A SQUARE PEG IN A ROUND HOLE?
THE 2000 LIMITATION ON THE SCOPE OF
FEDERAL CIVIL DISCOVERY

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I. INTRODUCTION

On December 1, 2000, an amendment to Federal Rule of Civil Procedure 26(b)(1) took effect, narrowing somewhat the scope of discovery in federal civil cases. At least since the revision of the discovery rules in 1970, the scope of permissible discovery had extended to "any matter, not privileged, which is relevant to the subject matter involved in the pending action," subject of course to many further specific rules and considerable trial-court control to restrain excessive or abusive discovery. Under the 2000 amendment to Rule 26(b)(1), the default definition of the scope of discovery is narrowed to "any matter, not privileged, that is relevant to the claim or defense of any party." However, "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." These changes are part of a larger package of amendments to the rules governing discovery and disclosure in federal civil litigation, all of which took effect December 1, 2000. The package as a whole has been ably discussed by the Special Reporter to the Advisory Committee on Civil Rules who was

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Most courts held, however, that the definition of scope also was applicable to interrogatories under Rule 33 and to production under Rule 34, and those rules were amended in 1948 to codify this result. The 1970 amendments made Rule 26 a general rule on discovery and what is now Rule 26(b)(1) was altered so that it speaks in a more appropriate fashion to the permissible scope of discovery under all of the devices for discovery.


2. FED. R. CIV. P. 26(b)(1).

3. Id.
responsible for drafting the discovery/disclosure amendments, Professor Richard Marcus, and I will not attempt such a survey here. Nor will I attempt to re-fight—at least not at length—the battle that, as an opponent of the scope amendment, I lost. Instead, I will make observations on the aims and workings of the scope change and on some of the issues that may arise in its implementation, and discuss significant cases among the reported decisions so far under the revised scope definition. I hope that these comments may also be of use to practitioners and courts as they work with the new definition.

In brief, I fear that the amendment may lead to little positive change by way of curbing cost and excess in federal discovery, while increasing purely procedural contention over the multiple and vague terms in the revised rule. These fears are partly because I see the amendment, seemingly aimed at making discovery more targeted, as fitting uneasily within the general federal regime of liberal notice pleading and still-broad discovery. If we had a system of more specific fact pleading and more limited pretrial discovery and disclosure, such as exists in some foreign systems and as is proposed in the ALI/UNIDROIT project on Principles and Rules of Transnational Civil Procedure, perhaps the 2000 scope redefinition would be a good fit. My doubts that it will make much difference or fit particularly well within the system that we do have inspired the title for this Article.

II. Why Now, and Why Change at All?

The federal discovery rules have been amended enough times over the


5. For detailed reference on the amendments, readers may wish to consult two articles written or co-authored by Professor Jeffrey Stempel. Jeffrey W. Stempel, Politics and Sociology in Federal Civil Rulemaking: Errors of Scope, 52 ALA. L. REV. 529 (2001) (giving historical background on the scope of discovery and proposals for its narrowing; critiquing the case for limiting scope and discussing likely impacts of the change; and considering the alignment of forces for and against the amendment); Jeffrey W. Stempel & David F. Herr, Applying Amended Rule 26(B)(1) in Litigation: The New Scope of Discovery, 199 F.R.D. 396 (2001) (providing history on the discovery-scope debate and suggesting approaches to applying the “claim or defense” and “good cause” terms in the amended rule).

previous three decades\textsuperscript{7} to make it fair for one to ask: why yet another round of changes? One significant reason why these amendments came forth when they did had nothing to do with the scope change. The Civil Justice Reform Act of 1990 (CJRA)\textsuperscript{8} provided impetus for the local-option disclosure amendments to the Federal Rules that took effect in 1993 and that were never regarded as permanent\textsuperscript{9} because much of the CJRA called for experiments and had a sunset clause terminating the requirements for local expense- and delay-reduction programs after seven years.\textsuperscript{10} The sunset provision, plus the need to revise some of the discovery and disclosure rules in its fading light, led to consideration of whether more changes were warranted. This general look at the discovery and disclosure rules in turn elicited a proposal from the American College of Trial Lawyers (ACTL),\textsuperscript{11} resuscitating an idea pressed by the American Bar Association's Section on Litigation in the late 1970s, to change from subject-matter to claim-or-defense discovery.\textsuperscript{12} After making changes that I regard as improvements\textsuperscript{13} despite my opposition to the amendment

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9. The Advisory Committee Notes to the 1993 amendments of Rule 26 explained, Authorization of these local variations is, in large measure, included in order to accommodate the Civil Justice Reform Act of 1990, which implicitly directs districts to experiment during the study period with differing procedures to reduce the time and expense of civil litigation. The civil justice delay and expense reduction plans adopted by the courts under the Act differ as to the type, form, and timing of disclosures required. Section 105(c)(1) of the Act calls for a report by the Judicial Conference to Congress by December 31, 1995, comparing experience in twenty of these courts; and section 105(c)(2)(B) contemplates that some changes in the Rules may then be needed.


10. See Civil Justice Reform Act § 103(b)(2) (stating that Act provisions requiring district-court civil justice expense- and delay-reduction plans "shall remain in effect for seven years after the date of the enactment of this title").


12. See Stempel, supra note 5, at 544 (discussing the 1977 Litigation Section report, publication of the proposal by Advisory Committee for comment, and its abandonment at the time).

13. See infra notes 19-20 and accompanying text (discussing addition of court authority to order subject-matter discovery).
as a whole, the Advisory Committee proposed, and the Supreme Court ultimately promulgated, the scope limitation.

The scope redefinition can be understood as fitting with several of the goals animating the 2000 package of amendments as a whole. Aside from restoring uniformity after its forced and temporary abandonment under the CJRA and the 1993 amendments, the 2000 amendments reflected concern for "(2) constraining improper or overly expensive discovery; (3) prompting judicial supervision in cases in which discovery is causing problems; and (4) confirming the discretion of the presiding judge to tailor discovery to the needs of the particular case." The extent to which the scope change is likely to serve those ends well, without creating significant costs of its own, is a main topic of the rest of this Article; first, though, I should state exactly what has changed.

III. THE 2000 SCOPE AMENDMENT

Before December 1, 2000, Rule 26(b)(1) provided:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

In redline form, the 2000 amendment made the following pertinent changes, with deleted language stricken through and added material underscored:

Parties may obtain discovery regarding any matter, not privileged, that which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge 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 The information sought need not be admissible at the trial if the discovery information sought appears reasonably calculated to lead to the discovery of

14. See supra note *.
admissible evidence.\textsuperscript{18}

The relevant changes are thus three in number, with the first two being the most significant for present purposes: the change in the default definition of the scope of “attorney-managed” discovery from unprivileged matter relevant to the “subject matter” of the action to that relevant to any party’s “claim or defense”; the addition of authority for “court-managed” discovery that, upon order made for good cause, can extend to the previous “subject-matter” scope; and the tinkering with language about discovery of inadmissible material that may lead to the discovery of admissible evidence, on which I shall not focus. The Committee Note to the changes as adopted explains:

The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the “subject matter” involved in the action.

The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. . . . The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.\textsuperscript{19}

\textsuperscript{18} Court Rules, 192 F.R.D. 340, 388 (2000).

\textsuperscript{19} Fed. R. Civ. P. 26(b)(1) advisory committee’s note, \textit{Court Rules}, 192 F.R.D. at 389. As an illustration of the possibly troubling breadth of discovery efforts under the “subject matter” scope definition, to which the first paragraph in the quoted extract in the text alluded, see, for example, \textit{Summary of Public Comments—Preliminary Draft of Proposed Amendments: Civil Rules Regarding Discovery} 94 (1998-99), http://www.uscourts.gov/rules/archive/1999/summary.pdf (last visited January 28, 2002) (summarizing comments of plaintiffs’ attorney Maxwell Blecher as follows: “As an example, consider an antitrust case about monopolizing oranges in which plaintiff wants to ask about grapefruits, that would probably be found not to relate to the claims or defenses. But it would relate to the subject matter of how defendant conducts its business.”).
The Note goes on to highlight the principal change from the ABA Litigation Section and ACTL proposal, the two-tier approach retaining subject-matter discovery upon court order granted for good cause—which I regard as a significant improvement, despite my opposition to the final proposal:

The similarity [to the ABA Litigation Section and ACTL proposals] is that the amendments describe the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party. The court, however, retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause. The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. . . . The good-cause standard warranting broader discovery is meant to be flexible. 20

To put it in the terms colloquially used by litigators who seek more court management of contentious discovery, the amended rule's second tier aims to provide "adult supervision" to contain possible squabbles when any party seeks and may engage in broader subject-matter discovery.

IV. ISSUES UNDER THE REVISED DEFINITION

A. Fishing for New Claims or Defenses

An important theoretical issue about the use and scope of discovery, and one with practical import for the workings of federal civil discovery under the narrowed scope definition, is whether parties should be able to use discovery to try to develop new claims and defenses, as opposed to finding evidence relevant to claims and defenses already properly pleaded. In principle, there is a strong case for regarding this broader form of fishing21 as inappropriate:

20. FED. R. CIV. P. 26(b)(1) advisory committee's note, Court Rules, 192 F.R.D. at 389.
21. The Supreme Court's well-known rejection of the "fishing-expedition" objection to discovery in the leading early case of Hickman v. Taylor, 329 U.S. 495 (1947), was phrased only in terms of each side being able to find out about the other's case, and gave no hint at sanctioning efforts to develop new claims and defenses: "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." Id. at 507; see also Stephen N. Subrin, Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules, 39 B.C.L. REV. 691, 728 (1998) (noting change in early draft of 1938 federal discovery rule from allowing depositions to be taken as soon as jurisdiction is obtained, to requiring an answer to be filed first, as "'a protection to defendants against fishing expeditions,' in that a plaintiff cannot file 'any claim which occurs to him,' and then go find a real claim through depositions, and move to amend" (quoting Edward H. Hammond, Some Changes in the Preliminary Draft of the Proposed Federal Rules of Civil Procedure, 23 A.B.A. J. 629, 631 (1937))).
A potential plaintiff with a single conceivable but unfiled claim generally may not use discovery to see whether the claim can be filed consistently with existing rules. Instead, one must have a basis for appropriately filing the claim, without benefit of discovery, and only then may one use discovery—which may, of course, provide information previously unknown to the claimant indicating either that the claim is a winner or that it is a non-starter that should be abandoned. But if a plaintiff should not in principle be able to use discovery without being able to file appropriately a lone claim, should having a single claim that can be filed without discovery permit one to use discovery to see if there may be other claims as long as they relate to the “subject matter” of the filed claim? If so, that creates a somewhat arbitrary and probably unworkable distinction between those who have a basis for getting a foot in the door (and can thus use discovery to see if they can develop new, related claims) and those who do not have the necessary ticket of entry (and thus cannot use discovery to see if they can get started at all).

The old subject-matter scope definition, though, may have allowed, at least in practice, some fishing for new claims (and defenses), which the Advisory Committee in proposing the scope change stated is precisely what it did not think courts should allow parties to do:

The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals

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22. The provision in Federal Rule of Civil Procedure 27(a) for depositions before filing of an action is a narrow one, viewed by most courts as meant only to allow perpetuation of testimony that might otherwise be lost before a case can be filed, and not as “a method of discovery to determine whether a cause of action exists; and, if so, against whom action should be instituted.” In re Gurnsey, 223 F. Supp. 359, 360 (D.D.C. 1963); accord, e.g., In re Ford, 170 F.R.D. 504, 506-09 (M.D. Ala. 1997); see 8 WRIGHT ET AL., supra note 1, § 2071, at 651-52 (“[T]he courts have generally agreed that to allow Rule 27 to be used [to enable a person to fish for some ground for bringing suit] would be an ‘abuse of the rule.’” (footnote omitted)).

23. As the Advisory Committee on Civil Rules explained concerning the language in Federal Rule of Civil Procedure 11(b)(3) permitting allegations that, “if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery”:

Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification.


24. Professor Richard Marcus suggests that a possible basis for the distinction criticized in the text is that a party who cannot file at all suffers no preclusion, while a party who files but can do no fishing could suffer preclusion as to unfiled, related claims under the modern transactional approach to claim preclusion. See RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1980). The point is a valid one but seems only, as I believe he and I agree, to mitigate the problem without eliminating it.
to the parties that they have no entitlement to discovery to develop new
claims or defenses that are not already identified in the pleadings. 25

The new claim-or-defense definition, perhaps unlike the previous subject-
matter definition, is consistent with this attitude; and this line of argument
may make the most principled case for the scope narrowing.

Where one stands on the Advisory Committee's no-fishing-for-new-
claims position, though, seems likely among practitioners to depend on where
one sits. Despite the surface even-handedness of the amended rule and the
Advisory Committee's explanation—restricting plaintiffs and defendants alike
from undertaking broad subject-matter discovery in efforts to develop new
claims or defenses, unless they can persuade the court to order it for good
cause—the divide in testimony and submissions to the Advisory Committee
showed the plaintiffs' bar overwhelmingly in opposition and the defense bar
in parallel fashion voicing virtually unanimous support. 26 Even with reasonably
broad discovery, plaintiffs are often likely to feel handicapped by limited
access to information and subject to stonewalling by defendants; the latter, in
turn, have frequently expressed a sense of oppression at burdensome,
expensive, and even settlement-inducing requests for massive, wide-ranging
production, 27 which adds significant practical concerns to the somewhat
theoretical ones that I have articulated above about broader or narrower
discovery.

Whatever one thinks of these theoretical and practical issues, there are
serious chinks in the case supporting the narrowed scope definition to the
extent that the case rests upon the argument against using discovery to fish for
new claims and defenses: The new rule generally gives parties an easy way
around it, along with an incentive to use the circuitvention, by way of
pleading more claims (or defenses) to spike possible objections that attorney-
managed discovery would exceed the narrowed scope. 28 In addition, Federal

25. See supra note 19 and accompanying quotation.
26. See Stempel, supra note 5, at 571 (citing argument before Advisory Committee vote
on scope narrowing that written comments on proposal "break down precisely—defendants
champion the scope change, and plaintiffs excoriate it").
27. See, e.g., Transcript of the "Alumni" Panel on Discovery Reform, 39 B.C. L. REV.
809, 825 (1998) [hereinafter "Alumni" Panel Transcript] (remarks of Mark Gitenstein) (refer-
ing to the feeling that "big business defendants . . . are settling cases because of transaction
costs driven by discovery").
28. See, e.g., Summary of Public Comments—Preliminary Draft of Proposed Amendments:
visited October 1, 2001). Comments of Allen D. Black on the effect of the proposed scope
narrowing are summarized as follows:
This change will . . . put pressure on lawyers to assert thin or borderline frivolous claims
or defenses. . . . Under the current rules plaintiff would file a breach of contract suit and
take discovery about the possibility of fraud. Under the amended rule, one is pushing the
plaintiff's lawyer into treading close to the Rule 11 line to file a fraud claim as a predicate
Rule 11(b)(3), as revised in 1993 and unchanged by the 2000 discovery amendments, explicitly allows allegations that "if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."\(^{29}\)

Despite the Advisory Committee's rhetoric when it added this language in the 1993 amendments,\(^ {30}\) the provision seems likely to make it easy for parties to avoid scope-limit problems, even without moving for subject-matter discovery, by initially pleading claims that they might otherwise have been more inclined under the old scope definition to leave out and perhaps later add by amendment.\(^ {31}\) The rule's apparent tolerance of claims that plaintiffs identify as likely to have support after discovery seems to me to be—along with generally broad notice pleading under the Federal Rules,\(^ {32}\) plus American

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29. FED. R. CIV. P. 11(b)(3).
30. See supra note 23.
31. See, for example, summary of comments by Allen Black, supra note 28. If plaintiffs would have included such claims anyway under the previous scope definition, then their presence in the complaint from the beginning should deprive the scope narrowing of much effect in such cases.
32. The scope change may create some incentives for more detailed pleading, which Professor Carl Tobias has viewed as potentially erod[ing] the conventional notice pleading regime that the original Advisory Committee instituted in the initial Federal Rules during 1938 . . . . [T]he "claim or defense" language may require that plaintiffs draft comparatively specific, fact-based pleadings before they can gain access to material under defendants' control that was previously available under general notice pleading.
Tobias, supra note 4, at 884-85; see also John S. Beckerman, Confronting Civil Discovery's Fatal Flaws, 84 MINN. L. REV. 505, 540 n.148 (2000) ("[T]he [scope-change] proposal's indirect effects on pleadings, namely that it will require plaintiffs' lawyers to aver the circumstances giving rise to claims in greater detail if discovery is to be available, will give additional particularized notice to defendants."). Whatever the virtues and defects of more detail in pleadings, an incentive to plead more claims and defenses need not necessarily lead to more detailed fact pleading—especially if the additional claims and defenses are ones for which the pleaders are saying they need discovery to find possible evidentiary support. Further, to the extent that rules provide positive incentives (such as easier discovery) for parties to plead more facts, that seems likely to be less troublesome than rules aimed at requiring more factual detail in pleading by imposing litigation-producing sanctions such as dismissal for insufficient specificity. See also Thompson v. Dep't of Hous. & Urban Dev., 199 F.R.D. 168, 172 (D. Md. 2001). The Thompson court stated that counsel should be forewarned against taking an overly rigid view of the narrowed scope of discovery. While the pleadings will be important, it would be a mistake to argue that no fact may be discovered unless it directly correlates with a factual allegation in the complaint or answer. Such a restrictive approach would run counter to the underlying purpose of the rule changes, as explained by the commentary, run afoul of FED. R. CIV. P. 1, and undoubtedly do disservice to the requirement of notice pleading in Rule 8, as parties would be encouraged to plead evidentiary facts, unnecessary to a "short and plain
reliance on private litigation for much enforcement of our public-law norms—part of the round hole into which the square peg of scope narrowing does not fit. Or if it fits, it does so with such gaps as to make it perhaps derisorily easy for parties often to evade the limits that those supporting the change seem to have wanted to impose.

B. The New Definitions and Possible Satellite Litigation

In disputes about discovery scope (as opposed to burdensomeness, appropriateness of particular requests, et cetera) before the 2000 amendment, aside from privilege, only one key concept needed to be defined and applied: relevance to "the subject matter involved in the pending action." Now it may be necessary to litigate that concept and also the "claim or defense" idea, plus what can constitute "good cause" for the court to allow subject-matter discovery. As the Advisory Committee frankly conceded, "The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision." Similarly, "[t]he good-cause standard warranting broader discovery is meant to be flexible."

As one who opposed the changes—partly because of the potential for satellite litigation over new and highly general terms—I am probably not one who should offer thoughts on just how the new terms should be defined. Suffice it to say, first, that no flood of satellite litigation has yet emerged; the Rule 26(b)(1) scope definition is at least not yet the growth industry that Rule 11 became after its revision in 1983, with the resultant concern for satellite litigation that contributed to the 1993 changes that remain in effect today. Second, it seems clear that to the extent parties choose to contest discovery based on the scope narrowing, results will be highly dependent on somewhat
unpredictable judicial attitudes about the import of the changes. The leading article thus far on the scope revision, in discussing possible scenarios in different areas, refers repeatedly to the possibility of courts going either way in specific hypothetical illustrations.\textsuperscript{38}

C. The Possibilities for Appellate Review and Clarification

If the new standards prove troublesome, it may eventually become important how much they are subject to review and clarification by appellate courts. With discovery orders not generally subject to interlocutory review,\textsuperscript{39} appellate consideration could come only through an exception to the limits on interlocutory review or after a final judgment. As opposed to Rule 11 with its sanctions and dismissals, it seems unlikely that the scope limitation will see much of either kind of traffic. A trial judge is not often likely to conclude that an issue of discovery-scope definition meets the criteria of § 1292(b) for certification for discretionary interlocutory review, with that provision’s requirements of “a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”\textsuperscript{40} Similarly, grants or denials of particular discovery requests would have to have an important impact on a final judgment to be worth pressing for review after entry of judgment in an appeal as of right under § 1291,\textsuperscript{41} that, too, seems likely not to be highly frequent given the plethora of discovery issues that get ruled on in many cases and the marginal impact of many of them.\textsuperscript{42}

A follower of advance sheets sees much appellate review of discovery sanctions, but little involving scope rulings; the purportedly modest change effected by the 2000 amendment seems unlikely to change that incidence greatly. These reasons for expecting limited appellate review of scope issues

\textsuperscript{38} See Stempel, supra note 5, at 605, 611. Professor Stempel states that “[r]educed scope may, depending on how judges construe the new standard, bar [discrimination] plaintiffs from using larger defendant workforce and employment practices data to bolster circumstantial evidence of discrimination.” Id. at 605. He adds that “in the hands of a judge hostile to [derivative] suits in general or credulous of corporate management’s story, claim-or-defense discovery will give plaintiffs too little information to have a fair fight with the company leadership.” Id. at 611.


\textsuperscript{40} 28 U.S.C. § 1292(b) (1994).

\textsuperscript{41} See 28 U.S.C. § 1291 (1994) (conferring jurisdiction upon federal courts of appeals over “all final decisions of the district courts of the United States”).

\textsuperscript{42} As Professor Marcus has reminded me in private correspondence, problems with the previous “subject matter” definition tended to get little appellate clarification, either. My point here is not that the previous rule was particularly clear; it is that to the extent the inclusion in the new version of additional vague terms increases the need for clarification, that greater need is likely to go unmet by appellate review.
(if my guess that there will be little proves accurate) reinforce the point made in the previous part that the change leaves much in the hands of district judges, with their already extensive discretionary control over discovery—to the extent that they have time and inclination to exercise it.43

V. THE EARLY DECISIONS

Westlaw and Lexis-Nexis searches through late January, 2002, found about two dozen district-court cases involving actual application of amended Rule 26(b)(1).44 It is too early to make generalizations with any confidence, but this modest number of decisions seems to permit a few observations. First, in nearly all instances it appears that the outcomes would have been the

43. See Gregory P. Joseph, Civil Rules II, Nat'l L.J., Apr. 24, 2000, at A17 ("Judges who are not eager to hear more discovery disputes are not likely to be excited by the prospect of more motion practice devoted to the pleadings, but the drafters determined otherwise.").
44. The lack of precision about the number is because some of the cases, while quoting or paraphrasing the new language as a point of departure, seem to turn at least in large part on other factors such as whether the proposed discovery would be too burdensome. I hesitate to exclude such cases entirely, but neither should one make much of them because they appear not to decide anything of significance about the amended rule. Nor do I regard this many cases turning up in a little over a year as a sign of significant satellite litigation brought on by the rule change. Federal courts have to make many decisions on discovery scope however it is defined; they should naturally start from the governing rule text. By contrast, in the period of problematic satellite litigation under pre-1993 Rule 11, see supra note 37 and accompanying text, the cases mostly arose purely because a party sought to take advantage of the rule.

The Westlaw search request was "26(b)(1) & discovery & date(>11/2000) & (2000/s (amend! change revis! limit! restrict)) & 'subject matter & relevant' in the "DCT" database, containing district court cases, which yielded 31 cases. Some decisions turned up by this search mentioned but did not apply the new version of the rule, holding the previous version applicable in an already-pending case. Not surprisingly, running the same request in the "CTA" database, which contains courts of appeals cases, yielded no cases.

The Lexis-Nexis search request was broader—"26(b)(1) and discovery and date aft Nov 2000 and 'subject matter' and 'claim or defense' and relevant"—run in the "Genfed-Currt" database of federal cases in the last two years. It turned up 69 district-court cases, reassuringly including many of those produced by the Westlaw search. Many of the cases from the broad Lexis-Nexis search did not involve application of the narrowed scope definition—and in several of them, the court and parties appeared to be proceeding under the pre-amendment language, unaware that the rule had been changed.

To avoid skewing this already imprecise sample, I have excluded cases decided by a single magistrate judge in Kansas City, Kansas, who has reported several similar decisions. These cases mostly involve discovery requests by plaintiffs, which this judge usually upholds in full or in large part, regularly explaining that the result would be the same under the new or old version of Rule 26(b)(1) and relying on pre-amendment cases. See, e.g., Sheldon v. Vermont, 204 F.R.D. 679, 689 & n.7 (D. Kan. 2001) (Waxse, M.J.) (emphasizing breadth of construction of relevancy standard and stating that liberality of approach articulated in pre-amendment district-court cases "remains good law").
same under either version of the rule; indeed, it is striking how little the courts' opinions reflect any apparent serious effort by parties who are resisting discovery to make anything out of this new and perhaps still unfamiliar scope definition. Second, so far plaintiffs have not been doing at all badly, both when they have sought discovery and when they have resisted it.

Third, courts are paying considerable attention to the Committee Note that accompanied the rule revision, generally relying on it to support positions that favor discovery and, in particular, citing examples given in the Note of what might have seemed to be borderline situations that could nonetheless come within "claim-or-defense" discovery. Fourth, the decisions often have seemed to rely on additional factors, such as the apparent burdensomeness of the discovery sought, instead of focusing narrowly on the definition of "claim or defense." Fifth, the decisions so far on what can constitute "good cause" are very small in number, reveal no pattern of tending to find good cause to have been shown or not shown, and seem to me to permit little more than the unsurprising observation that rank speculation about what discovery might turn up just won't do. Party efforts to show "good cause" do not yet, though, appear to be used as a way to try to move from attorney-managed to courtsupervised discovery as the amendment-drafters contemplated. Rather, the few judicial findings on good cause seem to come as incidental rulings when the court is already involved.

A. Probable Same Outcome Under Either Version of Rule 26(b)(1)

As is probably to be expected, at this time of transition the courts applying the new definition often discuss both pre- and post-amendment versions of the Rule—although several just quote or paraphrase the new language and proceed, sometimes adding observations about the broad scope or liberality of discovery and citing pre-amendment cases. In the cases I have found, no opinion expressly states that the change in rule language has led it to a different result from what it would have reached under the previous scope definition. Some do say in so many words, whether viewing a case as governed by the previous or the present rule, that the result would be the same under either version. Of course, in the several other cases upholding


46. See Behler v. Hanlon, 199 F.R.D. 553, 555 (D. Md. 2001) (stating, in ruling against defendant's objection to discovery to provide basis for challenging credibility of defense expert,
discovery requests under the claim-or-defense standard, the result would have been the same under the broader subject-matter definition.47

In only two cases do courts seem to have relied on the restrictive force of amended Rule 26(b)(1) to deny discovery, and in both, the opinions give reason for thinking that the result might not have been affected by the change. World Wrestling Federation Entertainment, Inc. v. William Morris Agency, Inc.,48 discusses the relevance of the documents requested to the claims and defenses in the case and states that under the amendments "it is intended that the scope of discovery be narrower than it was, in some meaningful way," but also emphasizes the burdensomeness of the requested discovery and the deferential standard for district judges' review of magistrate judges' rulings on non-dispositive matters.49 And Surles v. Air France rebuffs a party's position as inconsistent with the amendments while also containing language implying that the outcome would have been the same under the old rule.50

that although pre-amendment version governed "under either the 'old version' of Rule 26(b)(1) . . . or the 'new version' . . . the result would be the same"); Surles v. Air France, 50 Fed. R. Serv. 3d 983, 988 (S.D.N.Y. 2001) [hereinafter Surles I] (rejecting defendant's request for peripheral personal information about plaintiff that might conceivably have shown admission against interest or untruthfulness and stating that "even under the former version of Rule 26, discovery requests could not be 'based on pure speculation or conjecture'"), magis. order aff'd, No. 00CIV5004 (RMBFM), 2001 WL 1142231 (S.D.N.Y. Sept. 27, 2001) [hereinafter Surles II].


48. 204 F.R.D. 263 (S.D.N.Y. 2001)

49. Id. at 264 & n.1 (quoting Thompson v. Dep't of Hous. & Urban Dev., 199 F.R.D. 168, 172 (D. Md. 2001)).

50. Compare Surles I, 50 Fed. R. Serv. 3d at 989, stating,

To open the door to the discovery that Air France seeks based on such a speculative showing would fly in the face of the recent amendments to Rule 26(b)(1), which were intended to focus the attention of both the parties and the Court on the actual claims and defenses involved in a suit[,] with id. at 988 (quoted supra note 46). See also Marks v. Shaw Constructors, No. CIV.A. 00-3203, 2001 WL 1132028, at *1 (E.D. La. Sept. 24, 2001) (relying on a pre-amendment Fifth Circuit decision on inadmissibility of evidence about other employees not similarly situated to the plaintiff, while correcting the plaintiff's quotation of part of pre-amendment Rule 26(b)(1) in denying her discovery request); Thompson v. Dep't of Hous. & Urban Dev., 199 F.R.D. 168, 171-73 (D. Md. 2001). The Thompson court, after considerable on-the-one-hand, on-the-other discussion of the new rule, noted in denying plaintiffs' motion to compel their failure "to identify which claims[ ] that survived the partial consent decree will be furthered by the requested information." Id. at 173 (emphasis added). The court found the narrowed scope definition
Further, although I cannot cite chapter and verse in any decisions to point to dogs not barking, I can report my impression from reading the cases I have found, that parties resisting discovery seem not to be pressing arguments based on the changed scope definition. At least no such efforts seem to be reflected prominently in the courts’ opinions, which often proceed as if relevance of the discovery sought to the parties’ claims or defenses—as opposed to the subject matter of the action—is not a hotly contested issue, whether the requested discovery is found relevant or irrelevant. As litigants gain awareness of the scope change, its salience in litigation may, of course, increase. Yet, so far, one opinion discussing cases under the new scope definition seems to have it about right in saying, “None of the decisions suggest [sic] that amended Rule 26(b)(1) will bring about a dramatic effect on the scope of discovery.”

B. Plaintiffs’ Success Under Amended Rule 26(b)(1)

The pattern of plaintiffs’ opposition to, and defendants’ support for, the scope change makes it relevant to ask whether the narrowed definition appears to be making it significantly harder for plaintiffs to obtain information sought in discovery, or whether the Committee Note’s assurance of at most a modest change seems to have been well-founded. Although plaintiffs have not won every time that they have sought discovery over defense resistance, in several of the most noteworthy cases, courts have upheld plaintiffs’ requests. One significant case denied discovery sought by a large corporate defendant from an individual claimant in an employment-discrimination suit. By raw count, for whatever it is worth when still-small numbers of cases are involved and reporting patterns could skew the numbers, plaintiffs have prevailed at least in considerable part on contested discovery issues in about two-thirds of the cases that struck me as notable, whether the plaintiffs were seeking or

inapplicable to a case filed long before the amendments took effect, and directed the parties to focus their discussions not on scope issues but on burdensomeness factors under Federal Rule of Civil Procedure 26(b)(2). Id. at 171-73.

51. See, e.g., D.O.T. Connectors, Inc. v. J.B. Nottingham & Co., 4:99cv311-WS, 2001 U.S. Dist. LEXIS 739, at *2-*4 & n.1 (N.D. Fla. Jan. 22, 2001) (holding that defendant’s reliance on advice of counsel as defense to claim of willful patent infringement waived attorney-client privilege and observing that change in scope definition is unlikely to affect pertinence of pre-amendment waiver cases because “the opinions of counsel are directly relevant to a defense”).

52. See, e.g., McCann v. Bay Ship Mgmt. Inc., No. CIV. A 00-1430, 2000 WL 1838714, at *1 (E.D. La. Dec. 8, 2000) (denying discovery of personnel file ostensibly sought to challenge credibility of former employee and observing that plaintiff had failed to describe former employee’s involvement in matter or how his file would be relevant to a claim or defense, or indicating why his credibility would be at issue).


54. See Surles I, 50 Fed. R. Serv. 3d at 983.
resisting discovery.\(^{55}\)

Of course I cannot speak to what may be happening in cases that do not make it into the databases, or in decisions that escaped my search requests, or


Cases granting in part motions by plaintiffs to compel discovery, or rejecting in part defendants’ resistance, et cetera (6): In re Vitamins Antitrust Litig., No. 99-197TFH, 2001 WL 1049433 (D.D.C. June 20, 2001); Mosier v. Am. Home Patient, Inc., 203 F.R.D. 645 (N.D. Fla. 2001); Beauchem v. Rockford Prods. Corp., No. 01 C 50134, 2002 WL 100405 (N.D. Ill. Jan. 24, 2002); Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., No. 97 Civ.5499 (LAP)(JCF), 2001 WL 1033571, at *1 (S.D.N.Y. Sept. 6, 2001); Monaco v. Smith, No. 00CIV584SRMBKNF, 2001 WL 815529, at *3-*4 (S.D.N.Y. July 18, 2001); Laurenciano v. Lehigh Valley Hosp., Inc., No. CIV. A. 00-2621, 2001 WL 849713, at *2 (E.D. Pa. July 18, 2001). The cases listed in this paragraph could obviously affect the overall balance of plaintiffs’ versus defendants’ success, depending on whether one side prevailed in large part. By my reading in only one of these cases, Monaco, might defendants be said to have prevailed more than plaintiffs. There defendants won as to relevance concerning events at some distance in time while losing on a more recent event, and also lost as to some categories of their records—although with the court directing plaintiff to refine his requests to reduce burdensomeness. Monaco, 2001 WL 815529, at *3-*4.


Mixed result in a decision applying to consolidated cases, in which individual parties were defendants against a corporate plaintiff in one action and were plaintiffs against a different corporate defendant in second action, largely granting corporate parties’ motion to compel (1): Carnegie Hill Fin. Inc. v. Krieger, Nos. CIV. A. 99-CV-2592, CIV. A. 99-CV-5511, 2001 WL 869594, at *1-*3 (E.D. Pa. July 30, 2001).


effects that the scope narrowing may be having in parties’ discovery decisions and negotiations that do not lead to litigation at all. And “plaintiffs” are a heterogeneous group, including businesses that bring suit against other businesses or against individuals, as well as those who seemed to be the focus of much concern in the debate over the amendments—persons suing large corporate defendants on claims such as product liability, consumer rights, or employment discrimination. But at this early stage, based on the reported decisions, concerns that the effect of the change would significantly disfavor plaintiffs have not yet been borne out. Part of the reason for this pattern may be judicial reliance on examples given in the Committee Note, to which I turn next.

C. Judicial Reliance on Committee Note

In my experience as a member of the Advisory Committee on Civil Rules, the members and Reporters—as well as members of the public commenting on possible changes—devoted considerable attention to the explanatory notes as well as to the text of proposed rules. In the case of the Committee Notes to the scope amendment, some of the discussion that found its way into the final version works to counter the possible perception that the scope change was too restrictive.56 In any event, the care devoted to the Notes, as well as rule text, seems warranted in light of judicial focus on examples in the Notes in some of the cases decided under amended Rule 26(b)(1). Three of the cases relied at least in considerable part on the reference to “other incidents of the same type” in upholding discovery requests from plaintiffs,57 and a fourth relied on the mention of impeachment information as possibly discoverable.58 As it happened, all of these direct reliances on the Note came in decisions upholding discovery sought by plaintiffs; but some of the examples, such as impeachment, could readily be used in support of discovery sought by either side. In any event, courts administering the new scope definition are likely to continue finding the Note’s examples valuable—and rulemakers can take note that their official comments are likely to play a significant role along with rule text in decisions applying the rules.

56. See supra note 19 and accompanying quotation (quoting examples of types of discovery that might come within the scope of the “claim or defense” definition).
57. See Anderson, 2001 WL 641113, at *3; Sanchez I, 2001 WL 303719, at *2 (also finding good cause for plaintiffs’ requests for admissions); Laurenzano, 2001 WL 849713, at *1.
58. See Vitamins Antitrust, 2001 WL 1049433, at *11-*12; see also Bekker, 199 F.R.D. at 555-56 (relying on the Note’s discussion of discoverability of impeachment evidence in upholding plaintiff’s request for information about defense expert although holding pre-amendment version of Rule 26(b)(1) applicable).
D. Reliance on Factors Other than Scope Definition

Decisions on whether and how to permit requested discovery often turn on multiple factors—relevant discovery may, for instance, be limited because it appears unduly burdensome.\(^{59}\) Borderline discovery may be allowed because a court finds it, in the terms of Rule 26(b)(1), "reasonably calculated to lead to the discovery of admissible evidence."\(^{60}\) Examples of these and other factors\(^{61}\) relied on in the cases besides, or in addition to, relevance as redefined by the 2000 amendments are cited where pertinent in footnotes to this subpart. Discussion of individual cases does not seem necessary because the significant point for present purposes is that relevance to a claim or defense will often not be a make-or-break factor on its own when parties argue over, and courts rule on, whether and how much discovery should take place.

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59. See, e.g., World Wrestling Federation, 204 F.R.D. at 265 (emphasizing burdensomeness and deferential standard of review for discovery rulings of magistrate judges, in addition to relevance); Sanchez II, 50 Fed. R. Serv. 3d at 944 (quoting revised claim-or-defense scope definition and finding no good cause for subject-matter discovery and "that the defendant's position would subject the plaintiffs to unnecessary 'annoyance, embarrassment, oppression, [and] undue burden [and] expense' within the meaning of Rule 26(c)") (alterations in original); Monaco, 2001 WL 815529, at *4 (directing modification of some requests for material within post-amendment scope of discovery to reduce undue burden).

The 2000 amendments added a final sentence to Rule 26(b)(1), meant to emphasize trial courts' already-existing discretionary power to control possibly disproportionate or unduly burdensome discovery: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)," which provide,

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(i)-(iii). From my reading of the post-amendment cases I can report that courts do sometimes quote the new last sentence of Rule 26(b)(1), and they do consider concerns such as burdensomeness in ruling on discovery issues; but the cases do not reflect specific focus on the added sentence or leave me with the sense that they evidence altered judicial consciousness of courts' authority under Rule 26(b)(2)(i)-(iii).


61. See CSC Consulting, Inc. v. Aluminum.com, Inc., No. 00CIV.9513(LMM)(KNF), 2001 WL 546448, at *1 (S.D.N.Y. May 23, 2001) (finding that parties' previously entered confidentiality agreement adequately safeguarded potentially sensitive but relevant information, which supported denial of defendant's motion for protective order preventing taking of depositions of representatives of potential merger partners).
Thus, decisions on relevance and, hence, discoverability often will be the same under either version of the scope definition; and, further limiting the importance of the change, even when relevance is contested, it will often—at least when courts do find some relevance—not be determinative on its own.

E. "Good Cause" for Subject-Matter Discovery

Only a few cases have ruled on whether the required "good cause" was shown for subject-matter discovery under the amended rule. They have often been cursory in their discussion; no pattern even of relevant factors, much less tendencies to find good cause to have been shown or to be lacking, seems to be emerging. Other factors, such as burdensomeness, can play a role when a decision seems to turn in part on the presence or absence of good cause. At a minimum, rank speculation—in the particular case, that discovery about extraneous personal financial dealings of an employment-discrimination plaintiff might turn up impeachment material—"does not rise to the level of good cause."

The most substantial discussion of "good cause" that I have found came in the complex Vitamins Antitrust litigation. In brief, while the court limited the plaintiffs' claims to injuries with a United States nexus, it found good cause for discovery about foreign actions taken in furtherance of an alleged worldwide conspiracy, relying on pre-amendment precedent looking at conspiracies as a whole. Beyond good cause, the court noted that the discovery sought could lead to other admissible information by identifying more persons with knowledge of discoverable material, and it might also

62. See supra Part V.A.
63. See Mosier v. Am. Home Patient, Inc., 203 F.R.D. 645, 646-47 (N.D. Fla. 2001) (finding, in conclusory manner, that good cause had not been shown as to one discovery request, and also stating without elaboration that discovery would be limited to claims or defenses; also finding in conclusory fashion, as to another discovery request in same case, that requested files "could lead to evidence relevant to the subject matter of the litigation, and good cause has been shown[,]" adding that files were probably small in number); Sanchez II, 50 Fed. R. Serv. 3d at 944 (stating in a single sentence an unexplained finding that defendant did not show good cause); Sanchez I, No. 00 CIV 1674 AGS DFE, 2001 WL 303719, at *2 (S.D.N.Y. Mar. 29, 2001) (stating in a single sentence an unexplained finding of good cause).
64. For discussion of possible analogies to "good cause" as used elsewhere in the Civil Rules, and of suggested approaches to good-cause determinations under amended Rule 26(b)(1), see Stempel & Herr, supra note 5, at 418-23.
65. See Mosier, 203 F.R.D. at 646-47 (finding good cause, and adding that number of files covered by request was probably small); Sanchez II, 50 Fed. R. Serv. at 944 (finding undue burden in addition to no good cause).
produce material for impeaching the defendants' trial witnesses—once again illustrating how the specific changes in the amended rule will often not be determinative by themselves, but will bear on discovery decisions along with any of several other considerations.

Aside from the content of findings on good cause, there is the role that a party's efforts to show good cause was contemplated to play in discovery practice under the revised scope definition. One idea was for the injection of a good-cause contention seeking broader subject-matter discovery to trigger court involvement in complex or contentious cases: "The [good-cause] amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery." Although I have not checked the underlying records of the few reported cases, what appears to be happening instead is that good-cause issues arise after courts are already involved. Parties pursuing discovery in cases involving good-cause findings so far do not seem to have brought motions seeking good-cause findings to try to make a transition from attorney-managed to court-managed discovery. Rather, the court has already been heavily involved; the good-cause rulings often have an "Oh, by the way" flavor to them, as if injected by the court as one reason among others for allowing or denying discovery sought or resisted on other grounds. This pattern does not seem to involve a misuse of the good-cause factor, and cases may arise in which parties do seek to use it as a trigger for "adult supervision" after impasses in first-stage, attorney-managed discovery. In the cases so far, however, the courts have already been in up to their elbows.

VI. A NECESSARILY INCONCLUSIVE CONCLUSION

It is far too early to venture any confident conclusions about the impact of the 2000 changes in the definition of the scope of federal civil discovery.

68. See id.
70. Significantly, the five reported decisions I have found in which good-cause findings were made all involve either multiple rulings or district judge review of decisions by a magistrate judge or special master, reflecting contentious discovery and significant court supervision independently of the good-cause ruling. See Vitamins Antitrust, 2001 WL 1049433, at *11-*12 (overruling in part the special master’s geographic limitation on discovery by finding good cause for broader discovery); Mosier, 203 F.R.D. at 646 (finding good cause as to one request and no good cause as to another, in decision ruling on motion to compel as to eleven requests); Surles II, No. 00CIV5004 (RMBFM), 2001 WL 1142231, at *1 n.3 (S.D.N.Y. Sept. 27, 2001) (noting, in affirming magistrate judge’s decision in Surles I, both the intent of the rule revision to increase court involvement in contentious discovery and that the issue arose in the context of hotly contested discovery); Sanchez II, 50 Fed. R. Serv. 3d at 944-45 (responding apparently to defense arguments for relevance of the discovery it sought by, inter alia, finding no good cause); Sanchez I, No. 00 CIV 1674 AGS DFE, 2001 WL 303719, at *1-*2 (S.D.N.Y. Mar. 29, 2001) (responding to defense invocation of the new scope limit by finding good cause for discovery sought by plaintiffs).
Looking back at the debate over the scope change, in the cases decided thus far each side may be able to find some confirmation for its predispositions. Those who favored the changes can point to a modest increase in focus in some cases on the relationship between discovery sought and claims and defenses pleaded, along with no drastic cutbacks in discovery allowed or notable increases in apparent stonewalling attempted—in accord with the assurances offered while the changes were pending. Those who were in opposition can cite the seemingly minimal impact of the changes, along with some amount of litigation over just what the new terms mean. They can ask whether much has been accomplished and whether the changes were worth the fight and the degree of perceived politicization of the rules process. It is not clear whether more experience under the changes will provide grounding for more significant and confident conclusions, but we do not have anything yet like the basis that would be needed. If rulemakers in those states where subject-matter discovery is now the norm are considering whether to follow the federal scope changes, they would be well advised to wait unless they place a particularly high value on congruence between rules for their own state courts and those governing in federal court.

The perspective just indulged in largely involved looking backward (or replaying the federal debate on the state level), but the scope changes are on the books and seem highly likely to remain there for years and probably decades to come. To take a more forward-looking view, based on the limited experience so far, it does not appear that the sky has fallen or that it will probably do so. To put it more concretely, the scope narrowing will probably play, at most, a modest role given the limited nature of the changes and the multiplicity of other factors bearing on discovery problems and their control. We can hope that despite the doubts some of us had about the changes, they will help somewhat without too many offsetting costs and drawbacks; but the main provisions and techniques to deal with discovery problems seem likely to be those already available before, and still at hand after, the scope limitations.

71. See, e.g., Beauchem v. Rockford Prods. Corp., No. 01 C 50134, 2002 WL 100405, at *1 (N.D. Ill. Jan. 24, 2002) (indicating that the 2000 amendments have narrowed "the scope of discovery... by some degree and that relevance is more closely tied to the actual allegations contained in the complaint" (and, presumably, in the answer)).

72. See, e.g., Stempel, supra note 5, at 564-65 n.203 (quoting Discovery Subcommittee Chair Judge David Levi’s June 1999 statement before the Standing Committee). Judge Levi commented:

The amendment... would not limit the broad array of information that [civil rights and environmental] plaintiffs presently receive through discovery. They will, for example, still be entitled under the amended rule to information about the treatment of other employees, a pattern of discrimination, or a continuing violation, as well as information extending beyond the statute of limitations. These types of information are all considered relevant to the claims and defenses under current law.

Id.