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## Neither Limited nor Simplified: A Proposal for Reform of Illinois Supreme Court Rule 222(B)

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## NOTE

### NEITHER LIMITED NOR SIMPLIFIED: A PROPOSAL FOR REFORM OF ILLINOIS SUPREME COURT RULE 222(B)

*Michael S. Smith\**

*A limited and simplified discovery system should broaden access to courts, resolve disputes quickly, and expedite relief to injured parties. It should not incentivize procedural gamesmanship or increase the system's complexity. Regrettably, Illinois's "limited and simplified" discovery system does both. The initiation procedure for the simplified system, Rule 222(b), creates procedural traps and perverse incentives for both plaintiffs and defendants, and conflicting appellate interpretations of the Rule intensify the problem. This Note examines the flaws underlying the current simplified discovery scheme and argues for reform. It examines simplified discovery schemes in other states to recommend a new system for initiating and exiting limited and simplified discovery in Illinois. It also identifies lessons that other states can take from Illinois to improve their own discovery procedures. The proposed reforms would improve cost savings by broadening the Illinois scheme's applicability and increase transparency and fairness for all litigants.*

#### TABLE OF CONTENTS

INTRODUCTION.....	584
I. OVERVIEW: LIMITED AND SIMPLIFIED DISCOVERY IN ILLINOIS .....	586
A. <i>Rule 222 Generally</i> .....	586
B. <i>The Grady/Dovalina Split</i> .....	588
II. RULE 222(B) CREATES PERVERSE INCENTIVES AND PROCEDURAL TRAPS.....	591
A. <i>Appellate Splits Are Especially Problematic in Illinois</i> .....	591
B. <i>Plaintiffs Are Disadvantaged by Rule 222(b)</i> .....	592
C. <i>Defendants Are Disadvantaged by Rule 222(b)</i> .....	595

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III. A POTENTIAL SOLUTION TO THE RULE 222(B) PROBLEM.....	598
A. Voluntary “Opt-Ins” Are Ineffective .....	599
B. Mandatory Processes Provide More Control .....	601
C. A Proposal for Reform .....	603
1. A \$75,000 Bright Line .....	603
2. A Mandatory Process with an Administrative Check.....	605
3. A “Good Cause” Opt-Out.....	606
CONCLUSION.....	608

#### INTRODUCTION

A simplified discovery system holds a great deal of promise. It would broaden access to courts, ease resolution of disputes, and expedite relief to injured parties. What it should *not* do is make an already byzantine legal system even more complex and create traps poised to ensnare the legally unsophisticated. Unfortunately, the simplified discovery system in Illinois, as set out by Illinois Supreme Court Rule 222,<sup>1</sup> is emblematic of what such systems should not do, rather than what they should.

In early August of 2004, Evelyn Grady had almost certainly never heard of Rule 222.<sup>2</sup> She had just been injured in a car accident, had ongoing medical expenses, and was temporarily disabled—with some of that disability expected to be permanent.<sup>3</sup> Ms. Grady came to the courthouse seeking compensation from the driver who had injured her.<sup>4</sup> From Ms. Grady’s perspective, everything about her case must have appeared to be progressing normally. She filed a complaint seeking “an amount *exceeding* \$15,000,” and the case entered discovery.<sup>5</sup> The defendant took an evidence deposition.<sup>6</sup> And a little over two years after she first filed her complaint, her case went to a three-day trial.<sup>7</sup> Much to Ms. Grady’s delight, the jury returned an award of almost \$100,000,<sup>8</sup> far beyond what she had first hoped she might receive.

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1. ILL. SUP. CT. R. 222.

2. See *Grady v. Marchini*, 874 N.E.2d 179 (Ill. App. Ct. 2007). From the facts of the case, it seems apparent that her attorneys were not familiar with the rule either.

3. *Id.* at 180.

4. *Id.*

5. *Id.* (emphasis added).

6. *Id.* at 182. *But see*, ILL. SUP. CT. R. 222(f)(3) (prohibiting evidence depositions without leave of court in simplified discovery proceedings).

7. *Grady*, 874 N.E.2d at 181.

8. *Id.*

A month later, her award was cut in half.<sup>9</sup> The cause? A single line, buried in an Illinois Supreme Court Rule entitled “Limited and Simplified Discovery in Certain Cases”<sup>10</sup>—a rule the defendant did not even follow.<sup>11</sup> One more year and a costly appeal later, a rule ostensibly designed to avoid “expense, delays, and abuses”<sup>12</sup> had caused Ms. Grady all three. Both the trial and appellate court, with no procedural warning and no regard for the merits of Ms. Grady’s case, interpreted a complaint seeking “an amount exceeding \$15,000”<sup>13</sup> to be effectively equivalent to a complaint seeking “an amount not in excess of \$50,000,”<sup>14</sup> and consequently halved her recovery.<sup>15</sup>

The “Limited and Simplified” discovery rule in Illinois in practice is neither. Rule 222(b) reaches nearly all civil cases seeking monetary damages in the state.<sup>16</sup> The traps and perverse incentives created by conflicting judicial interpretations of some of the rule’s provisions have stolen its simplicity as well.<sup>17</sup>

Commentators view Illinois as a trendsetter with respect to procedural discovery rules.<sup>18</sup> Historically, state discovery procedures largely tracked the Federal Rules of Civil Procedure.<sup>19</sup> In the past thirty years, however, many states have moved away from the federal rules and have begun to develop their own procedures.<sup>20</sup> Illinois’s bifurcated system—and its unusual initiation provision<sup>21</sup>—is one item on the “smorgasbord” of procedural discovery initiatives that have emerged from widespread state experimentation.<sup>22</sup> But as a trendsetting state, problems with Illinois’s simplified discovery system

9. *Id.*

10. ILL. SUP. CT. R. 222(b) (“Any civil action seeking money damages shall have attached to the initial pleading the party’s affidavit that the total of money damages sought does or does not exceed \$50,000. . . . Any judgment on such claim which exceeds \$50,000 shall be reduced posttrial to an amount not in excess of \$50,000.”).

11. *Grady*, 874 N.E.2d at 182 (recounting that defendant took an evidence deposition without leave of court). Rule 222 does not permit evidence depositions unless a party explicitly obtains leave of court. ILL. SUP. CT. R. 222(f)(3).

12. Steven F. Pflaum & Faustin A. Pipal, Jr., *Successful Practice Under the New Illinois Civil Discovery Rules*, CBA REC., Oct. 1995, at 20.

13. *Grady*, 874 N.E.2d at 180.

14. ILL. SUP. CT. R. 222(b).

15. *Grady*, 874 N.E.2d at 183.

16. See ILL. SUP. CT. R. 222(b) (extending the rule’s reach to “[a]ny civil action seeking money damages”).

17. See *infra* Sections II.B, II.C.

18. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1173 (2005); see Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 599 (2002).

19. Koppel, *supra* note 18, at 1173.

20. *Id.* at 1171–72.

21. ILL. SUP. CT. R. 222. Note that the Federal Rules of Civil Procedure do not provide for simplified discovery procedures *at all*.

22. Koppel, *supra* note 18, at 1174.

are instructive to states pursuing reforms to simplify procedures in their own systems.<sup>23</sup>

This Note examines the flaws underlying the current limited and simplified discovery scheme in Illinois and argues for reform. Part I provides a broad overview of Rule 222 and describes an interpretive split regarding its initiation provision. Part II describes how the initiation provision of Rule 222 creates uncertainty, perverse incentives, and procedural traps for plaintiffs and defendants alike. Part III examines expedited discovery schemes in several other states to propose specific reforms in Illinois and illustrate more broadly applicable lessons. Part III concludes that the current party-driven affidavit scheme in Illinois should be replaced with a sorting process that is mandatory, is judicially driven, and provides for good cause opt-outs similar to those in the expedited discovery process in Texas.

### I. OVERVIEW: LIMITED AND SIMPLIFIED DISCOVERY IN ILLINOIS

Adopted on August 1, 1985, Illinois Supreme Court Rule 222 sets out procedures for “Limited and Simplified Discovery in Certain Cases.”<sup>24</sup> In 1995, the Illinois Supreme Court broadly reformed civil discovery procedures to avoid “expense[s], delays, and abuses.”<sup>25</sup> As part of these reforms, Rule 222 was “completely rewritten.”<sup>26</sup> The 1995 scheme, as amended, is the discovery system in effect in Illinois today.<sup>27</sup>

This Part describes the current limited and simplified discovery scheme in Illinois. Section I.A explains the structure of Rule 222, highlighting its initiation provision. Section I.B identifies a split in Illinois Appellate Court authority regarding how to resolve cases in which a plaintiff never files a Rule 222(b) initiation affidavit.

#### A. Rule 222 Generally

Rule 222 applies broadly to civil cases involving monetary damages less than \$50,000.<sup>28</sup> Certain limited categories of cases are exempted, such as cases seeking equitable relief and small claims cases.<sup>29</sup> But those exemptions on-

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23. *Id.*; see also Moskowitz, *supra* note 18, at 613 (“Justice Brandeis praised the ability of states to be ‘laboratories’ in which experiments in the law might be conducted.” (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

24. ILL. SUP. CT. R. 222; see also Kenneth Kandaras & Catherine Wozniak, *Civil Procedure*, 18 LOY. U. CHI. L.J. 317, 353 (1986).

25. Pflaum & Pipal, *supra* note 12, at 20.

26. *Id.* at 28.

27. ILL. SUP. CT. R. 222 (describing the rule’s amendment history).

28. ILL. SUP. CT. R. 222(a).

29. *Id.* Aside from equity cases, the exemptions apply because the exempted classes of cases have their own specialized procedures. Small claims cases and ordinance violations are explicitly governed by other rules. ILL. SUP. CT. R. 281–89 (small claims); ILL. SUP. CT. R. 570–

ly marginally limit the reach of Rule 222. At the time of the 1995 reforms, Rule 222 was estimated to apply to between eighty-five and ninety percent of Illinois civil cases<sup>30</sup>—meaning almost ninety percent of Illinois civil cases in 1995 sought damages less than \$50,000.

The Rule 222 process differs from the traditional Illinois civil discovery process in a few important respects. Deposition discovery is severely curtailed: barring “leave of court for good cause shown,” a party may only take three-hour discovery depositions of named parties, treating physicians, and expert witnesses.<sup>31</sup> Evidentiary depositions are prohibited absent “exceptional circumstances.”<sup>32</sup> Although traditional discovery depositions are also presumptively limited to three hours, outside Rule 222 there is no limit on how many discovery or evidentiary depositions a party may take.<sup>33</sup> Rule 222 also requires substantive initial disclosures upfront by all parties.<sup>34</sup> These initial disclosures resemble the initial disclosures required in federal cases.<sup>35</sup> Written discovery procedures under Rule 222 are substantively quite similar to traditional discovery process in Illinois, however.<sup>36</sup>

The most problematic provision of Rule 222 is its initiation provision. This provision requires that “[a]ny civil action seeking money damages shall have attached to the initial pleading the party’s affidavit that the total of money damages sought does or does not exceed \$50,000.”<sup>37</sup> Facially, this provision imposes an obligation on *almost every* civil plaintiff in Illinois seeking monetary damages. That is, an Illinois civil plaintiff, whether seeking \$10,001<sup>38</sup> or millions, must file a Rule 222(b) affidavit with her complaint estimating where her damages fall with respect to the \$50,000 bright line. If the Rule 222(b) affidavit estimates damages at \$50,000 or less, the case is governed by limited and simplified discovery procedures.<sup>39</sup> If the affidavit

79 (non-traffic, non-conservation ordinance violations). Procedural law in family law cases is specifically provided by statute. *E.g.*, 750 ILL. COMP. STAT. 5/401–5/413 (2016) (divorce cases).

30. Pflaum & Pital, *supra* note 12, at 20, 28.

31. ILL. SUP. CT. R. 222(f)(2)–(3).

32. ILL. SUP. CT. R. 222(f)(3).

33. ILL. SUP. CT. R. 206(d); *see* ILL. SUP. CT. R. 202 (“Any party may take the testimony of any party or person by deposition upon oral examination or written questions for the purpose of discovery or for use as evidence in the action.”).

34. ILL. SUP. CT. R. 222(c)–(d).

35. *Compare id.*, with FED. R. CIV. P. 26(a)(1) (describing federally required initial disclosures).

36. *Compare* ILL. SUP. CT. R. 222(f)(1), (4)–(5), with ILL. SUP. CT. R. 213–16 (both limited and traditional discovery procedures allow for thirty interrogatories by each party, robust document discovery rights, etc.). Discovery procedures in other states are a “smorgasbord.” *See supra* note 22 and accompanying text.

37. ILL. SUP. CT. R. 222(b).

38. Cases seeking monetary damages of \$10,000 or below in Illinois are handled via small claims. ILL. SUP. CT. R. 281.

39. ILL. SUP. CT. R. 222(b) (“If the damages sought do not exceed \$50,000, this rule *shall* apply.” (emphasis added)).

estimates damages greater than \$50,000, the case falls under ordinary Illinois discovery procedures.<sup>40</sup>

This bright line matters because Rule 222(b) has teeth. If a plaintiff's affidavit states she is seeking \$50,000 or less, and she is awarded over \$50,000, that award "shall be reduced posttrial to an amount not in excess of \$50,000."<sup>41</sup> If a plaintiff later discovers the initial affidavit was incorrect, she may amend or supersede it, but only for "good cause" and "only if it is clear that no party will suffer *any prejudice* as a result."<sup>42</sup> The plaintiff may amend this affidavit at any point in the proceedings before trial.<sup>43</sup>

But Rule 222(b) is silent on an important question: What happens when a plaintiff's case proceeds to trial *without* a Rule 222(b) affidavit having ever been filed?

### B. *The Grady/Dovalina Split*

The Illinois Appellate Court has split on this question. In one instance, it capped the plaintiff's damages at \$50,000 posttrial.<sup>44</sup> In another, it effectively read out Rule 222(b)'s affidavit requirement altogether.<sup>45</sup>

The first published appellate decision to seriously grapple with a plaintiff's failure to file a Rule 222(b) affidavit was *Grady v. Marchini*, decided in the Fourth District.<sup>46</sup> Plaintiff Evelyn Grady was involved in a car accident and sought damages for lost earnings, pain and suffering, emotional distress, and temporary and permanent disability "in an amount exceeding \$15,000."<sup>47</sup> After filing, her case was administratively classified under the "Law Magistrate" case type and therefore given an "LM" docket number.<sup>48</sup> Ms. Grady never attached a Rule 222(b) affidavit to her complaint and never corrected that oversight.<sup>49</sup> Her case made full use of Illinois's traditional civil discovery process: for example, the defendant took evidence depositions<sup>50</sup> and used information from those depositions at trial.<sup>51</sup> Ms. Grady prevailed

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40. *See id.*

41. *Id.*; accord *Grady v. Marchini*, 874 N.E.2d 179, 182–83 (Ill. App. Ct. 2007).

42. ILL. SUP. CT. R. 222(b) (emphasis added).

43. *Id.*

44. *See Grady*, 874 N.E.2d at 181–83.

45. *See Dovalina v. Conley*, 2013 IL App (1st) 103127, ¶ 1, 990 N.E.2d 305, 307.

46. 874 N.E.2d 179.

47. *Id.* at 180.

48. *Id.* In Champaign County, cases seeking monetary damages less than \$50,000 are designated with the "LM" case type. *Id.* at 183.

49. *Id.* at 180–81.

50. *But see* ILL. SUP. CT. R. 222(f)(3) (prohibiting evidence depositions without leave of court in Rule 222 cases).

51. *Grady*, 874 N.E.2d at 182–83.

at trial and was awarded \$97,700.<sup>52</sup> In response, the defendant filed a post-trial motion claiming that because the case was of the Law Magistrate case type and because Ms. Grady failed to file the required Rule 222(b) affidavit, damages should be reduced to \$50,000.<sup>53</sup> The trial court granted the reduction in damages, relying on Rule 222(b).<sup>54</sup>

On appeal, the *Grady* court held that “[t]he language of Rule 222(b) is clear”<sup>55</sup> and construed Rule 222(b) to require reduction of damages to \$50,000.<sup>56</sup> The language of this holding is broad: “Plaintiff did not file an affidavit saying she was seeking in excess of \$50,000. We conclude she is precluded from recovering more than \$50,000. Rule 222(b) requires the judgment be reduced to \$50,000.”<sup>57</sup> The *Grady* court therefore equated failure to file a Rule 222(b) affidavit with filing an affidavit seeking less than \$50,000. Facially, *Grady* requires that damages should be capped at \$50,000 in *any* case in which the plaintiff fails to file a Rule 222(b) affidavit prior to trial.

But the court then noted in dicta that Ms. Grady’s case was a “Law Magistrate” case, as signified by its “LM” docket number.<sup>58</sup> In Champaign County, the court noted, such cases ordinarily seek less than \$50,000 in damages.<sup>59</sup> In response, Ms. Grady argued that the clerk of the trial court—rather than Ms. Grady herself—was responsible for the designation of the case; Ms. Grady merely used the docket number she was assigned.<sup>60</sup> But the appellate court was not convinced.<sup>61</sup>

The second court to look at the failure-to-file issue under Rule 222(b) attempted to use the “LM” dicta to limit *Grady* to its facts. *Dovalina v. Conley*, decided in the First District, reasoned that *Grady*’s “LM” case type was a critical element of the court’s holding that capped damages at \$50,000.<sup>62</sup> Because *Dovalina* was designated with the “Law” case type, the court separately interpreted Rule 222(b) and concluded that “a plaintiff’s failure to attach the requisite affidavit does not mean that he is barred from recovering a judgment in excess of \$50,000.”<sup>63</sup>

52. *Id.* at 181.

53. *Id.*

54. *Id.*

55. *Id.* at 182.

56. *Id.* at 183.

57. *Id.*

58. *Id.*

59. *Id.* Technically, cases seeking up to \$10,000 are designated with the “Small Claims” case type. ILL. SUP. CT. R. 281; *Small Claims, Law, and Law Magistrate*, CHAMPAIGN COUNTY CIR. CLERK, <http://champaigncircuitclerk.org/forms-and-resources/civil/small-claims/> [<https://perma.cc/368L-AK3Q>].

60. *Grady*, 874 N.E.2d at 183.

61. *Id.* (“We note the complaint was designated as an LM case and the ‘LM’ was typed. Thus, plaintiff gave the designation of LM to this case.”).

62. 2013 IL App (1st) 103127, ¶ 24, 990 N.E.2d 305, 312.

63. *Dovalina*, 2013 IL App (1st) 103127, ¶¶ 25–27, 990 N.E.2d at 312.



*Dovalina* arose in very different factual circumstances from *Grady*. Mr. Dovalina brought a personal injury complaint seeking “an amount in excess of \$50,000” from each of three defendants.<sup>64</sup> After almost eight months with no response from the defendants, the trial court awarded Mr. Dovalina a default judgment of just under \$130,000.<sup>65</sup> Almost three years later, after Mr. Dovalina began collection proceedings on his judgment, one of the defendants filed a petition to quash on the grounds that Mr. Dovalina had never attached a Rule 222(b) affidavit to his complaint.<sup>66</sup> Relying on *Grady*’s interpretation of Rule 222(b), the trial court capped the judgment at \$50,000.<sup>67</sup>

On appeal, the First District reversed.<sup>68</sup> Limiting *Grady* to its facts, the court held that “what matters in a determination of whether Rule 222 applies to an action is the amount of damages a plaintiff is seeking, whether this is shown by a Rule 222 affidavit *or by a complaint*, in order to protect the defendant from surprise.”<sup>69</sup> This policy-based interpretation of Rule 222(b) contrasts markedly with *Grady*’s formalism.<sup>70</sup> The *Dovalina* court went on to reason that, because “[p]laintiff’s complaint notified defendant that he was seeking ‘in excess of \$50,000’ in damages,” and since “plaintiff filed his case in the law division . . . which only hears civil actions seeking in excess of \$100,000 in monetary damages,” the defendant “had ample notice that plaintiff was seeking more than \$50,000 in damages.”<sup>71</sup> Given the *Dovalina* court’s liberal construction of Rule 222(b)<sup>72</sup> and the purported lack of prejudice to the defendant,<sup>73</sup> the court concluded Rule 222(b) did not cap damages in this case.

The *Dovalina* interpretation allows a statement in the complaint to satisfy Rule 222(b), effectively reading out the affidavit requirement. This interpretation sharply contrasts with the strict construction and firm cap in *Grady*.<sup>74</sup> The Illinois Supreme Court has not yet stepped in to resolve the issue, and thus, both *Grady* and *Dovalina* remain good law in Illinois.

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64. *Id.* ¶ 3, 990 N.E.2d at 307.

65. *Id.*

66. *See id.* ¶ 5 & n.1, 990 N.E.2d at 307 & n.1.

67. *Id.* ¶ 20, 990 N.E.2d at 310–11.

68. *Id.* ¶ 34, 990 N.E.2d at 314.

69. *Id.* ¶ 27, 990 N.E.2d at 312 (emphasis added).

70. *See supra* notes 49–51 and accompanying text.

71. *Dovalina*, 2013 IL App (1st) 103127, ¶ 28, 990 N.E.2d at 313.

72. *See id.* ¶ 26, 990 N.E.2d at 312 (“[S]upreme court rules are to be construed liberally and not literally.”).

73. *Id.* ¶¶ 26–27, 990 N.E.2d at 312–13.

74. *Grady v. Marchini*, 874 N.E.2d 179, 183 (Ill. App. Ct. 2007).

## II. RULE 222(B) CREATES PERVERSE INCENTIVES AND PROCEDURAL TRAPS

This Part examines Rule 222(b) and the *Grady/Dovalina* split in more detail and concludes that the current limited discovery framework creates uncertainty, perverse incentives, and procedural traps that disadvantage both plaintiffs and defendants in unique ways. Section II.A briefly discusses the uncertainty an appellate split creates in Illinois. Section II.B explores how the Rule, especially under the *Grady* interpretation, creates traps and uncertainty for unwary plaintiffs. Section II.C considers how the Rule, especially under the *Dovalina* interpretation, fails to protect defendants' rights and creates uncertainty for them as well—something simplified discovery procedures and a damages cap should prevent.

### A. Appellate Splits Are Especially Problematic in Illinois

Appellate splits are particularly troublesome in Illinois. Although the state is divided into regional districts, Illinois has only one intermediate appellate court.<sup>75</sup> Any decision of an appellate panel therefore binds any circuit (trial) court, regardless of geographic location.<sup>76</sup> In tension with this uniformity-seeking structure is another principle of Illinois appellate procedural case law: in the event of a split between a circuit's "home" appellate district and an appellate district elsewhere in the state, the circuit court is bound to the decisions of the appellate district in which it sits.<sup>77</sup> Therefore, with respect to the split concerning a failure to file a Rule 222(b) affidavit, *Grady* binds the Fourth District, sitting in the state capital of Springfield, while *Dovalina* binds the Chicago-based First District.<sup>78</sup>

This means that what is constitutionally considered the same court, designed to uniformly apply the law across the state, applies different law in similar cases based on nothing more than geography.<sup>79</sup> Meanwhile, trial courts in the Second, Third, and Fifth appellate districts face uncertainty if and when the *Grady/Dovalina* dilemma arises there.<sup>80</sup>

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75. *Aleckson v. Village of Round Lake Park*, 679 N.E.2d 1224, 1229–30 (Ill. 1997) (Harrison, J., specially concurring) (citing *People v. Granados*, 666 N.E.2d 1191, 1179 (Ill. 1996)); see also ILL. CONST. art. VI, § 1 ("The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." (emphasis added)).

76. *Aleckson*, 679 N.E.2d at 1229–30 (Harrison, J., specially concurring).

77. *Id.* at 1229 (majority opinion) (citing *State Farm Fire & Cas. Co. v. Yapejian*, 605 N.E.2d 539, 542 (Ill. 1992)).

78. ILL. SUP. CT. R. 22(a)(1).

79. See *Aleckson*, 679 N.E.2d at 1229–30 (Harrison, J., specially concurring) ("Illinois has but one appellate court.").

80. The Second, Third, and Fifth districts have not taken a position on the failure to file a Rule 222(b) affidavit as of this Note's publication. See, e.g., *Timothy Whelan Law Assocs. v. Kruppe*, 947 N.E.2d 366, 382 (Ill. App. Ct. 2011) (declining to address the question in the Second District).

A further wrinkle: only the Illinois Supreme Court can overrule Illinois Appellate Court decisions.<sup>81</sup> An appellate district panel may not overrule *other* appellate districts and may not even overrule past decisions decided within the *same* district.<sup>82</sup> Until the Illinois Supreme Court steps in, both *Grady* and *Dovalina* remain good law. As a result, Illinois trial courts will apply the same rule differently, resulting in different outcomes for similarly situated parties in different regions of the state. This creates unnecessary uncertainty and complication for both plaintiffs and defendants who litigate in different regions of the state—the opposite of what a “limited and simplified” procedure should accomplish.

### B. Plaintiffs Are Disadvantaged by Rule 222(b)

The current scheme created by Rule 222(b) is a trap primed to snare an unwary plaintiff. Plaintiffs face three principal problems in the current scheme: (1) the obligation to file an affidavit is hidden; (2) plaintiffs must estimate damages very early on in the litigation; and (3) once a plaintiff commits to seeking damages above or below \$50,000, she is often stuck there.

First, Rule 222 applies broadly.<sup>83</sup> In 1995, an estimated eighty-five to ninety percent of civil cases in Illinois sought less than \$50,000 in damages and thus should have used simplified discovery procedures.<sup>84</sup> Yet, Rule 222(b)’s affidavit requirement applies to nearly all civil cases<sup>85</sup> and imposes this obligation from an entirely unexpected place. The title of Rule 222 is “Limited and Simplified Discovery in *Certain Cases*.”<sup>86</sup> Facially—and deceptively—this title implies that the rule’s provisions apply only to a limited set of cases. Perhaps this is why some attorneys fail to file the required affidavit. If the parties in *Grady* and *Dovalina* were ensnared by the Rule 222(b) trap despite being represented by counsel,<sup>87</sup> what hope does a pro se plaintiff have in the same situation? Additionally, as *Grady* remains good law outside

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81. *Gillen v. State Farm Mut. Auto. Ins. Co.*, 830 N.E.2d 575, 581 n.2 (Ill. 2005) (“A decision of our appellate court may only be reversed or overruled by this court.”).

82. *Id.* (refusing to permit the First District to “abrogate” one of its prior cases). Illinois has no analogue to the en banc procedure in the federal courts of appeals. *See* FED. R. APP. P. 35.

83. ILL. SUP. CT. R. 222(a) (“This rule applies to all cases subject to mandatory arbitration, civil actions seeking money damages not in excess of \$50,000 exclusive of interest and costs, and to cases for the collection of taxes not in excess of \$50,000. This rule does not apply to small claims, ordinance violations, actions brought pursuant to 750 ILCS (FAMILIES), and actions seeking equitable relief.”).

84. *See* Pflaum & Pipal, *supra* note 12, at 28.

85. ILL. SUP. CT. R. 222(a)–(b).

86. ILL. SUP. CT. R. 222 (emphasis added).

87. *See* *Grady v. Marchini*, 874 N.E.2d 179, 181–82 (Ill. App. Ct. 2007); *Dovalina v. Conley*, No. 06 L 66019, 2010 WL 9504209, at \*1 (Ill. Cir. Ct. Sept. 21, 2010), *rev’d*, 2013 IL App (1st) 103127, 990 N.E.2d 305.

of the First District, plaintiffs who miss the affidavit requirement of Rule 222(b) in good faith may find their damages capped, no matter how large their intended recovery or the merits of their case.<sup>88</sup>

Second, the early damages-estimation provision of Rule 222(b) may disadvantage even those plaintiffs who attempt to comply with it. The Rule directs a plaintiff to attach her affidavit to her “initial pleading.”<sup>89</sup> That is, a plaintiff is forced to estimate—at the very beginning of her action and under oath—whether her damages are greater or less than \$50,000. This estimate will stay with her until trial, barring a showing of good cause and no prejudice.<sup>90</sup> By requiring the estimate with the complaint, Rule 222(b)’s obligations necessarily attach well before discovery and, therefore, often well before a plaintiff has all the facts necessary to estimate damages.

Imposing a damages-estimation obligation at the pleadings stage poses problems for at least two classes of plaintiffs: (1) those whose damages are uncertain when their complaint is filed and (2) those whose damages are near the critical amount of \$50,000. Pro se plaintiffs in each of these classes would likely face even greater difficulty. For example, a pro se plaintiff with little legal experience might have great difficulty estimating and quantifying damages. Perhaps underestimating the magnitude of a possible award, that pro se plaintiff might unwisely choose simplified procedures, capping recovery at \$50,000.<sup>91</sup> The Rule 222(b) affidavit requirement is also difficult for plaintiffs whose claims are difficult to estimate or objectively quantify: for example, plaintiffs seeking pain and suffering, emotional distress, or punitive damages.<sup>92</sup>

For the second class of plaintiffs identified above—those whose damages may fall near the \$50,000 bright line—the trap poses the greatest danger to the attorney. For example, a plaintiff’s attorney who believes her client’s damages might be below \$50,000 but hopes for a larger award faces a dilemma: she could choose to submit a false affidavit and risk her client’s money on costly, lengthy traditional discovery procedures or take the faster, simpler, and less expensive path of Rule 222 with the \$50,000 damage cap.<sup>93</sup> The former choice risks sanctions and disciplinary action;<sup>94</sup> the latter opens

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88. 874 N.E.2d at 183.

89. ILL. SUP. CT. R. 222(b).

90. *Id.*

91. *See id.*

92. *See* Alice M. Noble-Allgire, *Revised Supreme Court Rule 222 Will Benefit Federal Courts*, 84 ILL. B.J. 317, 324 (1996) (“Rule 222 certainly imposes a new burden upon plaintiffs—particularly in cases where the damages are not readily quantifiable, such as in complaints seeking punitive damages or recovery for pain and suffering.”).

93. *See* Pflaum & Pipal, *supra* note 12, at 29.

94. ILL. SUP. CT. R. 222(i); *see also* ILL. SUP. CT. R. 137 (Illinois equivalent of FED. R. CIV. P. 11).

up plaintiff's counsel to a malpractice suit if the factfinder awards more than \$50,000.<sup>95</sup>

*Dovalina* opens the door to a third—and, from some perspectives, perverse—outcome for this class of cases. A plaintiff's attorney might *intentionally* fail to file the Rule 222(b) affidavit. Bypassing Rule 222's initial disclosure provisions,<sup>96</sup> this attorney could then fight to pile up damage allegations during discovery in the hopes that a judge's ex post examination of the complaint would permit a recovery in excess of \$50,000.<sup>97</sup> *Dovalina*'s liberal construction of Rule 222(b) makes such a course of action all the more likely to succeed<sup>98</sup>—if the trial judge adheres to that interpretation. *Dovalina* therefore incentivizes some plaintiffs' lawyers to intentionally fail to comply with Rule 222(b). This is all the more ironic given the *Dovalina* court's declaration that "Supreme court rules 'have the force of law, and the presumption must be that they will be obeyed and enforced as written.'"<sup>99</sup>

Third, Rule 222(b) provides very limited flexibility for plaintiffs to switch between discovery schemes after the affidavit is filed, discovery begins, and the facts begin to clarify. While the Rule does permit modification of the initial affidavit attached to the complaint, the plaintiff is first required to seek leave of court.<sup>100</sup> Leave is only granted if "good cause [is] shown, and only if it is clear that no party will suffer *any prejudice* as a result."<sup>101</sup> This provision may limit one method by which plaintiffs might use Rule 222 to gain a tactical advantage: for example, asserting damages less than \$50,000 to avoid removal to federal court, only to switch to full discovery procedures after the thirty-day removal window closes.<sup>102</sup> A "good cause" limitation falls harder on plaintiffs who legitimately discover higher damages in postcomplaint discovery. And, in reverse, a "good cause" limitation disadvantages plaintiffs who initially opt for full discovery but who might later be willing to trade recovery in excess of \$50,000 for the lessened time and cost of limited discovery proceedings.

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95. Noble-Allgire, *supra* note 92, at 324.

96. ILL. SUP. CT. R. 222(c)–(d).

97. See *Dovalina v. Conley*, 2013 IL App (1st) 103127, ¶¶ 26–29, 990 N.E.2d 305, 312–13.

98. See *id.*

99. *Id.* ¶ 26, 990 N.E.2d at 312 (quoting *Robidoux v. Oliphant*, 775 N.E.2d 987, 992 (Ill. 2002)).

100. ILL. SUP. CT. R. 222(b).

101. *Id.* (emphasis added). As of publication, there does not appear to be any case law specifically interpreting the "any prejudice" language in Rule 222(b). Read literally, the language could prevent a plaintiff from *ever* transitioning to full discovery. Opting out removes the \$50,000 damages cap, exposing a defendant to greater liability. It is difficult to see how increased liability would *not* be prejudicial.

102. See 28 U.S.C. § 1446(b)(1) (2012); Noble-Allgire, *supra* note 92, at 324.

In short, while Rule 222 offers plaintiffs lower costs by virtue of limited and speedier discovery, the hidden and wide-ranging disadvantages of the Rule may outweigh those benefits.

### C. *Defendants Are Disadvantaged by Rule 222(b)*

Ostensibly, Rule 222 should be a boon for some defendants. One would expect a simplified and fast-paced discovery process to speed up information exchange and facilitate settlements or trials, saving litigation costs for repeat players. Indeed, implicit in the Rule is the recognition that it will often apply to the types of claims in which repeat defendants are routinely involved—such as personal injury claims.<sup>103</sup> For defendants who routinely handle claims falling below the \$50,000 bright line,<sup>104</sup> Rule 222(b)'s damages cap should limit financial uncertainty. But Rule 222(b) fails to promote either clarity or certainty for civil defendants.

The damages cap does not promote candor. Instead, it incentivizes plaintiffs with all but the smallest of potential recoveries to never claim less than \$50,000 in their Rule 222(b) affidavit.<sup>105</sup> Even worse, it incentivizes some plaintiffs to file no affidavit at all.<sup>106</sup> Consequently, the confusion and uncertainty meant to be clarified by a Rule 222(b) affidavit remain in many cases. A defendant in such cases will lack information about how much a plaintiff's injuries are worth until discovery is underway. The defendant will have to make judgments about litigation and settlement strategy with incomplete information or at a later date. The result: litigation-related uncertainty lasts *longer*.

Even worse, outside the First District, *Grady*<sup>107</sup> baits a trap for defendants. As discussed above, plaintiffs seeking damages much greater than \$50,000 might never check Rule 222 and accordingly would never find its affidavit requirement—a requirement that applies to all actions seeking monetary damages.<sup>108</sup> Knowing this, defendants might be tempted to lie in wait for plaintiffs until trial and then argue that because the plaintiffs never filed a Rule 222(b) affidavit damages are capped at \$50,000—springing a *Grady* trap.<sup>109</sup> Should the court choose to follow *Dovalina*, however, the trap intended for the plaintiff may instead ensnare the defendant who laid it.<sup>110</sup>

103. Cf. ILL. SUP. CT. R. 222(f)(2)–(3) (permitting only discovery depositions of parties, treating physicians, and experts and prohibiting evidence depositions unless “exceptional circumstances exist”). In Illinois, discovery depositions have limited evidentiary value; evidence depositions, in contrast, may be used to perpetuate testimony for trial. See Ill. Sup. Ct. R. 212(a)–(b).

104. ILL. SUP. CT. R. 222(b).

105. See *supra* notes 93–95 and accompanying text.

106. See *supra* notes 96–99 and accompanying text.

107. *Grady v. Marchini*, 874 N.E.2d 179 (Ill. App. Ct. 2007).

108. See *supra* notes 83–88 and accompanying text.

109. See *Diaz v. Archer Daniels Midland Co.*, No. No. 4–10–0028, 2011 WL 10481524, at \*2, \*12–15 (Ill. App. Ct. June 28, 2011) (describing an unsuccessful attempt by a sophisticated

Because of the warped incentives Rule 222(b) creates, a defendant should be very suspicious of a plaintiff who asserts damages of less than \$50,000, particularly if the injury complained of could reasonably lead to greater recovery. Under Rule 222(b), a plaintiff has exclusive choice of the discovery scheme.<sup>111</sup> The plaintiff should be expected to choose the scheme best for her. While a plaintiff might legitimately prefer a simplified and quick discovery process, at least two additional procedural games are possible when a plaintiff asserts damages lower than \$50,000.

The first is played by a plaintiff with something to conceal. While written discovery procedures under Rule 222 are quite similar to traditional Illinois procedures, deposition rights are much more limited.<sup>112</sup> A plaintiff who fears extensive deposition discovery might therefore be more likely to opt for Rule 222 discovery procedures over the traditional process. While this course of action would likely lock the plaintiff into \$50,000 maximum damages,<sup>113</sup> the plaintiff could always spin the wheel and try to show good cause to get her Rule 222(b) affidavit amended just prior to trial.<sup>114</sup> Even if the court refuses to find good cause, the plaintiff with something to hide will still have used the simplified discovery process to extract \$50,000 from her defendant while avoiding extensive (and potentially claim-defeating) disclosures. This course of action might, however, risk sanctions.<sup>115</sup>

The second game that plaintiffs can play with a sub-\$50,000 Rule 222(b) affidavit is a game to avoid removal to federal court. Rule 222(b)'s \$50,000 bright line rule used to be more strongly justified when the threshold for diversity removal to federal court was also \$50,000.<sup>116</sup> This is because, in addition to acting as a bright line for simplified discovery, the \$50,000 threshold served as a signal to federal courts by facilitating the diversity removal pro-

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defendant to use *Grady* to cap the plaintiff's damages after admitting liability). While *Diaz* was also decided in the Fourth District, it is unpublished. Unpublished cases have no precedential value in Illinois and may only be cited for purposes of preclusion. ILL. SUP. CT. R. 23(e).

110. See *Dovalina v. Conley*, 2013 IL App (1st) 103127, ¶ 29, 990 N.E.2d 305, 313 (denying defendants' request to cap plaintiff's damages).

111. See ILL. SUP. CT. R. 222(b) ("If the damages sought do not exceed \$50,000, [Rule 222] shall apply." (emphasis added)).

112. See *supra* notes 32–37 and accompanying text.

113. Defendants would almost certainly be prejudiced by an eve-of-trial affidavit switch in a case such as this, likely precluding this game. ILL. SUP. CT. R. 222(b) (permitting amendment of the damages affidavit "only if it is clear that no party will suffer any prejudice as a result of such amendment").

114. *Id.*

115. See ILL. SUP. CT. R. 222(i) ("The court shall enter an appropriate order pursuant to Rule 219(c) against any party or his or her attorney, or both, as a result of any affidavit . . . which the court finds was (a) false; (b) filed in bad faith; or (c) . . . without reasonable factual support."). Rule 219 governs Illinois discovery sanctions. ILL. SUP. CT. R. 219.

116. See *Noble-Allgire*, *supra* note 92, at 318.

cess.<sup>117</sup> With the federal threshold now at \$75,000,<sup>118</sup> Rule 222(b)'s \$50,000 bright line appears somewhat arbitrary.

This second game is simple: while the Rule 222(b) affidavit must be attached to the complaint, a plaintiff's initial discovery disclosures are not due until 120 days after *the answer* is filed.<sup>119</sup> Until that time, a defendant's only source of information about the value of a plaintiff's claim may be the complaint—containing only what self-serving information a plaintiff chooses to include. A defendant's notice of removal, in contrast, is due 30 days after receipt of *the complaint*.<sup>120</sup> While a plaintiff can always be coy about damages to avoid removal, this second game is particularly problematic for a defendant because federal courts view a Rule 222(b) affidavit as evidence of the plaintiff's damages.<sup>121</sup> The result can be somewhat amusing.<sup>122</sup> Additionally, while a defendant may propound interrogatories to in an attempt to value the plaintiff's claims, a plaintiff is under no obligation to answer before the removal deadline passes.<sup>123</sup> Federal removal statutes do give a defendant some leeway to attempt to ascertain whether damages are above \$75,000.<sup>124</sup> But a hard stop kicks in after one year.<sup>125</sup> If a plaintiff can hold out that long and avoid a finding of bad faith, she may thwart removal.<sup>126</sup>

A rule that aims to simplify procedure and promote candor produces the opposite result on both counts. An appellate split intensifies the existing problem. Relying on the Illinois Supreme Court to fix the *Grady/Dovalina* split is not enough. Even if the split is reconciled, the underlying structure of Rule 222 creates traps and perverse incentives for both plaintiffs and defendants. A look around at other states reveals better alternatives for Illinois and similar states.

117. See Laurie Kratky Doré, *If You Build It, Will They Come? Designing Iowa's New Expedited Civil Action Rule and Related Civil Justice Reforms*, 63 DRAKE L. REV. 401, 421 (2015) (noting the "cost savings" a \$75,000 bright line creates for federal courts).

118. See 28 U.S.C. §§ 1332(a), 1446(c)(2) (2012).

119. ILL. SUP. CT. R. 222(c).

120. 28 U.S.C. § 1446(b)(1).

121. See *Diamond v. Porsche Cars N. Am., Inc.*, 70 F. App'x 893, 895–96 (7th Cir. 2003) (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 248 F.3d 668, 670–71 (7th Cir. 2001)) (finding plaintiff's Rule 222(b) affidavit that damages were below \$50,000 to be evidence against removal).

122. See *Noble-Allgire*, *supra* note 92, at 318 (“[A]t oral argument we had the privilege of witnessing a comic scene: plaintiff's personal injury lawyer protests up and down that his client's injuries are as minor and insignificant as can be, while attorneys for the manufacturer paint a sob story about how plaintiff's life has been wrecked.” (quoting *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir. 1993))).

123. *Id.*

124. See § 1446(b)(3) (permitting removal thirty days after “it may first be ascertained that the case is one which is or has become removable”).

125. § 1446(c) (prohibiting removal one year after “commencement of the action”).

126. *Id.*; *Noble-Allgire*, *supra* note 92, at 318, 324.



### III. A POTENTIAL SOLUTION TO THE RULE 222(B) PROBLEM

The Illinois simplified discovery scheme needs specific legislative or administrative reform. Resolving the *Grady/Dovalina* dilemma will not solve the problem. If *Grady* is right, it is bad policy. Under *Grady*, a hidden procedural rule can cap damages with no regard to the merits or amount at stake in a particular case.<sup>127</sup> If *Dovalina* is right, the uncertainty and perverse incentives it creates make it equally undesirable.<sup>128</sup>

The initiation process for Illinois's simplified discovery scheme is an outlier, and possibly unique, when compared to other states. It relies entirely on the plaintiff taking the initiative and filing the Rule 222(b) affidavit in the first place. As the existence of cases such as *Grady* and *Dovalina* shows, there is no procedural or administrative check in the trial court to make sure the Rule 222(b) affidavit was actually filed. Instead, the only check is the defendant's initiative—often shown in a motion that may not be filed until trial<sup>129</sup> and then perhaps only with the intention of sandbagging the plaintiff.<sup>130</sup> Other states initiate their simplified (or “expedited”) discovery processes differently. For example, some states make opt-in completely voluntary,<sup>131</sup> some leave initiation to the trial court's discretion,<sup>132</sup> and some make assignments via a mandatory cover sheet or otherwise based on definitive, facial aspects of the claim.<sup>133</sup>

This Part briefly examines the processes used by several other states to trigger their simplified discovery proceedings. Section III.A considers and rejects the voluntary processes of states such as Colorado, which do not do enough to incentivize participation in limited discovery schemes. Section III.B analyzes the greater control over the simplified discovery process provided by the mandatory assignment processes of states such as Minnesota

127. *But see* *Dovalina v. Conley*, 2013 IL App (1st) 103127, ¶ 29, 990 N.E.2d 305, 313 (“The purpose of a Rule 222 affidavit is to determine whether simplified discovery should apply in a particular case, not to limit a plaintiff's damages.”).

128. *See supra* notes 96–99 and accompanying text.

129. ILL. SUP. CT. R. 222(b) (“Any such affidavit may be amended or superseded *prior to trial* pursuant to leave of court for good cause shown . . .” (emphasis added)).

130. *See supra* notes 107–110 and accompanying text.

131. *See, e.g.*, CAL. R. CT. 3.1547(a)(1) (requiring both parties to file a “proposed consent order” for the process to begin).

132. *E.g.*, OR. UNIF. TR. CT. R. 5.150(1). Oregon's process additionally requires that all parties agree to the “expedited” system before the trial judge decides whether to initiate the process. *Id.* While this looks a lot like the purely voluntary process, the judge has “sole discretion” whether or not to allow it, perhaps providing a check against gamesmanship. OR. UNIF. TR. CT. R. 5.150(2).

133. *E.g.*, COLO. R. CIV. P. 16.1(b)(3) (requiring a cover sheet); TEX. R. CIV. P. 169(a)(1) (applying automatically to any suit seeking “\$100,000 or less”); *In re* Order Relating to the Civil Justice Reform Task Force, Nos. ADM10-8051, ADM09-8009, ADM04-8001, 2013 Minn. LEXIS 386, at \*6–8 (Minn. May 7, 2013). Note that Colorado permits any party to unilaterally opt out of the simplified process. COLO. R. CIV. P. 16.1(d).

and Texas. Section III.C suggests Illinois reform its simplified discovery procedure by (1) raising its bright-line initiation threshold to \$75,000; (2) handling initiation via a mandatory system with a plaintiff-driven estimate on a required initial cover sheet; and (3) adopting a good cause process similar to the Texas scheme for opt-outs or modification of the initial damages estimation. Section III.C synthesizes from this proposal similar principles that can be applied to similar state simplified discovery systems.

#### A. *Voluntary “Opt-Ins” Are Ineffective*

Voluntary initiation processes are too weak: if initiation is formally or functionally voluntary, parties will not use the simplified process often enough to achieve desired time and monetary savings. A voluntary initiation process for a simplified discovery scheme is a process that either requires the consent of all litigating parties to initiate or makes it so easy for any party to opt out that it is functionally voluntary. California takes the former approach;<sup>134</sup> Colorado takes the latter.<sup>135</sup>

A simplified discovery process has two principal advantages for litigants: the case moves more quickly, and it involves simpler procedures along the way. If both parties value greater speed and less process, one would expect them to readily agree to a purely voluntary simplified discovery scheme. All other things being equal, both parties should make this choice all the time—after all, it means less in attorney fees. All other things are rarely equal, however, and as a result, both speed and process have strategic value. When there is any discrepancy in financial resources between parties, when one party otherwise has “more to lose” from continued litigation than another, or when any party might perceive that either of the above is the case, it is less likely that both parties would opt in to simplified discovery. These discrepancies likely exist (or at least are perceived to exist) in the vast majority of cases. In practice, therefore, parties should rarely agree to purely voluntary simplified discovery processes.<sup>136</sup>

As it turns out, this is exactly what happened in Colorado. A report on the efficacy of Colorado’s simplified discovery rule (the “Gerety report”) found that its procedures were followed in sixty-two percent of sampled cas-

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134. See CAL. R. CT. 3.1547(a)(1) (requiring both parties to submit a “proposed consent order” to initiate the expedited process).

135. Colorado’s simplified process requires any pleading seeking relief to attach a standardized form including a damages estimation. See COLO. R. CIV. P. 16.1(b)(3). If plaintiff seeks damages less than \$100,000, the court opts the parties in to simplified discovery proceedings. COLO. R. CIV. P. 16.1(b)(2). However, any party may voluntarily, and unilaterally, decide to opt out. COLO. R. CIV. P. 16.1(d).

136. Admittedly, these strategic concerns are less likely to be present in narrow classes of cases such as when both parties are pro se or when a claim has very little at stake in terms of monetary damages. In such cases, efficient resolution likely trumps legal stratagem and manipulation.

es.<sup>137</sup> Where there was any level of participation by defendants, though, that rule (Rule 16.1) was followed in less than twenty percent of cases.<sup>138</sup> In cases where both parties had attorneys, the study found that “[a]ttorneys regularly opt out” and Rule 16.1 was used only thirty percent of the time.<sup>139</sup>

Qualitative reactions were even grimmer. Judges indicated the rule was “largely ignored” and described its use as “rare.”<sup>140</sup> One attorney described Rule 16.1 as “just a useless tool. It’s not even an infrequently used tool, it’s totally useless.”<sup>141</sup> Other Colorado attorneys interviewed for the Gerety report indicated they opted out of Rule 16.1 so often because its proceedings “tie[d] their hands, both with respect to discovery and with respect to the ultimate damage recovery.”<sup>142</sup> As a result, the report concluded that Rule 16.1, which was intended to be Colorado’s default procedure, “is not frequently used in cases truly invoking the pretrial process.”<sup>143</sup>

The Gerety report makes it clear that if the policy goal is a simplified discovery scheme that meaningfully applies to contested cases, leaving initiation to attorneys is not enough. Interestingly, however, when the Iowa Supreme Court took comments in 2014 for its new, simplified discovery scheme—a process that occurred *after* the Gerety report was published in 2012—most Iowa attorneys advocated for a purely voluntary system requiring opt-in by all parties: that is, a system exactly like Colorado’s.<sup>144</sup> Why would so many Iowa attorneys advocate for a voluntary simplified discovery system that a nearby state found to be a “useless tool”?<sup>145</sup> A cynic might point out that a simpler, quicker process means fewer billable hours for attorneys. It might also be the case that when the attorneys actually get to court they “do not want to say that their cases are simple” for strategic reasons.<sup>146</sup> Whatever the reason, relying on the parties’ attorneys to voluntarily initiate a simplified discovery process will not lead to that process’s mean-

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137. CORINA D. GERETY & LOGAN CORNETT, MEASURING RULE 16.1, at 1 (2012), [http://iaals.du.edu/sites/default/files/documents/publications/measuring\\_rule\\_16-1.pdf](http://iaals.du.edu/sites/default/files/documents/publications/measuring_rule_16-1.pdf) [<https://perma.cc/B8BA-RKPS>]. Rule 16.1 was intended to be the default rule in Colorado. *Id.* But, seventy percent of those cases in which Rule 16.1 applied involved no defendant participation, as most were debt collection actions. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 37.

141. *Id.*

142. *Id.* at 1.

143. *Id.* at 1–2.

144. See Doré, *supra* note 117, at 425 & n.97.

145. GERETY & CORNETT, *supra* note 137, at 37.

146. Civil Rules Advisory Comm., *Draft Minutes: Civil Rules Advisory Committee; April 11–12, 2013*, in COMMITTEE ON RULES OF PRACTICE & PROCEDURE: WASHINGTON, DC; JUNE 3–4, 2013, at 139, 152 (2013), [http://www.uscourts.gov/sites/default/files/fr\\_import/ST2013-06.pdf](http://www.uscourts.gov/sites/default/files/fr_import/ST2013-06.pdf) [<https://perma.cc/GL34-SBUH>] (finding many attorneys chose to opt out of simplified discovery schemes because they did not want their cases so characterized).

ingful use. To truly have teeth, simplified discovery must be mandatory in some cases.

### B. *Mandatory Processes Provide More Control*

At the other end of the spectrum, a purely mandatory process may be too harsh. In a purely mandatory process, the trial court assigns certain classes of claims to the simplified discovery scheme at the beginning of the action, and those actions must remain in the simplified scheme throughout. No state takes this approach. This is because the particular facts of a case may militate against simplified discovery. For example, a plaintiff with “small damages” (when compared to a state’s simplified discovery threshold) might still need more extensive discovery to uncover the facts to prove her case, particularly if that case is complex. For example, a car accident victim pursuing a products liability claim against a car company may only have limited damages if she has suffered limited physical injuries. But the extensive deposition and expert discovery required to prove the existence of a manufacturing or design defect might be beyond a state’s limited discovery scheme. Denying that plaintiff a chance to opt out of the simplified scheme limits individualized consideration of each case and may even implicate that plaintiff’s due process rights.

As a result, in practice even the strictest “mandatory” schemes may permit opt-outs for “good cause.”<sup>147</sup> Requiring that parties who wish to opt out show “good cause” checks abuse of the simplified discovery process. That abuse can come from the plaintiffs’ side (such as using a simplified process to deter removal to federal court,<sup>148</sup> then switching to full discovery after the window closes<sup>149</sup>) as well as from defendants’ end (such as forcing a financially sensitive plaintiff into a pretrial process with more complex procedures and greater expenses).

Yet not all opt-outs are created equal. For example, the Minnesota scheme directs trial courts to consider expected equitable factors, such as the presence of “[m]ultiple parties or claims” or “complex theories of liability,” when deciding whether to permit a party to opt out of simplified discovery proceedings.<sup>150</sup> But Minnesota also permits a court to consider more pedestrian factors, such as whether there is a “[s]ubstantial likelihood of dispositive motions” in the case.<sup>151</sup>

In contrast, Texas’s opt-out scheme is stricter. Texas rules permit opt-outs if a party shows “good cause” or if the amount at issue in the case rises

147. See, e.g., TEX. R. CIV. P. 169(c)(1)(A).

148. See *supra* notes 116–126 and accompanying text.

149. See *supra* notes 112–115 and accompanying text.

150. *In re Order Relating to the Civil Justice Reform Task Force*, Nos. ADM10-8051, ADM09-8009, ADM04-8001, 2013 Minn. LEXIS 386, at \*7–8 (Minn. May 7, 2013) (listing the factors that “should be considered by the court” in an opt-out ruling).

151. *Id.*

above the \$100,000 threshold.<sup>152</sup> In deciding whether a party has shown “good cause,” the comments to the Texas rules permit a judge to consider factors such as the aggregate value of the claims of multiple plaintiffs, potential counterclaims, and the complexity of the case.<sup>153</sup>

While both Texas and Minnesota rules use similar language with respect to the factors a judge should consider when deciding whether to permit opt-outs,<sup>154</sup> Texas chose to place those factors in a comment to the rule,<sup>155</sup> whereas Minnesota chose to enumerate them in the rule’s text.<sup>156</sup> That difference is significant: comments are generally given less weight than rule text.<sup>157</sup> A Texas judge *may* therefore consider any of the factors listed in the comment but is not *required* to consider any. Essentially, stricter Texas judges could permit fewer opt-outs, but more lenient judges may permit more. Regardless, the Texas scheme gives a savvy and informed judge a great deal of discretion to correct inequities and police abuses inadvertently created by a simplified discovery process.

The Minnesota rule, in contrast, can be read as confining a judge’s consideration to the five enumerated factors listed in the rule.<sup>158</sup> The last of these factors, however, is a catch-all, including “[a]ny factor” that “would substantially affect a party’s right to a fair and just resolution of the matter.”<sup>159</sup> If the rule *requires* a Minnesota trial court judge to undertake this broad inquiry for *every* opt-out motion, these motions should meet with greater success in Minnesota than in Texas. The wide-ranging, catch-all factor and the easy-to-satisfy “dispositive motions” factor<sup>160</sup> in the Minnesota scheme therefore shifts the inquiry slightly more in favor of opt-outs than in Texas—though the Minnesota scheme is still likely just as broad. There should therefore be more decisions permitting a party to opt out of simplified discovery in a

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152. See TEX. R. CIV. P. 169(a), (c).

153. TEX. R. CIV. P. 169 cmt. 3.

154. *Id.* (“[T]he court *should consider* factors such as . . . .” (emphasis added)); *In re Order Relating to the Civil Justice Reform Task Force*, 2013 Minn. LEXIS 386, at \*8 (“The factors that *should be considered* by the court in ruling on said motion include . . . .” (emphasis added)).

155. TEX. R. CIV. P. 169 cmt. 3.

156. *In re Order Relating to the Civil Justice Reform Task Force*, 2013 Minn. LEXIS 386, at \*7–8.

157. *Commandeur LLC v. Howard Hartry, Inc.*, 724 N.W.2d 508, 511 (Minn. 2006) (“[A]dvisory ‘committee comments are included for convenience and are not binding on the court.’” (quoting *Vandenhoevel v. Wagner*, 690 N.W.2d 753, 756 (Minn. 2005))); *cf.* *Bever Props., L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878, 888 (Tex. App. 2011) (following the text of a comment only because the comment specifically stated it was “intended to inform the construction and application of the rule” (quoting TEX. R. CIV. P. 166a 1997 cmt.)).

158. *In re Order Relating to the Civil Justice Reform Task Force*, 2013 Minn. LEXIS 386, at \*7–8.

159. *Id.* at \*8 (emphasis added).

160. *Id.*

Minnesota scheme than in a Texas scheme. While both schemes will result in much more participation than “voluntary” schemes,<sup>161</sup> there should be fewer opt-outs and greater cost savings in Texas than in Minnesota.<sup>162</sup>

### C. *A Proposal for Reform*

This Section outlines a proposal for reform of the initiation process for Illinois’s simplified discovery scheme. As commentators consider Illinois to be a discovery-procedure leader,<sup>163</sup> any reforms to the Illinois system are relevant to states considering whether to add a simplified system or modify their existing procedures. This Section recommends three principal reforms to the Illinois system: (1) increasing the threshold for simplified discovery procedures to \$75,000; (2) establishing a mandatory process; and (3) providing for good cause opt-outs, as in the Texas model. The national lessons are similar: (1) state amount-in-controversy bright lines are preferable to categorical approaches, and the best bright line is \$75,000; (2) mandatory systems are preferable to voluntary; and (3) opportunity for good cause opt-out is important to avoid any injustice the system might produce. These reforms should achieve desired judicial economy savings while rectifying the disadvantages to both plaintiffs and defendants the current Illinois system creates.

#### 1. A \$75,000 Bright Line

A \$75,000 bright line is less arbitrary than and has comparative advantages to Illinois’s current \$50,000 threshold. Normatively, there is nothing special about \$50,000, and that threshold has remained constant in Illinois for over twenty years.<sup>164</sup> Adjusted for inflation as of July 2018, \$50,000 in October of 1995 is worth over \$80,000 today.<sup>165</sup> Raising the threshold to \$75,000 would therefore function as an inflation adjustment, bringing the “real” value of the amount-in-controversy threshold closer to the value set out in Illinois’s 1995 reforms.<sup>166</sup>

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161. See *supra* Section III.A.

162. Note that the Texas and Minnesota simplified discovery schemes apply to slightly different sets of cases. The Texas scheme applies to any case where less than \$100,000 in money damages is at stake. TEX. R. CIV. P. 169(a)(1). In Minnesota, all complaints in broad classes of cases are opted into the simplified discovery scheme by default, regardless of the type or amount of relief sought. *In re Order Relating to the Civil Justice Reform Task Force*, 2013 Minn. LEXIS 386, at \*6–7 (applying to all cases designated “Consumer Credit, Consumer Credit Contract, Other Contract, Personal Injury, or Other Civil” in the pilot divisions). The Minnesota scheme is therefore slightly “deeper” while the Texas scheme is slightly “broader.”

163. See *supra* note 18 and accompanying text.

164. See Pflaum & Pipal, *supra* note 12, at 28 (published in October 1995).

165. *CPI Inflation Calculator*, BUREAU LAB. STAT., <https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=50%2C000.00&year1=199510&year2=201803> [https://perma.cc/7GK2-X4DQ].

166. See Pflaum & Pipal, *supra* note 12, at 28.

A bright line at \$75,000 is also better policy because it would set the Illinois threshold at the same level as that required for federal diversity jurisdiction.<sup>167</sup> A simplified discovery threshold at \$75,000 could assist federal courts considering diversity removal.<sup>168</sup> To the extent it eases diversity removal decisions, a threshold of \$75,000 would extend the judicial economy savings of a simplified discovery system to federal courts as well.<sup>169</sup>

The \$50,000 simplified discovery threshold also no longer includes as many cases as it used to. In 1995, Rule 222 was estimated to encompass eighty-five to ninety percent of Illinois state court civil cases.<sup>170</sup> Its efficiency savings therefore would have reached the vast majority of civil actions in Illinois if it had been effectively implemented. However, considering that the threshold has remained constant for over twenty years and that the inflation-adjusted value of \$50,000 has increased over sixty percent since that time,<sup>171</sup> the simplified discovery scheme should no longer apply to as many cases as it used to. Raising the threshold to \$75,000 would bring more civil actions within the purview of Rule 222, saving a greater number of litigants time and expense.

From a national perspective, a \$75,000 amount-in-controversy threshold also appears to be better policy than a *higher* threshold, such as Texas's \$100,000 bright line.<sup>172</sup> While a higher threshold necessarily embraces a greater number of cases than a lower threshold, it creates a more procedurally complicated system—exactly what a *simplified* discovery system should not do. Take, for example, a state with a \$100,000 bright line and a bifurcated system. This creates at least four procedural discovery regimes: (1) cases with an amount in controversy of \$75,000 or less that *must* be brought under the simplified state scheme; (2) cases with an amount in controversy greater than \$75,000 but no larger than \$100,000 that must be brought in the state simplified system (due to nondiverse defendants)<sup>173</sup>; (3) cases with an amount in controversy greater than \$75,000 but no larger than \$100,000 that may be removed to federal court (due to diverse defendants) or else must be brought under the state simplified system; and (4) cases with over \$100,000 in controversy that *may* be removed to federal court (diverse defendants) or else must be brought under the traditional state discovery system. A scheme with a bright line at \$75,000, however, has one fewer regime.<sup>174</sup>

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167. 28 U.S.C. §§ 1332(a), 1446(c) (2012). It might even be more desirable to tie the Illinois bright line explicitly to the federal diversity statute.

168. See *supra* notes 116–118 and accompanying text.

169. See Doré, *supra* note 117, at 421; Noble-Allgire, *supra* note 92, at 318.

170. See Pflaum & Pipal, *supra* note 12, at 28.

171. See *supra* note 165 and accompanying text.

172. TEX. R. CIV. P. 169(a)(1).

173. See 28 U.S.C. §§ 1332(a), 1446(c)(2) (2012).

174. Those schemes are as follows: (1) cases with an amount in controversy of \$75,000 or less that *must* be brought under the simplified state scheme; (2) cases with over \$75,000 in con-

A scheme with a bright line greater than \$75,000 also creates more uncertainty for the parties. It requires a plaintiff to estimate whether damages are below \$75,000 or whether they are between \$75,000 and the state's bright line. The second range may not be very wide, and it may be difficult for parties to estimate—before discovery has even begun—the amount in controversy with this level of precision. With a \$75,000 bright line, parties need only make an estimate that the federal removal statute ensures they would make anyways—whether the amount in controversy is greater than \$75,000. After that, outcomes are certain. Parties with less than \$75,000 at stake will always be in simplified state systems. Diverse defendants with more than \$75,000 at stake may choose between traditional state systems and removal. Nondiverse defendants with more than \$75,000 at stake will always be in traditional state systems. There is no narrow, difficult-to-ascertain range in which simplified discovery procedures may or may not apply based on an uninformed and nontransparent *ex ante* estimate.

A damages threshold is a less arbitrary initiation method than opting entire classes of cases into simplified discovery, like Minnesota's scheme.<sup>175</sup> Admittedly, a damages threshold is arbitrary for cases that fall near the bright line, but a categorical approach is arbitrary for entire *classes* of cases. The categorical approach opts cases into simplified discovery procedures based solely on their case type and with no safeguard for what procedures the individual facts of a case may require. The remedy for arbitrariness in either situation is the opportunity for a good cause hearing. Assuming that amounts in controversy are no more likely to cluster around the damages bright line than any other number, fewer good cause hearings should be expected in a bright-line damages scheme than a class-based scheme. Having fewer hearings is valuable. It simplifies proceedings and provides even greater judicial economy savings. In Illinois's bifurcated system, and nationally, a damages threshold approach therefore is both less arbitrary and more economical than the class-based approach. This better serves the purposes of a simplified discovery scheme.

## 2. A Mandatory Process with an Administrative Check

Raising the value of the initiation threshold for a simplified discovery scheme will do nothing to save on costs, though, if parties do not *use* the simplified process. Truly voluntary processes do not incentivize participation.<sup>176</sup> Illinois, and any other state using a bright-line threshold, would therefore be best served by a mandatory initiation process. Courts could

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troversty that *may* be removed to federal court (due to diverse defendants) or else *must* be brought under the traditional state discovery system; and (3) cases with over \$75,000 in controversy that *must* be brought under the traditional state discovery system (nondiverse defendants).

175. *In re* Order Relating to the Civil Justice Reform Task Force, Nos. ADM10-8051, ADM09-8009, ADM04-8001, 2013 Minn. LEXIS 386, at \*6–7 (Minn. May 7, 2013).

176. *See* discussion *supra* Section III.A.



verify compliance with this system by means of a mandatory cover sheet, as in Colorado.<sup>177</sup>

The current Illinois process, which relies on the plaintiff to read Rule 222(b) and file the required affidavit, has no procedural or administrative check to ensure compliance with Rule 222(b). This makes the process de facto voluntary in Illinois jurisdictions governed by *Dovalina*.<sup>178</sup> Illinois courts could check compliance with the simplified discovery scheme by means of a mandatory cover sheet attached to the complaint, as is done in Colorado.<sup>179</sup> Many Illinois jurisdictions use cover sheets already.<sup>180</sup> It would be a simple matter to include an estimation of damages on such sheets.<sup>181</sup> If Illinois adopted this proposed reform, a plaintiff estimating damages of \$75,000 or less would be automatically and mandatorily opted in to the simplified discovery scheme and capped at \$75,000 in damages if subsequent recovery exceeds that amount. To mitigate the risk that an imperfectly informed plaintiff would be “locked in” to her initial estimate, a plaintiff should be permitted to modify this estimate or opt out of the limited discovery scheme for good cause.

### 3. A “Good Cause” Opt-Out

Illinois illustrates, for national audiences, the problems of both a voluntary system and a too-strict mandatory system. That is because Illinois is, in effect, both—a near-voluntary system in jurisdictions governed by *Dovalina*<sup>182</sup> and a too-strict mandatory system in jurisdictions adhering to *Grady*.<sup>183</sup> A better policy in Illinois, and other jurisdictions using an amount-in-controversy threshold, would split this difference by establishing a clear, enforced, and mandatory system with a good cause safety valve for cases where the facts merit it.

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177. See COLO. R. CIV. P. 16.1(b)(3).

178. See *Dovalina v. Conley*, 2013 IL App (1st) 103127, ¶¶ 26–29, 990 N.E.2d 305, 312–13; see *supra* notes 96–99 and accompanying text.

179. COLO. R. CIV. P. 16.1(b)(3).

180. See, e.g., *Civil Action Cover Sheet – Case Initiation*, CLERK CIR. CT. COOK COUNTY, ILL., [http://www.cookcountyclerkofcourt.org/forms/pdf\\_files/CCL0520.pdf](http://www.cookcountyclerkofcourt.org/forms/pdf_files/CCL0520.pdf) [<https://perma.cc/5989-GG8K>].

181. Note that Illinois law prohibits the inclusion of ad damnum clauses in personal injury cases. 735 ILL. COMP. STAT. 5/2–604 (2016). But a revised rule could avoid this problem by exempting personal injury cases from this requirement and treating such cases as a class for the purposes of the simplified discovery scheme.

182. See *supra* notes 96–99 and accompanying text. See generally *Dovalina*, 2013 IL App (1st) 103127, 990 N.E.2d 305.

183. See ILL. SUP. CT. R. 222(b) (“Any such affidavit may be amended . . . only if it is clear that no party will suffer any prejudice as a result of such amendment.”); *Grady v. Marchini*, 874 N.E.2d 179 (Ill. App. Ct. 2007) (construing Rule 222(b) narrowly).

While a good cause restriction places some limits on a plaintiff, it is preferable to Illinois's current "any prejudice" standard.<sup>184</sup> Indeed, a successful opt-out from the Rule 222 scheme would remove the \$50,000 damages cap.<sup>185</sup> Opening a defendant up to greater liability seems facially prejudicial. Removing the "any prejudice" language and relying solely on a good cause scheme gives an informed trial judge a much freer hand to tailor opt-out decisions to the facts of the particular case.

Illinois should adopt an approach similar to the Texas good cause procedure for plaintiffs whose cases would otherwise fall under the limited discovery scheme. Colorado's unilateral opt-out process is no more effective than a purely voluntary process.<sup>186</sup> On the other hand, Minnesota's process seems too easy to circumvent to achieve the desired cost savings. Factors such as "[s]ubstantial likelihood of dispositive motions"<sup>187</sup> and the broad wording of the catch-all provision make it easy to argue for an opt-out for almost any conceivable case.<sup>188</sup> The Texas scheme combines a mandatory element—which ensures participation, thus locking in cost savings—while providing a robust process for opt-out to avoid injustice.

The Illinois system currently lacks an explicit opt-out mechanism. If estimated damages from the Rule 222(b) affidavit are below \$50,000, Rule 222's simplified procedures apply *mandatorily*.<sup>189</sup> A plaintiff may not opt out of these simplified procedures, even if she has good cause. If estimated damages are above \$50,000, traditional discovery procedures apply, also mandatorily.<sup>190</sup> Effectively, the Illinois opt-out procedure is choosing not to file a Rule 222(b) affidavit.<sup>191</sup>

Empowering a judge to discretionarily decide proposed opt-outs based on a good cause standard is a better policy; it ensures that a judge who is informed and experienced with the case is available to correct any inequities and police any abuses that the simplified discovery system might otherwise permit. To the extent the Illinois Supreme Court is concerned about investing a trial court with such sweeping discretion, particularly given the implications that decision could have for the remainder of the case, it may amend Rule 306 or 307 to provide for interlocutory review.<sup>192</sup> The Supreme Court

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184. ILL. SUP. CT. R. 222(b).

185. *See id.*

186. *See* discussion *supra* Section III.A.

187. *In re* Order Relating to the Civil Justice Reform Task Force, Nos. ADM10-8051, ADM09-8009, ADM04-8001, 2013 Minn. LEXIS 386, at \*6 (Minn. May 7, 2013).

188. *See supra* notes 158–162 and accompanying text.

189. ILL. SUP. CT. R. 222(b). This does not apply to the classes of cases exempted from Rule 222. ILL. SUP. CT. R. 222(a).

190. ILL. SUP. CT. R. 222(a)–(b).

191. *See supra* notes 96–99 and accompanying text.

192. ILL. SUP. CT. R. 306(a), 307(a) (stating which interlocutory appeals are permissive and which are of right, respectively).

may also recommend factors to consider when deciding whether good cause exists in its comments to the rules.<sup>193</sup>

The result in Illinois would be a simplified discovery scheme very similar to the Texas scheme with respect to opt-outs. The proposed scheme would still differ with respect to initiation. The Texas scheme has a \$100,000 initiation threshold.<sup>194</sup> Like the \$50,000 threshold of the current Illinois scheme, a \$100,000 bright line is more arbitrary—and therefore less justifiable—than \$75,000 with its ties to the federal amount-in-controversy threshold.<sup>195</sup> Additionally, whereas the Texas scheme assigns cases to the expedited discovery scheme based on the complaint's face,<sup>196</sup> the proposed Illinois scheme would use a cover sheet. Involvement by the plaintiff in the initial estimation of damages (on the cover sheet) and revision of that estimate might encourage that plaintiff to take a greater level of ownership of the discovery procedure in the case. It might therefore encourage communication and candor between parties. Subjecting the process to good cause oversight by defendants and the court, however, would check any tempting procedural gamesmanship.<sup>197</sup>

#### CONCLUSION

The limited and simplified discovery system in Illinois is neither in practice; it simply makes the existing system more complex. The current rule is not *limited*: it imposes a hidden affidavit obligation on almost every Illinois civil case seeking monetary damages,<sup>198</sup> an obligation that comes too early in the case for an accurate estimation of damages, and an obligation that even a reasonable plaintiff might miss.<sup>199</sup> The interpretive split on how to handle this contingency<sup>200</sup> creates further uncertainty and perverse incentives for all parties, undermining the rule's *simplicity* as well.<sup>201</sup>

Resolving the appellate split is not enough. From the start of a case, it should be clear whether simplified or traditional discovery procedures apply. While participation in the simplified process must be mandatory for certain cases in order to truly save costs,<sup>202</sup> Illinois's simplified system should em-

193. See *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st) 142925, ¶ 35, 36 N.E.3d 266, 277 (“Committee comments to supreme court rules are not binding but they may be used to determine the application of a rule.” (citing *Wright v. Desate, Inc.*, 686 N.E.2d 1199, 1201 (Ill. App. Ct. 1997))).

194. TEX. R. CIV. P. 169(a)(1).

195. See *supra* Section III.C.1.

196. See TEX. R. CIV. P. 169(a)(1).

197. See *supra* notes 112–126 and accompanying text.

198. See ILL. SUP. CT. R. 222(a).

199. See *supra* notes 83–88 and accompanying text.

200. See discussion *supra* Section I.B.

201. See discussion *supra* Sections II.B, II.C.

202. See *supra* Sections III.B, III.C.2.

power a trial judge to permit a good cause opt-out should the facts of a case warrant it.<sup>203</sup> Finally, reform of the simplified discovery system should modernize the bright line for simplified discovery cases. Raising the threshold from \$50,000 to \$75,000 would increase cost savings by increasing the number of cases following simplified procedures<sup>204</sup> and extend the simplified system's cost savings to federal courts considering diversity removal.<sup>205</sup>

These lessons carry over nationally. For states that wish to maintain a separate simplified discovery system, an amount-in-controversy trigger at \$75,000 appears to be both the best numerical threshold and less arbitrary and more efficient than a categorical approach.<sup>206</sup> A mandatory approach locks in cost savings that might never be realized in a voluntary system.<sup>207</sup> And a robust good cause opt-out provides a judge with the power and discretion to correct any injustices or abuses such a system might create.<sup>208</sup>

If Illinois had implemented these reforms, the system would have produced better outcomes both for Ms. Grady and Mr. Dovalina. A mandatory cover sheet makes the rules clear: Ms. Grady and her attorneys would have known whether a damages cap applied and could have tailored her strategy to make sure she received the recovery she deserved. Similarly, Mr. Dovalina would have avoided the cost of litigating the Rule 222(b) issue altogether and received the recovery he deserved faster. In short, the proposed reforms make the Illinois system clearer and easier to navigate—or, to put it another way, limited and simplified.

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203. *See supra* Section III.C.3.

204. *See supra* notes 164–166 and accompanying text.

205. *See supra* notes 167–169 and accompanying text.

206. *See supra* Section III.C.1.

207. *See supra* Sections II.A, III.C.2.

208. *See supra* Section III.C.3.