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NEW PLEADING, NEW DISCOVERY

Scott Dodson*

Pleading in federal court has a new narrative. The old narrative was one of notice, with the goal of broad access to the civil justice system. New Pleading, after the landmark Supreme Court cases of Twombly and Iqbal, is focused on factual sufficiency, with the purpose of screening out meritless cases that otherwise might impose discovery costs on defendants. The problem with New Pleading is that factual insufficiency often is a poor proxy for meritlessness. Some plaintiffs lack sufficient factual knowledge of the elements of their claims not because the claims lack merit but because the information they need is in the hands of defendants. New Pleading thus screens out these claims even though they may have merit. This Article offers a solution to New Pleading's problems of information asymmetry: New Discovery. New Discovery recognizes the need for a carefully limited presuit or predissmissal discovery paradigm to provide plaintiffs the opportunity to gather the facts necessary to comply with New Pleading's strictures. Drawing heavily on the experience of state procedural systems, the Article presents a normative defense of New Discovery, offers some guiding principles and tools for controlling its scope and cost, and explores how New Discovery might work both under the current discovery scheme and in the context of needed discovery reforms.

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INTRODUCTION

In 1957, the Supreme Court instilled the famous liberal “notice” pleading standard in federal civil proceedings.¹ And, for the next fifty years, that understanding generally prevailed (or at least was paid lip service to).² But the last three years have seen a sea change at the Supreme Court. *Bell Atlantic Corp. v. Twombly*³ and *Ashcroft v. Iqbal*⁴ together have changed the old notice pleading standard to a new “plausibility” regime based primarily on pleading nonconclusory facts.⁵

That change means that plaintiffs proceeding with claims that depend upon facts exclusively in the hands (or minds) of defendants and third parties may find themselves in a Catch-22: plaintiff needs those facts to plead her claim properly and survive a “*Twiqbal*” motion to dismiss, but she may not be able to discover those facts without first surviving the motion to dismiss.

One of the most obvious solutions to this problem is to abrogate or limit *Twombly* and *Iqbal*, by rule amendment or statute. By my count, at least nine written proposals to do so have been offered.⁶ I generally support such proposals to change the new pleading standard, but I do not hold out much

1. Conley v. Gibson, 355 U.S. 41, 47 (1957).

2. See *infra* text accompanying notes 31–32.

3. 550 U.S. 544 (2007).

4. 129 S. Ct. 1937 (2009).

5. See Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 460–63 (2010) [hereinafter Dodson, *Comparative Convergences*]; Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 138 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>. [hereinafter Dodson, *Pleading Standards*].

6. See, for example, the Notice Pleading Restoration Act:

[T]he law governing a dismissal . . . shall be in accordance with the Federal Rules of Civil Procedure as interpreted by the Supreme Court of the United States in decisions issued before May 20, 2007, other than decisions in cases arising under any law governed by the Private Securities Litigation Reform Act of 1995 A dismissal . . . is a dismissal or striking of all or any part of a pleading containing a claim or defense for failure to state a claim, indefiniteness, or insufficiency.

S. 1504, 111th Cong. (2010); see also Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 44 n.4 (2010) (listing seven early proposals); Edward A. Hartnett, *Responding to Twombly and Iqbal: Where Do We Go from Here?*, 95 IOWA L. REV. BULL. 24 (2010) (proposing a new Rule 12(j) that would allow a judge to credit an allegation specifically identified under Rule 11(b)(3)); cf. Posting of Jonathan Siegel, jsiegel@law.gwu.edu, to Civil Procedure Listserv, civ-pro@listserv.nd.edu (Oct. 20, 2009) (on file with author) (favoring the promulgation of new Federal Forms to abrogate *Twombly* and *Iqbal*, and proposing examples).

hope for them. Congress rarely intercedes in federal procedure⁷ and has done so in the pleadings area only for specific causes of action—and then only to impose greater restrictions, rather than fewer.⁸ The rulemaking process has promise, but there does not appear to be much motivation from its leadership to abrogate the Supreme Court’s pleadings decisions,⁹ and, in any case, rule amendments that purport to do so face the hostile prospect of needing the approval of the Supreme Court itself—a Court that is highly skeptical of the value of the prior pleading regime.¹⁰

Another possibility is that the Supreme Court itself, perhaps due to a change of heart (or a change in membership) will reverse course and restore some version of Old Pleading. That also seems improbable, at least in the short term, because *Twombly* itself, the originator of the new plausibility standard, was a 7–2 decision, and because *Iqbal* followed closely on its heels with such an emphatic endorsement of the new pleading regime and rejection of the old.¹¹

I thus assume, for the time being, that we are stuck with the “New Pleading” of Rule 8 that imposes significant burdens on some plaintiffs faced with information asymmetry. The question becomes how to rectify those burdens in a way that would meet the approval of the current sentiment of the Court and other judicial actors.

I am cautiously and preliminarily optimistic that a realistic answer lies in what I call “New Discovery,” namely, presuit or predissmissal discovery with—unlike in the current discovery paradigm—significant limitations in scope and cost bearing. Elsewhere, I have explored ways in which state presuit discovery mechanisms could provide potential federal plaintiffs with the information they need,¹² but for reasons that I discuss below, the better option would be to make such discovery available in federal court.

Unfortunately, the current availability of presuit or predissmissal investigative discovery in federal court is doubtful. The Federal Rules do not

7. A notable exception is the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

8. See, e.g., The Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

9. See Tony Mauro, *Plaintiffs Groups Mount Effort to Undo Supreme Court’s ‘Iqbal’ Ruling*, NAT’L L.J., Sept. 21, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433931370> (reporting that the chair of the Advisory Committee on Civil Rules intends to be cautious about rule amendments to soften *Iqbal*).

10. See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1135–36 (2002) (“[A] Court that has changed a Rule via interpretation may be reluctant to approve a proposed amendment that would undo its work.”).

11. Professor Edward Hartnett agrees. See Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 481 (2010) (“In light of *Iqbal*, and short of an amendment to the Federal Rules of Civil Procedure or legislative action, *Twombly* is here to stay across the broad range of federal civil actions.”).

12. See Dodson, *supra* note 6.

permit presuit investigative discovery at all.¹³ And, although recent scholarship has touted ways around *Twiqbal* through existing predissmissal discovery avenues,¹⁴ the likelihood that a district judge will allow such relatively unconstrained predissmissal investigative discovery in the *Twiqbal* era is extremely slim, given the rhetoric behind the Court's opinions.¹⁵

That rhetoric needs a counterweight, and this Article aims to provide it. It draws upon state experiences with presuit discovery mechanisms and offers a new paradigm for federal presuit or predissmissal discovery—what I term “New Discovery.” New Discovery, modeled on the state mechanisms, provides opportunities for federal court plaintiffs to obtain the discovery they need before facing a decision on a motion to dismiss, but it also contains new constraints to protect defendants. In other words, New Discovery could play a crucial role in rectifying information asymmetry and alleviating the injustice of overscreening meritorious claims, while still protecting defendants from unwarranted discovery burdens. I explore what that role could be and propose how judges and, particularly, rulemakers might make that role a reality.

Part I begins that task by providing a brief historical account of the development of federal pleading standards from the time of the Codes to *Twombly*—Old Pleading—paying special attention to the goals of the drafters of the rules and their insistence on the relative unimportance of pleadings.

Part II continues the pleadings narrative through the changes of *Twombly* and *Iqbal*—New Pleading—and contrasts the dramatic changes of New Pleading with the relative liberality of Old Pleading. It also explains why, when combined with the current discovery paradigm, New Pleading can have particularly harsh results for plaintiffs facing information asymmetry. It does credit the defensible policy arguments underlying New Pleading, which include the need to screen out meritless cases at an early stage in the litigation to avoid unfair and costly discovery burdens imposed on a blameless defendant, but it argues that New Pleading is the wrong way to achieve those policy goals because it overscreens by disallowing some meritorious cases. This Part also discusses why the existing options for ameliorating these harsh results under the current discovery paradigm are limited.

Part III then proposes the principal solution for New Pleading: New Discovery. A carefully limited and structured framework of “pre-discovery discovery,” either before suit or before a motion to dismiss is decided, has several normative benefits. It will enable plaintiffs with meritorious claims who otherwise would have been screened out by New Pleading to obtain the

13. See Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 226–27 (2007) (discussing Rule 27 and equitable bills of discovery).

14. See Hartnett, *supra* note 11, at 503–15; Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dissmissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 132–40 (2010).

15. For a more detailed defense of this point, see *infra* Part III.

justice they are due. It will allow all parties, for a relatively cheap price tag, to determine whether a weak case is truly meritless and thereby avoid the more expensive price tag of full-fledged litigation. And, if coupled with appropriate controls on scope and cost, it could do so while simultaneously respecting the underlying concerns of *Twombly* and *Iqbal*. In other words, New Discovery has the potential to rectify the imprecision and injustice of New Pleading in a way that ought to appease everyone.

After providing a normative defense of New Discovery, this Part then offers some guiding principles and tools for its use as well as proposals for how New Discovery might work in federal practice. Similar state presuit investigative discovery devices provide working models from which to create a meaningful federal mechanism. Lessons from state experiments suggest that such discovery in federal court is neither costly nor unworkable. To the contrary, New Discovery fits with New Pleading to better align its goals and fundamental policies. In other words, New Pleading needs New Discovery.

I conclude with a call to judges and rulemakers to recognize a more robust use of the New Discovery principles and proposals I offer in this Article.

I. OLD PLEADING

Prior to 1938, the dominant Code pleading regime required “[a] statement of the facts constituting the cause of action.”¹⁶ The Codes also sharply limited discovery.¹⁷ One of the primary shortcomings of Code pleading was the distinction between “ultimate” facts, which were required to be pleaded, and “evidentiary” facts and “conclusions of law,” which were not to be pleaded.¹⁸ Those distinctions proved unworkable in practice and resulted in a level of technicality and factual detail in the pleadings that became counterproductive.¹⁹

16. 1848 N.Y. LAWS 521, tit. 6 ch. 1 § 120(2); *see also* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1216 (3d ed. 2004) (describing the fact pleading required by the Codes). The Codes were creatures of state law, but the federal Conformity Act of 1872 required federal courts to use state procedures for actions at law. In the early 1900s, federal courts sitting in equity followed federal equity rules, which, similar to the Codes, required a “short and simple statement of the ultimate facts.” JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 166 (5TH ED. 1925).

17. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 936–37 (1987) (stating that the Codes disallowed interrogatories and strictly limited document requests and oral depositions).

18. *See* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 150, 225 (2d ed. 1947).

19. *See* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 891 (2009) (stating that the Codes drew “hopeless distinctions among allegations of ultimate fact, legal conclusions, and evidentiary facts”); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1930 (2009) (“The older view held that pleadings must . . . lay[] out the issues in dispute and stating the facts in considerable detail. But holders of this view asked too much of the pleading step, which consequently . . . provided the vehicle for monumental abuse.”); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986) (stating that the distinctions “invited unresolvable

Dissatisfaction with those pleading requirements led to Rule 8, which is conspicuously silent on fact pleading and instead requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.”²⁰ Rule 8 was revolutionary in its goals of reducing the importance of pleadings, eliminating the problems of fact pleading that existed under Code pleading, and retaining only the notice function of pleading.²¹ In line with the “liberal ethos” of the Federal Rules of Civil Procedure,²² pleadings were designed to ensure that case-screening mechanisms were delayed until after some fact discovery.²³ As Judge Posner put it, “The federal rules replaced fact pleading with notice pleading.”²⁴

The pleading rules do include two case-screening features, but they are very light. First, a pleading that fails to provide notice may be subject to a motion for a more definite statement under Rule 12(e).²⁵ If granted, the pleader must provide the requisite notice with more clarity or suffer dismissal.²⁶ Second, a pleading that fails to state a claim upon which relief could be granted is subject to a motion to dismiss under Rule 12(b)(6).²⁷ Such a motion,

disputes”); see also Charles E. Clark, *Pleading: History, Systems, and Functions*, 11 VA. L. REV. 517, 534 (1924) (noting that fact pleading was the least successful of the Code pleading reforms).

20. FED. R. CIV. P. 8(a).

21. See Dodson, *Comparative Convergences*, *supra* note 5, at 447–50; see also Clermont, *supra* note 19, at 1930 (“[M]ost people came to accept that the main task of pleadings is to give the adversary (and the court and the public) fair notice of the pleader’s contentions.”). For an assessment at the time of the Rules’ adoption, see James A. Pike & John W. Willis, *The New Federal Deposition—Discovery Procedure: I*, 38 COLUM. L. REV. 1179, 1179 (1938).

22. See Marcus, *supra* note 19, at 439.

23. See Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) (“[T]hrough the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate [screening] function.”); see also Clermont, *supra* note 19, at 1930 (“The motivating theory was that these later steps can more efficiently and fairly handle functions such as narrowing issues and revealing facts.”).

24. See *Thomson v. Washington*, 362 F.3d 969, 970 (7th Cir. 2004). Clark defines the notice requirement:

The notice in mind is . . . that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated—but not of details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case.

Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460–61 (1943); see also Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1001 (2003) (“What simplified notice pleading calls for is a general description of the case.”).

25. FED. R. CIV. P. 12(e). For a contemporary assessment of this vehicle at its adoption, see James A. Pike, *Objections to Pleadings Under the New Federal Rules of Civil Procedure*, 47 YALE L.J. 50, 62 (1937).

26. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *Whether the Supreme Court has Limited Americans’ Access to Court: Hearing Before the Sen. Comm. on the Judiciary*, 111th Cong. 18 (2009) (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania), available at <http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf> [hereinafter Limited Access] (“[A] Rule 12(e) motion . . . has always been available to deal with a ‘the defendant wronged me’ type of complaint.”).

27. FED. R. CIV. P. 12(b)(6).

however, is designed for complaints whose allegations could not justify relief even with the benefit of discovery—a test of the claim’s *legal* sufficiency.²⁸ Rule 12(b)(6) dismissals might be appropriate for claims based upon fictitious statutes or founded upon erroneous interpretations of the law. They are not vehicles for testing the factual sufficiency of a complaint. As Judge Easterbrook once put it, “[A] judicial order dismissing a complaint because the plaintiff did not plead facts has a short half-life.”²⁹ In other words, neither Rule 8 nor Rule 12 imposes a requirement of factual sufficiency.

The Supreme Court confirmed this in *Conley v. Gibson* by declaring that Rule 8 does “not require a claimant to set out in detail the facts upon which he bases his claim,” but instead requires only “[s]implified ‘notice pleading’” and that a complaint “should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief.”³⁰ Although lower courts attempted to impose heightened pleading in a variety of contexts even in the wake of *Conley* and to dismiss complaints for insufficient factual detail,³¹ the Supreme Court continued, often unanimously, to strike those attempts down and to adhere to the liberal notice pleading standard of *Conley*.³² At least, that was the case until 2007.

II. NEW PLEADING, OLD DISCOVERY

In *Bell Atlantic Corp. v. Twombly*³³ and *Ashcroft v. Iqbal*,³⁴ the Supreme Court charted a new path in pleadings jurisprudence and established what I

28. See Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1749 & n.4 (1998) (arguing that pleadings should be dismissed only when the allegations themselves demonstrate a bar to relief).

29. *Vincent v. City Colls. of Chi.*, 485 F.3d 919, 923 (7th Cir. 2007); see also *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006) (“Any decision declaring ‘this complaint is deficient because it does not allege X’ is a candidate for summary reversal.”).

30. *Conley v. Gibson*, 355 U.S. 41, 45–47 (1957); see also Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 825 (“Under the Rules, then, pleading was a pervious gate. Its main task became the giving of fair notice of the pleader’s basic contentions to the adversary (and the court and the public).”); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 6 (2009) (arguing that *Conley* endorsed a notice pleading regime under Rule 8). But see Emily Sherwin, *The Story of Conley: Precedent by Accident*, in CIVIL PROCEDURE STORIES 295, 317–18 (Kevin M. Clermont ed., 2d ed. 2008) (arguing that the original rules were stricter than *Conley* interpreted them to be); Subrin, *supra* note 17, at 985, 992–94 (same).

31. Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 551 (2002) (“Despite [the] clarity [of Rule 8] and the Supreme Court’s endorsement of notice pleading in *Conley v. Gibson*, federal courts have embraced heightened pleading burdens in a variety of situations.”) (footnotes omitted); Marcus, *supra* note 28, at 1750 (documenting that courts “appeared to disinterfact pleading” even after *Conley*).

32. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); Fairman, *supra* note 24, at 997 (“[W]hen called upon to address pleading issues square on, the Court continually—and unanimously—embrace[d] simplified notice pleading.”); cf. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 577–78 & n.4 (2007) (Stevens, J., dissenting) (listing over a dozen Supreme Court cases citing *Conley*’s standard).

33. 550 U.S. 544 (2007).

34. 129 S. Ct. 1937 (2009).

call “New Pleading.” This Part explains what New Pleading is, how it differs from Old Pleading, and what it means for plaintiffs under the current discovery regime.

A. Features

Rather than focusing on notice, New Pleading focuses on factual sufficiency. This new standard has several components.

First, New Pleading considers only nonconclusory factual allegations—conclusory allegations are to be disregarded.³⁵ The difference is difficult to discern (as, perhaps, was the difference between ultimate facts, conclusions of law, and evidentiary facts in the early 1900s).³⁶ Apparently, “labels and conclusions,” “conclusory statements,” and “formulaic” or “threadbare” recitations of the elements of a cause of action are not enough,³⁷ yet greater particularity, specificity, and detail are generally not required.³⁸

Twombly and *Iqbal* themselves illustrate these standards. Allegations of a “conspiracy” and an “agreement” in an antitrust conspiracy claim supported only by allegations of conscious parallel conduct are conclusory because they add nothing more to the allegations of conscious parallel conduct.³⁹ Similarly, the allegation that a government official “knew of, condoned, and willfully and maliciously agreed to subject [a plaintiff] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin” is conclusory if unsupported by factual allegations because it simply restates the elements of a discrimination claim.⁴⁰

35. *Id.* at 1949–50. *Iqbal* purported to rely on *Twombly* for this proposition, but, to be fair, *Twombly*’s disregard of the conclusory allegation of a “conspiracy” in that case was based on the Court’s construction of the complaint as a whole, in which the allegation of a conspiracy followed from the factual allegations of conscious parallel conduct. In other words, *Twombly* characterized the allegation of a conspiracy as meant to state merely the inference that the plaintiffs intended the allegations of conscious parallel conduct to create. *Twombly* did not create the strict conclusory/nonconclusory dichotomy that *Iqbal* claims it did. For more on the perhaps unwarranted extension of *Twombly* by *Iqbal*, see Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010).

36. At least one court has interpreted *Twombly* to resurrect those same distinctions, though in a way that would impose *more* fact pleading than even the Codes required. See *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 & n.5 (9th Cir. 2008) (requiring the plaintiff to “plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove [the ultimate facts]”).

37. *Iqbal*, 129 S. Ct. at 1949.

38. *Twombly*, 550 U.S. at 569 n.14 (“[W]e do not apply any ‘heightened’ pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9”); *id.* at 570 (Stevens, J., dissenting) (“Here . . . we do not require heightened fact pleading of specifics”). Not everyone takes the Court at its word. See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 475 (2008) (arguing that *Twombly* imposes “a pleading obligation that approaches the particularity requirement of Rule 9(b)”; Posting of Michael C. Dorf to Dorf on Law, *The End of Notice Pleading?*, <http://michaeldorf.org/2007/05/end-of-notice-pleading.html> (May 24, 2007, 07:34) (asserting that *Twombly* imposes a heightened pleading standard).

39. *Twombly*, 550 U.S. at 556–57.

40. *Iqbal*, 129 S. Ct. at 1951 (internal quotation marks omitted).

It is not entirely clear why these allegations are conclusory while an allegation that the allegedly discriminatory policy was “approved” by the defendants is not.⁴¹ Unsurprisingly, courts and commentators have struggled to define “nonconclusoriness.”⁴² But whatever the precise definition, the critical takeaway is that nonconclusoriness requires some meaningful factual grounding.⁴³

Second, New Pleading imposes a plausibility standard on the remaining nonconclusory factual allegations. “Plausibility” is not a self-defining term, but the Court has indicated that “plausible” is more than conceivable, possible, and speculative, yet less than probable.⁴⁴ It requires at least a “reasonable inference” of liability.⁴⁵ According to the Court, district judges should assess plausibility by drawing on their “judicial experience and common sense.”⁴⁶

41. *Id.* at 1961 (Souter, J., dissenting) (“[T]he majority’s holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory.”).

42. Compare Bone, *supra* note 35, at 868 (defining a conclusory allegation as one that “states facts at too high a level of generality”), with Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. (forthcoming 2010) (manuscript at 26, available at <http://ssrn.com/abstract=1469638>) (defining “conclusory” as an allegation that “attempts to plead directly an element of a claim that is only indirectly sensory-perceptible”), Hartnett, *supra* note 11, at 491–92 (defining conclusory as alleging the claim’s legal elements), A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 193 (2010) (defining it as a legal, as opposed to a factual, allegation), and Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming May 2010) (defining it in transactional terms); see also Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 520–26 (2009) (describing different circuit interpretations).

43. See *Iqbal*, 129 S. Ct. at 1955. (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”).

44. *Twombly*, 550 U.S. at 555, 557, 570.

45. See *Iqbal*, 129 S. Ct. at 1950 (“[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” (quoting FED. R. CIV. P. 8(a)(2))); see also Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules”*, 2009 WIS. L. REV. 535, 539 (equating “plausibility” with “reasonable inference”); Hartnett, *supra* note 11, at 484–85 (same). This definition is probably incomplete: the more accurate formulation is probably that plausibility is an inference that is reasonable *in light of other competing inferences*. See *Iqbal*, 129 S. Ct. at 1951–52 (“As between that obvious alternative explanation for the arrests and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.” (citation omitted)); *Twombly*, 550 U.S. at 565–66 (assessing plausibility in light of common economic experience). This standard approaches, and perhaps even exceeds, the heightened standard under the Private Securities Litigation Reform Act. See 15 U.S.C. § 78u-4(b)(2) (2006); see also Burbank, *supra*, at 552 (making this argument). For another take, see Mark Anderson & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL’Y (forthcoming 2010) (defining plausibility as a function of the expected false positive error costs).

46. *Iqbal*, 129 S. Ct. at 1450. The Court did not explain why a district judge could be entrusted to use “judicial experience and common sense” in assessing plausibility but not the considerable Rule-based powers to control discovery costs so feared by the *Twombly* Court. For other criticisms of the “judicial experience and common sense” standard, see Spencer, *supra* note 42, at 197–201 (worrying that it will lead to elitist assumptions about what is plausible or not, to the detriment of plaintiffs); Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10 (quoting Professor Steve Burbank as predicting that it will be “a blank check for federal judges to get rid of cases they disfavor”).

In the antitrust conspiracy context, for example, conscious parallel conduct is not enough because it is just as consistent with lawful conduct as it is with unlawful conduct; instead, a plaintiff must allege “enough factual matter . . . to suggest that an agreement was made.”⁴⁷ In the civil rights context, allegations that officials directed the detention of thousands of Arab Muslim men in restrictive conditions of confinement are not enough because they are as consistent with nondiscriminatory motives as they are with discriminatory motives.⁴⁸ Thus, plausibility requires facts that permit the inference that unlawful conduct occurred.

Third, New Pleading rejects the *Conley* maxim that a complaint should not be dismissed unless the plaintiff can prove no set of facts that would entitle him to relief. Instead, a claim must always be properly supported by factual detail alleged in the complaint. Other facts uncovered in discovery may be used to support the claims, but the complaint itself must be able to stand on its own allegations.⁴⁹

Fourth, the purpose of New Pleading is to screen out meritless or near-meritless cases before they get to burdensome discovery. Such a “thick” screening mechanism⁵⁰ is necessary to protect defendants from discovery costs because, the Court believed, the alternative—judicial supervision, control of discovery, and summary judgment—is largely ineffective.⁵¹ *Twombly* explained this expressly:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. . . . [T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases.⁵²

At bottom, New Pleading demands that the nonconclusory factual allegations reach a level of plausibility that justifies the likely discovery expense.

Taking these features together, New Pleading has dramatically changed the law of pleading.⁵³ Old Pleading was founded upon notice; facts were

47. *Twombly*, 550 U.S. at 556.

48. *Iqbal*, 120 S. Ct. at 1952 (“[R]espondent’s complaint does not contain any factual allegation sufficient to plausibly suggest petitioners’ discriminatory state of mind.”). Notably, the dissent agreed with this point. *Id.* at 1960 (Souter, J., dissenting) (“I agree that the[se] allegations . . . standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination.”).

49. *Twombly*, 550 U.S. at 557 n.5.

50. Professor Bone uses this terminology. See Bone, *supra* note 35, at 873.

51. *Twombly*, 550 U.S. at 559 (stating that “judicial supervision in checking discovery abuse has been on the modest side”); see also *id.* at 560 n.6 (“Given the system that we have, the hope of effective judicial supervision is slim . . .”).

52. *Id.* at 559 (internal quotation marks and citation omitted).

53. Clermont & Yeazell, *supra* note 30, at 823 (“The headline need no longer equivocate The Court has revolutionized the law on pleading.”); Posting of Scott Dodson to Civil Procedure and Federal Courts Blog, *Beyond Twombly*, <http://lawprofessors.typepad.com/civpro/2009/05/beyond-twombly-by-prof-scott-dodson.html> (May 18, 2009) (“I think it is fair to say that we have

largely unnecessary, and Rule 12(b)(6) dismissals were designed to be limited to those claims that failed on purely legal bases. New Pleading shifts the emphasis from notice to factual sufficiency,⁵⁴ requiring at least particularized mention of the factual circumstances of each element of the claim and perhaps even some evidence,⁵⁵ and Rule 12(b)(6) dismissals now are encouraged when claims are not facially “plausible.” Inferences previously construed in favor of the pleader may not be drawn unless they are suggestive of unlawful conduct.⁵⁶ Due to this shift in emphasis from notice to factual sufficiency, scholars have argued that New Pleading is really the New Summary Judgment.⁵⁷

A recent garden-variety slip-and-fall case illustrates New Pleading’s shift.⁵⁸ There, the plaintiff alleged that liquid was on the floor and that the defendant negligently failed to remove the liquid or warn her of its presence,⁵⁹ allegations that would have met the *Conley* notice pleading standard of old. Under the New Pleading standard, however, the district court dismissed the complaint because:

the Plaintiff has failed to allege any facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff’s accident occurred. . . . While

entered a new era in pleadings. Notice is now an aside, probably insignificant in most cases. Instead, pleadings litigation will focus on factual sufficiency.”). As a further indication, in the wake of *Iqbal*, some courts have held that the most recent reaffirmation of notice pleading in a discrimination case, *Swierkiewicz*, is, at least in part, no longer good law. See *Guirguis v. Movers Specialty Servs., Inc.*, 346 F. App’x 774 (3d Cir. 2009); *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009). For attempts to reconcile *Twigbal* and *Swierkiewicz*, see Hartnett, *supra* note 11, at 502 n.128; Steinman, *supra* note 42 (manuscript at 32, available at <http://ssrn.com/abstract=1442786>).

54. See Dodson, *Comparative Convergences*, *supra* note 5, at 462–63; see also Clermont, *supra* note 19, at 1932 (“This gatekeeping move represents the Court’s first unmistakable step backward from the modern conception of notice pleading.”).

55. Clermont & Yeazell, *supra* note 30, at 830 (“[A]s to factual sufficiency, the plaintiff practically must plead facts and even some evidence. The plaintiff should give a particularized mention of the factual circumstances of each element of the claim.”).

56. Compare *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (“Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” (internal quotation marks omitted)), with *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (“[I]t is well established that, in passing on a motion to dismiss . . . the allegations of the complaint should be construed favorably to the pleader.”), and *5B WRIGHT & MILLER*, *supra* note 16, § 1357, at 417 (“A proposition that is at the heart of the application of the Rule 12(b)(6) motion, and one that is of universal acceptance . . . is that for purposes of the motion to dismiss . . . all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader.”).

57. See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 41 (2010) (“The motion to dismiss is now the new summary judgment motion, in standard and possibly effect.”); cf. Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 510–11 (2009) (arguing that the Court improperly imported a substantive antitrust “plausibility” summary judgment standard into a transsubstantive procedural pleading standard); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 65–66 (2007) (making this argument on the basis of *Twombly* alone).

58. *Branham v. Dolgencorp, Inc.*, Civil No. 6:09-CV-00037 (W.D. Va. Aug. 24, 2009), available at <http://www.vawd.uscourts.gov/opinions/moon/branhamdolgencorpmtd.pdf>.

59. *Id.* at 1.

consistent with the possibility of the Defendant's liability, the Plaintiff's conclusory allegations that the Defendant was negligent . . . are insufficient to state a plausible claim for relief.⁶⁰

Such is the stark difference between Old Pleading and New Pleading.

B. Problems

The reason why the Supreme Court has pushed this change seems fairly obvious: the Court is concerned with high discovery costs. The Court is correct that the litigation world is different than it was in 1938. Litigation costs have risen sharply in recent years,⁶¹ particularly with the advent of electronic discovery.⁶² Though it is not clear whether high discovery costs are really the wide-scale problem some believe,⁶³ at least some discovery is disproportionately high,⁶⁴ and both unfairness and inefficiency result from subjecting defendants to high discovery costs, which they generally must bear, just to get summary judgment on a frivolous claim that never had a chance in the first place.⁶⁵

New Pleading may indeed screen out these frivolous suits before defendants suffer discovery costs, and this early filtering has its benefits. Such dismissals will conserve judicial resources for those claims that are more

60. *Id.* at 4.

61. See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986). Litigation costs—and discovery costs specifically—have been the subject of much debate over the years. For more, see Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998) (documenting discovery abuse reforms, particularly those restricting discovery).

62. For perspectives on electronic discovery, see Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U. L. REV. 1827, 1843–48 (2008); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561 (2001).

63. See generally EMERY G. LEE III & THOMAS W. WILLGING, FEDERAL JUDICIAL CENTER, NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009) (reporting that satisfaction with the pretrial process is relatively high and discovery costs are relatively reasonable), [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (disputing the perception of widespread discovery abuse); Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 93 (1997) (“Most cases in both state and federal court do not face long delays, nor do most cases have large amounts of discovery.” (footnotes omitted)). Even electronic discovery has been addressed by Rule 26 in a way that helps to alleviate the burdens of production. See FED. R. CIV. P. 26(b)(2)(B). For the perception that discovery costs are a significant problem for defendants and justify the restrictive pleading standards imposed by the Court, see Douglas G. Smith, *The Evolution of a New Pleading Standard: Ashcroft v. Iqbal*, 88 OR. L. REV. (forthcoming 2010) (manuscript at 15–17, available at <http://ssrn.com/abstract=1463844>).

64. See Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 685–86 (1998) (relying on data to conclude that complex, high-stakes litigation, handled by large firms with corporate clients, is most likely to involve the cost asymmetry that skews the discovery debate).

65. See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 562–63 (1997) (modeling the costs to defendants of frivolous suits).

likely to have merit and will save both plaintiffs and defendants the time and money they otherwise would have spent litigating meritless cases.⁶⁶

There is some evidence that New Pleading is causing an increase in dismissal rates, particularly for certain kinds of cases.⁶⁷ Two studies conducted after *Twombly* concluded that discrimination and civil rights claims are being severely affected.⁶⁸ The only study currently available of *Twombly* and *Iqbal* together finds that dismissal rates have increased across the board but most significantly for pro se litigation and constitutional civil rights cases.⁶⁹ These studies likely underreport the true effect of New Pleading, for many more rational plaintiffs who otherwise would face dismissal under the stricter pleading standard likely forgo filing suit at all.⁷⁰

The question then is whether New Pleading is screening out only those kinds of frivolous cases the Court was concerned about—in other words, whether the new factual sufficiency standard is a good proxy for meritlessness.⁷¹ No doubt that it is for some cases. After all, plaintiffs have access to certain resources—*e.g.*, public information, informal investigation, state investigation statutes,⁷² and FOIA⁷³—that may allow them to obtain the necessary facts prior to filing a complaint. If the facts necessary to survive a motion to dismiss ought to be available to the plaintiff through these means,

66. See Dodson, *supra* note 6, at 51–52.

67. See Limited Access, *supra* note 26, at 23–29 (Statement of Stephen B. Burbank) (citing cases where courts dismiss complaints that, in their own view, would have survived a motion to dismiss under the pre-*Twombly* standard).

68. Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014, 1034 [hereinafter Seiner, *Trouble with Twombly*] (stating that “the lower courts are unquestionably using the new plausibility standard to dismiss Title VII claims” and finding a high rate of summary judgment on Title VII claims); Kendall W. Hannon, Note, *Much Ado About Twombly: A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008) (concluding that dismissal rates rose in civil rights cases after *Twombly*). The suffering of employment discrimination claims at the hands of *Twombly* and *Iqbal* reinforces their status as disfavored claims. See generally Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103 (2009) (documenting the low success rate of employment discrimination claims on summary judgment and at trial). But see Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179 (2010) [hereinafter Seiner, *After Iqbal*] (finding enough success of employment discrimination claims to make the case for continuing pervasive employment discrimination).

69. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010).

70. Cf. Stephen J. Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 37 (2009) (reporting that non-nuisance lawsuits likely dropped after the enactment of the PSLRA’s stricter pleading standards). Some no doubt have framed their complaints to meet the New Pleading standard, but that possibility only makes the demonstrable increase in dismissal rates more meaningful.

71. The *Twombly* Court seemed to think that would be the case. It repeatedly suggested that, because of the lack of factual allegations in the pleadings, there was no “reasonably founded hope” that the discovery process would reveal relevant evidence to support the antitrust conspiracy claim at issue. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559, 562 (2007) (internal quotation marks omitted). This view is in some tension with the Court’s tacit concession that, although the claim as pleaded was not plausible, it at least was *possible*. *Id.* at 559.

72. See, *e.g.*, DEL. CODE ANN. tit. 8 § 220 (2003); *Guttman v. Huang*, 823 A.2d 492 (Del. Ch. 2003) (allowing use of the Delaware investigation statute as a pre-suit discovery tool).

73. Freedom of Information Act, 5 U.S.C. § 522(b) (2006).

and the plaintiff does not plead them, then it may be reasonable to infer that the failure to plead sufficient facts means that those facts do not exist, and that the plaintiff's claim is therefore meritless.⁷⁴

But that inference is not always reasonable.⁷⁵ Some facts may be solely in the hands of the defendants or hostile third parties.⁷⁶ Certain claims—often those hinging on the defendant's state of mind or secretive conduct—are particularly susceptible to that kind of “information asymmetry.”⁷⁷ Claims for civil rights and discrimination violations, corporate wrongdoing, unlawful conspiracies, and perhaps certain intentional torts are good examples,⁷⁸ although the range of cases in which this may be a problem is certainly much broader.⁷⁹

74. Of course, other reasons might cause such a deficiency. Uncovering the necessary facts through non-discovery means might be prohibitively costly. Or, the party or her attorney may have overlooked an opportunity for obtaining the information.

75. See Posting of Scott Dodson to Civil Procedure & Federal Courts Blog, *Against Twombly & Iqbal—A Reply to Drug & Device Law Post*, <http://lawprofessors.typepad.com/civpro/2009/06/response-to-drug-device-law-post.html> (June 5, 2009) (“The failure to plead a plausible claim is not necessarily an indication that the claim lacks merit.”). The opinion in *Twombly* assumes the opposite. *Twombly*, 550 U.S. at 559 (“[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim.” (internal quotation marks omitted)).

76. In rare cases, a plaintiff nevertheless may happen to obtain direct evidence of these facts. See, e.g., *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) (affirming the denial of a motion to dismiss allegations founded on motive when there was direct evidence of motive). But that is highly exceptional, as the Supreme Court has acknowledged. See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (noting in a race discrimination case that “[t]here will seldom be ‘eyewitness’ testimony as to the employer’s mental processes”); *Bailey v. Alabama*, 219 U.S. 219, 233 (1911) (“As the intent is the design, purpose, resolve, or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inferences from facts and circumstances developed by the proof.”).

77. Posting of Randal Picker to The University of Chicago Law School Faculty Blog, *Closing the Doors to (Antitrust) Plaintiffs?*, http://uchicagolaw.typepad.com/faculty/2007/05/closing_the_doo.html (May 21, 2007) (using the term); Bone, *supra* note 65, at 542 (discussing “asymmetric information”).

78. See Dodson, *supra* note 75 (“In those cases, the information often necessary to meet the plausibility standard is largely in the hands of the defendants.”); Lonny Hoffman, *Using Presuit Discovery to Overcome Barriers to the Courthouse*, LITIG., Summer 2008, at 31, 32 (mentioning these cases); Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond* (Nov. 18, 2009) (manuscript at 3, available at <http://ssrn.com/abstract=1508511>) (asserting that antitrust conspiracies are usually kept secret and in the hands of the defendants); Malveaux, *supra* note 14, at 87 (“[T]he plausibility standard works an unfair disadvantage in civil rights cases because plaintiffs alleging intentional discrimination, pre-discovery, can often only plead facts that are consistent with both legal and illegal behavior.”); Spencer, *supra* note 38, at 460 (arguing that plausibility pleading “is likely to impose a more onerous burden in those cases where a liberal notice pleading standard is needed most: actions asserting claims based on states of mind, secret agreements, and the like”); Randall S. Thomas & Kenneth J. Martin, *Using State Inspection Statutes for Discovery in Federal Securities Fraud Actions*, 77 B.U. L. REV. 69, 71–73 (1997) (noting that corporate fraud is difficult to detect without use of formal discovery); see also Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (discussing the impact of plausibility pleading on civil rights and discrimination claims); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 498 (1989) (noting that civil rights plaintiffs “rarely will possess or be able to obtain information pertinent to their cases . . . available only during discovery”).

79. See, e.g., *Branham v. Dolgencorp, Inc.*, Civil No. 6:09-CV-00037 (W.D. Va. Aug. 24, 2009), available at <http://www.vawd.uscourts.gov/opinions/moon/branhamdolgencorpmtd.pdf>.

To provide focus, take a typical employment case, in which a qualified candidate properly applies for a vacancy but is turned down. The employer gives the candidate no reason for the decision, a common circumstance in many hiring decisions, especially those involved in filling lower-skilled positions.⁸⁰ The candidate does not know whether the reason for the employer's decision was lawful or not. Say then that the candidate makes some calls and the employer gives a reason for its decision. The proffered explanation is certainly not going to be because of an unlawful consideration of race or gender or some other protected classification. In short, the candidate will rarely have direct evidence of discrimination, particularly before discovery.⁸¹

The fortunate plaintiff may find external evidence that creates a legally permissible inference of the defendant's state of mind in such cases.⁸² For example, a plaintiff alleging employment discrimination based on age may be able to state a plausible claim for relief by alleging that he was replaced by a younger, less qualified individual, if he has access to such information. Or, perhaps the plaintiff has facts that suggest that the employer's proffered explanation (if the employer gave one) is not the true reason for the employment action.⁸³

But not all plaintiffs will be fortunate enough even to have these facts in hand. Often, they will either be unable to bear the cost of pre-filing investigation or be unable to get the information at all without formal discovery.⁸⁴ Though they may have actually suffered cognizable harm, these plaintiffs will not be able to survive a motion to dismiss without formal discovery and will not be able to get access to formal discovery without surviving a motion to dismiss.⁸⁵ Nor will these plaintiffs be able to allege unknown facts in their

(dismissing a slip-and-fall case because the plaintiff did not plead whether the defendant knew the liquid was on the floor).

80. See Seiner, *After Iqbal*, *supra* note 68, at 216–17.

81. See *Aikens*, 460 U.S. at 716 (“There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.”).

82. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.4 (2007) (describing facts that would give rise to an inference of an antitrust conspiracy); Epstein, *supra* note 57, at 74–75 (discussing publicly available information supporting an inference of conspiracy); Geoffrey P. Miller, *Pleading After Tellabs*, 2009 Wis. L. Rev. 507, 523–24 (discussing publicly available information supporting an inference of scienter in securities fraud); Thomas & Martin, *supra* note 78 (offering the use of state inspection statutes).

83. See Seiner, *After Iqbal*, *supra* note 68, at 216–17.

84. Limited Access, *supra* note 26, at 16 (Statement of Stephen B. Burbank) (“Perhaps the most troublesome possible consequences of *Twombly* and *Iqbal* is that they will deny access to court to plaintiffs and prospective plaintiffs with meritorious claims who cannot satisfy those decisions’ requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries.”); see also Roy L. Brooks, Conley and Twombly: A *Critical Race Theory Perspective*, 52 How. L.J. 31, 68–69 (2008) (documenting the Catch-22 in discrimination cases); Tobias, *supra* note 78, at 498 (noting that civil rights plaintiffs “rarely will possess or be able to obtain information pertinent to their cases . . . [which would be] available only during discovery”).

85. I discuss the possibility of predismissal discovery in greater depth below. See *infra* notes 89–101 and accompanying text.

pleadings without running afoul of the certification provision in Rule 11, which requires a party to certify that the allegation will likely have evidentiary support after discovery.⁸⁶

Factual sufficiency is therefore a poor proxy for meritlessness in these kinds of cases. It overscreens cases that, though meritorious, cannot meet the fact pleading standard before discovery.⁸⁷ The overscreening effect is a significant inroad into justice concerns because it prevents deserving plaintiffs from gaining meaningful access to the civil justice system.⁸⁸

In such situations, the plaintiff is trapped in a Catch-22: she may have a meritorious claim, but, because critical facts are not obtainable through informal means, she cannot plead her claims with sufficient factual detail to survive a motion to dismiss under the New Pleading standard of *Twombly* and *Iqbal*. If only she could get some discovery, she might be able to obtain the facts that she needs. But how can she obtain that discovery without surviving a motion to dismiss?

C. Modest Solutions

Resort to current federal discovery rules is not very promising. The rules do not allow for presuit discovery absent a showing that the discovery is needed to preserve testimony.⁸⁹

Recent commentary, however, has suggested that predissmissal discovery under Rule 26 is a viable way to circumvent New Pleading's Catch-22.⁹⁰ I am extremely sympathetic to this view, but I have real doubts about its util-

86. FED. R. CIV. P. 11(b)(3) (requiring a party to "certif[y] that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . [the] factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery").

87. See Bone, *supra* note 65, at 563 (making this prediction); Dodson, *supra* note 75 ("[E]rroneously equating the failure to plead plausibility with meritlessness will result in fewer meritorious cases filed, fewer meritorious cases surviving to discovery, and fewer injuries resulting from wrongful conduct being redressed."). Plaintiffs who cannot sue might still obtain a presuit settlement, though at a fraction of the value of the case. See Bone, *supra* note 19, at 927.

88. There are other problems with New Pleading. For example, New Pleading also underscreens by failing to catch claims that, though meeting the factual sufficiency standard, ultimately fail on the merits later in the litigation process. The underscreening effect erodes the cost-saving benefits of the stricter screening mechanism because it allows weak claims to consume court and litigant resources. In addition, the tension between New Pleading and the Federal Forms and cases like *Swierkiewicz* will create uncertainty costs and additional litigation. Also, the higher factual burden on plaintiffs will impose greater front-end costs on plaintiffs seeking to bulk up complaints for fear of dismissal. The bloating of complaints will cost plaintiffs more to draft them, defendants more to answer them, and the court more to sift through them. Finally, the invitation by *Iqbal* for district judges to use judicial experience and common sense to apply the plausibility standard (or to determine what is conclusory and what is not) may lead to forum shopping for particular judges. It might also require judges to seek outside guidance on certain technical issues of substantive law, such as antitrust law, to determine what is plausible and what is not.

89. FED. R. CIV. P. 27.

90. Hartnett, *supra* note 11, at 503–15; Malveaux, *supra* note 14, at 106–23; William H. Page, *Twombly and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards*, 5 J. COMPETITION L. & ECON. 493, 466–68 (2009). But see Bone, *supra* note 19, at 934–35 ("Allowing pleading-stage discovery fits the current Rules awkwardly at best.").

ity. The text of Rule 26 generally does authorize discovery after the Rule 26(f) conference and enables protection from discovery only upon a showing of good cause.⁹¹ Yet, despite the text's general thrust favoring discovery, I have doubts as to whether the filing of a *Twiqbal* motion to dismiss is wholly irrelevant to the availability of discovery. The rules say nothing specifically about the availability of discovery pending a motion to dismiss. As an original matter, at least, the drafters probably did not contemplate the need for such discovery, for under the liberalized pleading standard of Rule 8, the assumption was that discovery would not be needed to survive a Rule 12(b)(6) motion to dismiss.⁹²

Twombly and *Iqbal* may change this dynamic, but it not clear in what direction. One could argue that the new pleading standard supports easier access to predissmissal discovery.⁹³ But one could also argue, perhaps more persuasively, that the rationale of those cases cuts the opposite way.

Indeed, the sentiments expressed by the Court in both *Twombly* and *Iqbal* are directly opposed to predissmissal discovery in its current form. The Supreme Court repeatedly cited the threat of discovery and the inability of district courts to police it adequately as reasons for imposing stricter plausibility pleading. *Twombly* stated, “[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the[se] potentially enormous expense[s] of discovery.”⁹⁴ And *Iqbal* stated, “Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”⁹⁵ And again, with emphasis: “Because respondent’s complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.”⁹⁶ Tellingly, *Twombly* itself rejected the limited predissmissal discovery option that Justice Stevens posed in dissent in that case.⁹⁷

Iqbal is a particular blow to the availability of predissmissal discovery under the current discovery regime. One commentator has argued that qualified immunity is an area in which limited predissmissal discovery historically has been allowed.⁹⁸ But *Iqbal*, itself a qualified immunity case, closed the

91. FED. R. CIV. P. 26(c) (allowing courts to protect a party from responding to discovery upon a showing of good cause).

92. See Pike & Willis, *supra* note 21, at 1192 (“Normally [the plaintiff] needs no such aid . . .”); see also GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 60 (1932) (suggesting the same).

93. See, e.g., Malveaux, *supra* note 14, at 123–24; Page, *supra* note 90, at 468.

94. Bell Atl. Corp. v. *Twombly*, 550 U.S. 544, 559 (2007); see also *id.* at 560 n.6 (“Given the system that we have, the hope of effective judicial supervision is slim . . .”); *id.* at 563 n.8 (“[B]efore proceeding to discovery, a complaint must allege facts suggestive of illegal conduct.”) (emphasis added).

95. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

96. *Id.* at 1954.

97. *Twombly*, 550 U.S. at 593–94 (Stevens, J., dissenting).

98. See Malveaux, *supra* note 14, at 113 (“[C]ourts have granted limited discovery after denying dismissal, but prior to merits discovery, on the propriety of qualified immunity.”). But see Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (“Until this threshold immunity question is resolved, discovery should not be allowed.”). Professor Hartnett argues that *Iqbal*'s rejection of predissmissal

doors on discovery, and, at least by implication, on any predissmissal discovery in that area as well.⁹⁹

Thus, the import of *Twombly* and *Iqbal* is that only a complaint that can survive a motion to dismiss entitles a plaintiff to any kind of discovery from the defendant or third parties. This provides strong support for any defendant who moves for a discovery stay under Rule 26(c) during the pendency of its motion to dismiss to argue that any discovery is an “undue burden” until the court concludes that the plaintiff has a plausible claim.

For these reasons, I strongly suspect that the potential for predissmissal discovery in its current form will not be a widely used mechanism for ameliorating the effects of *Twombly* and *Iqbal*.¹⁰⁰ In order to take advantage of it, a plaintiff would have to file a factually insufficient pleading on the hope that a district judge would allow discovery to proceed during the pendency of a motion to dismiss in the face of the Supreme Court’s statements in *Twombly* and *Iqbal* justifying stricter pleading standards as the only way to control discovery costs effectively. That may still happen, but recent cases suggest that district courts are more likely to rely on *Twombly* and *Iqbal* to stay discovery while a motion to dismiss based on those cases is pending.¹⁰¹

discovery can be tied to the qualified immunity context. *See* Hartnett, *supra* note 11, at 511 (“[I]t is crucial that these statements [rejecting pre-dismissal discovery options] were made in the context of a case involving the defense of qualified immunity.”). That argument, however, ignores the transsubstantive nature of other statements in *Iqbal* that do not appear at all tied to qualified immunity, *see, e.g., Iqbal*, 129 S. Ct. at 1950 (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”); *id.* at 1953 (“We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.”); Bone, *supra* note 35, at 859 (noting that although *Iqbal* might have limited its rejection of predissmissal discovery to qualified immunity cases, “it uses language that suggests a broader application”), as well as the transsubstantive statements in *Twombly* to the same effect, *see, e.g., Twombly*, 550 U.S. at 559, 560 n.6, 563 n.8.

99. *Iqbal*, 129 S. Ct. at 1954 (“Because [Iqbal’s] complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.”); *see also, e.g., Moss v. U.S. Secret Serv.*, 572 F.3d 962, 974 (9th Cir. 2009) (explaining that the district court “reasonably” stayed all discovery pending resolution of the motion to dismiss on the defendants’ qualified immunity defense); *Comm. for Immigrant Rights of Sonoma County v. County of Sonoma*, 644 F. Supp. 2d 1177, 1210–11 (N.D. Cal. 2009) (imposing a stay of discovery on the basis of *Iqbal*).

100. There is a practical obstacle as well. Absent court order, discovery cannot occur before the parties have had their Rule 26(f) conference, which can occur as late as ninety days after any defendant has appeared. *See* FED. R. CIV. P. 26(d). Even if the plaintiff gets the time to file a discovery request, the defendant could stonewall with objections. By the time any discovery would have changed hands, the motion to dismiss may have been long since decided.

101. *See, e.g., Moss*, 572 F.3d at 974–75; *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009) (interpreting *Twombly* to discourage discovery in complex cases “unless the complaint indicates that the plaintiff’s case is a substantial one”); *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008); *Harris v. Adams County Commc’ns. Ctr.*, No. 09-cv-01728-MSK-KMT, 2010 WL 882648 (D. Colo. Mar. 8, 2010) (issuing a stay of discovery based in part on the rationale of *Iqbal*); *Comm’n for Immigrant Rights*, 644 F. Supp. 2d at 1210–11; *Bierer v. Bd. of Trs. of Metro. State Coll.*, No. 09-cv-01034-WYD-KMT, 2009 WL 2242209 (D. Colo. July 24, 2009) (issuing a stay of discovery based in part on the rationale of *Iqbal*); *Schwartz ex rel Estate of Grafner v. Jefferson County Dep’t of Human Servs.*, No. 09-cv-00915-WYD-KMT, 2009 WL 2132416 (D. Colo. July 10, 2009) (same); *Albion Int’l, Inc. v. Am. Int’l Chem., Inc.*, No. 2:07 cv 994 CW, 2009 WL 1835024 (D. Utah June 19, 2009) (referring to a prior stay of discovery based on the rationale of *Twombly* and *Iqbal*); *Coss v. Playtex Prods., LLC*, No. 08 C 50222, 2009 WL 1455358 (N.D. Ill. May 21, 2009) (granting a general stay based on the rationale of *Twombly* and *Iqbal* but ordering very focused discovery that the defendant agreed would not be burdensome);

As a result, I do not hold out much hope for the availability of predissmissal discovery under the paradigm of Old Discovery as a meaningful cure to the ills of New Pleading.

A few other limited solutions to the New Pleading dilemma exist. For example, the plaintiff could sue a defendant against whom she has a plausible claim and then, during discovery in that case, seek to elicit facts that would enable her to plead a plausible claim against a second defendant against whom she otherwise would not have been able to plead a plausible claim. In an ironic twist, *Javaid Iqbal* may fall into this category. *Iqbal* sued a number of defendants and, while the principal defendants' motion to dismiss was pending in the district court and upon appeal, *Iqbal* conducted discovery of the other defendants. It is possible that *Iqbal* obtained information in that discovery process that he now can use to amend his complaint against the principal defendants in a way that enables him to survive a motion to dismiss on those claims.¹⁰²

This scenario is constrained in two ways, however. First, the plaintiff must have plausible claims against the persons who have the information the plaintiff needs to assert against the prospective defendant.¹⁰³ Second, absent a showing of good cause for broader discovery, the information must be relevant to a claim or defense asserted between the existing parties.¹⁰⁴ These limitations substantially reduce the efficacy of this option.

Another option is the use of state presuit discovery mechanisms.¹⁰⁵ Some states allow presuit investigative discovery for the purpose of filing a sufficient complaint. Plaintiffs who otherwise might be trapped in federal court with information asymmetry can use these state procedures as a

Kregler v. City of New York, 608 F. Supp. 2d 465, 475 (S.D.N.Y. 2009) (ordering a preliminary hearing to determine whether the complaint passed *Twombly* and *Iqbal* muster); *DSM Desotech Inc. v. 3D Sys. Corp.*, No. 08 CV 1531, 2008 WL 4812440 (N.D. Ill. Oct. 28, 2008) (granting a stay based on the rationale of *Twombly*); *McLafferty v. Deutsche Lufthansa A.G.*, 2008 WL 4612856 (E.D. Pa. 2008). *But see Charvat v. NMP, LLC*, No. 2:09-cv-209, 2009 WL 3210379 (S.D. Ohio Sept. 30, 2009) (Kemp, Mag. J.) (suggesting that *Twombly* and *Iqbal* do not alter the stay analysis vis a vis motions to dismiss); *Solomon Realty Co. v. Tim Donut U.S. Ltd.*, No. 2:08-cv-561, 2009 WL 2485992 (S.D. Ohio Aug. 11, 2009) (rejecting a stay request that was based on *Twombly* and *Iqbal*); *In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2008 WL 62278 (N.D. Cal. Jan. 4, 2008) (rejecting a blanket stay based on *Twombly* and rejecting a stay); *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417 WHA, 2007 WL 2127577 (N.D. Cal. July 24, 2007) (rejecting a blanket stay based on *Twombly* but entering a stay on the facts of the case nonetheless).

102. See Mauro, *supra* note 9 (reporting such plans by *Iqbal*'s counsel).

103. See Dodson, *supra* note 6, at 54.

104. See FED. R. CIV. P. 26(b) (allowing discovery relevant to a claim or defense, and allowing broader discovery only upon a showing of good cause). The 2000 amendments to Rule 26, reducing its default scope to claims or defenses as opposed to subject matter, were specifically designed to prevent parties from fishing for new claims. See *id.* advisory committee's note to 2000 amends. ("The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings."). For a criticism of this limitation, see Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13 (2001).

105. For a more detailed discussion of this possibility, see generally Dodson, *supra* note 6. Cf. Hoffman, *supra* note 78 (urging the use of state presuit discovery motions to meet state pleading requirements).

way to rectify that asymmetry before getting to federal court. In other words, a plaintiff who suspects she might be confronted with a federal motion to dismiss under *Twombly* and *Iqbal* might initiate a state presuit discovery action to get information she needs to survive such a motion. After getting the information, the plaintiff could either file in federal court (assuming there is a jurisdictional basis) or file in state court with the expectation that the case would be removed to federal court and subject to a federal motion to dismiss.

But there are limitations on the use of state presuit discovery mechanisms as well. One of the biggest is that not all states allow presuit discovery, and so a plaintiff may find herself restricted by personal jurisdiction and other doctrines to states that lack a viable presuit discovery option.¹⁰⁶ Another is that a federal court may not toll the running of a limitations period during the pendency of a state presuit discovery action, and thus filing such an action might be too risky for a plaintiff confronted with a looming limitations defense.¹⁰⁷ Finally, a more robust use of state presuit discovery mechanisms for the purpose of surviving a federal motion to dismiss may be seen as unseemly,¹⁰⁸ and it might cause state courts, legislatures, and rulemakers to backlash against the commandeering of state judicial mechanisms by narrowing their availability.¹⁰⁹

What is needed, then, is a new federal paradigm that can rectify the unfairness of the *Twiqbal* Catch-22 in federal court.

III. NEW DISCOVERY

I thus propose New Discovery as a necessary corollary to New Pleading. New Discovery recognizes the need for limited presuit or predismissal discovery to counteract the information asymmetry and overscreening caused by *Twombly* and *Iqbal*, structured in a way to alleviate the Court's concerns. In this Part, I first offer a theoretical defense for New Discovery generally. I then propose some guiding principles for how New Discovery ought to be structured and explore what concrete tools might be used to implement those principles. Finally, I show how New Discovery might work in practice.

106. See Dodson, *supra* note 6, at 62–64. Viability may be affected by the nonexistence of a state presuit discovery mechanism, the existence of a state presuit discovery mechanism that requires a state court substantive action, or limitations on an existing state presuit discovery mechanism that preclude the opportunity to discover sufficient information based on the applicable pleading standards. *Id.*

107. See *id.* at 64.

108. It is not without some analogous precedent, though. See Thomas & Martin, *supra* note 78 (urging plaintiffs to use state inspection statutes to gain access to information necessary to survive a federal motion to dismiss).

109. Congress in fact did so in the securities litigation context by enacting the Securities Litigation Uniform Standards Act of 1998 to give federal courts the power to stay state court discovery if state court discovery mechanisms were being used to circumvent more restrictive federal court discovery controls. For a discussion of that backlash, see *Newby v. Enron Corp.*, 338 F.3d 467, 471–72 (5th Cir. 2003).

A. Theoretical Basis

The problems of New Pleading for plaintiffs who are faced with information asymmetry are documented above. “Litigation depends on information,” one prominent commentator has stated,¹¹⁰ and *Twombly* and *Iqbal* operate—indeed, their whole purpose is—to cut off access to information. The solution, I believe, is to provide these plaintiffs with limited discovery targeted at the factual issues for which they lack evidentiary support and with appropriate controls to ameliorate the risk of imposing unwarranted discovery burdens.

Such discovery would have several benefits. First, and most obvious, it would provide the opportunity for plaintiffs to rectify the information asymmetry that confronts them. A plaintiff could seek limited discovery, perhaps even a few interrogatories or a couple of hours of deposition, narrowly circumscribed to target the existence of the facts she needs. Positive discovery would enable the plaintiff to plead her claims with plausibility and also to buttress otherwise conclusory allegations with nonconclusory factual support.

Second, and perhaps less obvious, New Discovery has benefits for truly innocent defendants. The failure to uncover any evidence of wrongdoing in New Discovery might convince a plaintiff that the case really is meritless, saving both parties the expense of filing and litigating a motion to dismiss.¹¹¹ There are, after all, powerful incentives for plaintiffs to refrain from filing lawsuits that they know are weak,¹¹² particularly in the *Twiqbal* era. As a result, defendants will be spared the litigation (through three possible levels of the federal courts) of the motion to dismiss, and the risk that courts, in their judicial experience and common sense, might nevertheless deny the motion.

In addition, innocent defendants likely would vastly prefer some mildly intrusive discovery to a formal lawsuit against them. For many defendants, the initiation of a lawsuit entails additional costs aside from litigation expenses. Being named as a defendant may trigger reporting obligations to oversight boards or agencies, notice to insurers (resulting in higher premiums), and professional or personal reputational damage.¹¹³ Having the opportunity to disclose, under penalty of court sanctions, that the evidence the plaintiff seeks does not exist may be far better for defendants than the

110. Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 574 (1994).

111. See Bone, *supra* note 65, at 541 (modeling frivolous suits with complete information symmetry and concluding that these frivolous suits “all settle early, producing little in the way of wasted litigation costs, and settlements are likely to be quite small”).

112. See generally *id.*; HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004). Strike suits may still be filed, but if the meritlessness of the lawsuit is known by both sides, the suit should command only a negligible settlement. See Bone, *supra* note 65, at 541.

113. See Hoffman, *supra* note 78, at 34.

plaintiff's alternative of a formal lawsuit, even if the lawsuit is ultimately dismissed.¹¹⁴

The point here is that a plaintiff confronted with information asymmetry faces a substantial *ex ante* uncertainty about his claims, and this uncertainty gives rise to significant error costs, either by the filing of a frivolous claim or by the inability to file a meritorious claim. If the defendant (or a hostile third party) actually knows whether the case has or lacks merit, then forcing him to show his cards in a limited and targeted way is better for the court, the justice system, and all parties—except, of course, for those particular defendants sitting on a smoking gun.¹¹⁵ If the defendant has something to hide, then the system ought to make her show it so that the plaintiff with a meritorious cause of action can obtain justice.¹¹⁶ If she does not, she frankly ought to be willing to show that voluntarily, for the likely result will be a quick and painless dismissal of the plaintiff's complaint (or, perhaps, no filing of a complaint at all).¹¹⁷

There is some evidence from state systems that suggests presuit discovery will have this effect. Texas allows presuit discovery for the express purpose of investigating claims when justice or some other benefit outweighs the burden and expense of the discovery requested.¹¹⁸ The available empirical evidence suggests that presuit discovery is widely sought and usually allowed in Texas,¹¹⁹ though only rarely sought relative to the total number of cases filed in Texas.¹²⁰ A recent survey found that presuit investigative discovery in Texas was used primarily to ensure that the complaint would be valid under the rules.¹²¹ In cases in which no lawsuit was filed after presuit discovery was allowed, the predominant reason was that the parties had settled.¹²² These data suggest that presuit investigative discovery is, at least in Texas, used properly and can be a net cost gain—early peeks at critical evidence may result in no lawsuit ever being filed, either because the evidence is too scanty to be worth anything other than a meager settlement, or because the evidence is substantial enough that the defendant wishes to settle rather than defend a lawsuit.

114. *See id.* at 35 (“After all, if taking a few presuit depositions would confirm that no legal wrong had been committed, then the minor cost and inconvenience entailed would certainly be outweighed by the individual and institutional benefits gained by avoiding a full-blown lawsuit.”).

115. *Id.* (“The limited and targeted use of presuit discovery can be a sensible option from the perspective of all parties, along with a social and administrative plus for the court system.”).

116. *Id.* at 34.

117. *See id.*

118. TEX. R. CIV. P. 202.1, 202.4.

119. Hoffman, *supra* note 13, at 222; *id.* at 258–59 (reporting that presuit discovery is rarely denied).

120. *Id.* at 224.

121. *Id.* at 255.

122. *Id.* at 260.

Those skeptical of these claims need only look to Florida. At the insistence of the defense bar, Florida enacted a statutory requirement¹²³ of presuit discovery in medical malpractice claims under a complicated procedural mechanism.¹²⁴ The Florida rule is designed to deter meritless claims, as well as to facilitate the early resolution of them,¹²⁵ by requiring the prospective plaintiff and defendant to share information under penalty of sanctions.¹²⁶ In sum, limited presuit or predissmissal discovery has the potential to improve the procedural fairness of New Pleading from a plaintiff's standpoint and reduce the size of litigation costs from a defendant's standpoint.

Nevertheless, skeptics may dismiss these theoretical benefits as naïve, believing that plaintiffs will not stop until they get the facts that they want, and that defendants will fight any and all discovery requests, even if the responses will tend to show the absence of liability. That is possible—old habits die hard, and I think that is a strong indication that such discovery under the flabby Old Discovery rules would be difficult to control. But as I explain in the next section, my proposal to implement New Discovery includes new, concrete methods to control these tactics.

B. Guiding Principles and Tools for Implementation

The concerns of both plaintiffs and defendants—the needs to rectify information asymmetry without imposing burdensome costs—naturally lead to three principles that ought to structure New Discovery: (1) it should be used sparingly; (2) it should be narrowly focused and minimize undue cost; and (3) it should toll the running of any applicable limitations period.

1. Sparingly Used

Full discovery is available for parties to claims that successfully pass through the crucible of a motion to dismiss. Such discovery is warranted to further test such claims. Conversely, discovery of claims that have not been so tested (or that have failed the test) ought to be more circumscribed.

One might object at the outset to limiting New Discovery in this way. If the plaintiff already has sufficient information to plead a case and survive a motion to dismiss, why do we care whether the discovery is presuit or during formal discovery? We might actually want virtually unlimited New Discovery so that the complaint names the proper parties (and does not name improper parties), is more specific, and is less likely to be frivolous.¹²⁷ Such a pleading might result in fewer discovery disputes and pretrial motions.¹²⁸

123. See Fla. Hosp. Waterman v. Stoll, 855 So. 2d 271, 276 (Fla. App. 2003).

124. See generally Edward J. Carbone, *Presuit Nuts 'n' Bolts*, 27 TRIAL ADVOC. Q. 27 (2007).

125. FLA. STAT. § 766.201(2) (2009); Musculoskeletal Inst. Chartered v. Parham, 745 So. 2d 946, 949–50 (Fla. 1999).

126. FLA. STAT. § 766.106(7) (2009).

127. See Jeffrey J. Kroll, *The Art and Science of Presuit Discovery*, TRIAL, March 2009, at 28.

128. Hoffman, *supra* note 78, at 34.

I am not necessarily opposed to exploring more robust presuit discovery mechanisms under the right circumstances, but my inclination is that our current structure would consider that to be putting the cart before the horse in a way that would disrupt the normal flow of many lawsuits. In addition, there are significant downsides to robust presuit discovery. For example, it might be difficult to prepare witnesses or document responses or written responses without knowing the contours of the dispute as set forth in formal pleadings.¹²⁹ Also, it would be difficult to gauge whether a request is relevant to the claims or defenses, or if the burdens of discovery outweigh its likely benefits, if the claims or defenses are not set out in pleadings.¹³⁰ Finally, it is possible that front-loading high discovery costs can make settlement more difficult later on because parties need a more favorable settlement to offset the costs already invested.

The safer course, then, is to restrict New Discovery to the particular problem at hand. How might this be done? First, the plaintiff could be required to identify those facts needed to both state a claim and survive a motion to dismiss. To do so, the plaintiff would have to identify both the substantive claim and the missing facts, as well as the legal basis for the conclusion that existing facts are insufficient to state a claim. Thus, a conspiracy plaintiff might petition for New Discovery on the grounds that he has only evidence of conscious parallel conduct and therefore, under *Twombly*, needs facts tending to show the existence of an agreement. A discrimination plaintiff might state that she was fired from her job under conditions that do not give rise to an inference of discrimination and therefore, under *Iqbal*, needs facts tending to show or imply a discriminatory motive. Note that this requirement is unlikely to generate much controversy or satellite litigation. Defendants surely would contest a petition for New Discovery on these grounds only if it were clear that the plaintiff did in fact have sufficient information, for any contestation would be tantamount to a concession that any motion to dismiss on that basis should fail.¹³¹

Existing state presuit discovery mechanisms show support for these requirements. Rule 4003.8 of the Pennsylvania Rules of Civil Procedure allows a plaintiff to “obtain pre-complaint discovery when the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.”¹³² Upon a defendant’s objection,

129. See Hartnett, *supra* note 11, at 512 (“[I]f there is no viable complaint currently framing the dispute, it might be thought that there is no way for a court to determine the scope of discovery, and therefore none is permissible.”); Kenneth E. Shore, *A History of the 1999 Discovery Rules: The Debates and Compromises*, 20 REV. LITIG. 89, 181 (2000).

130. See FED. R. CIV. P. 26(b). One way around this problem might be to require the plaintiff to provide the witness with a draft complaint. My thanks to Tom Rowe for this suggestion.

131. See Hoffman, *supra* note 78, at 34.

132. PA. R. CIV. P. 4003.8(a).

the court can require the plaintiff to “state with particularity how the discovery will materially advance the preparation of the complaint.”¹³³

Connecticut, which recognizes an independent equitable action for discovery, is similar.¹³⁴ To be entitled to such discovery, the petitioner must demonstrate that what he seeks to discover is “material and necessary for proof of, or is needed to aid in proof of . . . another action already brought or about to be brought.”¹³⁵ The plaintiff must describe with reasonable detail the material he seeks.¹³⁶

Alabama allows for pre-action investigative discovery under its Rule 27¹³⁷ and provides for similar showings. A petition for pre-action discovery must show that the petitioner is presently unable to bring the cause of action and must identify the facts which the petitioner desires to establish by the proposed discovery.¹³⁸ Other states have similar requirements.¹³⁹ These state analogues suggest that similar requirements in federal court should be adequate and workable—it is notable that no studies of which I am aware have suggested that presuit discovery under any of these mechanisms is routinely sought beyond their limited purposes.

A somewhat less analogous federal discovery mechanism—but one that still sheds some light on New Discovery opportunities—is the Private Securities Litigation Reform Act (“PSLRA”), which provides for an automatic stay of discovery during the pendency of any motion to dismiss “unless the court finds . . . that particularized discovery is necessary to . . . prevent undue prejudice.”¹⁴⁰ The PSLRA thus enables a plaintiff to make a showing that particularized, predissmissal discovery is necessary to prevent prejudice. The prejudice contemplated, however, is not the inability to formulate a factually sufficient complaint; rather, it is for other exceptional circumstances,

133. *Id.* 4003.8(b).

134. *Berger v. Cuomo*, 644 A.2d 333, 337 (Conn. 1994).

135. *Id.* (citing *Potteti v. Clifford*, 150 A.2d 207, 213 (Conn. 1959)).

136. *Id.* (quoting *Potteti*, 150 A.2d at 213).

137. *Driskill v. Culliver*, 797 So. 2d 495, 497–98 (Ala. Civ. App. 2001) (allowing pre-action discovery “to determine whether the plaintiff has a reasonable basis for filing an action”); *Ex parte Anderson*, 644 So. 2d 961, 965 (Ala. 1994) (“Rule 27 provides a limited means by which potential plaintiffs (and their attorneys), within the discretion of the trial court, can examine evidence before actually deciding whether they have a reasonable basis for filing an action.”).

138. ALA. R. CIV. P. 27.

139. *See* OHIO R. CIV. P. 34(D)(1) (requiring a presuit discovery action petitioner to state “the subject matter of the petitioner’s potential cause of action” and to identify “the information sought to be discovered with reasonable particularity”); *id.* 34(D)(3) (requiring a court to order the discovery if, *inter alia*, the petitioner would be “otherwise unable to bring the contemplated action”); TEX. R. CIV. P. 202.2 (requiring presuit discovery petitioners to identify the person to be deposed, the testimony expected to be elicited, and the reason for requesting the deposition); *Holzman v. Manhattan & Bronx Surface Transit Operating Auth.*, 707 N.Y.S.2d 159, 161 (N.Y. App. Div. 2000) (requiring a pre-action discovery petitioner to demonstrate a meritorious cause of action and that the information sought is material and necessary to the actionable wrong). In addition, the UK allows for pre-action disclosure in similar circumstances. *See* CIVIL PROCEDURE RULES, 1998, S.I. 1998/3132, ¶ 31.16; *Norwich Pharmacal Co. v. Comm’rs of Customs & Excise*, (1973) 2 All ER 943.

140. 15 U.S.C. §§ 77z-1(b)(1), 78u-4(b)(3)(B) (2006).

such as when discovery is necessarily to facilitate settlement or litigation strategy, or when discovery is necessary to inform a criminal investigation.¹⁴¹ Nevertheless, the very existence of this creative discovery mechanism supports the opportunity to explore New Discovery mechanisms for pleading purposes in federal court.¹⁴²

Second, the plaintiff could be required to show that these facts either are likely to be in the hands of the defendant or are not otherwise available to the plaintiff. There are many ways this could be achieved. Plaintiffs might be required to make a showing that the information ought to be (if it exists at all) in the hands of the defendants and that the defendants have been asked informally for the information but have not provided it. More severely, a plaintiff might be required to affirm—under penalty of perjury, or perhaps under a sanction of evidentiary preclusion—that the information is not within her possession. Most restrictively, a plaintiff might be required to affirm—again under penalty of perjury or under a sanction of evidentiary preclusion—that the information is not otherwise available to the plaintiff through other means, such as through friendly third parties, costly expert analysis, or private investigation.¹⁴³

State presuit discovery mechanisms vary on this requirement. Pennsylvania law requires the plaintiff, upon the defendant's motion or objection, to "state with particularity how the discovery will materially advance the preparation of the complaint."¹⁴⁴ Connecticut courts require the petitioner to show that he has no other adequate means of enforcing discovery of the desired material.¹⁴⁵ Ohio requires a petitioner to "make reasonable efforts to obtain voluntarily the information from the person from whom the discovery is sought."¹⁴⁶

My inclination is that the most restrictive option—requiring a verification that the information is not otherwise available to the plaintiff—is too restrictive¹⁴⁷ and too difficult to gauge, and that a combination of the other two options should be sufficient. In other words, the plaintiff should make an initial showing that the information would be in the defendant's posses-

141. See, e.g., *In re Sunrise Senior Living, Inc.*, 584 F. Supp. 2d 14, 18 (D.D.C. 2008).

142. My thanks to Christopher Bruner for pointing this out.

143. Relatedly, Professor Bone has recommended requiring the plaintiff to file an affidavit describing the investigative steps she took to gather information for her complaint to ensure that the plaintiff is not seeking predismissal discovery without good reason. Bone, *supra* note 19, at 934.

144. PA. R. CIV. P. 4003.8(b).

145. *Berger v. Cuomo*, 644 A.2d 333, 337 (Conn. 1994).

146. OHIO R. CIV. P. 34(D)(1).

147. Overly restrictive obligations can have undesirable chilling effects, as they did in an earlier iteration of Rule 11. See Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); cf. STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (1989); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989) (discussing the effect of the 1983 Rule 11 amendments). For an overview of Rule 11 and its amendments, see Paul D. Carrington & Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 LOY. L.A. L. REV. 563 (2004).

sion and should affirm that the information is not within the plaintiff's possession. True, a plaintiff might then be eligible for New Discovery even if the information is publicly accessible, and cheaply, on the Internet, but, if that is the case, there would be little reason for the plaintiff to invoke the formalized procedures of New Discovery.

Thus, a petition for New Discovery ought to identify missing facts, explain why they are needed, demonstrate a likelihood that they are within the defendant's possession, and affirm that they are not within the plaintiff's possession.¹⁴⁸ Such a petition should reserve New Discovery for when it is needed most.

Requiring such a petition has the additional benefit of tracking existing federal procedure—a Rule 56(f) affidavit made in opposition to a motion for summary judgment. A nonmovant can oppose a motion for summary judgment on the ground that additional discovery likely will disclose a genuine issue of material fact.¹⁴⁹ The rationale for Rule 56(f) is straightforward. Discovery is crucial to a fair summary judgment disposition, and thus courts are loath to enter summary judgment against a party when that party has not yet had the opportunity to amass evidence that might convince the ultimate factfinder otherwise.¹⁵⁰ Courts find Rule 56(f) oppositions particularly compelling when the evidence that the nonmovant needs is in the hands of the movant.¹⁵¹ Thus, Rule 56(f) helps to ensure that summary judgment motions are accurate and fair.

To balance those goals with the need for expedient resolution of lawsuits and to protect against abusive overuse, Rule 56(f) requires the nonmovant to file an affidavit explaining why additional discovery would be fruitful.¹⁵² The affidavit requirement ensures that the nonmovant's Rule 56(f) opposition is made in good faith.¹⁵³ It should detail exactly what information the nonmovant believes she will obtain, why she needs discovery to obtain it, and how the information will help her oppose the summary judgment motion.¹⁵⁴

The procedural requirements for Rule 56(f) oppositions are similar to those that I propose above for access to New Discovery. That similarity is not accidental. The close parallels between motions to dismiss and motions

148. For a similar suggestion, see Hoffman, *supra* note 13, at 274–76.

149. FED. R. CIV. P. 56(f); see also Crawford-El v. Britton, 523 U.S. 574, 599 n.20 (1998) (“The judge does . . . have discretion to postpone ruling on a defendant’s summary judgment motion if the plaintiff needs additional discovery . . .”); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986) (“[S]ummary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition”).

150. See Edward Brunet, *The Timing of Summary Judgment*, 198 F.R.D. 679, 687 (2001).

151. See *id.* at 700–02.

152. FED. R. CIV. P. 56(f). Some courts have held that an affidavit is not specifically necessary if the opposition brief itself makes a persuasive case for additional discovery. Brunet, *supra* note 150, at 691–94.

153. Brunet, *supra* note 150, at 689.

154. *Id.* at 690, 703–07.

for summary judgment—made even closer after *Twombly* and *Iqbal*¹⁵⁵—support a Rule 56(f)-like requirement for access to New Discovery before a motion to dismiss is granted.

2. Narrow Focus and Controlled Costs

Limiting the scope and cost of New Discovery is generally in plaintiffs' best interests. If plaintiffs truly are confronted with *ex ante* uncertainty about their claims, they should want to obtain decisive information as cheaply as possible, for they may find that they hold only a meritless claim. Reducing the investigative cost for plaintiffs through limited New Discovery also has benefits for defendants, who then need not worry about speculative gaming strategies employed by plaintiffs with incomplete information.¹⁵⁶

Nevertheless, there is still at least a theoretical risk that plaintiffs will abuse New Discovery. After all, *servicing* discovery usually is far less expensive than *responding* to discovery. As a result, without appropriate controls, plaintiffs might use New Discovery more liberally than necessary. Perhaps some plaintiffs would want to put cost pressure on defendants. Or, perhaps they would want cheap, one-way looks at the defendant's evidence beyond what they need to actually plead their claims. Or they would want to use the information for public relations purposes or other non-litigation purposes or to try to force a quick settlement. In addition, cheap New Discovery may open the doors to fishing expeditions that would otherwise be deterred by the investment of filing a formal lawsuit. Finally, there is residual unfairness to a defendant who knows she has no evidence of liability but who will have to foot the bill to demonstrate that to a plaintiff armed only with suspicions.

These are perfectly valid concerns,¹⁵⁷ and New Discovery ought to discourage such practices. Narrow focus and sensitivity to cost can be achieved in several ways, either individually or in concert. I do not necessarily advocate for one option or a set of options over others; rather, I mean only to discuss their potential as possibilities and set forth some tools for experimentation.¹⁵⁸

a. Scope Control

The first possibility is court control of the scope of discovery. Based on the plaintiff's representations in her petition for New Discovery, and with

155. See *supra* note 57.

156. See Bone, *supra* note 65, at 560–63 (explaining the benefits of encouraging prefiling investigation).

157. See Dodson, *supra* note 75 (conceding that “discovery costs can be unduly high and abusive,” especially for defendants).

158. For a firmer proposal along the lines that I discuss below, see INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM AT THE UNIVERSITY OF DENVER & AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE, 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM (2009), http://www.abajournal.com/files/Pilot_Project_Rules_for_Web.pdf.

the defendant's input, the court could impose limits on the scope of discovery to better estimate what would be necessary. Limits would control costs, reduce delays, and force lawyers to focus their discovery on the information that they truly need to plead their cases.

In Texas presuit discovery actions, for example, judges can, and do, impose limits on presuit discovery. In about 30 percent of presuit discovery depositions, the court limited the scope of the subject matter of the deposition, and in about 11 percent of document requests, the court limited the scope of the documents requested.¹⁵⁹ But, overall, the level of judicial oversight and limitation of presuit discovery in Texas is modest.¹⁶⁰

It is unclear whether federal court judges would provide more oversight than the Texas judges have. There is some reason to think that they will, if given appropriate guidance. In the context of a Rule 56(f) opposition to summary judgment and request for additional discovery, courts generally tailor the discovery to the needs identified in the Rule 56(f) affidavit.¹⁶¹ Indeed, the Supreme Court itself has stated that Rule 56(f) discovery should be tailored in this way.¹⁶² There is some hope, then, that federal judges can police New Discovery with appropriate controls and oversight.

An alternate, or perhaps ancillary, control measure is the *ex ante* imposition of default limitations. Default limitations already exist in the normal federal discovery process,¹⁶³ though I submit that New Discovery ought to be more limited. Default limits also can reduce costs and improve perceived fairness among attorneys and litigants.¹⁶⁴ In addition, limitation by rule rather than by *ad hoc* judicial assessment has the additional benefits of predictability and community participation.¹⁶⁵ Perhaps defaults as minimal as one four-hour deposition, one set of ten document requests, and one set of ten interrogatories would be appropriate.¹⁶⁶ The more general point, however, is that limits are needed, and rule-based default limits may be an appropriate vehicle for imposing them.

159. Hoffman, *supra* note 13, at 259.

160. *See id.* at 273 (reporting that judges rarely deny motions for presuit discovery or limit presuit discovery once granted).

161. *See* Brunet, *supra* note 150, at 691–93.

162. *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 298 (1968) (“[T]he discovery obtainable under Rule 56(f) to oppose a motion for summary judgment would normally be less extensive in scope than the general discovery obtainable under Rule 26” (footnote omitted)).

163. *See* FED. R. CIV. P. 33 (limiting interrogatories); *id.* 30 (limiting depositions).

164. *See* Subrin, *supra* note 63, at 95–96.

165. *See id.* at 94–95.

166. Professor Bone similarly has recommended that federal presuit discovery be limited by a *per se* rule of one deposition per defendant and a narrowly tailored set of document requests. Bone, *supra* note 19, at 934.

b. Cost Control

A second possibility is cost-shifting.¹⁶⁷ The usual rule is that parties bear their own costs of requesting and producing discovery.¹⁶⁸ New Discovery could include a presumptive rule that the plaintiff bears the burden of all New Discovery costs, perhaps enforced through a bond requirement. Such a rule will have two salutary benefits. The first is that it will force self-restraint by the plaintiff. A plaintiff faced with footing both parties' discovery costs will think long and hard before engaging in a fishing expedition or going well beyond what the plaintiff might otherwise need. The second is that it will protect defendants who knew the suit was meritless all along. Those defendants who lacked the discriminatory motive or knew an agreement never existed thus will be protected from unwarranted discovery costs.

Cost-shifting in discovery is not unprecedented. Federal courts have long condoned cost-shifting in appropriate cases under Rule 26(c), although the general presumption—the opposite of what I propose here—is that parties bear their own costs of production.¹⁶⁹ Recently, the Federal Rules have taken a stronger position on cost-shifting, expressly allowing it for discovery of electronically stored information when, for example, producing that information would be difficult.¹⁷⁰ In addition, cost- and fee-shifting are regularly available sanctions under the discovery rules.¹⁷¹

Thus, the Rules condone cost-shifting in ways that make it appropriate to consider cost-shifting for New Discovery. And, although the Rules do not provide for a presumption of cost-shifting, New Discovery is sufficiently different from regular discovery that the need to protect defendants from the

167. Others have alluded to this possibility in passing. *See, e.g.*, Spencer, *supra* note 30, at 31 (“Alternatively, plaintiffs could be charged with shouldering the cost of any limited, preliminary discovery the court decides to allow to determine the potential merit of their claims.”).

168. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975) (indicating that the American Rule applies to attorney’s fees and other costs of litigation). The usual rule is controversial. For a discussion generally supportive of one-way fee-shifting rules, see Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317 (1998).

169. For an example, see the Court’s statement in *Oppenheimer Fund, Inc. v. Sanders*:

Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests, but [it] may invoke the district court’s discretion under Rule 26(c) to grant orders protecting [it] from “undue burden or expense” in doing so, including orders conditioning discovery on the requesting party’s payment of the costs of discovery.

437 U.S. 340, 358 (1978); *see also, e.g.*, *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (recognizing that cost-shifting can be imposed for burdensome discovery and imposing it for electronically stored information).

170. *See* FED. R. CIV. P. 26(b)(2)(B) (allowing the court to compel discovery of such information and to “specify conditions for the discovery”); *id.* advisory committee’s note to 2006 amends. (stating that such conditions include requiring “payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.”). Cost-shifting for electronic discovery had vocal supporters even before the amendments to the Rules. *See, e.g.*, Redish, *supra* note 62 (arguing for a conditional cost-shifting model for electronic discovery).

171. *See, e.g.*, FED. R. CIV. P. 26(g)(3), 30(d)(2), 30(g), 37(a)(5), 37(b)(2)(C), 37(c)(1)(A), 37(c)(2), 37(d)(3).

burdens of New Discovery warrants such a presumption. For example, New Discovery almost certainly will be a one-way street of production, with the plaintiff requesting and the defendant producing. In addition, the prospect of discovery abuse is high, and making an innocent defendant bear the costs of even appropriately tailored discovery, at the insistence of a plaintiff that cannot meet the pleading standard, would still be unfair. For these reasons, it seems appropriate to incorporate cost-shifting into New Discovery.¹⁷²

The presumptive rule ought to have two catches, though. First, a defendant should not escape from the costs of discovery that uncover evidence of culpability. Thus, cost-shifting should not apply if the plaintiff uncovers sufficient evidence of wrongdoing to survive a motion to dismiss. Instead, in such a case, both sides should bear their own costs of New Discovery, as is the normal rule for Rule 26 discovery.¹⁷³ Second, cost-shifting should be avoided if the defendant stonewalls proper discovery requests. The discovery rules already allow cost-shifting as a sanction for obstructionist discovery tactics,¹⁷⁴ and that sanction should continue to be available for New Discovery as well. Cost-shifting procedures should recognize the disincentivizing effect they may have on New Discovery in the first instance. Too much cost burden shifted on plaintiffs—particularly plaintiffs who, because of information asymmetry, face uncertainty about the merits of their claims—may make even New Discovery too risky for some plaintiffs. To be sure, paying plaintiffs likely will not have lost much given the alternatives, for they ought to be less deterred by the costs of narrowly tailored New Discovery than the costs of a full-fledged lawsuit. But if cost deterrence is too high, then the benefits of New Discovery could be lost completely. Consequently, cost-shifting mechanisms should be sensitive to the adverse effects they may have on the justice gains that drive New Discovery in the first place, and perhaps also to any resource asymmetry that could enable defendants to easily bear what may be minor costs.

For example, cost-shifting is problematic for the plaintiff proceeding *in forma pauperis*, who cannot be expected to pay for cost-shifting at all. That plaintiff's access to New Discovery must be restricted in other ways, either by close court supervision of the discovery requests or by elimination of the opportunity for New Discovery altogether. As an alternative, perhaps the government might establish a fund from which defendants who successfully move to dismiss such a lawsuit after New Discovery might seek reimbursement for their New Discovery expenses. Also, New Discovery in lawsuits

172. Others have suggested cost-shifting for even normal discovery as a way to alleviate the difficulties of *Twombly* and *Iqbal*. See, e.g., Bone, *supra* note 19, at 934 (suggesting that if the court believes a suit to be “probably meritless,” then the court could let it go forward only if the plaintiff agrees to pay all of the defendants’ costs in the event the case is dismissed on summary judgment). *But cf.* Spencer, *supra* note 30, at 31 (discussing the prospect of cost-shifting in pleadings but noting that modification of the American Rule might “chill the claims of legitimate grievants”).

173. See *Oppenheimer Fund, Inc.*, 437 U.S. at 358 (“Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests . . .”).

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

against the government itself might be exempt from cost-shifting.¹⁷⁵ The details of any creative solutions to this problem can be worked out elsewhere. For now, I mean merely to flag the issue and suggest ideas for further thought.

3. Tolling

The third principle is that New Discovery ought to toll the running of the limitations period for the claim, at least for some period of time. The reason, of course, is that a defendant could stonewall New Discovery up to the date of the limitations period, forcing a plaintiff to file a claim without the benefit of New Discovery.

The flip side—that plaintiffs will use New Discovery primarily for the purpose of tolling the limitations period—is not unthinkable, though, and so any tolling feature of New Discovery ought to take this possibility into account. The limited nature of New Discovery is designed to allow such discovery to be completed in a relatively short period of time. Although each case is different, studies might conclude that such limited discovery should be able to be completed in fewer than three months, in the usual case. The tolling feature could then provide that if the plaintiff files a petition for New Discovery more than three months before the end of the applicable limitations period of the underlying claim, then the limitations period is extended to thirty days after the conclusion of New Discovery, unless applicable state law provides for longer tolling. Such a tolling rule would encourage plaintiffs to seek New Discovery well in advance of any limitations deadline and extend that deadline only when unexpected delays result.

Tolling in these circumstances is generally in line with the underlying purposes of limitations periods. Those purposes include, generally, the promotion of repose, the minimization of stale evidence, and the encouragement of prompt filings.¹⁷⁶ Tolling the limitations period during the pendency of New Discovery does not undermine repose significantly because an application for New Discovery puts the putative defendant on notice that an action may be available, much as a formal lawsuit does. Tolling also does not undermine the goal of minimizing stale evidence; to the contrary, the availability of New Discovery might promote the preservation and accuracy of the evidence. And, finally, although New Discovery might delay the filing of a formal complaint, the reasons for the delay—to ensure

175. The Equal Access to Justice Act contemplates one-way cost- and fee-shifting for plaintiffs who prevail against the government and in which the government's position was not substantially justified. 28 U.S.C. § 2412 (2006). Other statutes also provide for one-way shifting in lawsuits against the government. *See, e.g.*, 42 U.S.C. § 1988(b) (2006). Although these circumstances are quite distinguishable from cost-shifting in New Discovery, they do evince a general preference for using cost- and fee-shifting to facilitate lawsuits against the government, and that general preference is consistent with exempting the converse cost-shifting in New Discovery.

176. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460–500 (1997) (discussing the underlying purposes of limitations periods).

that a complaint is properly justified and supported—more than overcome the marginal benefit of forcing a plaintiff to file a formal complaint earlier.

There is an analogous tolling feature in § 1367(d) of the supplemental jurisdiction statute, which provides for tolling of a state claim that is dismissed under the discretionary dismissal provision of the supplemental jurisdiction statute. The tolling provision provides for tolling “while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.”¹⁷⁷

There are differences between the supplemental jurisdiction tolling provision and the tolling feature I suggest here, and there may also be both *Erie* implications that restrict the capacity of federal courts to toll state limitations periods¹⁷⁸ as well as statutory constraints on the ability of the Federal Rules to provide for such tolling.¹⁷⁹ Those details no doubt will have to be worked out eventually, but the general principle is still appropriate: New Discovery should, if possible, provide some tolling of the limitations period of the underlying claim.

C. In Practice

How might these New Discovery principles be employed in practice? In theory, an appropriate course of action would be for the defendant to move for a more definite statement under Rule 12(e) and identify those portions of the complaint that fail to meet the standards of New Pleading. The court then can grant the motion (if the complaint in fact fails to meet those standards) and order limited discovery targeted to those deficiencies.¹⁸⁰

Unfortunately, defendants rarely move for more definite statements, preferring instead the toothier motion to dismiss, and this preference is likely to become even stronger after *Twombly* and *Iqbal*, which invite such motions. Given that, there are basically two possibilities: predissmissal and presuit discovery.¹⁸¹

177. 28 U.S.C. § 1367(d) (2006).

178. Compare *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (holding that state tolling rules apply to state claims heard in federal court under *Erie*), with *Jinks v. Richland County*, 538 U.S. 456 (2003) (upholding the constitutionality of § 1367(d)).

179. See 28 U.S.C. § 2072(b) (2006) (requiring that Federal Rules “not abridge, enlarge or modify any substantive right”). But see FED. R. CIV. P. 15(c) (providing for the “relation back” of an amended pleading to the date of an original pleading, notwithstanding state law that would provide for the expiration of the limitations period in the interim). If the concern is too high that a tolling rule would run afoul of the Rules Enabling Act, Congress easily could amend the Act to allow the rule, as it has in the past in other circumstances. See 28 U.S.C. § 2072(c) (2006) (allowing the rules to determine what is “final” within the meaning of § 1291).

180. Courts have done just this in the past. See, e.g., *Old Time Enter. v. Int’l Coffee Corp.*, 862 F.2d 1213, 1216 (5th Cir. 1989).

181. New Discovery might also occur after the granting of a motion to dismiss, but I do not view this as an independent possibility. Either the court conditionally grants the motion to dismiss to allow the plaintiff an opportunity to file an amended complaint, in which case any discovery technically would be predissmissal, or the court grants the motion to dismiss and thereafter lacks rule authority to allow discovery except as provided under Rule 27. See, e.g., *In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2008 WL 62278, at *5 (N.D. Cal. Jan. 4, 2008). But see Hartnett,

1. *Predismissal Discovery*

As discussed above, predismissal discovery may be available under the Rules but is unlikely to be used in the current discovery paradigm because of the admonition of *Twombly* and *Iqbal* that sufficient pleading is a precondition to discovery.¹⁸²

One way for judges to be more confident in ordering predismissal discovery even in light of *Iqbal*, though, would be to impose the kinds of restrictions I have described for New Discovery. A plaintiff faced with a motion to dismiss might, in its opposition to the motion or directly thereafter, seek continued, limited discovery. In many cases, the necessary facts would already be identified in the defendant's motion, and so the plaintiff would need only to demonstrate a likelihood that those facts are within the defendant's possession and affirm that they are not within the plaintiff's possession. In response, the court could allow discovery under the limiting principles and cost-shifting controls that I describe above.¹⁸³ The court could do so either before the motion is decided, or after conditionally granting the motion by declining to enter an order dismissing the case until the plaintiff has had the opportunity to engage in New Discovery and file an amended complaint on the basis of the newly discovered facts.

Although I think the New Discovery paradigm has the potential to give judges appropriate security that allowing predismissal discovery under its principles would not fly in the face of *Twombly* and *Iqbal*, I am still skeptical that judges will allow discovery in this way as often as it is warranted without some affirmative authorization.¹⁸⁴ In addition, the potential for divergent practices across judges calls for rule-prescribed standardization.¹⁸⁵ Thus, the better course would be to consider amending Rule 26 to specifically allow predismissal discovery under delineated New Discovery principles.

2. *Presuit Discovery*

Perhaps an even better alternative—because it would allow New Discovery without the need for the defendant to file a motion to dismiss—would be to amend Rule 27 expressly to allow presuit discovery in the face of plausibility defects. A Rule dedicated to such presuit discovery would have the benefit of going through the deliberate rulemaking process, of pro-

supra note 11, at 512 (suggesting that even after a dismissal, “the case is still alive and the discovery rules still apply”).

182. See *supra* text accompanying notes 89–101.

183. One court already has done something similar, though without cost-shifting. *Kregler v. City of New York*, 608 F. Supp. 2d 465, 475 (S.D.N.Y. 2009) (allowing limited discovery on the *Twigbal* deficiencies identified in the defendant's motion to dismiss).

184. Cf. *Bone*, *supra* note 19, at 934–35 (“If pleading-stage discovery is a good way to deal with the uninformed plaintiff, the Federal Rules should be revised to authorize it explicitly. Allowing pleading-stage discovery fits the current Rules awkwardly at best.”).

185. My thanks to Tim Zick for prodding me to think about the uniformity problems of an ad hoc doctrinal, as opposed to a rule-based, solution.

viding clear and detailed parameters and standards,¹⁸⁶ and, if adopted, of being binding on the Supreme Court. And although the rulemaking process has its downsides, particularly for attempts to abrogate or limit the Supreme Court's recent pleadings decisions directly,¹⁸⁷ amending Rule 27 to codify New Discovery is promising because it would retain the Court's stricter plausibility pleading standard while creating a vehicle for discovery that is cabined by the same concerns that animated those decisions in the first place.

Existing Rule 27 allows presuit discovery only to perpetuate testimony, and courts are nearly uniform in holding that it does not authorize investigative discovery.¹⁸⁸ The historical reason for limiting Rule 27 in this way is, somewhat ironically, tied to the principles of Old Pleading. The drafters of Rule 27 intentionally rejected presuit investigative discovery on the assumption that, under a liberal notice pleading regime, causes of action could be pleaded in nearly every case without the need for such presuit discovery.¹⁸⁹ Under Old Pleading, even a skeletal complaint should satisfy Rule 8 and open the doors to full-fledged Rule 26 discovery, and any additional information gleaned from that discovery could be used to justify an amendment to the complaint under the liberal Rule 15.¹⁹⁰

As I have argued above, New Pleading demands, *mutatis mutandis*, a different result. Courts have not, however, been willing to reinterpret Rule 27 to allow such discovery in light of its wording and clear drafting history. Indeed, even in those rare Old Pleading cases (and less rarely in the context of special heightened pleading requirements) in which the unavailability of discovery would preclude the filing of a meritorious lawsuit, courts have declined to authorize presuit investigative discovery under Rule 27.¹⁹¹ Thus, there is little hope that federal courts will allow New Discovery under the current incantation of the Federal Rules.

Relatedly, state and federal courts have exercised equitable powers over discovery in the past, but the dominant view among federal courts now is that the adoption of the Federal Rules of Civil Procedure and subsequent amendments have rendered those powers unavailable.¹⁹²

186. For a preference on these grounds for rules over judicial discretion in the discovery context, see Subrin, *supra* note 63, at 94–96.

187. See *supra* text accompanying notes 9–10.

188. See Ann K. Wooster, Annotation, *Construction and Application of Fed. R. Civ. P. 27*, 37 A.L.R. FED. 2d 573 (2009) (citing cases). For a comprehensive study of Rule 27, see Nicholas A. Kronfeld, Note, *The Preservation and Discovery of Evidence Under Federal Rule of Civil Procedure 27*, 78 GEO. L.J. 593 (1990).

189. Kronfeld, Note, *supra* note 188, at 613 (recounting the drafting history).

190. James A. Pike & John W. Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 321–22 (1940).

191. See, e.g., *In re Ford*, 170 F.R.D. 504, 509 (M.D. Ala. 1997); Kronfeld, Note, *supra* note 188, at 613–15 (detailing other instances).

192. See Dodson, *supra* note 6, at 55–56; Hoffman, *supra* note 13, at 233–35; Rupert F. Barron, Annotation, *Existence and nature of cause of action for equitable bill of discovery*, 37 A.L.R. 5th 645 (1996). Only one federal court since the 1991 amendments to Rules 34 and 45 has

Thus, without rule authority, federal courts are highly unlikely to order investigative presuit discovery. That was not much of a problem under the liberal notice pleading standard of *Conley* (though it still had its injustices¹⁹³). But, as shown above, *Twombly* and *Iqbal* have changed the pleadings landscape. New Pleading requires New Discovery. In my view, Rule 27 should be amended to allow presuit New Discovery and provide appropriate guidance from the rulemakers.

Federal presuit discovery need not be developed in a vacuum. As discussed above, several states allow such discovery, and the federal system can learn from their experiences. Texas,¹⁹⁴ Pennsylvania,¹⁹⁵ and Alabama¹⁹⁶ all specifically allow presuit discovery for purposes of filing a sufficient complaint. Other states are less overt about the availability of presuit discovery but nonetheless do recognize it.¹⁹⁷ The available empirical and anecdotal evidence suggests these state mechanisms are valuable devices that are rarely abused.¹⁹⁸

My point here is that the state laboratories have provided the federal system with a broad array of presuit discovery models that the federal system could emulate to fit its purposes in the wake of *Twombly* and *Iqbal*. In light of the need for New Discovery and the existence of state presuit discovery mechanisms, federal rulemakers should consider a federal presuit investigative discovery mechanism, built upon the guiding principles I have offered above, and with the benefit of the existing practice of analogous state discovery mechanisms.

CONCLUSION

Discovery is tied to pleadings,¹⁹⁹ and so the time has come to rethink discovery in light of New Pleading. The New Pleading of *Twombly* and *Iqbal* imposes significant costs, particularly on plaintiffs faced with infor-

recognized the availability of the bill. See *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 2 F.3d 1397 (5th Cir. 1993).

193. See *Ford*, 170 F.R.D. at 504 (dismissing a wrongful death claim based on the inability of the plaintiff to identify the proper defendant).

194. TEX. R. CIV. P. 202.1, 202.4.

195. PA. R. CIV. P. 4003.8.

196. ALA. R. CIV. P. 27; *Ex parte Anderson*, 644 So. 2d 961, 965 (Ala. 1994); see also *Driskill v. Culliver*, 797 So. 2d 495, 497–98 (Ala. Civ. App. 2001) (allowing pre-action discovery “to determine whether the plaintiff has a reasonable basis for filing an action”).

197. N.Y. C.P.L.R. 3102(c) (Consol. 2010) (“Before an action is commenced, disclosure to aid in bringing an action . . . may be obtained, but only by court order.”); OHIO R. CIV. P. 34(D)(1) (“[A] person who claims to have a potential cause of action may file a petition to obtain discovery as provided in this rule.”); *Huge v. Ford Motor Co.*, 803 N.E.2d 859, 861 (Ohio Ct. App. 2004) (allowing an action for discovery “to uncover facts necessary for pleading”); *Benner v. Walker Ambulance Co.*, 692 N.E.2d 1053, 1055 (Ohio Ct. App. 1997) (same).

198. Hoffman, *supra* note 13, at 251–52 (estimating that Texas presuit discovery has been used approximately 4,500 times from 1999 to 2005 and that over 50 percent of Texas attorneys were involved in presuit discovery during that same period).

199. See Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133, 140 (2008).

mation asymmetry, and particularly in the kinds of discrimination, civil rights, and public-law cases that ought not be discouraged. The downsides of New Pleading can be mitigated through the use of limited discovery either before suit or before dismissal. This New Discovery, if carefully structured, has the potential to retain the promise of New Pleading while alleviating its harsher results.

