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What's New ATLA Board of Governors Convention Recap

DOCKET

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The Proportionality Rule and How to Prevent it from Hobbling your Case

by Geoffrey D. Kearney, Esquire

In 2014, the Federal Rules of Civil Procedure defined the scope of discovery as follows:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Fed. R. Civ. P. 26(b)(1) (December 1, 2014). Former Rule 26(b)(2)(C) on protective orders contained considerations similar to those set forth in the proportionality analysis. Moreover, a form of the concept was introduced, if not widely and deeply internalized, in the 1983 Amendments.[1] However, on December 1, 2015, the rule governing the scope of discovery changed in a way that many have characterized as a serious shift:

> Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

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Fed. R. Civ. P. 26(b)(1).

According to Chief Justice John Roberts, this modification, which placed the concept of "proportionality" on the same footing as whether information sought was "relevant", "mark[ed a] significant change, for both lawyers and judges, in the future conduct of civil trials" and while the "amendments may not look like a big deal at first glance,. . . they are."[2] To be sure, courts interpreting the new language have gone somewhat back and forth on the question of how large a change this is. Notably, as stated above, much of this language had been a part of the FRCP for over 30 years by the time of the 2015 Amendments.[3] Still, despite the similarities of language, the dearth of cases giving it much attention before 2015 demonstrates that even if this change is merely a matter of emphasis, not completely new law, this is clearly an alteration with which practitioners must grapple. In that vein, this Article aims to answer the following questions:

- What is a proportionality analysis?
- How should practitioners deal with proportionality disputes?[4]

What is Proportionality?

In broad strokes, the concept of proportionality might best be understood as an analysis of "the marginal utility of the discovery sought."[5] Moreover, "[T]he application of the concept of proportionality often turns on how 'central' (or relevant) the proposed discovery may be to overcome any number of objections that are associated with the discovery at issue."[6] As is the case with all factor tests, there is no broadly applicable rule determining how a proportionality challenge should be resolved. Rather, which factors are relevant and persuasive will depend on the particularities of a case.[7] Accordingly, counsel should have a working knowledge of the considerations driving each of the six factors.

The Factors

The Importance of the Issues at Stake in the Action & Amount in Controversy[8]

The Committee notes[9] make clear that "importance" is a wholistic concept, and takes into account not only the specific dispute between the parties, but is concerned with whether the dispute itself seeks to vindicate a position or address a harm of greater import:

> It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

Carr v. State Farm Mut. Auto. Ins. Co., 312 F.R.D. 459, 467 (N.D. Tex. 2015). Courts are often inclined against placing much weight on this factor where the dispute is of a substantially private nature with little direct relevance to those aside from the parties.[10] Which category a given dispute falls into can be a central issue. For instance, some courts expressly find more importance in workplace discrimination disputes, while others view them as essentially any other private litigation.[11]

The guiding principle with respect to the amount in controversy factor is that while "[t]here may be instances where litigation costs considerably exceed the amount realistically in controversy—when important issues need to be resolved[,] multiple hundreds of thousands of dollars should not frequently be devoted to litigation that realistically has modest dollar value."[12]

For instance, a claim that discovery costs of roughly $140,000 are excessive in a case with a reasonable potential value of $150M dollars has been rejected.[13] Obviously most cases are unlikely to have quite so large a chasm between these two figures, and such is by no means necessary for a propounding party to prevail on this factor. Indeed, merely keeping discovery costs under the potential case value might be enough.[14] Because making a showing as to the value of the case is crucial to the amount in controversy analysis, parties attempting to boost this amount with statutory multipliers, punitive damages, etc., can lose this point simply by not prevailing when attempting to show why they should apply and to what extent.[15]

Parties' Relative Access to Relevant Information

This factor is helpful to parties who are only able to obtain certain information through the opposing party or would have hardship obtaining it in the absence of their provision by the opposing party.[16] Whether proprietary or otherwise non-public information is a key part of a case will have a substantial bearing on whether this factor is relevant. In addition to commercial litigation cases involving sophisticated business data, employment cases, in which the employee defendant often possesses private but relevant data not available elsewhere, are another area in which propounding parties are often well-positioned to claim lack of access.[17]

In instances where a sophisticated resisting party claims difficulty accessing discoverable information that should be in its possession, propounding parties should be vigilant for circumstances suggesting that the party's purported difficulty might be the result of unwise or inefficient information storage practices that the party should have known better than to implement.[18]

While perhaps not, strictly speaking, a proportionality issue, a final point on this factor is that parties in electronic discovery disputes should keep in mind that under Rule

26(b)(2)(B), resisting parties who demonstrate undue burden or cost may still be compelled to produce the requested material upon a showing of good cause.

The Parties' Resources

A party with substantial resources will be unlikely to be able to rely on this factor to show lack of proportionality. For instance, where both parties are heavily resourced, this factor will generally weigh in favor of proportionality.[19] In a similar vein, this consideration will tend to favor a less resourced party facing off against a more resourced party.[20]

Still, this factor seems to be the one least likely to be able to carry the day on its own, given the Advisory Committee Notes' admonishments that "consideration of the parties' resources does not…justify unlimited discovery requests addressed to a wealthy party" and that courts "must apply the standards in an even-handed manner that will *prevent use of discovery to wage a war of attrition or as a device to coerce a party*, whether financially weak or affluent."[21]

The Importance of the Discovery in Resolving the Issues

One district court has explained this factor thus:

> In analyzing the importance of the discovery in resolving the issues in the case, the court looks to whether the discovery seeks information on issues "at the very heart of [the] litigation." *Oxbow Carbon,* 322 F.R.D. at 8 (alteration in original); *see also Lakeview Pharmacy [of Racine, Inc. v. Catamaran Corp.],* 2019 WL 587296, at *4 (stating that, in weighing this factor, the court "looks to whether the discovery request goes to a central issue in the case"). "A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them." Fed. R. Civ. P. 26(b)(1) advisory committee notes to the 2015 amendment. Where a party can establish only marginal relevance, courts are less likely to determine that the discovery sought is proportional. *See, e.g., In re Bard IVC Filters Prod. Liab. Litig.,* 317 F.R.D. 562, 566 (D. Ariz. 2016) (concluding defendants were not required to search ESI that "appear[ed] marginal" to resolving the issues in the case).

Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *15 (D. Kan. June 18, 2020), aff'd, No. 18-1100-EFM, 2020 WL 6939752 (D. Kan. Nov. 24, 2020), *appeal dismissed,* No. 21-3219, 2021 WL 8651002 (10th Cir. Dec. 20, 2021), and *appeal dismissed,* No. 21-3219, 2021 WL 8651002 (10th Cir. Dec. 20, 2021).

This factor, perhaps more than any other, clearly builds on the idea of relevance,[22] and is often crucial to a court's analysis. However, if relevance is a kind of binary question of whether requested information does or does not illumi-

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nate the issues, this factors examines the how much light is actually being shed and, importantly, where.

Whether the burden or expense of the proposed discovery outweighs its likely benefit.

This factor measures the burden or expense to the responding party against the potential benefit. As such, the starting point for those asserting undue burden is to provide the court with evidence of how much it would cost, in money or other resources, it would cost to comply with the requests.[23] Indeed, "A party claiming undue burden or expense ordinarily has far better information -- perhaps the only information -- with respect to [this] part of the determination." Fed. R. Civ. P. 26(b)(1) Advisory Committee Notes to the 2015 Amendment. As with any factual assertion, claims of burden are subject to proof and may be appropriately parsed by the propounding party. For instance, a party might looking to under a discovery expense estimate might wish to interrogate when a bid on a search by a third party was sought, as a bid solicited on short notice might not not represent the best, truest price available.[24]

The factor seems most relevant when dealing with electronic discovery issues or other undertakings that will require the expenditure of substantial manpower. It will likely be ineffective for relatively small bore requests.[25]

Though some courts seem, to an extent, to articulate this factor as a summation of the proportionality considerations set forth in Rule 26(b)(1), this appears to be more of a matter of semantics than anything that affects the actual analysis undertaken.[26]

Dealing with Proportionality Objections

What the above in mind, the next step is to consider how to handle proportionality objections. The first section below gives pointers on drafting discovery that does not draw proportionality objections. The ones that follow it discuss what do once a discovery motion has been filed.

Strive to draft proportional discovery requests.

The most proactive way to avoid discovery disputes is to draft discovery that does not draw objections. Given both the stakes of litigation and the approach that many parties have to discovery, this is an endeavor that will never have a 100% success rate. However, by keeping the above principles in mind as guideposts, drafting discovery that meets the proportionality standard can be a relatively straightforward exercise.

In going about this task, the most important thing to do is to contemplate what your case is about and what you are actually seeking, and why. For each request, consider, for instance, what facts it might prove, how easy it is for the other party to provide it to you, whether it is available elsewhere, and just how helpful it might be. If it is central to the case and easily producible, you should have little doubt that it meets the proportionality test. If you think, "Well, this information would be nice to have…" or "This is the set of discovery requests we used in a similar state court case in 2013…", you should probably drill down on the factors more to make sure you are not setting yourself up for a protective order showdown (*especially* if it is one that you are unlikely to win). This process is especially important in e-discovery, where which search terms, dates, etc. you select can add or subtract substantial sums of money from the total cost to the producing party.

You should also take the time to try to meaningfully confer with opposing counsel about these issues. If you can agree on the scope of the case and discovery on the front end, that can save everyone a lot of time and money down the line. Even if, as is likely, you cannot agree on everything, even winnowing down the list of areas of disagreement can be useful for making the case move more efficiently, reducing how many issues need to be tackled if and when discovery disputes do arise, and evinces to the judge that based on your previous willingness to be reasonable and perhaps compromise somewhat, they should be confident that you are not attempting to go on a fishing expedition.

Do not allow proportionality to have a chilling effect on how you conduct discovery. Rather, use it as a tool to help you consider your discovery strategy, ponder and sharpen your requests, and tee up the issues on which agreement is not reached for consideration.

Be mindful of where the burden of proof lies.

Though the Rule states that all parties are responsible for accounting for proportionality, as a practical matter, it gets its true test in the context of motions to compel and motions for protective orders (as well as objections made in the lead-up to such motions). Accordingly, as an initial matter, an attorney dealing with a proportionality objection should keep in mind which side has the burden of showing disproportionality. Though the structure of the rule might give the impression that the responding party has to show both relevance and proportionality, courts have been clear that a lack of proportionality is still an objection that must be carried by the responding party.[27]

Certainly the propounding party must give an indication of relevance and address the relevant proportionality factors, but a lack of proportionality must be affirmatively proven by the resisting party. If responding to such an objection, counsel should be sure that the ruling court has this concept front and center.

Be attentive to the Burden of Production.

The next question is what a resisting party must submit to show a lack of proportionality.

Vallejo v. Amgen, Inc.[28] is the leading Eighth Circuit case on proportionality. It provides useful guidance on a number of issues relating to this concept. Relevant here is the discussion of how a resisting party must support its contentions.

In *Vallejo,* the widow of a man who died of a disease she claimed her husband contracted as a result of his use of a drug manufactured by the defendant (Amgen) filed a product

liability suit seeking damages for his death. Unsurprisingly, the case was rife with discovery disputes. These clashes primarily revolved around which approval, testing, and reporting documents Amgen would disclose.[29]

One of several matters taken up on appeal was whether Amgen had submitted sufficient, competent evidence on proportionality.[30] Specifically, the court, in an opinion by Chief Judge Smith, framed the argument as follows: "Vallejo contends that the district court lacked a basis for weighing proportionality because Amgen failed to provide affidavits showing Vallejo's discovery requests were unduly burdensome."[31] The appellant argued that because Amgen had presented their claims of undue burden only through representations of counsel, there was insufficient evidentiary support for the district court's decision.[32] Amgen contended that this was enough due to Fed. R. Civ. P. 11, by which an attorney's signature on a brief "certifies to the court that 'the factual contentions have evidentiary support.' And, Amgen contends that it provided sufficiently detailed explanations to Vallejo's unduly burdensome discovery requests through its briefing to the court." *Id.* (citing Fed. R. Civ. P. 11(b)(3))."[33]

Though the court upheld the district court's order limiting discovery, it did not do so on the strength of defense counsel's certification. Indeed, the court explicitly commented that "certification that the facts have evidentiary support may not be helpful in the context of Rule 26(b)(1), where a party's burden must be quantified."[34] Rather, it held that the evidentiary record as a whole—namely, a plaintiff search term demonstration that went awry during a hearing and thereby showing that the search terms requested would have been quite onerous and the district court's "common sense" justified the limitations imposed.[35]

This holding is in line with the standard approach to proportionality objections, by which resisting parties must submit competent proof aside from attorney representations specifying the manner in which the party will be burdened.[36] Notably, the failure to support such an objection with the required evidence *can be* the basis of a court's decision not to provide any weight to a cited factor.[37] This burden is not necessarily a difficult one, and the evidence presented likely will not need to satisfy the Federal Rules of Evidence.[38] Indeed, the *Vallejo* decision makes clear that a district court has some flexibility in how it goes about its factfinding on this issue. But it also sets forth something of a floor on the issue.

Therefore, if arguing proportionality, check to be sure that the the bar is being cleared. If representing a propounding party, be ready to strike if all the opposing party submits is the word of their attorney. If representing a resisting party, well…do not be the attorney from the previous sentence.

Given the paucity of appellate decisions on proportionality, there are relatively few directives governing district courts outside the text of the Rule and committee notes. Therefore, counsel should be especially alert on this issue.

Know Your Case and Be Creative.

A six-factor test presents counsel with multiple potential proverbial buttons to push during a proportionality dispute. As this Article hopefully demonstrates, facts relevant to a proportionality analysis are diverse, and can include the actual claims and defenses of the parties,[39] the type of case being litigated, the parties' relative power and standing, and even the manner in which the parties have litigated the case.[40] To be able to make use of the opportunity this presents, counsel would be well-served to give some thought to the parties' legal claims and factual contentions and all potentially relevant attendant circumstances as part of the process of dealing with a proportionality objection.

One secondary source counsels, "As with many other legal balancing tests, the value of any particular factor will depend on the specific circumstances of the dispute and the outcome may be clear from only one or two."[41] Which factor or factors will carry the day are not truly known on the front end. Accordingly, having a solid grip on everything that has a reasonable chance of mattering to the court—What do you need? What's available publicly? What might the producing party need down the line anyway as it prepares its case? Are there potential public policy considerations?—is the best way to ensure your ability to make the right arguments. What might initially feel like a case in which you only have one factor on which to hang your hat could, upon reflection, have three or four worth vigorously arguing.

Relatedly, knowing who your judge is and which factors and circumstances might move them and which are unlikely to is also important. Tapping into your (and colleagues') knowledge and experience of their general approaches to different sorts of civil cases and claims and defenses and conducting research into their past discovery orders are all potentially useful exercises.

Don't Let Resisting Parties Rest on One Factor, and Don't Do so Yourself.

There are six proportionality factors. To the seeming disappointment of many a district court, parties often emphasize only the factors that militate in their favor.[42]

Though it is certainly possible that the court will decide for your client on the strength of the only factors you address, such an approach is risky, as it essentially leaves it up to the opposing party and court to define and determine the weight of the other factors. This is especially dangerous because, in almost all instances, the factors being ignored are one's weakest points. Though this impulse is understandable, doing so actually allows others to decide whether and to what extent the factors with the greatest potential to derail your argument matter. Moreover, the failure to fully address proportionality may, in and of itself, result in the loss of a discovery motion.[43]

Conversely, where the opposing party has decided that the only factor worth considering is the one that is in their favor, it is important to present as many factors supporting your argument as possible. Moreover, a litigant in this position should emphasize the manner in and extent to which the other party has failed to either give the court the information it needs[44] to rule and that such should not be held to satisfy an inquiry with six separate factors.

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In addition to potentially helping a party win the dispute at the district court level, such an approach can also be useful on appeal. As the *Vallejo* court noted, the Eighth Circuit provides district courts with wide latitude in discovery orders: "We review a district court's discovery rulings for abuse of discretion. Our review is both narrow and deferential, and relief will be granted on the basis of erroneous discovery rulings only where the errors amount to a gross abuse of discretion resulting in fundamental unfairness."[45] Given this standard of review, an appealing party will likely have a better chance of reversal with a record replete with well-preserved arguments. Accordingly, even if you can sense a judge leaning toward ruling for the other side, making sure to touch on every issue at the trial court level is the best way to give your client a chance for a win on appeal.

Conclusion

Almost 40 years after proportionality's initial introduction and 7 years into its re-emphasis, there is much to say on the topic. Engaging with the text of the Rule (including the extensive committee notes), case law, and the facts and attendant circumstances of your case provide your best opportunity to make these factors work for you and, as applicable, get the discovery you need or keep the opposing party from compelling you to produce discovery they do not.•

Endnotes

1 Though it is outside the scope of this article, numerous sources trace rather interesting development of the proportionality rule. *See, e.g.,* Elizabeth D. Laporte & Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26, 9 Fed. Cts. L. Rev. 19 (2015).

2 Chief Justice of the United States, 2015 Year-End Report on the Federal Judiciary 6 (2015).

3 *Vaigasi v. Solow Mgmt. Corp.,* No. 11CIV5088RMBHBP, 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016) (briefly discussing development of concept of proportionality and concluding that the new Rule represents a "reemphasis").

4 Because this is a publication of the plaintiffs' bar, more emphasis will generally be on how to defeat such objections.

5 *Merrimack Mut. Fire Ins. Co. v. Hodge,* No. 20-CV-00791 (VLB), 2021 WL 2037954, at *5 (D. Conn. May 21, 2021) (citing *Vaigasi,* 2016 WL 616386, at *14).

6 Laporte & Redgrave, *supra,* at 53.

7 *See, e.g., Emps. Ins. Co. of Wausau v. Daybreak Express, Inc.,* No. 2:16-CV-4269-JLL-SCM, 2017 WL 2443064, at *2 (D.N.J. June 5, 2017) (citing *Bell v. Reading Hosp.,* Civ. No. 13–5927, 2016 WL 162991, at *2 (E.D. Pa. Jan. 14, 2016)) ("Proportionality determinations are made on a case-by-case basis with the aforementioned factors, and 'no single factor is designed to outweigh the other factors in determining whether the discovery sought is proportional.'").

8 Given the overlap between these factors, they are discussed together.

9 Though this piece contains several quotations and other references to them, readers are strongly encouraged to review the Advisory Committee notes accompanying this amendment.

10 *See, e.g., Garber v. Nationwide Mut. Ins. Co.,* No. 5:21-CV-00546-HNJ, 2022 WL 1420916, at *11 (N.D. Ala. Mar. 24, 2022) ("While recovering the amounts he believes Nationwide owes him undoubtedly bears personal importance to Garber, the case does not present issues of civil rights, governmental action, public policy, or other vitally important personal or public values beyond the importance of contractual parties upholding their promises. . As such, the issues at stake warrant no more importance than any other breach of contract or bad faith case.) (cleaned up); *but see also Schultz v. Sentinel Ins. Co., Ltd,* No. 4:15-CV-04160-LLP, 2016 WL 3149686, at *7 (D.S.D. June 3, 2016) (framing the issue at stake in single-plaintiff bad faith case, as the fact that case could "affect [insurer defendant's] alleged business practices" and "remedy the situation for many insureds" and holding it weighs in favor of propounding party).

11 *Compare Lamaute v. Power,* 339 F.R.D. 29, 35 (D.D.C. 2021) *with Hightower v. Grp. 1 Auto., Inc,* No. CV 15-1284, 2016 WL 3430569, at *4 (E.D. La. June 22, 2016).

12 *Webb v. Korneman,* No. 18-6061-CV-W-HFS, 2020 WL 3097086, at *2 (W.D. Mo. June 11, 2020).

13 *Oxbow Carbon & Mins. LLC v. Union Pac. R.R. Co.,* 322 F.R.D. 1, 8 (D.D.C. 2017).

14 *See Bell v. Reading Hosp.,* No. CV 13-5927, 2016 WL 162991, at *3 (E.D. Pa. Jan. 14, 2016) ("It appears that the discovery conducted to date, as well as the discovery requests currently at issue, would certainly not exceed the amount of controversy in this matter.").

15 *See, e.g. Nat.-Immunogenics Corp. v. Newport Trial Grp.,* No. SACV152034JVSJCGX, 2019 WL 3110021, at *8 (C.D. Cal. Mar. 19, 2019) (determining, in proportionality analysis, that because potential punitive damages award would be allocated among defendants held liable instead of multiplied by the number of defendants, that case value considered in amount in controversy analysis would be substantially lower than that urged by plaintiff).

16 *See, e.g., Geoshack Canada Co. v. Hendriks,* No. 3:19-CV-00158, 2020 WL 12189059, at *3 (S.D. Ohio Nov. 24, 2020) ("Hendriks has no access to Plaintiffs' original-source data, while Plaintiffs enjoy sole possession of it. Without access to this data, Hendriks lacks sufficient information to accurately calculate for himself the correct net book value of shares."); *Lamaute, supra,* 339 F.R.D. at 36 ("Third, consideration of the parties' relative access to relevant materials weighs in favor of Lamaute. The Court finds that Lamaute lacks access to the vast majority of documents she requests, while the Agency has access. As such, the burden properly 'lies heavier on the party who has more information.' Fed. R. Civ. P. 26 advisory committee's notes to 2015 amendment; *see also Oxbow Carbon,* 322 F.R.D. at 8.").

17 *See Wagoner v. Lewis Gale Med. Ctr., LLC,* No. 7:15CV570, 2016 WL 3893135, at *4 (W.D. Va. July 14, 2016) ("Employment discovery presents particular challenges to the employees where most, and sometimes all, relevant discovery is in the control of the employer. Here, in light of the limited request, restricted by custodian, search terms, and time period, I find the request proportional to the needs of the case.").

18 *Id.* at *3 ("[I]t is difficult to conclude that the ESI sought is not proportional or 'not reasonable accessible' due to undue burden and expense because Lewis Gale apparently chose to use a system that did not automatically preserve e-mails for more than three days, and did not preserve e-mails in an readily searchable format, making it costly to produce relevant e-mails when faced with a lawsuit.") (citations omitted).

19 *See Consumer Fin. Prot. Bureau v. Navient Corp.,* No. 3:17-CV-101, 2018 WL 2088760, at *2 (M.D. Pa. May 4, 2018).

20 *See Labrier v. State Farm Fire & Cas. Co.,* 314 F.R.D. 637, 643 (W.D. Mo. 2016), *vacated on unrelated grounds sub nom. In re State Farm Fire & Cas. Co.,* 872 F.3d 567 (8th Cir. 2017) (requiring insurer to provide names of approximately 145,000 potential class members where, in addition to other factors suggesting proportionality, "[i]n terms of resources, LaBrier is an individual, while State Farm is a corporation with a national presence, with sophisticated access to data.").

21 Fed. R. Civ. P. 26 Advisory Committee Notes to 2015 Amendments.

22 For instance, in discussing this factor, one court began its discussion by reiterating a previous finding of relevance, stating that the recordings in dispute "appear to be of some importance in resolving the issues. Indeed, the court already found that RFP No. 89 seeks relevant information."

23 *See, e.g., Waskul v. Washtenaw Cnty. Cmty. Mental Health,* No. CV 16-10936, 2021 WL 5049154, at *5 (E.D. Mich. Oct. 31, 2021).

24 *See CCA Recordings 2255 Litig. v. United States,* No. 19-CV-2491-JAR, 2020 WL 4284222, at *6 (D. Kan. July 27, 2020) (noting objection on this basis but finding resolution unnecessary due to finding of proportionality under either amount).

25 *See, e.g., Wertz v. GEA Heat Exchangers Inc.,* No. 1:14-CV-1991, 2015 WL 8959408, at *3 (M.D. Pa. Dec. 16, 2015) (allowing two additional depositions over burden/expense objection); *Mir v. L-3 Commc'ns Integrated Sys., L.P.,* 319 F.R.D. 220, 232 (N.D. Tex. 2016) ("Finally, Mir has not shown that any burden or expense of the proposed discovery—which here involves simply signing the

Releases—outweighs its likely benefit.")

26 *See, e.g., Wall v. Reliance Standard Life Ins. Co.,* No. 20-CV-2075 (EGS/GMH), 2022 WL 1145158, at *3 (D.D.C. Apr. 19, 2022).

27 *See, e.g., Morris v. King,* No. 4:20-CV-04101, 2021 WL 6070535, at *2 (W.D. Ark. Dec. 22, 2021) ("The burden is generally on the party resisting discovery to show why discovery should be limited.") (citing *Cincinnati Ins. Co. v. Fine Home Managers, Inc.,* 2010 WL 2990118, at *1 (E.D. Mo. July 27, 2010)); *Murguia v. Childers,* No. 5:20-CV-05221, 2021 WL 5364197, at *3 (W.D. Ark. Nov. 17, 2021) (holding similarly); *Gilmore v. L.D. Drilling, Inc.,* No. 16-CV-2416-JAR-TJJ, 2017 WL 3116576, at *2 (D. Kan. July 21, 2017) ("Moving the proportionality provisions to Rule 26 does not place on the party seeking discovery the burden of addressing all proportionality considerations. If a discovery dispute arises that requires court intervention, the parties' responsibilities remain the same as under the pre-amendment Rule."); *Carter v. H2R Rest. Holdings, LLC,* 2017 WL 2439439, at *4 (N.D. Tex. June 6, 2017) (amendments "do not alter the basic allocation of the burden on the party resisting discovery"); *William Powell Co. v. Nat. Indemnity Co.*, 2017 WL 1326504, at *5 (S.D. Ohio Apr. 11, 2017)("the amended rule did not shift the burden of proving proportionality to the party seeking discovery").

28 903 F.3d 733 (8th Cir. 2018),

29 *Id.* at 738-41.

30 *Id.* at 743-44.

31 *Id.* at 743.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.* at 744.

36 *See, e.g., Murphy v. Setzer's World of Camping, Inc.,* No. 3:20-CV-00406, 2021 WL 2042732, at *1 (S.D.W. Va. May 21, 2021) (collecting cases) ("The law is clear that a party resisting discovery on the grounds of burdensomeness and oppression must do more to carry its burden than make conclusory and unsubstantiated allegations."); *Swann v. Coakley,* No. 219CV00199JPHMJD, 2020 WL 8705751, at *2 (S.D. Ind. Sept. 21, 2020) ("Defense counsel's argument that producing these documents would require the review of 'countless' documents is little more than a boilerplate objection. Furthermore, counsel has not supported his argument with affidavits or evidence establishing the burden of complying with Mr. Swann's discovery requests. Accordingly, the defendants have failed to meet their burden of resisting Mr. Swann's discovery requests, and the motion to compel is GRANTED with respect to these documents.")

37 S*ee, e.g., In re Syngenta AG MIR 162 Corn Litig.,* No. 15-9900-JWL, 2019 WL 5622318, at *3 (D. Kan. Oct. 31, 2019).

38 *See JP Morgan Chase Bank, N.A. v. DataTreasury Corp.,* 936 F.3d 251, 260 n. 6 (5th Cir. 2019) (declining to find error in district court's consideration of discovery costs set forth in emailed quote).

39 Indeed, this is where the inquiry generally starts. *See, e.g., Schwanke v. JB Med. Mgmt. Sols., Inc.,* No. 5:16-CV-597-OC-30PRL, 2017 WL 3034039, at *5-6 (M.D. Fla. July 18, 2017) (Any application of the proportionality factors "must start with the actual claims and defenses in the case, and a consideration of how and to what degree the requested discovery bears on those claims and defenses.")

40 *See Vay v. Huston,* No. CV 14-769, 2016 WL 1408116, at *6 (W.D. Pa. Apr. 11, 2016) (noting the rigor with which the defendant had approached the case weighed in favor of allowing extensive discovery by the plaintiff).

41 155 Am. Jur. Trials 413.

42 *See, e.g., Lakeview Pharmacy of Racine, Inc. v. Catamaran Corp.,* No. CV 3:15-290, 2019 WL 587296, at *1 n. 4 (M.D. Pa. Feb. 13, 2019) (chiding, in order on motion to compel, plainitff's counsel for "list[ing] the proportionality factors, but fail[ing] to substantively discuss each of the factors and how they weigh in favor of compelling discovery on the facts of this case" and defense counsel for spending 7 ½ pages on relevance but only 2 "pages summarily discussing the proportionality factors in relation to the instant action"); *Oxbow Carbon,* 322 F.R.D. at 7 (D.D.C. 2017) (resisting party failing to address all factors); *Skypoint Advisors, LLC. v. 3 Amigos Prods. LLC.,* No. 2:18-CV-356-JES-MRM, 2021 WL 4428893, at *5 (M.D. Fla. June 17, 2021) (overruling proportionality objection where party only discussed one

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Justice by State
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to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws."

West Virginia - Constitution, Art. III § 17 - "The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."•

Wyoming - Constitution, Art. 1 § 8 - "All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial, or delay."

As Sir William Blackstone said in his COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 2, p. 109:

> [I]t is a settled and invariable principle ... , that every right when withheld must have a remedy, and every injury its proper redress.•

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discovery issues costing more in time than they are worth – you will gain the reputation of being a hated plaintiff's attorney by the defense bar. THERE IS NO GREATER HONOR THAN BEING HATED BY THOSE WHO WANT TO PAY YOUR CLIENTS PENNIES ON THE DOLLAR.

In the next issue, we will discuss the nuts and bolts of the motion and how to file and how to seek sanctions so that they are granted. Following that, we will in the third installment take up, how to argue the motion so that you are successful in obtaining the relief sought, i.e. forcing the defense to answer the discovery and obtaining sanctions. In this last installment, we will discuss the actual argument of the motion to compel and how to pose it so that it is most likely that you get the discovery and you obtain sanctions. Finally, we will have an ATLA discovery seminar in the spring that will discuss this and many other items relating to discovery leading to success in your case whether it is by settlement or trial. Plan on coming, it will be worth the time and effort! At the seminar, we will provide copies of letters, motions and the plans for arguing Motions to Compel at the seminar to all attendees as well as a wealth of knowledge on the use of discovery for your next case.•

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factor in any depth and failed to support it with evidence); *Ackley v. Honeywell Int'l, Inc.,* No. 2:15-CV-01188, 2017 WL 2380628, at *3 (W.D. La. May 31, 2017) ("Although Ackley opposes Honeywell's motion to compel on the grounds of proportionality and sets forth the factors to consider when evaluating proportionality, his arguments actually re-address whether or not the information requested is relevant."); *N.U. v. Wal-Mart Stores, Inc.,* No. 15-4885-KHV, 2016 WL 3654759, at *7 (D. Kan. July 8, 2016) ("And while Wal-Mart cites to the amendments to Rule 26(b) and raises proportionality concerns, Wal-Mart fails to address a number of factors considered when addressing proportionality, among them: the importance of the issues at stake in this action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, or the importance of the discovery in resolving the issues.")

43 *See, e.g., Samsung Elecs. Am. Inc. v. Chung,* 325 F.R.D. 578, 595 (N.D. Tex. 2017) (noting, as a number of Texas district court cases do, that while the court and all parties are responsible for being cognizant of proportionality, "a failure to appropriately address Rule 26(b)(1) proportionality factors may be determinative in a proportionality analysis and result in the motion to compel being denied on its merits") (citation omitted).

44 In instances where the court issued a briefing order or other directive instructing the parties to discuss all the factors, emphasizing that the opposing party's submission failed to provide the court what it specifically asked for could also be worthwhile.

45 903 F.3d at 742 (cleaned up); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) ("The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery.").