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**BEFORE THE WISCONSIN ASSEMBLY
COMMITTEE ON THE JUDICIARY**

**ON BEHALF OF THE
AMERICAN TORT REFORM ASSOCIATION (ATRA)**

IN SUPPORT OF ASSEMBLY BILL 773

JANUARY 4, 2018

**TESTIMONY OF MARK BEHRENS
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Mr. Chairman and Members of the Subcommittee, I am testifying today on behalf of the American Tort Reform Association (ATRA) in support of Assembly Bill 773. ATRA is a broad-based coalition of businesses, municipalities, associations, and professional firms that promote fairness, balance, and predictability in civil litigation. ATRA supports the package of reforms in Assembly Bill 773. ATRA's members are particularly supportive of the class action and discovery improvements that are the focus of my testimony.

Class Action Reform

We applaud the Wisconsin Supreme Court's December 2017 order replacing Wisconsin's previous one-sentence class action statute, Wis. Stat. 803.08, with language that generally aligns the state's class action procedures with Rule 23 of the Federal Rules of Civil Procedure. Assembly Bill 773 improves upon the state's new approach in three key ways: the bills addresses overly broad, "no-injury" class actions, adds an explicit ascertainability requirement, and provides for interlocutory appeal of class certification decisions.

No-Injury Class Actions

Overly broad, "no-injury" class actions are cases in which a named plaintiff with a concrete injury brings a lawsuit seeking to represent a class that includes countless others that have suffered no genuine injury at all. The cases often involve a product that has malfunctioned for the named plaintiff and that has the potential to malfunction for others, but has not actually caused any problems for most of the class members. "No-injury" class actions can also arise in privacy/data breach and labeling/advertising cases, among others.

Plaintiffs' theory in these cases is that the named plaintiff and the class members share a common "injury"—e.g., alleged overpayment of the product they purchased. In reality, these

cases involve a named plaintiff whose claim is highly *atypical* of the class because the named plaintiff has suffered an *actual* harm while the class members merely have a *speculative* economic harm. Unlike the named plaintiff, whose product has malfunctioned, the class members' products may never malfunction.

“No-injury” class actions are unfair to class members that *have* an actual harm because they may have to sacrifice valid claims in order to preserve the lesser claims that everyone in the class can assert. This may lead to under-compensation for consumers who have suffered an actual harm. The actions are unfair to defendants because of the settlement pressure imposed by an artificially enlarged class.

Many of these types of cases are not successful. When they do produce a settlement, there is usually little interest among class members in participating. As one commentator has explained:

Billed as “consumer protection” measures, these cases allege causes of action under the auspices of both product liability and consumer fraud. However, these so-called “no-injury” actions are very often nothing more than an attempt by creative plaintiffs’ lawyers to cash in on the class action concept—the plaintiffs themselves, if successful, would each be entitled to a relatively minimal amount of money, while their attorneys would collect millions upon millions of dollars in fees.

“No-injury” class actions create enormous costs on companies, even in the vast majority of cases that are resolved with no settlement or just tiny payments to class members. The legal fees can be enormous. Ultimately, consumers bear these costs.

There is public support to address overly broad no-injury class actions. A 2015 DRI – *The Voice of the Defense Bar* National Poll on the Civil Justice System found that 78% of Americans would support a law requiring a person that joins a class action to show actual harm rather than just the potential for harm.

Assembly Bill 773 modestly amends the current Rule 23 approach by requiring that the “claims or defenses and type and scope of injury of the representative parties are typical of the claims or defenses and type and scope of injury of the class.”

Ascertainability

Courts recognize that an appropriate definition of the class is fundamental to class certification, so it makes sense to address and delineate this universally recognized implicit requirement. Assembly Bill 773 requires that class members must be “objectively verifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden.”

Interlocutory Appeal of Class Certification Orders

Presently under the Rule 23 approach, appellate courts have discretion to grant appeals of trial court decisions certifying or denying certification of a class action. Assembly Bill 773 provides plaintiff and defendants with a right to appellate review of such important decisions.

The right to appellate review provided in the legislation is important because when a class is certified, defendants often have little practical choice but to settle. As Judge Posner of the Seventh Circuit Court of Appeals observed, certification of a class action forces defendants “to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.” “[Defendants] may not wish to roll these dice,” he said. “They will be under intense pressure to settle.” Judge Posner called the resulting settlements “blackmail settlements.” Some have called them “legalized blackmail.”

By enacting this provision, Wisconsin would join other states that specifically allow interlocutory appeals of class certification decisions as a matter of right to the parties.

Discovery Reform

Civil litigation is widely perceived to take too long and cost too much. Much of this time and expense relates to pretrial discovery. All too often the discovery process is subject to abuse, marked by “fishing expeditions” by plaintiffs and use of the tools of discovery to harass and pressure defendants into settlements.

In December 2015, a number of amendments to the Federal Rules of Civil Procedure took effect to address some of these concerns. The overarching goal of these amendments—the product of years of discussion and debate—was to improve early case management and the scope of discovery in civil litigation. Important changes were made regarding obligations for preserving evidence, proportionality of discovery, and standards for imposing sanctions, among other areas. At the end of my testimony you will find summaries of some of the many comments submitted by employers to demonstrate the need for discovery reform.

Assembly Bill 773 will help align Wisconsin’s state court discovery with the current federal court approach. The bill also incorporates recommendations from respected organizations such as Lawyers for Civil Justice (LCJ), DRI – *The Voice of the Defense Bar*, Federation of Defense & Corporate Counsel, and International Association of Defense Counsel.

ATRA appreciates that discovery is a two-way street. Businesses may find themselves as plaintiffs in business-versus-business cases. Business plaintiffs need access to information to prosecute their claims. Further, defendants in all cases need access to information to determine the validity of a claim and mount a defense.

ATRA supports the discovery provisions in Assembly Bill 773 because they are fair and balanced. The bill will allow parties access to the information they need to bring or defend a case while addressing the worst abuses that unjustifiably drive up the costs of litigation.

Cooperation

Like federal Rule 1, Assembly Bill 773 makes clear that courts and parties have an obligation to secure the just, speedy, and inexpensive determination of every action.

Cost-Benefit and Proportionality Requirements

Early settlement demands often reference the high cost of discovery as a basis to encourage settlement. Defendants may be compelled to settle, regardless of the merits of a case, simply to avoid spending thousands or even millions of dollars in discovery costs.

The bill establishes cost-benefit and proportionality requirements for civil discovery modeled after federal Rule 26(b)(1). Assembly Bill 773 allows a court to limit discovery if “the burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue considering the needs of the case, the amount in controversy, the parties’ resources, the complexity and importance of the issues at stake in the action, and the importance of discovery in resolving the issues.”

This cost-benefit and proportionality requirements prevent litigants from abusing the discovery process to leverage a higher potential settlement or engage in a “fishing expedition.”

Cost Allocation

Consistent with federal Rule 26(c), the bill provides that a court may allocate expenses to the requesting party, such as when disproportionate discovery is sought. This provision encourages parties to be reasonable in their requests. The provision also discourages the use of discovery as a weapon to try to force settlements that are not based on the merits of the case.

Stay of Discovery Pending Certain Motions

Assembly Bill 773 provides that upon the filing of a motion to dismiss, a motion for judgment on the pleadings, or a motion for more definite statement, discovery and other proceedings will be put on hold until the motion is decided unless the court finds good cause for

allowing particularized discovery. This common sense provision prevents a defendant from having to respond to discovery when a motion is pending that may make the case go away.

Third Party Agreements

The bill requires disclosure of any agreement under which a third party has a right to receive compensation that is contingent on and sourced from the proceeds of a civil action. This information is important for a number of reasons. For instance, if the third party is a consumer lawsuit lender, disclosure of the agreement will help ensure that consumer protections found elsewhere in Assembly Bill 773 are satisfied. If the third party is providing funds to a contingency fee plaintiffs' law firm, disclosure of the fee agreement will help ensure that the common law doctrine of champerty has not been violated and that ethical obligations are met, such as the need for the lawyer to exercise independent judgment and put the client's interests first. Further, such disclosure can help courts identify and avoid potential conflicts, and facilitate settlements by identifying parties not at the settlement table that have a stake in the case.

ESI

The escalating volume of electronically stored information (ESI), such as e-mails, is one of the most significant drivers of high discovery costs. Assembly Bill 773 contains clear standards for the preservation and production of ESI.

Under the bill, a party is not required to preserve certain categories of ESI absent a showing by the requesting party of a substantial need for discovery of the ESI requested. These categories are limited to situations where a preservation obligation would be unreasonable: data that cannot be retrieved without substantial additional programming or without transforming it into another form before search and retrieval can be achieved; backup data that are substantially duplicative of data that are more accessible elsewhere; legacy data on obsolete systems; and

other data that are not available to the producing party in the ordinary course of business. There is also no requirement to produce such data absent a showing of substantial need and good cause.

Limits on Frequency and Time

Assembly Bill 773 provides that, unless otherwise stipulated or ordered by the court, parties are limited to 25 interrogatories, 10 depositions—none of which may exceed 7 hours in duration (important for very sick plaintiffs and other witnesses)—and a reasonable look-back of 5 years from the time the cause of action accrued.

* * *

Thank you again for the opportunity to testify before the Committee.

**BROAD AND DIVERSE CORPORATE SUPPORT
EXISTS FOR CIVIL DISCOVERY REFORM**

In support of amendments to the Federal Rules of Civil Procedure that went into effect in December 2015, many corporations told the Federal Civil Rules Advisory Committee about the need for civil discovery reform. Below are statements by some of the companies supporting reforms of the type now being considered in Wisconsin.

Google Inc.

“In an age where email and word processing documents create huge volumes of data, discovery for even a single lawsuit often costs millions of dollars.”

“Google preserves hundreds of terabytes of data, yet only a tiny fraction is actually produced in litigation or used at trial.”

General Electric Company

“[O]ur experience under the current discovery rules has been one of waste and needless burden and costs. . . . [In one case,] GE produced approximately 340,000 unique documents (in pages, more than 6 million) to plaintiffs. . . . At trial, a total of 194 documents were marked as exhibits by both sides. Thus, less than 0.1% of the documents produced (and a far, far smaller percentage of the documents preserved or collected) were actually used at trial.”

“We recently saw the same pattern in an intellectual property dispute that culminated in a \$170 million judgment for GE in federal court in Dallas. For that case (and directly related litigation against the same party), GE collected and preserved 2.4 terabytes of data or roughly 180,000,000 pages. To provide a tangible comparison, that is about 72,000 banker’s boxes of documents. We produced only 7% of that in discovery. The total volume of exhibits eventually admitted in evidence fit into two binders, a total of 165 documents.”

Johnson & Johnson

“In one representative set of cases, J&J companies had to collect documents from 350 custodians. Under the current discovery practice, J&J collected over 56 *million* documents amounting to 625 *million* pages. Even after application of extensive key word filtering and de-duplication, third party vendors reviewed over 13 *million* documents amounting to over 148 *million* pages. After this massive discovery effort, in two resulting trials, the parties entered into evidence a grand total of less than 200 documents in each trial.”

“In another representative set of cases, J&J companies collected documents from 370 custodians amounting to 194 *million* pages of electronically stored information that J&J had to pay to de-duplicate and filter prior to review of over 22 *million* pages of documents. At trial, the parties submitted only 410 documents into evidence.”

Hallmark Cards, Inc.

“In one recent case, in response to our opponent’s third set of document requests, and utilizing the efforts of nearly 85 people, Hallmark produced more than a million pages of electronic documents – and only one was utilized at the subsequent jury trial.”

Pfizer Inc.

“Over the years, Pfizer has been subjected to tens of thousands of discovery requests. Responding to these requests under the current rules has required Pfizer to preserve and collect staggering amounts of data far out of proportion to the volume of data actually produced and, even more telling, the number of documents ultimately used at trial. Pfizer’s experience with a recent products liability litigation is illustrative. In that matter, for eight years, Pfizer preserved an extraordinary 1.2 million back-up tapes, each of which holds up to 100 gigabytes of data. Preservation of these tapes cost Pfizer nearly \$40 million, yet Pfizer never had to retrieve a single document from the tapes. Rather, Pfizer collected millions and millions of documents from more than 170 custodians and over 75 centralized systems (e.g., databases housing regulatory documents). Ultimately, approximately 2.5 million documents (representing more than 25 million pages) were produced to plaintiffs, but only about 400 company documents were marked at trial. Thus, for every one document used at trial, approximately 625,000 additional documents were produced.”

Anadarko Petroleum Corporation

“Much money, time and effort is spent in litigation today on discovery gamesmanship and cost shifting efforts due in large part to threats of discovery sanctions encouraged by the currently worded Rules.”

“In many cases, corporate parties . . . over-preserve at exorbitant expense in order to avoid tactical threats of spoliation sanctions. At present, 16% of our electronic data and 60% of our corporate e-mail are subject to a Legal Hold.”

Microsoft

Results of Microsoft case study:

- “Microsoft placed an average of 45 custodians under a litigation hold per matter in 2013, and preserved – as a result – approximately 59,285,000 pages of material per matter.
- As Microsoft moves through a case, we narrow the group of custodians for collection and processing. At this stage Microsoft collects from an average of 8 custodians, and processes, on average, 241 GB, or 10,544,000 pages of data.
- After applying a range of technological tools to filter that data, Microsoft ends up with about 8 GB, per case, or about 350,000 pages that need to be manually reviewed by attorneys for privilege and responsiveness.
- That process further narrows the set to about 2 GB, or 87,500 pages that Microsoft produces in the average case.
- Of that, only about 1 in 1000 pages are ever actually admitted as exhibits in trial. In the average case, therefore, only about 88 pages of material are actually used.”

“[F]or every single page that is actually used as evidence in litigation, Microsoft produces about 1000 pages, manually reviews about 4000 pages, collects and processes about 120,000 pages (both physically and through the use of technology), and preserves 673,693 pages. . . .”

“Put simply, discovery is too broad. The entire process has taken on a life of its own, and it has made litigation enormously costly. About 30% to 50% of Microsoft’s out-of-pocket litigation costs (depending on the type of case and the time it takes to resolve) are attributable to this discovery process. In the last decade, Microsoft paid about \$600 million in fees to outside counsel and vendors, just to manage this process. And that figure captures only some of the costs.

- It does not include Microsoft’s investment in in-house technology and personnel. . . .
- It does not take into account the costs of database management, and in particular the management of data that from time to time must be extracted from legacy systems that are not currently used for business purposes.
- It does not address all of the employee time spent managing the discovery process, and the lost productivity of the thousands of employees that must take time away from their productive tasks to comply with preservation and discovery obligations.
- Most fundamentally, it does not address how the costs of preservation and discovery impact the calculus involved in whether to litigate to reach a result on the merits or to settle. . . . There have been occasions on which we have settled a case to avoid incurring disproportionate expense, although we sometimes choose to continue litigating even though a strict cost-benefit analysis might militate in favor of settling.”

Verizon Communications Inc.

“The mounting costs of the preservation, review, and production of electronically stored information do not solely affect large scale litigation; in fact, it may have an even greater impact on small to medium size cases. In such cases, the potential discovery costs often approach or exceed the amount at issue. Such discovery costs are often one-sided: while Verizon may incur large expenses to preserve and produce information from a large number of employees or systems, the opposing party may not have much if any relevant information to collect or produce. This results in an incentive for that party to use disproportionate discovery as leverage to increase the costs associated with litigating the case for one party in order to secure a favorable settlement.”

Altec Industries

Altec reported spending twice as much on discovery as it did to pay claims in 2012.

Ford Motor Company

“In *Stokes v. Ford Motor Co.*, [No. 05-1236 (Mont. 13th Jud. Dist. Ct. 2011)] the plaintiff sued Ford in a products liability action relating to a fatality arising from a single-vehicle crash. The plaintiff propounded requests for discovery seeking litigation materials from other personal injury cases, including cases involving other vehicle models. Ford responded with uncontroverted evidence demonstrating that these other vehicle models had entirely distinct designs and *did not share any of the components at issue*. [T]he court . . . ordered Ford to produce the requested material.”

“Compliance with the court’s order imposed an enormous burden. Ford identified more than 1,300 lawsuits and 1,200 witness transcripts meeting the parameters specified in the

requests. The vast majority of these 1,300 cases had been closed years earlier, and most of the specific documents covered by the court's order were maintained only within the archived or off-site files of the outside counsel who had represented Ford. Culling through these 1,300 other cases—by hand on a document-by-document basis to identify responsive items, separate out materials not requested, and log and remove privileged documents from this enormous number of cases—required the work of 60 law firms and numerous individuals from Ford's in-house legal team. Ford estimated that complying with the court's discovery order would consume more than 800 hours from Ford's legal staff and cost \$2 million in outside counsel legal fees."

"All told, Ford produced to the *Stokes* plaintiff nine computer hard drives containing more than 360 GB of documents and 1,200 witness transcripts. . . . The true purpose of the *Stokes* plaintiff's discovery requests was to drive settlement value that was not warranted by the case facts."

"[T]he evidence actually presented at trial demonstrated just how insignificant the onerous discovery was to the plaintiff's case: he attempted to introduce exactly *one* document drawn from the court-ordered other lawsuit production and he initially offered only *six* transcripts. After the court ruled on admissibility from the "other lawsuit" production, *none* of the testimony transcripts were actually presented to the jury and *none* of the documents gleaned from the court-ordered production were admitted into evidence. Thus, the court's order . . . resulted in the utter waste of hundreds of hours of internal legal staff time and millions of dollars. The interests of justice were not served at all."

"Ultimately Ford won the battle with a 12-0 defense jury verdict, but lost the war in the sense that Ford cannot recover the wasted expenditures required by the sweeping court order...."

Farmers Insurance Exchange

"The single largest factor contributing to the unusually high cost of litigation in the United States is discovery. Yet, in large cases, very few documents obtained in discovery impact the lawsuit. A survey on the topic found that when cases of at least moderate size (with defense costs exceeding \$250,000) go to trial, on average just 0.1% of the pages produced in discovery are even offered as trial exhibits."

The Hartford Financial Services Group, Inc.

"The preservation and production of stored information that is either irrelevant or, at best, tangentially related to the just resolution of litigated disputes pose enormous financial burdens. The Hartford alone spends millions of dollars every year preserving and producing documents that never find their way into a courtroom and play no part in the ultimate outcome of any lawsuit. These substantial costs skew heavily against corporate defendants and are borne ultimately by customers and clients of those defendants."

Services Group of America

In 2014, Services Group of America reported spending \$1 million on discovery in cases where legal costs exceeded the amount in controversy and no findings were made against the company.

QVC, Inc.

“QVC is forced to preserve far more material than could ever be used at trial or produced in discovery. QVC currently has over 600 email custodians on legal hold, and only a small fraction of this vast amount of information will ever be reviewed, let alone produced in discovery or offered at trial.”

Hewlett-Packard Company

“HP, like other companies, incurs enormous costs in reviewing and producing materials, particularly electronically stored information, in response to broad discovery requests.”

Avnet, Inc.

“In many cases, companies, often because of plaintiffs’ tactical leveraging of the federal rules’ overbroad standards, are forced to spend more on discovery expenses, mostly e-discovery, than their possible exposure in the litigation. For example, in one of our lawsuits Avnet produced the equivalent of more than 1.3 million pages of information in e-discovery, only to be served with additional discovery demands and a motion to compel *despite the fact that the plaintiff had already been provided significant portions of the information it demanded.*”

BP America Inc.

“[T]he costs of preserving, collecting, reviewing, and producing documents and information, and especially electronically stored information, is by far the most significant, and rapidly increasing, expense in civil litigation.”

* * *

“Our experience has been that even seemingly modest-sized civil disputes routinely require collection and review of tens or hundreds of thousands of electronic documents and communications under the current rules. More complex disputes require processing volumes many times that, often including millions of documents measured in multiple gigabytes or terabytes of electronic data. A common rule of thumb is that a gigabyte of data equates to 70,000 pages. Even when technology assisted review is employed, many hundreds or thousands of hours of attorney review time is required for reviewing data and creating privilege logs. Technology assisted review does not result in significant cost savings that make up for the ever-increasing volume of data subject to discovery. Yet for all these efforts and expenses, the number of exhibits used in litigation is a small fraction of the universe of documents and data subject to preservation, collection, review, and production.”

Mack Trucks, Inc.

“[L]itigation today is inefficient, too expensive, and fraught with too many uncertainties that have little or nothing to do with the merits of particular cases. This stems, in large part, from costly and inconsistent obligations to preserve, process and produce vast amounts of data for discovery, even though much of that data has no real relevance to the issues in dispute and, in many cases, the data is never used at trial. . . . [P]arties are driven to simply settle claims or defenses based on the disproportionately high cost of retrieval and production of electronically stored information, rather than on the merits of the litigation.”

Bayer

Bayer reportedly produced 2.1 million pages of documents in a case that went to trial for eight weeks, and only 0.04 percent of that information was used at trial.

State Farm

“In a recent wage and hour collective and class action, plaintiffs requested that State Farm search the email of its managers for emails regarding employees’ right to opt-in to the collective action. The request was prompted by the low percentage of employees who elected to opt-in to the collective action. State Farm’s objections were overruled and the mailboxes of approximately 4,700 management employees were searched. More than 23,000,000 *potentially relevant files* consisting of more than 550 gigabytes of information (the equivalent of 40 million pages) were identified. State Farm hired an outside vendor who used predictive coding to conduct the search and the search yielded approximately 500 emails that met the Court’s criteria. These emails did not substantiate the plaintiffs’ suspicions that State Farm improperly communicated with its employees and none of the emails was ever used in a subsequent hearing or briefing.”

Vodafone US Inc.

“The preferred tactic of the plaintiffs’ bar is to burden corporate defendants with massive discovery requests that force the corporate defendant to ignore the merits of the case and instead weigh the costs of settlement against the costs of production.”

GlaxoSmithKline

“The overly broad scope of discovery . . . creates an overwhelming preservation and production burden for corporate litigants while providing little evidentiary benefit to any party at trial. Fortune 200 companies surveyed reported that in 2008, an average of 1,000 pages was produced in discovery in major cases for every one page used at trial, or one-tenth of 1 percent. GSK’s own experience is similar. For example, in one federal multidistrict product litigation that settled shortly before trial in 2011, GSK produced 1.2 million documents, yet plaintiffs included only 646 GSK documents on their exhibit list – less than five-hundredths of 1% of the production.”

* * *

“More than 45% of GSK's U.S. employees are subject to at least one preservation notice, as compared with 12.4% of our employees outside the United States. As just one example of the amounts of data at issue, GSK has preserved 57.6% of its company email. It amounts to 203 terabytes of information – roughly equating to 20 sets of the entire print collection at the Library of Congress. The amount of material we collected to respond to specific requests in litigation increased 316% from 2010 (2.86 terabytes) to 2012 (9.03 terabytes). Hosting, processing, collecting, and reviewing this amount of material are not without significant cost.”

Boston Scientific

Boston Scientific reported in 2014 that one-half of its employees were subject to litigation holds, and that preservation had cost the company \$35 million since 2005, and \$5 million in 2013 alone.

Polaris Industries Inc.

“Like most large manufacturing companies, Polaris has been involved in a wide variety of commercial, consumer, products liability, patent, and other cases. In many of those, Polaris was forced to spend significant financial and personnel resources to gather, review, and produce tens of thousands of documents that had no bearing on the outcome of the case. Plaintiff’s attorneys routinely use the burdens of discovery as a means to drive settlement based on nuisance value rather than the merits of the case.”

Sanofi US

“The cost Sanofi faces when made to produce or place electronically-stored information on legal hold, is substantial. These costs are fixed and do not vary with the merits of a given case. In the past five years alone, Sanofi US has produced an estimated 47,095,853 pages of documents in various litigations. The processing, hosting, and production of these pages bore its own cost, an estimated \$20,451,633, which was merely an initial fraction of the total expense Sanofi shouldered. This fraction represented only the base cost – before any lawyer reviewed a single document.”

“Opposing counsel are well-aware of these costs and therefore often employ the strategy of leveraging the high cost of responding to their discovery requests against the value of the case. Indeed, the business distraction and sheer expense associated with excessive discovery all too often drive the outcome of disputes. It is only once Sanofi makes the conscious decision to endure the extortive price tag of currently sanctioned e-discovery practices, that we might hope to eventually defend ourselves in court.”

“The following illustrates an example of how disproportionate and irrelevant discovery practices are currently being exploited in our system:

In an active antitrust litigation . . . Sanofi US has produced more than 12 million pages of documents from more than 110 custodians, more than 8.75 million of which were from the custodial files of 75 sales representatives. Sanofi US employees spent over 4,200 hours working to identify, collect, and facilitate production of documents in response to discovery requests from plaintiff, and Sanofi US’s counsel has spent over 86,000 hours reviewing and producing these documents. The cost to Sanofi US for these discovery efforts exceeded \$10 million.”

Nationwide Mutual Insurance Company

“[T]he costs and burdens of preservation and discovery on Nationwide have continued to grow over time. For example, in a recent case filed against Nationwide, Nationwide was required to search over 11 terabytes of data (approximately 110 million documents). From this search, Nationwide collected approximately 290,000 documents and produced approximately 224,000 documents (approximately 6.4 million pages). Although this case has yet to go to trial, this is but one of the thousands of matters in which Nationwide is involved every year.”

ExxonMobil

ExxonMobil reported in 2013 that it had 5,200 employees subject to litigation holds and estimated that the navigation of those holds required an average of 10 minutes per day per employee, for a total of 867 hour a day or 327,000 hours a year in lost productivity.

CSXT Transportation, Inc.

“*CSX Transportation, Inc. v. Robert N. Peirce, Jr., et al.*, (5:05-cv-202)(N.D.W.V.) is a case ‘aris[ing] from the successful efforts of the defendants to deliberately fabricate and prosecute objectively unreasonable, false and fraudulent asbestosis claims against CSX’. . . . During discovery, the defense adopted a strategy of seeking broad and wide sweeping categories of information that resulted in a CSX discovery spend of *more than \$3.5 million* in attorney fees and expenses. . . .”

“Among other things, CSX collected files from more than 30 law firms scattered across the United States. The volume of those files was enormous—over 75,000 electronic documents and 1,900 boxes of hard copy documents—and the ensuing privilege review was a massive undertaking that resulted in a log containing over 150,000 individual entries. Due to the sheer volume of documents collected, CSX was forced to lease space in three separate locations—at a cost of \$11,000 per month—to house the hard copy documents for privilege review and the defendants’ subsequent inspection and copying. CSX also made 300,000 electronic documents available for copying and inspection via an electronic database hosted by a third party vendor.”

“Having inflicted a substantial burden in money and resources on CSX, the defense made little effort to review the documents made available. For example, they waited over three months before sending just two individuals to review the 900 hard copy boxes at one of the locations. Those two individuals completed the task in just four days and selected only 631 documents for production. Overall, the defendants requested copies of just 4,600 documents from the 1,900 hard copy boxes (i.e., over 3.5 million pages) CSX made available and none of the 300,000 electronic documents.”

“At trial, from the full universe of documents CSX made available in that massive and costly production, the defense offered but a single exhibit. That exhibit was excluded by the court as irrelevant.”

Medtronic, Inc.

“Currently, the costs and burdens of discovery – particularly e-discovery – are far too high.”

Vulcan Materials Company

“I have seen countless cases where the time and cost of discovery was hugely disproportionate to the claims made by the plaintiff. All too often, however, we are forced to settle what we believe are non-meritorious, if not downright frivolous, lawsuits due to the costs and burden of responding to discovery. We encounter plaintiffs lawyers whose strategy is to make the discovery process so time-consuming, burdensome, and costly that we cannot take cases all the way through trial, much as we would like to.”

Eli Lilly and Company

“Companies are pressured by the explosion of data that, under the current rules, has to be preserved, sifted through and produced. To make matters worse, lawyers in mass tort and patent cases have learned to leverage these costs, often by seeking overly broad discovery that can cost companies millions of dollars to produce. The result is a system that consistently creates unbalanced and unreasonable discovery costs for civil defendants, abusive litigation tactics, and the resolution of cases based on costs rather than merits.”

* * *

“Lilly spends tens of millions of dollars to over-preserve vast amounts of information, only a tiny fraction of which will ever be used in determining a case on the merits. Indeed, Lilly has spent tens of millions just to preserve e-mail messages in the past six years. Also, at any given time, more than 10,000 U.S. employees are under multiple litigation holds. These holds impose significant costs, resulting in thousands of employee working hours spent each year on the preservation of documents and information.”

* * *

“In a recent product liability case, Lilly reviewed more than 20 million pages of documents and produced 4.2 million pages, of which about 200 documents were admitted at trial. Similarly, in a recent patent lawsuit, Lilly reviewed 9.5 million pages of documents and produced 1.3 million pages. At trial, about 450 documents were admitted. In another patent lawsuit, Lilly reviewed more than 6 million pages of documents and produced more than 1.2 million pages with fewer than 140 documents being admitted at trial. Overall, Lilly has spent more than \$50 million in the past three years processing, reviewing, and producing documents.”

* * *

In 2010, Lawyers for Civil Justice, Civil Justice Reform Group, and U.S. Chamber Institute for Legal Reform conducted a joint “Litigation Cost Survey of Major Companies.” Almost twenty percent of the Fortune 200 companies responded to all or a portion of the survey. The survey’s key findings with respect to civil discovery costs were:

“Litigation costs continue to rise and are consuming an increasing percentage of corporate revenue.”

- “The average outside litigation cost per respondent was nearly \$115 million in 2008, up 73 percent from \$66 million in 2000. This represents an average increase of 9 percent each year.”
- “For the 20 companies providing data on this issue for the full survey period, average outside litigation costs were \$140 million in 2008, an increase of 112 percent from \$66 million in 2000.”
- “Between 2000 and 2008, average annual litigation costs as a percent of revenues increased 78 percent for the 14 companies providing data on average litigation costs as a percent of revenues for the full survey period.”
- “Increases in hourly rates do not appear to be driving the increase in litigation costs, as the available data show relatively little change in outside legal fees over time.”

“Inefficient and expensive discovery does not aid the fact finder. The ratio of pages discovered to pages entered as exhibits is as high as 1000/1. In 2008, on average, 4,980,441 pages of documents were produced in discovery in major cases that went to trial – but only 4,772 exhibit pages actually were marked.”

“Whatever marginal utility may exist in undertaking such broad discovery pales in light of the costs. While only some of the survey respondents were able to provide data on a per case basis, for the period 2006-2008, the average company paid average discovery costs per case of \$621,880 to \$2,993,567. Companies at the high end during the same time periods reported average per-case discovery costs ranging from \$2,354,868 to \$9,759,900.”