

FEDERAL PLEADING AND STATE PRESUIT DISCOVERY

by
Scott Dodson*

This Article explores the role that state presuit discovery could play in rectifying the information imbalance caused by Twombly and Iqbal—when a plaintiff in federal court requires information in the hands (or minds) of defendants or third parties in order to properly plead her claim, but such information is not discoverable unless the claim can survive a motion to dismiss. First, this Article provides an account of the development of federal pleading standards from before Twombly through their current post-Iqbal state. Second, this Article describes the effects of the post-Iqbal federal pleading standards and highlights the harsh results that they can have when the plaintiff is confronted with information asymmetry. Third, this Article describes various state law presuit discovery tools that are available to be used by plaintiffs who fear dismissal under the federal pleading standards. It then considers whether they can be an effective tool for avoiding dismissal, in light of both their utility and their limitations. Finally, this Article argues that both the availability and limitations of state presuit discovery options support amending the federal rules to provide for federal presuit discovery.

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* Associate Professor of Law, William & Mary School of Law. My gratitude goes to John Parry for inviting me to contribute to this symposium issue. I presented this Article to the faculty at Cumberland School of Law and received helpful feedback there. Special thanks to Michael Steven Green and Lonny Hoffman for extraordinarily helpful comments on an earlier draft.

I. INTRODUCTION

It is an exciting time to be a federal civil rules buff. Historically, blockbuster opinions involving the civil rules have been few and far between. But the last two years have been an exception. *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² together have transformed federal civil pleading from a seventy-year³ pleading regime based primarily on notice to a newly-minted “plausibility” regime based primarily on non-conclusory facts.

That transformation implicates high stakes for plaintiffs proceeding with claims that depend upon facts exclusively in the hands (or minds) of defendants and third parties. The plaintiff may need those facts to plead her claim properly under *Twombly* and *Iqbal*, but she may not be able to discover those facts unless she can survive a motion to dismiss.

Commentators have begun to explore ways out of this catch-22. One of the most obvious is to abrogate or limit *Twombly* and *Iqbal*.⁴ Others

¹ 127 S. Ct. 1955 (2007).

² 129 S. Ct. 1937 (2009).

³ Some might say “fifty-year regime.” 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 v. Gibson*, 355 U.S. 41 (1957), interpreted them to be); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 985, 992–94 (1987) (same).

⁴ By my count, no less than seven such proposals have been offered in writing since *Iqbal*. See Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2(a) (2009) (“A court shall not dismiss a complaint under [Rule 12] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint . . . on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff’s claim to be plausible . . .”); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009) (“Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).”); *Has the Supreme Court Limited Americans’ Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (prepared statement of Stephen B. Burbank), available at <http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf> (“[T]he law governing (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 and (b) judgment on the pleadings, shall be in accordance with interpretations of the Federal Rules of Civil Procedure by the Supreme Court of the United States, and by lower courts in decisions consistent with such interpretations, that existed on May 20, 2007.”); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming 2010) (manuscript at 50), available at <http://ssrn.com/abstract=1448796> (suggesting Rule 8(a) should be amended in this way: “a short and plain statement of the claim—regardless of its nonconclusory plausibility—showing that the pleader is entitled to relief”); Posting of Michael C. Dorf to Dorf on Law, *An Alternative to Senator Specter’s Notice Pleading Bill*, <http://www.dorfonlaw.org/2009/07/>

have suggested tinkering with federal discovery rules or practices to ameliorate the harsh results of plausibility pleading.⁵ Those possibilities are promising, but they also run up against the time-consuming, cumbersome, and politically uncertain task of revising the federal rules or statutorily overturning them.⁶

But a less obvious way out may already exist: using presuit discovery to gather the facts needed to survive a motion to dismiss based on *Twombly* and *Iqbal*. Federal presuit discovery is of little help here: Rule 27 of the Federal Rules of Civil Procedure⁷ allows for presuit discovery only to perpetuate testimony, not to discover new facts needed to survive a motion to dismiss.⁸ But many state rules permit presuit discovery, and several do so for the express purpose of drafting a sufficient complaint. Although these rules likely were not designed for this purpose, plaintiffs could use these state procedures in state court to obtain the information

alternative-to-senator-specters-notice_28.html (July 29, 2009, 3:13 AM) (“Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not deem a pleading inadequate under rule 8(a)(2) or rule 8(b)(1)(A) of the Federal Rules of Civil Procedure, on the ground that such pleading is conclusory or implausible, except that a court may take judicial notice of the implausibility of a factual allegation. So long as the pleaded claim or defense provides fair notice of the nature of the claim or defense, and the allegations, if taken to be true, would support a legally sufficient claim or defense, a pleading satisfies the requirements of rule 8.”); Posting of David Shapiro, dshapiro@law.harvard.edu, to Civil Procedure Listserv, civ-pro@listserv.nd.edu (July 7, 2009) (on file with author) (“Except as otherwise expressly provided by statute or in these rules, an allegation of fact, or of the application of law to fact, shall [must?] not be held insufficient on the grounds that it is conclusory and/or implausible, unless the rules governing judicial notice require a determination that the allegation is not credible.”); Posting of Art Wolf, awolf@law.wnec.edu, to Civil Procedure Listserv, civ-pro@listserv.nd.edu (Oct. 20, 2009) (on file with author) (proposing amending Rule 8(a)(2) to read “a short and plain statement giving [sufficient] notice of the claim upon which relief can be granted” or “a short and plain statement of the claim upon which relief can be granted so that a party can [may] reasonably prepare a response” (alterations in original)); 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). No doubt others are percolating. See Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1223–24 (2008) (suggesting that the Rules Advisory Committee considered options for overturning the effect of *Twombly*).

⁵ See, e.g., A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009) (suggesting such proposals).

⁶ See Tony Mauro, *Plaintiffs Groups Mount Effort to Undo Supreme Court’s Iqbal’ Ruling*, LAW.COM, Sept. 21, 2009, <http://www.law.com/jsp/article.jsp?id=1202433931370> (reporting that the chair of the rules committee intends to be cautious about rule amendments to soften *Iqbal*).

⁷ FED. R. CIV. P. 27.

⁸ 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).

necessary to file a complaint that ultimately would be subject to federal pleading standards.

This Article explores the role that state presuit discovery could play in rectifying the information imbalance caused by *Twombly* and *Iqbal*. Part II of this Article provides an account of the development of federal pleading standards from before *Twombly* through their current post-*Iqbal* state. Part III describes the effects of the post-*Iqbal* federal pleading standards and highlights the harsh results that they can have when the plaintiff is confronted with information asymmetry.

Part IV then describes various state law presuit discovery tools that are available to be used by plaintiffs who fear dismissal under the federal pleading standards. It then considers whether they can be an effective tool for avoiding dismissal, in light of both their utility and their limitations. Two points bear clarification here. The first is that I mean to focus on the role state presuit discovery can play in *state* courts to obtain information that then will enable the plaintiff to avoid dismissal in federal court. Thus, I do not intend to delve into the murky waters of whether *federal* courts could (or must) implement state presuit discovery rules under *Erie*.⁹ The second is that most state presuit discovery really is *presuit*; thus, the presuit discovery mechanisms can be implemented before any substantive claims are filed in a complaint. As I will explain below, that feature makes removal of presuit discovery difficult, if not impossible.

Part V concludes by suggesting that both the availability and limitations of state presuit discovery options support amending the federal rules to provide for federal presuit discovery.

II. PLEADINGS DEVELOPMENT THROUGH *IQBAL*

A. *Pre-Twombly Law*

Rule 8 of the Federal Rules of Civil Procedure, the principal pleadings rule, was adopted in 1938 and replaced a code pleading regime that differed substantially from its successor. The code required the complaint to contain “[a] statement of the facts constituting the cause of action.”¹⁰ Rule 8, by contrast, is conspicuously silent on fact pleading,¹¹ instead requiring only “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹²

⁹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). For more on that thorny issue, see *infra* note 74 and accompanying text.

¹⁰ Act of Apr. 12, 1848, ch. 379, § 120(2), 1848 N.Y. Laws 497, 521; see also 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 207 (3d ed. 2004) (describing the fact pleading required by the codes).

¹¹ See 5 WRIGHT & MILLER, *supra* note 10, § 1216, at 207 (“Conspicuously absent from Federal Rule 8(a)(2) is the requirement found in the codes that the pleader set forth the ‘facts’ constituting a ‘cause of action.’”).

¹² FED. R. CIV. P. 8(a)(2).

The drafters of Rule 8 intentionally devised a pleading regime more lenient than that of the codes.¹³ They wished to reduce the importance of pleadings and their technicalities.¹⁴ Indeed, Charles Clark, the principal draftsman of Rule 8, initially favored eliminating special pleadings altogether and argued for a standard requiring a concise statement of only pertinent facts with little legal recitation.¹⁵ Although that was not to be, Rule 8 implemented a pleading regime less concerned about facts and more concerned with providing notice.¹⁶ As the Seventh Circuit once put it, “a judicial order dismissing a complaint because the plaintiff did not plead facts [under Rule 8] has a short half-life.”¹⁷

Nevertheless, the lower courts largely resisted this liberal pleading standard until 1957,¹⁸ when the Supreme Court, in *Conley v. Gibson*, declared 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 “simplified ‘notice pleading.’”¹⁹ Although lower courts continued to attempt to impose heightened pleading in a variety of contexts,²⁰ the Court continued, often unanimously, to strike those attempts down and to adhere to the liberal notice pleading standard of *Conley*.²¹ At least, that was the case until 2007.

¹³ See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 433 (1986).

¹⁴ See Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1749 (1998).

¹⁵ See Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 923–28 (1976).

¹⁶ See Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1351994> (describing this contrast); see also Thomson v. Washington, 362 F.3d 969, 970 (7th Cir. 2004) (Posner, J.) (“The federal rules replaced fact pleading with notice pleading.”).

¹⁷ 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 . . .”).

¹⁸ See Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998); Marcus, *supra* note 13, at 433.

¹⁹ *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957); see also Spencer, *supra* note 5, at 5 (arguing that *Conley* endorsed a notice pleading regime under Rule 8); Clermont & Yeazell, *supra* note 4 (manuscript at 5) (“Under the Rules, then, pleading was a pervious gate. Its main task was to give fair notice of the pleader’s contentions to the adversary (and the court and the public).”). But see Sherwin, *supra* note 3, at 317–18 (arguing that the original rules were stricter than *Conley* interpreted them to be); Subrin, *supra* note 3, at 985, 992–94.

²⁰ See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 551 (2002) (“Despite this 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.”).

²¹ See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002); see also Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 997 (2003) (“[W]hen called upon to address pleading issues square on, the Court continually—and unanimously—embrace[d] simplified notice pleading.”).

B. Twombly

In 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*²² and turned the civil procedure world on its head.²³ *Twombly* involved an antitrust conspiracy class action complaint alleging conscious parallel conduct among telecommunications providers.²⁴ Conscious parallel conduct alone does not prove a conspiracy under substantive antitrust law.²⁵ But the Supreme Court had never imposed that evidentiary standard at the pleadings stage before.

Twombly did just that. The Court held that plaintiffs seeking to avoid dismissal of their complaint must plead “plausible grounds” for inferring a conspiracy, and that allegations of conscious parallel conduct alone would not suffice.²⁶

Twombly created widespread uncertainty among lower courts and commentators.²⁷ The Court did not explain whether its holding was trans-substantive²⁸ or not, such as being limited to costly litigations²⁹ or

²² 127 S. Ct. 1955 (2007).

²³ See Clermont & Yeazell, *supra* note 4 (manuscript at 2) (“The headline need no longer equivocate The U.S. Supreme Court has revolutionized the law on pleading.”); Dodson, *supra* note 16 (manuscript at 3) (calling the case “dramatic[.]”); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 135 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (arguing that the Court “gutted the venerable language from *Conley v. Gibson* that every civil procedure professor and student can recite almost by heart”).

²⁴ *Twombly*, 127 S. Ct. at 1961–62.

²⁵ *Id.* at 1964.

²⁶ *Id.* at 1964–66, 1966 n.5. What is required under Rule 8 and what is needed to survive dismissal under Rule 12(b)(6) are not necessarily the same, and it does not appear that the Supreme Court, in either *Conley* or *Twombly*, has given much thought to those distinctions. I leave deeper exploration of those issues for another day.

²⁷ See, e.g., Dodson, *supra* note 16 (manuscript at 19) (“*Twombly* raised a stir after it was decided, resulting in mass confusion about its scope and meaning.”); Dodson, *supra* note 23, at 141–42 (documenting the uncertainties remaining after *Twombly*); Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic v. Twombly*, 41 SUFFOLK U. L. REV. 851, 853 (2008) (“We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim.”); Posting of Scott Dodson to PrawfsBlawg, *The Mystery of Twombly Continues*, <http://prawfsblawg.blogspot.com/prawfsblawg/2008/02/the-mystery-of.html> (Feb. 5, 2008, 11:40 PM) (describing circuit confusion).

²⁸ See, e.g., Dodson, *supra* note 23, at 140 (arguing that “the best reading of *Bell Atlantic* is that Rule 8 now requires notice-plus pleading for all cases”).

²⁹ See *Twombly*, 127 S. Ct. at 1967 (“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.”); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1083–85 (2009) (suggesting that *Twombly* applied only to complex, high-discovery-cost cases).

antitrust conspiracy claims.³⁰ Nor did the Court explain what its new “plausibility” test was or how it might be applied in different cases.³¹ Some even wondered whether *Twombly* was significant as a pleadings case.³² Just about the only thing that was clear from *Twombly* was that it would take another pronouncement from the Court to answer these questions.

C. Iqbal

That pronouncement came on May 18, 2009, when the Court decided *Ashcroft v. Iqbal*.³³ There, an executive detainee sued John Ashcroft, the former U.S. Attorney General, and Robert Mueller, the FBI Director, alleging that they adopted a policy of discrimination on the basis of race, religion, and national origin in the aftermath of September 11th.³⁴ The defendants asserted a qualified immunity defense and argued that Iqbal had failed to plead a “plausible” showing of entitlement to relief under *Twombly*.³⁵

The Supreme Court agreed. In the process, it confirmed that *Twombly*’s plausibility standard for Rule 8 pleading was a new³⁶ factual

³⁰ See, e.g., Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 635–36 (2007) (“[T]he ‘better’ reading of *Bell Atlantic* is that it did not change the law of pleading, but that it simply applied long-accepted pleading standards to a unique body of law under which the plaintiffs’ complaint failed to include any facts or plausible inferences supportive of a material element of the claim specifically asserted by the plaintiffs.”).

³¹ Compare *Twombly*, 127 S. Ct. at 1973 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.”), and *id.* at 1974 (“Here, . . . we do not require heightened fact pleading of specifics . . .”), with 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, 7:35 AM) (asserting that *Twombly* imposes a heightened pleading standard), and 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)”), and with Dodson, *supra* note 23, at 140 (“What Rule 8 requires after both *Erickson* and *Bell Atlantic* are not specific facts, but sufficient facts such that the complaint as a whole makes a ‘showing’ of entitlement to relief.”), and Dodson, *supra* note 16 (manuscript at 22) (arguing that *Twombly* shifted the pleadings emphasis from one of notice to one of facts).

³² See, e.g., Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 877 (2009) (arguing that *Twombly*’s import is modest); Posting of Einer Elhauge to The Volokh Conspiracy, *Twombly—The New Supreme Court Antitrust Conspiracy Case*, <http://volokh.com/2007/05/21/twombly-the-new-supreme-court-antitrust-conspiracy-case> (May 21, 2007, 6:15 PM) (calling the decision “quite insignificant”). But see Dodson, *supra* note 23, at 137 (“*Bell Atlantic* is a significant statement from the Court from a proceduralist perspective.”).

³³ 129 S. Ct. 1937 (2009).

³⁴ *Id.* at 1942.

³⁵ *Id.*; Brief for the Petitioners at 12–13, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015).

³⁶ Compare *Iqbal*, 129 S. Ct. at 1949 (“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.’” (quoting *Bell Atl. Corp. v.*

sufficiency standard that operates independent of the notice requirement,³⁷ and that the plausibility standard was trans-substantive, spanning all Rule 8 cases regardless of the cause of action or the anticipated cost of discovery.³⁸

In addition, the Court imposed a new pleadings dichotomy between conclusory and non-conclusory factual allegations. *Iqbal* alleged that the defendants “‘knew of, condoned, and willfully and maliciously agreed to subject [him]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.’”³⁹ He also alleged that the defendants were “instrumental” and the “principal architect” of the discriminatory policies.⁴⁰

The Court disregarded these allegations as conclusory and unsupported by additional factual allegations.⁴¹ The Court stated: “Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”⁴² Accordingly, the Court refused to credit those allegations and instead assessed the plausibility of the complaint without them. Under that standard, “respondent’s complaint does not contain any factual allegation sufficient to plausibly suggest petitioners’ discriminatory state

Twombly, 127 S. Ct. 1955, 1966 (2007))), *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 10, § 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.”); *see also* Posting of Scott Dodson to Civil Procedure & 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 entered a new era in pleadings. Notice is now an aside, probably insignificant in most cases. Instead, pleadings litigation will focus on factual sufficiency.”).

³⁷ *Iqbal*, 129 S. Ct. at 1949 (stating that *Twombly* required “sufficient factual matter” to state a plausible claim); *see also* Dodson, *supra* note 16 (manuscript at 24) (collecting additional cites from *Iqbal*).

³⁸ *Iqbal*, 129 S. Ct. at 1953 (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions,’ . . . and it applies to antitrust and discrimination suits alike.”); *id.* at 1953–54 (“We decline respondent’s invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery.”); *see also* Dodson, *supra* note 36 (“*Twombly*’s ‘plausibility’ standard is clearly now a uniform Rule 8 standard, not a standard borne of antitrust law or reserved for certain claims, as some had argued.”).

³⁹ *Iqbal*, 129 S. Ct. at 1951 (quoting First Amended Complaint and Jury Demand at ¶ 96, *Elmaghraby v. Ashcroft*, No. 04 CV 1809 (JG)(JA), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005)).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1950.

of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8.”⁴³

Taken together, *Twombly* and *Iqbal* are having a transformative impact on pleading. In August 2009, for example, a district court dismissed a garden-variety slip-and-fall negligence case under the new standard because of the plaintiff’s failure to plead certain facts.⁴⁴ The plaintiff pleaded that there was liquid on the floor and that the defendant negligently failed to remove the liquid or warn her of its presence.⁴⁵ The district court, incorporating evidentiary standards of proof into the pleading burden, 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 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.⁴⁶

That is a far cry from notice pleading pre-*Twombly*.⁴⁷

III. PLAUSIBILITY PLEADING EFFECTS

As I have argued elsewhere, *Twombly* and *Iqbal* impose a fact pleading requirement on Rule 8.⁴⁸ The plausibility standard of *Twombly* assesses the factual sufficiency of the allegations. And, the conclusory/non-conclusory dichotomy of *Iqbal* forces a plaintiff to detail factual support for her allegations to avoid having them be deemed “conclusory” and thus disregarded. As Professors Kevin Clermont and Stephen Yeazell have recently argued, “[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.”⁴⁹ Thus, the *Twombly-Iqbal* standard focuses motions to dismiss on factual detail, resulting in some cases being dismissed that would not have been under pre-*Twombly* standards.⁵⁰

Dismissing at an early stage cases that lack merit has its benefits. Such dismissals will conserve judicial resources for those claims that do

⁴³ *Id.* at 1952.

⁴⁴ *Branham v. Dolgencorp, Inc.*, Civil No. 6:09-CV-00037, 2009 WL 2604447, at *3 (W.D. Va. Aug. 24, 2009) (mem.).

⁴⁵ *Id.* at *1.

⁴⁶ *Id.* at *2.

⁴⁷ Professor Robert Bone has argued that *Iqbal* represents a far cry from the pleading standards even of *Twombly*. See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1467799>.

⁴⁸ See Dodson, *supra* note 16 (manuscript at 25); Dodson, *supra* note 23, at 138.

⁴⁹ Clermont & Yeazell, *supra* note 4 (manuscript at 11).

⁵⁰ Dodson, *supra* note 23, at 142.

have merit and will save both plaintiffs and defendants the time and money they would otherwise spend litigating meritless cases. The question is whether the *Twombly-Iqbal* pleading standard is an appropriate proxy for meritlessness.

In some cases, the inability or refusal of a plaintiff to plead sufficient non-conclusory facts under *Twombly* and *Iqbal* might indeed suggest that the plaintiff's claims are meritless. After all, plaintiffs have resources—such as public information, informal investigation, state inspection statutes,⁵¹ and the Freedom of Information Act⁵²—to get certain 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, and the plaintiff does not plead them, then it may be reasonable to infer that the failure to plead those facts with plausibility means that those facts do not exist, and that the plaintiff will be unable to prove her claim without them.⁵³

But that inference is not always reasonable.⁵⁴ Some facts may be solely in the hands of the defendants or hostile third parties. Certain claims, especially those hinging on the defendant's state of mind or secretive conduct, are particularly susceptible to that kind of "information asymmetry."⁵⁵ Civil rights and discrimination claims, corporate wrongdoing, unlawful conspiracies, and intentional torts are all good examples.⁵⁶

⁵¹ See generally Randall S. Thomas & Kenneth J. Martin, *Using State Inspection Statutes for Discovery in Federal Securities Fraud Actions*, 77 B.U. L. REV. 69 (1997).

⁵² 5 U.S.C. § 552(a) (2006).

⁵³ Of course, other reasons might cause such a pleading. Uncovering the necessary facts through non-discovery means might be cost-prohibitive, or the party or her attorney may simply have overlooked an opportunity for obtaining the information.

⁵⁴ 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. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007) ("[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." (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005))).

⁵⁵ Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 542 (1997) (using the term "asymmetric information"); Posting of Randal Picker to The University of Chicago Law School Faculty Blog, *Closing the Doors to (Antitrust) Plaintiffs?*, (May 21, 2007, 4:45 PM), http://uchicagolaw.typepad.com/faculty/2007/05/closing_the_doo.html (using the term).

⁵⁶ See Dodson, *supra* note 54 ("In those cases, the information often necessary to meet the plausibility standard is largely in the hands of the defendants."); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic 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*); Lonny Hoffman, *Using Presuit Discovery to Overcome Barriers to the Courthouse*, 34 LITIG. 31, 32 (2008)

The fortunate plaintiff may find external evidence that creates a legally permissible inference of the defendant's state of mind in such cases,⁵⁷ but not all plaintiffs will be so fortunate. Less fortunate plaintiffs may require formal discovery to obtain those facts. Though they may actually have suffered cognizable harm, these plaintiffs cannot survive a motion to dismiss without formal discovery and cannot access formal discovery without surviving a motion to dismiss.⁵⁸ In such cases, the plausibility standard imposes a significant cost—the dismissal of meritorious claims through no fault of the plaintiff.⁵⁹

IV. POTENTIAL SOLUTIONS

Therein lies the catch-22: a plaintiff may have a meritorious claim, but, because critical facts are solely within the possession of the defendant, she cannot plead her claims with sufficient factual detail to survive a motion to dismiss under *Twombly* and *Iqbal*. If only she could get

(mentioning these cases); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (“[T]he lower courts are unquestionably using the new plausibility standard to dismiss Title VII claims.”); 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. (forthcoming 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”).

⁵⁷ See, e.g., *Twombly*, 127 S. Ct. at 1965 n.4 (describing facts that would give rise to an inference of an antitrust conspiracy); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2007) (discussing publicly available information supporting an inference of conspiracy); Geoffrey P. Miller, *Pleading After Tellabs*, 2009 WIS. L. REV. 507 (2009) (discussing publicly available information supporting an inference of scienter in securities fraud).

⁵⁸ Professor Edward Hartnett argues that district courts have the power to permit discovery pending a decision on a motion to dismiss. See Edward Hartnett, *Taming Twombly*, 158 U. PA. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1452875>. I discuss this possibility in greater depth below.

⁵⁹ Dodson, *supra* note 36 (predicting that plausibility pleading “will surely result in fewer meritorious cases filed, more meritorious cases dismissed, and less unlawful conduct redressed”); Dodson, *supra* note 54 (“[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.”); Dodson, *supra* note 23, at 138–39 (“Safeguarding defendants from meritless strike suits is all fine and good. But using fact pleading standards to do so is problematic. Antitrust plaintiffs often do not possess evidence of an agreement to conspire, and requiring such evidence prior to discovery may prevent them from ever having it. It may be that *Twombly* did not allege more facts because he simply did not have them yet, not because they did not exist [T]he Court’s standard is likely to bar many antitrust cases (and mass tort, discrimination, and a host of other cases) *with merit*.”).

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?

A. *Some Unlikely Federal Options*

There are a few federal options for rectifying this problem, but none of them is particularly promising.

First, Rule 27 of the Federal Rules of Civil Procedure, which allows for presuit discovery only to perpetuate testimony,⁶⁰ is unavailing. Courts are nearly uniform in holding that it does not authorize discovery for the purpose of obtaining new facts needed to survive a motion to dismiss.⁶¹ Some have urged, notwithstanding the limitations of Rule 27, the adoption of a federal mechanism for allowing presuit or pre-dismissal discovery.⁶² But the civil rulemaking process is cumbersome and any rule proposal must win the approval of the Supreme Court, the very body that imposed the plausibility pleading requirement in the first place.

Second, 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. This scenario has promise but only would be available to plaintiffs who have plausible claims against the persons who have the information the plaintiff needs to assert against the prospective defendant.

Third, Professor Edward Hartnett has argued that discovery can proceed during the pendency of a motion to dismiss.⁶³ If discovery is allowed pending the motion to dismiss, plaintiffs may obtain the information they need to survive *Twombly* and *Iqbal* in an amended complaint.⁶⁴ Discovery, he argues, could be narrowly tailored to the particular allegation at issue.⁶⁵

I am convinced that Professor Hartnett is correct that the rules do not automatically stay discovery upon the filing of a motion to dismiss⁶⁶

⁶⁰ FED. R. CIV. P. 27.

⁶¹ See Hoffman, *supra* note 8, at 226–27.

⁶² See, e.g., Bone, *supra* note 32, at 910–35 (sketching out such a system); Clermont & Yeazell, *supra* note 4 (manuscript at 46–47) (The “civil rulemakers might require as the price of admission to discovery—imposed if the opposing party has successfully moved under *Twombly-Iqbal* against the claim—that the claimant demonstrate something like probable cause to believe that discovery would yield significant pertinent evidence.”); Spencer, *supra* note 5, at 29–30.

⁶³ Hartnett, *supra* note 58 (manuscript at 44). Professor Suzette Malveaux has made a similar argument. See Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-D dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010) (arguing for targeted, pre-merits discovery under Rule 26 to resolve threshold plausibility issues).

⁶⁴ Hartnett, *supra* note 58 (manuscript at 46–47).

⁶⁵ *Id.* (manuscript at 47).

⁶⁶ *Id.* (manuscript at 44). As he points out, Rule 26(c) allows district courts to stay discovery for good cause. FED. R. CIV. P. 26(c).

(except in specific statutory contexts⁶⁷) and that a district court has discretion to allow discovery to proceed during the pendency of such a motion. Indeed, it appears that some courts pre-*Twombly* have allowed discovery even *after* dismissing a complaint for failure to state a claim.⁶⁸ As a related possibility, federal courts may attempt (and have done so occasionally in the past) to allow discovery outside of the context of the federal rules under an inherent equitable power.⁶⁹

But language in *Twombly* and *Iqbal* surely will give defendants ammunition with which to argue against such discovery, and that same language will give district courts great pause before allowing pre- or post-dismissal discovery or discovery authority outside of the context of the federal rules. It was, after all, the very threat of discovery costs and the perceived inability of district courts to control it that motivated the Court to impose the stricter pleading standard in the first place. *Twombly*, for example, spares no words on that score:

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 before reaching those proceedings. Probably, then, it 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 discovery⁷⁰

Iqbal was even more emphatic: “Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”⁷¹ And again: “We decline respondent’s invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. . . . Because respondent’s complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.”⁷²

The import of *Twombly* and *Iqbal* is that only a complaint that can survive a motion to dismiss entitles a plaintiff to discovery from the defendant or third parties. In order to take advantage of Professor

⁶⁷ Securities fraud is a notable example. See 15 U.S.C. § 77z-1(b)(1) (2006).

⁶⁸ See, e.g., *Cordero-Hernández v. Hernández-Ballesteros*, 449 F.3d 240, 244 (1st Cir. 2006); *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 290 (1st Cir. 1987); *Reints v. Sheppard*, 90 F.R.D. 346, 347 (M.D. Pa. 1981).

⁶⁹ *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406 (5th Cir. 1993).

⁷⁰ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007); see also *id.* at 1967 n.6 (“Given the system that we have, the hope of effective judicial supervision is slim . . .”).

⁷¹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

⁷² *Id.* at 1953–54.

Hartnett's solution, a plaintiff would have to file a factually insufficient pleading on the hope that the district judge allows discovery to proceed during the pendency of a motion to dismiss and in the face of the Supreme Court's statements in *Twombly* and *Iqbal* justifying stricter pleading standards as a way to control discovery. That strikes me as a risky, costly, and altogether unlikely course of action.

B. *Using State Law*

But that is in federal court. Parallel state court systems are generally available and can operate simultaneously. Might they provide ways out for plaintiffs trapped in federal court by this information asymmetry?

For plaintiffs able to file their claims in states that retain a notice pleading standard more forgiving than the *Twombly-Iqbal* standard, the answer may be yes, but only in insignificant ways for my purposes. To be sure, plaintiffs suing non-diverse defendants for state causes of action *must* choose this route because federal court is unavailable. But these plaintiffs never had to fear the federal standard at all. It is therefore more revealing to ask whether filing a removable claim in state court under a forgiving pleading standard would be a useful option.

Here, I think the answer is probably not. Most federal claims do not come with a statutory pleading standard attached to them,⁷³ meaning that a state court hearing a federal cause of action probably would apply a more liberal state pleading standard instead of the *Twombly-Iqbal* federal pleading standard.⁷⁴ And, of course, a state would also apply its pleading standards to a state claim brought by a plaintiff against a diverse defendant.⁷⁵ But in either case, the state court likely will never have the opportunity to apply its more lenient pleading standard. Defendants, already prone to removal,⁷⁶ will favor federal court even more strongly if the federal pleading standard is stricter than the state standard of the

⁷³ There are exceptions. *See, e.g.*, 15 U.S.C. § 78u-4(b) (2006) (imposing a heightened federal pleading standard for federal securities fraud claims).

⁷⁴ There is some uncertainty here. Federal pleading standards may control even in state court if stricter state pleading standards would impose unnecessary burdens on federal rights. *See* *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 298 (1949). But the Supreme Court has never said that principles of preemption or reverse-*Erie* apply to displace more lenient state pleading standards with stricter, non-statutory federal pleading standards. *But see* Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1452-53 (2008) (making the argument). For more on reverse-*Erie*, see generally Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006).

⁷⁵ In contrast with federal control of federal rights or federal procedure, federal control of state procedure involving state rights is far more limited. *See generally* Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001). There are a few exceptions but none apply to pleading standards. *See, e.g.*, *Jinks v. Richland County*, 538 U.S. 456 (2003) (upholding 28 U.S.C. § 1367(d) which imposes a federal tolling rule for state statutes of limitations).

⁷⁶ *See* Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1921-26 (2009).

state court in which the case is filed.⁷⁷ Removal can be accomplished almost immediately, followed quickly by a motion to dismiss in federal court under the stricter federal standard. Thus, for plaintiffs confronted with *Twombly* and *Iqbal*, filing a removable case in state court is not a comforting option.⁷⁸

State law harbors another option for these plaintiffs, however. Like federal court, most states allow at least some presuit discovery.⁷⁹ Many state rules mirror federal Rule 27 and are similarly restrictive.⁸⁰ Others allow presuit discovery only to ascertain the identity of potential defendants in certain cases and not to determine facts necessary to state a claim.⁸¹ But several states allow presuit investigative discovery for the purposes of filing a sufficient complaint.⁸² Plaintiffs who otherwise might be trapped in federal court with information asymmetry can use these procedures as a way to rectify that asymmetry before getting to federal court.⁸³ In the next few subparts, I explain how and evaluate the utility of those state presuit discovery mechanisms.

1. State Presuit Discovery Mechanisms

Texas is perhaps the strongest proponent of presuit discovery for purposes of framing a complaint. It allows presuit discovery whenever justice or some other benefit outweighs the burden and expense of the discovery requested.⁸⁴ The Texas presuit discovery procedure is routinely used to assist plaintiffs in drafting their complaints.⁸⁵

Alabama, like Texas, has a strong policy favoring presuit discovery for claim investigation. Rule 27 of the Alabama Rules of Civil Procedure allows pre-action discovery for “[a] person who desires to perpetuate [his] own testimony or that of another person or to obtain discovery under Rule 34 or Rule 35 regarding any matter that may be cognizable in

⁷⁷ See Clermont & Yeazell, *supra* note 4 (manuscript at 13 n.40) (arguing that the disparity between liberal state pleading and federal plausibility pleading will incent defendants to remove).

⁷⁸ Plaintiffs who sue diverse defendants on state law claims in the courts of the state of a defendant’s residence can avoid this result because such a case is not removable. See 28 U.S.C. § 1441(b). But, like the plaintiff who sues a non-diverse defendant, because such a case is not removable, the plaintiff never had to fear the federal *Twombly-Iqbal* standard in the first place.

⁷⁹ Hoffman, *supra* note 8, at 225.

⁸⁰ See *id.* at 235–36; Jeffrey J. Kroll, *The Art and Science of Presuit Discovery*, 45 TRIAL Mar. 2009, at 28, 29.

⁸¹ See Hoffman, *supra* note 8, at 238; Kroll, *supra* note 80, at 29–30.

⁸² See *infra* Part IV.B.1.

⁸³ Professor Lonny Hoffman has urged state law claimants faced with state pleading hurdles and information asymmetry to use state presuit discovery mechanisms more liberally. See Hoffman, *supra* note 56, at 31. He focuses on pleading in state court; I focus here on pleading in federal court.

⁸⁴ TEX. R. CIV. P. 202.1, 202.4.

⁸⁵ Hoffman, *supra* note 8, at 253–54 (estimating that Texas presuit discovery has been used approximately 4,000 times from 1999–2005 and that over 50% of the time the rule was used, it was for presuit discovery).

any court of this state.”⁸⁶ The Alabama Supreme Court has construed the rule to allow pre-action discovery “regardless of any need to perpetuate evidence” if the plaintiff wishes to use it to determine whether she has a reasonable basis for filing a lawsuit.⁸⁷

Other states are less overt about the availability of presuit discovery but nonetheless do recognize it. New York statute provides: “Before an action is commenced, disclosure to aid in bringing an action . . . may be obtained, but only by court order.”⁸⁸ To be entitled to this presuit discovery, the applicant must make a prima facie showing that a cause of action exists.⁸⁹ But that does not mean that the applicant must already be able to plead the cause of action; to the contrary, the application will be denied if the applicant already has sufficient information upon which to frame a complaint.⁹⁰ Thus, New York law allows presuit discovery where necessary to plead a claim.⁹¹

Similarly, Ohio allows a petitioner to bring an action for discovery when she is otherwise unable to file a complaint without the discovery. Rule 34(D)(1) of the Ohio Rules of Civil Procedure provides that “a person who claims to have a potential cause of action may file a petition to obtain discovery as provided in this rule.”⁹² Under this rule, an action for discovery may be used “to uncover facts necessary for pleading,”⁹³ including facts that would allow a plaintiff to determine if she has a valid cause of action against a known defendant.⁹⁴ “[T]he rule acts as a safeguard against charges that the plaintiff filed a frivolous lawsuit in a case where the wrongdoer or a third party has the ability to hide the facts needed by the plaintiff to determine who is the wrongdoer and exactly what wrong occurred.”⁹⁵

Pennsylvania also allows presuit discovery for purposes of composing a complaint. The Pennsylvania Rules of Civil Procedure allow a plaintiff to “obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery

⁸⁶ ALA. R. CIV. P. 27.

⁸⁷ *Ex parte Anderson*, 644 So. 2d 961, 964 (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”).

⁸⁸ N.Y. C.P.L.R. § 3102(c) (McKinneys 2005).

⁸⁹ *Holzman v. Manhattan & Bronx Surface Transit Operating Auth.*, 707 N.Y.S.2d 159, 161 (N.Y. App. Div. 2000).

⁹⁰ *In re Henry*, 843 N.Y.S.2d 891, 892 (N.Y. App. Div. 2007); *W. Inv. L.L.C. v. Georgeson S’holder Sec. Corp.*, 841 N.Y.S.2d 40, 41 (N.Y. App. Div. 2007).

⁹¹ New York courts have not been entirely clear in explaining what a “prima facie” case is, but because they hold that plaintiffs with sufficient evidence to plead a claim are not entitled to presuit discovery, the prima facie threshold must be fairly minimal. For a more skeptical view, *see Hoffman*, *supra* note 8, at 237–38.

⁹² OHIO CIV. R. 34(D)(1).

⁹³ *Huge v. Ford Motor Co.*, 803 N.E.2d 859, 861 (Ohio Ct. App. 2004).

⁹⁴ *Benner v. Walker Ambulance Co.*, 692 N.E.2d 1053, 1055 (Ohio Ct. App. 1997).

⁹⁵ *Id.*

will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.”⁹⁶ Upon a defendant’s objection, the court can require the plaintiff to “state with particularity how the discovery will materially advance the preparation of the complaint.”⁹⁷

Other states besides those I mention above, such as Vermont, appear to have statutes or rules allowing presuit discovery to be used in the way I suggest, though the case law is too sparse to conclude that definitively.⁹⁸

In addition to statutory or rule-based authorizations for presuit discovery, most states—though not all⁹⁹—allow equitable bills of discovery. Equitable bills of discovery were the primary mechanism to obtain discoverable information in civil cases prior to the adoption of the Federal Rules of Civil Procedure and their state analogues.¹⁰⁰ The common law courts provided no mechanism for discovery at all, and, to ameliorate that result, equity courts created the bill as an exercise of ancillary jurisdiction in aid of actions at law.¹⁰¹ Although modern discovery rules in state and federal courts and the merger of law and equity have largely replaced the need for equitable bills of discovery, the majority of states still allow the bill.¹⁰² Courts generally have restricted the bill to instances in which discovery cannot otherwise be had under the applicable rules and statutes, and where discovery is necessary to secure justice in the underlying proceeding.¹⁰³ Thus, most states that do not have a statute or rule allowing for presuit discovery to frame a complaint allow an equitable action for a bill of discovery instead.¹⁰⁴

⁹⁶ PA. R. CIV. P. 4003.8(a).

⁹⁷ PA. R. CIV. P. 4003.8(b).

⁹⁸ See, e.g., VT. R. CIV. P. 27 (reporter’s notes following rule stating that Vermont’s “Rule 27(a)(1) provides for a verified petition for perpetuation of testimony *or other appropriate discovery* before action” (emphasis added)); *In re Burlington Bagel Bakery, Inc.*, 549 A.2d 1044, 1045 (Vt. 1988) (representing the only case interpreting Vermont’s rule and stating that the rule “gives the presiding judge discretion to grant a petition for preaction discovery if he or she ‘is satisfied that the perpetuation of the testimony *or other discovery* may prevent a failure or delay of justice” (emphasis added)).

⁹⁹ See, e.g., *Austin v. Johnston Coca-Cola Bottling Group, Inc.*, 891 P.2d 1143, 1146 (Kan. Ct. App. 1995) (holding that Kansas does not recognize the equitable bill of discovery).

¹⁰⁰ Rupert F. Barron, Annotation, *Existence and Nature of Cause of Action for Equitable Bill of Discovery*, 37 A.L.R.5TH 645, 658–59 (1996).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Federal courts are decidedly more mixed about the availability of the equitable bill of discovery in federal court after the advent of the Federal Rules of Civil Procedure, which provide ample discovery opportunities. See *id.* Still, at least one court since the 1991 amendments to Rules 34 and 45 continues to recognize the availability of the bill. See *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1408 (5th Cir. 1993).

Connecticut, for example, recognizes an independent equitable action for a bill of discovery.¹⁰⁵ The bill is designed to obtain evidence for use in an action for affirmative relief.¹⁰⁶ Because “a pure bill of discovery is favored in equity, it should be granted unless there is some well founded objection against the exercise of the court’s discretion.”¹⁰⁷ To sustain the bill, the petitioner must demonstrate that what she seeks to discover is material and is necessary to prove, or is needed to aid in proving or in defending, another action already brought or about to be brought. The petitioner must show that he has no other adequate means of enforcing discovery of the desired material, where “adequate” takes into consideration convenient, effective, and full relief.¹⁰⁸

2. *Minor Limitations*

As the foregoing Part demonstrates, many states allow presuit discovery to obtain information that may be critical to surviving a *Twombly-Iqbal* motion to dismiss. To be granted, however, the plaintiff must overcome several potential limitations on the viability of the use of these state presuit discovery mechanisms. Each of these limitations is likely to be minor or easy to overcome.

First, the plaintiff may worry that the defendant will remove to federal court her state petition for presuit discovery or independent action for an equitable bill of discovery, and that the federal court will then be reluctant to allow the discovery in the face of *Twombly* and *Iqbal*. A defendant may argue for removal based on diversity of the parties to the discovery action or, perhaps, based on any federal question presented by the underlying substantive cause of action. But removal probably is not available in these cases. Indeed, courts usually refuse to allow removal of presuit discovery petitions.¹⁰⁹ They reason that presuit discovery is not a civil action within the meaning of the removal statute.¹¹⁰ This view is likely correct, for presuit discovery is a procedural device rather than a cause of action for substantive relief. Courts have also held that independent actions for equitable bills of discovery are not removable,¹¹¹

¹⁰⁵ *Berger v. Cuomo*, 644 A.2d 333, 337 (Conn. 1994).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 28 U.S.C. § 1441 (2006) (restricting removal to “civil action[s]”).

¹¹⁰ *See Young v. Hyundai Motor Mfg. Ala., LLC*, 575 F. Supp. 2d 1251, 1254 (M.D. Ala. 2008) (citing cases following the majority rule); *McCrary v. Kansas City S. R.R.*, 121 F. Supp. 2d 566, 569 (E.D. Tex. 2000) (holding that Texas Rule 202 does not initiate a civil action within the meaning of the removal statute because it asserts no claim or cause of action upon which relief could be granted); *In re Hinote*, 179 F.R.D. 335, 336 (S.D. Ala. 1998) (holding that Alabama Rule 27 is a request for discovery, not a civil action within the meaning of the federal removal statute). *But see In re Texas*, 110 F. Supp. 2d 514, 522–23 (E.D. Tex. 2000) (finding a petition for presuit discovery is a civil action under the removal statutes), *rev’d on other grounds, sub nom. Texas v. Real Parties in Interest*, 259 F.3d 387, 395 (5th Cir. 2001).

¹¹¹ *See Wilson v. Belin*, 20 F.3d 644, 651 n.8 (5th Cir. 1994) (suggesting that an equitable bill of discovery is not removable); *Young*, 575 F. Supp. 2d at 1255 (same).

though as an independent cause of action, that seems less certain. Nevertheless, removal would still be unavailable if the parties are not diverse (or, even if the parties are diverse, if the defendant is a citizen of the forum state),¹¹² or if the amount in controversy is not met (likely to fail, given that the relief sought is merely equitable discovery¹¹³). Finally, the Supreme Court has held that the All Writs Act is generally unavailable to allow removal of otherwise non-removable actions that threaten to interfere with federal proceedings.¹¹⁴ All told, removal to a hostile federal forum is unlikely.

Second, the plaintiff may worry that a state court will not permit presuit discovery if her claim is a federal claim. No presuit discovery mechanism I am aware of so limits presuit discovery. A few mechanisms, such as Alabama's rule, limit presuit discovery to causes of action that can be heard in the courts of that state,¹¹⁵ but state courts generally can hear federal causes of action, including civil rights claims under § 1983 and federal antidiscrimination claims. It is true that a select few causes of action provide for exclusive federal jurisdiction—federal antitrust and securities fraud claims are prime examples.¹¹⁶ But states generally recognize analogous causes of action—say, breach of fiduciary duties, unfair competition, or even state antitrust claims—that should cover sufficiently similar allegations such that the presuit discovery mechanism would allow discovery of facts needed to plead the federal cause of action.

Third, the costs of presuit discovery may be prohibitive. Plaintiffs truly confronted with information asymmetry may face a substantial *ex ante* uncertainty about the merit of their claims. The cost of presuit discovery may outweigh the possibility and benefit of a meritorious claim, but this does not seem very likely. Most states, even Texas, limit presuit discovery far more than the full discovery parties employ after the filing of a formal lawsuit.¹¹⁷ Plaintiffs deterred by the limited costs of presuit discovery ought to be even more deterred from filing a formal lawsuit. If anything, the limited cost of presuit discovery ought to benefit plaintiffs overall, for those plaintiffs deterred by the cost of a formal lawsuit may be able to use the presuit discovery mechanism to buy, relatively cheaply, a

But see Hernandez Perez v. Citibank, N.A., 328 F. Supp. 2d 1374, 1379 (S.D. Fla. 2004) (holding an equitable bill of discovery under Florida law to be removable under the Edge Act).

¹¹² 28 U.S.C. § 1441(a)–(b).

¹¹³ *See, e.g.*, Stoller v. Nissan Motor Corp., 934 F. Supp. 423, 424 (S.D. Fla. 1996) (remanding a removed equitable bill of discovery for lack of subject-matter jurisdiction because the amount in controversy requirement was not met).

¹¹⁴ *See* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 34 (2002).

¹¹⁵ ALA. R. CIV. P. 27 (“A person who desires to . . . obtain discovery under Rule 34 or Rule 35 regarding any matter that may be cognizable in any court of this state may file a verified petition . . .” (emphasis added)).

¹¹⁶ Sherman Act, 15 U.S.C. § 4 (2006); Clayton (Antitrust) Act, 15 U.S.C. § 15(a) (2006); Securities Act of 1933, 15 U.S.C. § 77v (2006).

¹¹⁷ Hoffman, *supra* note 8, at 225–26.

free look at the merits of the case. On balance, the cost limitations of presuit discovery are minimal and, compared to the alternative of full discovery, probably amount to a net cost benefit.

Fourth, there may be equitable objections if defendants cannot access state presuit discovery mechanisms for their compulsory counterclaims.¹¹⁸ Conceivably, the catch-22 of federal pleading could apply to defendants with counterclaims just as it does to plaintiffs.¹¹⁹ This inequity is less stark if, as in most cases relevant to this Article, the defendant is the one invoking the federal forum by removing the case. In addition, a defendant with a compulsory counterclaim can always sue first, in effect turning the tables on the other party. And, there may still be opportunities for a defendant to take advantage of equitable bills of discovery in state court while the federal case is pending.¹²⁰

3. Major Limitations

There are, however, several major limitations on the use of state presuit discovery mechanisms to cure the federal pleadings catch-22. State court authority over presuit actions is cabined by federal due process considerations and may be, additionally, by state venue rules and state long-arm statutes. Thus, a plaintiff may find herself confined to one of the states that recognizes neither presuit investigative discovery nor equitable bills of discovery.

In addition, some states' mechanisms may not allow presuit discovery in particular instances.¹²¹ For example, some states that recognize equitable bills of discovery do so only after a plaintiff has filed a lawsuit on the substantive claim,¹²² and it is unclear whether the bill would be allowed if the claim is before a federal, as opposed to a state, court. I have not found a case in which a state court has allowed an equitable bill of discovery ancillary to a federal case. The dearth of opinions suggests that such a split proceeding is not likely to be allowed. However, one court that has denied a bill of discovery based on ancillary proceedings in federal court, did so only on the grounds that the federal court provided an adequate opportunity for the discovery requested.¹²³ In other words,

¹¹⁸ I thank Professor Michael Steven Green for raising this point.

¹¹⁹ *Twombly* and *Iqbal*, as constructions of Rule 8(a), surely apply to counterclaims, though they probably do *not* apply to defenses, which are governed by Rules 8(b) and (c). FED. R. CIV. P. 8.

¹²⁰ See *infra* text accompanying notes 123–124.

¹²¹ In addition, it is possible that the use of state presuit discovery mechanisms to survive federal pleading standards, a role for which they likely were not intended, will engender significant pushback among state courts and legislatures, ultimately resulting in a restriction on their utility. My thanks to Professor Lonny Hoffman for raising this point.

¹²² Barron, *supra* note 100, at 670.

¹²³ See *Trak Microwave Corp. v. Culley*, 728 So. 2d 1177 (Fla. Dist. Ct. App. 1998) (per curiam). Analogous situations of underlying proceedings in foreign jurisdictions also depend not upon the separateness of the judicial systems but rather the availability of discovery in the underlying case. See, e.g., *Debt Settlement Adm'rs, LLC*

what doomed the bill was not that it was ancillary to a federal court—it was that the federal court provided an adequate discovery mechanism. Perhaps if the federal court had not provided an adequate opportunity for discovery—because of, say, a high pleading standard—the equitable bill would have issued.¹²⁴ That outcome is very uncertain, however. If discovery is not available, then plaintiffs will have to file solely in state court and seek a bill of discovery prior to removal of the substantive claim.¹²⁵

Similarly, asymmetry between state and federal pleading standards may undermine a plaintiff's attempt to justify state presuit discovery. In other words, a plaintiff who makes the case for presuit discovery based upon the notice pleading standards of, for example, Ohio,¹²⁶ may be limited by the court to discovering only enough facts to plead her case under that liberal standard, preventing her from obtaining other facts that she might need to survive the stricter *Twombly-Iqbal* federal standard. Or, perhaps more likely, she has sufficient information to bring a case under that notice pleading standard already and will be denied the opportunity to use the presuit discovery mechanism to obtain additional discovery needed to meet the federal standard.¹²⁷ This problem may indeed reduce the utility of using the presuit discovery mechanisms of notice pleading states whose mechanism does not extend to plaintiffs who are able to file a state complaint without presuit discovery. In relation, plaintiffs may resist filing presuit discovery for fear that their allegations of inability to plead a cause of action will be used against them later.¹²⁸

v. Antigua & Barbuda, 950 So. 2d 464, 465 (Fla. Dist. Ct. App. 2007) (foreign proceeding). Indeed, in one foreign case, the fact that the foreign case had been reduced to a judgment and was no longer open to discovery was used by the court to *allow* a state equitable bill of discovery. See *Otto's Heirs v. Kramer*, 797 So. 2d 594, 596–97 (Fla. Dist. Ct. App. 2001).

¹²⁴ One might question how this would work in practice, particularly if the federal court would be likely to dismiss the federal case under Rule 12(b)(6) prior to the completion of discovery in state court. One simple way to avoid the logistical timing issues would be for the federal court to dismiss only on the condition that an amended complaint is not filed within a certain period of time, with that period being long enough for the state discovery to be completed.

¹²⁵ This may not be as time-sensitive as it initially sounds, at least for certain cases. Removal must take place in thirty days, but that clock only begins to run from the time that the action first becomes removable. See 28 U.S.C. § 1446(b) (2006). Thus, a plaintiff who asserts a non-removable claim initially may simultaneously seek an equitable bill of discovery and then, after obtaining the information, add the removable claim.

¹²⁶ OHIO CIV. R. 8(A); *Fancher v. Fancher*, 455 N.E.2d 1344, 1347–48 (Ohio Ct. App. 1982) (confirming that Ohio is a notice pleading state).

¹²⁷ On the other hand, the pleading asymmetry may work in favor of presuit discovery. A notice pleading state whose presuit discovery mechanism can be used only to supplement a sufficient pleading with additional facts may provide the plaintiff with access to presuit discovery *because* she met the state notice pleading standard, even if her fear is a failure to meet the stricter federal pleading standard.

¹²⁸ See *Hoffman*, *supra* note 56, at 31.

Finally, limitations periods may curtail the utility of presuit discovery. Most states provide that presuit discovery tolls the limitations period for filing the underlying state causes of action in state court.¹²⁹ Federal courts hearing state causes of action on diversity generally would credit that state rule,¹³⁰ but federal courts hearing federal causes of action may not. It may be that federal courts would allow the tolling as a matter of federal law, but that is unclear. The resulting uncertainty in the face of an easy limitations defense may discourage the use of presuit discovery if it would either cause a claim to be filed outside its limitations period or if it could not be completed before the limitations period expired.

V. CONCLUSION

The use of state presuit discovery mechanisms has promise as a way to avoid the catch-22 of federal pleading standards. In cases in which they are applicable, state presuit discovery mechanisms ought to be used more robustly by plaintiffs who fear that their complaints would otherwise be dismissed under the federal plausibility pleading standard.

But state presuit discovery is not a panacea. It has significant limitations for use in federal pleading. For those who believe presuit discovery ought to be available to soften *Twombly* and *Iqbal*, amending Federal Rule of Civil Procedure 27 or providing for presuit discovery by statute may be the best way to achieve that goal and to avoid the limitations that state presuit discovery entails. The rulemaking and statutory processes have their downsides. They can be cumbersome, and a rule proposal would have to win the blessings of a Court that is highly skeptical of current tools to control discovery costs.

If one of these routes is taken however, state presuit discovery may serve an additional role as a model for federal reform. Perhaps it could be used to propose a Rule 27 amendment or federal presuit discovery statute that not only would alleviate the information asymmetry problems created by *Twombly* and *Iqbal* but also would be focused enough to assuage concerns about high discovery costs. I leave for another day just what such a proposal would look like.

¹²⁹ Hoffman, *supra* note 8, at 266–67.

¹³⁰ Federal courts generally must apply both the state statute of limitations, see *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945), and state tolling principles, see *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949).