U.S. SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE *on* BANKRUPTCY *and* THE COURTS

FOR IMMEDIATE RELEASE: November 5, 2013
CONTACT: Ian Koski at 202-224-5042 or Ian_Koski@coons.senate.gov

Opening Statement of Senator Coons

Senate Judiciary Subcommittee on Bankruptcy and the Courts hearing:
"Changing the Rules: Will limiting the scope of civil discovery diminish accountability and leave Americans without access to justice?"

- As Prepared for Delivery on November 5, 2013 -

The purpose of this hearing today is to examine a suite of changes to the Federal Rules of Civil Procedure proposed by the Judicial Conference's Advisory Committee on Civil Rules. Under current rules, all relevant material is discoverable, but a party may seek court relief from an otherwise valid discovery request if the request is out of proportion to the needs of the case. The proposed changes would invert this standard, allowing responding parties themselves to decide what is proportional and what is not.

The changes are also designed to increase the frequency with which courts assign the costs of discovery to the requesting, rather than the producing, party.

The changes would also place stricter presumptive limits on depositions – from 10 to 5 and lasting no more than 6 hours, as compared to 7 under current rules; interrogatories – from 25 to 15; and requests for admission, currently not limited, would be limited to 25.

Although in service of an important goal—reducing unnecessary discovery costs—these proposed changes have sparked no small amount of controversy in the civil rights, consumer rights, antitrust and employment rights communities. These advocates worry that limitations on civil discovery will unduly hamper the ability of those who have been subject to discrimination and other violations to obtain the evidence that they need to prove their cases in court.

Under the Rules Enabling Act, it is the role of the judiciary to propose, and for Congress to review, changes to the rules that govern litigation in our courts.

Despite the mechanism for rules changes under the Rules Enabling Act, however, over the past 30 years courts have eschewed the role of Congress and used decisional law time and again to reinterpret the Federal Rules. In nearly every case, the reinterpretation has narrowed the path for a citizen to have his case decided by a jury according to the facts and the law. Most recently, a suite of decisions has sharply

limited the availability of the class action, raised pleading standards, and foreclosed federal and state courts entirely for those who are unlucky enough to find their dispute subject to an arbitration clause.

Today, however, I am glad to report that the Judicial Conference is proposing that the rules be changed through the mechanisms set out in the Rules Enabling Act, which gives the public and Congress a valuable opportunity to be heard before any changes take effect.

In conducting my review of the proposals I am guided, as I hope is the Judicial Conference, by four critical considerations:

First, what specifically, are the reforms meant to accomplish? What problems or abuses are they hoping to remedy?

Second, how effectively would the reforms succeed in addressing the abuses?

Third, are there collateral costs to our system of justice?

And finally, if there are collateral costs, we must weigh the costs and benefits in light of the public's interest in a fair, efficient, and effective court system.

As to the first question, what are these changes meant to accomplish, let me start with what I think is an unobjectionable statement: Civil litigation in America can be very expensive. As a former in-house counsel for a materials-based manufacturing company, I knew the challenges that corporate defendants face in controlling the cost of lawsuits, where even a meritless complaint could put settlement pressure on my client.

But, to the second question--are these rules likely to significantly reduce discovery costs that are unnecessary to resolve the case? Studies cited by the Judicial Conference note that discovery costs are not a problem in the majority of cases, and that discovery is a problem in a, quote "worrisome" number of cases. In those cases where discovery costs are a problem, which is to say that they are, quote "out of proportion," to the needs of the case, it tends to be in cases that are high stakes, highly complex, or highly contentious.

In these cases, presumptive discovery limits are likely to be of no impact at all. In smaller cases, however, presumptive limits are likely to play a normative role, restricting the ability of the plaintiff in a small case to take needed depositions from a defendant who holds all of the information relevant to a fair lending or employment discrimination claim.

Without objection, I would submit for the record letters from Barry Dyller and the Delaware Trial Lawyers Association setting forth some of these concerns.

As to proposals to restrict the scope of discovery, the import and impact of these discovery changes is likely to be highly litigated. Motions practice is not cheap and, when all is said and done, these changes would be implemented by the same judges who today, according to the Judicial Conference itself, are not doing a good enough job limiting discovery in the cases before them.

Five times since 1980, the Judicial Conference has tweaked civil discovery rules in an attempt to curb perceived abuses. In 1980, a pretrial conference was added to reduce the burdens of discovery. In

1983, proportionality was first added as a limitation on discovery. In 1993, the rules were amended to add presumptive discovery limits. In 2000, the scope of discovery was narrowed. Finally, just a few years ago in 2006, the proportionality provision instituted in 1983 was revised in an attempt to reflect the increased burdens of electronic discovery.

Today, we are faced with yet another incremental restriction on discovery. Why would we expect these changes to work where others have failed? And if discovery cost is not a problem in the majority of cases, is it appropriate to narrow the scope of discovery across the board?

Next, even if we are to assume that these changes would have some positive impact curbing discovery abuse, we must still consider the third question in my line of inquiry – what harms are risked if these changes are implemented?

Discovery is, of course, a critical stage in litigation that allows parties to marshal evidence in support of their claims or defenses, as well as to evaluate the claims and defenses of the counterparty. Without discovery, parties would ask judges and juries to decide cases based on incomplete information, which can only degrade the ability of the legal system to deliver justice under the law.

If discovery is important to the civil justice system, it is absolutely indispensable to many civil plaintiffs. Plaintiffs, not defendants, must bear the burden of persuasion in proving their claims, yet often, especially in employment, discrimination, and consumer fraud cases, most of the relevant evidence is in the possession of the defendant. Less access to information could mean that responsible parties will remain unaccountable, not because the plaintiff's allegations are untrue, but because the plaintiff lacks the evidence to prove them.

If so, this would be a very real cost, and not just to the plaintiffs whose meritorious cases would be thrown out. In many areas of the law, notably antitrust and discrimination, the law recognizes the societal value of so-called "private attorneys general." Recognizing the limitation of government resources, the law provides encouragement for civil plaintiffs to bring suit and help ensure compliance with the law.

Where we can cut costs without doing damage to our civil justice system, we should absolutely do so.

When there is the possibility of collateral costs to our courts and the ability of Americans to enforce their substantive rights, however, we must tread more carefully.

Before we amend the rules to limit the ability of litigants to marshal evidence to prove their cases, therefore, we must examine whether any of these potential harms are likely to come to pass. We must also examine whether other reforms are more likely to achieve the goals of reducing unnecessary litigation costs and less likely to have the collateral consequence of reducing access to justice.

Commentators are in general agreement that judges could do more under the Rules than they are doing currently to narrow issues for discovery and reduce the burdens on producing parties. Why aren't they doing so?

Are judges overworked? If so, perhaps the problem could be addressed by creating some or all of the 91 new Article III judgeships recommended by the Judicial Conference, as would be accomplished by the Federal Judgeship Act of 2013 that I introduced with Chairman Leahy. Would a greater investment in

technical and support resources in the courts allow for more efficient management of cases, leading to significant savings to litigants? Is judicial training a limiting factor, and how might we address that?

Clients also have tremendous power to limit litigation costs incurred by their legal representation. Clients can and do negotiate down hourly rates, the size of legal teams, and even the hourly-billing model that has created a divergence of incentives between attorney and client. Do these paths, either in isolation or in concert, offer a more promising avenue for reform?

These are just a few of the questions we will explore with the witnesses today.

###