Federal Discovery Stays

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Pursuant to the Federal Rules of Civil Procedure discovery often proceeds in federal civil litigation while motions to dismiss are pending, absent a discretionary stay. One adverse effect of this phenomenon is that plaintiffs with non-meritorious cases can compel defendants to spend massively on electronic discovery, which dominates modern discovery, before federal district courts ever rule on such motions. Defendants who are unable or unwilling to incur the huge up-front expense associated with electronic discovery may be forced to settle non-meritorious actions. The Federal Rules of Civil Procedure were amended in 2006, and the Federal Rules of Evidence were amended in 2008, in an effort to address multiple electronic discovery issues. That effort has failed to achieve a primary objective – reducing costs to a significant degree. Moreover, those amendments failed to address the critical issue of the timing of discovery. This Article contends that the most effective solution to the problem of electronic discovery during the pendency of motions to dismiss is a mandatory stay. Pursuant to the Private Securities Litigation Reform Act, since 1995 there has been a mandatory stay of all discovery while motions to dismiss are pending in actions alleging violations of the securities laws, absent application of two limited statutory exceptions. This Article examines the operation of the mandatory stay in securities actions and concludes that it should be extended to electronic discovery during the pendency of motions to dismiss in all federal civil litigation, absent application of one of the exceptions. Imposition of a mandatory stay of electronic discovery prior to the disposition of motions to dismiss is the most equitable and effective solution to the unresolved problem of coercive settlements.

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Introduction

Electronic discovery (e-discovery) is ubiquitous. Indeed, it has been suggested that in modern litigation all discovery is electronic,¹ insofar as 99 percent of the world’s information is generated electronically² and only a fraction is ever converted to paper. Electronic discovery has become increasingly complex and expensive,³ and in many cases it commences during the pendency of a motion to dismiss. Nothing in Rule 12 of the Federal Rules of Civil Procedure (FRCP), which governs motions to dismiss, triggers an automatic stay of discovery prior to disposition of such motions.⁴ Likewise, no other rule triggers an automatic stay. Accordingly, the default situation is that discovery may proceed during the pleading stage of the approximately 280,000 civil cases that are filed annually in the federal courts.⁵

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² Peter Lyman & Hal R. Varian, How Much Information?, at 1 (2003), http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf (reporting that in 2002, 92% of new information was stored on magnetic media (primarily hard drives), 7% on film, and a mere 0.01% on paper) (hereafter How Much Information?).
³ Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F. Supp.2d 456, 461 (S.D.N.Y. 2010). The costs of e-discovery often reach three to four times the low estimate of liability and twice the high estimate of liability in civil cases. Inst. for the Advancement of the Am. Legal Sys., The Emerging Challenge of Electronic Discovery: Strategies for American Business 12 (2008), http://www.du.edu/legalinstitute/pubs/EDiscovery-Strategies.pdf. See also H.R. 4115: Triggering Soaring E-Discovery Costs, METROPOLITAN CORP. COUNSEL, July 2010, at 6 (“E-discovery is in many cases the most significant cost in litigation. It can easily eat as much as 50 percent of a company’s litigation budget.”) (quoting David Lender, Partner, Weil, Gotshal & Manges LLP); Nathan Koppel, Using Software to Sift Digital Records, WALL ST. J., Nov. 23, 2010 (noting that at Fortune 1000 companies, spending on e-discovery as a share of litigation costs increased to 7.1% in 2010, up from 5.2% in 2006).
A major adverse effect of the burden and expense associated with e-discovery during this stage, which typically lasts for months, is that plaintiffs with non-meritorious cases are able to coerce settlements from defendants who cannot or choose not to bear such expense. While "there is no litmus test to identify extortionate settlements or measure how frequently they occur," it is clear that they do happen. One indicium is the well-documented phenomenon of vanishing civil trials. A mere 1.2% of federal civil cases ultimately proceed to trial. This phenomenon has multiple causes, a primary one of which likely is the high cost of e-discovery.

Another indicium is the reported experience of practicing attorneys. According to a 2009 survey by the American Bar Association (ABA) Section of Litigation, 69.4% of approximately 3,300

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9 See David R. Fine, et al., The "Vanishing" Civil Jury Trial—(Report of the Middle District Civil Jury Trial Bench/Bar Task Force), 80 PA. B.A. Q. 24, 31 (2009) (linking cost of e-discovery, among other factors, to vanishing civil trials); H.R. 4115: Triggering Soaring E-Discovery Costs, METROPOLITAN CORP. CounSEL, July 2010, at 6 ("Trial lawyers are seeing fewer trials because of settlements triggered by the spiraling cost of e-discovery."); (quoting David Lender, Partner, Weil, Gotshal & Manges LLP); U.S. Chamber Institute for Legal Reform, The Centre Cannot Hold: The Need for Effective Reform of the U.S. Civil Discovery Process 2 (May 2010), http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/ilr_discovery_2010.pdf (hereafter Effective Reform) ("[T]he effort and expense associated with electronic discovery are so excessive that settlement is often the most fiscally prudent course—regardless of the merits of the case."); Lee H. Rosenthal, A Few Thoughts on Electronic Discovery After December 1, 2006, 116 YALE L.J. POCKET PART 167, 191 (Nov. 20, 2006) ("Lawyers and judges are collectively wringing their hands over the continuing decline in the number of trials, especially jury trials. The factors that contribute to this are many and varied, but there is a consensus that the costs and delays of civil litigation—largely due to discovery—play a significant role."). The United States Supreme Court recently underscored the danger that plaintiffs can extort settlements from cost-conscious defendants via threats of expensive discovery. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559 (2007).
responding attorneys agreed or strongly agreed that discovery is commonly used as a tool to force settlement,\textsuperscript{10} and 54.3\% of respondents agreed or strongly agreed that discovery about the adequacy of e-discovery responses is used as a tool to force settlement.\textsuperscript{11} In a separate survey, published in 2009 by the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System, 71\% of approximately 1,400 responding Fellows of the ACTL agreed that discovery is used as a tool to force settlement.\textsuperscript{12}

In recent years efforts have been made to confront the numerous problems associated with e-discovery, in the form of amendments to both the FRCP (in 2006) and the Federal Rules of Evidence (in 2008). Those efforts have not reduced costs to a significant degree and they fail entirely to address the critical issue of the timing of discovery. Specifically, the amendments do nothing to curb the problem of extortionate settlements stemming from front-loaded e-discovery costs.

An effective solution to this problem lies in the form of a mandatory stay of e-discovery during the pendency of motions to dismiss. Since 1995, pursuant to a provision of the Private Securities Litigation Reform Act (PSLRA, Act),\textsuperscript{13} a mandatory stay of all discovery during the pendency of motions to dismiss has been imposed in litigation involving alleged violations of the securities laws, subject to two limited exceptions. The PSLRA’s mandatory stay of all discovery in securities actions should be extended to e-discovery in all federal civil litigation while motions

\textsuperscript{10} See Am. Bar Ass’n Section of Litig., Member Survey on Civil Practice: Detailed Report 69 (Dec. 11, 2009), \url{http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf} (hereafter ABA Report).
\textsuperscript{11} Id. at 81.
to dismiss are pending. Imposition of a mandatory stay is the most equitable and effective solution to the e-discovery cost problem.

I. Discovery Proceeds While Motions to Dismiss Are Pending in Federal Court

Contrary to recent suggestions by some commentators, and even the United States Supreme Court, discovery may proceed while motions to dismiss are pending in federal litigation, unless the action is governed by the PSLRA’s automatic stay of discovery or a discretionary stay has been imposed for good cause under Rule 26(c) of the FRCP. The FRCP have no specific provision about the availability of discovery during the pendency of a motion to dismiss. Rule 26(d)(1) is the only federal rule to specifically address the timing of discovery. It provides that discovery may be taken at any time after the completion of the initial discovery conference mandated by Rule 26(f), which must take place as soon as practicable and not later than 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16.

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14 See, e.g., Schneider, supra note 8, at 545 (“At pleading, there has been no opportunity for discovery. . . . With Iqbal, a summary judgment decision is effectively disguised as a Rule 12(b)(6) motion before any discovery occurs.”); Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 IOWA L. REV. 873, 933 n.249 (2009) (asserting that judges rarely allow targeted discovery prior to resolving Rule 12(b)(6) motions); and Lonny S. Hoffman, Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings, 88 B.U. L. REV. 1217, 1268 (2008) (“[A] pleading sufficiency challenge is designed to be made before the case advances to the discovery stage.”).

15 See Ashcroft v. Iqbal, 129 S.Ct. 1937, 1954 (2009) (“Because respondent’s complaint is deficient under Rule 8, he is not entitled to discovery. . . .”); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564 n.8 (2007) (referring to an “understanding that, before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct”); See also David L. Noll, The Indeterminacy of Iqbal, 99 Geo. L.J. 117, 141 (2010) (“In both Iqbal and Twombly, the Court assumed that the filing of a motion to dismiss stays discovery.”); Scott Dodson, New Pleading, New Discovery, 109 Mich. L. Rev. 53, 69 (2010) (noting that Court’s statements in Iqbal and Twombly reflect its belief that the filing of a motion to dismiss automatically stays discovery); Scott Dodson, Federal Pleading and State Prewsuit Discovery, 14 LEWIS & CLARK L. REV. 43, 55 (2010) (“The import of Twombly and Iqbal is that only a complaint that can survive a motion to dismiss entitles a plaintiff to discovery from the defendant or third parties.”).


In turn, Rule 16(b) requires that a scheduling order be issued as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the initial complaint in the action or 90 days after any defendant has appeared.\(^\text{20}\) No aspect of this sequence establishes that a motion to dismiss must be decided, or even filed, prior to the completion of the Rule 26(f) discovery conference. Indeed, Rule 12(i) provides that a court may defer resolving a motion to dismiss until trial.\(^\text{21}\)

The general rule that discovery may proceed while motions to dismiss are pending\(^\text{22}\) has been underscored by numerous federal courts. For example, the Seventh Circuit has stated: “Discovery need not cease during the pendency of a motion to dismiss.”\(^\text{23}\)

A number of courts\(^\text{24}\)

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\(^{19}\) Fed. R. Civ. P. 26(f).
\(^{20}\) Fed. R. Civ. P. 16(b).
\(^{21}\) Fed. R. Civ. P. 12(i).


\(^{23}\) SK Tool Hand Tool Corp. v. Dresser Indus., Inc., 852 F.2d 936, 945 n.11 (7th Cir. 1988).

and scholars are in accord. Finally, the fact that Congress specifically included a mandatory stay provision in the PSLRA strongly militates against the notion that the FRCP provide for a mandatory stay in all civil litigation.

While there is no automatic stay of discovery in federal actions not governed by the PSLRA, Rule 26(c) of the FRCP authorizes the imposition of discretionary stays, subject to a showing of good cause, which is nowhere defined in that rule or in the accompanying Advisory Committee’s Notes. It is frequently remarked by federal courts that Rule 26(c) discovery stays are disfavored. Consistent with this prevailing view, courts strictly apply the good cause requirement.

See also Lori Andrus, In the Wake of Iqbal, 46 TRIAL 20, 29 (2010) (noting “the many federal decisions rejecting the pendency of a motion to dismiss as a basis for granting a blanket discovery stay.”).

See Arthur R. Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 DUKE L.J. 1 (2010) (“Nor is there any mandatory or automatic stay of discovery while a Rule 12(b)(6) motion is pending.”); Hartnett, supra note 7, at 507 (“While the opinions in Twombly, as well as most commentators, seem to assume that surviving a 12(b)(6) motion is a prerequisite to discovery, this is simply not the case. The mere filing of a motion to dismiss does not trigger a stay of discovery.”).

See Brooks v. Macy’s, Inc., No. 10 Civ 5304 BSJ HBP, 2010 WL 5297756, at *1 (S.D.N.Y. Dec. 21, 2010) (“Except in cases covered by the Private Securities Litigation Reform Act, a motion to dismiss does not automatically stay discovery.”).

Some states provide for an automatic stay of discovery. For example, in 2009 Georgia amended its civil practice rules to provide for an automatic stay of discovery lasting 90 days from the filing of a motion to dismiss. See Kimberly Hermann & Melissa G. Hodson, Civil Practice Reform, 26 GA. ST. U. L. REV. 185, 192-93 (2009).

Fed. R. Civ. P. 26(c)(1) provides that “[t]he 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, for the disclosure or discovery.” Fed. R. Civ. P. 26(c)(1). See also Fed. R. Civ. P. 34 Advisory Committee’s Note to 1970 Amendment (“[C]ourts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs.”). Apart from their power under Rule 26(c), federal district courts may issue stays pursuant to their inherent authority to manage cases before them. See Clinton v. Jones, 520 U.S. 681, 706 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.”); Shaw v. Allred, Civ. Action No. 10-cv-00156-MSK-MEH, 2010 WL 2757357, at *1 (D. Colo. July 12, 2010) (staying discovery pending resolution of motion to dismiss, pursuant to court’s docket control power); Power v. Williams, No. 3:09-cv-594-J-20HTS, 2010 WL 431921, at *1 (M.D. Fla. Feb. 5, 2010) (“[T]he Court finds the issuance of a stay in the instant case is appropriate pursuant to both Rule 26(c) of the Federal Rules of Civil Procedure and its inherent authority to manage cases pending before it.”).
The mere filing of a case-dispositive motion, or intent to file such a motion, does not constitute good cause.\textsuperscript{31} Much more must be shown by defendants, but courts disagree as to what must be shown.\textsuperscript{32} At least ten similar but non-identical multi-factor tests have been devised by federal district courts to determine good cause in connection with Rule 26(c). The number of factors identified in the various tests ranges from two to six. While most of the tests focus on the prejudice to the party opposing the stay and the burden on the party resisting discovery, this focus is not universal and numerous other factors have been listed by district courts.

One version of the test considers the pendency of dispositive motions, potential prejudice to the party opposing the stay, the breadth of discovery sought, and the burden that would be imposed on the parties responding to the proposed discovery.\textsuperscript{33} A second version weighs the balance of the harm produced by a delay in discovery against the possibility that the motion will


\textsuperscript{32} See Jacqueline S. Guengo, Note, Trends in Protective Orders Under Federal Rule of Civil Procedure 26(c): Why Some Cases Fumble While Others Score, 60 FORDHAM L. REV. 541, 542 (1991) (observing that Rule 26(c)’s failure to define good cause has resulted in inconsistent rulings).

be granted and eliminate the need for such discovery.\textsuperscript{34} A third version tracks the language of Rule 26(c) and specifies that good cause may exist when the party from whom discovery is sought would suffer annoyance, embarrassment, oppression or undue burden or expense.\textsuperscript{35} A fourth version provides that a court must consider whether the movant is likely to prevail in the underlying proceeding; whether, absent a stay, any party will suffer substantial or irreparable harm; and the public interests at stake.\textsuperscript{36} A fifth version provides that good cause may exist if a dispositive motion has been filed that could resolve the case and a stay does not unduly prejudice the opposing party.\textsuperscript{37}

A sixth version considers whether defendant has made a strong showing showing that plaintiff’s claim is unmeritorious, the breadth of discovery and the burden of responding to it, the risk of unfair prejudice to the party opposing the stay, the nature and complexity of the action, and whether some or all of the defendants have joined in the stay request.\textsuperscript{38} A seventh version examines plaintiff’s interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay, the burden on defendants in going forward, the convenience to the court, the interest of persons not parties to the civil litigation, and the public interest.\textsuperscript{39} An


eighth version considers the type of motion and whether it is a challenge as a matter of law or to the sufficiency of the allegations; the nature and complexity of the action; whether counterclaims and/or cross-claims have been interposed; whether some or all of the defendants joined in the stay request; the posture or stage of the litigation; the expected extent of discovery in light of the number of parties and complexity of the issues in the case; and any other relevant circumstances. A ninth version provides for a stay where the case is likely to be finally concluded as a result of the ruling thereon, the facts sought through uncompleted discovery would not affect the resolution of the motion, or discovery on all issues of the complaint would be wasteful and burdensome. A tenth version provides that good cause is shown where a party has filed a dispositive motion, the stay is for a short period of time, and the opposing party will not be prejudiced.

The discretionary use by federal district courts of the multiple, conflicting tests described above is largely unreviewable. Neither the grant nor the denial of a motion for stay of discovery pending resolution of a motion to dismiss is a final appealable order of the district court. In general, federal discovery orders are not immediately appealable final orders because they do not end the litigation on the merits. If discovery is stayed, and then an action is dismissed without leave to amend pursuant to Rule 12(b)(6), the dismissal and stay can be reviewed, but the

standard of review is abuse of discretion.\textsuperscript{44} On review, it is extremely unlikely that an appellate court would find that a stay of discovery constituted reversible error.\textsuperscript{45} If discovery is not stayed, and then a motion to dismiss is denied, there is no appealable order. If the matter proceeds to trial and defendant wins, any errors in denying the stay and denying the motion to dismiss will be unreviewable, whereas if defendant loses at trial any error in denying the stay will be harmless.\textsuperscript{46}

In short, then, in federal civil litigation not involving securities claims there is no mandatory stay of discovery pending determination of a motion to dismiss, absent imposition of a discretionary stay under Rule 26(c). Such stays are disfavored and subject to an undefined good cause requirement that has yielded at least ten different but sometimes overlapping tests. And the denial of a stay is essentially unreviewable. The next Part of this Article examines the burden and cost of e-discovery that litigants face in civil litigation.

II. The Burden and Cost of E-Discovery

A decade ago discovery accounted for at least half the cost of civil litigation and in complex litigation the share increased to 90\% in cases in which it was actively employed.\textsuperscript{47} There is conflicting evidence as to whether these shares have declined significantly since then, but they remain high.\textsuperscript{48} Electronic discovery accounts for much of this cost,\textsuperscript{49} as a function of

\textsuperscript{45} Hartnett, supra note 7, at 513.
\textsuperscript{46} Id. at 514.
\textsuperscript{47} Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 340, 357 (2000) (“[T]he cost of discovery represents approximately 50\% of the litigation costs in all cases, and as much as 90\% of the litigation costs in the cases where discovery is actively employed.”).
\textsuperscript{48} See ABA Report, supra note 10, at 99 (reporting mean response of 3,300 surveyed attorneys that 65.6\% of costs associated with cases that do not go to trial and are not dismissed on an initial 12(b)(6) motion are incurred in discovery); Navigant Consulting, The State of Discovery Abuse in Civil Litigation: A Survey of Chief Legal Officers 8 (Oct. 2008)
several factors. The first factor is the sheer volume of electronically-stored information (ESI), which comes in numerous varieties and is stored on an ever-expanding range of devices and platforms. Even a simple dispute can involve millions of electronic documents. The volume...


49 See ABA Report, supra note 10, at 105 (reporting that 76.5% of 3,300 surveyed attorneys agree or strongly agree that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery); Navigant Consulting, supra note 48, at 8 (survey of Fortune 1000 chief legal officers finds that discovery of ESI accounts for, on average, 33-39% of total discovery costs).

50 There is no precise definition of ESI. See Fed. R. Civ. P. 34(a), Advisory Committee’s Notes to 2006 Amendments (“The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of ESI.”). But ESI is commonly understood to include at least e-mail (and attachments); word processing files; spreadsheets; presentation documents (such as PowerPoint and Corel); graphics; animations; images; audio, video and audiovisual recordings; and voicemail. See American Bar Association Civil Discovery Standard 29(a)(i) (2004), http://abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf. Multinational corporations commonly have 2,000 or more such applications, “each with varying functionality bearing on the preservation, collection, analysis, review, and production of ESI.” Daniel M. Kolkey & Chuck Ragan, Reevaluating the Rules for e-Discovery, SAN FRANCISCO DAILY JOURNAL, May 21, 2010, at 7.

51 These devices and platforms include databases; networks; computer systems (hardware and software); servers, archives; backup systems; tapes, magnetic and optical discs (including DVDs and CDs), drives (including thumb or flash), cartridges, and other storage media; desktops and laptops; Internet data; personal digital assistants (PDAs); handheld wireless devices (such as a BlackBerry); firewalls; mobile telephones; paging devices; and audio systems, including voicemail. See American Bar Association Civil Discovery Standard 29(a)(iii) (2004), http://abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf. Litigants often view data on “outlier” devices and platforms as such as cellular telephones, PDAs, voicemail and IM systems, chat rooms, and websites as duplicative or insignificant. Edward H. Rippey & Skye L. Perryman, Court Imposes Sanctions for Wiping BlackBerrys, N.Y.L.J., Dec. 14, 2009, at 17. But this perception can have serious adverse litigation consequences, because federal courts increasingly have recognized a duty to preserve and produce outlier ESI even as they continue to disagree about the level of culpability necessary for an adverse inference instruction. See, e.g., Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 615 (S.D. Tex. 2010) (noting circuit differences); Vagenos v. LGD Fin. Servs. LLC, No. 09-cv-2672 (BMC), 2009 WL 5219021, at *2 (E.D.N.Y. Dec. 31, 2009) (ordering adverse inference instruction for failure to preserve relevant voicemail recording on cellular telephone); Southeastern Mech. Serv., Inc. v. Brody, Case No. 8:08-CV-1151-T-30EAJ, 2009 WL 2883057 (M.D. Fla. Aug. 31, 2009) (ordering adverse inference instruction for destruction of e-mails, calendar entries, and text messages stored on Blackberry). See also Erik Harris, Note, Discovery of Portable Electronic Devices, 61 ALA. L. REV. 193 (2009); Farrah Pepper, Honey, I Forgot the Cell Phone: The 411 on ‘Outlier’ ESI, Law.com (Jan. 27, 2010), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202439544884 (noting express or implied duty to preserve and produce outlier ESI in cases involving website, IM or chat room conversations, voicemail systems, cellular telephones, and PDAs). One species of outlier ESI is random access memory (RAM) data. In 2007, a federal district court held that RAM data involved in the case before it was discoverable ESI. See Columbia Pictures Inc. v. Bunnell, 245 F.R.D. 443 (C.D. Cal. 2007); Thomas Y. Allman & Kevin F. Brady, Can Random Access
of ESI is much higher than with traditional paper documents, in part because the quantity of e-mails and instant messages (IMs) is so huge. It has been estimated that globally approximately 100 billion e-mails\textsuperscript{53} and 12 billion IMs\textsuperscript{54} are sent daily. The average employee sends and receives more than 135 e-mails each day\textsuperscript{55} and large corporations like Microsoft receive 300-400 million internal and external e-mails each month.\textsuperscript{56} Moreover, by some measures social networks already rival e-mails in importance. In 2009, time spent on social networks (Twitter, LinkedIn, Facebook, MySpace, and others) surpassed that for e-mail\textsuperscript{57} and by 2014 the number of worldwide consumer and business social networking accounts is projected to reach 3.7 billion, virtually equal to the 3.8 billion worldwide e-mail accounts.\textsuperscript{58} While courts are just beginning to grapple with this issue, social network activity can be discoverable ESI, at least in certain circumstances.\textsuperscript{59}


\textsuperscript{57} Teddy Wayne, \textit{Social Networks Eclipse E-mail}, N.Y. Times, May 18, 2009, at B3.

\textsuperscript{58} The Radicati Group, Inc., \textit{Email Statistics Report}, 2010 at 2-3 (2010), http://www.radicati.com/wp/wp-content/uploads/2010/04/Email-Statistics-Report-2010-2014-Executive-Summary2.pdf. The number of IM accounts is projected to reach 3.5 billion in 2014. \textit{Id.} at 3. The respective numbers of social network, e-mail, and IM accounts in 2010 were 2.2 billion, 2.9 billion, and 2.4 billion. \textit{Id.} at 2-3.

Overall, between 2005 and 2007, the average amount of data stored by a Fortune 1000 corporation grew from 190 terabytes (TBs)\(^{60}\) to 1,000 TBs (one petabyte).\(^{61}\) In the same time period, the average data sets at 9,000 U.S. midsize companies increased from two to 100 TBs.\(^{62}\) In 2000, 70% of corporate records were stored in electronic format\(^{63}\) and by 2008 this share had increased to an estimated 90%.\(^{64}\) Costs associated with the preservation of this potentially discoverable ESI are a separate and often significant cost-driver in the e-discovery process.\(^{65}\)

A second factor is that discovery of ESI is significantly more complex than discovery of paper documents.\(^{66}\) This is true in part because many, if not most, corporations fail to store and networking information as ESI); Andrew C. Payne, Note, Twitigation: Old Rules in a New World, 49 WASHBURN L.J. 841 (2010) (arguing that courts should hesitate to analogize social networking information to traditional ESI).

A TB is a measure of computer storage capacity equal to 1,000 gigabytes (GB). One GB of data is equal to one billion bytes (10\(^9\) bytes), so one TB of data equals one trillion (10\(^{12}\) bytes). A petabyte is 10\(^15\) bytes and an exabyte (EB) is 10\(^18\) bytes. It has been estimated that the total volume of information generated worldwide in 1999 was two EB, by 2011 the world will create, capture, or replicate nearly 1,800 EB of information, and by 2020 the amount of digital information created and replicated in the world will grow to 35 trillion GB, or 44 times as much digital information as existed in 2009. How Much Information?, supra note 2, at 3-4; John Gantz & David Reinsel, The Digital Universe Decade – Are You Ready?, at 1 (May 2010), http://idcdocserv.com/925; John F. Gantz, et al., The Diverse and Exploding Digital Universe: An Updated Forecast of Worldwide Information Growth Through 2011, at 3 (March 2008), http://www.emc.com/collateral/analyst-reports/diverse-exploding-digital-universe.pdf.


Id.


Effective Reform, supra note 9, at 12. E-discovery vendors, who are frequently hired to collect and process ESI in mid- to large-size cases, have adopted a variety of pricing models, including per page, per GB, per hour, or per custodian. In recent years the most common model has shifted from per page to per GB, as a reaction to the wildly inaccurate page count estimates often associated with processing ESI. See Jeffrey S. Jacobson, How to Spend Less on Electronic Discovery, N.Y.L.J., June 10, 2010, at 7; Jason Krause, Confusion Carries the Day in E-Discovery, LAW. TECH. NEWS, March 22, 2010, http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202446546213. Some vendors use a tiered pricing model, charging one rate per GB to process ESI and a different rate per GB to host data following de-duplication, filtering and searching. Marla S.K. Bergman & Steven C. Bennett, Managing E-Discovery Costs: Mission Possible, THE PRACTICAL LITIGATOR 57, 59 (July 2009), http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/PLIT0907-Bergman-Bennett_thumb.pdf.
organize their ESI in ways that facilitate efficient collection and review. Much ESI is saved on backup tapes to guard against catastrophic computer failure. Backup tape cartridge characteristics, including large storage capacities, rapid transfer rates, and low power consumption, make tapes an ideal backup medium in those respects. But they have other characteristics which render them an unfortunate medium for e-discovery. Tapes contain vast amounts of duplicative data and are frequently unlabeled and disorganized, rendering difficult and time-consuming the search for responsive information. Data on a tape are not organized for efficient retrieval of individual documents or files, because the data are generally recorded and stored sequentially. In order to locate and access a specific document or file, all data on the tape preceding the target must be read first. Moreover, much of the information stored on backup tapes is compressed, difficult to recover, and must be specially processed before it is usable. Tapes are typically restored to hard drives and reformatted so they can be searched for responsive information. The estimated cost of restoration varies considerably, but is usually at least $1,000 per tape. Thus, the average cost of collecting, processing, reviewing, culling, and

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73 See, e.g., Toussie v. County of Suffolk, No. CV 01-6716(JS)(ARL), 2007 WL 4565160, at *4 (E.D.N.Y. Dec. 21, 2007) (estimated cost to restore 417 tapes was $418,000 to $963,500, or approximately $1,000 to $2,300 per tape); Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 313-14 (2003) (defendant’s estimated cost to restore 94 tapes was $300,000, or almost $3,200 per tape); Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 428 (S.D.N.Y. 2002) (estimated cost to restore 200 tapes was approximately $9.75 million, or more than $45,000 per tape); Murphy Oil USA, Inc. v. Fluor Daniel, Inc., 52 Fed. R. Serv. 168 (E.D. La. 2002) (estimated cost to restore 93 tapes was $6.2 million, or almost $67,000 per tape). Cf. Behzad Behtash, *E-Discovery: How to Avoid Death by Backup*,
producing one GB of data has been estimated at between $5,000 and $7,000.\textsuperscript{74} If a typical mid-size case produces 500 GB of data, the total production cost will be $2.5 million to $3.5 million.\textsuperscript{75} Improvements in technology\textsuperscript{76} and increased market competition\textsuperscript{77} have reduced the per-GB processing cost in recent years, but those savings have been more than offset by the exponential increase in ESI volume.\textsuperscript{78}


\textsuperscript{75} Institut. for the Advancement of the Am. Legal Sys., \textit{Electronic Discovery: A View from the Frontlines} 5, 25 (2008), \url{http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf}. A survey of Fortune 200 companies found that, for the period 2006-08, the average company paid average discovery costs per case of $681,880 to $2,993,567. Companies at the high end during the same time period reported average per case discovery costs ranging from $2,354,868 to $9,759,900. \textit{See Litigation Cost Survey of Major Companies}, Statement Submitted by Lawyers for Civil Justice, Civil Justice Reform Group, and U.S. Chamber Institute for Legal Reform to Comm. on Rules of Practice and Procedure of the Judicial Conf. of the United States 3 (May 10-11, 2010), \url{http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement}. A significant percentage of these costs can be attributed to ESI.


\url{http://www.informationweek.com/story/showArticle.jhtml?articleID=224400402} (estimating that restoration of backup tapes typically costs $500-$1,000 per tape).
The cumulative effect of the foregoing factors is that the vendor and other non-attorney e-discovery market increased from $1.5 billion in 2006 to $2.8 billion in 2009, and was expected to increase another 10-15% in both 2010 and 2011. This estimate excludes costs associated with the review by attorneys of documents for responsiveness and privilege, which can account for 75-90% of the total cost of producing ESI. Document review is regularly performed manually, whether the information is paper or electronic, and manual review of one GB of ESI (the equivalent of approximately 80,000 -100,000 typewritten pages of text) has an estimated average cost of $32,000-$40,000.

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82 George L. Paul & Jason R. Baron, Information Inflation: Can the Legal System Adapt?, 13 RICH. J.L. & TECH. 10, at *20. A much higher conversion estimate of 500,000 pages of text per GB comes from The Manual for Complex Litigation (Fourth) § 11.446 (2004), but is subject to some dispute. See Instit. for the Advancement of the Am. Legal Sys., Electronic Discovery: A View from the Frontlines 5 & n.10 (2008), http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf; Craig Ball, Expert Explodes Page Equivalency Myth, Law TECH. NEWS, Aug. 8, 2007, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1186477613170 ("Scholarly articles and reported decisions pass around the 500,000 pages per gigabyte value like a bad cold. Yet, 500,000 pages per gigabyte isn’t right. It isn’t even particularly close to right."). Page equivalency numbers vary considerably when they are not expressed in a common currency -- the number of pages in a document file varies widely as a function of the file type and its characteristics. According to one estimate, the average number of pages per GB varies from a low of 17,552 for PowerPoint files to a high of 677,963 for text files. Word files average 64,782 pages and e-mail files average 100,099 pages. See LexisNexis Applied Discovery, How Many Pages in a Gigabyte? (2008), http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesinAGigabyte.pdf.

83 Donald Wochna, Electronic Data, Electronic Searching, Inadvertent Production of Privileged Data: A Perfect Storm, 43 AKRON L. REV. 847, 853 (2010). This estimate can vary widely, depending on billable rates and the efficiency of the document reviewer. The stated estimate assumes an average billable rate of $200 per hour and that a single attorney can review 500 pages of data per hour with acceptable accuracy. Id. at 853.
Attorney review for privilege and the preparation of privilege logs constitute the single most costly steps in the e-discovery process. This is true for a number of reasons. The first concerns the qualitative differences between electronic and paper documents. The former tend to be considerably more informal, use significantly more abbreviations and shorthand, and accordingly often are much more ambiguous than their paper counterparts. This ambiguity forces additional review time. Costs also multiply when e-mail strings are reviewed and logged. Each e-mail in the chain may need to be reviewed and logged separately insofar as only privileged communications which are adequately identified may properly be withheld from production of an e-mail chain.

Costs multiply again when potentially privileged metadata are involved. Metadata are data about data, or information describing the history, tracking, or management of an electronic file. They have no counterpart in the world of paper discovery. There are different types of metadata, which can include privileged or confidential information and serve to indicate the date an electronic file was created, its author, when and by whom it was edited, what edits were

84 Donald Wochna, Electronic Data, Electronic Searching, Inadvertent Production of Privileged Data: A Perfect Storm, 43 AKRON L. REV. 847, 852-53 (2010); Julie Grantham, Managing E-Discovery Costs from the Vendor Perspective, 51 THE ADVOC. (TEXAS) 57 (2010) (“The most expensive component of any e-discovery project is human document review. . . .”). See also Fulbright & Jaworski L.L.P., E-Discovery Trends: E-Discovery Findings from the 2005-2009 Fulbright & Jaworski L.L.P. Litigation Trends Survey 4 (2009), http://civilconference.uscourts.gov/LotusQuickr/dcc/main.nsf/$defaultview/F873BA28DC4854F38525767E004A4F9A/$File/Fulbright’s%20E-Discovery%20trends.pdf?OpenElement (reporting that in 2007 national survey of general counsel or senior litigation counsel from than 300 corporations, more than 50% of respondents said privilege reviews accounted for more than 5% of their litigation spending in the previous 12 months, and 26% said that such reviews consumed between 20% and 50% of their annual litigation expenditure).


87 See Muro v. Target Corp., 243 F.R.D. 301 (N.D. Ill. 2007).

made, and, in the case of e-mail, the history of its transmission. Depending on the circumstances, metadata showing the date a document was created, altered or transmitted may be important to a party’s claims or defenses. Metadata also may be useful to establish authenticity of a document under the Federal Rules of Evidence and state counterparts. The word “metadata” does not appear at all in the FRCP. The Rules are deliberately silent concerning the production of metadata probably because the Advisory Committee did not feel sufficiently confident to establish a rule in this still-developing area of the law. Nevertheless, increasingly litigants seeking the production of ESI also target production of the accompanying metadata and, if the requests are made sufficiently early in the case, they are generally granted. To the extent that production is required this can significantly increase the cost of e-discovery. The process of extracting and reviewing metadata to identify and redact privileged information can be very time-consuming.

91 See Thomas Y. Allman, The Impact of the Proposed Federal e-Discovery Rules, 12 RICH. J.L. & TECH. 13, 15 (2006) (“The Advisory Committee discussed the competing concerns at some length but ultimately decided that the best course of action was to remain silent and leave the issue to individual case law development.”).
93 See CP Solutions PTE, Ltd. v. Gen. Elec. Co., No. 3:04 cv 2150 (JBA) (WIG), 2006 WL 1272615, at *4 (D. Conn. Feb. 6, 2006) (declining to order production of metadata because redaction for privilege would be unduly burdensome); Adam K. Israel, Note, To Scrub or Not to Scrub: The Ethical Implications of Metadata and Electronic Data Creation, Exchange, and Discovery, 60 ALA. L. REV. 469, 496 (2009) (“[T]he hours logged reviewing metadata for privileged or protected information will likely be extremely costly.”).
Accounting for the range of electronic discovery activities, revenues for the e-discovery industry as a whole, including records management and litigation-readiness plans, were expected to increase from $9.7 billion in 2006 to $21.8 billion in 2011, far out-stripping the vendor e-discovery market. In sum, then, the accelerating cost and importance of e-discovery in modern civil litigation are unmistakable. The next Part of this Article examines whether the 2006 and 2008 Amendments have capped the rise in e-discovery expense.

III. The 2006 and 2008 Amendments Failed to Solve the E-Discovery Cost Problem

A. The 2006 Amendments

The Federal Rules of Civil Procedure were amended in 2006 (the 2006 Amendments) to address the dramatically expanding importance and cost of electronic discovery. This was the tenth time that Rule 26 (which covers the duty to disclose and general provisions governing discovery) had been amended since the FRCP were adopted in 1938, and the sixth time that

Rule 37 (which covers the failure to make disclosures or cooperate in discovery, and sanctions)\textsuperscript{97} had been amended.\textsuperscript{98}

Three major changes were made in 2006 to Rules 26 and 37. First, the 2006 Amendments implemented a two-tiered proportionality approach to the scope of e-discovery. The proportionality principle provides that a party is not required to provide discovery when the potential benefits are outweighed by the associated burdens or costs. Pursuant to Rule 26(b)(2)(B), a responding party is not required to produce ESI from sources that the party identifies as “not reasonably accessible because of undue burden or cost.”\textsuperscript{99} A common example is backup tapes, which are often held to be inaccessible.\textsuperscript{100} If a requesting party seeks discovery of ESI that is not reasonably accessible, that party has the burden of demonstrating good cause for production,\textsuperscript{101} which (as in the case of Rule 26(c)) is undefined.\textsuperscript{102} Courts are required to balance the requesting party’s need for the information and its relevance against the burden and expense imposed on the responding party under Rule 26(b)(2)(C)(i)-(iii), but they are given limited guidance by the Rule and the Advisory Committee’s Note.\textsuperscript{103}

Proportionality concerns are typically raised in a motion to compel or request for a protective order under Rule 26(c). A court which orders discovery from inaccessible sources for

\begin{flushleft}
\textsuperscript{97} Fed. R. Civ. P. 37.
\textsuperscript{101} See David K. Isom, The Burden of Discovering Inaccessible Electronically Stored Information: Rules 26(b)(2)(B) and 45(d)(1)(D), 3 FED. CTS. L. REV. 39, 55 (2009) (“Most courts that have addressed the Rule 26(b)(2)(B) allocation of burdens have held that, once the responding party proves inaccessibility the seeking party has the burden of proving good cause for production of the inaccessible ESI.”).
\textsuperscript{102} Fed. R. Civ. P. 26(b)(2)(B).
\textsuperscript{103} See Fed. R. Civ. P. 26(b)(2)(B) – (C), Advisory Committee’s Note.
\end{flushleft}
good cause may specify conditions, the most important of which is cost-shifting to mitigate some of the cost or burden involved. Prior to the 2006 Amendments there was no universally accepted framework for shifting the costs of producing ESI. There were three primary tests, derived from three district court cases of the early 2000s – *McPeek v. Ashcroft*,104 *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,105 and *Zubulake v. UBS Warburg LLC*.106 Each of these cases involved, at least in part, requests for ESI that was available only on backup tapes. *McPeek* applied a marginal utility analysis and held that the more likely it is that ESI contains information that is relevant to a claim or defense, the fairer it is that the responding party pay search costs.107 *Rowe*, a racial discrimination case, went one step further and listed eight factors to guide courts in deciding whether to shift costs.108 *Zubulake*, a gender discrimination case, refined and prioritized the *Rowe* factors, reduced the list to seven,109 and emerged as the most common, albeit non-universal, approach to the cost-shifting issue.110

Amended Rule 26 does not codify any of the foregoing approaches. Indeed, the text of the rule does not even mention cost-shifting. The Advisory Committee’s Note includes a list of seven factors that it considers relevant to a determination of whether good cause exists to require discovery of ESI that is not reasonably accessible.111 That list liberally borrows from both *Rowe*

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107 202 F.R.D. at 34.
108 205 F.R.D. at 429.
109 217 F.R.D. at 322.
111 Fed. R. Civ. P. 26, Advisory Committee’s Note.
and *Zubulake* but is not co-extensive with either.\footnote{112 See Bradley T. Tennis, Comment, *Cost-Shifting in Electronic Discovery*, 119 YALE L.J. 1113, 1114 (2010) ("[T]he Zubulake test and the amendment test exhibit significant differences that preclude straightforward harmonization.").} The similarities to *Rowe* and *Zubulake* raise an obvious question: is the list, in addition to providing guidance concerning good cause for the production of inaccessible ESI, also designed to provide guidance in making a cost-shifting determination? To date, courts have reached no consensus on this issue.\footnote{113 See Vlad Vainberg, Comment, *When Should Discovery Come with a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523, 1561-62 (2010).}

Second, the 2006 Amendments created a “safe harbor” provision in Rule 37(e), pursuant to which, absent exceptional circumstances, a court may not sanction a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.\footnote{114 Fed. R. Civ. P. 37(f).} The safe harbor was designed to protect against sanctions arising solely from the loss of ESI through the routine operation of electronic systems that automatically discard information.\footnote{115 Dan H. Willoughby, Jr., et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 824 (2010).} “Good faith” is not defined in Rule 37, but the Advisory Committee’s Notes state that good faith may require that a party intervene to modify or suspend certain features of the routine operation of a computer system to prevent the loss of information, if that information is subject to a preservation obligation.\footnote{116 Fed. R. Civ. P. 37(b)(5)(B).}

Third, the 2006 Amendments permit the parties to agree in advance that inadvertent production of privileged materials does not automatically waive the privilege.\footnote{117 Fed. R. Civ. P. 26(b)(5)(B).} Specifically, amended Rule 26 endorses the use of both “quick peek” and clawback agreements. Quick peek agreements allow the requesting party to take a quick “peek” at the producing party’s ESI absent any preproduction review. The requesting party then identifies the particular documents it wants produced and the producing party can limit its privilege review to only those documents. In
exchange, the requesting party agrees that it will not use or claim waiver over documents it examined during the quick peek. Clawback agreements provide that privileged or protected documents which are inadvertently produced during discovery will be returned, or clawed back, absent waiver of privilege. While the text of Rule 26 does not mention either quick peek or clawback agreements, the 2006 Advisory Committee’s Note to Rule 26(f) discusses clawbacks as a way to reduce discovery costs and minimize the risk of privilege waiver.\footnote{Fed. R. Civ. P. 26(f) Advisory Committee’s Note.}

The 2006 Amendments have various features that collectively render them mostly ineffective as a mechanism to significantly reduce the escalating cost of e-discovery. First, the good cause requirement of Rule 26(b)(2)(B) leaves judges with slim guidance and virtually unfettered discretion in deciding whether discovery of ESI that is not reasonably accessible is appropriate. Rule 26(b)(2)(B) does not define the term and it does not provide that good cause equals either the seven factors identified in the Advisory Committee’s Note or the limitations in Rule 26(b)(2)(C)(i)-(iii). Subsequent to 2006 no additional guidance concerning the meaning of good cause has been provided by the Civil Rules Advisory Committee or the Federal Judicial Center, which is the research and education agency for the federal courts.\footnote{See Henry S. Noyes, Good Cause is Bad Medicine for the New E-Discovery Rules, 21 HARV. J.L. & TECH. 49, 71 & n.102 (2007).} Moreover, the FRCP contain numerous good cause standards even within the limited universe of discovery rules. These standards are subject to significantly different interpretations by the courts and thus not only provide no guidance concerning good cause under 26(b)(2)(B) but also counter the canon of statutory construction that a single word used multiple times in the same statute or rule should receive the same interpretation.\footnote{id. at 71-72.}
The absence of clear boundaries as to the meaning of good cause in Rule 26(b)(2)(B) means that the rule fails to provide any new or additional protection against the rising cost of e-discovery. The absence of boundaries may even encourage parties to seek broad e-discovery from sources which are difficult and expensive to search, thus driving up costs for their adversaries.\(^{121}\) This danger is magnified by the ambiguity, described above, as to whether the seven factors are designed to guide the cost-shifting determination, and is reflected in the increasing rarity of cost-shifting orders following the 2006 Amendments. A 2010 survey found that only 35 federal cases addressed cost-shifting post-December 1, 2006, and only one of them yielded a contested cost-shifting order.\(^{122}\) The rarity of cost-shifting orders further minimizes the incentive for parties to limit their discovery requests.\(^{123}\)

Second, the proportionality standard incorporated into Rule 26(b)(2)’s good cause requirement is likely to have little or no positive impact, based on prior experience with a substantially similar requirement incorporated into Rule 26(b) by amendment in 1983.\(^{124}\) That requirement, designed to curb discovery abuse of the pre-ESI era, is generally regarded as a failure, because courts ignored proportionality concerns following the amendment.\(^{125}\) Since modern e-discovery presents a much broader and deeper array of challenges than did prior paper-based discovery, there is no reason to assume that the 2006 Amendments will fare any better.

\(^{121}\) John H. Beisner, Discovering a Better Way: The Need for Effective Civil Litigation Reform, 60 DUKE L.J. 547, 583 (2010).
\(^{123}\) See, e.g., Roy W. Breitenbach & Alicia M. Wilson, Managing the Fact Discovery Tsunami: Tips When Defending a Federal Antitrust Case, N.Y.L.J., Jan. 18, 2011, at S8 (noting that absence of cost-shifting means there is little incentive for antitrust plaintiffs to limit discovery).
\(^{124}\) See Scott A. Moss, Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age, 58 DUKE L.J. 889, 905 (2009).
\(^{125}\) See The Sedona Conference Commentary on Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289 n.9 (2010); Scott A. Moss, Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age, 58 DUKE L.J. 889, 899-901 (2009).
One problem is the significant difficulty of assessing the cost of e-discovery before it is has been conducted. A second problem is the great difficulty judges have in deciding when the cost of discovery is proportional to some measure of benefit. This is particularly true in cases not involving economic damages.

Third, Rule 37(e)’s safe harbor provision has provided little protection to parties or counsel because the provision provides no guidance on what data must be preserved or the manner of preservation, and judges have tended to give the Rule the narrow application that the drafters intended. From the promulgation of Rule 37(c) on December 1, 2006 until January 1, 2010, only 27 federal court decisions relating to discovery of ESI in civil cases cited the safe harbor provision. Of these decisions, no more than eight invoked Rule 37(e) to deny sanctions in whole or in part. Given the limited protection that Rule 37(e) provides, parties have no incentive to limit the costly preservation (and production) of all potentially relevant evidence.

Fourth, as is explained in more detail below in connection with the 2008 Amendments, the quick peek and clawback agreements contemplated by amended Rule 26 of the Federal Rules of Civil Procedure and new Rule 502 of the Federal Rules of Evidence offer only limited potential cost savings.

The cumulative result of the foregoing factors is that the 2006 Amendments have not reduced costs to a significant degree. Only 22.1% of the respondents in a 2010 survey of all U.S. Magistrate Judges reported that Rule 26(b)(2)(B) was frequently effective in limiting the cost

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126 See Reduce the E-Discovery Burden – Your and Your Law Firms’ Anecdotal Evidence and Data Can Help, METROPOLITAN CORP. COUNSEL, Apr, 2010, at 11 (“It is hard to apply the proportionality principle because it is very difficult to assess the cost of discovery up front.”) (quoting Thomas M. Mueller, Partner, Morrison & Foerster LLP).
127 Dan H. Willoughby, Jr., et al., Sanctions for E-Discovery Violations: By the Numbers, 60 DUKE L.J. 789, 825 (2010).
128 Id.
129 See text accompanying notes 148-50, infra.
and burden of discovery, and only 19.5% reported that Rule 26(b)(2)(C) frequently limited the cost and burden.\textsuperscript{130} Two 2009 surveys of attorneys, limited to those who had dealt with e-discovery cases since December 1, 2006, also found that the new rules were ineffective in reducing costs. Roughly half of all attorneys surveyed by the ABA and ACTL Reports responded that the 2006 Amendments provide for cost-effective discovery of ESI in less than a majority of cases.\textsuperscript{131} And according to the ABA Report, 45.7% of defense attorneys responded that the 2006 Amendments never provide for cost-effective discovery of ESI.\textsuperscript{132}

**B. The 2008 Amendments**

In 2008 the Federal Rules of Evidence (FRE) were amended with the enactment of Rule 502, in an effort to control the spiraling cost of preproduction privilege review in a discovery world dominated by ESI.\textsuperscript{133} Rule 502, which is designed to be read in tandem with Rule 26(b)(5)(B) of the FRCP, addresses the mechanics of privilege waiver for documents subject to attorney-client privilege and work product protection. Prior to the enactment of this rule there was no uniform approach by federal courts to determining whether and to what extent privilege was waived upon the inadvertent disclosure of privileged information,\textsuperscript{134} and the outcome in any given federal diversity case turned on the applicable state privilege law.\textsuperscript{135}

\begin{itemize}
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} See Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19, 30 (2010) ("Rule 502 was enacted to meet the obvious concern that in a world where a four gigabyte ‘thumb drive’ now costs less than twelve dollars, the costs of review on a file-by-file basis of the contents of a client’s hard drive or server would soon dwarf the actual value of the case.").
  \item \textsuperscript{134} See Hopson v. Baltimore, 232 F.R.D. 228, 235-36 (D. Md. 2005) (discussing different tests used by federal courts).
  \item \textsuperscript{135} In federal actions based on diversity jurisdiction, federal courts apply state substantive law, including state law of privilege. Fed. R. Evid. 501.
\end{itemize}
Rule 502 attempts to standardize the federal approach to determining the consequences of the disclosure of a communication covered by attorney-client privilege or work product protection. Indeed, Rule 502 has been referred to as the “first step in the federalization of state privilege law.” Section (a) limits the scope of any waiver to material inadvertently produced in a federal case or to a federal agency, thereby precluding broad subject matter waiver. Protection is lost if the producing party intentionally waived the privilege, the disclosed and undisclosed information concern the same subject matter, and the disclosed and undisclosed information should fairly be considered together. A scenario likely to meet all three conditions is where a party deliberately discloses privileged information in an effort to gain a tactical advantage.

Section (b) precludes waiver in a federal or state proceeding for information produced in a federal case or to a federal agency if the disclosure was inadvertent, the producing party took reasonable steps to prevent disclosure, and the producing party took reasonable steps to retrieve the material upon discovering the disclosure. The producing party has the burden of establishing each of the three factors. In most cases the key factor will be the second one – the reasonableness of the steps taken to prevent disclosure. The Advisory Committee’s Note identifies some additional factors that pertain to the reasonableness of a party’s actions to prevent

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136 See Fed. R. Evid. 502 Advisory Committee’s Note.
140 Fed. R. Evid. 502(b).
disclosure, beyond those listed in the text of the rule.\textsuperscript{143} Neither the Note nor the text of the rule addresses the question of whether waiver must be resolved by the federal court in which the disclosure occurred, or instead may be resolved in a subsequent federal or state proceeding.\textsuperscript{144}

Sections (c) – (e) are designed to make non-waiver agreements enforceable in subsequent proceedings and against subsequent parties. Section (c) provides that disclosure at the state level will not waive privilege in a federal proceeding, if it would not have constituted a waiver in federal court or under that state’s law.\textsuperscript{145} Section (d) provides that if a federal court ordered that a privilege was not waived, the order is binding on all other federal and state court proceedings.\textsuperscript{146} Section (e) provides that a waiver agreement entered into by parties in a federal proceeding only binds the parties to the agreement, unless it is incorporated into a court order.\textsuperscript{147} Accordingly, if a quick peek or clawback agreement is incorporated into a federal court order, it binds both signatories and non-signatories in all other federal or state proceedings.

Rule 502, while well-intentioned, has a number of drawbacks that collectively limit its cost-saving potential. First, the genie cannot be placed back in the bottle, and the bell cannot be un-rung. Once privileged information is disclosed to an adversary it cannot be retrieved -- even if the documents themselves can be clawed-back. Such disclosures have the potential to dramatically undermine a party’s ability to effectively litigate a case in numerous respects. The privileged information can suggest and shape, \textit{inter alia}, an adversary’s written discovery requests, deposition questions, witness preparation, settlement and trial strategy, and trial

\textsuperscript{143} Fed. R. Evid. 502(b), 2008 Advisory Committee’s Note.
\textsuperscript{145} Fed. R. Evid. 502(c).
\textsuperscript{146} Fed. R. Evid. 502(d).
\textsuperscript{147} Fed. R. Evid. 502(e).
examination questions. Accordingly, prudent counsel may be very reluctant to rely on quick peek or clawback agreements, with the result that expensive preproduction privilege reviews will continue as before. Not surprisingly, then, in a 2010 survey of all U.S. Magistrate Judges, more than 80% of the respondents reported that quick peek discovery is rarely or never used. The Magistrate Judges reported that clawback agreements were used more often, but even so less than one-quarter of them reported that such agreements were used on a frequent basis.

Second, while Rule 502 permits disclosure of privileged information, the rules of professional conduct do not, absent fully-informed consent by the client. Rule 1.1 of the ABA’s Model Rules of Professional Conduct, which provide a template for the ethics codes of many states, requires a lawyer to use diligence and care in representation. Entering into non-waiver agreements, absent client consent, could constitute a violation of this provision, if privileged documents are produced and that production materially damages the client’s case.

Third, while Rule 502(b) eliminates waiver for inadvertent disclosures when the disclosing party has taken reasonable steps to protect the privilege, the uncertain scope of what constitutes such steps vitiates the available protection. The Advisory Committee’s Note refers to

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148 See Inst. for the Advancement of the Am. Legal Sys., Electronic Discovery: A View from the Frontlines 20 (2008), http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf (“Privileged information, once learned, cannot be unlearned and it can permeate and alter the course of a case.”).
150 Id.
the five-factor test previously used by most federal courts, but the test is not codified by Rule 502. Moreover, courts have divergent views of what is reasonable, and they focus on and weigh the relevant factors differently. This was true before Rule 502 was enacted and it remains true following enactment. The result is that steps taken in one case may suffice to avoid waiver, but the same steps may be insufficient in another case. Some pre-Rule 502 federal court decisions suggest that parties defending the reasonableness of their conduct will have a steep slope to climb. This slope may include satisfaction of the strict expert witness requirements of Rule 702 of the FRE, if parties are required to defend the reasonableness of their search methodology. But even if Rule 702 need not be satisfied, various courts prior to the 2008 Amendments still imposed a very demanding “reasonable steps” standard. If courts

153 The five factors are: (1) the reasonableness of steps taken to prevent disclosure; (2) the amount of time taken to remedy the inadvertent disclosure; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness or justice. See First American CoreLogic, Inc. v. Fiserv, Inc., Civ. Action No. 2:10-CV-132-TJW, 2010 WL 49755666, at *3 (E.D. Tex. Dec. 2, 2010).
155 Gareth T. Evans & Farrah Pepper, Federal Rule of Evidence 502: Getting to Know an Important E-Discovery Tool, 51 ORANGE COUNTY LAWYER, Nov. 2009, at 10; Heriot v. Byrne, 257 F.R.D. 645, 655 n.7 (N.D. Ill. 2009) (“In applying FRE 502(b), the court is free to consider any or all of the five [] factors. . . .”). Heriot criticized the “rather peculiar” approach of another decision, Rhoads Indus., Inc. v. Bldg. Materials Corp. of America, 254 F.R.D. 216, 218-27 (E.D. Pa. 2008), which chose to adopt the five factors as a “wholesale test of inadvertent disclosure,” rather than use the factors to supplement the required analysis under Rule 502(b). Id.
157 See Fed. R. Evid. 702.
continue this practice following the enactment of Rule 502 then litigants will be required to
design and execute strict document review protocols that fail to contain costs.  

Fourth, there is a disconnection between the text of Rule 502 and the rule’s stated goal of
reducing the cost of preproduction privilege reviews. An example of this disconnection is
provided by Spieker v. Quest Cherokee, LLC, a district court case which held that quick peek
and clawback agreements could not be endorsed by court order unless the producing party had
taken reasonable steps to protect the privilege. This decision might be consistent with the text
of Rule 502, which does not expressly limit the “reasonable steps” requirement to Section (b),
but it is inconsistent with the Advisory Committee’s Notes, which state that the court may
enforce quick peek and clawback agreements irrespective of the care taken by the disclosing
party, as a way to avoid the excessive costs of pre-production review for privilege and work
product.  

The cumulative result of the foregoing factors is that the 2008 Amendments have not
reduced costs. In a 2009 national survey of general counsel or senior litigation counsel from
approximately 300 corporations, 93% of respondents reported that Rule 502 had not resulted in

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(“FRE 502 does not define ‘reasonable steps,’ but case law before adoption of the Rule and common sense dictate
that anything short of a document-by-document review of potentially privileged documents may not be
reasonable. Thus, the reasonable step requirement imposes the very expense the Rule was designed to
mitigate.”).  
DJW, 2010 WL 2949582, at *3 (D. Kan. July 22, 2010) (noting that under a clawback provision, “typically, the
materials are returned irrespective of the care taken by the disclosing party’’); H. Christopher Boehning & Daniel J.
Toal, Kansas Case Casts Doubt on Usefulness of Rule 502, N.Y.L.J., Oct. 27, 2009, at 5 (arguing that Spieker decision
is “entirely at odds with the purpose and history behind the adoption of Rule 502”). But cf. Jessica Wang,
Comment, Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback
Agreements, 56 UCLA L. Rev. 1835 (2009) (arguing that courts should refuse to enforce nonwaiver agreements
which preserve privilege in the absence of document review or where the review has been grossly negligent).
any cost savings to their companies, and none of the respondents reported that Rule 502 had produced significant savings.

The foregoing discussion demonstrates that the 2006 and 2008 Amendments have done remarkably little to curb the exponentially growing cost and burden of e-discovery. Most importantly, the Amendments fail to address the timing of e-discovery. They do nothing to curb the practice of imposing onerous e-discovery obligations on parties before motions to dismiss are resolved. The optimal way to solve this problem is to impose a stay on e-discovery pending disposition of motions to dismiss. The PSLRA discovery stay provides a successful model for such a solution. The next Part of this Article discusses the PSLRA stay and its utility as a model for application in all federal civil litigation.

IV. The PSLRA Discovery Stay

A. Background

Prior to 1995, when the PSLRA was enacted, defendants in federal securities cases were required to participate in discovery during the pendency of motions to dismiss. Defendants


166 See Michael H. Gruenglas, Robert A. Fumerton & Patrick G. Rideout, A Proposal to Prevent Blackmail at the Pleading Stage — Stay Discovery Pending Motions to Dismiss, N.Y.L.J., Oct. 5, 2009, at 1 ("[N]one of these amendments addresses the timing of e-discovery costs or deters the use of e-discovery in meritless litigation to extract settlements from defendants. Indeed, by making e-discovery a focal point at the outset of every case, these amendments to Rule 26 not only ignore the ever-increasing in terrorem effect on defendants, but actually compound the problem.").
could avoid discovery only by moving for a protective order, requesting a stay, and showing
good cause under Rule 26(c) of the FRCP.\textsuperscript{167} Such motions were typically denied.\textsuperscript{168} The
playing field was substantially modified with the enactment of the PSLRA. The Act provides, in
relevant part, that “[i]n any private action arising under this chapter, all discovery and other
proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds
upon motion of any party that particularized discovery is necessary to preserve evidence or to
prevent undue prejudice to that party.”\textsuperscript{169}

The Act’s legislative history indicates that Congress included the mandatory stay
provision for two primary reasons. The first was to prevent plaintiffs from filing securities class
actions with the intent of using the discovery process to force a coercive settlement.\textsuperscript{170} The cost
of discovery in class action securities litigation can be extraordinarily high, in both dollars and
business resources, with coercive settlements being a likely result. One estimate presented to
Congress when it was debating the PSLRA was that 80 percent of the cost of litigating securities
class actions was associated with discovery.\textsuperscript{171} Moreover, discovery costs in securities litigation
are highly asymmetrical. They are borne largely by defendants.\textsuperscript{172} Thus Congress recognized
that “[t]he cost of discovery often forces innocent parties to settle frivolous securities class
actions.”\textsuperscript{173}

\begin{thebibliography}{100}
\bibitem{167} Fed. R. Civ. P. 26(c).
\bibitem{169} 15 U.S.C. §78u-4(b)(3)(B). The term “particularized discovery” modifies both the terms “preserve evidence” and
\bibitem{170} In re Thornburg Mort., Inc. Sec. Litig., No. CIV 07-0815 JB/WDS, 2010 WL 2977620, at *6 (D.N.M. July 1, 2010).
\bibitem{172} See Hillary A. Sale, \textit{Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA’s Internal-
discovery requests to defendants, plaintiffs have very little to offer in the form of reciprocal discovery. . .[I]n the
average securities case, the plaintiffs’ document production consists solely of trading slips. . . .”).
the Bar of the City of New York Securities Litigation Committee, Subcommittee on Use of Confidential Sources,
litigation as a vehicle in order to conduct discovery in the hopes of uncovering a sustainable claim.\textsuperscript{174}

The PSLRA’s stay applies equally to discovery of parties and non-parties\textsuperscript{175} and whether or not the litigation has been commenced by individual plaintiffs or as a class.\textsuperscript{176} The stay applies where plaintiffs have asserted only federal securities law claims or pendent state law claims in conjunction with federal securities law claims\textsuperscript{177} but not where plaintiffs have asserted only state law claims in federal court pursuant to diversity jurisdiction.\textsuperscript{178} The stay applies in shareholder derivative actions that allege violations of federal law\textsuperscript{179} and to state law derivative

\textit{Dialogue on the Current Law and Proposals for Reform on the Use of Information from and the Disclosure of the Identity of Informants} 17-18 (Aug. 2009), \texttt{http://www.nycbar.org/pdf/report/uploads/20071798-UseofConfidentialSources.pdf} (“The legislative history shows that Congress recognized that even weak cases surviving a motion to dismiss often resulted in coercive settlements because of the prohibitive cost of discovery. . . . Once a motion is denied, discovery moves forward and cases often acquire a settlement value regardless of the merits of the claim.”). (The foregoing report includes separate sections written by plaintiffs’ counsel and defense counsel. The foregoing quotation is taken from the plaintiffs’ section.)

\textsuperscript{174} In re Thornburg Mort., Inc. Sec. Litig., No. CIV 07-0815 JB/WDS, 2010 WL 2977620, at *6 (D.N.M. July 1, 2010).


\textsuperscript{177} SG Cowan Sec. Corp. v. United States Dist Ct. for the N. Dist. of Calif., 189 F.3d 909, 913 n.1 (9th Cir. 1999); Winer Family Trust v. Queen, No. Civ.A. 03-4318, 2004 WL 350181, at *2 (E.D. Pa. Feb. 6, 2004) (“N)umerous courts have held that the PSLRA stay on discovery is applicable to pendable state law claims.”).


claims over which the federal court has asserted supplemental jurisdiction,\textsuperscript{180} but not to
derivative actions asserting solely state law claims.\textsuperscript{181}

Absent application of one of the statutory exceptions the stay is mandatory. Thus,
according to a majority of courts, so long as a motion to dismiss by any defendant is pending, or
even contemplated,\textsuperscript{182} discovery (expedited or otherwise) is stayed for the entire case, even if
there are multiple defendants, some of whom have had their motions to dismiss denied and/or
have answered.\textsuperscript{183} This includes motions to dismiss amended complaints\textsuperscript{184} and motions for
reconsideration of orders concerning motions to dismiss.\textsuperscript{185}

\textsuperscript{180} In re Countrywide Fin. Corp. Deriv. Litig., 542 F. Supp. 2d 1160, 1180 (C.D. Cal. 2008).
\textsuperscript{181} See In re First Bancorp Deriv. Litig., 407 F. Supp. 2d 585 (S.D.N.Y. 2006); In re Firstenergy Shareholder Deriv.
WL 23830479, at *3 (D.N.H. Jan. 29, 2003). Plaintiff shareholders have sometimes attempted to circumvent the
PSLRA stay by pursuing their statutory right to inspect the books and records of the defendant corporation under
Section 220 of the Delaware General Corporation Law, ostensibly to investigate a possible derivative suit relating
to the same core facts present in the parallel federal suit. 8 Del. C. § 220; Joseph M. McLaughlin, Delaware Records
Inspection Litigation and U.S. Securities Law, N.Y.L.J., Oct. 9, 2009, at 5. In Beiser v. PMC-Sierra, Inc., C.A. No. 3893-
VCL, 2009 WL 483321 (Del. Ch. Feb. 26, 2009), the court held that when the Section 220 action seeks records that
would be discoverable in a pending federal securities action and the shareholder or counsel making the records
demand is a party to the federal action or assisting a party to the federal action, the Section 220 action may not be
pursued unless the party or counsel signs a confidentiality agreement ensuring that any materials produced in the
Section 220 action will not be used in the federal action.

\textsuperscript{182} Courts have reached different conclusions as to whether the PSLRA’s discovery stay applies before a motion to
dismiss has been filed. The majority and better-reasoned view is that the stay is triggered by any defendant’s
indication of intent to file a motion to dismiss. See Friedman v. Quest Energy Partners LP, Nos. CIV-08-936-M, CIV-
08-968-M, 2009 WL 5065690, at n.2 (W.D. Okla. Dec. 15, 2009); Spears v. Metropolitan Life Ins., No. 2:07-CV-
00088-RL-PRC, 2007 WL 1468697, at *3 (N.D. Ind. May 17, 2007); Sedona Corp. v. Ladenburg Thalmann, No. 03 Civ.
3120 LTSTHK, 2005 WL 2647945, at *2 n.1 (S.D.N.Y. Oct. 14, 2005) (“There is no dispute that the PSLRA stay applies
when an initial motion to dismiss is contemplated, but has not yet been filed.”).

\textsuperscript{183} See Lane v. Page, No. CIV 06-1071 JB/ACT, 2009 WL 1312896, at *1 (D.N.M. Feb. 9, 2009) (“The result may be
harsh, but Congress has clearly expressed a desire that discovery not proceed in any securities litigation the PSLRA
covers until all pending motions to dismiss have been resolved.”); Sedona Corp. v. Ladenburg Thalmann, No. 03 Civ.
3120 LTSTHK, 2005 WL 2647945, at **9-10 (S.D.N.Y. Oct. 14, 2005); Fazio v. Lehman Bros., Inc., No. 1:02CV157,
1:02CV370, 1:02CV382, 2002 WL 32121836, at *2 (N.D. Ohio May 16, 2002) (stay applies “even as to discovery
against co-defendants who have not filed motions to dismiss.”); and Jeff G. Hammel & Robert J. Malionek, Some
Courts: PSLRA Stay-Provision Language Ambiguous, N.Y.L.J., Dec. 11, 2006, at 4. However, there is some dispute
Aug. 20, 2010) (rejecting argument that all discovery must be stayed during pendency of any motion to dismiss

Analyst Litig., 373 F. Supp. 2d 252 (S.D.N.Y. 2005) (PSLRA discovery stay applies to renewed motions to dismiss);
B. **SLUSA**

Three years after the PSLRA was enacted Congress reinforced the mandatory stay when it enacted the Securities Litigation Uniform Standards Act of 1998 (SLUSA).\(^{186}\) SLUSA’s primary objective was to federalize class action securities litigation. In the immediate post-PSLRA years Congress perceived, not necessarily accurately, that plaintiffs were circumventing the Act’s strict pleading requirements\(^{187}\) and discovery stay by asserting securities-related fraud under state law theories such as common law fraud, and increasingly filing such claims in state court.\(^{188}\) SLUSA amended the Securities Act of 1933 (Securities Act)\(^ {189}\) and the Securities Exchange Act of 1934 (Exchange Act)\(^ {190}\) in substantially identical ways,\(^ {191}\) by precluding

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Footnotes:


187 The PSLRA imposed two distinct pleading requirements, both of which must be met in order for a complaint to survive a motion to dismiss. The complaint must specify each allegedly misleading statement, why the statement was misleading, and, if an allegation is made on information and belief, “all facts” supporting that belief with particularity. In addition, the complaint must, with respect to each act or omission alleged to violate the securities laws, state with particularity facts giving rise to a “strong inference” that the particular defendant acted with the requisite state of mind. See 15 U.S.C. § 78u-4(b)(1) and (2).

188 See H.R. Conf. Rep. No. 105-803, at 14 (1998) (noting that decline in the level of federal class action securities litigation had been matched by an almost equal increase in the level of state court activity); Demings v. Nationwide Life Ins. Co., 593 F.3d 486, 490-91 (6th Cir. 2010) (“Congress found that plaintiffs and their representatives began bringing class actions under state law, often in state court, thus subverting the purpose of PSLRA.”) This perception persists, in the courts and elsewhere. See, e.g., Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc., 521 F.3d 1278, 1280 (10th Cir. 2008) (“[T]his shift to state court re-introduced many of the abuses that the PSLRA had attempted to mitigate. . .“); Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Incorporated, 332 F.3d 116, 123 (2d Cir. 2003) (“PSLRA’s objectives went largely unrealized due to this ‘federal flight’ loophole.”) But the accuracy of this perception is subject to considerable dispute. See William B. Snyder, Jr., Comment, The Securities Act of 1933 After SLUSA: Federal Class Actions Belong in Federal Court, 85 N.C. L. REV. 669, 696 n.183 (2007) (noting debate about existence of so-called “federal flight”); and (Richard W. Painter, Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action, 84 CORNELL L. REV. 1, 9 nn.31-33 (1998) (reviewing studies contradicting findings presented to Congress concerning federal flight).


“covered class actions”\textsuperscript{192} based upon the statutory or common law of any state if they involve allegations of untrue statements or omissions of material fact\textsuperscript{193} in connection with the purchase or sale\textsuperscript{194} of a “covered security.”\textsuperscript{195} Such class actions are to be dismissed.\textsuperscript{196}

SLUSA also authorizes federal courts to stay discovery proceedings in any private actions in state court (class actions or not)\textsuperscript{197} as necessary in aid of their jurisdiction or to protect or effectuate their judgments in actions subject to PSLRA stays.\textsuperscript{198} The Seventh Circuit has noted that the purpose of a discovery stay under SLUSA is “is to prevent settlement extortion—using discovery to impose asymmetric costs on defendants in order to force a settlement advantageous to the plaintiff regardless of the merits of his suit.”\textsuperscript{199} In determining whether to stay state court discovery, relevant considerations include the risk of federal plaintiffs obtaining the state plaintiff’s discovery, the extent of factual and legal overlap between the state and

\begin{footnotes}
\item See 15 U.S.C. §78bb(f)(5)(B) (defining “covered class action” as, \textit{inter alia}, actions in which damages are sought on behalf of more than 50 persons or prospective class members and common questions of law or fact predominate).
\item Non-fraud-based claims are precluded by SLUSA if they incorporate by reference allegations of false or misleading statements. Levinson v. PSCC Serv., Inc., No. 3:09-CV-00269, 2009 WL 5184363 (D. Conn. Dec. 23, 2009).
\item The Supreme Court has held that the “in connection with” requirement must be read expansively. It suffices that the fraud alleged coincides with a securities transaction, whether by the plaintiff or someone else. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 85 (2006). See also Appert v. Morgan Stanley Dean Witter, Inc., No. 08-CV-7130, 2009 WL 3764120, at *6 (N.D. Ill. Nov. 6, 2009) (“Post-Dabit, courts have consistently found SLUSA preemption applicable to broker-dealer claims based on allegations of deception or material omissions or misrepresentations concerning transaction fees, even where plaintiffs had painstakingly avoided alleging fraud.”).
\item See 15 U.S.C. §78bb(f)(5)(E) (defining “covered security” as one that is traded nationally and listed on a regulated national exchange, such as the New York Stock Exchange, NASDAQ, or the American Stock Exchange).
\end{footnotes}
federal actions, and the burden of state court discovery on defendants.\textsuperscript{200} SLUSA’s legislative history specifies that the stay provision is to be used “liberally” by courts.\textsuperscript{201} Accordingly, stays generally have been granted at defendants’ request.\textsuperscript{202}

C. Exceptions to the PSLRA Stay

1. Particularized Discovery is Necessary to Preserve Evidence

There are two statutory exceptions to the PSLRA’s mandatory stay. The first is when particularized discovery is necessary to preserve evidence. This exception presents a high hurdle for plaintiffs to clear. Congress itself cited a single viable example of required preservation—the deposition of a terminally ill witness\textsuperscript{203}—and that situation was already covered by the FRCP.\textsuperscript{204} Other scenarios will not clear the statutory hurdle. For example, the risk of document destruction in the usual case likely is too low to convince a court to lift the stay, given the possibility of civil and criminal sanctions and the alternative less costly remedy of an order prohibiting destruction.\textsuperscript{205} In order to satisfy the standard the plaintiff must demonstrate that the

\textsuperscript{201} See H.R. rep. No. 105-640, at 17-18 (1998)
\textsuperscript{202} Matthew L. Mustokoff, Shareholder Discovery, the PSLRA and SLUSA in Parallel Securities and Derivative Actions, 35 SEC. REG. L.J. 143, 144 (2006).
\textsuperscript{204} Fed. R. Civ. P. 27.
\textsuperscript{205} Gary L. Cutler, PSLRA Stay Does Not Always Halt the Process, N.Y.L.J., June 19, 2006, at S8. In addition, the PSLRA protects against document destruction by requiring parties to treat evidence in their custody or under their control as if it were the subject of a continuing discovery request while the stay is in place. See 15 U.S.C. §78u-4(b)(3)(C)(i); In re Merrill Lynch & Co. Research Reports Sec. Litig.,In re: Merrill Lynch Infospace Analysts Reports Sec. Litig., No. 02 MDL 1484(MP), 01 CV 6881(MP), 2004 WL 305601, at *1 (S.D.N.Y. Feb. 18, 2004) (refusing to lift stay because defendants avowed they had taken all necessary steps to preserve all potentially relevant electronic evidence); In re: CFS-Related Sec. Fraud Litig., AUSA, 179 F. Supp. 2d 1260, 1265 (N.D. Okla. 2001) (refusing to lift stay where motions to dismiss had been pending for more than one year, on basis that such a delay failed to establish significant risk of evidence loss); and In re Carnegie Int’l Corp. Sec. Litig., 107 F. Supp. 2d 676, 684 (D. Md. 2000). But see Koncelik v. Savient Pharm., Inc., No. 08 Civ. 10262(GEL), 2009 WL 2448029, *2 (S.D.N.Y. Aug. 10. 2009) (court partially lifts stay to permit service of document preservation subpoenas).
loss of evidence is imminent and not merely speculative. Accordingly, the mere fact that defendant debtor corporation faces possible liquidation or reorganization does not suffice to establish imminent document destruction. If the subject documents already have been produced to the government or an investigating entity, then usually no risk of loss exists.

2. Particularized Discovery is Necessary to Prevent Undue Prejudice

Plaintiffs have been only marginally more successful with the second statutory exception to the mandatory stay, which is when particularized discovery is necessary to prevent undue prejudice to the party seeking relief. The requirement of particularized discovery has been accurately described by several courts as “nebulous” and courts have differed greatly in their definition of a particularized discovery request under the PSLRA. Moreover, neither the statute nor the legislative history indicates what may constitute “undue prejudice.” In the absence of statutory and legislative guidance the majority of federal courts to consider the issue have construed the standard to require that plaintiffs seeking relief from the stay show

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206 In re Vivendi Universal, S.A. Sec. Litig., 381 F. Supp. 2d 129, 130 (S.D.N.Y. 2003); Sarantakis v. Gruttadaura, No. 02 C 1609, 2002 WL 1803750, at *2 (N.D. Ill. Aug. 5, 2002). In In re Royal Ahold N.V. Sec. & ERISA Litig., 220 F.R.D. 246, 251 (D. Md. 2004), the court lifted the stay because a wide-ranging corporate re-organization involving divestitures of key subsidiaries created a reasonable concern that documents might be lost.


210 In re Spectranetics Corp. Sec. Litig., Civ. Action Nos. 08-cv-02048-REB-KLM, etc., 2009 WL 3346611, at *2 (D. Colo. Oct. 14, 2009). A request is not particularized when it covers all documents that would be discoverable in a non-PSLRA case. Id.
exceptional circumstances involving improper or unfair treatment amounting to something less than irreparable harm. 211

Undue prejudice does not arise from a delay in the collection of evidence or the development of settlement or litigation postures, because such delay is inherent in every mandatory PSLRA stay. 212 Plaintiffs have had some success when defendants are insolvent. In several cases courts have found undue prejudice and lifted the stay, 213 reasoning that because multiple parties were competing for slices of a limited pie, class action plaintiffs would be at a serious disadvantage in planning their litigation and settlement strategies absent the requested discovery. 214

The most commonly asserted basis for a claim of undue prejudice is the existence of parallel litigation, or criminal or regulatory investigations, that have required class action

211 See, e.g., Ohio Public Employees Ret. Sys.v. Fed. Home Loan Mort. Corp., No. 4:08CV0160, 2010 WL 1628059, at *3 (N.D. Ohio Apr. 22, 2010); Brigham v. Royal Bank of Canada, No. 08 CV 4431(WHP), 2009 WL 935684, at *1 (S.D.N.Y. Apr. 7, 2009); In re Smith Barney Transfer Agent Litig., No. 05 Civ. 7583(WHP), 2006 WL 1738078, at *2 (S.D.N.Y. June 26, 2006). Cf. Sara S. Gold & Richard L. Spinogatti, Are the PSLRA Discovery Stay Exceptions Swallowing the Rule?, N.Y.L.J., Dec. 9, 2009, at 3 (“Although the majority of federal district courts appear to have required ‘unique’ or ‘exceptional’ circumstances to exist before permitting an exception to the discovery stay, as the PSLRA appears to require, a significant minority of courts seems to have strayed from the plain language of the provision to permit discovery without exceptional circumstances. . . .”).


defendants to produce documents to other plaintiffs, the government, or an investigating entity.\textsuperscript{215} Parallel investigations are common.\textsuperscript{216} Notwithstanding their frequency, or in part because of it, plaintiffs seeking modification of the PSLRA’s mandatory stay for the purpose of permitting them to obtain documents that have been produced to government regulators and investigators usually fail.\textsuperscript{217} District courts presented with applications for modification in this situation have typically, but not always, concluded that undue prejudice has not been shown.\textsuperscript{218}


\textsuperscript{216} For example, during the period 2005-2009, 199 securities class action filings had some form of involvement by the Securities and Exchange Commission (SEC), including formal or informal investigations, and 115 filings had some form of involvement by the United States Department of Justice (DOJ), including investigations. PricewaterhouseCoopers, \textit{2009 Securities Litigation Study} 26-27 (Apr. 2010), http://10b5.pwc.com/PDF/ny-10-0559%20SEC%20LIT%20STUDY\_V7%20PRINT.pdf.


\textsuperscript{218} See, \textit{e.g.}, In re Spectranetics Corp. Sec. Litig., Civ. Action Nos. 08-cv-02048-REB-KLM, etc., 2009 WL 3346611, at *7 (D. Colo. Oct. 14, 2009) (refusing to find undue prejudice where three of five referenced regulatory bodies were not actively proceeding against defendant); In re Schering-Plough Corp./Enhance Sec. Litig., Civ. Action No. 08-397, 2009 WL 1470453 (D.N.J. May 22, 2009); In re Merck & Co., Inc. Vytoris/Zetia Sec. Litig., No. 08-2177, 2009 WL 1456615 (D.N.J. May 22, 2009); In re Asyst Tec., Inc. Deriv. Litig., No. C-06-04669 EDL, 2008 WL 916883 (N.D. Cal. Apr. 3, 2008). The stay was lifted in Waldman v. Wachovia Corp., No. 08 Civ. 2913(SAS), 2007 WL 86763, at *2 (S.D.N.Y. Jan. 12, 2009), a class action involving the underwriting, marketing, and sale of auction rate securities. Such securities are bonds or preferred stock with interest or dividend rates established by periodic auctions. In \textit{Waldman}, the Court concluded that maintaining a discovery stay with regard to documents already produced to state and federal authorities would unduly prejudice plaintiffs because the documents could help resolve plaintiffs’ decision whether to pursue the case. The stay was not lifted in the same federal district in at least two other class actions involving auction rate securities, based on the same arguments raised in \textit{Waldman}. See Brigham v. Royal Bank of Canada, No. 08 CV 4431(WHP), 2009 WL 935684, at *1 (S.D.N.Y. Apr. 7, 2009); In re UBS Auction Rate Sec. Litig., No. 08 Civ. 2967(LMM), 2008 WL 5069060, at *1 (S.D.N.Y. Nov. 21, 2008). Likewise, the stay was not lifted in a different federal district, in a class action involving auction rate securities. See Zisholtz v. SunTrust Banks, Inc.,
Courts have refused to lift the stay while simultaneously acknowledging that granting plaintiffs’ applications would not frustrate the PSLRA’s goals. Specifically, district courts have refused to lift the stay where parallel SEC or DOJ investigations have revealed that plaintiffs’ claims may be meritorious. Courts have rejected the argument that the PSLRA’s policy goal of preventing plaintiffs from filing frivolous strike suits would not be thwarted under such circumstances. No federal appellate court had considered the issue by early 2011.

The outcome with respect to parallel litigation has been mixed. Courts sometimes accept the argument that whereas the primary function of the stay is to eliminate the high cost of discovery before the potential merits of a securities fraud case are assessed in connection with a motion to dismiss, that cost is sharply reduced when defendants already have found, reviewed, and organized the requested documents in parallel litigation, or where plaintiff offers to pay defendant’s costs to produce the documents. Other courts have rejected the same argument.

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Civ. Action File No. 1:08-CV-1287-TWT. 2009 WL 3132907, at *7 (N.D. Ga. Sept. 24, 2009). As mentioned supra, in order to lift the stay plaintiffs must show both the existence of undue prejudice and that their discovery requests are sufficiently particularized. Courts disagree about whether a request is sufficiently particular if it is limited to documents already produced to the government. At least two courts have answered that question in the negative. See In re American Funds Sec. Litig., 439 F. Supp. 2d 1103 (C.D. Cal. 2007); In re Fannie Mae Sec. Litig., 362 F. Supp. 2d 37, 39 (D.D.C. 2005).

219 See, e.g., Brigham v. Royal Bank of Canada, No. 08 CV 4431(WHP), 2009 WL 935684, at *2 (S.D.N.Y. Apr. 7, 2009) (“[T]he mere fact that the PSLRA’s goals would not be frustrated . . . is not sufficient to warrant lifting the stay.”); 308544 Canada, Inc. v. Aspen Tech., No. 07 Civ. 1204(JFK), 2007 WL 2049738, at *1 (S.D.N.Y. July 18, 2007). See also In re Spectranetics Corp. Sec. Litig., Civ. Action Nos. 08-cv-02048-REB-KLM, etc., 2009 WL 3346611, at *8 (D. Colo. Oct. 14, 2009) (“Although courts may consider whether policies behind the PSLRA discovery stay are frustrated by lifting that stay. . . nothing in the statute requires such a consideration nor allows an exception to the stay based merely on policy considerations.”).


Overall, with some isolated exceptions, plaintiffs have generally been unsuccessful in their efforts to have the PSLRA’s mandatory stay of discovery lifted. The score has changed very little even when a confidentiality agreement has been part of the mix. In several cases plaintiffs have asked the court for orders limiting the scope of confidentiality agreements signed by former employees of defendants, and/or lifting the discovery stay, to permit the former employees to be interviewed by plaintiffs’ counsel. Defendants have argued in response that such motions are encompassed by the PSLRA’s stay of “all discovery and other proceedings” (including witness interviews).\textsuperscript{222} While nothing in the PSLRA prohibits interviewing prospective witnesses, and the Act’s elevated pleading standard “encourages plaintiffs to do more investigation before filing a complaint, not less,”\textsuperscript{223} several district courts have refused to lift the stay to permit interviews of former employees bound by confidentiality agreements.\textsuperscript{224}

D. Salutary Effects of the PSLRA Stay

The PSLRA discovery stay has been successful in achieving its two primary objectives and that record of success suggests that an extension of the stay to all federal civil litigation also is likely to be beneficial. Extension of the stay to preclude e-discovery during the pendency of

\begin{itemize}
  \item \textsuperscript{222} 15 U.S.C. §78u-4(b)(3)(B) (emphasis added).
  \item \textsuperscript{223} In re: JDS Uniphase Corp. Sec. Litig., 238 F. Supp. 2d 1127, 1134 (N.D. Cal. 2002) (emphasis in original).
\end{itemize}
motions to dismiss is likely to achieve the following benefits. First, a mandatory stay is likely to result in significant cost-savings, by deferring e-discovery until after meritless claims have been dismissed. Cost savings will be greatest where complaints are dismissed with no leave to amend, but savings also will results from partial dismissals that narrow the claims and scope of relevant discovery. A narrowed scope of discovery probably can be expected to result in fewer and less costly discovery disputes. The Federal Judicial Center found that each reported type of dispute over ESI increased a party’s overall litigation costs by 10%, even after controlling for other case factors. This was true for both plaintiffs’ and defendants’ reported costs. Fewer disputes will mean lower costs.

Second, by significantly reducing front-loaded discovery costs, a mandatory stay is likely to decrease the coercive pressure that defendants presently face to settle cases prior to disposition of motions to dismiss. The reduced pressure to settle has been observed in securities litigation following the enactment of the PSLRA and a similar reduction can be expected in other civil litigation. Third, a stay is likely to decrease the incidence of frivolous civil litigation. Recent

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227 See U.S. Chamber Institute for Legal Reform, The Centre Cannot Hold: The Need for Effective Reform of the U.S. Civil Discovery Process 30 (May 2010), http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/ilr_discovery_2010.pdf (“An automatic stay [of discovery] would greatly reduce the in terrorem value of lawsuits. . . . “); Michael H. Gruenglas, Robert A. Fumerton & Patrick G. Rideout, A Proposal to Prevent Blackmail at the Pleading Stage – Stay Discovery Pending Motions to Dismiss, N.Y.L.J., Oct. 5, 2009, at 1 (“By deferring all e-discovery until after the legal sufficiency of a complaint has been tested, plaintiffs will no longer be able to use frivolous lawsuits to extract settlements by holding the prospect of e-discovery over defendants’ heads.”).
research establishes that frivolous securities litigation has declined, post-PSLRA,\(^{228}\) and this decline might be expected to be mirrored in non-securities cases.

In short, the same policies that justified adoption of the PSLRA stay also justify extension of that stay to e-discovery in all civil cases in federal court, and the same advantages can be expected to ensue. Given the significant benefits described above, it is unsurprising that support among attorneys for a stay is high. In a 2010 survey of 403 senior corporate counsel, 79% of the respondents in U.S. companies agreed that the U.S. rules of civil procedure should be modified to limit e-discovery in civil actions.\(^{229}\) And a clear majority of the more than 3,300 attorneys surveyed in the 2009 ABA Report agreed that there should be an automatic stay of discovery in all cases, pending determination of a threshold motion to dismiss.\(^{230}\)

V. **Twombly and Iqbal**

For the reasons indicated above, enactment of a mandatory stay of e-discovery during the pendency of motions to dismiss in all federal civil litigation is likely to have significant salutary effects. But do the benefits outweigh the costs? The most significant potential negative effect is preclusion of meritorious litigation. In this regard it is imperative to consider **Twombly** and **Iqbal**. In **Twombly**, decided in 2007, the United States Supreme Court overruled its 50 year-old decision in **Conley v. Gibson**\(^ {231}\) and established a new standard for pleading in federal court.

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\(^{228}\) See Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J. LAW, ECON. & ORGAN. 598, 623 (2007) (concluding that PSLRA has operated to reduce incidence of both nuisance litigation and meritorious litigation). See also John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 593 (2010) (“Because judges must now evaluate the merits of a securities class-action suit before subjecting a defendant to expensive civil discovery, there is little incentive for plaintiffs to file frivolous claims.”).


\(^{231}\) 355 U.S. 41 (1957).
Conley held that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."\textsuperscript{232} Twombly re-wrote that standard in a 7-2 decision. The Supreme Court, confronted with a consumer class action initiated against local telephone carriers for allegedly conspiring to inflate charges and inhibit market entry of rival firms in violation of federal antitrust law, concluded that Conley was “best forgotten as an incomplete, negative gloss on an accepted pleading standard”\textsuperscript{233} which had “earned its retirement.”\textsuperscript{234} Conley’s standard was replaced in Twombly with a requirement that a pleading set forth “enough facts to state a claim to relief that is plausible on its face.”\textsuperscript{235} Two years later the Supreme Court held in Iqbal that the Twombly pleading standard applies to all civil cases, and not just antitrust cases.\textsuperscript{236} Neither decision defines plausibility or specifies what factual allegations would comprise a plausible claim.\textsuperscript{237}

The Supreme Court’s motivation for adopting a stricter pleading standard in Twombly was a need to require some level of plausibility “lest a plaintiff with largely groundless claims be allowed to take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.”\textsuperscript{238} The Court repeatedly emphasized the high costs

\textsuperscript{232} 355 U.S. at 45-46.  
\textsuperscript{233} 550 U.S. at 563.  
\textsuperscript{234} 550 U.S. at 563.  
\textsuperscript{235} 550 U.S. at 570.  
\textsuperscript{236} 129 S. Ct. at 1953-54. The majority of federal district courts that have considered the issue have held that Twombly’s plausibility standard also applies to affirmative defenses. Manuel John Dominguez, William B. Lewis & Anne F. O’Berry, The Plausibility Standard as a Double-Edged Sword: The Application of Twombly and Iqbal to Affirmative Defenses, 84 FLA. B.J. 77 (2010).  
\textsuperscript{237} See Mark Moller, Procedure’s Ambiguity, 86 IND. L.J. 645, 645 (2011) (noting that “[f]ew Supreme Court opinions are as deeply inscrutable” as Twombly and Iqbal); Alexander A. Reinert, The Costs of Heightened Pleading, 86 IND. L.J. 119, 131 (2011) (“[L]ower courts are confused as to the precise ramifications of the cases.”).  
of discovery, particularly in private securities and antitrust litigation, and underscored the “common lament that the success of judicial supervision in checking discovery has been on the modest side.”

Twombly and Iqbal have been influential, but probably less so than many critics have suggested. It is true that Twombly is on-track to become the most-cited Supreme Court case of all-time, unless it is surpassed by Iqbal. By March 2010 Twombly, decided in 2007, already ranked No. 7 on the all-time list of Supreme Court cases most frequently cited by federal courts and tribunals and Iqbal, decided in 2009, already ranked No. 76. By comparison, Conley, decided 50 years before Twombly, ranked No. 4. And Twombly and Iqbal have been the subject of a flood of academic commentary, much of it negative. The two decisions have

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239 See 550 U.S. 560 n.6. Private enforcement of the antitrust laws is significantly more common than public enforcement. There are roughly ten private federal cases for every case brought by the DOJ or Federal Trade Commission. Daniel A. Crane, Optimizing Private Antitrust Enforcement, 63 Vand. L. Rev. 675, 675-76 (2010). The cost of discovery in antitrust cases can be enormous. See DSM Desotech Inc., No. 08 CV 1531, 2008 WL 4812440, at *2 (N.D. Ill. Oct. 28, 2008) (“[D]iscovery in any antitrust case can quickly become enormously expensive and burdensome to defendants.”) (Emphasis in original.). Roy W. Breitenbach & Alicia M. Wilson, Managing the Fact Discovery Tsunami: Tips When Defending a Federal Antitrust Case, N.Y.L.J., Jan. 18, 2011, at S8 (“In complex antitrust disputes, the amount of ESI often is so vast, and the preservation and production issues so complex, that e-discovery issues quickly spin out of control and destroy the entire defense budget.”). One indicator of the potential scope of antitrust discovery is that between 2003 and 2008 the DOJ’s antitrust division increased its electronic storage capacity from 12 to 70 TB. Tracy Greer, E-Discovery Initiatives at the Antitrust Division 1 (March 25, 2009), http://www.justice.gov/atr/public/electronic_discovery/243194.htm. But cf. Mark Anderson & Max Huffman, Iqbal, Twombly, and the Expected Cost of False Positive Error, 20 Cornell J.L. & Pub. Pol’y 1, 18 & n.84 (2010) (“[In Twombly] the Court did not rely on quantitative analysis of discovery expense in antitrust suits, which does not appear to exist in current literature.”).

240 550 U.S. at 559 (citing Frank H. Easterbrook, Discovery as Abuse, 69 B.U. L. Rev. 635, 638 (1989)). See also Suzette M. Malveaux, Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases, 14 Lewis & Clark L. Rev. 65, 107 (2010) (“There is no doubt that one of the Supreme Court’s primary rationales for retiring Conley’s permissive pleading standard was the Court’s desire to reduce time-consuming, costly, and burdensome discovery.”).

241 See, e.g., Thomas, supra note 238, at 216 (“[T]he new standard will likely have a revolutionary impact on cases. . . .”).

242 Adam N. Steinman, The Pleading Problem, 62 Stan. L. Rev. 1293, 1295, 1357 & n.9 (2010). See also Reinert, supra note 237, at 133 n.71 (“At last count, Iqbal had been cited in more than fourteen thousand decisions, but this does not tell us much about its impact. After all, most courts are presumably citing Iqbal because it is the most recent Supreme Court decision addressing pleading.”).

been criticized on a range of grounds, the primary one of which is that the new stricter pleading standard will significantly increase the incidence of pre-trial dismissals and thereby restrict access to justice for plaintiffs with meritorious civil claims.\textsuperscript{245}

To date, however, the empirical evidence does not support the notion that dismissals have significantly increased.\textsuperscript{246} In particular, while a major concern of some critics has been that \textit{Twombly} and \textit{Iqbal} will serve to bar civil rights cases,\textsuperscript{247} a study conducted by the Administrative Office of the United States Courts in 2009 and updated in April 2010 examined the 94 federal district court dockets and found no significant increase in dismissals of civil rights cases. During the nine-month period after \textit{Iqbal} was decided in 2009 only 16\% of filed civil rights employment cases were dismissed, as compared to the 20\% that were dismissed in the nine months prior to \textit{Twombly} in 2007. The results were somewhat different for “other civil rights cases,” but not dramatically so. For this category 25\% of all filed cases were dismissed during

\begin{footnotesize}
\begin{enumerate}
\item See 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, 1145 (2010) (“[T]he limited studies and reports on the impact of \textit{Twombly} and \textit{Iqbal} suggest no radical sea change or general denial of access to the courts for specific groups of plaintiffs.”); John G. McCarthy, \textit{An Early Review of Iqbal in the Circuit Courts}, 57 FED. L.J. 36, 36 (2010) (“In most circuits, the application of the pleading requirements expressed in \textit{Iqbal} to specific complaints have achieved the same results as would have been reached under pre-existing case law.”).
\item See, e.g., Patricia W. Hatamyar, \textit{The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?}, 59 AM. U. L. REV. 553, 624 (2010) (“\textit{Twombly} and \textit{Iqbal} are poised to have their greatest impact on civil rights cases, simply because those cases are by far the most likely type of case to be attacked by a 12(b)(6) motion.”); Alex Reinert, \textit{Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity}, 78 UMKC L. REV. 931, 931 (2010) (“The Court’s decision in Ashcroft v. \textit{Iqbal} has the potential to impose significant pleading barriers for most claims brought under civil rights statutes. . . .”)
\end{enumerate}
\end{footnotesize}
the nine-month period after *Iqbal*, compared to the 20% that were dismissed during the nine-month period prior to *Twombly*.248

These results likely overstate the significance of dismissals because they do not reveal whether motions were granted with or without leave to amend, and, if with leave, whether the case continued with an amended complaint.249 Other studies with smaller subsets of data have found more significant increases in post-*Iqbal* dismissal rates, but much of the increase is explained by grants of motions to dismiss with leave to amend.250 Moreover, even if the statistics from the Administrative Office do establish a modest increase in dismissals of non-employment civil rights cases, they certainly do not confirm or even suggest an increase in the dismissals of meritorious cases.

A December 2010 review of cases applying *Twombly* and *Iqbal* performed for the Federal Civil Rules Committee and Standing Rules Committee concluded that “the case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency.”251 Instead, application of *Iqbal* has been context-specific. Under this approach courts apply the *Iqbal* analysis more leniently in cases...
where pleading with more detail may be more difficult. For example, courts have continued to emphasize that *pro se* pleadings (which are increasingly common in federal court)\(^{252}\) are evaluated more leniently than others, and they continue to find pleading on “information and belief” to be appropriate when permitted under applicable civil procedure rules and relevant case law.\(^ {253}\) Courts also continue to provide leave to amend when motions to dismiss are granted. An example is antitrust litigation. A 2010 study found that motions to dismiss were granted post-*Twombly* in 65.3% of 170 antitrust cases filed in federal court. But most of these decisions dismissed the complaint at issue without prejudice, were adjudicating a previously amended complaint, or dismissed the complaint but granted leave to amend.\(^ {254}\)

*Twombly* and *Iqbal* are consistent with this Article’s central argument, which is that e-discovery should be stayed in civil cases pending the resolution of motions to dismiss, and, according to recent empirical evidence, those cases have not resulted in a significant increase in dismissals. But even if *Twombly* and *Iqbal* have not yet operated to bar access to the federal courts for plaintiffs with meritorious claims, are they more likely to do so in the future, if e-discovery is stayed while courts resolve motions to dismiss? Probably, yes. Recent research has concluded that the PSLRA, which codified both a discovery stay and tightened pleading

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\(^{252}\) See Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 591-93 (2011) (“[F]ederal courts have recently experienced a staggering increase in the proportion of *pro se* cases on their dockets. . . . Presently, *pro se* litigants appear in approximately thirty-seven percent of all federal court cases. . . . [A]pproximately sixty-two percent of all civil appeals are presently pursued *pro se*. . . .”).

\(^{253}\) Kuperman Memorandum, *supra* note 251, at 5.

standards, has operated to bar some meritorious securities claims\textsuperscript{255} and a similar effect might well result if a discovery stay is widely applied in civil cases.

For several reasons, however, it is likely that such an adverse effect would be limited. First, the proposal set forth herein does not suggest a stay of all discovery pending resolution of motions to dismiss. It merely suggests a stay of e-discovery. Under this proposal the parties still would be permitted to engage in traditional paper-based discovery, depositions, and physical and mental examinations, consistent with the FRCP. Moreover, as some commentators have noted, the decreasing severity of information asymmetries between plaintiffs and defendants have made informal methods of investigation cheaper and more effective, thereby reducing the importance of taking formal discovery prior to the disposition of motions to dismiss.\textsuperscript{256} As one example, in \textit{Twombly} “much of the information that was relevant to the ultimate disposition of the case was publicly available to both parties at the outset of the litigation.”\textsuperscript{257}

Second, the proposal does not even suggest a stay of all e-discovery. Rather, the two statutorily recognized exceptions to the mandatory PSLRA stay would be extended to all civil litigation. Plaintiffs could seek to have the stay lifted if particularized discovery was necessary to preserve evidence or to prevent undue prejudice. While it is true that plaintiffs in securities actions generally have failed to have stays lifted under either of those exceptions, their failure is due in least in part to the unduly narrow construction federal district courts have given to the

\textsuperscript{255} See Stephen J. Choi, \textit{Do the Merits Matter Less After the Private Securities Litigation Reform Act?}, 23 J. LAW, ECON. & ORGAN. 598, 623 (2007) (concluding that PSLRA has operated to reduce incidence of both nuisance litigation and meritorious litigation).

\textsuperscript{256} See Colin T. Reardon, Note, \textit{Pleading in the Information Age}, 85 N.Y.U. L. Rev. 2170, 2208 (2010) (“While critics of Twombly and \textit{Iqbal} have rightly noted that certain types of cases will be disproportionately impacted by the plausibility standard because of information asymmetries, they have ignored how much information plaintiffs do have access to because of modern technological advances and the rise of informational regulation.”)

requirement to show undue prejudice. As indicated supra, federal courts have declined to lift the stay where parallel litigation or SEC or DOJ investigations have revealed that plaintiffs’ claims may be meritorious. These courts have rejected the argument that the PSLRA’s policy goal of preventing plaintiffs from filing frivolous strike suits would not be thwarted under such circumstances.258

If an e-discovery stay is extended to all civil litigation, but courts acknowledge that the stay should be lifted where parallel litigation or investigations reveal that plaintiffs’ claims may have merit, the danger that access to the courts will be blocked can be minimized. A good example is private antitrust litigation. Historically, such litigation has often been sparked by government investigations and prosecutions. By the time private litigation commences counsel for defendants usually have already produced documents to government investigators and retained electronic copies for themselves. There is no significant cost to defendants to provide additional copies to plaintiffs in the parallel litigation and, accordingly, stays should be lifted in these cases if the documents suggest that plaintiff’s claims have merit, under this Article’s proposal.259

Third, given the absence of empirical evidence establishing that Twombly and Iqbal have resulted in a significant increase in the dismissal of meritorious claims, there is little reason to assume that an e-discovery stay will add more than incrementally to such dismissals. A Memorandum prepared in October 2009 for the Advisory Committee on Civil Rules noted: “[I]t is difficult to determine from case law whether meritorious claims are being screened under the

258 See, e.g., Brigham v. Royal Bank of Canada, No. 08 CV 4431(WHP), 2009 WL 935684, at *2 (S.D.N.Y. Apr. 7, 2009) (“[T]he mere fact that the PSLRA’s goals would not be frustrated . . . is not sufficient to warrant lifting the stay.”)
259 But see In re Graphics Processing Units Antitrust Litig., No. C 06-07417 WHA, MDL No. 1826, 2007 WL 2127577, at *5 (N.D. Cal. July 24, 2007) (granting defendants’ motion to stay discovery in post-Twombly antitrust multidistrict litigation even where the requested documents had already been produced to DOJ).
Iqbal framework or whether the new framework is effectively working to sift out only those claims that lack merit earlier in the proceedings."  Fourth, it seems likely that whatever modest increase in dismissals of meritorious cases may occur will be significantly out-weighed by the benefits that will flow from a stay.

Conclusion

Pursuant to the Federal Rules of Civil Procedure discovery proceeds while motions to dismiss are pending, absent imposition of a discretionary stay. A common effect of this phenomenon is that plaintiffs with non-meritorious cases can compel defendants to incur massive discovery expenses before federal district courts ever rule on motions to dismiss. Much of this expense stems from the need to engage in electronic discovery, which dominates discovery in modern litigation. More specifically, much of the expense stems from the need for defendants to conduct costly privilege reviews of e-discovery. The overall effect is that plaintiffs with non-meritorious cases are able to extract extortionate settlements from defendants who are unwilling to incur the expense associated with electronic discovery at the onset of an action. The Federal Rules of Civil Procedure were amended in 2006, and the Federal Rules of Evidence were amended in 2008, in an effort to address e-discovery issues. That effort has failed to resolve the cost problem. Costs have not been reduced to a significant degree and the timing of discovery has not been addressed at all. The most effective solution to the problem of electronic discovery during the pendency of motions to dismiss is a mandatory stay of such discovery. Pursuant to the PSLRA, since 1995 there has been a mandatory stay of all discovery during the pendency of

motions to dismiss in actions alleging violations of the securities laws, absent application of one of two statutory exceptions. That stay should be extended to e-discovery in all federal civil litigation, absent application of one of the exceptions. Application of a mandatory stay of electronic discovery prior to the disposition of motions to dismiss is the most equitable and effective solution to the on-going problem of coercive settlements stemming from prohibitive discovery expense.