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Cost-Shifting Can Stimulate More Focused, Efficient Discovery in MDL Proceedings

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While the scope of civil discovery is expressly tempered by proportionality considerations,[1] discovery costs in multidistrict litigation (MDL) remain staggering because well-funded plaintiffs' counsel have no incentive to tailor their document requests. Given enough plaintiffs and sufficiently serious allegations of harm, no matter how baseless, proportionality loses its effectiveness as a check on discovery. Forcing defendants to bear the cost of plaintiffs' expansive discovery requests distorts economic incentives and transforms discovery into a cudgel to force a settlement without regard to merit. Cost-shifting for discovery over and above a core of undeniably relevant information, or for meritless claims would restore balance to the equities, requiring plaintiffs' counsel to more carefully weigh both the cost and utility of discovery.

The Status Quo is Neither Efficient Nor Sustainable

The presumption that a producing party must bear the cost of responding to discovery arises not from the Federal Rules of Civil Procedure, but rather from the archaic *Oppenheimer* case.[2] That continued reliance, however, does not bear up well under scrutiny.

Oppenheimer, decided 40 years ago, involved a class action in which the U.S. Supreme Court held that Rule 23(d) was the appropriate source of authority for a district court to facilitate notice to the class. The presumption that the responding party must bear the expense of complying with discovery requests was not part of the Court's reasoning, but rather dictum cited as a "rough," but "imperfect" analogy to the parties' obligations under Rule 23(d).[3] The Court provided no additional context or rationale for the presumption.

In fact, forty years ago, when discovery comprised only hard copies, it was common practice for requesting parties to pay for copies of responsive materials.[4] Even modest copying costs were sufficient to discourage overly broad discovery requests.

Oppenheimer is also frequently cited for the proposition that the scope of relevant discovery pursuant to Rule 26(b)(1) should be construed broadly. This proposition is no longer good law because the "key phrase" in the Federal Rules' definition the *Oppenheimer* court relied upon—"relevant to the subject matter

[1] Fed.R.Civ.P. 26(b)(1).
[2] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).
[3] *Id.* at 358.
[4] 7 Moore's Federal Practice § 34.13[5] at 39-92 (2008) ("A party producing documents will ordinarily not be put to the expense of making copies for the requesting party.").

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involved in the pending action"—was removed in the 2015 amendments to the Federal Rules.[5] Continued reliance on either aspect of the *Oppenheimer* decision, therefore, is neither legally nor factually justified.

The immense cost of discovery cannot be overstated. Research by the RAND Institute for Civil Justice found that the median cost to a corporate defendant to collect, process, and review a gigabyte of ESI was $17,507, with the maximum reported at $222,674.[6] If a custodian has 40 gigabytes of ESI, the median cost for collection, processing, and review can reach $700,280. A white paper submitted to a Duke Law School Conference on Civil Litigation collected information from corporate defendants showing that the average discovery costs per case ranged from $621,880 to $2,993,567, with the high end at $2,354,868 to $9,759,900 per case.[7] Moreover, of the millions of pages produced, only a fraction is ever used as evidence at deposition or trial—the ratio of pages produced to those used at trial is as high as 1,000 to 1. Similarly, in the average case, Microsoft calculated that it collected and processed 12.9 million pages, reviewed 645,750 pages, produced 141,450 pages, but only 142 pages were actually used at trial.[8]

While proportionality can serve as an effective limit on the scope of discovery in ordinary cases, it loses its value as a check on scope in mass actions. In a single-plaintiff personal-injury action, a court can effectively evaluate whether discovery is proportional to the needs of a case by reference to the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden of the proposed discovery outweighs its likely benefit. However, when hundreds or thousands of lawsuits are filed, proportionality loses its value as a limit on the scope of discovery. Indeed, the relative resources of the parties are often not what they would seem—plaintiffs' counsel are well-financed entrepreneurs often with the backing of venture capitalists, hedge funds, and other third-party litigation financiers. Almost anything can be justified as proportional if the number of plaintiffs and the resulting amount in controversy are large enough.

Discovery Costs Have Robbed MDL Litigation of its Intended Efficiency Benefits

Though Congress intended the MDL process to be an efficient mechanism for addressing multiple products-liability claims, discovery costs to defendants have directly undermined that goal. MDL litigation does provide efficiencies for defendants in terms of limiting duplicative discovery disputes, duplicative depositions, and streamlining the discovery process. But the end result is still that a defendant in an MDL is subjected to the most expensive and expansive discovery process in federal courts.

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[5] Some courts acknowledge that because the scope of discovery has changed, the oft-abused *Oppenheimer* formulation no longer governs. *See*, *e.g.*, *Cole's Wexford Hotel, Inc. v. Highmark, Inc.*, 2016 WL 5025751 (W.D. Pa. Sept. 20, 2016)("The Supreme Court in *Oppenheimer* did not construe just the term 'relevant;' rather, the Supreme Court construed the phrase 'relevant to the subject matter involved in the pending action,' which is a phrase that no longer appears in amended Rule 26(b)(1). The Court's definition of 'relevant to the subject matter involved in the pending action,' therefore, has no application to the text of amended Rule 26(b)(1), and it would be inappropriate to continue to cite to *Oppenheimer* for the purpose of construing the scope of discovery under amended Rule 26(b)(1)."). Unfortunately, other courts cite the amended Rule 26(b)(1) definition of relevance but then inexplicably rely upon *Oppenheimer* to justify a broad approach to relevance. *See, e.g., Saller v. QVC, Inc.,* 2016 U.S. Dist. LEXIS 82895 (E.D. Pa. June 24, 2016) ("Relevance is 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Green*, 314 F.R.D. at 171 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978))).

[6] Nicholas M. Pace, Laura Zakaras, *Where the Money Goes, Understanding Litigant Expenditures for Producing Electronic Discovery* (Rand Institute for Civil Justice 2012), at 28.

[7] *White Paper: Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure*, submitted to the 2010 Conference on Civil Litigation, Duke Law School May 10-11, 2010 on behalf of Layers for Civil Justice, DRI—The Voice of the Defense Bar, Federation of Defense and Corporate Counsel, and the International Association of Defense Counsel.

[8] Letter to the Advisory Committee on Civil Rules, http://www.uscourts.gov/sites/default/files/microsoft.pdf, at 5.

The organization of MDL litigation through a plaintiff steering committee (PSC) compounds the discovery-related inefficiencies by creating perverse incentives. The PSC typically is awarded a percentage of monies paid in all MDL cases, irrespective of whether the plaintiff is their client. Because PSC counsel stand to gain a larger share of the common-benefit fund[9] there is a financial incentive for the PSC to spend more time and money in the common prosecution of the cases. Thus, scorched earth discovery is in the PSC's best interest. The fact that millions of documents and hundreds of depositions never see the light of day at trial does not lower the profitability of a PSC member in a successful MDL in the same way that inefficiencies in plaintiff work does for individual lawsuits.

Plaintiffs spend virtually nothing to propound broad discovery demands under Rule 34 utilizing boilerplate requests for documents based on cut-and-paste templates. However, reviewing and redacting documents to respond to those requests can impose substantial vendor costs and attorney fees, coupled with crippling expenses to comply with strict privacy regulations that require review and redaction. Whether and how the documents ultimately are utilized is rarely analyzed. Thus, with no skin in the game, the cost of discovery becomes leverage in MDL litigation, which is often marked by waves of ever increasing discovery directed to the defendant and defendant's vendors.

Cost-Shifting Can Rebalance the Equities

Courts should have access to a variety of tools to ensure they can appropriately allocate the cost of discovery. The 2015 Federal Rules amendments added subsection (c)(1)(B) to Rule 26 to expressly address cost-shifting in discovery, making clear that a court may enter a protective order that specifies terms "including time and place or the allocation of expenses, for the disclosure or discovery."[10] That provision, however, has not been widely adopted and has not relieved defendants of the discovery burden.[11] The following are offered as tools a court can employ in its discretion to meet the needs of the particular ligation before it.

Core Discovery

In every case the parties and the court can agree upon a core of materials which are indisputably relevant to the claims and defenses. The parties would each be responsible for the costs of producing their own core discovery. In a pharmaceutical products-liability case, for example, core discovery from the defendant would be its regulatory submissions as well as any readily available information relating to plaintiffs. Core discovery from plaintiffs would be their medical records, records of purchase and use, and any communications with defendants. Plaintiffs can hardly complain about the minimal costs of producing the core discovery they should have had before filing suit.

Requests for information over and above the core should be charged to the requesting party. This would discourage baseless expansion of discovery because even well-funded plaintiffs' counsel would want to carefully evaluate the benefit of additional discovery before incurring its costs. This approach better accounts for the realities of mass litigation and aligns the economic and other incentives toward resolving cases on their merits.

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[9] MDL courts cite the common-fund doctrine as a basis for assessing common-benefit fees in favor of attorneys who render legal services beneficial to all MDL plaintiffs, funded by a levy on contingent fees recovered by plaintiffs' counsel, or more commonly, by defendants pursuant to a settlement agreement. *In re Vioxx Prods. Liab. Litig.,*760 F. Supp. 2d 640, 647 (E.D. La. 2010); *see also* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 La. L. Rev. 371 (2014).

[10] Fed.R.Civ.P. 26(c)(1)(B).

[11] A LEXIS search, conducted on May 22, 2018, of all federal case law since December 1, 2015 yields only 51 citations to Rule 26(c)(1)(B), with less than a handful of those cases actually allocating discovery costs.

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Cost Shifting Based Upon a Failure to Make a Threshold Showing of Merit

A rule or order that adds "teeth" to the requirement that each plaintiff make a threshold showing of merit would be a powerful incentive. By shifting discovery and other costs upon a failure to establish threshold elements, such as use of the product in question and medical evidence of the injury alleged, a court can ensure that it will no longer make economic sense for plaintiffs' counsel to solicit and file inventories of unexamined claims. Faced with the prospect of paying some portion of costs should claims lack merit, plaintiffs' counsel would be incentivized to spend more time investigating and preparing each claim to ensure it has merit.

Such a requirement would enforce *Iqbal/Twombly* pleading standards that require facts that establish a plausible claim before proceeding to discovery. For example, in the Avandia MDL, the court entered an order which "merely requires information which plaintiffs and their counsel should have possessed before filing their claims: proof of Avandia usage, proof of injury, information about the nature of the injury, and the relation in time of the injury to the Avandia usage."[12] While effective case management orders weed out claims that lack merit *after* they have been filed, the addition of cost shifting would motivate the vetting of claims *before* they are filed.

Conclusion: Cost Shifting Would Incentivize More Focused Discovery

Armed with these tools, in combination with case management orders that limit the number of custodians produced and depositions taken, courts would be better able to appropriately incentivize plaintiffs to be strategic and focused in their discovery, while protecting defendants from overly broad discovery demands.

[12] *In re Avandia Marketing, Sales Practices and Products Liab. Litig.*, 2007-MD-1871 (E.D. Pa.), Pretrial Order No. 121.

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