

FEDERAL DISCOVERY STAYS

By

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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

A major adverse effect of the burden and expense associated with e-discovery during this stage, which typically lasts for months,⁶ 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,"⁷ 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.⁸ This phenomenon has multiple causes, a primary one of which likely is the high cost of e-discovery.⁹

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 responding attorneys agreed or strongly agreed that discovery is commonly used as a tool to force settlement,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.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.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),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 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,¹⁴ and even the United States Supreme Court,¹⁵ 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.¹⁶ The FRCP have no specific provision about the availability of discovery during the pendency of a motion to dismiss.¹⁷ Rule 26(d)(1) is the only federal rule to specifically address the timing of discovery and it does not provide that a motion to dismiss must be decided, or even filed, before discovery commences. It provides that discovery may be taken at any time after the completion

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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(b).¹⁸ 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.¹⁹ 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.²⁰ Indeed, Rule 12(i) provides that a court may defer resolving a motion to dismiss until trial.²¹

The general rule that discovery may proceed while motions to dismiss are pending²² has been repeatedly underscored by federal courts. The Seventh Circuit has stated that “[d]iscovery need not cease during the pendency of a motion to dismiss,”²³ and many courts²⁴ and scholars²⁵ 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.²⁶

While there is no automatic stay of discovery in federal actions not governed by the PSLRA,²⁷ Rule 26(c) of the FRCP authorizes the imposition of discretionary stays, subject to a showing of good cause,²⁸ 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.²⁹ Consistent with this prevailing view, courts strictly apply the good cause requirement.³⁰

The mere filing of a case-dispositive motion, or intent to file such a motion, does not constitute good cause.³¹ Much more must be shown by defendants, but courts disagree as to what must be shown.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). Most of the tests focus on the prejudice to the party opposing the stay and the burden on the party resisting discovery, but this focus is not universal and numerous other factors have been listed by district courts.³³

The discretionary use by federal district courts of the multiple, conflicting tests that have been adopted 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.³⁴ 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.³⁵ On review, it is extremely unlikely that an appellate court would find that a stay of discovery constituted reversible error.³⁶ 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.³⁷

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.³⁸ There is conflicting evidence as to whether these shares have declined significantly since then, but they remain high.³⁹ Electronic discovery accounts for much of this cost,⁴⁰ as a function of several factors. The first factor is the sheer volume of electronically-stored information (ESI), which comes in numerous varieties⁴¹ and is stored on an ever-expanding range of devices and platforms.⁴² Even a simple dispute can involve millions of electronic documents.⁴³ The volume 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-mails⁴⁴ and 12 billion IMs⁴⁵ are sent daily. The average employee sends and receives more than 135 e-mails each day⁴⁶ and large corporations like Microsoft receive 300-400 million internal and external e-mails each month.⁴⁷ 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-mail⁴⁸ 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.⁴⁹ While courts are just beginning to grapple with this issue, social network activity can be discoverable ESI, at least in certain circumstances.⁵⁰

Overall, between 2005 and 2007 the average amount of data stored by a Fortune 1000 corporation grew from 190 terabytes (TBs)⁵¹ to 1,000 TBs (one petabyte).⁵² In the same time period the average data sets at 9,000 U.S. midsize companies increased from two to 100 TBs.⁵³ In 2000, 70% of corporate records were stored in electronic format⁵⁴ and by 2008 this share had increased to an estimated 90%.⁵⁵

A second factor is that discovery of ESI is significantly more complex than discovery of paper documents.⁵⁶ This is true partly because many, if not most, corporations fail to store and organize their ESI in ways that facilitate efficient collection and review.⁵⁷ 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 data⁵⁸ and are frequently unlabeled and disorganized, rendering difficult and time-consuming the search for responsive information.⁵⁹ 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.⁶⁰ Moreover, much of the information stored on backup tapes is compressed, difficult to recover, and must be specially processed before it is usable.⁶¹ Tapes are typically restored to hard drives and reformatted so they can be searched for responsive information.⁶² The estimated cost of restoration varies considerably, but is usually at least \$500-\$1,000 per tape.⁶³ Thus, the average cost of collecting, processing, reviewing, culling, and producing one GB of data has been estimated at between \$5,000 and \$7,000.⁶⁴ If a typical mid-size case produces 500 GB of data, the total production cost will be \$2.5 million to \$3.5 million.⁶⁵ Improvements in technology⁶⁶ and increased market competition⁶⁷ 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.⁶⁸

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 2009,⁶⁹ and was expected to increase another 10-15% in both 2010 and 2011.⁷⁰ 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.⁷¹ 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)⁷² has an estimated average cost of \$32,000-\$40,000.⁷³

Attorney review for privilege and the preparation of privilege logs constitute the single most costly steps in the e-discovery process.⁷⁴ This is true partly because electronic documents tend to be considerably more informal, use significantly more abbreviations and shorthand, and accordingly often are much more ambiguous than their paper counterparts.⁷⁵ Such 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 separately⁷⁶ insofar as only privileged communications which are adequately identified may properly be withheld from production of an e-mail chain.⁷⁷

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 electronic discovery. There are different types of metadata,⁷⁸ 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 made, and, in the case of e-mail, the history of its transmission.⁷⁹ 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.⁸⁰

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.⁸¹ 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.⁸² 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 and costly.⁸³

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 2011,⁸⁴ far out-stripping the vendor e-discovery market. In sum, then, the accelerating cost and importance of e-discovery in modern civil litigation are undeniable. 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.⁸⁵ Three major changes were made to Rules 26 (which covers the duty to disclose and general provisions governing discovery) and 37 (which covers the failure to make disclosures or cooperate in discovery, and sanctions). 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.”⁸⁶ If a requesting party seeks discovery of ESI that is not reasonably accessible, that party has the burden of demonstrating good cause for production. 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.⁸⁷

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 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 – *McPeck v. Ashcroft*,⁸⁸ *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,⁸⁹ and *Zubulake v. UBS Warburg LLC*.⁹⁰ Each of these cases involved, at least in part, requests for ESI that was available only on backup tapes. *McPeck* 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 more fair it is that the responding party pay search costs.⁹¹ *Rowe*, a racial discrimination case, went one step further and listed eight factors to guide courts in deciding whether to shift costs.⁹² *Zubulake*, a gender discrimination case, refined and prioritized the *Rowe* factors, reduced the list to seven,⁹³ and emerged as the most common, albeit non-universal, approach to the cost-shifting issue.⁹⁴

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.⁹⁵ That list liberally borrows from both *Rowe* and *Zubulake* but is not co-extensive with either.⁹⁶

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.⁹⁷ 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.⁹⁸

Third, the 2006 Amendments permit the parties to agree in advance that inadvertent production of privileged materials does not automatically waive the privilege.⁹⁹ 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.

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).

Because Rule 26(b)(2)(B) fails to define good cause, it provides no new or additional protection against the rising cost of e-discovery. In addition, parties may be encouraged to seek broad e-discovery from sources which are difficult and expensive to search, thus driving up costs for their adversaries.¹⁰⁰ This danger is magnified by the ambiguity 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.¹⁰¹ The rarity of cost-shifting orders further minimizes the incentive for parties to limit their discovery requests.¹⁰²

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 1983.¹⁰³ 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.¹⁰⁴ 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.

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.¹⁰⁵ Of these decisions, no more than eight invoked Rule 37(e) to deny sanctions in whole or in part.¹⁰⁶ 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.

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 and burden of discovery, and only 19.5% reported that Rule 26(b)(2)(C) frequently limited the cost and burden.¹⁰⁷ 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.¹⁰⁸ And according to the ABA Report, 45.7% of defense attorneys responded that the 2006 Amendments never provide for cost-effective discovery of ESI.¹⁰⁹

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.¹¹⁰ 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,¹¹¹ and the outcome in any given federal diversity case turned on the applicable state privilege law.¹¹²

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.¹¹³ 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.¹¹⁴

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.¹¹⁵

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.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸

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, *inter alia*, an adversary's written discovery requests, deposition questions, witness preparation, settlement and trial strategy, and trial examination questions.¹¹⁹ 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.¹²⁰ 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.¹²¹

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.¹²² 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.¹²³

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 the five-factor test¹²⁴ previously used by most federal courts,¹²⁵ 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.¹²⁶ The result is that steps taken in one case may suffice to avoid waiver, but the same steps may be insufficient in another case.¹²⁷

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 any cost savings to their companies,¹²⁸ and none of the respondents reported that Rule 502 had produced significant savings.¹²⁹

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.¹³⁰ 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

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 could avoid discovery only by moving for a protective order, requesting a stay, and showing good cause under Rule 26(c) of the FRCP.¹³¹ Such motions were typically denied.¹³² 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."¹³³

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.¹³⁴ 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. Moreover, discovery costs in securities litigation are highly asymmetrical, borne largely by defendants.¹³⁵ Thus Congress recognized that "[t]he cost of discovery often forces innocent parties to settle frivolous securities class actions."¹³⁶ The second justification was to prevent plaintiffs from commencing securities litigation as a vehicle in order to conduct discovery in the hopes of uncovering a sustainable claim.¹³⁷

The PSLRA's stay applies equally to discovery of parties and non-parties¹³⁸ and whether or not the litigation has been commenced by individual plaintiffs or as a class.¹³⁹ 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,¹⁴⁰ 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.¹⁴¹

Three years after the PSLRA was enacted Congress reinforced the mandatory stay when it enacted the Securities Litigation Uniform Standards Act of 1998 (SLUSA).¹⁴² This statute authorizes federal courts to stay discovery proceedings in any private actions in state court (class actions or not)¹⁴³ as necessary in aid of their jurisdiction or to protect or effectuate their judgments in actions subject to PSLRA stays.¹⁴⁴ 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."¹⁴⁵

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 witness¹⁴⁶--and that situation was already covered by the FRCP.¹⁴⁷ 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.¹⁴⁸ In order to satisfy the standard the plaintiff must demonstrate that the loss of evidence is imminent and not merely speculative.¹⁴⁹ Accordingly, the mere fact that defendant debtor corporation faces possible liquidation or reorganization does not suffice to establish imminent document destruction.

¹⁵⁰ If the subject documents already have been produced to the government or an investigating entity, then usually no risk of loss exists.¹⁵¹

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”¹⁵² and courts have differed greatly in their definition of a particularized discovery request under the PSLRA.¹⁵³ 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 exceptional circumstances involving improper or unfair treatment amounting to something less than irreparable harm.¹⁵⁴

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 defendants to produce documents to other plaintiffs, the government, or an investigating entity.¹⁵⁵ Parallel investigations are common.¹⁵⁶ 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.¹⁵⁷ District courts presented with applications for modification in this situation have typically, but not always, concluded that undue prejudice has not been shown.¹⁵⁸ 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.¹⁵⁹

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,¹⁶⁰ or where plaintiff offers to pay defendant’s costs to produce the documents. Other courts have rejected the same argument.¹⁶¹

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 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 result 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.¹⁶² 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 PSLRA¹⁶³ and a similar reduction can be expected in other civil litigation.¹⁶⁴

Third, a stay is likely to decrease the incidence of frivolous civil litigation. Recent research establishes that frivolous securities litigation has declined, post-PSLRA,¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷

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*¹⁶⁸ and established a new standard for pleading in federal court. *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."¹⁶⁹ *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"¹⁷⁰ which had "earned its retirement."¹⁷¹ *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."¹⁷² Two years later the Supreme Court held in *Iqbal* that the *Twombly* pleading standard applies to all civil cases, and not just antitrust cases.¹⁷³ Neither decision defines plausibility or specifies what factual allegations would comprise a plausible claim.¹⁷⁴

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."¹⁷⁵ The Court repeatedly emphasized the high costs of discovery, particularly in private securities and antitrust litigation,¹⁷⁶ and underscored the "common lament that the success of judicial supervision in checking discovery has been on the modest side."¹⁷⁷

Twombly and *Iqbal* undeniably have been influential, but probably less so than many critics have suggested.¹⁷⁸ 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 *Iqbal*, decided in 2009, already ranked No. 76. By comparison, *Conley*, decided 50 years before *Twombly*, ranked No. 4.¹⁷⁹ And *Twombly* and *Iqbal* have been the subject of a flood of academic commentary,¹⁸⁰ much of it negative.¹⁸¹

Twombly and *Iqbal* have 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.¹⁸² To date, however, the empirical evidence does not support the notion that dismissals have significantly increased.¹⁸³ In particular, while a major concern of some critics has been that *Twombly* and *Iqbal* will serve to bar civil rights cases,¹⁸⁴ 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 *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 *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 the nine-month period after *Iqbal*, compared to the 20% that were dismissed during the nine-month period prior to *Twombly*.¹⁸⁵

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.¹⁸⁶ 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.¹⁸⁷ 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."¹⁸⁸ 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)¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹

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 standards, has operated to bar some meritorious securities claims¹⁹² 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.¹⁹³ As one example, in *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.”¹⁹⁴

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 requirement to show undue prejudice. 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.

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 *Iqbal* framework or whether the new framework is effectively working to sift out only those claims that lack merit earlier in the proceedings.”¹⁹⁵

Fourth, it seems likely that whatever modest increase in dismissals of meritorious cases may occur will be significantly out-weighted 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. 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.

Footnotes

¹ See Megan Jones, *Giving Electronic Discovery a Chance to Grow Up*, NAT’L L.J., Dec. 14, 2009, at 18 (citing federal district judge Shira Scheindlin).

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).

⁴ See Fed. R. Civ. P. 12.

⁵ Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 2009 Annual Report of the Director* 1 (2010), <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf> (reporting that 276,397 civil cases were filed in U.S. district courts during the 12-month period ending September 30, 2009).

⁶ See *Agile Sky Alliance Fund LP v. Citizens Fin. Group*, Civ. Action No. 09-cv-02786-MSK-BNB, 2010 WL 1816351, at *2 (D. Colo. May 5, 2010) (“Motions to dismiss usually take months to decide.”); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 508 n.151 (2010) (“It is not all that unusual for six months to a year to elapse between the filing of a motion to dismiss and the court’s decision on that motion.”).

⁷ 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).

⁸ See Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 2009 Annual Report of the Director* 165 (2010), <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf> (reporting that of the 263,049 civil cases that were terminated in U.S. district courts during the 12-month period ending September 30, 2009, only 1.2% reached trial). See also Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 518 (2010) (“Pretrial practice in federal civil litigation has dramatically changed over the last thirty years. . . . [T]rials have vanished.”).

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).

¹⁰ See Am. Bar Ass’n Section of Litig., *Member Survey on Civil Practice: Detailed Report* 69 (Dec. 11, 2009), <http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf> (hereafter ABA Report).

¹¹ *Id.* at 81.

¹² Am. College of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* 9 (rev. ed. Apr. 15, 2009), <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008> (hereafter ACTL Report).

¹³ Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.).

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”); 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); and Scott Dodson, *Federal Pleading and State Presuit 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.”).

¹⁶ Fed. R. Civ. P. 26(c).

¹⁷ See *Williams v. New Day Farms, LLC*, No. 2:10-cv-0394, 2010 WL 3522397, at *2 (S.D. Ohio Sept. 7, 2010) (“Had the Federal Rules contemplated that a motion to dismiss under Fed.R.Civ.Pro. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect.”)

¹⁸ Fed. R. Civ. P. 26(f).

¹⁹ Fed. R. Civ. P. 16(b).

²⁰ Fed. R. Civ. P. 26(d)(1).

²¹ Fed. R. Civ. P. 12(i).

²² The general rule has some narrow exceptions. First, the United States Supreme Court has endorsed the practice of staying discovery pending resolution of the threshold issue of qualified immunity. See *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Williams v. Metcalfe*, No. C 08-3907 SI (pr), 2010 WL 2640293, at *2 (N.D. Cal. July 1, 2010) (“The U.S. Supreme Court has made it abundantly clear that a district court should stay discovery until the threshold question of qualified immunity is settled.”). Cf. *O’Meara v. Heineman*, Nos. 8:09CV00157, 4:10CV3020, 4:10CV3021, 2010 WL 2640299, at *1 (D. Neb. June 28, 2010) (“Thus, where qualified immunity is asserted as a defense, it is within the discretion of the court to stay discovery until the issue of qualified immunity is resolved.”). Second, discovery might be stayed pending resolution of the threshold issue of a challenge to plaintiff’s standing. See *United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80 (1988); *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *1 (N.D. Ill. Nov. 17, 2010).

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

²⁴ See, e.g., *Allstate Ins. Co. v. Levy*, No. CV-10-1652 (FB)(VVP), 2011 WL 288511, at *1 (E.D.N.Y. Jan. 27, 2011) (“The pendency of the motion to dismiss does not provide an automatic basis to stay discovery.”); *Integ. Systems & Power, Inc. v. Honeywell Int’l, Inc.*, No. 09 CV 5874(RPP), 2009 WL 2777076, at *1 (S.D.N.Y. Sept. 1, 2009) (“It is well-settled that the issuance of a stay of discovery pending the outcome of a motion to dismiss is ‘by no means automatic.’”); *DSM Desotech Inc. v. 3D Systems Corp.*, No. 08 CV 1531, 2008 WL 4812440, at *2 (N.D. Ill. Oct. 28, 2008) (“[T]he mere filing of the motion [to dismiss] does not automatically stay discovery.”); *Bocciolone v. Solowsky*, No. 08-20200-CIV, 2008 WL 2906719, at *1 (S.D. Fla. July 24, 2008) (“[C]ourts have consistently rejected any *per se* requirement to stay discovery pending resolution of a dispositive motion.”). In *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1368 (11th Cir. 1997), the Eleventh Circuit made certain statements that have sometimes been misinterpreted to recognize an automatic stay of discovery. The misinterpretation was noted in *Koock v. Sugar & Felsenthal, LLP*, No. 8:09-CV-609-T-17EAJ, 2009 WL 2579307, at *2 (M.D. Fla. Aug. 19, 2009) (“The holding in *Chudasama* does not establish the general rule that discovery should not proceed while a motion to dismiss is pending. . . . Instead, *Chudasama* and its progeny ‘stand for the much narrower proposition that courts should not delay ruling on a likely meritorious motion to dismiss while undue discovery costs mount.’”). Accord *In re Winn Dixie Stores, Inc. ERISA Litig.*, No. 3:04-cv-194-J-33MCR, 2007 WL 1877887, at *1 (M.D. Fla. June 28, 2007). 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.”).

²⁵ 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 6, 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.”).

²⁶ See *Brooks v. Macy’s, Inc.*, No. 10 CIV 5304 BSJ HBP, 2010 WL 5297756, at *1 (S.D.N.Y. Dec. 21, 2010).

²⁷ 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).

²⁸ 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.”).

²⁹ See, e.g., Meadows at Buena Vista, Inc. v. Town of Buena Vista, Civ. Action No. 10-cv-02871-MSK-KMT, 2011 WL 403344, at *1 (D. Colo. Feb. 3, 2011).

³⁰ See, e.g., Stone v. Lockheed Martin Corp., Civ. Action No. 08-cv-02522-REB-KMT, 2009 WL 267688, at *1 (D. Colo. Feb. 2, 2009) (“The underlying principle in determination of whether to grant or deny a stay clearly is that ‘[t]he right to proceed in court should not be denied except under the most extreme circumstances.’”). But see Sanders v. City of Indianapolis, No. 1:09-cv-0622-SEB-JMS, 2010 WL 1410587, at *1 (S.D. Ind. Apr. 2, 2010 (“Although not mandatory, courts often stay discovery while a motion to dismiss the complaint is pending.”); In re Sulfuric Acid Antitrust Litig., 231 F.R.D. 331, 336 (N.D. Ill. 2005) (“Numerous cases in this Circuit have allowed stays in the face of a Rule 12(b)(6) challenge.”).

³¹ Coyle v. Hornell Brewing Co., Civ. No. 08-2797 (JBS/JS), 2009 WL 1652399, at *3 (D.N.J. June 9, 2009); Rothstein v. Steinberg, No.5:08CV0673, 2008 WL 5716138, at *4 (N.D. Ohio June 9, 2008); Gerald Chamales Corp. v. Oki Date Americas, Inc., 247 F.R.D. 453, 454 (D.N.J. 2007). State law is often in accord. See, e.g., Orloff v. Shulman, No. Civ.A. 852-N, 2005 WL 333240, at *1 (Del. Ch. Feb. 2, 2005) (noting that under Delaware law, there is no right to stay of discovery where a dispositive motion has been filed).

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).

³³ See, e.g., Anthracite Capital BOFA Funding, LLC v. Knutson, No. 09 Civ. 1603(LTS)(KNF), 2009 WL 4496050, at *2 (S.D.N.Y. Dec. 3, 2009) (relevant factors are 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 discovery); v. Mort. Elec. Reg. Sys., Inc., No. CV410-228, 2010 WL 5463165, at *1 (S.D. Ga. Dec. 29, 2010) (weighing the balance of the harm produced by a delay in discovery against the possibility that the motion will be granted and eliminate the need such for such discovery); and Morien v. Munich Reins. America, Inc., Civ. No. 3:09-CV-746 (CFD)(TPS), 2010 WL 2869769, at *1 (D. Conn. July 22, 2010) (considering whether defendant has made a strong 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).

³⁴ American Bank v. City of Menasha, No. 10-1963, 2010 WL 4812811, at *2 (7th Cir. Dec. 8, 2010) (“[D]iscovery orders, being interlocutory, generally are not appealable in the federal court system.”); Hernandez v. Tanninen, No. 09-35085, 2010 WL 1882304, at *4 (9th Cir. May 12, 2010).

³⁵ See Sapp v. Mem. Hermann Healthcare Sys., No. 10-20340, 2010 WL 5395679, at *3 (5th Cir. Dec. 29, 2010); Mann v. Brenner, 375 Fed. Appx. 232, 239-40 (3d Cir. 2010).

³⁶ Hartnett, *supra* note 6, at 513.

³⁷ *Id.* at 514.

³⁸ 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.”).

³⁹ 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. 29, 2008) <http://www.law.northwestern.edu/searlecenter/uploads/The%20State%20of%20Discovery%20Abuse%20in%20Civil%20Litigation%20A%20Survey%20of%20Chief%20Legal%20Officers.ppt> (survey of Fortune 1000 chief legal officers shows that, on average, 45-50% of corporations’ civil litigation costs in 2007 related to discovery activities); and Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conf. Adv. Comm. on Civil Rules* 38-40 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf) (reporting that lawyers who primarily represent defendants estimate that discovery accounts for 27% of total litigation costs, whereas lawyers who primarily represent plaintiffs estimate that discovery accounts for 20% of total litigation costs).

⁴⁰ 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 39, at 8 (survey of Fortune 1000 chief legal officers finds that discovery of ESI accounts for, on average, 33-39% of total discovery costs).

⁴¹ 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.

⁴² 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)(ii)* (2004), <http://abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf>. Litigants often view data on “outlier” devices and platforms 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. LDG 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 Memory Make Good Law? Court Holds Data Discoverable Even Though They Existed Only Temporarily in Computer’s RAM*, NAT’L L.J., Dec. 10, 2007, at E1. Despite ensuing predictions of the widespread expansion of discovery obligations, by 2010 no other federal court had held similarly, or even specifically analyzed RAM data. See Jennifer H. Rearden & Farrah Pepper, *Oh No, Ephemeral Data!*, N.Y.L.J., March 22, 2010, at S6; Kenneth J. Withers, “Ephemeral Data” and the Duty to Preserve Discoverable Electronically Stored Information, 37 U. BALT. L. REV. 349, 380 (2008) (noting very narrow duty to preserve ephemeral data).

⁴³ Patrick L. Oot, *The Protective Order Toolkit: Protecting Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237, at n.5 (2009).

⁴⁴ George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 12 (2007).

⁴⁵ Gene J. Koprowski, *Instant Messaging Grew by Nearly 20 Percent in 2005*, TECHNEWSWORLD, Nov. 10, 2005, <http://www.technewsworld.com/story/47270.html>.

⁴⁶ Instit. for the Advancement of the Am. Legal Sys., *Electronic Discovery: A View from the Frontlines* 5 (2008), <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf>.

⁴⁷ Rachel Hytken, Comment, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 879 (2008).

⁴⁸ Teddy Wayne, *Social Networks Eclipse E-mail*, N.Y. TIMES, May 18, 2009, at B3.

⁴⁹ The Radicati Group, Inc., *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. *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. *Id.* at 2-3.

⁵⁰ See H. Christopher Boehning & Daniel J. Toal, *Social Networking Data Presents New Challenges*, N.Y.L.J., June 30, 2009, at 5; Steven C. Bennett, *Look Who’s Talking – Legal Implications of Twitter Social Networking Technology*, 81 N.Y. ST. B.J. 10 (May 2009) (noting disagreement as to whether Twitter messages are “stored” within the meaning of the FRCP); Katherine Minotti, Comment, *The Advent of Digital Diaries: Implications of Social Networking Websites for the Legal Profession*, 60 S.C. L. REV. 1057, 1062-63 (2009) (arguing that courts should treat social 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).

⁵¹ 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>.

⁵² Lucas Mearian, *A Zettabyte by 2010: Corporate Data Grows Fiftyfold in Three Years*, COMPUTERWORLD, March 6, 2007, http://www.computerworld.com/s/article/9012364/A_zettabyte_by_2010_Corporate_data_grows_fiftyfold_in_three_years.

⁵³ *Id.*

⁵⁴ Lori Enos, *Digital Data Changing Legal Landscape*, E-COMMERCE TIMES, May 16, 2000, <http://www.ecommercetimes.com/story/3339.html>.

⁵⁵ See Lynne Marek, *Law Firms Begin to Hire ‘E-Discovery Counsel,’* NAT’L L.J. Oct. 13, 2008, at 10.

⁵⁶ 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.

⁵⁷ Inst. for the Advancement of the Am. Legal Sys., *Electronic Discovery: A View from the Frontlines* 19, 26 (2008), <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf>.

⁵⁸ Grant J. Esposito & Thomas M. Mueller, *Backup Tapes, You Can’t Live with Them and You Can’t Toss Them: Strategies for Dealing with the Litigation Burdens Associated with Backup Tapes under the Amended Federal Rules of Civil Procedure*, 13 RICH. J.L. & TECH. 13, at *7 (2007).

⁵⁹ Inst. for the Advancement of the Am. Legal Sys., *The Emerging Challenge of Electronic Discovery: Strategies for American Business* 3 (2008), <http://www.du.edu/legalinstitute/pubs/EDiscovery-Strategies.pdf>.

⁶⁰ Sedona Conference Glossary: E-Discovery & Digital Information Management 5 (May 2005), <http://www.sedonaconference.org>.

⁶¹ Inst. for the Advancement of the Am. Legal Sys., *The Emerging Challenge of Electronic Discovery: Strategies for American Business* 3 (2008), <http://www.du.edu/legalinstitute/pubs/EDiscovery-Strategies.pdf>.

⁶² *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 314 (S.D.N.Y. 2003).

⁶³ Behzad Behtash, *E-Discovery: How to Avoid Death by Backup*, INFORMATIONWEEK, Apr. 17, 2010, <http://www.informationweek.com/story/showArticle.jhtml?articleID=224400402>.

⁶⁴ Inst. for the Advancement of the Am. Legal Sys., *Electronic Discovery: A View from the Frontlines* 5 (2008), <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf>.

⁶⁵ Inst. for the Advancement of the Am. Legal Sys., *Electronic Discovery: A View from the Frontlines* 5, 25 (2008), <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf>.

⁶⁶ See Megan Jones, *Giving Electronic Discovery a Chance to Grow Up*, NAT’L L.J., Dec. 14, 2009, at 18 (reporting that between 2001 and 2009, the average price charged by e-discovery vendors to process, search, and export to a tool for review one GB of data declined from \$2,000 to less than \$400). The increasing use of more efficient cloud-based platforms for processing and hosting also has contributed to the per-unit price decline. George Socha & Tom Gelbmann, *Climbing Back*, LAW TECH. NEWS, Aug. 1, 2010, <http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202463900292>. “Clouds” have been defined as third-party services that host computing workloads in multi-tenant data centers. Accessing data, information and e-mail on the Internet through third-party vendors which provide cloud services is “cloud computing.” Global spending on cloud computing services reached an estimated \$68 billion in 2010 and is expected to increase to \$95 billion in 2013. David McCann, *Be Clear About the Cloud*, CFO.com, Dec. 1, 2010, <http://www.cfo.com/printable/article.cfm/14540108>; Robert W. Pass & Rebecca N. Shwayri, *When Cloud Computing Meets E-Discovery Obligations*, Law360, Sept. 14, 2010, <http://law360.com/articles/184339/print?section=ip>. The basic cloud pricing model is a flat fee based on capacity consumption. David McCann, *Six Costly Cloud Mistakes*, CFO.com, Aug. 12, 2010, <http://www.cfo.com/printable/article.cfm/14516478>. Cloud computing services, including e-mail, contain their own form of

ESI. See Fernando A. Bohorquez Jr. & Alberto Rodriguez, *How to Keep the 'Cloud' from Bursting in Litigation*, NAT'L L.J., Dec. 20, 2010, at 13 (identifying five different types of cloud services that may contain ESI). Whether or not cloud-based ESI is discoverable has not yet been resolved by the courts. See Steven C. Bennett, *E-Discovery Meets the Cloud*, 83 N.Y. State B.J. 45 (2011).

⁶⁷ Litigation is counter-cyclical, with the result that a number of e-discovery vendors entered the market during the recession of 2007-09. See Debra Logan, et al., *Gartner RAS Core Research Note G00171281, MarketScope for E-Discovery Software Product Vendors*, Dec. 21, 2009, <http://www.gartner.com/technology/media-products/reprints/ca/vol2/article2/article2.html>. By 2009 the e-discovery market consisted of more than 600 vendors. See George Socha & Tom Gelbmann, *Strange Times*, LAW TECH. NEWS, Aug. 1, 2009, <http://www.law.com/jsp/law/PubArticlePrinterFriendly.jsp?id=1202435558482>.

⁶⁸ See Jason Krause, *When Is an E-Discovery Burden an Undue Burden?*, LAW TECH. NEWS, June 1, 2010, <http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202458961735>.

⁶⁹ See George Socha & Tom Gelbmann, *Climbing Back*, LAW TECH. NEWS, Aug. 1, 2010, <http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202463900292>; Daniel Fisher, *The Data Explosion*, Forbes.com, Oct. 10, 2007, http://www.forbes.com/forbes/2007/1001/072_print.html.

⁷⁰ George Socha & Tom Gelbmann, *Climbing Back*, LAW TECH. NEWS, Aug. 1, 2010, <http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202463900292>

⁷¹ James N. Dertouzos, Nicholas M. Pace & Robert H. Anderson, RAND Inst. for Civil Justice, *The Legal and Economic Implications of Electronic Discovery: Options for Future Research* 3 (2008), http://www.rand.org/pubs/occasional_papers/2008RAND_OP183.pdf. Cf. VRA Partners, LLC, *Industry Review: Legal Support* 6 (Apr. 2009), <http://www.vrapartners.com/pdf/legal-support-newsletter-0409.pdf> (estimating that the ratio of e-discovery review costs to processing costs is 5:1).

⁷² 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.

⁷³ 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.

⁷⁴ Donald Wochna, *Electronic Data, Electronic Searching, Inadvertent Production of Privileged Data: A Perfect Storm*, 43 AKRON L. REV. 847, 852-53 (2010).

⁷⁵ Adam Hurwitz & Alon Israely, *Tweet This: Social Networking May Count in EDD*, NAT'L L.J., Dec. 20, 2010, at 14.

⁷⁶ 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, 37-38 (2010).

⁷⁷ See *Muro v. Target Corp.*, 243 F.R.D. 301 (N.D. Ill. 2007).

⁷⁸ See Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 80-83 (2008) (describing four types of metadata).

⁷⁹ Barbara J. Rothstein, Ronald J. Hedges & Elizabeth C. Wiggins, Federal Judicial Center, *Managing Discovery of Electronic Information: A Pocket Guide for Judges* 3 (2007), [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/\\$file/eldscpkt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf).

⁸⁰ Philip J. Favro, *A New Frontier in Electronic Evidence: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH. L.J. 1, 11-12 (2007).

⁸¹ 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.”).

⁸² See Tresa Baldas, *Metadata Grows in Legal Import – Litigation Demanding Production of Metadata is Roiling the Courts*, NAT'L L.J., Jan. 26, 2009, at 4; *In re Seroquel Prods. Liab. Litig.*, No. 6:06-md-1769-Orl-22DAB, 2008 WL 1995058, at *8-9 (M.D. Fla. May 7, 2008) (requiring production of specific metadata fields); *Williams v. Sprint/United Mgt. Co.*, 230 F.R.D.

640, 656 (D. Kan. 2005) (requiring production of metadata). *But see* Autotech Techs. Ltd. v. AutomationDirect.com, Inc., 248 F.R.D. 556, 559 (N.D. Ill. 2008) (denying request to require metadata production); Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc., 2006 WL 5097354 (E.D. Ky. Dec. 18, 2006) (rejecting *Williams, supra*, as "not persuasive").

⁸³ 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.").

⁸⁴ Instit. for the Advancement of the Am. Legal Sys., *Electronic Discovery: A View from the Frontlines* 15-16 (2008), <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf>.

⁸⁵ See Emery G. Lee III, *Effectiveness of the 2006 Rules Amendments*, 11 SEDONA CONF. J. 191 (2010).

⁸⁶ Fed. R. Civ. P. 26(b)(2)(B).

⁸⁷ See Fed. R. Civ. P. 26(b)(2)(B) – (C), Advisory Committee's Note.

⁸⁸ 202 F.R.D. 31 (D.D.C. 2001).

⁸⁹ 205 F.R.D. 421 (S.D.N.Y. 2002).

⁹⁰ 217 F.R.D. 309 (S.D.N.Y. 2003).

⁹¹ 202 F.R.D. at 34.

⁹² 205 F.R.D. at 429.

⁹³ 217 F.R.D. at 322.

⁹⁴ Bradley T. Tennis, Comment, *Cost-Shifting in Electronic Discovery*, 119 YALE L.J. 1113, 1114 (2010).

⁹⁵ Fed. R. Civ. P. 26, Advisory Committee's Note.

⁹⁶ See Tennis, Comment, *supra* note 94, at 1114.

⁹⁷ Fed. R. Civ. P. 37(f).

⁹⁸ Dan H. Willoughby, Jr., et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 824 (2010).

⁹⁹ Fed. R. Civ. P. 26(b)(5)(B).

¹⁰⁰ John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 583 (2010).

¹⁰¹ See Vlad Vainberg, Comment, *When Should Discovery Come with a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523, 1565-66 (2010).

¹⁰² 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).

¹⁰³ 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).

¹⁰⁴ 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).

¹⁰⁵ Dan H. Willoughby, Jr., et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 825 (2010).

¹⁰⁶ *Id.*

¹⁰⁷ Emery G. Lee III & Kenneth J. Withers, *Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure*, 11 SEDONA CONF. J. 201 (2010).

¹⁰⁸ Emery G. Lee III, *Effectiveness of the 2006 Rules Amendments*, 11 SEDONA CONF. J. 191 (2010).

¹⁰⁹ *Id.*

¹¹⁰ 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).

¹¹¹ See *Hopson v. Baltimore*, 232 F.R.D. 228, 235-36 (D. Md. 2005) (discussing different tests used by federal courts).

¹¹² In federal actions based on diversity jurisdiction, federal courts apply state substantive law, including state law of privilege. Fed. R. Evid. 501.

¹¹³ See Fed. R. Evid. 502 Advisory Committee's Note.

¹¹⁴ Fed. R. Evid. 502(a).

¹¹⁵ Fed. R. Evid. 502(b).

¹¹⁶ Fed. R. Evid. 502(c).

¹¹⁷ Fed. R. Evid. 502(d).

¹¹⁸ Fed. R. Evid. 502(e).

¹¹⁹ See Instit. 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> ("[P]rivileged information, once learned, cannot be unlearned and it can permeate and alter the course of a case.").

¹²⁰ Emery G. Lee III & Kenneth J. Withers, *Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure*, 11 SEDONA CONF. J. 201 (2010).

¹²¹ *Id.*

¹²² Model Rules of Prof'l Conduct R. 1.1 (2003).

¹²³ See Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH. & LEE L. REV. 673, 743 (2009) (“In order to be effective, however, Rule 502 must preempt state rules of professional responsibility that impose duties on lawyers to zealously protect their clients’ confidential information and to conduct this review before turning over the client’s documents to a litigation adversary during discovery.”).

¹²⁴ 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 4975566, at *3 (E.D. Tex. Dec. 2, 2010).

¹²⁵ Fed. R. Evid. 502, Explanatory Note; *American Coal Sales Co. v. Nova Scotia Power, Inc.*, No. 2:06-cv-94, 2009 WL 4677576, at *17 (S.D. Ohio Feb. 23, 2009) (“[M]ost federal courts use a five factor balancing test. . .”).

¹²⁶ 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. . .”).

¹²⁷ See Robert D. Owen & Melissa H. Cozart, *FRE 502, One Year Later*, N.Y.L.J., Oct. 5, 2009, at S4; Roger P. Meyers, *An Analysis of Federal Rule of Evidence 502 and Its Early Application*, 55 WAYNE L. REV. 1441, 1458 (2009).

¹²⁸ Fulbright & Jaworski L.L.P., *E-Discovery Trends: E-Discovery Findings from the 2005-2009 Fulbright & Jaworski L.L.P. Litigation Trends Survey* 5 (2009), [http://civilconference.uscourts.gov/LotusQuickr/dcc/main.nsf/\\$defaultview/F873BA28DC4854F38525767E004A4F9A/\\$File/Fulbright's%20E-Discovery%20trends.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/main.nsf/$defaultview/F873BA28DC4854F38525767E004A4F9A/$File/Fulbright's%20E-Discovery%20trends.pdf?OpenElement).

¹²⁹ Fulbright & Jaworski L.L.P., *E-Discovery Trends: E-Discovery Findings from the 2005-2009 Fulbright & Jaworski L.L.P. Litigation Trends Survey* 5 (2009), [http://civilconference.uscourts.gov/LotusQuickr/dcc/main.nsf/\\$defaultview/F873BA28DC4854F38525767E004A4F9A/\\$File/Fulbright's%20E-Discovery%20trends.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/main.nsf/$defaultview/F873BA28DC4854F38525767E004A4F9A/$File/Fulbright's%20E-Discovery%20trends.pdf?OpenElement).

¹³⁰ 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.”).

¹³¹ Fed. R. Civ. P. 26(c).

¹³² Brian Philip Murray, *Lifting the PSLRA “Automatic Stay” of Discovery*, 80 N.D. L. REV. 405, 407 & n.19 (2004).

¹³³ 15 U.S.C. §78u-4(b)(3)(B). The term “particularized discovery” modifies both the terms “preserve evidence” and “undue prejudice.” *Mishkin v. Ageloff*, 220 B.R. 784, 792-93 (S.D.N.Y. 1998).

¹³⁴ *In re Thornburg Mort., Inc. Sec. Litig.*, No. CIV 07-0815 JB/WDS, 2010 WL 2977620, at *6 (D.N.M. July 1, 2010).

¹³⁵ See Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA’s Internal-Information Standard on ’33 and ’34 Act Claims*, 76 WASH. U. L.Q. 537, 582 (1998) (“Despite their voluminous 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. . .”). This asymmetry is not unique to securities litigation. See, e.g., Eric P. Mandel & Mitchell J. Rapp, *E-Discovery Alignment in Antitrust Actions: Good Idea?*, Law360, Sept. 17, 2010, <http://www.law360.com/articles/192265/print?section=competition> (“In practical terms, the defendants in civil class action antitrust cases are producing the vast majority of discovery.”).

¹³⁶ H.R. Conf. Rep. No. 104-369, at 37 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 736. See also The Association of the Bar of the City of New York Securities Litigation Committee, Subcommittee on Use of Confidential Sources, *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), <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.)

¹³⁷ *In re Thornburg Mort., Inc. Sec. Litig.*, No. CIV 07-0815 JB/WDS, 2010 WL 2977620, at *6 (D.N.M. July 1, 2010).

¹³⁸ *Faulkner v. Verizon Communc., Inc.*, 156 F. Supp. 2d 384, 404 (S.D.N.Y. 2001); *Powers v. Eichen*, 961 F. Supp. 2d 233, 235 (S.D. Cal. Apr. 15, 1997).

¹³⁹ Lindner v. American Express Co., No. 10 Civ. 2228(JSR)(JLC), 2010 WL 4537819, at *1 (S.D.N.Y. Nov. 9, 2010); Schnall v. Proshares Trust, No. 10 Civ. 3042(JGK), No. 09 Civ. 6935(JGK), 2010 WL 1962940, at *1 (S.D.N.Y. May 17, 2010).

¹⁴⁰ 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).

¹⁴¹ 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).

¹⁴² Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended at 15 U.S.C. §78a (2000)).

¹⁴³ Buettgen v. Harless, Nos. 3:09-CV-0791K, 3:09-CV-0938-K, 3:09-CV-1049-K, 2010 WL 2573463, at *1 (N.D. Tex. June 25, 2010).

¹⁴⁴ See 15 U.S.C. §78u-4(b)(3)(D).

¹⁴⁵ Bank v. City of Menasha, No. 10-1963, 2010 WL 4812811, at *4 (7th Cir. Dec. 8, 2010); Thorogood v. Sears, Roebuck & Co., No. 10-2407, 2010 WL 4286367, at **6-8 (7th Cir. Nov. 2, 2010).

¹⁴⁶ H.R. Conf. Rep. 104-369, at 37, reprinted in 10995 U.S.C.C.A.N. 730, 736.

¹⁴⁷ Fed. R. Civ. P. 27.

¹⁴⁸ Gary L. Cutler, *PSLRA Stay Does Not Always Halt the Process*, N.Y.L.J., June 19, 2006, at S8.

¹⁴⁹ 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).

¹⁵⁰ In re Colonial BancGroup, Inc. Sec. Litig., Civ. Action No. 2:09cv104-MHT, 2009 WL 4585928. At *2 (M.D. Ala. Dec. 2, 2009).

¹⁵¹ See, e.g., In re Williams Sec. Litig., No. 02-CV-72H(M), 2003 WL22013464, at *1 (N.D. Okla. May 22, 2003); In re Vivendi Universal, S.A., Sec. Litig., 381 F. Supp. 2d 129, 130 (S.D.N.Y. 2003).

¹⁵² Winer Family Trust v. Queen, No. Civ.A. 03-4318, 2004 WL 350181, at *6 (E.D. Pa. Feb. 6, 2004).

¹⁵³ 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.*

¹⁵⁴ 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).

¹⁵⁵ Debra M. Torres, *PSLRA Mandatory Stay Can Be Heavy Lifting*, N.Y.L.J., June 18, 2007, at S6.

¹⁵⁶ 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, *2009 Securities Litigation Study* 26-27 (Apr. 2010), http://10b5.pwc.com/PDF/NY-10-0559%20SEC%20LIT%20STUDY_V7%20PRINT.pdf.

¹⁵⁷ See, e.g., Kuriakose v. Federal Home Loan Mort. Co., No. 08-cv-7281, 2009 WL 4609591 (S.D.N.Y. Dec. 7, 2009) (refusing to lift stay where about 400,000 documents had been produced by lead defendant during active investigations conducted by the SEC, the U.S. Attorney's Office, and the House Committee on Oversight and Government Reform). The court stated: "Contrary to Plaintiffs' assertion, courts do not routinely lift the PSLRA discovery stay when the requested documents have already been provided to government investigators." *Id.* at *3. Accord In re Sunrise Senior Living, Inc., 584 F. Supp. 2d 14, 18 (D.D.C. 2008) (refusing to lift discovery stay in part because "an SEC investigation occurring contemporaneously with private litigation is not at all an uncommon occurrence. . .").

¹⁵⁸ See, 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).

¹⁵⁹ 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).

¹⁶⁰ See, e.g., Westchester Putnam Heavy & Highway Laborers Local 60 Benefit Fund v. Sadia S.A., No. 08 Civ. 9528(SAS), 2009 WL 1285845, at *1 (S.D.N.Y. May 8, 2009) (partially lifting stay to permit discovery of investigative report produced in parallel litigation the day after plaintiffs respond to defendants' motion to dismiss).

¹⁶¹ See In re Sunrise Senior Living, Inc., 584 F. Supp. 2d 14, 17 (D.D.C. 2008) ("[T]he ease with which the defendant can produce the documents is not the standard for assessing whether a discovery request is particularized.")

¹⁶² See Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis – Report to the Judicial Conf. Advisory Comm. on Civil Rules* 5, 7 (March 2010), [http://www.fjc.gov/public.nsf/lookup/costciv1.pdf/\\$file/costciv1.pdf](http://www.fjc.gov/public.nsf/lookup/costciv1.pdf/$file/costciv1.pdf).

¹⁶³ See, e.g., Richard H. Walker, David M. Levine & Adam C. Pritchard, *The New Securities Class Action: Federal Obstacles, State Detours*, 39 ARIZ. L. REV. 641, 665 (1997) (“[D]efendants [in securities fraud class action litigation] are now extremely reluctant to settle before a motion to dismiss has been decided.”).

¹⁶⁴ 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.”).

¹⁶⁵ 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).

¹⁶⁶ Fulbright & Jaworski L.L.P., *Seventh Annual Litigation Trends Survey Report* 52 (2010), <http://www.fulbright.com/images/publications/7thLitigationTrendsReport.pdf>.

¹⁶⁷ ABA Report, *supra* note 10, at 99.

¹⁶⁸ 355 U.S. 41 (1957).

¹⁶⁹ 355 U.S. at 45-46.

¹⁷⁰ 550 U.S. at 563.

¹⁷¹ 550 U.S. at 563.

¹⁷² 550 U.S. at 570.

¹⁷³ 129 S. Ct. at 1953-54.

¹⁷⁴ 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*).

¹⁷⁵ 550 U.S. at 557-58. See also Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 219 (2011) (“[H]igh cost and significant asymmetry in costs drove the new plausibility standard in *Twombly*.”).

¹⁷⁶ 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.”).

¹⁷⁷ 550 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.”).

¹⁷⁸ See, e.g., Thomas, *supra* note 175, at 216 (“[T]he new standard will likely have a revolutionary impact on cases. . . .”).

¹⁷⁹ Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295, 1357 & n.9 (2010). See also Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 133 n.71 (2011) (“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.”).

¹⁸⁰ See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295-96 & n.10 (2010) (listing scholarly commentary).

¹⁸¹ See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (“[T]hese decisions do more than redefine pleading rules. By inventing a new and foggy test for the threshold stage of

every lawsuit, they have destabilized the entire system of civil litigation.”); Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in Ashcroft v. Iqbal*, 62 FLA. L. REV. 951, 959 (201) (“Academic criticism of the Twombly decision was speedy and abundant.”); Robert D. Owen & Travis Mock, *The Plausibility of Pleading After Twombly and Iqbal*, 11 SEDONA CONF. L.J. 181 (2010) (“The Twombly decision generated a great deal of academic criticism alleging that it was overturning decades of precedent and flying in the face of basic principles of notice pleading and the Federal Rules of Civil Procedure. *Iqbal* has done little to change critics’ minds.”).

¹⁸² See, e.g., Thomas, *supra* note 175, at 216 (“Because the new standard is akin to summary judgment with much less information, more dismissals are likely to occur at the motion to dismiss stage.”).

¹⁸³ See Victor E. Schwartz & Christopher E. Appel, *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 Twombly and Iqbal suggest no radical sea change or general denial of access to the courts for specific groups of plaintiffs.”); John G. McCarthy, *An Early Review of Iqbal in the Circuit Courts*, 57 FED. LAW. 36, 36 (2010) (“In most circuits, the application of the pleading requirements expressed in Iqbal to specific complaints have achieved the same results as would have been reached under pre-existing case law.”).

¹⁸⁴ See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010) (“Twombly and 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.”).

¹⁸⁵ Administrative Office of the United States Courts, Statistics Division, *Motions to Dismiss* 9 (rev. Apr. 13, 2010), http://host4.uscourts.gov/rules/Motions%20to%20Dismiss_042710.pdf.

¹⁸⁶ *Id.* at 1.

¹⁸⁷ See, e.g., Hatamyar, *supra* note 184, at 556 (“[T]he rate at which such motions were granted increased from Conley to Twombly to Iqbal, although grants with leave to amend accounted for much of the increase.”); Schneider, *supra* note 8, at 535 (“There are also numerous employment and civil rights cases in which district courts have granted leave to amend.”).

¹⁸⁸ Memorandum from Andrea Kuperman to Civil Rules Committee and Standing Rules Committee 4 (Dec. 15, 2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_121510.pdf (hereafter Kuperman Memorandum). See also Report of the New York State Bar Association’s Special Committee on Pleading Standards in Federal Litigation 18 (June 2010),

<http://www.nysba.org/Content/NavigationMenu42/June192010HouseofDelegatesMeetingAgendaItems/StandardsforPleadingFinalReport.pdf> (“[B]ut for patent cases, *Iqbal* has not had an appreciable effect on the percentage of motions to dismiss that have been granted and denied in the federal courts.”); Michael R. Huston, Note, *Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal*, 109 MICH. L. REV. 415, 434 (2010) (“By and large, federal courts are not dismissing more cases following *Iqbal*.”).

¹⁸⁹ 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. . . .”).

¹⁹⁰ Kuperman Memorandum, *supra* note 188, at 5.

¹⁹¹ Heather Lamberg Kafele & Mario M. Meeks, Shearman & Sterling LLP, *Antitrust Digest: Developing Trends and Patterns in Antitrust Cases After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal* 8, 15 (Apr. 2010), <http://www.shearman.com/Antitrust-Digest-04-20-2010/>. Accord Michael P. Lehmann, *Twombly and Antitrust Class Action Plaintiffs*, Law360, Jan. 27, 2011, <http://www.law360.com/articles/219599/print?section=competition> (“In sum, in many recent major antitrust actions, while Twombly has sometimes had the effect of lengthening the period in which dismissal motions are considered (and, on occasion, has necessitated the filing of amended complaints), more often than not, motions to dismiss were ultimately denied (or sometimes reversed on appeal).”).

¹⁹² 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).

¹⁹³ See Colin T. Reardon, Note, *Pleading in the Information Age*, 85 N.Y.U. L. REV. 2170, 2208 (2010).

¹⁹⁴ Richard A. Epstein, *Of Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187, 202 (2011).

¹⁹⁵ See New York State Bar Association, *Memorandum re: Report of the Special Committee on Pleading Standards in Federal Litigation* 3 (June 2, 2010) (quoting Oct. 2, 2009 version of Kuperman Memorandum, *supra* note 188), <http://www.nysba.org/Content/NavigationMenu42/June192010HouseofDelegatesMeetingAgendaItems/StandardsforPleadingReportMemo.pdf>. See also A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 24 (2009) (“[I]t is unknowable whether a dismissed claim was nonetheless meritorious in an absolute sense.”).