (1998); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1879–82 (2002).

39. See Cooter & Rubinfeld, *supra* note 11, at 458; Fitzpatrick, *supra* note 19, at 1642–43.

40. See Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1359 (1978) (“[T]he dollar cost of [discovery in] complex commercial litigation between private parties is a societal problem” because “[i]ndirectly, as taxpayers, consumers, and shareholders, most Americans foot some portion of the bill.”); Bruce L. Hay & Kathryn E. Spier, *Settlement of Litigation*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 442, 447 (Peter Newman ed., 1998) (“[C]ertain settlements will have undesirable effects on primary behaviour. . . . [S]ettlements that are too high may discourage socially beneficial activities.”); Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1852 (2004) (“[Nuisance] settlements decrease social welfare by vexing and taxing the victimized party, encouraging the misallocation of legal resources, and diminishing public confidence in the civil liability system. Further, the prospect of such settlements distorts the ex ante incentives of potential litigants to take socially appropriate levels of precautions against risks.”); Polinsky & Shavell, *supra* note 38, at 878–79, 882 (“If damages are . . . higher than the harm, various socially undesirable consequences will result, [including businesses] tak[ing] socially excessive precautions, . . . refrain[ing] from engaging in [activities] even when the benefits exceed the harms, . . . [and] withdraw[ing their] product from the marketplace.”).

41. See, e.g., Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 520 (1998) (“In a survey of lawyers conducted in 1997 by the Federal Judicial Center, eighty-three percent of those responding thought that changes to discovery rules were required.”); Winter, *supra* note 33, at 275–76 (noting that even the critics of discovery reform “do not defend [the current system] as adequate, much less desirable” and do not attack “the general idea of reform in contrast to its proposed implementation”).

42. Redish & McNamara, *supra* note 11, at 773 & n.1 (“Over the years, numerous amendments to the Federal Rules of Civil Procedure have been promulgated in an effort to curb discovery costs . . . .” (citing the 1980, 1983, and 2003 amendments to Rule 26)).

43. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (“It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse.”); *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring) (“As the years have passed, discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice.”); *ACF Indus., Inc. v. EEOC*, 439 U.S. 1081,

discovery and its potential to coerce defendants prompted the Court's shift from notice pleading to plausibility pleading in *Bell Atlantic Corp. v. Twombly*<sup>44</sup> and *Ashcroft v. Iqbal*.<sup>45</sup> The Court recognized that "the threat of discovery expense . . . push[es] cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial]."<sup>46</sup>

### *B. Current Fee-Shifting Proposals*

Despite the broad consensus that discovery reform is needed, there are sharp disagreements about what exactly should be done. The new amendments to the Federal Rules take small measures to increase judicial supervision of the discovery process. Other commentators have suggested bolder reforms, including automatic fee-shifting mechanisms like loser-pays and requester-pays. In my view, these proposals swing the pendulum too far, are inadequate to solve the problems with discovery, or would create new problems of their own.

#### 1. The New Amendments to Rule 26: Case-by-Case Fee Shifting

In their most recent amendments, the rulemakers added language to Rule 26(c) to clarify that district courts have the power to shift discovery costs from the producing party to the requesting party.<sup>47</sup> This reform is part of the rulemakers' long-standing goal of increasing judicial supervision over discovery.<sup>48</sup> The idea is that the trial judge is in the best position to supervise the parties and ensure they do not make overly burdensome discovery requests or engage in abusive discovery practices.<sup>49</sup>

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1086 (1979) (Powell, J., joined by Stewart & Rehnquist, JJ., dissenting from the denial of certiorari) ("[T]he widespread abuse of discovery . . . is a prime cause of delay and expense in civil litigation.").

44. 550 U.S. 544 (2007).

45. 556 U.S. 662 (2009).

46. *Twombly*, 550 U.S. at 559.

47. See FED. R. CIV. P. 26(c)(1) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . : specifying terms, including time and place or *the allocation of expenses*, for the disclosure or discovery." (emphasis added)).

48. See John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 561–62 (2000) (noting that, "for at least the last forty years," the rulemakers have made "remarkably consistent calls for increased judicial control" over discovery).

49. See 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>] ("Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery . . . .").

Yet the new amendments are largely cosmetic. District courts have always had the authority to shift costs. By 1978, the Supreme Court had established that district courts have “discretion under Rule 26(c) to grant orders . . . conditioning discovery on the requesting party’s payment of the costs of discovery.”<sup>50</sup> Indeed, the rulemakers acknowledged that the new amendments merely codify authority that the district courts “already” had.<sup>51</sup> The problem with discovery, however, has never been one of authority, but rather willingness and ability.<sup>52</sup>

As the Supreme Court recognized in *Twombly*, “success of judicial supervision in checking discovery abuse has been on the modest side” and “the hope of effective judicial supervision is slim.”<sup>53</sup> For starters, discovery occurs at a relatively early stage of the litigation, before the judge knows enough about the case to determine which discovery requests are relevant, proportional, impositional, or abusive.<sup>54</sup> The Supreme Court explained this phenomenon in *Twombly*, quoting at length from Judge Easterbrook’s seminal article:

A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester’s claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define “abusive” discovery except in theory, because in practice we lack essential information.<sup>55</sup>

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50. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

51. FED. R. CIV. P. 26 advisory committee’s notes to 2015 amendment.

52. Redish, *supra* note 11, at 208 (noting that although district courts have “broad discretion . . . to ‘shift’ costs” via protective orders, “such a power is only rarely employed”).

53. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 559, 560 n.6 (2007).

54. *See* Cooter & Rubinfeld, *supra* note 11, at 458 (“Under current law, the judge must identify discovery abuse by estimating the expected value of the information to the party making the request. The judge is poorly placed for making such computations.”); Fitzpatrick, *supra* note 19, at 1643–44 (“Making wise decisions about discovery requires some assessment of how much discovery is going to cost defendants and how much value plaintiffs might reap from it; at the outset of a case, judges know almost nothing about either of these things.” (footnote omitted)); Redish & McNamara, *supra* note 11, at 803–04 (discussing judges’ “inability to distinguish abusive requests from legitimate requests”).

55. *Twombly*, 550 U.S. at 560 n.6 (quoting Easterbrook, *supra* note 28, at 638–39).

Given their inability to separate the good discovery from the bad, district judges typically err on the side of more discovery.<sup>56</sup> Indeed, district judges not only fail to recognize excessive discovery; they often fail to look for it at all. In this era of crowded dockets, district judges have no time to supervise discovery and typically delegate the task to magistrate judges.<sup>57</sup> Yet, as Judge Posner has explained, magistrate judges are “not responsible for the trial or the decision and can have only an imperfect sense of how widely the district judge would want the factual inquiry in the case to roam to enable him to decide it.”<sup>58</sup> Magistrate judges err even further on the side of more discovery.<sup>59</sup>

With respect to the new amendments to the Federal Rules, case-by-case cost shifting will likely fail for the same reason that judicial supervision has failed in general: case-by-case cost shifting will be too uncertain to change the parties’ incentives. Every district judge is different, and each judge has a different view about the propriety of cost shifting.<sup>60</sup> To determine whether cost shifting is appropriate, district courts apply a vague, multifactor balancing test that could justify almost any result.<sup>61</sup> Accordingly, the parties have no ability to predict

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56. See Winter, *supra* note 33, at 265:

Where a party objects to discovery, it will have an effect only if district and magistrate judges give the requisite scrutiny to discovery demands. This scrutiny may be no easy task because the expense and likely benefits of discovery and the importance of the proposed discovery in resolving disputed issues cannot be determined without a considerably more searching inquiry into the case than is required under present rules. Moreover, where the balance does not tip decidedly against the proposed discovery, past habit is likely to cause the court to permit it.

57. Swanson v. Citibank, N.A., 614 F.3d 400, 411 (7th Cir. 2010) (Posner, J., dissenting).

58. *Id.* at 411–12.

59. *Id.* at 411; see also Easterbrook, *supra* note 28, at 639:

One common form of unnecessary discovery (and therefore a ready source of threatened discovery) is delving into ten issues when one will be dispositive. A magistrate lacks the authority to carve off the nine unnecessary issues; for all the magistrate knows, the judge may want evidence on any one of them. So the magistrate stands back and lets the parties have at it.

60. Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 912–13 (2009).

61. See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003) (setting forth a seven-factor test for shifting the costs of e-discovery); see also Easterbrook, *supra* note 28, at 640–41:

Many complex [discovery] disputes are governed not by rules but by standards—amorphous agglomerations of ‘factors’ that must be ‘balanced,’ usually without any way to reduce the factors to a common metric or attach weights to them when they conflict, as they invariably do. . . . When there is no rule of decision but only an injunction to consider everything that turns out to matter, lawyers and clients cannot tell in advance—that is, when planning conduct and conducting litigation—what the judge or jury will think matters.;

the likelihood of cost shifting in advance. If anything, they should expect little cost shifting. According to the rulemakers, the new amendments to Rule 26(c) “do[ ] not imply that cost shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”<sup>62</sup>

Not only is this case-by-case approach uncertain, it is expensive. The parties must fight over whether this case is the one where the requester should pay some or all of the discovery expenses. Then they must fight over how much of those discovery expenses the requester should pay. District judges and their magistrates will be the ones tasked with adjudicating these fights. This sort of litigation over litigation is one of the worst wastes of social resources.<sup>63</sup>

Instead of relying on judges to police abusive discovery practices, discovery reform should change the parties’ incentives to engage in those practices in the first place.<sup>64</sup> The “invisible hand” of incentives is a more effective and efficient method of regulation than asking district judges to police a phase of litigation that they have no willingness, time, or ability to supervise. Fee shifting is one way to change litigants’

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*accord* Redish & McNamara, *supra* note 11, at 821. *See generally* Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (“[Balancing tests are] like judging whether a particular line is longer than a particular rock is heavy.”).

62. FED. R. CIV. P. 26 advisory committee’s notes to 2015 amendment.

63. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 51 (1991) (“[E]xtensive and needless satellite litigation . . . is contrary to the aim of the Rules themselves.”); ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 19, 40 (1984) (explaining that “satellite proceedings” entail “more work for judges, which arguably may completely chew up the efficiencies and the economies that the[ ] rules might have produced”).

64. *See* Easterbrook, *supra* note 28, at 643 (“Relief comes from dealing with the causes. Lawyers respond to the incentives the legal system gives them. Change these incentives, and you change lawyers’ conduct. Leave them alone, and efforts to deal with their consequences are doomed.”); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 334 (1986) (“The fundamental weakness in managerial judging is its ad hoc, flexible character. The basic premise for managerial judging is that the effects of incentives for socially inappropriate behavior in litigation can be overcome by designing counteracting incentives on a case-by-case basis.”); Maurice Rosenberg, *The Federal Rules After Half a Century*, 36 ME. L. REV. 243, 248 (1984) (“Rather than . . . threats of sanctions and penalties, a modern procedural system should try to develop incentives and rewards of positive kinds . . . . The incentive approach is not only more pleasant, it is more efficient, for it does not require enforcement activities, satellite litigation, or other extra steps.”).

incentives,<sup>65</sup> but it must be *automatic* in order to have the desired effect.<sup>66</sup>

## 2. Requester-Pays

The rulemakers recently considered a more ambitious proposal for discovery reform: requester-pays. Requester-pays would reverse the current presumption of producer-pays. The party who submits a discovery request would be required to pay for the costs of producing the requested information.<sup>67</sup>

Requester-pays would eliminate the incentives problem created by producer-pays. Under producer-pays, a discovery request has two benefits for plaintiffs: (1) it produces information that can help the plaintiff's case, and (2) it imposes costs on the defendant, making him more likely to settle on favorable terms. Even if a discovery request would not serve the first goal, it is still worthwhile if it serves the second. Under requester-pays, however, discovery requests no longer impose costs on the defendant because the plaintiff must foot the bill. The plaintiff will not ask for discovery unless the desired information would actually benefit her case—i.e., if it would serve the first goal. Indeed, the plaintiff will not ask for discovery unless the expected benefit of the desired information *outweighs* the expected cost of producing it.<sup>68</sup> In this way, requester-pays encourages plaintiffs to narrowly tailor their discovery requests.<sup>69</sup> And it eliminates their power

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65. Easterbrook, *supra* note 28, at 645 (“[R]equiring the loser to pay the winner’s legal fees and costs would do a great deal to cut off the attractiveness of unnecessary discovery requests,” which “depend[ ] on asymmetric stakes”); Fitzpatrick, *supra* note 19, at 1645 (“Fee-shifting rules are attractive because they take the decision to pursue discovery away from judges and give it to plaintiffs who would have every reason to weigh carefully the expected costs and benefits as they would be paying the costs for those benefits.”).

66. Easterbrook, *supra* note 28, at 645; Norris, *supra* note 8, at 206; Redish & McNamara, *supra* note 11, at 821; *see also* E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487, 511 (1989) (“To perform effectively as an *ex ante* incentive, a rule must be announced in advance so that litigants can consider it in formulating their strategies. The rule must also present a credible threat of an unacceptable consequence.”); Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 880 (2012) (“[A]bsent a provision in the Federal Rules expressly dictating that presumptively the costs of discovery are to be imposed on the requesting party, it appears clear that as a general matter courts will fail to allocate discovery costs in this manner.”).

67. *See, e.g., The Un-American Rule*, *supra* note 4, at 1 (“LCJ proposes that the Rules be amended to require that each party pay the costs of the discovery it seeks.”).

68. Cooter & Rubinfeld, *supra* note 11, at 450–54; Fitzpatrick, *supra* note 19, at 1645; Kobayashi, *supra* note 11, at 1495.

69. Cooter & Rubinfeld, *supra* note 11, at 450; Cooter & Rubinfeld, *supra* note 36, at 69–70; Fitzpatrick, *supra* note 19, at 1645; Redish & McNamara, *supra* note 11, at 804.

to threaten defendants with costly discovery in order to extract a favorable settlement.<sup>70</sup>

Although requester-pays would solve the distortions created by producer-pays, it would introduce a distortion of its own. The current rule of producer-pays makes litigation cheaper for plaintiffs: it forces the party with more discoverable information to pay most of the costs of discovery. That party is often a resource-rich corporate defendant. Requester-pays would eliminate this subsidy and impose an additional expense on plaintiffs that does not currently exist. Because plaintiffs' litigation expenses are higher under requester-pays than under producer-pays, requester-pays will deter some meritorious suits that producer-pays now permits. Indeed, under requester-pays, there are suits with a one hundred percent chance of success that will never be filed, even though they would have been filed under producer-pays: suits where the plaintiff's expected damages are less than her expected litigation expenses.<sup>71</sup>

As explained earlier, the goal of any civil litigation system should be full deterrence and full compensation. Producer-pays facilitates overdeterrence and overcompensation by increasing discovery costs and forcing defendants to pay too much in settlement. Requester-pays creates the opposite problem: it raises plaintiffs' price of admission to court, causing some meritorious cases to never be filed at all. As a result, defendants could be *underdeterred* and plaintiffs could be *undercompensated*.<sup>72</sup>

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70. Cooter & Rubinfeld, *supra* note 11, at 452–53; *see also* Amy Farmer & Paul Pecorino, *A Reputation for Being a Nuisance: Frivolous Lawsuits and Fee Shifting in a Repeated Play Game*, 18 INT'L REV. L. & ECON. 147, 156 (1998) (“[F]ee shifting is highly effective in reducing the number of lawyers engaged in nuisance suits. Increased fee shifting lowers the amount of money the plaintiff can extract from the defendant, and raises the costs to an attorney of maintaining a reputation for pursuing such cases to trial.”).

71. *See* Spencer, *supra* note 6, at 802 (“[T]here is a degree of discovery expense that . . . could be sufficiently large to discourage the bringing of some number of claims. . . . [T]he impact would be the deterrence of . . . legitimate claims, particularly those that might have negative value (meaning the potential recovery is outweighed by the expense of pursuing the claim.”); Richard A. Nagareda, *1938 All Over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 686 (2011) (“[O]ne should expect the addition of a contingent possibility of a discovery cost shift against the plaintiff to have the predictable effect, at the margin, of discouraging suit.”).

72. Fitzpatrick, *supra* note 19, at 1645; *see also* Cooter & Rubinfeld, *supra* note 11, at 456 (“[A] rule that shifts all discovery costs . . . will impose much larger costs on the plaintiff than the defendant. Consequently, the rational settlement will be less than the expected judgment, thus favoring the defendant.”); Spencer, *supra* note 6, at 802:

[T]o the extent valid claims would be deterred, under-enforcement would result. This means that a larger number of law-violators would go unpunished and thus undeterred, undermining the specific and general deterrence goals of civil litigation. The remedial goals of litigation would also be underserved, as actual victims would not obtain compensation for wrongs simply because the costs of seeking vindication were too high.

## 3. Loser-Pays

Proponents of tort reform have long advocated wholesale abandonment of the American Rule in favor of the English Rule practiced in other countries.<sup>73</sup> Under the English Rule, the losing party must pay her own litigation expenses *and* the litigation expenses of the prevailing party.<sup>74</sup> Accordingly, the English Rule (or loser-pays) discourages plaintiffs from filing unmeritorious suits by raising the cost of losing, and encourages plaintiffs to file meritorious suits by maximizing the benefits of winning.<sup>75</sup>

But the English Rule has a major downside. Both empirical evidence and theoretical models suggest that loser-pays *increases* the overall cost of litigation. For example, in 1980, Florida enacted a loser-pays rule for medical malpractice litigation. While that rule was in effect, the amount that defendants spent on litigation expenses increased more than one hundred percent.<sup>76</sup> Unsurprisingly, the same defense interests that lobbied for the loser-pays rule quickly convinced the Florida legislature to repeal it.<sup>77</sup>

Florida's experience matches theoretical predictions. Generally speaking, a litigant's odds of success increase as she spends more on the litigation (e.g., better attorneys, more expert witnesses, more evidence).<sup>78</sup> Under the American Rule, a litigant must bear all these expenses herself. Under the English Rule, by contrast, a litigant can discount her litigation expenses by the odds that she prevails at trial; if she wins, the other side must cover her expenses.<sup>79</sup> Accordingly, loser-

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73. See Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315, 1327 (2004) (“[T]he tort reform movement has fairly consistently advocated abandonment of the American rule in favor of a loser-pays rule.”); see also, e.g., Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 317 (1998) (“Bills to implement the Contract with America, on which the House Republicans had fought and won the 1994 election, included major proposals for replacing the ‘American rule’ in some types of federal-court civil litigation.”).

74. James R. Maxeiner, *The American “Rule”: Assuring the Lion His Share*, in COST AND FEE ALLOCATION IN CIVIL PROCEDURE 288, 288 (Mathias Reimann ed., 2011); see, e.g., CPR 44.2(2) (U.K.) (“If the court decides to make an order about costs . . . the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party . . .”).

75. Steven A. Shavell, *Suit, Settlement, and Trial*, 11 J. LEGAL STUD. 55, 59–60 (1982); Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 866–67 (2015).

76. Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, J.L. ECON. & ORG. 345, 374 (1990).

77. Avery Wiener Katz & Chris William Sanchirico, *Fee Shifting in Litigation: Survey and Assessment* 30 (Univ. of Pa. Inst. for Law & Econ. Research Paper No. 10-30, 2010), <http://ssrn.com/abstract=1714089> [<https://perma.cc/V9AL-AM5X>].

78. David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEGAL ANALYSIS 305, 317 (2014).

79. See SHAVELL, *supra* note 14, at 431:

pays encourages litigants to spend more on the litigation than they would under the American Rule.<sup>80</sup>

Litigation generally, and discovery particularly, are already too expensive. Discovery reform should strive to *decrease* litigation expenses, not increase them. Replacing producer-pays with loser-pays is undesirable because it could trade one costly rule for another.<sup>81</sup>

## II. A BETTER WAY

The current proposals for discovery reform are unsatisfactory. Ad hoc supervision by trial judges and multifactor balancing tests are too uncertain to shape the parties' incentives *ex ante*. Mandatory fee shifting provides the most promising route for discovery reform. Nevertheless, the two most common fee-shifting proposals—requester-pays and loser-pays—are problematic. Although they would eliminate discovery abuse, they would also create new problems by decreasing plaintiffs' access to court or by increasing the overall cost of litigation. I therefore propose a middle-ground approach: a mandatory fee-shifting rule that shifts discovery costs to plaintiffs who lose at summary judgment.

### *A. One-Way Fee Shifting After Summary Judgment*

My proposed rule can be stated succinctly: if the plaintiff's entire case is dismissed at summary judgment, she must pay the difference between the defendant's discovery expenses and her own.<sup>82</sup>

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[F]ee-shifting means that a party will not necessarily have to pay the bill for legal services that he orders, making legal services effectively cheaper. If the plaintiff has a lawyer spend \$1,000 more of time and expects to win with a probability of about seventy percent, the odds that he will have to pay for the extra \$1,000 of services are only thirty percent, so their effective cost to him is only \$300.;

Nagareda, *supra* note 71, at 686:

[C]ost-shifting approaches tend toward an escalation of expenditures on both sides. Specifically, each side stands to bear its own expenditures, discounted by the probability that a cost shift might later occur. In effect, each side stands to garner one dollar of benefit from litigation expenditure for less than one dollar in expected cost.

80. Ronald Braeutigam et al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 L. & CONTEMP. PROBS. 173, 181–82 (1984); Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J.L. ECON. & ORG. 143, 169 (1987); Nagareda, *supra* note 71, at 686; Tidmarsh, *supra* note 75, at 866–87.

81. See Nagareda, *supra* note 71, at 686 (explaining that the problems associated with loser-pays would also apply to a loser-pays rule for discovery).

82. A variant of my proposal was proposed by Professor Donald Elliot years ago. See Easterbrook, *supra* note 28, at 646:

Professor Elliott's variant is that after the commencement of the litigation, each side may tender to the other all documents (and other evidence) it believes is relevant to the

In practice, my rule would work like this. Litigation would begin as it always has. The plaintiff would file a complaint; the defendant would file a motion to dismiss or answer; and, if the complaint survived the motion to dismiss, the parties would proceed to discovery. Discovery also would proceed as it always has. One party would request information, and the other party would respond and cover its own costs of responding. Moreover, if the plaintiff voluntarily dismissed her complaint before summary judgment, or if one of her claims survived summary judgment, nothing would change. Both parties would pay their own litigation expenses, and the traditional producer-pays rule would apply. But my rule would impose one major change: if the plaintiff's entire case is dismissed at summary judgment, she would pay the difference between the defendant's discovery expenses and her own discovery expenses.

My proposal is something of a hybrid between loser-pays and requester-pays. It departs from the traditional loser-pays rule in two respects. First, my proposal shifts *discovery* costs to the losing party, whereas the English Rule shifts *all* litigation expenses to the losing party. The distortion created by the current discovery rules is mostly due to the asymmetric amount of information that defendants possess. I am frankly unsure whether similar cost asymmetries exist with regard to other aspects of litigation (e.g., drafting motions, conducting oral advocacy, preparing for trial). Because the problem at hand is specific to discovery,<sup>83</sup> my proposal shifts discovery expenses, not all litigation expenses, and it shifts them when discovery is completed—after summary judgment.

Second, the traditional English Rule requires every losing party—plaintiff or defendant—to pay the other side's expenses, but my proposal only requires losing *plaintiffs* to pay the defendant's discovery costs. In other words, fee shifting under the English Rule is two-way, but fee shifting under my rule is one-way. One-way fee shifting is preferable because it lessens the English Rule's propensity to raise the overall cost of litigation. As explained, parties operating under loser-pays can discount their litigation expenses by their odds of winning,

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case. A litigant believing that information has been withheld may obtain compulsory discovery, but if it loses, must pay fully for the privilege.

83. Cf. Redish & McNamara, *supra* note 11, at 779:

[D]iscovery costs are conceptually, economically, and morally distinct from attorney's fees and other costs a defendant incurs in association with the litigation process. A party—even a defendant—fully controls the extent of its expenditures on legal fees, and all benefits deriving from those expenditures, legally or strategically, inure to that party. . . . By contrast, the extent of a party's discovery costs are determined not by the litigant himself but by the scope and content of the request filed by his opponent, and none of those expenditures benefits the producing party's own case.

which encourages both parties to spend more. One-way fee shifting, by contrast, reduces this dynamic by eliminating the discount for one side.<sup>84</sup>

My proposal also departs from the requester-pays proposal that the rulemakers have considered. Requester-pays would apply automatically in every case: the plaintiff would always pay for the cost of responding to her discovery requests. My proposal, by contrast, forces a plaintiff to pay the defendant's discovery costs only if she *loses* at summary judgment. In other words, my proposal is losing-requester-pays, not requester-pays.

For this reason, my proposal captures only some of the gains of requester-pays. Under requester-pays, plaintiffs have no incentive to request discovery unless they believe it will be more valuable than the cost of production. My rule is not quite so strong because plaintiffs would not have to repay the defendants' discovery expenses unless they lose at summary judgment. Thus, plaintiffs will discount the cost of production by the probability they will win at summary judgment; this means plaintiffs will make some discovery requests where the benefits to the plaintiffs' case do not exceed the costs of production. My rule also does not completely eliminate plaintiffs' incentives to run up discovery costs on the defendant irrespective of the discovery's benefit to the plaintiff's case. Because my proposal requires the plaintiff's entire case to lose at summary judgment before costs are shifted, if the plaintiff is certain she will prevail at summary judgment on at least one claim, she has every incentive to run up the defendant's costs (though, no more incentive than under the current producer-pays rule).

But my rule also does not impose the same costs as requester-pays. Under requester-pays, defendants have every incentive to respond extravagantly to discovery requests because plaintiffs have to pay them back. Under my proposal, this incentive is mitigated, since in many cases there is some chance that the defendant will lose at summary judgment. Moreover, my proposal should lessen the access-to-justice problems associated with requester-pays. In particular, the price of admission for plaintiffs would not rise as much under my proposal as under requester-pays. Under requester-pays, that price includes the defendant's full costs of producing discovery; under my proposal, that price includes those production costs discounted by the probability that the plaintiff will prevail at summary judgment. In other words, requester-pays increases the price of admission for *all*

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84. Norris, *supra* note 8, at 205.

plaintiffs, but my proposal does so only for plaintiffs with *weak* claims.<sup>85</sup> The stronger the merits of the plaintiff's suit, the more my proposal looks like producer-pays. The weaker the merits of the plaintiff's suit, the more my proposal looks like requester-pays. Of course, the plaintiff often does not know at the outset whether her claim is weak or strong. Nonetheless, my proposal strikes a more reasonable balance between the interests of plaintiffs and defendants than a pure requester-pays rule or a pure producer-pays rule.

Two additional features of my proposal warrant unpacking.<sup>86</sup> First, my rule would shift only the *difference* between the defendant's discovery expenses and the plaintiff's discovery expenses to the losing plaintiff, rather than all of the defendant's discovery expenses. Again, the problem is the defendant who possesses an asymmetrically greater amount of discoverable information than the plaintiff; it is in these cases where litigation costs can lead to overdeterrence. This is so because the mutually beneficial settlement range in these cases is no longer centered over the merits value of the case. Return to my earlier example: If the expected value of a case at trial is \$50,000, and Plaintiff and Defendant both have litigation expenses of \$20,000, the mutually beneficial settlement range is \$30,000 to \$70,000. The parties should, on average, reach settlement in the middle of that range, at or near the merits value of the case. But if the Defendant's litigation expenses are instead \$40,000, the settlement range is now \$30,000 to \$90,000; the middle of that range is \$60,000—above the merits value of the case. By shifting only the difference in discovery expenses, my proposal homes in on the cases that pose the greatest social costs.

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85. See Albert H. Choi, *Fee-Shifting and Shareholder Litigation*, 104 VA. L. REV. 59, 64 (2018) (“[I]f [the plaintiff] has a nonmeritorious or even a frivolous claim . . . under [requester-pays], she knows that . . . she also will likely have to reimburse the defendant's litigation expenses. This makes her less likely to file or proceed with the claim, compared to the standard regime.”); Easterbrook, *supra* note 28, at 647:

The paradigm impositional discovery request comes from a party thinking it has a relatively small chance of prevailing . . . but wanting to convey the message: ‘This suit will cost you \$1 million whether I win or not; we can split that in settlement.’ Such tactics are unambiguously discouraged by a loser-pays rule. The target of this request has only to say no, and the demand will stand revealed as a bluff. . . . The loser-pays rule, therefore, is likely to discourage exactly the kind of demand that should be discouraged, while being neutral toward . . . discovery by parties with superior legal claims.;

Mark Liang & Brian Berliner, *Fee Shifting in Patent Litigation*, 18 VA. J.L. & TECH. 59, 136 (2013) (“[U]sing fee shifting selectively to sanction parties who bring objectively weak cases may effectively weed out the weak cases while maintaining a fair playing field for parties who bring meritorious cases.”).

86. One question I do not resolve here is whether my proposal should apply to suits filed by the government. My proposal is largely a response to the dysfunctional incentives of plaintiffs, but one could argue that, because the government is not profit motivated, it is less likely to engage in dysfunctional behavior. So there might be little need for my proposal in government cases.

Second, my proposal would shift the defendant's discovery costs only when the plaintiff's *entire case* is dismissed at summary judgment. If the plaintiff brings ten claims and nine are dismissed at summary judgment, no fee shifting would occur. A complaint with at least one meritorious claim is not something that the legal system should discourage; it means the defendant likely did something illegal, and the plaintiff's suit will thus further the goals of deterrence and compensation.<sup>87</sup> One alternative would be to permit a district court that awarded partial summary judgment to impose partial fee shifting on the plaintiff, but I expect it would be difficult to attribute particular discovery costs to particular claims. And attempting to do so would require satellite litigation over which costs are attributable to which claims. My proposal, which requires an entry of complete summary judgment, is easy to apply and avoids such disputes.

### *B. Potential Criticisms*

No reform is perfect, and my proposal has potential downsides as well. Ultimately, however, the downsides compare favorably to other proposals for discovery reform.

To begin with, my proposal is a modified version of requester-pays and is thus subject to some of the same criticisms—though, as explained, to a lesser extent. For example, although requester-pays would fix the incentives problem created by producer-pays, it would also create bad incentives of its own. Under requester-pays, the producing party is tempted to drive up his *own* discovery costs because doing so makes litigation more expensive for the requesting party<sup>88</sup> (and makes her more likely to settle on favorable terms). As explained above, my proposal is not as vulnerable to this criticism as requester-pays.<sup>89</sup> My rule would shift the defendant's discovery costs only if the plaintiff *loses* at summary judgment. Thus, a defendant should not run up his own discovery costs as much as under requester-pays because if at least one of the plaintiffs' claims survives summary judgment, the defendant must cover his (now inflated) costs. Moreover, under my proposal, if the

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87. See Norris, *supra* note 8, at 205 n.159 (“[I]f a plaintiff files a lawsuit and demonstrates that the defendant violated [the] law in at least one way, this seems like something that the legal system should reward.”).

88. Fitzpatrick, *supra* note 19, at 1645; Norris, *supra* note 8, at 205; see also Cooter & Rubinfeld, *supra* note 11, at 454 (“With a cost-shifting rule, a party might discourage discovery requests by inflating the costs of complying with them. For example, the defendant who is subject to discovery might hire a more expensive lawyer or waste time gathering documents.”); Liang & Berliner, *supra* note 85, at 100 (noting that defendants have this incentive with one-way fee shifting as well).

89. See *supra* Section II.A.

defendant begins running up his own discovery costs, the plaintiff can voluntarily dismiss the complaint prior to summary judgment and stick the defendant with his (now inflated) discovery bill. Voluntary dismissal should serve as a checkmate on defendants' incentive to drive up their own discovery costs. Finally, I am not sure how big of a problem this is to begin with. The requesting party has a key tool to prevent the producing party from driving up his discovery costs: the power to frame the discovery request. Because the requesting party decides what to ask for, she can decline to ask for certain information or narrowly tailor her discovery requests to keep costs down. Her power to control the scope of discovery is a powerful check on the producing party's ability to inflate his own discovery costs.<sup>90</sup>

Critics of requester-pays also argue that it would decrease plaintiffs' access to court by raising the price of admission. As explained above, this criticism has some merit, but my proposal does not increase that price nearly as much as requester-pays. Moreover, the countries that employ the loser-pays approach, of which my rule is something of a variant, have created solutions to facilitate plaintiffs' access to the courts. In Europe, for example, plaintiffs with uncertain claims can purchase "after-the-event" insurance to help cover the risk of losing their case and being forced to pay the defendant's litigation expenses.<sup>91</sup> A similar market could develop in the United States. In fact, the current growth of third-party litigation financing is already paving the way.<sup>92</sup>

I recognize my proposal has something of an "optics" problem. My rule relies on *one-way* fee shifting and places a burden on *plaintiffs* only. In this regard, requester-pays and loser-pays have a virtue that my proposal lacks: they apply to all parties equally. Yet, symmetry is not a virtue in and of itself.<sup>93</sup> The United States Code is replete with one-way fee-shifting statutes that impose burdens on only one side of the "v."<sup>94</sup> Granted, most of those statutes inure to the benefit of

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90. See Redish, *supra* note 11, at 208 ("[I]t is the discovering party who sets the contours of the response by the scope of its inquiries or production requests. In an important sense, then, the outer limits of the costs that the responding party will incur are set out by the requesting party.").

91. Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 380–81 n.26 (2009); Nagareda, *supra* note 71, at 686.

92. See generally Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343 (2011).

93. See Norris, *supra* note 8, at 206 ("It is hard to see why a general concern with treating plaintiffs and defendants differently should matter when there are good policy-based reasons for doing so."). See generally Stancil, *supra* note 22.

94. Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 720–21 (1995).

plaintiffs.<sup>95</sup> But some inure to the benefit of defendants.<sup>96</sup> And both types of statutes demonstrate that asymmetric solutions are appropriate when litigation imposes asymmetric burdens. As I have explained already, discovery is one such situation: it imposes asymmetric burdens on many defendants and therefore calls for an asymmetric solution. Not to mention my proposal is more plaintiff friendly than requester-pays and should thus receive more support from the plaintiffs' bar than that proposal.

There is one final potential criticism, but it is one that might come from the defense bar rather than the plaintiffs'. Might my automatic fee-shifting rule increase the likelihood that judges *deny* summary judgment to defendants in order to save plaintiffs from fee shifting? Might this be even worse from the defense perspective than the current regime? This criticism gives me some pause; it would not be socially beneficial if judges unnecessarily prolong litigation. But, ultimately, I doubt it is cause for concern. Judges who avoid fee shifting by erroneously denying summary judgment only create more work for themselves. Instead of clearing a case off their crowded docket, these judges would be *adding a trial*. Trials are particularly taxing on district courts' time.<sup>97</sup> I suspect that judges' self-interest in avoiding unnecessary work will trump their concerns about fee shifting.<sup>98</sup> Indeed, a judge who wants to spare a plaintiff from fee shifting would do her few favors by pushing her to trial—itsself a costly undertaking.<sup>99</sup>

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95. *Id.*; see also Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 CHI.-KENT L. REV. 547, 553 (1995) ("[O]ne-way, pro-plaintiff statutes . . . make up 52.5 percent of fee-shifting laws, compared to 7.9 percent one-way, pro-defendant statutes . . .").

96. See Spencer, *supra* note 6, at 775 n.18 (citing 42 U.S.C. §§ 1988(b), 11113).

97. See Peter B. Knapp, *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, 20 WM. MITCHELL L. REV. 1, 5 (1994) ("[W]e do not have enough judges, courtrooms, or days in the week to try even half of the civil suits filed. . . . [C]omplicated civil trials can consume enormous amounts of a judge's time and can be expensive for the parties.").

98. See Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (1994):

[J]udges [are] more likely to further their own self-interest by pursuing nonmonetary interests such as increasing leisure (reduction in workload) . . . and reputation within the legal community. This observation is consistent with Richard Posner's view that "judges, like other people, seek to maximize a utility function that includes both monetary and nonmonetary elements (the latter including leisure, prestige, and power)."

(citation omitted).

99. Knapp, *supra* note 97, at 5.

### C. Legal Authority

How could my proposed rule be enacted? A congressional statute would obviously do the trick.<sup>100</sup> Although it is a close question—and others have expressed skepticism on this point<sup>101</sup>—there are plausible arguments that my proposal could be enacted as an amendment to the Federal Rules of Civil Procedure.

At bottom, my rule would partially overrule the presumption of producer-pays. That presumption, according to the Supreme Court, is rooted in “the discovery rules.”<sup>102</sup> Although no rule expressly assigns discovery costs to a particular party, producer-pays is implicit: it is inferred from the fact that the Federal Rules protect *producing* parties from undue burden and expense.<sup>103</sup> But if producer-pays is a creature of the Federal Rules—one that lurks in the shadows, at that—then the rulemakers presumably have the authority to alter it by amending the rules themselves.

Arguably, my proposal does more than partially overrule producer-pays; it also departs from the American Rule by shifting discovery fees and costs to a losing party. Under the Rules Enabling Act, a federal rule of procedure cannot “abridge, enlarge or modify any substantive right,”<sup>104</sup> and the Supreme Court has suggested that loser-pays rules are substantive. In *Alyeska Pipeline Service Co. v. Wilderness Society*, for example, the Court suggested that a state law “denying the

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100. See Jon Kyl & E. Donald Elliott, *Comment to the Advisory Committee on Civil Rules Proposed Amendments to Rule 26 Federal Rules of Civil Procedure*, LAW. FOR CIV. JUST. 7 (2014) [http://www.lfcj.com/uploads/3/8/0/5/38050985/kyl\\_and\\_elliott\\_joint\\_comments.pdf](http://www.lfcj.com/uploads/3/8/0/5/38050985/kyl_and_elliott_joint_comments.pdf) [<https://perma.cc/7EC8-9TJ5>] (“Congress has generally deferred to the experts in the rules committee; but, if problems become too widespread and are not being dealt with by the judges, the Congress could step in . . . .”); see, e.g., Patent Abuse Reduction Act of 2013, S. 1013, 113th Cong. § 4(b)(3)(B)(i) (2013) (requiring plaintiffs seeking “additional discovery” in patent litigation to “bear[] the costs of the additional discovery, including reasonable attorney’s fees”).

101. See Fitzpatrick, *supra* note 19, at 1646 (“[I]t would no doubt take an Act of Congress to institute a pervasive fee-shifting regime for discovery costs.”).

102. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

103. See Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 520 (2013):

If you carefully read the discovery rules, you will not find any express language regarding which party—the requesting party or the producing party—should bear the cost of searching for; reviewing for relevance, privilege, and work-product protection; and producing the information asked for in discovery. Implicitly, however, the rules establish a presumption that this burden and expense falls upon the responding or producing party. . . . [I]f the requesting party were required to pay for the costs associated with discovery under a “user-pays” system, the rules would not need to have so many provisions designed to provide the means for courts to issue orders preventing excessive and disproportionate burden and expense to the producing party.

(citations omitted).

104. 28 U.S.C. § 2072(b) (2012).

right to attorney’s fees or giving a right thereto” reflects “a substantial policy of the state” and “should be followed” in federal diversity cases.<sup>105</sup> My rule therefore might present a problem under the Rules Enabling Act.

Yet my proposal is not like the fee-shifting statutes that the Supreme Court discussed in *Alyeska Pipeline*. As the Supreme Court later explained, *Alyeska Pipeline* was discussing fee-shifting statutes that “permit[ ] a prevailing party in *certain classes* of litigation to recover fees.”<sup>106</sup> Such statutes are “substantive” because they reflect a “public policy choice[ ]” that “vindication of the rights afforded by a *particular statute* is important enough to warrant the award of fees.”<sup>107</sup> My rule, by contrast, would apply in every case and would be neutral with respect to the nature of the plaintiff’s claim. In this sense, it is more procedural than substantive. Moreover, unlike traditional fee-shifting statutes, my proposal would not shift “the entire cost of litigation.”<sup>108</sup> It would shift “only the cost of a discrete event”—namely, discovery.<sup>109</sup> In this way, my rule is like other fee-shifting provisions in the Federal Rules—Rule 11<sup>110</sup> and Rule 68,<sup>111</sup> for example—that shift costs only in certain circumstances.<sup>112</sup> Of course, my rule would *affect* substantive rights: it would discourage some claims from being filed at all. But everything affects substantive rights in one way or another, including the current discovery rules. My proposal does not discourage the filing of some claims by plaintiffs any more than the current discovery rules discourage the defending of some claims by defendants.<sup>113</sup>

For all these reasons, it is at least plausible that my proposal could be adopted as an amendment to the Federal Rules of Civil Procedure. Notably, the Supreme Court has never invalidated a Federal Rule under the Rules Enabling Act.<sup>114</sup>

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105. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 259 n.31 (1975).

106. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 52 (1991) (emphasis added).

107. *Id.* (emphasis added).

108. *Bus. Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 553 (1991).

109. *Id.*

110. FED. R. CIV. P. 11(c) (imposing sanctions for asserting frivolous claims or defenses).

111. FED. R. CIV. P. 68(d) (requiring party to pay costs if he rejects an offer to settle that is more favorable than the ultimate judgment).

112. *See Bus. Guides*, 498 U.S. at 553 (holding that Rule 11 does not violate the Rules Enabling Act); *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 726 F.3d 403, 409 (3d Cir. 2013) (holding that Rule 68 does not violate the Rules Enabling Act).

113. *See Redish*, *supra* note 11, at 821.

114. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (“[W]e have rejected every statutory challenge to a Federal Rule that has come before us.”).

## CONCLUSION

No matter how it is adopted, I believe my proposal is the best solution to the well-known problems with federal civil discovery. The new amendments to the Federal Rules of Civil Procedure tiptoe in the right direction, but I am pessimistic that a mere reminder to the district courts about their authority to shift discovery costs will change much of anything. As long as the presumption of producer-pays remains intact, discovery costs will continue to increase and defendants will continue to overpay in settlement. Litigants' *incentives* must change. A rule that shifts the difference between the defendant's and the plaintiff's discovery expenses when the plaintiff loses at summary judgment is the best way to fix civil discovery. My proposal would require plaintiffs to internalize more of the cost of discovery, reducing the bad incentives created by producer-pays. It would also avoid the access-to-justice and cost-containment problems associated with requester-pays and loser-pays. My proposal is a middle-ground approach that should be attractive to all but the most ardent defenders of the discovery status quo.