Answers to Written Questions of Senator Jeff Flake
to Andrew J. Pincus

"Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"
Senate Committee on the Judiciary
Subcommittee on Bankruptcy and the Courts
Held on November 5, 2013

1. Some at the hearing suggested that excessive discovery costs are driven by the defense as much as the plaintiff. Moreover, it was suggested that one way to reduce costs of discovery would be to reduce the size of the defense's legal team. Do you agree with these suggestions?

The suggestion that defendants typically over-litigate discovery issues or expend unnecessary resources conducting discovery simply does not reflect the reality of civil litigation today. To the contrary, defense counsel face ever-greater pressure from their clients to keep the overall cost of litigation *down*, including both attorneys' fees and vendor costs, and that pressure has intensified in the wake of the economic downturn.[1] Clients are increasingly involved in managing their cases and in keeping those cases on budget, which includes setting limits on the work that their lawyers can do and the motions that will be filed in a case.

In addition, defense lawyers have a powerful incentive not to vex and annoy the judges who will ultimately preside over their case by making frequent, meritless motions. Defense counsel know that such motions are much more likely to prejudice the client's case than to accomplish anything constructive. The chastening influence of clients and judges is more than sufficient to rein in motions practice on the defense side.

The source of run-away discovery costs is not excessive use of defense resources or motions practice but rather—as I explained in my written testimony—the costs associated with the retention, collection, processing, review, and production of an ever-growing volume of electronically-stored information. These costs fall disproportionately on *defendants*. In civil lawsuits in which the plaintiff is an individual or small entity and the defendant is a business or larger organization, it is the defendant who possesses a much greater amount of electronically-stored information and who accordingly incurs much greater costs to preserve that information and produce it in discovery. Indeed, the fact that the objections to the proposals—such as the presumptive limits on depositions, interrogatories, and requests for admission—have come overwhelmingly from the plaintiffs' bar confirms the asymmetric distribution of these very large costs.

[1] *See, e.g.*, Susan Kelly, *Big law coming under cost pressure*, CRAIN'S NEW YORK BUS. (Nov. 4, 2013).

2. Some of the hearing statements and testimony suggested there was no empirical data or demonstrated need to support the proposed changes to the Federal Rules of Civil Procedure. Do you agree?

I stated in response to questions that we have little empirical data regarding how the Federal Rules are applied in the courtroom—just as we have little empirical data about the grounds on which cases are resolved in federal court litigation. We all would benefit from greater research about how judges enforce the existing rules and how previous changes to the Rules have affected judicial behavior and discovery costs.

But that does not mean that there is no empirical support for the proposed Rule changes. There is very substantial evidence documenting the trends requiring changes in the Rules.

First, the overwhelming empirical evidence demonstrates that discovery costs have exploded in recent years—led by costs related to electronic discovery—and that there is a significant disparity between plaintiffs' and defendants' shares of those costs. The study by the RAND Institute for Civil Justice that I cited in my written testimony found that the median cost of simply *producing* electronically stored information is $1.8 million per civil case, and the study further described a variety of ways in which storing and processing electronic data can entail additional costs for litigants.[2] And as I have already mentioned, defendants bear the brunt of such costs. The burden on a large company such as Microsoft of storing, preserving, and producing the vast amounts of data its business generates for litigation can be onerous—anywhere from several hundred thousand dollars to millions or more.

Second, reports by organizations such as the American College of Trial Lawyers and The Sedona Conference—organizations that include both plaintiff and defense lawyers—recognize the crisis in discovery costs based on *input from the organizations' own members, who are "in the trenches" litigating in federal courts every day*.[3] I discuss these organizations' statements in my written testimony.

Third, the available data indicate that discovery and litigation costs are a burden to U.S. businesses and a disincentive to foreign firms when they consider investing in this country. I cite several studies documenting the high costs of litigation in the United States in my written testimony.[4] In addition, I discuss a 2007 study conducted under the

[2] Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* at 17 (RAND Institute for Civil Justice 2012).

[3] American College of Trial Lawyers & Institute for the Advancement of the American Legal System, *Final Report* (2009) ("*Final Report*"); The Sedona Conference, *Commentary on Proportionality in Electronic Discovery* (Jan. 2013).

[4] NERA Economic Consulting, *International Comparisons of Litigation Costs: Canada, Europe, Japan and the United States* (June 2013), *available at* http://www.instituteforlegalreform.com/resource/international-comparisons-of-litigation-costs-europe-the-unitedstates-and-canada/; U.S. Department of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment* (Oct. 2008), *available at* http://2001-2009.commerce.gov/s/groups/public/@doc/@os/@opa/ documents/content/prod01_007457.pdf; Institute for the

auspices of Senator Schumer and Mayor Bloomberg; the study found that "propensity toward legal action was the predominant problem" with the U.S. legal system, in the opinion of senior executives at leading financial services firms.[5]

The implications of all of this empirical information could not be clearer: discovery costs are growing exponentially, they are acting as a drag on our economy and on the competitiveness of American firms in the global marketplace, and they need to be brought under control. The Advisory Committee is thus on solid ground in concluding that there is room for improvement in the current discovery rules. And although no one can predict the effect of the Committee's proposed changes with perfect accuracy, its proposals will, at a minimum, help ameliorate the cost problems in our discovery system.

3. At the hearing, Professor Arthur Miller was asked about arbitration provisions in consumer and employee contracts. Do you agree with Professor Miller's response?

I disagree completely with Professor Miller. His response is based on two erroneous premises—that the Federal Arbitration Act ("FAA") wasn't meant to apply to consumers' and employees' claims, and that arbitration of such claims on an individual basis leaves consumers and employees worse off than pursuing their disputes in court.

First, the FAA was intended to apply to consumer and employee disputes. Congress enacted the FAA to enable parties to avoid "the delay and expense of litigation." That benefit of arbitration, Congress anticipated, would appeal "to big business and little business alike, . . . corporate interests [and] individuals."[6] Justice Breyer has written that "Congress, when enacting [the FAA], had the needs of consumers, as well as others in mind," noting that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."[7] Likewise, the FAA was intended to cover employment relationships. The relevant text of the FAA, unchanged since its enactment in 1925, expressly carves out only employment contracts for transportation workers ("contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce")—therefore implicitly bringing all other employment contracts within its scope. In short, the FAA was meant to cover consumer and employee disputes as well as business-to-business disputes. There is no merit to Professor Miller's suggestion that the Supreme Court has departed from that original purpose by applying the FAA to consumer contracts and employee relationships.

Advancement of the American Legal System, Civil Litigation Survey of Chief Legal Officers and General Counsel (2010) ("*CLO Survey*"), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules-/Duke%20Materials/Library/IAALS%2C%20General%20Counsel%20Survey.pdf.

[5] *Sustaining New York's and the US' Global Financial Services Leadership* 75 (2007), *available at* http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

[6] S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924).

[7] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

Second, far from preventing consumers and employees from vindicating their rights, arbitration significantly *expands* the class of claims that consumers and employees can vindicate.

Litigating in court is complicated and requires legal representation. While some plaintiffs with large-value claims can find attorneys to represent them, many wrongs suffered by employees or consumers result in small-value claims that are too small for lawyers to agree to pursue *in court*.[8] And although small-claims courts were designed to help individuals pursue their claims in arbitration, they do not present a realistic alternative because of budget cuts and resulting delays.[9]

In contrast to the slow court system that requires expensive legal representation to navigate effectively, arbitration provides consumers and employees with a less complex dispute resolution system that is far easier for non-lawyers to navigate. Filings are informal; hearings can be conducted over the telephone at convenient times.

And, most importantly, consumers fare at least as well, if not better, than in court. A study by Professors Christopher Drahozal and Samantha Zyontz examined claims filed with the American Arbitration Association and found that consumers win relief in 53.3% of their disputes.[10] That is a higher rate of success than the average reported 50% win rate for plaintiffs in state and federal courts.[11] The authors also found that "[c]onsumer claimants who bring large claims tend to do better than consumers who bring smaller claims," but that, "[i]n *both types of cases*, the consumer claimant won some relief against the business more than half of the time."[12] What is more, recent data released by an arbitration provider—the American Arbitration Association ("AAA")—establish that a sample of claims resolved in 2007 resulted in consumers obtaining settlements (or otherwise withdrawing their disputes from arbitration) in 60 percent of cases they brought against businesses; in the remaining 40 percent, they prevailed roughly half of the time.[13] Professor Peter Rutledge of the University of Georgia has reviewed the empirical studies comparing arbitration and litigation, and concluded that "raw win rates, comparative win rates, comparative recoveries, and comparative recoveries relative to amounts claimed

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[8] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 783 (2003).

[9] *See, e.g.*, William Glaberson, *Despite Cutbacks, Night Court's Small Dramas Go On*, N.Y. TIMES, June 2, 2011, *available at* http://www.nytimes.com/2011/06/03/nyregion/despite-cutbacks-new-york-small-claims-courts-trudge-on.html; Emily Green, *Budget Woes Mean Big Delays For Small Claims Courts*, Nat. Pub. Radio, May 15, 2013, *available at* http://www.npr.org/2013/05/17/182640434/budget-woes-mean-big-delays-for-small-claims-courts.

[10] Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-903 (2010).

[11] *See, e.g.*, Theodore Eisenberg, et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1995) (observing that in 1991-92, plaintiffs won 51% of jury trials in state court and 56% of jury trials in federal court, while in 1979-1993 plaintiffs won 50% of jury trials).

[12] Drahozal & Zyontz, 25 Ohio St. J. on Disp. Resol. at 898.

[13] See Am. Arbitration Ass'n, Analysis of the American Arbitration Association's Consumer Arbitration Caseload, *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325.

. . . do not support the claim that consumers and employees achieve inferior results in arbitration compared to litigation."[14]

Employees using arbitration also fare as well or better than they would in court. Studies demonstrate that employees who arbitrate their claims are more likely to win their disputes than those who litigate in federal court (46% in arbitration as compared to 34% in litigation), and the arbitrations are resolved 33% faster than lawsuits in court.[15]

Moreover, a study of AAA employment arbitration awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were too small to attract an attorney willing to bring litigation on the employee's behalf. These employees were often able to pursue their arbitrations without an attorney, and they won their arbitrations at the same rate as individuals with representation.[16] Another study examined AAA employment awards and found that win rates (and damages) were essentially equal for higher-income employees. The study found no statistically significant difference in discrimination and non-discrimination claims for higher-income employees in arbitration and in litigation. Yet for lower-income employees, the study did not attempt to draw comparisons between results in arbitration and in litigation, because lower-income employees appeared to lack *meaningful access to the courts*—and therefore the ability to bring a sufficient volume of court cases to provide a baseline for comparison.[17]

Many opponents of arbitration focus only on class actions, arguing the unavailability of class procedures in arbitration by itself demonstrates the claimed deficiency of arbitration. But most wrongs suffered by consumers and employees are individualized and cannot be remedied in a class action. For those individuals, as the above analysis demonstrates, arbitration is by far the superior dispute resolution system.

Justice Breyer has observed that, without arbitration, "the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)" would be left "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[18] Thus, for a large category of injuries suffered by consumers and employees, the choice is "arbitration—or nothing."[19]

And even claims that could be asserted in a class action can be remedied in arbitration. In the recent decision in *American Express Co. v. Italian Colors Restaurant*, even the dissenting members of the Supreme Court—Justices Ginsburg, Breyer, and

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[14] Peter Rutledge, *Whither Arbitration?*, 6 Geo. J.L. & Pub. Pol'y 549, 560 (2008).

[15] Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003 - Jan. 2004).

[16] Hill, 18 Ohio St. J. on Disp. Resol. at 794, 800.

[17] Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 45-50 (Nov. 2003/Jan. 2004).

[18] *Allied-Bruce*, 513 U.S. at 281.

[19] Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 792 (2008) (discussing analogous situation of employees with low-dollar claims).

Kagan—disagreed with the assertion that class procedures are essential to vindicate rights conferred by federal law. They pointed out that other mechanisms, such as the use by many claimants of the same lawyer and expert to file their individual arbitration claims, provided a way to vindicate those rights effectively.[20] That mechanism is available under virtually all arbitration agreements, and it is being used with increasing frequency.

Moreover, skepticism is growing about the benefits of class actions for consumers and employees. Everyone recognizes that class actions are great for lawyers: both those that file them and those who represent defendants. But little actual benefit is conferred on class members. That reality is additional evidence that arbitration is a better deal for consumers and employees than our overcrowded, procedurally complex, and inefficient court system.

In short, Professor Miller's response is based on a mistaken premise that individual arbitration prevents the resolution of what he terms "economically unviable" claims. Yet the empirical evidence demonstrates that, for most claimants, dispute resolution in our overburdened court system is out of reach. Arbitration allows individuals—including consumers and employees—to resolve their disputes to their satisfaction, more efficiently, and with higher win rates and often greater awards than in litigation.

4. In your written testimony, you argue the current discovery rules, combined with other elements of the U.S. legal system, provide a significant incentive for the filing of abusive lawsuits. Please elaborate on that issue and explain how the proposed amendments may address this concern.

Two criteria are relevant in assessing the proposed rule changes: whether they will adversely affect legitimate claims; and whether they will address skewed incentives—resulting from the existing rules—that encourage the filing of abusive lawsuits because the economic burdens on defendants often produce settlements unrelated to the merits of the underlying claims.

Virtually all of the testimony and questioning at the hearing focused on the first question—the potential impact of the proposed amendments on plaintiffs' ability to bring important and legitimate claims, such as civil rights lawsuits. But there is no evidence supporting the claim that the proposed changes to the Rules would have any effect on the viability of such claims. Much has been made, for example, of the potential effect of the change in Rule 26's proportionality language on civil rights lawsuits—but under the current version of Rule 26, judges are *already* required to take into consideration the importance of the issues involved in a case, including the societal significance of small but meritorious civil rights claims, in determining whether to limit discovery that is not proportional to the case. The proposed amendment does not alter this standard. Instead, the proposed amendment merely relocates that proportionality language within Rule 26 in an attempt to focus judges' attention on the issue. That will encourage courts to give more attention to all of the proportionality factors—including the societal significance of

[20] *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2318 (2013) (Kagan, J., dissenting).

small but meritorious civil rights claims. With respect to the presumptive limits, as explained in my written testimony and discussed in my oral testimony, there is no basis for fearing a potential impact on legitimate discovery requests.

In sum, I simply do not believe that the case has been made—or can be made—that federal judges will exercise their discretion under the proposed rules in a manner that will negatively affect legitimate claims.

The discussion during the hearing largely ignored the second question—the significant benefits of the Rules proposal on another, all-too-common type of case: those in which the threat of costly discovery produces outcomes unrelated to the merits. A plaintiff can file a lawsuit against a large defendant relatively easily and, as I have explained, incur little or no discovery costs. The defendant, by contrast, will have to bear significant costs in the discovery phase of litigation, to say nothing of the expense of going to trial to prove its innocence if the case should progress that far. This is true regardless of the merits of the plaintiff's claim: thanks to the longstanding "American rule," even a blameless defendant has little chance of recovering its discovery costs from the plaintiff because, in general, each side must pay its own legal fees no matter who prevails in the case.

Defendants thus have a powerful incentive to settle any case that survives a motion to dismiss, even one that is wholly meritless on the facts, for less than the costs of defense (costs that have ballooned as a result of the costs associated with electronic discovery). And when even meritless lawsuits settle, plaintiffs are only further encouraged to bring frivolous claims. In light of this set of perverse incentives, it is hardly surprising that, when the Institute for the Advancement of the American Legal System surveyed both plaintiffs' and defense lawyers, over 80% disagreed with the proposition that the merits of a case, rather than litigation costs, determine the outcome,[21] or that, in a survey by the American College of Trial Lawyers, 71% of lawyers surveyed—again, both plaintiffs' lawyers and defense lawyers—agreed that discovery is "used as a tool to force settlement."[22]

The proposed improvements to the Federal Rules would alleviate this problem by addressing some of the factors that currently contribute to excessive discovery costs. The proposed amendments to Rule 26 would encourage judges to be more active in managing cases and to reject discovery requests that are disproportionate, and they would restrict the scope of discoverable material to exclude matter that is not relevant to the issues at stake. The new presumptive limits on depositions, interrogatories, and requests for admission would encourage lawyers to be more efficient and judicious in their use of those tools, while permitting judges to authorize additional discovery of each type when necessary. Finally, the proposed amendments to Rule 37 would reduce the risk that innocent defendants will be subjected to draconian sanctions for alleged spoliation of evidence—a risk that leads to costly and needless over-preservation of information.

[21] *CLO Survey* at 19.

[22] *Final Report* at 2, 9.

Ultimately, the changes to the Rules would be effective in helping to restore balance to the discovery process and ensure the "just, speedy, and inexpensive determination of every action and proceeding" that is the goal expressed in Rule 1. By bringing down the costs of discovery in cases in which those costs are currently egregious, the changes would reduce plaintiffs' ability to use those costs as a source of leverage to extract *in terrorem* settlements of frivolous claims and enable defendants to rationally allocate resources toward resolving viable claims and fighting meritless ones. Reducing the costs of discovery thus helps weed out abusive litigation while judicial discretion (and the standards for exercising it specified in the proposal) safeguards the right of plaintiffs with meritorious claims to obtain justice.