one action via representative parties. If the plaintiff or defendant satisfies certain requirements, they may act as a "representative" of the class. The facts determined in a class action, and a judgment in a class action, will bind all parties in the class (*res judicata*), whether or not they appeared in court. The requirements for a class action are that:

1. There are so many plaintiffs or defendants that bringing them together in one lawsuit is impracticable;

2. There are questions of law or fact common to the class;

3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

4. The representative parties will fairly and adequately protect the interests of the class.

Class actions are often filed in consumer protection, mass tort, antitrust or securities cases, where many individuals have suffered a loss but are reluctant to fight big companies using their own money, or in civil rights cases where many persons without much money claim their rights were violated. The advantages of a class action are obvious when the plaintiff is an average person, but the large increase in class actions in the United States in recent years is due to the advantages for defendants' and plaintiffs' lawyers. A defendant such as an asbestos manufacturer may prefer one trial and one judgment in a class action, which all plaintiffs must follow, to the expense and uncertainty of being sued in many states over several generations by persons who suffered lung disease from asbestos. When the law under which the class action is begun allows the court to award attorney's fees to the plaintiffs' lawyers if the plaintiff wins, the plaintiffs' lawyers may obtain attorney's fees multiplied by the number of members of the class, often amounting to tens of millions of dollars, making representation of plaintiffs in class actions very profitable for some lawyers. The Class Action Fairness Act of 2005 sets special requirements for federal diversity class actions.

The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), disappointed class action advocates. The District Court had certified a class of 1.5 million female employees who claimed the company discriminated against women in violation of Title VII of the Civil Rights Act of 1964. The Supreme Court reversed, ruling that each of plaintiff's claims involved distinct circumstances and that the women had failed to demonstrate they had suffered from a general policy. Thus, the Court said, their proposed class did not satisfy the "common questions" requirement.

Discovery

If the plaintiff satisfies the requirements to bring a case in federal court, and the defendant does not show any valid defenses, the judge may conduct a "pre-trial conference." At the pre-trial conference, a judge will typically urge the parties to settle,

but will also try to eliminate duplication and poor quality preparation in a trial and establish a schedule for moving ahead.

In the next stage, lawyers investigate the facts of the case for the plaintiffs and defendants in a process called "discovery." Without further action by the court, or even a request, each party must promptly provide:

1. The name (and, if known, the address and telephone number) of any person likely to know about the claim or defenses;

2. A copy of, or description of, all documents and data that each party has that may be used in the case;

3. Materials showing how the plaintiff computed the damages it is claiming;

4. Any contracts showing that an insurance company will pay a party for the judgment; and

5. The names of all witnesses.

Computers as we know them did not exist when the FRCP were adopted in 1938. In contrast, nearly all information generated in the U.S. by institutions such as corporations or governmental entities is now in digital form. Computer records have thus become a major object of discovery. Assume that a corporate manager creates one document and stores it on one hard disk drive on their computer. If they share different drafts or versions of the document from time to time, and the company backs up its records regularly, hundreds or even thousands of versions of nearly the same document will quickly come into existence and be preserved on the company's servers (whether physical or offered by "cloud" providers), the email servers of outside organizations, laptop computers, home computers, smartphones and other devices. This data may include not only saved documents but also system files and deleted files. For any single document, there may be thousands of pieces of information in digital form, perhaps showing key facts or motives in the case.

When paper documents were the primary subject of discovery, the side holding the documents could usually locate them quickly, and the more documents, the greater cost of the discovery process was on the receiving side, which had to read and copy many boxes of papers. In electronic discovery, however, the greater cost is typically on the side that must locate the documents: the side receiving the documents can often use a software program to search and index the electronic documents. Electronic discovery in court cases can cost millions of dollars. One of the largest electronic document discovery exercises so far occurred during the antitrust litigation brought against Intel Corp. by its rival AMD, which resulted in production of electronic documents that, if in paper form, would have created a stack 137 miles high. *In re Intel Corp. Microprocessor Antitrust Litig.*, 258 F.R.D. 280, 283 (D. Del. 2008). If the *Intel* litigation set a record in 2008, it surely must have been broken by other big cases since.

The FRCP have been revised to deal with the costs of electronic discovery. Rule 16(b)(3)(B)(iii) provides for scheduling "disclosure or discovery of electronically

stored information." Rule 26(b)(2)(B) limits the general duty to disclose by stating that "a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Rule 34(b)(2)(E)(iii) provides that "a party need not produce the same electronically stored information in more than one form." Most important, a 2015 amendment to FRCP Rule 26(b)(1) strengthened a concept of proportionality by explicitly limiting the scope of discovery to material "proportional to the needs of the case, considering . . . whether the burden or expense of the proposed discovery outweighs its likely benefit." An entire data services industry has built up around dealing with discovery requests, including rudimentary functions such as "de-duplicating" so that an email message sent to a large group is not reviewed by ten different lawyers, but only once. More recently, much more sophisticated "technology assisted review" has been developed, applying the latest in "big data" techniques and machine learning to the process of civil discovery.

Another problem exacerbated by the proliferation of electronic documents is the risk that evidence will be destroyed. Once a party reasonably anticipates litigation, it has a duty to preserve relevant evidence. At that point, it is essential that steps be taken so that data is not destroyed. This typically requires circulation of a "litigation hold" memorandum cautioning all data custodians about their duties, as well as intervention to stop any regular automated deletion of relevant electronic data. Under the 2015 amendments to Rule 37 of the FRCP, the court may impose sanctions for failing to preserve electronic information, where a party did not take reasonable steps to do so and the information cannot be restored or replaced. If the court determines that the offending party "acted with the intent to deprive another party of the information's use in the litigation," then the court may presume that the lost information was unfavorable to the offending party or even dismiss the action or enter a default judgment.

In many civil law countries, gathering discovery information would be the work of the judge, but in the United States the lawyers do it under the "adversary system" discussed elsewhere in this book. This is not because federal judges are weak; to the contrary, federal judges are appointed for life. Moreover, federal judges can command armed federal marshals to maintain order and can fine or imprison the parties to a lawsuit. There are many reasons why the American judicial system uses discovery by the parties and not by a judge:

1. Faster Settlement. If each side learns its weak points, settlement is more likely.

2. Fewer Disputed Facts. Discovery may show that the parties agree on certain facts, so they can agree to admit those facts and shorten the time and expense of trial.

3. Fewer Tricks. If all the facts are available to a judge or jury, a fairer judgment is likely to result than if one side suddenly reveals an unknown fact.

4. Better Understanding. Each party already knows what many of the facts in its case means, while a judge would be assembling pieces of information without any background, and therefore is less likely to understand the significance of each fact.

5. Full Effort. Each party has the most motivation to find all the facts and theories that benefit it and argue against all the facts and theories that benefit the other side. Each party only has to do one-half the work of gathering all the facts and can focus on considering the full meaning of all the facts and theories that benefit it the most. In contrast, a judge would have to guess at the plaintiff's facts and theories part of the time and imagine the defendant's facts and theories part of the time. With multiple plaintiffs or defendants, this becomes impossible.

6. Fairness. Trials in the United States are generally public, and it appears much fairer to Americans to allow each side to do its own work and present its own evidence than to have the discussion limited by what a judge decides is interesting or important.

7. Efficiency. Trials in the United States are usually held in one continuous trial of all the issues and facts, not in a series of short hearings over a long period of time as in many civil law countries. Concentrated trials are necessary in a jury system, as the jurors must interrupt their daily lives to attend the trial, but they also are viewed as potentially more efficient, easier to follow, and more likely to examine all the facts and issues. In a concentrated trial, each side must be better prepared because they will not have several weeks to investigate new facts before the next hearing. They will also have only one chance to create a factual record, since new evidence is not generally admitted at the appellate level.

8. Cost. Discovery has a reputation of greatly increasing the cost of a trial because people say it encourages expensive and time consuming "fishing expeditions" for facts. A 1978 Federal Judicial Center study concluded that the average cost to an attorney for preparing a civil case was $13,000 and that discovery represented about half of that cost, but that discovery costs were only three percent of the amount at issue in the lawsuit. More recent studies have found some increases in the costs of discovery, with the cost significantly higher where electronic discovery is involved, but also have supported the important role that discovery plays in advancing litigation toward a resolution.

Major Forms of Discovery

Discovery is not done in court. Most often, it is done at a lawyer's office, but, depending on the subject, it can be done at any convenient location or in writing.

Depositions are the most common form of discovery. In a deposition, a party or other witness is "deposed," meaning that the party is placed under oath by a court reporter. The party's lawyer asks questions. The lawyer for the other side asks cross-examination questions. The court reporter creates a full, verbatim written record of all the questions, answers, and objections. A deposition of a party can be used for any purpose by either side. A deposition of a non-party witness can be used if it is different from the witness' testimony at trial, or if the witness is unable to testify. Depositions allow each lawyer to determine how strong the party's case may be, avoid surprises, and determine whether a person would be an effective witness in court.

Interrogatories are written questions, sent only to a party, which must be answered in writing under oath. They are sent directly by the lawyer for one side, without court action and without a court reporter. Usually the party receiving the interrogatory allows a lawyer to draft the answer to the interrogatory so as to answer the question while revealing as little as possible.

"Requests to Produce" can be sent only to an opposing party, and are used to make the other side produce documents or things, or allow inspection of land.

"Orders for Physical or Mental Examination" are used to check on a party's physical or mental health, but, because these orders can be abused, courts will only issue them when physical or mental health is an issue in the lawsuit, and will only issue them against parties and not against general witnesses.

"Requests for Admission" are written requests to the opposing party to admit facts that are not in dispute. Failure to respond is taken as an admission against the party who is silent, but a party may deny a request to admit when there is a good faith dispute about the fact.

Exceptions to Discovery

Persons involved in the U.S. discovery process for the first time are often astonished at its wide range, which extends to "any matter relevant to the claim or defense of any party." There is no requirement that the information requested in discovery will actually be used in the trial, or even that it would be admissible as evidence. However, discovery does have some limits. As noted above, in December 2015, the FRCP were amended to implement a limit of proportionality, requiring that discovery requests be "proportional to the needs of the case." Rule 26(b)(1). Communications between certain categories of professionals and their clients cannot be discovered except with the consent of the client. These communications are called "privileged." Some of the more common privileges are those between an attorney and a client, a doctor and a patient, a husband and a wife, a priest and a penitent, and, in some states, an accountant and a client, or a psychologist or social worker and a patient. Confidential commercial information can be made available to a party under a protective order of the court forbidding the party from using or disclosing the information except in the lawsuit.

Abuses of Discovery

Since a lawsuit in the United States can be an expensive, time consuming, and stressful action for both parties, some readers may find it hard to believe that lawyers all voluntarily cooperate in discovery to show each other facts, documents, and witnesses that could cause the other side to win. It is true that there are some lawyers who try to abuse discovery, but the discovery process succeeds for various reasons:

1. Desire to Avoid Angering the Judge. Judges like to have an efficient courtroom and to hear cases as soon as they are ready. They are impatient with parties who

delay or evade discovery or try to gain unfair advantage over the other party. Judges can grant a "motion to compel discovery" forcing the other side to provide information. An angry judge can make decisions that are unfavorable to the party that is seen as uncooperative.

2. Desire to Avoid a Bad Impression on the Jury. In jury trials, a jury will often assume that if a party is uncooperative, that party has something to hide. This may cause a jury to decide against such a party.

3. Limits to Interrogatories. If an individual sues a rich person or corporation, the rich party's lawyers may try to overwhelm the individual ("burying him in paper") with thousands of pages of interrogatories. The FRCP now limit interrogatories to twenty-five unless the court permits more.

4. Penalties. Judges can require the loser in a discovery dispute to pay the other side's attorney fees unless the loser's position was "substantially justified." Judges can order that the other party's facts be taken as established or that a party be denied the opportunity to present defenses, if the party is uncooperative.

Summary Judgment

A party that was defeated in its earlier motion to dismiss for failure to state a claim may ask for "summary judgment" at the end of discovery. Summary judgment means the judge will decide the case without a full trial. Summary judgment can only be made if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." In deciding a motion for summary judgment by a party, the court must view the facts in the light most favorable to the non-moving party, drawing any reasonable inferences in that party's favor. If the non-moving party can show that there is any genuine fact in dispute, summary judgment is not permitted and the case goes to trial.

The Trial

All civil trials in the United States are supervised by a judge who decides matters of law, guides the proceedings and makes a wide range of evidentiary and other rulings. In some cases, a civil jury made up of ordinary citizens is empanelled to perform the role of factfinder. If no party demands a jury trial, then the trial will go forward as a so-called bench trial and the judge will take on the additional role of factfinder.

The selection of a pool of individuals for potential service on juries, and the selection of the jury to hear a specific case, are discussed below in the chapter on Criminal Law and Procedure.