

Submitted electronically via Regulations.gov

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle
Washington, DC 20544

Dear Members of the Committee on Rules of Practice and Procedure:

Thank you for this opportunity to comment on the Committee's proposed changes to the Federal Rules of Civil Procedure governing discovery in civil cases. We submit this comment for the National Consumer Law Center (NCLC) on behalf of its low-income clients and the National Association of Consumer Advocates (NACA). While we have concerns about a number of the Committee's proposals, we will focus this comment on the proposed changes to Rule 26(b). We strongly believe that this proposed rule is both unnecessary and harmful in that it will lead to a diminished opportunity for consumers to hold powerful corporate defendants accountable for their unfair and fraudulent behavior.

NCLC is a national research and advocacy organization focusing on justice in consumer financial transactions for low income consumers. Since its founding as a non-profit corporation in 1969 at Boston College School of Law, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned for legal answers, policy analysis, and technical and legal support. NCLC is recognized nationally as an expert in consumer protection law and has drawn on this expertise to provide trainings, treatises, information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 40 years.

NACA is a non-profit organization whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers. Each day our members represent consumers in small and large cases in state and federal courtrooms across this country. Because of our core belief in both the inherent fairness of the American justice system, as well as the need for all consumers to have fair and equal access to those public courts, we are committed to promoting rules and guidelines that promote that vision. As part of this effort, NACA maintains the comprehensive "Standards and Guidelines for Litigating and Settling Consumer Class Actions" 176 F.R.D. 375, first published in 1998, fully updated in 2006 (and currently under revision).

A. The Proposed Changes To Rules 26(b) Are Unnecessary And Will Diminish the Opportunity for Consumers to Hold Corporate Defendants Accountable.

In our current justice system, when a consumer brings a court action against a corporate defendant, the consumer appropriately bears the burden of proof to substantiate her claims.

Recognizing, however, that much of the information needed to find the truth of the matter asserted rests in the hands of the more powerful and resource-rich defendant, the consumer is helped in meeting this burden by a court-supervised discovery process. Discovery, as it's currently structured, appropriately allows for a broad search of facts and information which might potentially assist the consumer in meeting her ultimate burden of proof. Under our system, the defendant is protected from burdensome and/ or irrelevant requests by having the right to seek a protective order from the court. These requests are fairly routine and are typically weighed expeditiously and with the appropriate level of care by judges – usually magistrate judges. While the party seeking the protective order bears the burden of proving that the discovery request be disallowed, this is unquestionably the proper approach. After all, it is that party, and that party alone that has the necessary information about the volume of documents it possesses and the potential cost of their production.

Unfortunately, in proposing changes to Rule 26(b), the Committee disregards this current fair and balanced approach to discovery. Instead, it unnecessarily shifts the burden of proof about the appropriateness of discovery to the party with the least information about the cost and volume of the documents requested. Under the proposed rule, a defendant will be able to thwart a consumer's honest effort to seek relevant information by merely refusing to answer a discovery request on the grounds that it is not proportionate. The consumer, typically with far less resources, will then be forced to move to compel and carry the burden of showing that their request is both relevant and proportionate. Unfortunately, whatever good intentions the Committee might have had in proposing this rule change, the results will be anything but positive. Instead, because of the fundamental shift in the burden of discovery and its disparate impact on consumers/plaintiffs, what we are likely to see is a more contentious, more expensive, less efficient, more time-consuming and more complex discovery process for both parties and courts alike.

B. Adding Proportionality to the Scope of Discovery Will Negatively Impact the Ability of Consumers to Seek Justice in “Small Dollar” Cases.

Making matters even worse, in its proposal, the Committee appears to be moving the scope of discovery in Rule 26(b) from a relevancy standard to a proportionality standard that would contravene well-established public policy. The proposal lays out five specific factors for the courts to evaluate “proportionality” which include: (1) the amount in controversy; (2) the importance of the issues; (3) the parties' resources; (4) the importance of the discovery in resolving the issue; and (5) whether the burden or expense of the proposed discovery outweighs its likely benefit.

As attorneys who solely represent consumers in our public justice system, the problems with this proposal are both obvious and striking. First, while we have heard the proposed rule described as nothing more than a “relocation” of existing proportionality factors, it clearly is not. By anyone's plain reading, the proposed rule intentionally narrows the scope of available discovery. No longer will consumers be able to obtain all relevant evidence. Instead, they will

only be entitled to relevant evidence that is cost effective for defendants to produce even when the consumer plaintiff is acting as a private attorney general.

Further, the factors used to determine this newly enhanced proportionality standard may limit the ability of consumers from obtaining real justice in matters too casually defined as “small dollar” cases. For instance, will a typical federal statutory damage consumer case, where at most \$1,000 can be awarded, be no longer triable because the cost of discovery exceeds the available damages? This result would be absurd, because the value of these cases is often far greater than the apparent “value” of the individual case; they often serve to expose bad corporate practices and change bad corporate behavior. Similarly, the “importance of the issues at stake” in consumer litigation is often extremely subjective and typically unknown until the discovery process has begun. Without conducting discovery, it will sometimes be difficult for consumers to show the importance of the claims being asserted, thus placing them in a “Catch-22” conundrum. Would the numerous cases that ultimately uncovered widespread mortgage servicing fraud, or systemic problems in our fair credit reporting system, have been allowed to appropriately proceed if a judge initially assessed them as appearing to be of minor importance?

Finally, allowing an evaluation of the expense of discovery be a factor early in the discovery process, makes minimal sense when little is known (except possibly to the defendant) about the potential benefits of discovery. Unfortunately, allowing this evaluation early in the discovery process may create the perverse incentive of encouraging defendants to store or maintain relevant evidence in a format that is expensive and burdensome to produce.

As attorneys representing the interests of consumers, we respectfully urge the Committee to reject the proposed changes to Rule 26(b), which unnecessarily change the definition of the scope of discovery. We believe this proposal would have an unfair impact on consumer plaintiffs and diminish the ability of consumers to hold bad corporate actors accountable. We also believe that the proposal will do damage to our public justice system by creating a more contentious, more expensive, less efficient, more time-consuming and more complex discovery process for both parties and courts alike.

Thank you for considering our comments.

Sincerely,

National Consumer Law Center
National Association of Consumer Advocates