

University of Virginia School of Law

Public Law & Legal Theory 2015-6

January 2015



Rationalizing Cost Allocation in Civil Discovery

by

A. Benjamin Spencer

University of Virginia School of Law

This paper may be downloaded without charge from the Social Science Research Network Electronic Paper
Collection: <http://ssrn.com/abstract=2557613>

A complete index of University of Virginia School of Law research papers is available at:
Law and Economics: <http://www.ssrn.com/link/U-Virginia-LEC.html> Public Law and Legal Theory:
<http://www.ssrn.com/link/U-Virginia-PUB.html>

Rationalizing Cost Allocation In Civil Discovery

A. Benjamin Spencer*

INTRODUCTION	2
I. THE EXISTING DISCOVERY COST-ALLOCATION LANDSCAPE	4
A. <i>The “American Rule”</i>	4
B. <i>The Discovery Cost-Allocation Experience under the American Rule</i>	8
II. REVERSING THE PRESUMPTION: SHOULD REQUESTERS HAVE TO PAY?.....	11
A. <i>Constitutional Considerations</i>	11
B. <i>Policy Considerations</i>	24
III. RATIONALIZING OUR APPROACH TO COST ALLOCATION	29
A. <i>Judicial pre-screening of discovery requests</i>	30
B. <i>Loser-Pays Cost-Shifting</i>	31
C. <i>Better Case Management</i>	34
CONCLUSION.....	35

* Earle K. Shawe Professor of Law, University of Virginia School of Law. Copyright © 2015 A. Benjamin Spencer.

INTRODUCTION

*“Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional”*¹

A movement is afoot to revise the longstanding presumption that in civil litigation, the producing party bears the cost of production in response to discovery requests. A proposed amendment to Rule 26(c)—slated to take effect in December 2015—makes explicit the authority of courts to issue protective orders that shift discovery costs away from producing parties.² But this authority is not new;³ what is new is what may be coming next—an undoing of the producer-pays presumption itself. Thus far, the sentiment to move in this direction has been slightly below the radar, advocated by pro-business interest groups and advocates before the Advisory Committee on Civil Rules in letters urging them to place this issue on its agenda. A letter from the U.S. Chamber of Commerce is representative:

We also suggest that as the Committee contemplates proposals in the future, it should consider amendments that address the root cause of our broken discovery system: the rule that the producing party bears the cost of production. This system, under which a plaintiff can propound broad and costly discovery requests on a defendant before there is any finding of liability, not only encourages unwieldy and costly discovery requests, but also runs afoul of a defendant’s fundamental right to due process. As a result, the Committee should consider, over the longer term, an amendment requiring each party to pay the costs of the discovery it requests, subject to adjustments by the court.⁴

The topic was treated even more extensively in a letter addressed to the Judicial Conference Committee on Rules of Practice and Procedure (the “Standing Committee”) from John H. Beisner, a partner at Skadden who

¹ Legal Tender Cases, 79 U.S. 457 (1870).

² See Proposed Amendment to Rule 26(c), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf> (“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 one or more of the following: . . . (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery.”).

³ See Committee Note, Proposed Amendment to Rule 26(c) (“Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority.”). See also, e.g., CBT Flint Partners, LLC v. Return Path, Inc., 737 F.3d 1320, 1338 (Fed. Cir. 2013) (“Rule 26(b)(2)(B) limits discovery on electronically stored information from sources not ‘reasonably accessible,’ and provides the court discretion to order discovery and specify cost-shifting to obtain that discovery.”); Spears v. City of Indianapolis, 74 F.3d 153, 158 (7th Cir. 1996) (noting that even absent a party’s bad faith, Federal Rule of Civil Procedure 26 grants of “considerable discretion in determining whether expense-shifting in discovery production is appropriate in a given case”).

⁴ U.S. Chamber Institute for Legal Reform, Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure, 2 (Nov. 7, 2013).

has testified before Congress on behalf of the U.S. Chamber of Commerce.⁵ After setting forth his argument that the producer-pays rule violates due process Mr. Beisner wrote, “In light of the due process concerns raised by the current producer-pays discovery regime, the Committee should consider additional amendments to the federal rules. One solution would be to establish a general rule that each party pays the costs of the discovery it requests, subject to adjustments by the court.”⁶ The Lawyers for Civil Justice, a self-declared proponent of “the corporate and defense perspective on all proposed changes to the FRCP,” has expressly stated that “Our current federal rulemaking agenda is focused on reining in the costs and burdens of discovery through FRCP amendments [including] . . . development of incentive-based ‘requester pays’ default rules.”⁷ Needless to say, revising the default producer pays rule in this way would turn the current approach on its head, presumptively saddling requesters with an *ex ante* burden of funding the expense associated with responding to their discovery requests.⁸

Given indications that the Advisory Committee will indeed take up the issue of cost shifting in the context of civil discovery,⁹ now is an apt time to

⁵ See Testimony of John H. Beisner On Behalf of the U.S. Chamber Institute for Legal Reform Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary United States House of Representatives (Mar. 13, 2013), available at <http://judiciary.house.gov/files/hearings/113th/03132013/Beisner%2003132013.pdf>.

⁶ Letter of John H. Beisner to the Committee on Rules of Practice and Procedure, 10 (Jan. 2, 2014).

⁷ Lawyers for Civil Justice, *Federal Rules of Civil Procedure*, available at <http://www.lfcj.com/federal-rules-of-civil-procedure.html>.

⁸ Critics of the producer-pays rules tend to argue that the expense associated with extensive electronic discovery coupled with the belief that most of the requested information is of little practical utility supports their desire to shift those costs onto the requesting party. To what extent is this cost/abuse narrative valid? Certainly, in some contexts—such as high stakes commercial litigation or cases involving one-way fee-shifting—discovery costs can run high. However, there is evidence that in ordinary cases the incidence of discovery as well as the associated costs tend to be lower than critics suggest. I recently addressed this issue in more detail in *Pleading and Access to Justice*, 60 UCLA L. REV. 1710, 1730 (2013) (“[T]he very source cited by the Court in support of its claim of a discovery problem itself admits that discovery is nonexistent in 40 percent of the cases and is limited to three hours in a substantial additional percentage of cases . . .”). See also Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1088–89 (2012):

The FJC reported that the median cost of litigation for defendants was \$20,000, including attorneys’ fees. For plaintiffs, the median cost was even less, at \$15,000, with some reporting costs of less than \$1600. Only at the ninety-fifth percentile did reported costs reach \$280,000 for plaintiffs and \$300,000 for defendants. The median estimate of stakes in the litigation for plaintiffs was \$160,000, with estimates ranging from \$15,000 at the tenth percentile to almost \$4 million at the ninety-fifth percentile. The median estimate of the stakes by defendants’ attorneys was \$200,000, with estimates ranging from \$15,000 at the tenth percentile to \$5 million at the ninety-fifth percentile. . . . [T]he discovery costs that animated the Duke [Civil Litigation] Conference organizers and participants did not appear to be, in the vast majority of cases, significant or disproportionate.

⁹ See Minutes of the Advisory Committee on Civil Rules, at 14–18 (Nov. 2013), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2012-min.pdf> (“The Discovery Subcommittee carries forward on its agenda the question whether additional ‘requester pays’ provisions might be included in the discovery rules.”). That the Committee will take this up should not

evaluate the producer-pays rule and the claims of those urging its demise. Specifically, to what extent is the producer-pays rule imposing costs on parties in litigation; are there fairness, policy, or constitutional considerations that warrant a revisiting of the rule; and, ultimately, what would a rational approach to discovery cost allocation look like? In the passages that follow, we will explore the current landscape of discovery expenses in the federal system and the rules governing their allocation (Part I), followed in Part II by an exploration of the various purported difficulties with a producer-pays approach. Part III will then build on these discussions to develop a rational approach to cost allocation that appropriately balances the interests of litigants on all sides of civil disputes in federal court.

I. THE EXISTING DISCOVERY COST-ALLOCATION LANDSCAPE

A. *The “American Rule”*

Under the standard practice known as the “American rule”, each litigant in American courts pays his or her own attorneys’ fees and expenses.¹⁰ This practice contrasts with the longstanding approach in England (and most European countries) that has supported fee and cost awards to prevailing litigants for centuries¹¹—a practice commonly referred to as the “English rule.” The American approach has been justified principally as an access to justice device, meaning that the rule protects the ability of prospective plaintiffs to bring actions that may vindicate their rights and does not penalize defendants for merely defending themselves in a lawsuit.¹² Conversely, English rule defenders highlight its purported ability

be surprising, given the success the corporate defense bar has had in getting other of its civil rules priorities onto the Advisory Committee’s agenda; the pending package of 2015 amendments is a testament to their efficacy in this regard.

¹⁰ See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (“The rule here has long been that attorney’s fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.”). See also *Fox v. Vice*, 131 S. Ct. 2205 (2011) (“Our legal system generally requires each party to bear his own litigation expenses, including attorney’s fees, regardless whether he wins or loses. Indeed, this principle is so firmly entrenched that it is known as the ‘American Rule.’”). This principle was first announced and embraced by the Supreme Court in 1796 in *Arcambel v. Wiseman*: “We do not think that this charge [for counsel’s fees] ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.” 3 U.S. 306, 1796 WL 896, at *1 (1796).

¹¹ Successful plaintiffs in English courts have been entitled to expenses since the Statute of Gloucester in 1278, see Statute of Gloucester, 1278, 6 Edw. 1, c. 1, while prevailing defendants gained this entitlement in 1607 under the Statute of Westminster, see Statute of Westminster, 1607, 4 Jac. 1, c. 3.

¹² *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967):

In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be

to deter frivolous or weak claims while providing full compensation for prevailing parties. Most states in the United States adhere to the American rule (generally speaking), with the exception of Alaska.¹³

Over time, the courts and Congress have created numerous exceptions to the American Rule at the federal level, particularly with regard to attorney's fees. Numerous federal and state statutes provide for the shifting of the prevailing party's attorney's fees onto a losing party in civil litigation.¹⁴ The preponderance of fee-shifting statutes tend to be one-way, meaning they impose attorney's fees on losing defendants more so than requiring losing plaintiffs to pay the prevailing defendant's legal expenses.¹⁵ The objective of these provisions appears to be to encourage the private enforcement of the federal statutes in which they are found.¹⁶ That said, fee-shifting provisions that impose an obligation on plaintiffs to pay defendants' attorneys' fees can be found within substantive statutory provisions.¹⁷

unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.

Id. at 718. *See also, e.g.*, *R.M. Palmer Co. v. Ludens, Inc.*, 236 F.2d 496, 501–502 (3d. Cir. 1956) (“It is clear that counsel fees should not be awarded as a matter of course, nor as a penalty against the loser who followed conventional procedure.”).

¹³ *See* ALASKA R. CIV. P. 82 (“Except as otherwise agreed to by the parties, the prevailing party in a civil case shall be awarded attorney’s fees calculated under this rule.”).

¹⁴ *See, e.g.*, Clayton Act § 4(a), 15 U.S.C. § 15(a) (2012); 42 U.S.C. § 1988(b) (2012) (civil rights cases).

¹⁵ Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROB. 321, 322 (1984) (“[T]he vast majority of state attorney fee shifting statutes allow fee shifting only to prevailing plaintiffs.”). *See also, e.g.*, 15 U.S.C. § 15(a) (Clayton Act) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”); 29 U.S.C. § 216(b) (Fair Labor Standards Act) (“The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.”).

¹⁶ *See, e.g.*, *Parkinson v. Hyundai Motor America*, 796 F. Supp. 2d 1160, 1171 (C.D. Cal. 2010) (“California’s fee-shifting and private attorney general statutes incentivize counsel to take cases on behalf of plaintiffs who could not otherwise afford to vindicate their rights through litigation.”); *Turner v. D.C. Board of Elections and Ethics*, 170 F. Supp. 2d 1, 7 (D.D.C. 2001) (“The fee shifting statute is designed to create an incentive for ‘private Attorney Generals’ to bring meritorious lawsuits by vindicating the citizens’ rights when the government may be incapacitated by political or budgetary considerations from bringing them.”); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 133 F.R.D. 41, 43 (D. Nev. 1990) (“[Title 15 U.S.C. § 15(a)] also provides for treble damages and attorneys fees, creating incentives for private attorneys general.”).

¹⁷ *See, e.g.*, 42 U.S.C. § 1988(b) (“In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs”); 42 U.S.C.A. § 11113 (Health Care Quality Improvement Act) (“In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney’s fee, if the claim, or the claimant’s conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.”).

Other two-way fee-shifting regimes tend to be connected with litigation conduct by either side that unnecessarily creates legal expenses for an adversary, thereby justifying an equitable imposition of such expenses on the culpable party. Examples of this approach can be found within the Federal Rules of Civil Procedure at Rule 4 (expenses and fees resulting from the failure to waive service without good cause),¹⁸ Rule 11 (expenses and fees resulting from filings that violate the certification requirements of Rule 11),¹⁹ Rule 16 (expenses and fees resulting from noncompliance with court orders under Rule 16),²⁰ and Rule 37 (expenses and fees resulting from discovery misconduct),²¹ as well as in the Judicial Code at 28 U.S.C. § 1447(c) (expenses and fees incurred for an improper removal),²² and 28 U.S.C. § 1927 (expenses fees resulting from vexatious attorney misconduct).²³ In the absence of express authorization, courts have identified circumstances when they have the inherent authority to impose fee awards on litigants.²⁴ These judicially-created exceptions to the American rule tend to involve instances of bad faith misconduct or equitable considerations that suggest the propriety of relieving a party of some or all of its obligation to bear the costs of legal services in a given case.²⁵

With respect to ordinary litigation expenses beyond attorney’s fees or the costs arising out of litigation misconduct, there have been only limited

¹⁸ FED. R. CIV. P. 4(d)(2) (“If a defendant located within the United States fails, without good cause, to sign and return a waiver . . . the court must impose on the defendant . . . The reasonable expenses, including attorney’s fees, of any motion required to collect those service expenses.”).

¹⁹ FED. R. CIV. P. 11(c)(4) (“The sanction may include . . . an order directing payment to the movant of part or all of the reasonable attorney’s fees and other expenses directly resulting from the violation.”).

²⁰ FED. R. CIV. P. 16(f)(2) (“Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney’s fees—incurred because of any noncompliance with this rule . . .”).

²¹ FED. R. CIV. P. 37(b)(2)(C) (“Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure . . .”).

²² 28 U.S.C. § 1447(c) (“An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.”).

²³ 28 U.S.C. § 1927 (“Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”).

²⁴ *Chambers v. NASCO*, 501 U.S. 32, 45 (1991) (“[A]n assessment of attorney’s fees is undoubtedly within a court’s inherent power . . .”).

²⁵ *Id.* at 45–46:

[E]xceptions [to the American rule] fall into three categories. The first, known as the “common fund exception,” derives not from a court’s power to control litigants, but from its historic equity jurisdiction and allows a court to award attorney’s fees to a party whose litigation efforts directly benefit others. Second, a court may assess attorney’s fees as a sanction for the “willful disobedience of a court order.” . . . Third, . . . a court may assess attorney’s fees when a party has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” (citations and internal quotation marks omitted).

deviations from strict adherence to the American rule. At least since 1853 Congress has authorized taxing the losing party for specified costs.²⁶ Today, a similar provision is codified at 28 U.S.C. § 1920 and Rule 54, under which “costs” such as fees for the clerk, witnesses, printing, and copying are reimbursable by the losing party to the prevailing party.²⁷ Dismissals for lack of jurisdiction can trigger an obligation of the dismissed party to reimburse an adversary for such costs,²⁸ as can appellate affirmances for litigants who lose on appeal.²⁹ Under Rule 68 an unaccepted offer of judgment that is followed by a less favorable final judgment will trigger an obligation to cover the costs incurred by the adversary from the time of the offer.³⁰ An important common thread in each of these provisions is the traditional understanding that the term “costs” does not ordinarily include attorneys’ fees, unless otherwise provided for by Congress.³¹ Thus, Rule 68’s allowance for costs only permits an award of attorney’s fees if the underlying statute that animates the claim at issue defines “costs” to include such fees.³² Absent the inclusion of attorneys’ fees, these cost-shifting rules have tended to be of minimal impact on redistributing the financial burdens associated with litigation.³³

²⁶ Act of Feb. 26, 1853, 10 Stat. 161 (“That in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers, in the several States, the following and no other compensation shall be taxed and allowed.”).

²⁷ 28 U.S.C. § 1920 (taxation of enumerated costs allowed); FED. R. CIV. P. 54(d)(1) (“[C]osts—other than attorney’s fees—should be allowed to the prevailing party.”).

²⁸ 28 U.S.C. § 1912.

²⁹ 28 U.S.C. § 1919.

³⁰ FED. R. CIV. P. 68(d) (“If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.”).

³¹ Title 28 U.S.C. § 1923 provides nominal amounts taxable as “Attorney’s and proctor’s docket fees,” and thus provide a mild departure from the principle of taxable costs not including attorney’s fees. 28 U.S.C. § 1923 (providing that “Attorney’s and proctor’s docket fees in courts of the United States may be taxed as costs as follows” and then delineating amounts of \$5, \$20, \$50, and \$100 of such fees depending on the disposition the matter, e.g., by trial, by “discontinuance,” by appeal in admiralty cases, or on motion for judgment, and a \$2.50 fee “for each deposition admitted into evidence”). *See also* *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 257 (1975) (“[W]ith the exception of the small amounts allowed by s. 1923, the rule ‘has long been that attorney’s fees are not ordinarily recoverable’” (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967))).

³² *Marek v. Chesny*, 473 U.S. 1, 9 (1985) (“[T]he term ‘costs’ in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority.”). There was an unsuccessful effort in 1995 to amend the diversity jurisdiction statute to permit the payment of an opponent’s attorney’s fees after a litigant received a judgment that was less favorable than one previously offered by that opponent. *See* Attorney Accountability Act of 1995, House Report 104-62 (Mar. 1, 1995), available at <http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt62/html/CRPT-104hrpt62.htm>.

³³ *See, e.g.*, Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, 102 F.R.D. 407, 433 (1984) (“[Rule 68]

B. *The Discovery Cost-Allocation Experience under the American Rule*

Notwithstanding the number of departures from the American rule discussed above, that rule has remained the default principle governing how the expenses associated with responding to discovery requests are borne. As the Supreme Court has noted for some time, “Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests. . . .”³⁴ This means that ordinarily, when a party receives a discovery request—such as a request for documents under Rule 34—the responding party must pay for all expenses associated with responding to that request, which may include search and retrieval, photocopying, forensic reconstruction, travel, human resources, and attorney supervision and review.³⁵ As previously mentioned, attorney fees and expenses arising from discovery misconduct are potentially reimbursable at the court’s discretion under Rule 37.³⁶

Although producers must bear these costs, the bulk of empirical data seems to indicate that overall, the costs of civil discovery in the federal system are not disproportionate or excessive,³⁷ tending to suggest that for most litigants the need to shift discovery expenses onto requesting parties is not compelling. However, to the extent the anticipated expenses associated with responding to a discovery request are thought to be excessive (either in an absolute or relative sense) in any given case, the federal courts—with some license and less guidance from the Federal Rules of Civil Procedure—have developed mechanisms for determining whether some or all of those expenses should be shifted to the requesting party.³⁸ The inquiry currently

has been considered largely ineffective as a means of achieving its goals. The principal reasons for the rule’s past failure have been (1) that “costs” [when they do not include attorney’s fees] . . . are too small a factor to motivate parties to use the rule; and (2) that the rule is a ‘one-way street,’ available only to those defending against claims and not to claimants.”)

³⁴ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

³⁵ Rule 26(b)(4)(E) provides a notable exception to this default rule by requiring “the party seeking discovery” to pay the fee of an opponent’s expert for the time spent responding to certain expert discovery requests (e.g. a deposition of an opponent’s expert). FED. R. CIV. P. 26(b)(4)(E).

³⁶ See FED. R. CIV. P. 37(b)(2)(C).

³⁷ I previously discussed the evidence rebutting the notion that overall the costs of federal civil discovery are excessive in *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1729–31 (2013), a discussion that pointed, in turn, to the work of the Federal Judicial Center and other scholars, see Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1088–89 (2012); EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 527 (1998); 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).

³⁸ See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317–18 (S.D.N.Y. 2003) (“*Zubulake P*”); *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428–29 (S.D.N.Y. 2002).

employed by federal courts involves a multi-factored consideration of issues such as the proportionality of the expense, the significance of the information sought, its availability from other sources, and the relative ability of the parties to cover and control the costs.³⁹ This analysis is typically applied in the face of electronic discovery that is argued to be not reasonably accessible,⁴⁰ most likely due to the fact that the Rule 26(b)(2)(B) specifically protects parties against having to provide discovery from such sources when doing so would be unduly burdensome or costly.⁴¹ However, Rule 26(c)(1)(B) also provides courts with the authority to split or shift the costs of discovery—if “good cause” is shown—via a protective order,⁴² an authority that will be made explicit when an amendment to Rule 26(c) takes effect on December 1, 2015.⁴³ There does not appear to have been widespread utilization of this authority prior to the advent of electronically stored information (ESI) and its associated costs,⁴⁴ although some courts have engaged in cost-shifting beyond the ESI context.⁴⁵ Even with ESI the

³⁹ *Zubulake I*, 217 F.R.D. at 322. In *Zubulake I* Judge Scheindlin set out a seven-factor test to be applied to cost-shifting determinations, which were themselves a modification of factors previously laid out in *Rowe*:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

Zubulake I, 217 F.R.D. at 322

⁴⁰ *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) (*Zubulake III*) (“It is worth emphasizing again that cost-shifting is potentially appropriate only when inaccessible data is sought. When a discovery request seeks accessible data—for example, active on-line or near-line data—it is typically inappropriate to consider cost-shifting.”).

⁴¹ See FED. R. CIV. P. 26(b)(2)(B) (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”).

⁴² *Oppenheimer*, 437 U.S. at 358 (noting that responding parties “may invoke the district court’s discretion under Rule 26(c) to grant orders protecting him from ‘undue burden or expense’ in [complying with discovery requests], including orders conditioning discovery on the requesting party’s payment of the costs of discovery”).

⁴³ See Proposed Amendment to Rule 26(c), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf> (“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 one or more of the following: . . . (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery.”).

⁴⁴ *Boeynaems v. LA Fitness Intern., LLC*, 285 F.R.D. 331, 335–36 (E.D. Pa. Aug. 16, 2012) (“Despite this broad authorization of cost shifting by the Supreme Court over thirty years ago, very few Courts took advantage of this authority before the advent of ESI.”).

⁴⁵ See, e.g., *Simms v. Ctr. for Corr. Health & Policy Studies*, 272 F.R.D. 36 (D.D.C. 2011) (relieving producing party of obligation to make photocopies due to the associated expense and ordering requesting party to review and copy the material at its own expense); *Schweinfurth v. Motorola, Inc.*, No. 1:05CV0024, 2008 WL 4449081 (N.D. Ohio Sept. 30, 2008), (ordering class action plaintiffs to pay half the costs of requested discovery because of the size and limited probative value of the information sought); *Am. Int’l Specialty Lines Ins. Co. v. NWI-I, Inc.*, 240 F.R.D. 401 (N.D. Ill. 2007) (ordering the

imposition of cost-shifting orders seems to be quite the exception rather than a standard practice.⁴⁶ Further, the costs that are shifted or shared under these rules do not include the attorneys' fees associated with retrieval and production in response to discovery requests,⁴⁷ although such fees can be shifted as a sanction for discovery misconduct under Rule 26(g) or Rule 37.

Beyond the cost-shifting that occurs to alleviate production expenses thought to be unduly burdensome, there is the statutorily authorized shifting of the costs of "exemplification and copies of papers necessarily obtained for use in [a] case" pursuant to 28 U.S.C. § 1920. Under this statute, courts may tax such expenses as "costs" awardable to the prevailing party under Rule 54.⁴⁸ This language unquestionably applies to the actual photocopying expenses associated with discovery but not preparatory costs leading up to the copying.⁴⁹ The Third Circuit has articulated the dominant view of how § 1920 applies to the reproduction of electronic material:

[O]f the numerous services the vendors performed, only the scanning of hard copy documents, the conversion of native files to TIFF, and the transfer of VHS tapes to DVD involved "copying," and that the costs attributable to only those activities are recoverable under § 1920(4)'s allowance for the "costs of making copies of any materials."⁵⁰

In other words, courts have not read § 1920 as a broad authorization of shifting all of the costs associated with electronic discovery to a losing party but only the expenses associated with reproduction.⁵¹ Section 1920 is thus

plaintiff and defendants to share equally the costs associated with discovery of a particular set of documents).

⁴⁶ At least among published cases, online legal database searches do not reveal a significant number of cases in which the discovery costs are shifted.

⁴⁷ See, e.g., *Melton ex rel. Dutton v. Carolina Power & Light Co.*, No. 4:11-cv-00270-RBH, 2012 WL 4322520, at *4 (D.S.C. Sept. 19, 2012) ("[T]he cost shifting contemplated by Rule 26(c) provides for shifting of discovery costs, not the shifting of attorney's fees."); *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 577 (N.D. Ill. 2004) (awarding shifting of certain out-of-pocket discovery costs but providing that "[e]ach party will bear their own costs of reviewing the data.").

⁴⁸ 28 U.S.C. § 1920(4); FED. R. CIV. P. 54(d)(1).

⁴⁹ *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1328 (Fed. Cir. 2013) ("But only the costs of creating the produced duplicates are included, not a number of preparatory or ancillary costs commonly incurred leading up to, in conjunction with, or after duplication.").

⁵⁰ *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 171 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 233 (2012). See also *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 260 (4th Cir. 2013) (finding the Third Circuit's reasoning persuasive to not include imaging or metadata extraction costs).

⁵¹ See *Race Tires America*, 674 F.3d at 171:

Neither the language of § 1920(4), nor its history, suggests that Congress intended to shift all the expenses of a particular form of discovery—production of ESI—to the losing party. Nor can such a result find support in Supreme Court precedent, which has accorded a narrow reading of the cost statute in other contexts. See, e.g., *Crawford Fitting Co.*, 482 U.S. at 442. Although there may be strong policy reasons in general, or compelling equitable circumstances in a particular case, to award the full

a narrow provision not seen as a vehicle for broadly shifting the costs of discovery onto a losing opponent.⁵²

In sum, although there are multiple opportunities for litigants to seek and for courts to grant the shifting of expenses associated with responding to discovery requests, they remain limited and stand as an exception to—rather than an upending of—the presumption that producing parties bear the obligation to incur those costs.

II. REVERSING THE PRESUMPTION: SHOULD REQUESTERS HAVE TO PAY?

As noted at the outset, currently on the table is the question of whether the presumption that the producing party pays the costs of responding to discovery should be replaced with a default “requester-pays” rule.⁵³ Note that a move towards the English rule—which is a *post hoc* “loser-pays” regime saddling the culpable party with the costs of the victor’s case—is not what proponents of change have proposed. Rather, the suggestion is that requesting parties should bear the costs of responding to the discovery requests they issue *ex ante* as a matter of course, not as an exceptional occurrence done only after a judicial assessment of the propriety of such an allocation. Whether the proposal structures itself in this fashion (as a default requester-pays rule) or in the manner of the traditional English rule—whereby the producing party is subsequently reimbursed if it becomes the prevailing party—is material from a practical perspective (and to a lesser extent from a policy perspective) but not so much so from a theoretical and constitutional perspective. Below, we will review the various constitutional and policy considerations surrounding the proposal to move to a default requester-pays system to determine whether such a course is advisable, warranted, or perhaps even compelled.

A. Constitutional Considerations

A principal claim made by opponents of the producer-pays rule is that it is unconstitutional because it results in the deprivation of the producer’s property—its financial resources associated with the cost of production—

cost of electronic discovery to the prevailing party, the federal courts lack the authority to do so, either generally or in particular cases, under the cost statute.

⁵² *See* *Taniguchi v. Kan Pac. Saipan, Ltd.*, — U.S. —, 132 S. Ct. 1997, 2006 (2012); *Race Tires*, 674 F.3d at 170 (“Nor may the courts invoke equitable concerns . . . to justify an award of costs for services that Congress has not made taxable.”).

⁵³ *See, e.g.*, Lawyers for Civil Justice, *Federal Rules of Civil Procedure*, available at <http://www.lfcj.com/federal-rules-of-civil-procedure.html> (urging the “development of incentive-based ‘requester pays’ default rules”).

“absent any finding of liability and without adequate procedures.”⁵⁴ As Prof. Martin Redish and his co-author have stated it, “impos[ing] the nonreimbursable costs of a plaintiff’s discovery on the defendant on the basis of nothing more than the plaintiff’s unilateral allegation of liability surely takes defendant’s property without due process” because these costs are imposed “without even a preliminary judicial finding of wrongdoing.”⁵⁵ These are serious charges⁵⁶ whose implications would be severe: If this procedural due process challenge⁵⁷ is correct, courts would not be permitted to force producing parties to bear the costs of responding to discovery requests, with such costs presumably becoming the responsibility of the requester.

To evaluate the strength of this due process claim, we must begin with the meaning of the due process right. The text of the Fifth Amendment is familiar: “No person shall . . . be deprived of life, liberty, or property, without due process of law.”⁵⁸ The Supreme Court has stated that the “central meaning” of this “procedural due process” protection is that “[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.”⁵⁹ However, these protections apply only if there is a “deprivation” within the

⁵⁴ Beisner Letter, *supra* note __ at 8.

⁵⁵ Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 807 (2011).

⁵⁶ In discussing this constitutional argument with other scholars they have derided it as “laughable” and not one to be taken seriously, given that none of its proponents are invoking it as grounds for refusing to comply with a discovery request in an actual litigation. That said, the argument has been invoked repeatedly and likely will have rhetorical force that will permit those already inclined to oppose the producer-pays rule to invoke it as justification for making the policy change they desire—a move to a requester-pays rule. Thus, it is important that the argument be taken seriously and evaluated honestly rather than simply dismissed out-of-hand so that the results of the analysis herein will be less assailable.

⁵⁷ None of the proponents of the due process argument appear to be claiming that the obligation to cover the expenses of responding to discovery requests constitutes a violation of substantive due process—nor could they. Substantive due process supplies heightened scrutiny only to impingements on “fundamental rights” “implicit in the concept of ordered liberty.” See *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (internal quotation marks and citations omitted). No one could assert—in good faith—that the right not to cover the costs of discovery production is a fundamental right. Not being a fundamental right, rational basis scrutiny applies, meaning that the government action must be rationally related to a legitimate governmental interest. *Id.* at 728. The government’s interest in eliciting evidence in civil cases heard by the federal courts is obviously a legitimate one and asking each party to cover associated expenses—with the opportunity to challenge particularly burdensome costs—is certainly a rational approach. See also Redish & McNamara, *Back to the Future, supra* note __ at 806 (“[I]f the forced subsidization of its opponent’s discovery costs gives rise to serious concerns about the procedural due process rights of the producing party.”).

⁵⁸ U.S. CONST. amend. V. The Fourteenth Amendment, which would apply to action by state courts, similarly provides “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV.

⁵⁹ *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)).

meaning of the Fifth (or Fourteenth) Amendment.⁶⁰ Thus two issues present themselves when confronted with the claim that the producer-pays rule violates due process: First, does obligating a producing party to bear the costs associated with responding to civil discovery requests constitute a deprivation of the kind embraced by the Due Process Clause? Second, if so, is the party suffering the deprivation afforded a constitutionally sufficient opportunity to be heard in connection with the deprivation?

1. A Deprivation?

Our system of regulation in this country includes both public and private enforcement mechanisms. The civil justice system, at both the state and federal level, is the principal means through which private wrongs are vindicated. All persons and entities are subject to this system, provided the requisites of jurisdiction can be satisfied to give a court authority over the defendants in a given case. Once lawful jurisdiction is established, all come under the obligation to appear and cooperate with the judicial process—including discovery—or face sanctions up to and including a dismissal or default judgment.⁶¹ Appurtenant to that obligation will be the costs of participating in that process, which include hiring counsel, mailing and filing documents, hiring expert witnesses, producing copies of requested information, and the like. Indeed, litigation expenses such as those just described are an inevitable cost of doing business in a society as reliant on private enforcement as is the United States.⁶² The question is whether the costs of compliance with the judicial process—which are incidental to that process rather than its object—can fairly be classified as a constitutional “deprivation” such that the protections of due process apply to their imposition.⁶³

⁶⁰ *Id.* at 84 (“The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment’s protection.”); *id.* at 85 (“Any significant taking of property by the State is within the purview of the Due Process Clause.”). *See also* *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1990) (“The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in ‘property’ or ‘liberty.’”).

⁶¹ FED. R. CIV. P. 37(b). *See also, e.g.*, *Kafele v. Javitch, Block, Eisen & Rathbone*, 232 F.R.D. 286, 289 (S.D. Ohio 2005) (holding that plaintiff’s repeated, persistent, and willful refusal to participate in discovery process despite earlier sanctions warranted dismissal of action); *Guy v. Abdulla*, 58 F.R.D. 1, 2 (N.D. Ohio 1973) (“[A] defendant may not completely refuse to participate in pre-trial discovery . . .”). Of course, the complete failure to defend oneself in an action at all risks a default judgment. FED. R. CIV. P. 55.

⁶² This is why under appropriate circumstances, litigation expenses are deductible against business income. *See* 26 U.S.C. § 162.

⁶³ Proponents of the due process argument—to my knowledge—have not addressed this particular point, assuming—rather than establishing—that a constitutionally cognizable deprivation occurs when a defendant is made to finance the expense of producing information requested by plaintiffs in the course of litigation. *Redish & McNamara, Back to the Future, supra* note __ at 807 (“To impose the

Whether such costs constitute a constitutional deprivation depends on the ends they serve. To the extent the litigation expenses in question are expended for the benefit of the party incurring the cost, no constitutionally cognizable deprivation can be said to have occurred. It is a well-established principle that property employed for the benefit of the complaining party is not a deprivation warranting due process protection. In *Moody v. Weeks*⁶⁴ the court articulated this principle in rejecting an inmate's due process challenge to being charged \$5 per month to cover court costs: "The inmate is not absolutely 'deprived' of his funds when they are used to pay court costs and fees because the funds are being used for the inmate's benefit."⁶⁵ In *Jensen v. Klecker*⁶⁶ the Eighth Circuit stated the principle more starkly in terms apropos here: "It is important to note that this issue does not involve a forfeiture of property or a penalty. Rather, it is in the nature of an assessment for value received."⁶⁷ Litigation expenses incurred for the benefit of the litigant spending them are not being forfeited to the government or to the adverse party, nor are they being imposed as a penalty for a wrong; rather, they are funds a litigant spends in the process of defending itself in court, a defense that provides a benefit to that litigant. Thus, ordinary litigation expenses cannot be characterized as a deprivation worthy of due process protection.⁶⁸

But what of the costs associated with responding to a discovery request? Is there something unique about such costs that makes their imposition a deprivation of the kind due process will recognize? The short answer is no, for three reasons. First, to the extent that producing information in

nonreimbursable costs of plaintiff's discovery on the defendant on the basis of nothing more than the plaintiff's unilateral allegation of liability surely takes defendant's property without due process. The judicial process has imposed a financial burden on the defendant without even a preliminary judicial finding of wrongdoing.").

⁶⁴ No. 1:09-cv-332, 2009 WL 1728102, at *1 (S.D. Ohio June 18, 2009).

⁶⁵ *Id.* at *2. *See also* *Browder v. Ankrom*, No. Civ.A. 4:05CV-P9-M, 2005 WL 1026045, at *5 (W.D. Ky. Apr. 25, 2005), ("[S]uch debits are not 'deprivations' in the traditional sense because an inmate has been provided with a service or good in exchange for the money debited.").

⁶⁶ 648 F.2d 1179 (8th Cir. 1981).

⁶⁷ *Id.* at 1183. *See also* *Bailey v. Carter*, 15 Fed. Appx. 245, 251 (6th Cir. 2001) ("We question whether the inmates were truly 'deprived' of their property, however. The copayment fee was deducted from their accounts in exchange for medical services."); *Hampton v. Hobbs*, 106 F.3d 1281, 1287 (6th Cir. 1997) ("Moreover, prisoners are not absolutely deprived of the use of their funds when those funds are applied toward the filing-fee requirements. The funds are being utilized for the prisoner's benefit just as a non-indigent's money is used by him to proceed in federal court.").

⁶⁸ Professor Redish seems to concede this point in part when he writes,

[I]t is important to distinguish the burdens caused by the forced subsidy [of the cost of production] from the normal costs incurred by a defendant in preparing his own case after a complaint is filed. Unlike the costs incurred by a defendant in mounting his own case, the costs involved in responding to a plaintiff's discovery requests are a financial benefit that the defendant is required—at the risk of severe sanctions—to provide to the plaintiff on the basis of nothing more than the unilateral filing of the plaintiff's complaint."

Back to the Future, *supra* note __ at 810.

response to a discovery request is beneficial to the producing party, no constitutional deprivation has occurred for the reasons stated above: Self-serving expenditures are not classed as constitutional deprivations.⁶⁹ Under what circumstances would producing information in response to a discovery request be beneficial to the producing party? Clearly, such would be the case if the information produced were *exculpatory* from the perspective of a producing defendant⁷⁰ or probative of the producing party's claims or defenses because in those circumstances the information would be supportive of the producing party's position in the litigation.⁷¹ As a result, the expense would be beneficial to the producing party and thus not a constitutionally cognizable deprivation.⁷²

Conversely, the information produced may be *inculpatory* or probative of the requesting party's claims or defenses and thus used against the producing party. In this situation, Professor Reddish believes that producing parties are forcibly—without due process—being made to subsidize their adversaries: “Because each party bears the costs of producing the information that will be used against it by its opponent, each party effectively subsidizes that portion of its opponent's case.”⁷³ However, when the information produced tends to confirm the defendant-producer's liability (or the meritlessness of the plaintiff's claims in the event the plaintiff is the producing party) this analysis should fail because the producer has unclean hands; a litigant should have no equitable claim to a right to withhold information tending to refute its litigation position or to saddle the requester with the expense of discovering such information.

More basically, though, the argument that having to bear the costs of production in civil litigation is a constitutional deprivation fails because if the information has evidentiary value in a live dispute, the court and all

⁶⁹ See *supra* TAN 65.

⁷⁰ Producing plaintiffs, having initiated the action, are likely not in a position to challenge the legitimacy of having to pay to produce material in response to proper discovery requests from the parties they have sued, given such plaintiffs' own invocation of the discovery process to prosecute and support its own claims.

⁷¹ This is a distinction that seems to be recognized at least implicitly by advocates of moving to a requester-pays rule in their failure to complain (in the context of the contemporary debate) of having to pay the costs of producing documents pursuant to the initial disclosure obligations of Rule 26(a). Those disclosures are expressly limited to “information . . . that the disclosing party may use to *support* its claims or defenses,” *i.e.* information whose production is beneficial to the producing party. FED. R. CIV. P. 26(a)(1)(i) & (ii) (emphasis added).

⁷² Such exculpatory information may not be exclusively beneficial to the producing party; the information might also be of some benefit to the requesting party's litigation position as well. However, so long as the information is of some benefit to the producing party, the claim of a constitutional deprivation cannot be maintained.

⁷³ *Back to the Future*, *supra* note ___ at 792. Unmentioned is the fact that the taxpayers, in turn, subsidize these costs through their deductibility against tax liability as business expenses. See 26 U.S.C. § 162.

parties are entitled to access it and those in possession of the information have a duty to provide it. As the Eleventh Circuit once stated the principle, “There is a fundamental responsibility of every person to give testimony, and the duty to provide evidence has long been considered to be almost absolute.”⁷⁴ Further, this duty obtains notwithstanding the fact that it may be accompanied by burdens such as incurring expenses or opportunity costs. As one court explained the point,

The Professor claims that having to produce his records and give testimony would be burdensome. He claims that to require him to be available in every lawsuit would create an extraordinary hardship on him and that the court should protect him. His claim must be kept in context with the way in which the system of administering justice affects every citizen. Every person is burdened by having to disclose knowledge he acquires, even though it is acquired purely by accident. A person who sees an auto accident cannot refuse to testify because it burdens him. A person who witnesses a will cannot refuse to testify. All are burdened, yet some are burdened more than others.⁷⁵

Clearly, the mere fact of a financial burden arising out of complying with lawful discovery obligations itself cannot constitute a constitutional deprivation. What the Constitution protects against, rather, is the imposition of *unreasonable* or excessive burdens.⁷⁶ So long as the information sought is relevant to the dispute and the costs of producing the requested information are reasonable, the expenses are an ordinary incident of doing business and a constitutionally cognizable deprivation cannot be said to have occurred.⁷⁷

This test—whether the information is relevant to the dispute and the reasonableness of the costs of compliance—crystalizes for us the constitutionality of the default producer-pays rule in the federal courts because the discovery rules are designed to ensure that responding parties bear the cost of production only under these conditions. On the first point—relevance to the dispute—the Federal Rules of Civil Procedure currently permit only the discovery of information that is “relevant to any

⁷⁴ *Klay v. All Defendants*, 425 F.3d 977, 968 (11th Cir. 2005) (citation and internal quotation marks omitted).

⁷⁵ *Wright v. Jeep Corp.*, 547 F. Supp. 871, 876 (E.D. Mich. 1982).

⁷⁶ *See United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 130 (3d Cir. 1967) (“If the Fourth and Fifth Amendments accord any protection it could only be from the imposition of an unreasonable and excessive financial burden.”).

⁷⁷ *See United States v. Bremicker*, 365 F. Supp. 701, 702 (D. Minn. 1973):

[T]he bank complains that the financial burden of compliance would be considerable, such that it would amount to a deprivation of property without due process of law. . . . Since the material sought by the Internal Revenue Service is relevant to a legitimate investigation, the bank has the duty of full cooperation, including the diligent search for and production of all records requested. The expenses incurred in producing such records are reasonably incident to the bank’s normal operations and should be anticipated as a cost of doing business as a bank.

party's claim or defense";⁷⁸ although a good cause showing has heretofore been grounds for expanding the scope of discoverable information to material relevant to "the subject matter involved in the action,"⁷⁹ that allowance is slated to be eliminated from the Rule.⁸⁰ Thus, the discovery requests to which parties have a duty to respond are those seeking information relevant to a claim or defense actually asserted in the action. On the second point, the Federal Rules give producing parties the right to object to discovery that would impose unreasonable costs.⁸¹

Currently, then, if the information requested is useless, irrelevant, or too expensive the Federal Rules afford a producing party a process whereby it can challenge—*ex ante*, in an adversarial process before an impartial judge—both the propriety of the request and the producer's obligation to cover the expenses associated with that request. Rule 26(c) entitles responding parties to seek protective orders when that party believes it is entitled to protection "from annoyance, embarrassment, oppression, or undue burden or expense."⁸² Thus, in the very circumstance when the costs and benefits of the requested information are in question, responding parties are not forced to pay for such information until after a hearing on their objection occurs. We will return to an expanded discussion of the constitutional sufficiency of this process below.⁸³

Recall that we are exploring the reasons why bearing the costs of producing information in response to civil discovery requests is not ordinarily a constitutional deprivation. The first was that productions that benefit the litigation position of the producing party cannot be regarded as deprivations, equitable considerations preclude complaining of the costs of giving information harmful to one's litigation position, and under the circumstances where one might be able to claim a deprivation—the obligation to pay for discovery that is unreasonably expensive and/or not relevant to the dispute—the Federal Rules provide for a prior hearing that can result in a protective order against such an obligation. The second reason why the producer-pays rule is not a constitutional deprivation is that the Due Process Clause has always been understood to apply to government appropriations of or impositions on property or property rights, not to adverse economic consequences that are the mere incidents of

⁷⁸ FED. R. CIV. P. 26(b)(1).

⁷⁹ *Id.*

⁸⁰ See Proposed Amendment to Rule 26(b)(1), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf>.

⁸¹ FED. R. CIV. P. 26(c)(1).

⁸² FED. R. CIV. P. 26(c)(1).

⁸³ See *infra* Part II.B.2.

lawful governmental action. Long ago, in the *Legal Tender Cases*,⁸⁴ the Supreme Court stated the following:

That provision [the Due Process Clause of the Fifth Amendment] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals.⁸⁵

From that time, it has been clear “that the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action.”⁸⁶ Thus, the incidental adverse economic consequences of enforcement of a statute cannot be challenged as unconstitutional deprivations of property.⁸⁷ Similarly, the incidents of complying with properly instituted judicial action may not be cast as a deprivation warranting due process protections. This includes the obligation to comply with discovery orders; if the court orders a producing party to produce information relevant to the dispute, the expenses associated with doing so are nothing more than “consequential injuries resulting from the exercise of lawful power”—not a constitutional deprivation.

Third and most compellingly is the fact that giving evidence in aid of a judicial process is a universal duty owed by all, entitling none to a claim of compensation for the reasonable costs incurred thereby. The Supreme Court has clearly indicated that the giving of evidence is an obligation; in *Blackmer v. United States* it wrote, “It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.”⁸⁸ Continuing in this vein, the Court in *United States v. Bryan* noted, quoting Wigmore,

For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary

⁸⁴ 79 U.S. 457 (1870).

⁸⁵ *Id.* at 551.

⁸⁶ *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980).

⁸⁷ *Detweiler v. Welch*, 46 F.2d 71, 74 (D. Idaho 1930) (“[A] statute should not be rendered unconstitutional because the property of persons is subjected to restraint, or that expense results to individuals from the enforcement of the statute.”).

⁸⁸ *Blackmer v. United States*, 284 U.S. 421, 438 (1932). *See also* *United States v. Bryan*, 339 U.S. 323, 331 (1950) (“[P]ersons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery.”).

assumption that there is a general duty to give what testimony one is capable of giving.⁸⁹

As a solemn public duty, the Court has admonished that “this obligation persists no matter how financially burdensome it may be. . . . “The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.”⁹⁰ As such, there is no due process right to be compensated for the costs of complying with the obligation to give evidence to a governmental authority pursuing lawful objectives; “the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed.”⁹¹

Applying this concept in the discovery context clearly precludes a claim of a due process problem simply based on having to bear the costs of producing information within the permissible scope of discovery in a civil action. When a bank raised such a challenge in response to an IRS summons seeking the production of documents, the court rejected the assertion that “requiring the Bank to expend the funds required to comply with the summons would amount to a taking of property without just compensation and deprive it of property without due process of law” and concluded that the bank had “no right to reimbursement under the Fifth Amendment.”⁹² That said, there does seem to be a need for the incidental costs of compliance to be reasonable.⁹³ As noted above, the Federal Rules provide producing parties every opportunity to object to paying the costs of production if they are unreasonable and to do so prior to having to bear the costs, in an adversary proceeding before the judge.⁹⁴ So, again, when the reasonableness of the production costs (or the relevance of the information) are in question—which are the only circumstances under which one might be exempted from the otherwise generally applicable obligation to give evidence—the civil rules provide for a process to resolve the matter. Thus, all that remains is to assess whether that process is sufficient from a constitutional perspective.

2. A constitutionally sufficient process?

Assessing the constitutionality of imposing the costs of responding to discovery on producing parties in civil litigation only partially depends on

⁸⁹ *Bryan*, 339 U.S. at 331.

⁹⁰ *Hurtado v. United States*, 410 U.S. 578, 589 (1973) (quoting *Blair v. United States*, 250 U.S. 273, 281 (1919)).

⁹¹ *Hurtado*, 410 U.S. at 589.

⁹² *United States v. Covington Trust & Banking Co.*, 431 F. Supp. 352, 355 (E.D. Ky. 1977).

⁹³ *Id.* (noting that “the summons imposes no unreasonable financial burden on the Bank”).

⁹⁴ FED. R. CIV. P. 26(c)(1).

determining whether a constitutionally cognizable deprivation has occurred. Any deprivation that might be identified under such circumstances would have to occur in the absence of the requisite procedural protections to be unconstitutional. For those instances in which a litigant is compelled to produce material to another party at its own expense, the Federal Rules of Civil Procedure put in place an adversarial hearing at which a judge will determine the propriety of imposing that obligation.⁹⁵ Is this a constitutionally sufficient process?

The Federal Rules limit the scope of discovery to information relevant to a claim or defense,⁹⁶ and afford parties the opportunity to object if a request exceeds that limit or would impose “undue burden or expense.”⁹⁷ These restrictions cabin discovery within the boundaries of what the government—through the courts—has the right to demand of those who have evidence relevant to a pending judicial proceeding. Recall that within these confines, no constitutional deprivation occurs and all have a duty to cooperate without compensation.⁹⁸ However, the Federal Rules give producing parties the opportunity to assert that the requested production would fall outside of the permissible scope of discovery—either due to irrelevance or undue burden—prior to having to produce the information. This is done through a motion for a protective order; movants have the opportunity to present their arguments against having to comply with a discovery request to a judge.⁹⁹ Thus, an order compelling a party to produce material at its own expense comes only after a pre-deprivation hearing at which the producing party has had the opportunity to be heard. After this hearing, the court may order the discovery if appropriate or order the costs of such discovery must be shared with or shifted to the requesting party.¹⁰⁰

Is this type of hearing one that comports with due process? The Supreme Court has consistently indicated a threefold inquiry to assess the constitutional sufficiency of procedures that accompany governmental deprivations of property based on *Mathews v. Eldridge*: (1) consideration of “the private interest that will be affected by the official action”; (2) “the risk

⁹⁵ FED. R. CIV. P. 26(c)(1).

⁹⁶ FED. R. CIV. P. 26(b)(1). After December 1, 2015—assuming pending amendments to the Federal Rules are approved by the Supreme Court and not blocked by Congress—there will no longer be the ability to obtain discovery related to the subject matter involved in the action.

⁹⁷ FED. R. CIV. P. 26(c)(1).

⁹⁸ *Supra* TAN 88–91.

⁹⁹ FED. R. CIV. P. 26(c)(1).

¹⁰⁰ FED. R. CIV. P. 26(c)(2) (“If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.”). After December 1, 2015—assuming pending amendments to the Federal Rules are approved by the Supreme Court and not blocked by Congress—there will be an explicit authorization to order cost-sharing in Rule 26(c)(1)(B).

of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”¹⁰¹ When the deprivation is at the behest of a private party, the third consideration is revised to embrace consideration of the interest of the party seeking the deprivation, along with “any ancillary interest the government may have in providing the procedure.”¹⁰²

For civil discovery requests, the private interest to be affected by the discovery is the financial costs associated with compliance. However, so long as the costs are not unduly burdensome and are connected with the production of information within the permissible scope of discovery, no constitutional deprivation occurs. Further, the hearing that Rule 26(c) provides minimizes the risk of an erroneous deprivation because it permits a judge to assess the propriety of the discovery request before the deprivation occurs, ensuring that it is consistent with the relevance and proportionality constraints the Federal Rules place on discovery.¹⁰³ Finally, the party requesting the information has an interest in receiving it to the extent it relates to a claim or defense actually raised in the action, as such information will further their ability to prosecute or defend against asserted claims. Similarly, the government has an interest in arriving at a resolution of the dispute on the merits, which can only be aided by having access to information relevant to the claims and defenses raised in the action. It seems beyond doubt, then, that in those instances where having to pay the costs of production would constitute a constitutional deprivation—the production of irrelevant or unduly burdensome information—an appropriate pre-deprivation hearing is provided consistent with what the Constitution requires.

As further protection, litigants only gain access to the entitlements of discovery after surmounting additional procedural hurdles that permit the dispute to be heard. Most obviously, civil defendants must be subject to the personal jurisdiction of the court before being bound.¹⁰⁴ More importantly, defendants are obligated to respond to complaints that meet the minimum pleading requirements of Rule 8(a) as interpreted by the

¹⁰¹ 424 U.S. 319, 335 (1976).

¹⁰² *Connecticut v. Doehr*, 501 U.S. 1, 10 (1991).

¹⁰³ *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–570 (1972) (“When protected interests are implicated, the right to some kind of prior hearing is paramount.”).

¹⁰⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (“Due process requires that the defendant . . . be subject to the personal jurisdiction of the court.”).

Supreme Court. In the wake of *Bell Atlantic Corp. v. Twombly*¹⁰⁵ and *Ascroft v. Iqbal*,¹⁰⁶ plaintiffs must substantiate their allegations with sufficient facts to make their claims plausible.¹⁰⁷ This obligation was developed expressly to address the supposed prior ability of plaintiffs to gain access to discovery on too thin of a basis.¹⁰⁸ The need for plaintiffs to articulate facts showing plausible entitlement to relief mirrors the similar obligation claimants had in *Mitchell v. W.T. Grant Co.*, in which a writ of sequestration could only issue when “the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by a verified petition or affidavit.”¹⁰⁹ This safeguard, among others, was deemed to be important in legitimizing the deprivation occasioned by the writ in *Mitchell*, notwithstanding the absence of a pre-deprivation hearing for the adversely affected party.¹¹⁰ In the context of civil discovery, plaintiffs have similarly specified the plausibility of their claims and—as noted above—must further demonstrate (if challenged) that the information they seek is within the relevance and proportionality limits of discovery to a judge. Thus, civil defendants in the federal system are compelled to respond to discovery requests only in those actions in which plaintiffs have demonstrated plausible entitlement to relief, not just any claims that a plaintiff may have imagined, and only after a court determines that the request does not fall beyond the proper scope of discovery. An adversarial, pre-deprivation hearing before a judge is the gold-standard of due process and cannot be seriously challenged as constitutionally deficient.

Although Professor Redish acknowledges the screening function of the *Twombly/Iqbal* standard, he dismisses it as a constitutionally insufficient means of protecting defendants against the obligation to provide discovery at their own expense.¹¹¹ What he misses, however, is the fact that not all instances of self-financed compelled discovery production constitute constitutionally cognizable deprivations. Professor Redish also ignores the fact that prior to imposing production obligations that *would* constitute a deprivation—the production of irrelevant or unduly burdensome

¹⁰⁵ 550 U.S. 544 (2007).

¹⁰⁶ 556 U.S. 662 (2009).

¹⁰⁷ *Id.* at 678 (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (quoting *Twombly*, 550 U.S. at 570)).

¹⁰⁸ *Twombly*, 550 U.S. at 559 (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim.” (citation omitted)).

¹⁰⁹ 416 U.S. 600, 605 (1974).

¹¹⁰ *Id.*

¹¹¹ *Back to the Future*, *supra* note __ at 807–10.

information—there indeed is an adversarial, pre-deprivation hearing before a neutral decisionmaker. Here, we make note of the *Twigbal* threshold pleading hurdle not to indicate its status as a sufficient pre-deprivation protection against improper discovery; rather, the pleading requirement is cited for the role that it plays in ensuring that discovery is cabined by claims that have demonstrated plausibility rather than claims that are purely speculative in nature. That standard contributes to the assurance that the deprivation is not erroneous; that is, by permitting only plausible claims to gain access to discovery, the risk that discovery obligations are being imposed in aid of meritless or baseless claims is greatly reduced.

It is worth mentioning that in addition to the pre-deprivation hearing that a producing party may avail itself of under Rule 26(c), the certification and sanctions provisions of Rule 26(g) provide an additional layer of protection against improper discovery requests that would constitute a constitutionally cognizable deprivation. Requesting parties must certify that their requests are consistent with the rule, not interposed to needlessly increase the cost of litigation, and are not unreasonable or unduly burdensome.¹¹² Violation of this certification requirement subjects the offending party to the imposition of sanctions, which can include the reasonable expenses—including attorney’s fees—caused by the violation.¹¹³ Not only does this provision have deterrent value to the extent it discourages wayward discovery requests, it provides for a *post hoc* compensation scheme that makes the producing party whole in the event it incurs costs as a result of improper discovery requests. Certainly, the protection provided by Rule 26(g) will depend on how willing the court is to enforce it, a consideration to which we will return when considering discovery reforms below.

In sum, only requests outside the scope of discovery or those that are unduly burdensome constitute constitutionally cognizable deprivations. The Federal Rules provide for a pre-deprivation, adversary hearing before a judge to determine whether the discovery sought falls within or beyond this permissible scope. Only litigants who have demonstrated plausible entitlement to relief gain the right to invoke discovery with respect to their claims. And litigants who in fact interpose inappropriate discovery requests can be sanctioned in a way that makes the responding party financially whole. Needless to say, any effort to disparage this process as constitutionally insufficient is baseless.

¹¹² FED. R. CIV. P. 26(g)(1)(B).

¹¹³ FED. R. CIV. P. 26(g)(3).

B. Policy Considerations

Although there is no constitutional prohibition against requiring producing parties to bear the reasonable costs of responding to permissible discovery requests, that does not mean that such an approach is the most appropriate way to allocate these costs. The next question, then, is whether the producer-pays rule makes sense from a policy perspective. More specifically, what are the consequences of a producer-pays rule compared with a requester-pays approach and how do those consequences bear on litigants' goals and on the goals we collectively have for civil litigation more generally? Civil litigation is a mechanism through which civil law enforcement objectives are achieved. These objectives include the encouragement of law compliance (specific and general deterrence); the peaceful resolution of disputes on their merits, the remediation of harm (compensation); and—derivatively—the development of the law.¹¹⁴ A meta-objective would be the achievement of these objectives in a manner consistent with due process and with standards of efficiency and proportionality.¹¹⁵ What role—if any—does the producer-pays approach play in furthering or frustrating the goals of civil litigation?

There are not studies to date—of which this author is aware—that study the impact of the various discovery cost-allocation approaches discussed herein. However, there have been numerous writings that address the relative merits of the American rule versus the English rule, which allocate the overall legal expenses associated with litigation. Unfortunately, empirical studies attempting to measure the respective impacts of these competing regimes are more limited and have reached seemingly inconsistent or inconclusive results.¹¹⁶ For example, a Florida medical malpractice study suggested that under the English rule—which applied to medical malpractice claims in Florida—claim quality increased,

¹¹⁴ See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 426–27 (1999). (Civil litigation accomplishes more than a simple resolution of the dispute. . . . [J]udicial adjudication generates specific and general deterrence, educates the public, creates precedent, develops uniform law, and forms public values.”).

¹¹⁵ FED. R. CIV. P. 1 (These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”). After December 1, 2015, Rule 1 will read, “These 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.” See also Proposed Amendment to Rule 26(b)(1), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf> (“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 . . .”).

¹¹⁶ Theodore Eisenberg *et al.*, *When Courts Determine Fees in a System With a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 U.C.L.A. L. REV. 1452 (2013) (“Although a vast theoretical literature exists on litigation costs, much of it need not be described here. The literature has been reviewed elsewhere and is of limited relevance to this study because it reaches few consistent predictions or prescriptions.”).

settlement rates decreased, and plaintiffs obtained higher recoveries.¹¹⁷ Another study focused on Alaska's loser-pays regime found little effect to the extent that tort filings were similar to other U.S. jurisdictions following the American rule.¹¹⁸ An experiment that sought to mimic American and English rule environments demonstrated an increased likelihood of settlement under the English rule, a result that runs counter to the Florida malpractice study.¹¹⁹ Theoretical treatments of the topic have similarly yielded inconsistent perspectives on the probable impact of varying approaches to cost allocation.¹²⁰ One scholar seemed to suggest the futility of attempts to make predictions in this area when he wrote,

[T]he current state of economic knowledge does not enable us reliably to predict whether a move to fuller indemnification would raise or lower the total costs of litigation, let alone whether it would better align those costs with any social benefits they might generate. The reason for this agnostic conclusion is straightforward. Legal costs influence all aspects of the litigation process, from the decision to file suit to the choice between settlement and trial to the question whether to take precautions against a dispute in the first place The combination of all these external effects are too complicated to be remedied by a simple rule of "loser pays." Instead, indemnity of legal fees remedies some externalities while failing to address and even exacerbating others.¹²¹

I make no attempt to improve upon existing theoretical or empirical assessments of the relative merits of the American versus the English rule here. I offer the above brief overview simply to indicate that we may not be able to obtain concrete guidance on that issue as we seek to determine the optimal approach for allocating the costs of civil discovery. That said, can we still attempt to reason toward some conclusions regarding what the impact of various discovery cost-allocation approaches might be?

¹¹⁷ Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345 (1990) [hereinafter Snyder & Hughes, *The English Rule*]; James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225 (1995) [hereinafter Hughes & Snyder, *Litigation and Settlement*].

¹¹⁸ See SUSANNE DI PIETRO ET AL., ALASKA JUDICIAL COUNCIL, ALASKA'S ENGLISH RULE ATTORNEY'S FEE SHIFTING IN CIVIL CASES (1995).

¹¹⁹ Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 INT'L REV. L. & ECON. 161 (1988).

¹²⁰ Professor Herbert Kritzer summed this point up nicely when he wrote, "There is surprisingly little agreement among those who have undertaken these theoretical analyses. Some analysts argue that fee shifting should increase the likelihood of settlement, while others argue that it will increase the likelihood of cases going to trial. Some argue that fee shifting will decrease the number of cases filed, 20 while others argue that the numbers of cases will increase." Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1948 (2002) (citing various articles).

¹²¹ Avery Wiener Katz, *Indemnity of Legal Fees*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 64–65 (BOUDEWIJN BOUCKAERT & GERRIT DE GEEST EDS., 2000).

Regarding the impact of discovery cost-allocation on claim initiation and claim quality, it seems reasonable to assume that from the perspective of a rational prospective litigant, the imposition of greater costs on litigating a claim would permit that litigant to proceed only if it could perceive a greater potential benefit to justify those expenses. This perception of one's own claim quality and likelihood of success may or may not comport with actual claim quality, but at a minimum the claimant must have some increased measure of confidence in success to justify pursuing a claim at a cost of $x + n$ as opposed to a cost of x . For this to be true, prospective claimants would have to have reasonably accurate information about what those costs are likely to be as well as some means of properly assessing the merits of their respective claims. Further, the magnitude of the increased costs—reflected in the likely discovery costs the claimant will have to bear—would have to be sufficient to matter to the decision to bring the claim; relatively negligible discovery costs or costs that would be largely outweighed by a recovery are less likely to deter the bringing of claims. Finally, claimants could reduce the costs they bore under a requester-pays regime by modifying or narrowing their requests, which would potentially lessen the deterrent effect of such a regime. As this brief exercise demonstrates, the lament excerpted above that predicting the impact of the competing indemnification regimes is a fool's errand may have some merit: The array of factors, information deficits, and contingencies that bear on the decision to initiate a lawsuit may be too numerous, complex, and amorphous to isolate the impact of cost-shifting on that decision.

Although this may be so, I would surmise that there is a degree of discovery expense that, if placed at the feet of claimants, could be sufficiently large to discourage the bringing of some number of claims. It simply is unclear what that level would be in proportion to the value of the overall claim (although I would guess having to spend anything approaching, say, 50% of one's anticipated claim value might begin to deter one from pursuing it at all). What is clear is that were such a level to be reached, the impact would be the deterrence of some frivolous or meritless claims but also of some number of legitimate claims, particularly those that might have negative value (meaning the potential recovery is outweighed by the expense of pursuing it). How would such an outcome impact the objectives of civil litigation outlined above? On the one hand, the elimination or reduction of frivolous claims would lessen the chance that litigants who are not entitled to a recovery under the law will nonetheless obtain a recovery based on financial incentives on the defendant to settle—an outcome that would promote greater resolution of disputes on their merits. On the other hand, however, to 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. All of this said, without being able to know where we are on the over-deterrence/under-deterrence spectrum, it is difficult to argue that more or less deterrence-through-cost-allocation is needed.

What of the narrower impact of discovery cost-allocation rules on discovery itself? If we assume that the impact of these rules on case initiation and claim quality is indeterminate, might there be an independent and discernable impact such rules have on discovery, such as the overall cost of discovery, the number and scope of discovery requests, or the production of information useful to a resolution of the dispute on the merits? The goal of discovery is to produce information that permits a resolution of the dispute on its merits, which is an objective of civil litigation more generally. Discovery rules that facilitate the production of relevant and probative information further that goal, while rules that permit or encourage either the concealment of such information or the production of irrelevant information do not. Raising the costs of seeking and obtaining information from one's adversary likely would have the effect of forcing a party to narrowly confine its requests to that which is most likely to be useful to the requesting party.¹²² That is a positive result in one sense in that frivolous requests for information could be minimized. But an alternative impact could be a chilling effect on requests that might prevent useful information from being discovered, something that would impede the effort of the parties and the court to resolve the case on its merits and likely adversely impact enforcement objectives. A useful avenue for future empirical research would be to attempt to assess the impact of cost-allocation rules on the discovery process itself. That said, it seems clear that making it cost-free to request information from one's adversary does nothing to incentivize requesting parties to limit their requests to the information they truly need. Indeed, requesting parties have an incentive (albeit an improper one¹²³) to request more information of little to no utility

¹²² See Ronald J. Allen, *How to Think about Errors, Costs, and Their Allocation*, 64 FLA. L. REV. 885, 894 (2012) (“[P]lacing the costs of discovery provisionally on the person asking for it . . . may . . . give incentives for the optimal production of information . . .”).

¹²³ The Federal Rules prohibit making discovery requests for the purpose of driving up an adversary's costs. FED. R. CIV. P. 26(g)(1)(B)(ii) (requiring attorneys to certify that a discovery request is “not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation”).

given that such requests impose costs on the adversary,¹²⁴ costs that can alter the calculus of whether to proceed with or to settle a case.

What conclusions, if any, can we draw from this brief discussion of how the various cost-allocation approaches might impact claim quality and the quality of discovery? It seems as if moving towards either end of the spectrum between raising and lowering costs for one litigant or the other simply modulates from achieving more or less deterrence from bringing claims or interposing discovery requests, which in turn may either frustrate or facilitate our larger law enforcement objectives. Such a situation calls for a balanced approach that takes the facts of a given case into account to determine the most appropriate allocation of costs under the circumstances. A flat rule that the producer pays under all circumstances—regardless of relevance or the reasonableness of the costs—would clearly be inappropriate, as it would permit requesting parties to saddle their adversaries with sufficient discovery costs to coerce them into acquiescing to their claims. But a flat rule that the requesting party has to pay the costs associated with responding to its requests would be no less inappropriate, as such a rule would deter meritorious claims and legitimate discovery requests and permit producing parties bury information in ways that made its recovery cost-prohibitive, as well as incentivize responding parties to drive up production costs as a means of burdening requestors.

Fortunately, the current discovery system opts for neither approach. Under the Federal Rules, litigants are not free to impose massive discovery expenses on their adversaries with impunity. Requesting parties are under an obligation to confine their requests to the relevant and the reasonable or face sanctions.¹²⁵ Producing parties can challenge compliance with those strictures before a judge prior to having to respond.¹²⁶ Are these protections sufficient? The fact that requested information might be relevant does not mean that the information is necessarily going to be useful to the case. Further, there will be times that relevant information will be costly to produce and a court may deem that those costs are reasonable, meaning producing parties will come under an obligation to pay significant sums to respond. In this situation, should producers have to pay? Finally, if, after having borne the costs of production in response to discovery requests, the producing party ultimately prevails in the litigation, might that party justly claim entitlement to the *reimbursement* of such expenses to be made whole? The next section fleshes out some possibilities for modifying

¹²⁴ Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 603 (2001) (“[T]he fact that a party’s opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests . . .”).

¹²⁵ FED. R. CIV. P. 26(b), (g).

¹²⁶ FED. R. CIV. P. 26(c).

the current approach to allocating discovery expenses that might address some of these concerns and more rationally align with the objectives of civil litigation and fairness to the litigants.

III. RATIONALIZING OUR APPROACH TO COST ALLOCATION

As noted above, it may be difficult to assess the impact of various approaches to allocating discovery expenses. My goal herein, then, is to articulate a framework for the rational allocation of such expenses among litigants based on policy principles and fairness considerations. Rule 1 provides a useful starting point, as it commands that the Federal Rules should be “construed and administered to secure the just, speedy, and inexpensive determination of every action.”¹²⁷ In the discovery context, this means that discovery should facilitate a resolution of the dispute on its merits (just), should not be unduly time-consuming (speedy), and the expense associated with discovery should be minimized (inexpensive). The Federal Rules—currently and as reflected in pending amendments thereto—further these objectives by limiting discovery to information that is relevant to a claim or defense, require that discovery be “proportional to the needs of the case,” and permit producing parties to object to unduly burdensome discovery and obtain a court order reallocating associated costs.¹²⁸ What additional measures might further advance to goals of making discovery just, speedy, and inexpensive?

Justice is served by the full disclosure of information that will assist the court in resolving the dispute between the litigants on its merits. But justice is disserved by discovery requests not designed to yield useful information. Without commenting on the degree to which such impositional discovery requests¹²⁹ are interposed (for that is not knowable), it cannot be denied

¹²⁷ FED. R. CIV. P. 1.

¹²⁸ See FED. R. CIV. P. 26(b) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense”); FED. R. CIV. P. 26(c) (“The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”); Proposed Amendment to Rule 26(b)(1), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf> (“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”); Proposed Amendment to Rule 26(c), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf> (“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 one or more of the following: . . . (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery.”).

¹²⁹ I borrow this term from Frank Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635 (1989). See *id.* at 637–38 (“[A]n impositional request is one justified by the costs it imposes on one’s adversary rather than by the gains to the requester derived from the contribution the information will make to the accuracy of the judicial process.”). I do so without endorsing or embracing the range of views propounded by Judge Easterbrook in the piece.

that the current rules permit (practically speaking) such requests to be made. One way to minimize the ability to make impositional discovery requests, of course, would be to saddle requesting parties with the cost of responding to those requests. However, as noted above, such an approach could deter legitimate requests that might contribute to a resolution on the merits. Further, making requesting parties bear that expense could provide an incentive to producing parties to manipulate such costs in a manner that unduly burdens the requester. Below, I briefly introduce three alternatives to a requester-pays approach that would better balance the interests of justice and cost-efficiency.

A. Judicial pre-screening of discovery requests

One of the most promising alternatives might be to reintroduce the judge into the discovery request process, at least in cases where discovery is likely to be (or is certain to be) expensive and contentious. Prior to 1970, parties had to seek court orders to obtain discovery from another party and could only do so on a showing of good cause.¹³⁰ The 1970 amendment to Rule 34 eliminated the requirement to show good cause and removed the court from the process so that the rule could “operate extrajudicially.”¹³¹ One could imagine returning to the pre-1970 version of the rule for discovery-intensive cases, requiring parties to submit their discovery requests to the court, which would then screen them for their propriety. Part of the good cause showing would not only be a demonstration of the relevance of the information requested but an articulation of why it is needed and how it would advance a resolution of the claims. Certainly, having to convince a judge of the propriety of a discovery request would chasten litigants in what they seek, at least to a greater degree than the purely lawyer-directed discovery approach—where judicial intervention in discovery disputes is rare and often avoided.

To be sure, taking this approach would not be feasible or warranted in most cases, given that judicial dockets are overloaded and that most cases involve little discovery.¹³² However, judges should be encouraged to identify cases in which such pre-screening of discovery requests would make sense. There could also be a mechanism for parties to request such intervention. When it is deemed that pre-screening discovery requests would be worthwhile but would be an overly time-intensive process for the

¹³⁰ The pre-1970 version of Rule 34 read, “Upon motion of any party showing good cause therefor . . . the court in which an action is pending may [] order any party to produce . . . any designated documents . . . which constitute or contain evidence relating to any of the matters within the scope of the examination permitted in Rule 26(b) . . .” FED. R. CIV. P. 34 (as amended in 1946, effective 1948).

¹³¹ Advisory Committee Notes, 1970 Amendment to Rule 34.

¹³² See Reda, *supra* note __ at 1089.

court, magistrates or discovery special masters could be tasked with the job. Rule 16(c)(2) already provides district judges with this authority. Specifically, Rule 16(c)(2)(F) empowers a court to “take appropriate action” with respect to “controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37.”¹³³ Further, Rule 16(c)(2)(H) permits judges to take action with respect to “referring matters to a magistrate judge or a master,” which of course is buttressed by the authority given the court under Rule 53 for masters and under Rule 72 and 28 U.S.C. § 636 for federal magistrate judges.¹³⁴ Indeed, one can find cases in which special masters have been used to handle discovery;¹³⁵ under this suggestion, however, their role would not be limited to post hoc resolution of discovery disputes but rather to ex ante determinations regarding the propriety of requested discovery. It is important to understand that a blanket approach of pre-screening is not being suggested, for most cases do not have discovery warranting this additional step. But for those that do, such pre-production intervention by a neutral third party could be helpful in facilitating meaningful, tailored discovery requests that do not impose undue expense.

B. *Loser-Pays Cost-Shifting*

In addition to strengthening judicial involvement in the discovery-request process in appropriate cases, it may be worth considering whether cost-shifting on the back-end—post-adjudication—would fairly serve the interests of incentivizing appropriate and proportionate discovery requests while permitting an information exchange that leads to a decision on the merits. As previously discussed, Rule 54(d)(1) empowers courts to award “costs”—not including attorneys’ fees—to “the prevailing party.”¹³⁶ Costs,

¹³³ FED. R. CIV. P. 16(c)(2)(F).

¹³⁴ FED. R. CIV. P. 16(c)(2)(H), 53, 72; 28 U.S.C. § 636.

¹³⁵ See, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 94 F.R.D. 173, 174 (1982):

After careful reflection, the court is satisfied that the magnitude of the case, the complexity of the anticipated discovery problems, the sheer volume of documents to be reviewed, many of which are subject to claims of privilege, the number of witnesses to be deposed, the need for a speedy processing of all discovery problems in order to meet the trial date established in this order, all argue in favor of using a special master to supervise discovery

¹³⁶ FED. R. CIV. P. 54(d)(1) (“[C]osts—other than attorney’s fees—should be allowed to the prevailing party.”). Compare this “prevailing party” language to provisions that make attorney’s fees available for those who “substantially prevail.” See, e.g., 5 U.S.C. §§ 552(a)(4)(E)(i)–(ii) (Freedom of Information Act) (“The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.”); 28 U.S.C. § 2465(b)(1)(A) (Civil Asset Forfeiture Reform Act) (“[I]n any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for reasonable attorney fees and other litigation costs reasonably incurred by the claimant.”). It is unclear to what extent the slightly more liberal “substantially

in turn, are defined in a very limited way in 28 U.S.C. § 1920 to include the following:

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.¹³⁷

There may be warrant for revising § 1920 to include a broader range of costs associated with producing material in response to discovery requests given realities of electronic discovery.¹³⁸ Rather than limiting reimbursable discovery costs strictly to those arising from reproduction, the fuller range of expenses connected with producing electronic discovery such as the search and retrieval process and associated e-discovery vendor costs would go much further in making a prevailing party whole. Further, the prospect of having to pay such expenses in the event of a defeat in the litigation should ensure that discovery requests are kept within the confines of what would be truly meaningful to the case.

Unfortunately, many of the problems that would result from moving to a requester-pays system would exist under a loser-pays rule. The prospect of having to pay such expenses on the back-end could over-deter discovery requests, leading requesting parties to fail to seek information that would be useful to the case for fear of having to pay. Further, for some plaintiffs in particular there may be no realistic ability for them to cover what could be hundreds of thousands of dollars or more in discovery expenses borne by their opponents that prevail in the litigation. As a result, some legitimate claims could be deterred altogether under such a regime.

Avoiding such an impact could be achieved in part by the development of some sort of after-the-event litigation insurance that one could purchase

prevails” language impacts litigant behavior versus the impact of the “prevailing party” language in cases to which that latter standard applies.

¹³⁷ 28 U.S.C. § 1920.

¹³⁸ Note that my proposal for post hoc shifting of discovery expenses is limited to expenses incurred responding to discovery requests; I am not suggesting that expenses incurred in building one’s own case be shifted.

to cover the potential discovery expense liability.¹³⁹ Another approach could be for judges in such cases to be vigilant in making sure that the discovery expenses to be shifted are themselves reasonable and not unduly trumped up by the party who initially incurred them, an assessment courts already make under circumstances when currently-authorized cost-shifting mechanisms are employed.¹⁴⁰ Additionally, an alleviating factor that would practically minimize the actual burden placed on litigants by post-judgment cost-shifting would be the fact that the loser-pays rule would only be invoked upon a judgment after a trial, not on a summary judgment or other preliminary termination of the case (or, at least the rule could be written in a way that so limited its applicability). Judgments on verdicts after a trial are extremely rare;¹⁴¹ thus, the instances in which post-hoc cost-shifting would occur would be relatively rare as well. That said, the potential for cost-shifting post-trial will necessarily factor into each litigant's risk-reward assessment at earlier stages of the litigation, which in turn will likely impact whether and how the case settles.¹⁴² There may be other ways to blunt the potential of this proposal to over-deter legitimate claims and discovery requests, such as vesting judges with discretion to shift less than all (or none) of the discovery expenses to the losing party based on factors such as ability to pay or the reasonableness of the defeated claims or defenses.¹⁴³

¹³⁹ See Collin M. Davison, *Fee Shifting And After-The-Event Insurance: A Twist To A Thirteenth Century Approach To Shifting Attorneys' Fees To Solve A Twenty-First Century Problem*, 59 DRAKE L. REV. 1199, 1201–02 (“England has developed an insurance product known as after-the-event insurance to provide funding for litigants who cannot afford the cost of the other party’s attorneys’ fees should they be unsuccessful in litigation.”).

¹⁴⁰ See, e.g., *Flagg v. City of Detroit*, No. 05–74253, 2011 WL 6131073, at *3 (E.D. Mich. Dec. 9, 2011):

[I]n arriving at an appropriate award of reasonable fees and costs, the Court must strike a balance between the two considerations outlined above: namely, (i) the extent to which Plaintiffs and their counsel devoted excessive time and resources to the discovery effort at issue, and (ii) the extent to which the conduct of the City and its counsel thwarted Plaintiffs’ reasonable attempts to secure the e-mails sought in their discovery request or, failing that, to obtain relief from the City’s destruction of these emails.

¹⁴¹ See U.S. Courts, 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, available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/C04Mar14.pdf> (showing that for the 12-month period ending March 31, 2014 only 1.2% of all civil cases reached trial).

¹⁴² See Laura Inglis et al., *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89, 116 (2005):

Our subjects tend to behave rationally when confronted with changes in the magnitude of court costs. The overall settlement rate under low costs was 58.7% compared to 77.7% under high costs. High costs increased the number of settlements across all treatment variables. This suggests that high court costs create strong incentives for settlement.

¹⁴³ Such a “judge-centered” approach characterizes what is done in Israel; their process and its impact was studied in Theodore Eisenberg et al., *When Courts Determine Fees in a System With a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 U.C.L.A. L. REV. 1452 (2013). The study authors’ findings revealed that judges used their discretion in a variety of ways to vary how post hoc cost-shifting was implemented across different categories of cases and depending upon the nature of the

But the underlying propriety of the approach in terms of fairness seems clear: After a party prevails in litigation, some degree of the costs incurred in supplying material to the losing party in discovery should be recoupable. Future research efforts should be designed to study what the range of impacts of a post-hoc discovery cost-shifting regime might be and how they could be mitigated.

C. Better Case Management

Before concluding, it must be urged that judges have within their power the case-management tools necessary to address many of the discovery cost concerns that defendants have today. Phased discovery—which involves the prioritization of discovery with respect to some matters whose resolution might eliminate the need for later discovery—is a potential means of minimizing the burden that producing parties will bear that courts should consider when appropriate and useful. Parties are encouraged to consider phased discovery within their discovery plan under Rule 26(f)(3)(B). Judges can and should enter protective orders under Rule 502 of the Federal Rules of Evidence to reduce the costs associated with overly-meticulous pre-production privilege review.¹⁴⁴ Judges can require parties to tailor their discovery requests in a manner that will reduce the expense associated responding to them. Pre-production cost-shifting is already permitted under the rules if the producing party is able to demonstrate undue burden; judges should not shy away from recognizing these burdens and ordering cost-shifting or sharing where appropriate.¹⁴⁵ When shifting the costs would be too burdensome for the requesting party to bear, judges can help the parties reach an agreement regarding the requests or protocols for identifying responsive material that might be able to reduce these costs. Clearly, there will be cases in which high discovery costs will be unavoidable and someone will have to bear them; and there may be no solution for such cases. But there is enough that can be done in most cases where discovery is an issue under either the existing rules or under approaches proposed above that recourse to an ex ante requester-pays rule would seem to be unnecessary.

parties involved. *See id.* at 1457–58 (“Our findings suggest that Israeli judges operate multiple de facto litigation cost systems: a one-way shifting system that dominates in most tort cases; a loser pays system that operates when publicly-owned corporations litigate; and a loser pays system with discretion to deny litigation costs in all other cases.”).

¹⁴⁴ FED. R. EVID. 502(d) advisory committee’s note (“Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery.”).

¹⁴⁵ Recall that there will be explicit authorization to order cost-sharing under Rule 26(c)(1)(B) once currently pending amendments take effect on December 1, 2015.

CONCLUSION

The principal purpose of this article was to address the nascent argument that the producer-pays rule should be abandoned in favor of a requester-pays rule for constitutional and policy reasons. What is clear is that there is nothing unconstitutional about the producer-pays rule because unreasonable, inappropriate, or disproportionate discovery requests can be blocked by recourse to a protective order from the judge. Once declared to be within the scope of discovery and otherwise reasonable given the needs of the case, the producing party has had a hearing and no deprivation can be said to have occurred under such circumstances in any event. The policy case against moving to a requester-pays rule is equally strong: The over-deterrence of legitimate claims and appropriate discovery requests would fundamentally undermine access to justice and the resolution of disputes on their merits in ways that would ultimately compromise the larger law-enforcement objectives of the civil justice system.

Less clear is what alternatives can be employed to address the issue of excessive discovery expense when such is a problem in a case. Absent any rule changes, it seems that judges or their delegates will have to take responsibility for better-policing this issue by shaping discovery in a way that minimizes expense and cabins discovery within confines that are reasonable given the needs of the case. However, the labor-intensiveness of such an approach—plus the potential for unduly constraining the ability of litigants to pursue information they feel would be helpful to their litigation position—may favor supplementing it with some form of post-judgment cost-shifting that requires the losing party to reimburse the winner for some portion of its discovery expenses. Whatever approach is taken, let us hope that it is designed and implemented in a manner consistent with the need to nurture rather than thwart access to civil justice by those with legitimate claims.