One-Way Fee Shifting After Summary Judgment

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I. INTRODUCTION

New, defendant-friendly amendments to the Federal Rules of Civil Procedure took effect on December 1, 2015.1 Included in the amendments are several provisions designed to curb the cost of discovery.2 Although modest, the discovery-related provisions created more controversy than perhaps anything the rulemakers have done in recent memory.3 But defendants are not done. They placed one more discovery proposal before the rulemakers, and it is even more ambitious: to outright \textit{flip} who pays for discovery, from the party who

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1 See The United States Supreme Court Adopts Proposed Federal Rules of Procedure (FRCP) Changes, iPRO (May 12, 2015) (“With no comments expected to come from congress, which has until December 1st to act if it objects to the rule change, lawyers and eDiscovery professionals should prepare as if all of the proposed FRCP rule changes will go into effect at the end of the year.”).
produces the discovery to the party who requests it. To the surprise of many commentators, the rulemakers placed the proposal on their agenda for serious study. But scholarly commentary has thus far been very critical, and the rulemakers recently tabled the proposal indefinitely.

Although the proposal is extremely ambitious, it is an attempt to solve an equally ambitious problem: the current approach of “producer pays” creates incentives for both sides to run up the other side’s discovery costs. This is the case because, if the other side is paying the bill, you have no reason not to request as much as you can. In fact, you have every reason to request as much as you can: driving up the other side’s litigation costs creates pressure on the other side to settle with you on more favorable terms. These incentives not only make litigation more expensive, but, because defendants usually possess more discoverable information than plaintiffs, they lead defendants to overpay to settle cases. Overpayment, in turn, leads to over deterrence and exacts negative costs on society. The incentives problem created by producer-pays is well known in the American litigation system and has been for some time. The proposed “requester pays” rule would solve the problem full stop: parties would no longer ask for discovery unless they thought it was justified by the cost.

But requester-pays has its drawbacks as well. For one, defendants would have every incentive to respond extravagantly to discovery

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4 See, e.g., 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) (“[T]he Committee should consider, over the longer term, an amendment requiring each party to pay the costs of the discovery it requests.”); Lawyers for Civil Justice (LCJ), Comment to the Civil Rules Advisory Committee and the Discovery Subcommittee 1 (Apr. 1, 2013) (“[LCJ] respectfully writes to engage the Civil Rules Advisory Committee . . . on what we consider to be the ‘third pillar’ of needed discovery reform: a ‘requestor pays’ default rule requiring the party that asks for discovery to pay the costs of its requests.”).


6 See, e.g., A. Benjamin Spencer, Rationalizing Cost Allocation in Civil Discovery 27 (working paper Jan. 2015)

requests in order to drive down the settlement value of cases. For another, requester pays would increase plaintiffs’ price of admission to court. Indeed, some plaintiffs would be priced out of court altogether—namely, those whose discovery costs plus other litigation expenses exceed the value of their claim. Of course, defendants are currently priced out of defending themselves in court under the producer-pays regime; they settle claims to avoid discovery costs and other litigation expenses even if they might win the claims on the merits. Nonetheless, it must be admitted that requester-pays means more misconduct by defendants would go uncompensated and undeterred.

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

There is a better way to split the baby. Based on our earlier work, we propose the following: if the plaintiff’s entire case is dismissed at summary judgment, she must pay the difference between the defendant’s discovery expenses and her own. The rule we propose is a bright line rule. It does not require litigation over who pays and how much. And it does not require judges to guess how valuable discovery may or may not be. Under our proposed rule, the requesting party could still access any relevant discovery they want, and the producing party must still cover the cost of responding. But if the plaintiff’s case is later dismissed on summary judgment, then she must repay the difference between the defendant’s discovery expenses and her own discovery

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8 See Brian T. Fitzpatrick, Twombly and Iqbal Reconsidered, 87 NOTRE DAME L. REV. 1621, 1645-46 (2012) (“[P]laintiffs might be asked to pay only the defendants’ discovery-related fees and expenses . . . if they lose their cases on summary judgment.”); Cameron T. Norris, Drugs, Devices & Discovery: Using Fee-Shifting to Resolve the Twombly/Iqbal Problem for Parallel Claims Under the FDCA, 70 FOOD & DRUG L.J. 187 (2015).
expenses. This rule will curb the incentive to run up discovery costs because in many cases plaintiffs will not know for certain whether they will find any incriminating evidence in discovery. Moreover, unlike the requester-pays proposal, it will not cause defendants to respond to discovery requests extravagantly because defendants will likewise not know whether the plaintiffs will find something incriminating. Finally, although this rule will increase the price of admission somewhat for plaintiffs because they would have to factor in the probability of repayment if they lose on summary judgment, it does not increase the price nearly as much as requester-pays.

One might ask why we stop at summary judgment and do not embrace a wholesale switch to the English Rule, whereby every losing party must repay every winning party for all of his fees and costs. The answer is two-fold. First, the problem we are trying to solve is the problem of discovery. Our proposal hones in on discovery expenses and, accordingly, kicks in when discovery is over, at the summary-judgment stage. The English Rule, by contrast, shifts all fees and costs, whether incurred in discovery or not. We are not sure the other costs of litigation suffer from the same incentive problems that discovery does. Most of the incentive problems in discovery stem from the asymmetric quantities of discoverable information that plaintiffs and defendants possess; we are not sure similar asymmetries exist in other stages of litigation. Moreover, because it is asymmetries that we are trying to correct, the rule we propose on shifts fees to the extent those fees are asymmetric; that is, only to the extent the defendant has incurred greater fees than the plaintiff. Second, the English Rule is a two-way fee shifting rule—both plaintiffs and defendants have to pay if they lose—and, as such, it comes with additional problems that our one-way rule against plaintiffs does not. Specifically, both theoretical models and natural experiments have shown that two-way fee shifting leads to an increase in overall litigation expenses because both sides think there is a good chance the other side will end up picking up their tab. We are trying to reduce litigation expenses, not increase them. This same pathology does not affect one-way fee shifting; it makes plaintiffs less eager to impose litigation expenses, not more.

The final question we address is whether our proposal could be adopted by the rulemakers or whether it needs action by Congress to become law. We think this is a close question, but we believe there are plausible arguments that the rulemakers have the authority to adopt it on its own.
II. DISCOVERY AND ITS DISCONTENTS

A. The Problem with Discovery

Discovery in the United States is typically producer-pays: when one party requests information, the other party must produce it and cover the associated costs. Producer-pays is often described as a corollary to the “American Rule”—the tradition in this country of requiring all parties, win or lose, to cover their own litigation expenses. But producer-pays has a major incentives problem. Because the requesting party does not foot the bill, she has little reason to tailor her discovery requests or to otherwise limit the cost of discovery. In fact, she has every reason to increase the cost of discovery.

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

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

11 See Martin H. Redish, The Allocation of Discovery Costs and the Foundations of Modern Procedure, in THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW (F.H. Buckley ed. 2013) (“[W]hen the responding party, rather than the requesting party, bears the costs of the process, the requesting party has absolutely no economic disincentive not to make the request, regardless of its costs.”); Bruce H. Kobayashi, Law’s Information Revolution as Procedural Reform: Predictive Search as a Solution to the In Terrorem Effect of Externalized Discovery Costs, 2014 U. ILL. L. REV. 1473, 1491–92 (2014) (“[U]nder the traditional discovery cost-allocation rule . . . , [t]he incentives of the plaintiff are to only consider the costs of request and review in determining the size of his search, and to ignore the cost of response.”); Martin H. Redish & Colleen McNamara, Back to the Future: Discovery Cost Allocation and Modern Procedural Theory, 79 GEO. WASH. L. REV. 773, 801 (2011) (“The externalization of discovery costs, accomplished through the de facto hidden litigation subsidy caused by our current model of cost allocation, incentivizes what can most appropriately be called excessive discovery.”); Robert D. Cooter & Daniel L. Rubinfeld, An Economic Model of Legal Discovery, 23 J. LEGAL STUD. 435, 452 (1994) (“If the parties act noncooperatively and each bears his own cost of complying with discovery requests, then the plaintiff will conduct discovery whose incremental cost exceeds the expected increase in the value of the legal claim . . . .”); E. Donald Elliott, Twombly in Context: Why Federal Rule of Civil Procedure 4(b) Is Unconstitutional, 64 FLA. L. REV. 895, 953–54 (2012) (“[U]nder producer-pays[,] a plaintiff’s lawyer may externalize a substantial portion of the costs of the economic venture that he or she initiates onto the defendant, but the attorney and his client obtain all of the benefits if the venture is successful. In other contexts, this incentive structure, in which one economic actor gets the profits but another bears the risks, has been criticized by economists for creating runaway speculation.”); A. Benjamin
discovery because doing so makes it more likely that the producing party will settle on favorable terms.\textsuperscript{12}

This latter dynamic can be demonstrated mathematically. Assume there are two parties, Plaintiff and Defendant, who are rational economic actors with perfect information.\textsuperscript{13} Plaintiff sues Defendant for $100,000 and has a 50\% chance of prevailing. The expected value of the litigation to Plaintiff—and the expected cost to Defendant—is

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

Of course, litigation is not free and, under the American Rule, the parties must pay for their own litigation expenses. Those costs must be factored

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\textsuperscript{12} See Redish, supra note 11, at 3 (“The very threat of costly discovery likely induces rationally self-interested defendants to settle even non-meritorious suits for an amount smaller than the projected costs of discovery.”); Redish & McNamara, supra note 8, at 802 (“Because a party's opponent is the source of the litigation subsidy, the requesting party also has a perverse incentive to make the request as broad and expensive as possible in order to impose costs on its opponent.”); Spencer, supra note 11, at 27–28 (“[R]equesting parties have an incentive . . . to request more information of little to no utility given that such requests impose costs on the adversary, costs that can alter the calculus of whether to proceed with or to settle a case.”); Edward R. Finch, Some Fundamental and Practical Objections to the Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States, 22 ABA J. 809, 810 (1936) (complaining that, under the discovery rules, “it will be cheaper and more to the self interest of the defendant to settle for less than the cost to resist”).

\textsuperscript{13} By “rational economic actors,” we mean that the parties are risk neutral and seek to maximize their economic gains and minimize their economic losses. Of course, these assumptions do not always hold up in real-world litigation. But they usually do, and they are in any event useful to help explain particular litigation dynamics. By “perfect information,” we mean that the parties know, and agree on, the plaintiff’s damages and likelihood of success at trial. We make this assumption in order to isolate the effect of discovery costs on the parties' propensity to settle. This basic effect would not change if we incorporated uncertainty into our models.
into the parties’ calculations. Assume the litigation will cost each party $20,000. The expected value of the lawsuit to Plaintiff is now

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

and the expected cost to Defendant is

\[ $50,000 + $20,000 = $70,000 \]

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

Now, assume Defendant’s litigation expenses are $40,000 instead of $20,000. Then, the Defendant is willing to settle for up to $90,000. The same is true for Plaintiff: if her litigation expenses increased to $40,000, she would now accept as little as $10,000.

Thus, the mutual settlement range depends on the sum of the parties’ litigation expenses.\(^ {15} \) As litigation expenses increase, the parties become more likely to settle.\(^ {16} \) And the more one party can increase the other side’s litigation expenses, the more likely he can negotiate a settlement on better terms.\(^ {17} \)

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\(^{14}\) See Steven Shavell, Foundations of Economic Analysis of Law 402 (2004) (“[I]f the plaintiff’s minimum acceptable amount is less than the defendant’s maximum acceptable amount, a mutually beneficial settlement is possible—a settlement equal to any amount in between these two figures would be preferable to a trial for each party.” (emphasis omitted)); Cooter & Rubinfeld, supra note 11, at 463 (“[T]he difference between the expected loss of defendant and the expected net gain of plaintiff, must be positive” for the parties to settle.).

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

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

\(^{17}\) See Rosenberg & S. Shavell, A Model in Which Suits Are Brought for Their Nuisance Value, 5 Int’l Rev. L. & Econ. 3, 10 (1985) (“[W]henever a party is able to impose significant [discovery] costs on the other, he should be able to bargain for a relatively advantageous settlement.”); Cooter & Rubinfeld, supra note 11, at 453 (“[A]
This result is remarkable. It means there are even cases in which a rational defendant would settle with a rational plaintiff even though the plaintiff’s suit has zero chance of success. Indeed, it is rational for a plaintiff to file such a case whenever her litigation expenses are less than the defendant’s litigation expenses.\(^\text{18}\)

This is usually the case when it comes to discovery\(^\text{19}\)—perhaps the biggest overall driver of litigation expenses.\(^\text{20}\) Discovery costs fall disproportionately on defendants, rather than plaintiffs, for several reasons. In every case, the plaintiff alleges wrongdoing by the defendant, and the best evidence of that wrongdoing (assuming it occurred) is usually in the defendant’s possession. The plaintiff therefore wants more information from the defendant than the defendant wants from the plaintiff.\(^\text{21}\) Generally speaking, it is far cheaper to
credible threat by the plaintiff to impose discovery costs on the defendant will increase the rational settlement value.”).\(^\text{18}\)

\(^{18}\) See Rosenberg & Shavell, supra note 17, at 5 (explaining that a rational plaintiff will sue “whenever the cost of filing is less than the defense costs plus his expected judgment”); Cooter & Rubinfeld, supra note 11, at 442 (“A rational plaintiff files a complaint and pursues it when the cost of doing so is less than the expected value of the claim. . . . [T]he expected value of the claim at time 1 is the net payoff that settlement or trial yields to the plaintiff, adjusted for the probability of each, less the cost of bearing risk.”).


\(^{21}\) See Swanson v. Citibank, N.A., 614 F.3d 400, 411 (7th Cir. 2010) (Posner, J., dissenting) (“In most suits against corporations or other institutions, . . . the plaintiff wants or needs more discovery of the defendant than the defendant wants or needs of the plaintiff, because the plaintiff has to search the defendant’s records (and, through depositions, the minds of the defendant’s employees) to obtain evidence of wrongdoing.”).
request information than to produce it. Although plaintiffs incur some costs in reviewing the information they request, those costs are dwarfed by the costs of the defendant (who must review the information and produce it). And plaintiffs can control their costs by simply declining to request certain information or declining to review the information they receive. Defendants, by contrast, must produce whatever the plaintiff requests—subject to a minimal standard of relevance—or face sanctions for noncompliance. Moreover, plaintiffs are often individuals and defendants are often companies. Companies possess far more discoverable information (records to review, databases to search, employees to interview, etc.) than individuals.

The cost of discovery is often exorbitant, creating immense pressure on defendants to settle in order to avoid it. The United States has the most liberal discovery rules in the world. Their stated purpose is “to allow a broad search for . . . any . . . matters which may aid a party

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22 See Redish & McNamara, supra note 11, at 800.
24 See Proposed FED. R. CIV. P. 26(b)(1) (2015) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case . . . . Information within this scope of discovery need not be admissible in evidence to be discoverable.”).
25 See FED. R. CIV. P. 37.
27 See id. ("Corporate America is perhaps the most vocal critic of litigation expense—understandably so, given that large, deep-pocketed businesses so often are targeted as defendants and bear a disproportionate share of litigation’s burdens."); Frank Easterbrook, Discovery as Abuse, 69 B.U.L. REV. 635, 643 (1989) ("[I]n a fight between the big and the small, the big are more likely to be the targets of impositional discovery requests.").
in the preparation or presentation of his case.” To achieve this goal, the rules provide litigants with a veritable arsenal of discovery weapons—document requests, interrogatories, depositions, and the like.

The cost of responding to discovery requests has skyrocketed in recent years. Two phenomena are largely responsible for this trend. The first is globalization. Corporations are larger and more complex today than they have been in the past. Instead of cities and states, companies now span nations and continents. These multinational corporations produce massive amounts of information and, when they are sued, it is expensive to gather all of the relevant information,

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30 Estes, supra note 29; see also Hickman, 329 U.S. at 501 (“The various instruments of discovery” allow “the parties to obtain the fullest possible knowledge of the issues and facts before trial.”); Stephen N. Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules, 39 B.C. L. Rev. 691, 718 (1998) (explaining that Edson Sunderland, the original drafter of the federal discovery rules, “included every type of discovery that was known in the United States and probably England up to that time . . . . oral and written depositions; written interrogatories; motions to inspect and copy documents and to inspect tangible and real property; physical and mental examination of persons; and requests for admissions”).

31 Fitzpatrick, supra note 19, at 1638; see also Phillip I. Blumberg, Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems, 50 Am. J. Comp. L. 493, 493 (2002) (“In the modern global economy, the largest corporations conduct worldwide operations. They operate in the form of multinational corporate groups organized in incredibly complex multi-tiered corporate structures . . . . The 1999 World Investment Report estimated that there are almost 60,000 multinational corporate groups with more than 500,000 foreign subsidiaries and affiliates.” (quotation marks omitted)); Jed Greer & Kavaljit Singh, A Brief History of Transnational Corporations, CORPWATCH (2000) (“Whereas in 1906 there were two or three leading firms with assets of US$500 million, in 1971 there were 333 such corporations . . . . Over the past quarter century, there has been a virtual proliferation of transnationals. In 1970, there were some 7,000 parent TNCs, while today that number has jumped to 38,000. 90 percent of them are based in the industrialised world, which control over 207,000 foreign subsidiaries.”).
interview all of the relevant employees, and otherwise participate in litigation.\footnote{Fitzpatrick, \textit{supra} note 19, at 1638; see also Swanson v. Citibank, N.A., 614 F.3d 400, 411 (7th Cir. 2010) (Posner, J., dissenting) (“With the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical. And the cost is not only monetary; it can include, as well, the disruption of the defendant’s operations.”).}

The second phenomenon driving the cost of discovery is technological innovation. The federal discovery rules predate the copy machine—much less computers, the Internet, thumb drives, email, text messages, smartphones, and cloud computing.\footnote{See Martin H. Redish & Colleen McNamara, \textit{Back to the Future: Discovery Cost Allocation and Modern Procedural Theory}, 79 GEO. WASH. L. REV. 773, 775 (2011) ("[I]t would have been difficult for the drafters of the original Federal Rules to foresee the advent of the copy machine, let alone the explosion of electronic discovery that occurred at the turn of this century—developments that have no doubt dramatically raised the discovery stakes.").} Today, billions of electronic documents are created every day in the United States,\footnote{See THE RADICATI GROUP, INC., \textit{EMAIL STATISTICS REPORT, 2013-2017 – EXECUTIVE SUMMARY} at 3 (2013), http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf ("In 2013, the majority of email traffic comes from business email, which accounts for over 100 billion emails sent and received per day. Email remains the predominant form of communication in the business space. This trend is expected to continue, and business email will account for over 132 billion emails sent and received per day by the end of 2017."); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., \textit{ELECTRONIC DISCOVERY} 5 (2008) ("Over 99\% of the world's information is now generated electronically . . . . Worldwide, [p]robably close to 100 billion e-mails are sent daily, with the average employee sending and receiving more than 135 e-mails each day. And every day, the world generates five billion instant messages . . . ." (quotation marks and citations omitted)); Christine Sgarlata Chunga & David J. Byer, \textit{The Electronic Paper Trail: Evidentiary Obstacles to Discovery and Admission of Electronic Evidence}, 4 B.U. J. SCI. & TECH. L. 5, 11 (1998) ("Businesses, organizations, and individuals around the world generate computerized information at amazing speeds, often in lieu of traditional paper records and in circumstances where a paper record might not exist."); \textit{see also} Victor E. Schwartz & Christopher E. Appel, \textit{Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal}, 33 HARV. J.L. & PUB. POL’Y 1107, 1141 (2010) ("At present, more than ninety percent of discoverable information is generated and stored electronically.").} and

\footnote{\textit{See} THE RADICATI GROUP, INC., \textit{EMAIL STATISTICS REPORT, 2013-2017 – EXECUTIVE SUMMARY} at 3 (2013), http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf ("In 2013, the majority of email traffic comes from business email, which accounts for over 100 billion emails sent and received per day. Email remains the predominant form of communication in the business space. This trend is expected to continue, and business email will account for over 132 billion emails sent and received per day by the end of 2017."); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., \textit{ELECTRONIC DISCOVERY} 5 (2008) ("Over 99\% of the world's information is now generated electronically . . . . Worldwide, [p]robably close to 100 billion e-mails are sent daily, with the average employee sending and receiving more than 135 e-mails each day. And every day, the world generates five billion instant messages . . . ." (quotation marks and citations omitted)); Christine Sgarlata Chunga & David J. Byer, \textit{The Electronic Paper Trail: Evidentiary Obstacles to Discovery and Admission of Electronic Evidence}, 4 B.U. J. SCI. & TECH. L. 5, 11 (1998) ("Businesses, organizations, and individuals around the world generate computerized information at amazing speeds, often in lieu of traditional paper records and in circumstances where a paper record might not exist."); \textit{see also} Victor E. Schwartz & Christopher E. Appel, \textit{Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal}, 33 HARV. J.L. & PUB. POL’Y 1107, 1141 (2010) ("At present, more than ninety percent of discoverable information is generated and stored electronically.").}
that number will probably continue to grow at an exponential pace.\textsuperscript{35} The size and space limitations that governed the world of paper no longer apply: a single eight-millimeter backup tape can hold the equivalent of 1,500 banker’s boxes.\textsuperscript{36} Discovery in even a “midsized” lawsuit can involve five hundred gigabytes of data (or fifty million pages).\textsuperscript{37} That data must be reviewed by lawyers for relevance, responsiveness, and privilege—generating enormous attorney’s fees.\textsuperscript{38} And some kinds of data (e.g., metadata, “deleted” data, and data stored on outdated technologies) require a team of experts to unearth and reproduce.\textsuperscript{39} All told, discovery in the digital age is often a multi-million dollar enterprise.\textsuperscript{40}

Few practitioners would dispute that discovery has become prohibitively expensive.\textsuperscript{41} Yet, a 2009 study from the Federal Judicial Center purports to do just that.\textsuperscript{42} The Federal Judicial Center surveyed lawyers about the cost of litigation in civil cases that terminated in the

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\textsuperscript{35} See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., supra note 34, at 5 (“The quantity of electronic information is growing exponentially; one report shows that new stored information increases about 30% annually.”).


\textsuperscript{37} See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., supra note 34, at 5.

\textsuperscript{38} See Mazanec, supra note 10, at 641.

\textsuperscript{39} See id. at 640.

\textsuperscript{40} Fitzpatrick, supra note 19, at 1639 & n.106; see also INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., supra note 34, at 5; Mia Mazza et al., In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information, 13 RICH. J. L. & TECH. 1, 4 (2007).

\textsuperscript{41} See Hon. Ralph K. Winter, In Defense of Discovery Reform, 58 BROOK. L. REV. 263, 263 (1992) (“In private conversations with lawyers and judges, I find precious few ready to argue that pretrial discovery involves less than considerable to enormous waste.”); Wayne D. Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 AM. B. FOUND. RES. J. 217, 234 (“[V]irtual consensus [exists] among larger case lawyers that the discovery system as they experienced it would not fare well in a rigorous cost-benefit analysis: many such lawyers apparently believe that the expense the process generates is often disproportionate to the value of the information it yields.”).

\textsuperscript{42} EMERY G. LEE III & THOMAS E. WILLING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY (2009).
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last quarter of 2008. Of the cases that required discovery, defense attorneys reported median litigation costs of $20,000—27% of which were attributable to discovery. This $5000 number attributable to discovery is less than the last time the Federal Judicial Center surveyed lawyers in 1997. This means that, according to the Federal Judicial Center, the amount of money that defendants spend on discovery has decreased over the last two decades. This finding strikes us as not even remotely realistic. It is facially implausible to think that discovery has become less expensive since the advent of e-discovery.

Indeed, studies like the 2009 Federal Judicial Center survey are inherently limited because they focus on incurred litigation costs instead of threatened litigation costs. Defendants settle cases to avoid incurring litigation costs. Thus, “the crucial piece of information in many cases is not what defendants actually paid in discovery, but what they would have paid had they not settled, and this information was not (and probably could not have been) collected in the 2009 Federal Judicial Center study.” Such information is difficult to find because the litigants possess it but they are extremely reluctant to disclose it.

43 Id. at 5.
44 Id. at 35, 38.
45 Fitzpatrick, supra note 19, at 1641 (“[If] the Federal Judicial Center’s studies are to believed, in the median civil case, the amount of money defendants spent on discovery declined from $7500 in 1997 (half of $15,000) to $5400 in 2009 (twenty-seven percent of $20,000)!”).
46 Id.
47 Id. (“I know of no one who believes that discovery has become a less expensive enterprise since the advent of e-discovery.”).
48 Id. at 1641–42; see also Easterbrook, supra note 27, at 637 (“Data showing that most cases settle without substantial discovery are not reassuring; the terms of settlement are affected the most when the parties threaten discovery (explicitly or implicitly) but never use it.”).
49 See Nicholas M. Pace & Laura Zakaras, Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery 4 (2012) (“Even when pressured to do so by regulators, companies are often skittish about disclosing lawsuit costs. Disclosure of information about a lawsuit, including costs incurred, is felt by some corporate defendants and their counsel to run the risk of permitting plaintiffs to learn or reverse engineer defendants’ litigation assessments and strategies. Attorney bills, for example, have been characterized as potentially
Similar to the Federal Judicial Center, some scholars argue that actual discovery abuse—i.e., plaintiffs intentionally threatening defendants with exorbitant discovery expenses—is rare.\textsuperscript{51} We are less sanguine. We doubt that lawyers are abstaining from a practice that is easy to do, is difficult to detect,\textsuperscript{52} and increases their prospects of getting paid quickly and handsomely. As just explained, serious underreporting makes it hard to know just how much discovery abuse does or does not occur. The general sense of both practitioners and jurists is that revealing “the motive of the client in seeking representation, litigation strategy, privileged communications or the specific nature of the services provided by attorneys, such as research into particular areas of the law,” (quotation marks and footnotes omitted)); Robert G. Bone, \textit{Modeling Frivolous Suits}, 145 U. PA. L. REV. 519, 528 (1997) (“[R]esearchers cannot easily obtain settlement data because parties often keep settlements confidential, making it very difficult to test . . . the most serious effects of frivolous litigation.” (footnote omitted)); see also Steven S. Gensler & Lee H. Rosenthal, \textit{The Reappearing Judge}, 61 U. KAN. L. REV. 849, 875 n.75 (2013) (“Gathering hard data about discovery costs is difficult, to say the least. That information is not recorded in the court statistics compiled and published annually by the Administrative Office of the United States courts, but instead must be collected from clients and counsel. Collection is complicated by the fact that clients and lawyers typically do not comprehensively track ‘discovery’ expenses in any systematic way—especially costs borne by the client in their in-house departments or IT departments.”).


\textsuperscript{52} See Easterbrook, \textit{supra} note 27, at 641 (“When our system of legal rules induces lawyers to make requests that are extensive but justified, and therefore cannot be called abusive, it also offers the perfect ‘cover’ for making requests designed only to impose costs (or to impose costs excessive in relation to the gains). A judicial officer cannot separate one from the other either ex ante or ex post. Indeed, many lawyers do not know whether their own discovery requests are proper or impositional; it is almost impossible to tell one from the other, and both are in the interests of the lawyer’s client.”); Renfrew, \textit{supra} note 11, at 279 (“A party that is determined to abuse the judicial process can generally do so successfully. The court and the opposing party may have a pretty good idea when a party or his attorney abuses the judicial process, but their inability to prove it makes them unable to do anything about it.”).
discovery abuse happens, and it happens a lot. Furthermore, even assuming intentional discovery abuse is rare, producer-pays threatens distortions in every case because it removes the parties’ incentive to keep discovery costs low. This moral-hazard problem is reason enough to dispose of producer-pays, regardless of the frequency of intentional, bad-faith discovery abuse.

For all these reasons, producer-pays makes for poor public policy. From a utilitarian standpoint, a system of civil litigation should strive to fully deter illegal behavior and fully compensate injured individuals. Such a system would seek to minimize the cost of illegal behavior to society in the most efficient manner. The current discovery rules, however, lead to overdeterrence and overcompensation: they require

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54 See Redish, supra note 11 (“[E]xcessive’ discovery . . . includes discovery that, while not consciously interposed for purposes of delay or harassment, nevertheless gives rise to costs greater than its benefits in finding the truth. . . . While the more judicially driven practices are more likely to punish or deter abusive discovery, the self-executing shift in discovery cost allocation is far more likely to deter the practice of excessive discovery.”); Easterbrook, supra note 27, at 638 (“[B]oth normal and impositional [discovery] requests may inflict on the responding party costs substantially greater than the social value of the information. They may inflict costs greater than the private value of the information . . . . From the perspective of the producing party, normal and impositional requests are hard to distinguish—and for the producing party’s purposes the difference is immaterial, because they have identical effects.”); Cooter & Rubinfeld, supra note 53, at 69 (“[C]ost-shifting eliminates the incentives for abusive discovery requests while not requiring judges to determine case-by-case whether discovery abuse has occurred.”).

defendants to settle when they did nothing wrong, or to pay more than necessary to achieve full compensation and full deterrence. In this way, discovery serves as a kind of “litigation tax” on American businesses—a tax that provides no corresponding benefits to the public. The negative consequences of this tax extend far beyond the immediate defendants. The high cost of discovery may require businesses to raise the price of goods and services on consumers, forgo socially beneficial activities, or simply close up shop altogether.

People from all walks of the legal profession agree that civil discovery in the United States is flawed. Tellingly, discovery reform has been a target of the rulemakers’ efforts for the last thirty years.

56 Fitzpatrick, supra note 19, at 1642–43; see also Cooter & Rubinfeld, supra note 11, at 458.

57 See Randy J. Kozel & David Rosenberg, Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment, 90 VA. L. REV. 1849, 1851–52 (2004) (“[Nuisance] settlements decrease social welfare by vexing and taxing the victimized party, encouraging the misallocation of legal resources, and diminishing public confidence in the civil liability system. Further, the prospect of such settlements distorts the ex ante incentives of potential litigants to take socially appropriate levels of precautions against risks.”); Polinsky & Shavell, supra note 55 (“If damages are ... higher than the harm, various socially undesirable consequences will result,” including businesses “taking” socially excessive precautions, “refrain[ing] from engaging in [activities] even when the benefits exceed the harms,” and “withdraw[ing] their product from the marketplace even though consumers place a higher value on the product than ... the average harm caused by the product.”); Bruce L. Hay & Kathryn E. Spier, Litigation and Settlement, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 442, 447 (1998) (“[C]ertain settlements will have undesirable effects on primary behavior.... [S]ettlements that are too high may discourage socially beneficial activities.”); Wayne D. Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 VAND. L. REV. 1295, 1358–59 (1978) (“Indirectly, as taxpayers, consumers, and shareholders, most Americans foot some portion of the bill for most of the major litigation in this country. It follows, then, that the dollar cost of [discovery in] complex commercial litigation between private parties is a societal problem in whose solution virtually every citizen has a real economic interest.”).

58 See, e.g., Hon. Paul V. Niemeyer, Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?, 39 B.C. L. REV. 517, 520 (1998) (“In a survey of lawyers conducted in 1997 by the Federal Judicial Center, eighty-three percent of those responding thought that changes to discovery rules were required.”); Winter, supra note 53, at at 275–76 (noting that even the critics of discovery reform “do not defend [the current system] as adequate, much less desirable” and do not attack “the general idea of reform in contrast to its proposed implementation”).

59 Redish & McNamara, supra note 33, at 773 & n.1 (“Over the years, numerous amendments to the Federal Rules of Civil Procedure have been promulgated in an
The Supreme Court has also recognized the problem. The high cost of discovery and its potential to coerce defendants prompted the Court’s shift from notice pleading to plausibility pleading in *Twombly* and *Iqbal*. The Court has recognized that “the threat of discovery expense . . . push[es] cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial].”

**B. Current Fee-Shifting Proposals**

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

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

In their most recent amendments, the rulemakers added language to Rule 26(c) to clarify that district courts have the power to shift discovery costs from the producing party to the requesting party. This effort to curb discovery costs.” (citing the 1980, 1983, and 2003 amendments to Rule 26)).

60 See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (“It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse.”); *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring) (“As the years have passed, discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice.”); *ACF Indus., Inc. v. EEOC*, 439 U.S. 1081, 1086 (1979) (Powell, J., joined by Stewart, Rehnquist, JJ., dissenting from the denial of certiorari) (“[T]he widespread abuse of discovery . . . is a prime cause of delay and expense in civil litigation.”).


63 See Proposed FED. R. CIV. P. 26(c)(1)(B) (2015) (“The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery.”) (emphasis added)).
reform is part of the rulemakers’ longstanding goal of increasing judicial supervision over discovery. The idea is that the trial judge is in the best position to supervise the parties and to ensure they do not make overly burdensome discovery requests or engage in abusive discovery practices. 64

Yet, the new amendments are largely cosmetic. District courts have always had the authority to shift costs. By 1978, the Supreme Court established that district courts have “discretion under Rule 26(c) to grant orders . . . conditioning discovery on the requesting party’s payment of the costs of discovery.” 65 Indeed, the rulemakers acknowledge that the new amendments merely codify authority that the district courts “already” had. 66 The problem with discovery, however, has never been one of authority, but rather willingness and capacity. 67

As the Supreme Court recognized in Twombly, “success of judicial supervision in checking discovery abuse has been on the modest side” and “the hope of effective judicial supervision is slim.” 68 For starters, discovery occurs at a relatively early stage of the litigation, before the judge knows enough about the case to determine which discovery requests are relevant, proportional, impositional, or abusive. 69 The Supreme Court explained this phenomenon in Twombly, quoting at length from Judge Easterbrook’s seminal article:

64 See John S. Beckerman, Confronting Civil Discovery’s Fatal Flaws, 84 MINN. L. REV. 505, 561–62 (2000) (“[F]or at least the last forty years, . . . there have been remarkably consistent calls for increased judicial control” over discovery by the rulemakers.).
67 Redish, supra note 11 (although district courts have “broad discretion . . . to ‘shift’ costs” via protective orders, “such a power is only rarely employed”).
68 Twombly, 550 U.S. at 560 & n.6.
69 See Fitzpatrick, supra note 19, at 1643–44 (“Making wise decisions about discovery requires some assessment of how much discovery is going to cost defendants and how much value plaintiffs might reap from it; at the outset of a case, judges know almost nothing about either of these things.” (footnote omitted)); Cooter & Rubinfeld, supra note 11, at 458 (“Under current law, the judge must identify discovery abuse by estimating the expected value of the information to the party making the request. The judge is poorly placed for making such computations.”); Redish & McNamara, supra note 11, at 803–04.
A judicial officer does not know the details of the case the parties will present and in theory cannot know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester’s claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define “abusive” discovery except in theory, because in practice we lack essential information.70

Given their inability to separate the good discovery from the bad, district judges typically err on the side of more discovery.71 Indeed, district judges not only fail to recognize excessive discovery, but they often fail to look at all. In this era of crowded dockets, district judges have no time to supervise discovery and typically delegate the task to magistrate judges.72 Yet, as Judge Posner has explained, magistrate judges are “not responsible for the trial or the decision and can have only an imperfect sense of how widely the district judge would want the

70 Twombly, 550 U.S. at 560 n.6 (quoting Easterbrook, Discovery as Abuse, 69 B.U.L. Rev. 635, 638–39 (1989)).

71 See Winter, supra note 53, at 265 (“Where a party objects to discovery, it will have an effect only if district and magistrate judges give the requisite scrutiny to discovery demands. This scrutiny may be no easy task because the expense and likely benefits of discovery and the importance of the proposed discovery in resolving disputed issues cannot be determined without a considerably more searching inquiry into the case than is required under present rules. Moreover, where the balance does not tip decidedly against the proposed discovery, past habit is likely to cause the court to permit it.”).

factual inquiry in the case to roam to enable him to decide it.”

They err even further on the side of more discovery.

With respect to the new amendments, case-by-case cost shifting will likely fail for the same reasons that judicial supervision has failed in general: case-by-case cost shifting will be too uncertain to change the parties’ incentives. Every district judge is different, and each judge has a different view about the propriety of cost shifting. To determine whether cost shifting is appropriate, district courts apply a vague, multi-factor balancing test that could justify almost any result. Accordingly, the parties have no ability to predict the likelihood of cost-shifting in advance. If anything, they should expect little cost shifting. According to the rulemakers, the new amendments to Rule 26(c) “do[] not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.”

Not only is this case-by-case approach uncertain, but it itself is expensive. The parties will fight over whether this case is the one where

73 Id. at 411–12.

74 Id.; see also Easterbrook, supra note 26, at 639 (“One common form of unnecessary discovery (and therefore a ready source of threatened discovery) is delving into ten issues when one will be dispositive. A magistrate lacks the authority to carve off the nine unnecessary issues; for all the magistrate knows, the judge may want evidence on any one of them. So the magistrate stands back and lets the parties have at it.”).


76 See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003) (setting forth a seven-factor test for shifting the costs of e-discovery); see also Easterbrook, supra note 26, at 640–41 (“Many complex [discovery] disputes are governed not by rules but by standards—amorphous agglomerations of ‘factors’ that must be ‘balanced,’ usually without any way to reduce the factors to a common metric or attach weights to them when they conflict, as they invariably do. . . . When there is no rule of decision but only an injunction to consider everything that turns out to matter, lawyers and clients cannot tell in advance—that is, when planning conduct and conducting litigation—what the judge or jury will think matters.”); Redish & McNamara, supra note 11, at 821. See generally Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (“[Balancing tests are] like judging whether a particular line is longer than a particular rock is heavy.”).

the requester should pay some or all of the discovery expenses. Then they will fight over how much of those discovery expenses the requester should pay. Someone has to adjudicate all of these fights, and it will be district court judges or their magistrates. This sort of litigation over litigation is one of the worst wastes of social resources.

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

78 See Easterbrook, supra note 26, at 643 (“Relief comes from dealing with the causes. Lawyers respond to the incentives the legal system gives them. Change these incentives, and you change lawyers’ conduct. Leave them alone, and efforts to deal with their consequences are doomed.”); E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U. Chi. L. Rev. 306, 334 (1986) (“The fundamental weakness in managerial judging is its ad hoc, flexible character. The basic premise for managerial judging is that the effects of incentives for socially inappropriate behavior in litigation can be overcome by designing counteracting incentives on a case-by-case basis. This approach has the understandable appeal of necessity to the judges who are faced with the task of dealing with individual cases in which they see what they consider to be gross abuses. But as a comprehensive strategy for dealing with the effects on inappropriate incentives in litigation, managerial judging is more stopgap than final solution.”); Maurice Rosenberg, The Federal Rules After Half a Century, 36 MAINE L. Rev. 243, 248 (1984) (“Rather than devise additional rules propelled by threats of sanctions and penalties, a modern procedural system should try to develop incentives and rewards of positive kinds to encourage lawyers to act in harmony with the system’s goals. . . . The incentive approach is not only more pleasant, it is more efficient, for it does not require enforcement activities, satellite litigation, or other extra steps.”).

79 Fitzpatrick, supra note 19, at 1645 (“Fee-shifting rules are attractive because they take the decision to pursue discovery away from judges and give it to plaintiffs who would have every reason to weigh carefully the expected costs and benefits as they would be paying the costs for those benefits.”); Easterbrook, supra note 26, at 645 (“Impositional discovery depends on asymmetric stakes: the requester incurs lower costs than the person interrogated. The requester saddles its adversary with these costs to improve its bargaining position. . . . [R]quiring the loser to pay the winner’s legal fees and costs would do a great deal to cut off the attractiveness of unnecessary discovery requests.”).

2. Requester-Pays

The rulemakers are currently considering a more ambitious proposal for discovery reform: requester-pays. Requester-pays would reverse the current presumption of producer-pays. The party who submits a discovery request would be required to pay for the costs of producing the requested information.81

Requester-pays would eliminate the incentives problem created by producer-pays. Under producer-pays, a discovery request has two benefits for plaintiffs: (1) it produces information that can help the plaintiff’s case and (2) it imposes costs on the defendant, making him more likely to settle on favorable terms. Even if a discovery request would not serve the first goal, it is still worthwhile if it serves the second. Under requester-pays, however, discovery requests no longer impose costs on the defendant because the plaintiff must foot the bill. The plaintiff will not ask for discovery unless the desired information would actually benefit her case—i.e., if it would serve the first goal. Indeed, the plaintiff will not ask for discovery unless the expected benefit of the desired information outweighs the expected cost of producing it.82 In this way, requester-pays gives plaintiffs an incentive to narrowly tailor their discovery requests.83 And it eliminates their
effectively as an ex ante incentive, a rule must be announced in advance so that litigants can consider it in formulating their strategies. The rule must also present a credible threat of an unacceptable consequence.”); Norris, supra note 19, at 206; Redish & McNamara, supra note 11, at 821; Easterbrook, supra note 26, at 645; Martin H. Redish, Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure, 64 Fla. L. Rev. 845, 880 (2012) (“[A]bsent a provision in the Federal Rules expressly dictating that presumptively the costs of discovery are to be imposed on the requesting party, it appears clear that as a general matter courts will fail to allocate discovery costs in this manner.”).

81 See, e.g., LCJ, supra note 4, at 1 (“LCJ proposes that the Rules be amended to require that each party pay the costs of the discovery it seeks.”).

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

83 See Fitzpatrick, supra note 19, at 1645; Cooter & Rubinfeld, supra note 53, at 69–70; Redish & McNamara, supra note 11, at 804; Cooter & Rubinfeld, supra note 11, at 450.
power to threaten defendants with costly discovery in order to extract a favorable settlement. 84

Although requester-pays would solve the distortions created by producer-pays, it would introduce a distortion of its own. The current rule makes litigation cheaper for plaintiffs: it forces the party with more discoverable information to pay most of the costs of discovery. That party is often a resource-rich corporate defendant. Requester-pays would eliminate this subsidy and impose an additional expense on plaintiffs that does not exist in the status quo. Because plaintiffs’ litigation expenses are higher under requester-pays than under producer-pays, then requester-pays will deter some meritorious suits that producer-pays permits. Indeed, under requester-pays, there are some suits with a 100% chance of success that will never be filed, even though they would have been filed under producer-pays (i.e., a suit where the damages are less than the plaintiff’s expected litigation expenses).

As explained earlier, the goal of any civil litigation system should be full deterrence and full compensation. Producer-pays facilitates overdeterrence and overcompensation by increasing discovery costs and forcing defendants to pay too much in settlement. Requester-pays creates the opposite problem: it raises plaintiffs’ price of admission to court, causing some meritorious cases to never be filed at all. 85 As a

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

85 See Spencer, supra note 11, at 26 (“[T]here 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. . . . [W]here such a level to be reached, the impact would be the deterrence 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).”); Richard A. Nagareda, 1938 All over Again? Pretrial As Trial in Complex Litigation, 60 DEPAUL L. REV. 647, 686 (2011) (“As to the initial decision to sue, one should expect the addition of a contingent possibility of a discovery cost shift against the plaintiff to have the predictable effect, at the margin, of discouraging suit. In effect, the prospect of a discovery cost shift would add to the uncertainty already associated with claiming.”).
result, defendants could be underdeterred and plaintiffs could be undercompensated.  

3. Loser-Pays

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

But the English Rule has a major downside. Both empirical evidence and theoretical models indicate that loser-pays increases the overall cost of litigation. In 1980, for example, Florida enacted a loser-pays rule for medical-malpractice litigation. Under that rule, the amount that defendants spent on litigation expenses increased more than

86 Fitzpatrick, supra note 19, at 1645; see also Spencer, supra note 11, at 26–27 (“[T]he 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.”); Cooter & Rubinfeld, supra note 11, at 456 (“[A] rule that shifts all discovery costs . . . will impose much larger costs on the plaintiff than the defendant. Consequently, the rational settlement will be less than the expected judgment, thus favoring the defendant.”).


88 See Civil Procedure Rule 44.3(2) (U.K.) (“If the court decides to make an order about costs . . . the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party . . . .”).

Unsurprisingly, the same defense interests that lobbied for the loser-pays rule quickly convinced the Florida legislature to repeal it. Florida’s experience matches theoretical predictions. Generally speaking, a litigant’s odds of success increase as she spends more on the litigation (e.g., better attorneys, more expert witnesses, more evidence). Under the American Rule, a litigant must bear all of these expenses herself. Under the English Rule, by contrast, a litigant can discount her litigation expenses by the odds that she prevails at trial; if she wins, the other side must cover her expenses. Accordingly, loser-pays encourages litigants to spend more on the litigation than they would under the American Rule.

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

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93 See Shavell, supra note 14, at 431 (“[F]ee-shifting means that a party will not necessarily have to pay the bill for legal services that he orders, making legal services effectively cheaper. If the plaintiff has a lawyer spend $1,000 more of time and expects to win with a probability of about 70 percent, the odds that he will have to pay for the extra $1,000 of services are only 30 percent, so their effective cost to him is only $300.”); Nagareda, supra note 85 (“[C]ost-shifting approaches tend toward an escalation of expenditures on both sides. Specifically, each side stands to bear its own expenditures, discounted by the probability that a cost shift might later occur. In effect, each side stands to garner one dollar of benefit from litigation expenditure for less than one dollar in expected cost.”).
95 See Nagareda, supra note 85 (explaining that the problems associated with loser-pays would also apply to a loser-pays rule for discovery).
III. **A Better Way**

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

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

Our proposed rule can be stated succinctly: If the plaintiff’s entire case is dismissed at summary judgment, she must pay the difference between the defendant’s discovery expenses and her own.⁹⁶

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

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⁹⁶ A variant of our proposal was proposed by Professor Donald Elliot years ago. See Easterbrook, *supra* note 26, at 646 (“Professor Elliott’s variant is that after the commencement of the litigation, each side may tender to the other all documents (and other evidence) it believes is relevant to the case. A litigant believing that information has been withheld may obtain compulsory discovery, but if it loses, must pay fully for the privilege.”).
Our proposal is something of a hybrid between loser-pays and requester-pays. It departs from the traditional loser-pays rule in two respects. First, our proposal shifts discovery costs to the losing party, whereas the English Rule shifts all litigation expenses to the losing party. The distortion created by the current discovery rules is mostly due to asymmetric amounts of information that defendants possess. We are frankly unsure whether similar cost asymmetries exist with regard to other aspects of litigation (e.g., drafting motions, conducting oral advocacy, preparing for trial). Because the problem we are trying to solve is specific to discovery, our proposal shifts discovery expenses, not all litigation expenses, and it shifts them when discovery is completed—after summary judgment rather than trial.

Second, the traditional English Rule requires every losing party—plaintiff or defendant—to pay the other side’s expenses, but our proposal only requires losing plaintiffs to pay the defendant’s discovery costs. In other words, fee shifting under the English Rule is two-way, but fee shifting under our rule is one-way. One-way fee shifting is preferable because it lessens the English Rule’s propensity to raise the overall cost of litigation. As explained, parties operating under loser-pays can discount their litigation expenses by the odds that they win, which encourages both parties to spend more. One-way fee shifting, by contrast, reduces this dynamic by eliminating the discount for one side.98

Our proposal also departs from the requester-pays proposal currently under consideration by the rulemakers. Requester-pays would apply automatically in every case: the plaintiff would always pay for the cost of responding to her discovery requests. Our proposal, by contrast, forces a plaintiff to pay for the defendant’s discovery costs only if she loses at summary judgment. In other words, our proposal is losing-requester—pays, not requester-pays. For this reason, our proposal

97 Cf. Redish & McNamara, supra note 33, at 779 (“[D]iscovery costs are conceptually, economically, and morally distinct from attorney’s fees and other costs a defendant incurs in association with the litigation process. A party—even a defendant—fully controls the extent of its expenditures on legal fees, and all benefits deriving from those expenditures, legally or strategically, inure to that party. . . . By contrast, the extent of a party’s discovery costs are determined not by the litigant himself but by the scope and content of the request filed by his opponent, and none of those expenditures benefits the producing party’s own case.”).

98 See Norris, supra note 19, at 205.
captures only some of the gains but also imposes only some of the costs requester-pays. Under requester-pays, plaintiffs have no incentive to request discovery unless they believe it will be more valuable than the cost of production. Our rule is not quite so strong because plaintiffs do not have to repay the defendants’ discovery expenses unless they lose on summary judgment. Thus, plaintiffs will discount the cost of production by the probability they will win on summary judgment; this means plaintiffs will make some discovery requests where the benefits to the plaintiffs case do not exceed the costs of production. Our rule also does not completely eliminate the plaintiffs’ incentive to run up discovery costs on the defendant irrespective of the benefit of the discovery to the plaintiffs’ case. Because our proposal requires the plaintiff’s entire case to lose on summary judgment before costs are shifted, if the plaintiff is certain she will prevail on summary judgment on at least one claim, she has every incentive to run up the defendant’s costs on that or other claims. But our rule also does not impose the same costs as requester-pays. Under requester-pays, defendants have every incentive to respond extravagantly to discovery requests because plaintiffs have to pay them back. Under our proposal, because there is some chance defendants may lose on summary judgment in many cases, these incentives are mitigated. Moreover, our proposal should lessen the access-to-justice problems associated with requester-pays. In particular, the price of admission for plaintiffs does not rise as much under our proposal as under requester-pays. Under requester pays, that price includes the defendant’s full costs of producing discovery requests; under our proposal, that price includes only those production costs discounted by the probability the plaintiff will prevail at summary judgment. In other words, requester-pays increases the price of admission for all plaintiffs, but our proposal does so only plaintiffs with weak claims.99 The stronger the merits of the plaintiff’s suit, the more

99 See Mark Liang & Brian Berliner, Fee Shifting in Patent Litigation, 18 VA. J.L. & TECH. 59, 135 (2013) (“[U]sing fee shifting selectively to sanction parties who bring objectively weak cases may effectively weed out the weak cases while maintaining a fair playing field for parties who bring meritorious cases.”); Easterbrook, supra note 26, at 647 (“The paradigm impositional discovery request comes from a party thinking it has a relatively small chance of prevailing . . . but wanting to convey the message: ‘This suit will cost you $1 million whether I win or not; we can split that in settlement.’ Such tactics are unambiguously discouraged by a loser-pays rule. The target of this request has only to say no, and the demand will stand revealed as a bluff. . . . The loser-pays rule, therefore, is likely to discourage exactly the kind of demand that should be discouraged, while being neutral toward . . . discovery by parties with superior legal claims.”).
our proposal looks like producer-pays. The weaker the merits of the plaintiff’s suit, the more our proposal looks like requester-pays. Of course, the plaintiff often does not know at the outset whether her claim is weak or strong. Nonetheless, we think our proposal strikes a more reasonable balance between the interests of plaintiffs and defendants than a pure requester-pays rule or a pure producer-pays rule.

Two additional features of our proposal warrant unpacking. First, our rule would shift only the difference between the defendant’s discovery expenses and the plaintiff’s discovery expenses to the losing plaintiff, rather than all of the defendant’s discovery expenses. Again, we are mostly concerned with the defendant who possesses an asymmetrically greater amount of discoverable information than the plaintiff because it is in these cases where litigation costs can lead to overdeterrence. This is the case because the mutually-beneficial settlement range in these cases is no longer centered over the merits value of the case. Return to our earlier example: if the expected value of a case at trial is $50,000, and Plaintiff and Defendant both have litigation expenses of $20,000, the mutually-beneficial settlement range is $30,000-$70,000; we might expect the parties, on average, to reach settlement in the middle of that range, at or near the merits value of the case. But if the Defendant’s litigation expenses are instead equal to $40,000, the settlement range is now $30,000-$90,000; the middle of that range is $60,000—above the merits value of the case. By shifting only the difference in discovery expenses, our proposal hones in on the cases that pose some of the greatest social costs.

Second, our proposal would shift the defendant’s discovery costs only when the plaintiff’s entire case is dismissed at summary judgment. If the plaintiff brings ten claims and nine are dismissed at summary judgment, no fee shifting would occur under our proposal. In our view, a complaint with at least one meritorious claim is something the legal system should not discourage: it means the defendant did something illegal and, thus, the plaintiff’s suit will further the goals of deterrence.

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100 One question that we do not resolve here is whether our proposal should apply to suits filed by the government. Our proposal is largely a response to the dysfunctional incentives of plaintiffs, but one could argue that, because the government is not profit-motivated, it is less likely to engage in dysfunctional behavior, and, as such, there is little need for our proposal in government cases.
and compensation. The alternative would permit a district court that awarded partial summary judgment to impose partial fee shifting on the plaintiff, but we expect it would be difficult to attribute particular discovery costs to particular “claims.” And attempting to do so would require satellite litigation over which costs are attributable to which claims. Our proposal, which requires an entry of complete summary judgment, is easy to apply and avoids such disputes.

B. Potential Criticisms

Of course, no reform is perfect, and our proposal has potential downsides as well. Ultimately, however, we believe the downsides compare favorably to other proposals for discovery reform.

To begin with, our proposal is a modified version of requester-pays and is therefore subject to some of the same criticisms, though, as we explained, to a lesser extent. For example, although requester-pays would fix the incentives problem created by producer-pays, it would also create bad incentives of its own. Under requester-pays, the producing party is tempted to drive up his own discovery costs because doing so makes litigation more expensive for the requesting party (and, thus, makes her more likely to settle on favorable terms). As we explained above, our proposal is not as vulnerable to this criticism as requester-pays. Our rule would shift the defendant’s discovery costs only if the plaintiff loses at summary judgment. Thus, a defendant should not ramp up his own discovery costs as much as under requester-pays because, if at least one of the plaintiff’s claims survives summary judgment, the defendant must cover his (now inflated) costs. Moreover, under our proposal, if the defendant begins ramping up his own discovery costs, the plaintiff can voluntarily dismiss the complaint prior to summary judgment and stick the defendant with his (now inflated) discovery bill. Voluntary dismissal should serve as a checkmate on

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101 See Norris, supra note 19, at 205 n.159 (“[I]f a plaintiff files a lawsuit and demonstrates that the defendant violated federal law in at least one way, this seems like something that the legal system should reward.”).

102 Fitzpatrick, supra note 19, at 1645; Norris, supra note 19, at 205; see also Cooter & Rubinfeld, supra note 11, at 454 (“With a cost-shifting rule, a party might discourage discovery requests by inflating the costs of complying with them. For example, the defendant who is subject to discovery might hire a more expensive lawyer or waste time gathering documents.”); Liang & Berliner, supra note 99, at 100 (noting that defendants have this incentive with one-way fee shifting as well).
defendants’ incentive to drive up their own discovery costs. Finally, we are not sure how big of a problem this is to begin with. The requesting party has a key tool to prevent the producing party from driving up his discovery costs: the power to frame the discovery request. Because the requesting party decides what to ask for, she can decline to ask for certain information or narrowly tailor her discovery requests to keep costs down. Her power to control the scope of discovery is a powerful check on the producing party’s ability to inflate his own discovery costs.103

Critics of requester-pays also argue that it would decrease plaintiffs’ access to court by raising the price of admission. As explained above, we agree with this criticism, but, as we explained above, our proposal does not increase that price nearly as much as requester pays. Moreover, the countries that employ the loser-pays approach, of which our rule is something of a variant, have created solutions to facilitate plaintiffs’ access to the courts. In Europe, for example, plaintiffs with uncertain claims can purchase “after-the-event” insurance to help cover the risk of losing their case and being forced to pay the defendant’s litigation expenses.104 A similar market could develop in the United States if our proposed rule was enacted. In fact, the current growth of third-party litigation financing may be paving the way already.105

We recognize our proposal has something of an “optics” problem. Our rule relies on one-way fee shifting and places a burden on plaintiffs only. In this regard, requester-pays and loser-pays have a virtue that our proposal lacks: they apply to all parties equally. Yet, symmetry is not a virtue in and of itself.106 The U.S. Code is replete with one-way fee-shifting statutes that impose burdens on one side of the “v.” but not the

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


106 See Norris, supra note 19, at 206 (“It is hard to see why a general concern with treating plaintiffs and defendants differently should matter when there are good policy-based reasons for doing so.”).
other.\textsuperscript{107} Granted, most of those statutes inure to the benefit of plaintiffs.\textsuperscript{108} But some inure to the benefit of defendants.\textsuperscript{109} And both types of statutes demonstrate that asymmetric solutions are appropriate when litigation imposes asymmetric burdens. As we have explained already, discovery is one such situation: it imposes asymmetric burdens on many defendants and therefore calls for an asymmetric solution. In any event, regardless of the optics, our proposal is more plaintiff-friendly than requester pays; as such, we expect it to receive more support from the plaintiffs’ bar than requester pays.

There is one final potential criticism, but it is one that might come from the defense bar rather than the plaintiffs’ bar. Might the automatic fee shifting rule we propose lead judges to deny summary judgment to defendants more often in order to save plaintiffs from fee shifting? Might this be even worse from the defense perspective than the current regime? We think this is possible and this criticism gives us pause. It would not be socially beneficial if judges unnecessarily prolong litigation—and go to trial unnecessarily, in particular—to evade our fee shifting rule. We are not sure how likely this is—judges who do this only create more work for themselves—but we think it is worth further study.

\section*{C. Legal Authority}

How could our proposed rule be enacted? A congressional statute would obviously do the trick.\textsuperscript{110} Although it is a close question—and

\textsuperscript{107} See Carl Tobias, \textit{Common Sense and Other Legal Reforms}, 48 VAND. L. REV. 699, 720 (1995) (“Congress . . . has passed approximately two hundred statutes which provide for fee-shifting.”).


\textsuperscript{109} See Spencer, \textit{supra} note 11, at 5 n.17 (citing 42 U.S.C. §§ 1988(b); 11113).

\textsuperscript{110} See Hon. Jon Kyl and Prof. E. Donald Elliott, Comment to the Advisory Committee on Civil Rules Proposed Amendments to Rule 26 Federal Rules of Civil Procedure at 7, available at http://www.lfcj.com/uploads/3/8/0/5/38050985/frcp_jon_kyl_and_prof_e_donald_elliott_2.7.14.pdf (“Congress has generally deferred to the experts in the rules committee; but, if problems become too widespread and are not being dealt with by the judges, the Congress could step in.”); see also, \textit{e.g.}, Patent Abuse Reduction Act
one of us initially expressed skepticism on this point\textsuperscript{111}—we also believe there are plausible arguments that our proposal could be enacted as an amendment to the Federal Rules of Civil Procedure.

At bottom, our rule would partially overrule the presumption of producer-pays. That presumption, according to the Supreme Court, is rooted in “the discovery rules.”\textsuperscript{112} Although no Rule expressly assigns discovery costs to a particular party, producer-pays is implicit: it can be inferred from the Rules that protect \textit{producing} parties from undue burden and expense.\textsuperscript{113} But if producer-pays is a creature of the Federal Rules—one that lurks in the shadows, at that—then the rulemakers presumably have the authority to alter it by amending the Rules themselves.

Of course, our proposal does more than partially overrule producer-pays. Many believe it also departs from the American Rule by shifting discovery fees and costs to plaintiffs who \textit{lose} at summary judgment. Under the Rules Enabling Act, a federal rule of procedure cannot “abridge, enlarge or modify any substantive right.”\textsuperscript{114} The Supreme Court has never invalidated a federal rule under the Rules Enabling Act, S.1013 (requiring plaintiffs seeking “additional discovery” in patent litigation to “bear[] the costs of the additional discovery, including reasonable attorney’s fees”).

\textsuperscript{111} See Fitzpatrick, supra note 19, at 1646 (“[I]t would no doubt take an Act of Congress to institute a pervasive fee-shifting regime for discovery costs.”).


\textsuperscript{113} See Hon. Paul W. Grimm & David S. Yellin, \textit{A Pragmatic Approach to Discovery Reform: How Small Changes Can Make A Big Difference in Civil Discovery}, 64 S.C. L. REV. 495, 520 (2013) (“If you carefully read the discovery rules, you will not find any express language regarding which party--the requesting party or the producing party--should bear the cost of searching for; reviewing for relevance, privilege, and work-product protection; and producing the information asked for in discovery. Implicitly, however, the rules establish a presumption that this burden and expense falls upon the responding or producing party. . . . [I]f the requesting party were required to pay for the costs associated with discovery under a “user-pays” system, the rules would not need to have so many provisions designed to provide the means for courts to issue orders preventing excessive and disproportionate burden and expense to the producing party.”).

The test is fairly easy to satisfy: a rule does not violate the Rules Enabling Act if it “really regulat[es] procedure” and therefore implicates “the manner and the means” by which the litigants’ rights are ‘enforced,’” not “the rules of decision by which the court will adjudicate those rights.” At times, however, the Supreme Court has suggested that loser-pays fee-shifting rules are substantive, not procedural. In *Alyeska Pipeline*, for example, the Court suggested that a state law “denying the right to attorney’s fees or giving a right thereto” reflects “a substantial policy of the state” and “should be followed” in federal diversity cases. Our rule may therefore present a problem under the Rules Enabling Act.

Nevertheless, we think our proposal is “procedural” for these purposes. Our proposal is not like the fee-shifting statutes that the Supreme Court discussed in *Alyeska Pipeline*. As the Supreme Court later explained, *Alyeska Pipeline* was discussing fee-shifting statutes that “permit[] a prevailing party in certain classes of litigation to recover fees.” Such statutes are “substantive” because they reflect a “public policy choice[]” that “vindication of the rights afforded by a particular statute is important enough to warrant the award of fees.” Our rule, by contrast, would apply in every case and would be neutral with respect to the nature of the plaintiff’s claim. Moreover, unlike traditional fee-shifting statutes, our proposal would not shift “the entire cost of litigation.” It would shift “only the cost of a discrete event”—namely, discovery. In this way, our rule is like other fee-shifting

116 Id. (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).
117 Shady Grove, 559 U.S. at 407 (plurality) (quoting Miss. Publishing Corp. v. Murphree, 326 U.S. 438, 446 (1946)).
120 Id. (emphasis added).
122 Id.
provisions in the Federal Rules—e.g., Rule 11123 and Rule 68124—that shift costs only in certain circumstances.125 Of course, our rule would affect substantive rights: it would discourage some claims from being filed at all. But everything affects substantive rights in one way or another, including the current discovery rules. Indeed, our proposal does not discourage the filing of some claims any more than the current discovery rules discourage the defending of some claims by forcing defendants to settle them.126

Accordingly, we believe it is plausible that our proposal could be adopted as an amendment to the Federal Rules of Civil Procedure.

IV. CONCLUSION

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

123 Fed. R. Civ. P. 11 (imposing sanctions for making frivolous claims or defenses).
124 Fed. R. Civ. P. 54 (requiring party to pay costs if he rejects an offer to settle that is more favorable than the ultimate judgment).
126 See Redish & McNamara, supra note 11, at 821.