Among the numerous changes to the Federal Rules of Civil Procedure that took effect in December 2015, the increased prominence of the concept of “proportionality” in the rule 26(b)(1) standard for permissible discovery is, on its face, the most potentially impactful change for toxic tort litigants. Indeed, toxic tort practitioners, and defendants in particular, have long been at the forefront of encouraging proportionality in discovery as the field is particularly, if not uniquely, plagued by a lack of symmetry in the discovery demands placed on parties. The question is, Will the new rules help defendants’ cause?

Defendants in toxic tort suits are often corporations with decades of voluminous records that are time-consuming, burdensome, and expensive to produce. By contrast, toxic tort plaintiffs tend to be individuals whose only relevant records are a few recent medical files and/or property records. Furthermore, because of their relative lack of information or context, plaintiffs’ discovery requests, and even their claims, may be ill-targeted and overbroad, further exacerbating the already inequitable distribution of discovery burdens.

For several reasons, the new “proportionality” requirement in the rule 26(b)(1) discoverability standard is unlikely to dramatically reduce the burden resulting from information asymmetries in toxic tort cases. First, the concept of “proportional” discovery is not entirely new to the Federal Rules’ standard for discovery. Proportionality initially was included in rule 26’s definition of the scope of permissible discovery in 1983, but was later demoted to section (b)(2)(C)(iii) governing the issuance of protective orders limiting discovery.

The 2015 revision simply restores the concept to its original prominence. As the Advisory Committee noted, “[r]estoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality.”

Second, the new rule includes a six-factored test for proportionality, and many of these factors counsel against allowing corporate defendants to shield relevant information from discovery, even where it would be burdensome:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Of particular note is the factor of “the parties’ relative access to relevant information,” which is entirely new to the 2015 rules. This, combined with the other preexisting factors including “the parties’ resources,” eliminates any impression that discovery should result in equal levels of effort from each party. Rather, proportionality refers to imbalances not as between the parties, but given the relative resources of each party and the magnitude of the issues at stake, among other considerations. Just as has always been the case, deep-pocketed, information-rich toxic tort defendants should expect to continue to bear a higher burden than individual plaintiffs.

But those hoping for change may not be at a complete loss—if the revisions to rule 26 prove
ineffectual in reducing the imbalance between parties’ relative discovery burdens in toxic tort suits, other change to the Federal Rules outside of rule 26 could be more likely to yield impact. Several changes to the rules encourage early and active judicial involvement in case management. Revisions to rule 16, for example, shorten the deadline for entry of an initial scheduling order, eliminate language that authorized scheduling conferences to be held “by telephone, mail, or other [not in-person] means,” and explicitly permit judges to require a conference before a party may file a motion for a discovery order. These provisions could be leveraged by defendants hoping to more favorably chart their course in discovery through early and active court involvement. Indeed, for many of the same reasons, toxic tort defendants have been on the forefront of advocating for increased proportionality in discovery, so too have they been at the forefront of encouraging creative case management.

A prime example of how creative case management can be an effective bulwark against disproportionate discovery is the so-called Lone Pine order, by which the court requires a plaintiff to first make a prima facie showing of the elements of its case before requiring defendants to undertake full-blown, burdensome discovery. In Lore v. Lone Pine, 1986 WL 637507 (N.J. Super. Ct. Law Div. 1986), plaintiffs brought suit against some 464 defendants alleging personal injury and property damage resulting from their exposure to materials at a landfill. Early on, the court determined that the number of defendants necessitated active case management. After it came to light that the U.S. Environmental Protection Agency had conducted extensive study and concluded there was no pollution problem emanating from the site, the court issued a case management order requiring that, before any discovery of defendants could be taken, plaintiffs would have to provide, among other things, proof of their injuries and doctors’ affidavits supporting the contention that their injuries were caused by substances at the landfill. Plaintiffs eventually submitted documentation that was “woefully and totally inadequate” under this order, and the court dismissed their claims, stating that “[w]ith the hundreds of thousands of dollars expended to date in this case, it appears that plaintiffs’ counsel is . . . hoping that some of the defendants, to avoid further delay and expense, would recommend a settlement of the case.” The court concluded that there was “nothing to be settled because there is total and complete lack of information as to causal relationship and damages.” Other courts have followed the example set in Lone Pine, requiring a threshold showing by toxic tort plaintiffs before permitting burdensome discovery of defendants, and the practice has been affirmed under the Federal Rules. See, e.g., In Re Asbestos Products Liability Litigation (No. VI), 718 F.3d 236 (3d Cir. 2013). However, courts’ use of this mechanism is entirely discretionary and far from commonly used.

There is a possibility that Lone Pine orders and similar proactive approaches to case management could become more commonplace following the December 2015 revisions to the Federal Rules. The rule revisions not only emphasize proactive management, they also create more opportunities for litigants to show judges the need for such tools to be employed. For example, parties are now permitted to serve early rule 34 discovery requests—which relate to inspection, copying, testing, sampling, and entry onto property requests—21 days after service of the complaint and before the initial 26(f) discovery conference. Previously, no discovery was permitted until after a rule 26(f) conference. Under this new schedule, defendants could have what they view to be disproportionate discovery requests in hand the day after their responsive pleading is filed and well before a 26(f) report is submitted to the court. Defendants finding themselves in this position could have more tangible reasons to object to plaintiffs’ discovery approach in a rule 26(f) conference and more notice of the need to involve the court by motion for atypical and proactive case management assistance.

Furthermore, while the increased focus on proportionality may not, as discussed above,
change the scope of permissible discovery, it could influence judges who see significant proportionality issues on the horizon to adjust their case management strategies. *Lone Pine* itself, while not an application of the Federal Rules, presents a good example of the type of proportionality concerns that could prompt courts to rely upon the revisions to rule 16 and rule 26 and to exercise creative case management techniques. The *Lone Pine* court required a prima facie showing of plaintiffs only after it had been confronted, during an in-person scheduling conference, with the likelihood that discovery in that case would have been unnecessarily complicated, time-consuming, and burdensome for defendants given the apparent merit (or lack thereof) of plaintiffs’ claims. These early demands that the *Lone Pine* court placed on plaintiffs were likely intended to smoke out illegitimate claims, but the approach could similarly assist courts in understanding how the factors identified in rule 26’s proportionality inquiry—including “the importance of the issues at stake,” “the importance of the discovery in resolving the issues,” and “whether the burden or expense of the proposed discovery outweighs its likely benefit”—should apply. In other words, even where toxic tort plaintiffs’ claims may be more facially legitimate than those of the *Lone Pine* plaintiffs, federal courts could find value in targeting or tiering discovery to minimize potentially unnecessary discovery burdens.

While it is unlikely that the 2015 amendments to the Federal Rules will dramatically impact toxic tort strategy or outcomes, there is a possibility that some of the rules’ more subtle changes could begin to shift the way in which courts manage cases with conspicuous information asymmetries, like many toxic torts.

Lauren Daniel is an associate at Arnold & Porter LLP. She focuses her practice on environmental litigation and can be reached at lauren.daniel@aporter.com.