Discovery Costs and Default Rules

Author : Jay Tidmarsh

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Brian T. Fitzpatrick & Cameron T. Norris, *One-Way Fee Shifting After Summary Judgment* (2016), available on SSRN.

In *One-Way Fee Shifting After Summary Judgment*, Brian Fitzpatrick and his student, Cameron Norris, address what has been the dominant impulse in federal procedural reform for the past thirty-five years: reducing cost and delay in civil litigation.

The most recent effort to curb litigation expense — the 2015 amendments to the Federal Rules of Civil Procedure that, among other things, sought to invigorate the concept of proportional discovery expenditures that had first found its way into the Rules in 1983 — has been widely criticized as feckless. Switching the proportionality requirement from (principally) Federal Rule 26(b)(2) to (principally) Federal Rule 26(b)(1) and then eliminating "subject matter" discovery seem to be little more than moving the deck chairs on the Titanic, given that judges have no more tools in 2016 to determine whether discovery is proportional than they had in prior years, and "subject matter" discovery was minimal at best.

One fundamental difficulty with requiring that discovery be proportional to the needs of the case — as alluring as this principle is in theory — is its informational demand. Neither the parties nor the judge can quantify with any certainty the most relevant proportionality variables: how much the case is worth, how much discovery will cost, or how much the information will affect the likelihood of recovery (including how much follow-on discovery might affect this calculus). Equally problematic is that the parties often have a private incentive to engage in discovery that, from society's viewpoint, is disproportionate.

Take a simple example in which all the variables are known. The plaintiff has a 50% chance of winning a $100,000 claim. The plaintiff seeks discovery costing $7,000 that will increase the odds of victory to 60%. But the defendant will then seek to obtain discovery to discredit the new information, and at a cost of $4,000, can successfully minimize the impact of the discovery, reducing the plaintiff's chances of recovery to 55%.

As an initial matter (and without regard for who pays for the discovery), the plaintiff's discovery seems proportional: a $7,000 expenditure increases the expected value of the case by $10,000 (from $50,000 to $60,000). When the defendant's countermeasures are considered, however, this discovery is not justified. Looked at in total, the plaintiff's discovery request has triggered $11,000 in expenses (the original $7,000 in response to the plaintiff's request, plus an additional $4,000 for countermeasure discovery) but moved the value of the case by only $5,000. To the extent that proportionality is judged in cost-benefit terms, this discovery is not proportional.

Confounding the calculation in some cases is the American approach to paying for discovery: as a rule, the requesting party bears the burden of making the request (a burden that is often fairly minimal), while the responding party bears the burden of providing the discovery. On the assumption that the defendant bears the $7,000 cost of providing the initial discovery while the plaintiff bears the $4,000 cost of providing the countermeasure discovery, this "responder pays" approach gives the plaintiff an

incentive to ask for the initial discovery: a $4,000 expense yields a $5,000 increase in case value (from $50,000 to $55,000). And the defendant has an incentive to ask for the countermeasure discovery: at an expense of $0, the value of the case falls by $5,000.

If each party bore its own costs — and another 2015 reform hinted that judges should consider this "requester pays" approach more broadly — then an omniscient plaintiff would not have requested the initial discovery: the plaintiff would expect to expend $7,000 to yield a benefit of $5,000. But on facts that were styled differently, it could be shown that the requester-pays approach (as well as the loser-pays approach adopted in countries other than the United States) would also lead to inefficient discovery. The sad reality is that the private incentive to invest in litigation often diverges from the public goal, represented *inter alia* in the proportionality principle, of cost-effective action by the parties.

But the most immediate problem with proportionality is the improbability that the parties and the judge have access to information of the precision that the hypothetical provides. The parties and judge may have some sense of the cost of the discovery itself, but the value of the claim, the likelihood of winning, and the impact of countermeasure discovery on the value and likelihood are dimly graspable at best, and simply unknowable in most cases. Any proportionality rule that asks the judge to engage in a case-by-case cost-benefit analysis regarding the cost of discovery sounds great as an aspirational matter but is unenforceable in practice — as our thirty-three-year history with proportionality shows.

For that reason, default rules become attractive. Such rules may not offer finely tuned balancing of costs and benefits in each case. But a default rule that, in the main, leads to a more efficient outcome may yield more benefit in the long run than a more tailored approach that is unwieldy in practice. Fitzpatrick and Norris propose a new kind of default rule to deal with excessive discovery expenditures. It is ingeniously simple: require the plaintiff to pay the difference between the plaintiff's discovery expenses and the defendant's discovery expenses — but only when the plaintiff loses a motion for summary judgment. This modified requester-pays rule does not kick in if the plaintiff prevails in whole or part on the motion for summary judgment, or if the plaintiff settles or voluntarily dismisses the case before summary judgment is entered.

The authors argue that this rule is better than pure producer-pays, requester-pays, or loser-pays regimes, including the present producer-pays approach with a proportionality principle. A lose-summary-judgment-and-pay-the-discovery-cost-differential rule particularly targets the problem of asymmetric discovery, in which one party (typically a defendant) has access to far more information than the other party (typically the plaintiff). In a producer-pays world with asymmetric information, the plaintiff has an incentive to ask the defendant for significant amounts of information as a means of driving up settlement values. To recur to the example above, if we assume that the plaintiff's discovery requests would require the defendant to spend $60,000 to respond, the defendant has an incentive to settle even a frivolous case for substantial value. By shifting the differential between the plaintiff's and the defendant's discovery costs (in other words, the measurable extent of the asymmetry) to the plaintiff when the plaintiff persists in prosecuting the case despite the lack of a "genuine dispute as to any material fact," a plaintiff's incentive to engage in "impositional discovery" (discovery so costly that it shakes a defendant down to settle a meritless case) is vastly reduced.

As a stand-alone way to limit discovery costs, the authors' proposal seems insufficient. To the extent the problem is excessively costly discovery, the solution is overinclusive in one way. There are well-known empirical analyses (here, here, and here) that the cost of discovery is not excessive, except in a small subset of cases. The authors dispute the validity of some of this data, but perhaps they need not. Even if the data are correct, the "problem cases" involving excessive discovery expenditures are also likely to be cases with vigorous summary-judgment practice; therefore, the proposal could make headway to contain discovery costs in the cases in which containment is most needed.

The proposal is also underinclusive in some ways. There are data (here and here) about how frequently summary judgment is sought and how frequently it terminates an entire lawsuit; summary-judgment termination occurs in fewer than 10% of federal civil cases (6 to 7% seems to be about right in most district courts). So the authors' solution would not affect discovery costs in most cases, unless the proposal has an outsized *in terrorem* effect. On the positive side, however, the proposal might affect cases in which the cost of discovery is greatest (on the reasonable assumption of a substantial overlap between cases involving high discovery costs and cases in which summary-judgment motions are filed). It also fails to address situations in which the asymmetry in discoverable information favors the defendant, who can force the plaintiff to expend substantial amounts on discovery. Like Federal Rule 68, this proposal is a one-way ratchet that operates only in favor of defendants. But it is not clear that many cases feature such asymmetries. Even if their proposed rule is underinclusive, therefore, it takes a small bite out of the problem of discovery cost — and could do more if joined with proposals to curb excessive discovery in other cases.

Of course, it is in the nature of default rules to be over- and underinclusive, so these concerns do not doom the idea of making plaintiffs pay the differential in discovery costs when they lose a summary-judgment motion. The greatest drawbacks to the proposal are its untoward side effects. As the authors acknowledge, defendants have an incentive to run up their discovery-response costs, precisely to keep risk-averse plaintiffs from pressing their claims. Moreover, the proposal may make some defendants less willing to settle litigation and more willing to play the case out through summary judgment precisely to recoup discovery costs, thus increasing overall litigation costs.

More generally, as Samuel Issacharoff and George Loewenstein have shown, any toughening of summary-judgment standards for plaintiffs suppresses settlement values for plaintiffs' claims across the board; the same effect seems likely under the authors' proposal. As the authors acknowledge, judges who realize the consequences to plaintiffs when summary judgment is granted (that they must pay the discovery cost differential) may become less willing to do so, thus defeating the purpose of the proposal. Finally, the proposal would add to the perception that federal courts are pro-defendant, which might drive some plaintiffs into state courts that did not adopt this proposal, or, more problematically, discourage them from bringing meritorious suits at all.

My preference is for a broader approach to litigation costs (about which I have written in a prior post and elsewhere): require the parties to establish, and live within, litigation budgets (including a budget for discovery). Such an approach is perhaps too radical for most, although litigants in England have been faring reasonably well under a variant of this method for nearly four years. Fitzpatrick and Norris's proposed rule is perhaps more politically palatable: less sweeping and more targeted at cases susceptible to disposition on summary judgment. In the end, however, its side effects seem sufficiently grave and its reach sufficiently narrow that implementing the proposal without first trying it out on a pilot or experimental basis is probably a mistake.

But the impulse behind the proposal — to find simple, workable solutions that allow us to abandon an amorphous proportionality inquiry — is exactly right. May many more such proposals blossom in the years to come.

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