

# REINVIGORATING PLEADINGS



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## INTRODUCTION

Pleadings are the gateway to the American civil justice system. When properly drafted, they frame the issues to be resolved and open the door to the procedures that make complete and effective dispute resolution possible. To fulfill their potential, however, pleadings must provide litigants with two types of access: the ability to get into court in the first place, and the ability to participate meaningfully in the process until a complete judicial resolution is reached.<sup>1</sup> Getting in the courthouse door is a necessary step, but it is not sufficient; parties must be able to afford to stay in the system long enough to narrow their disputed issues and collect relevant evidence for presentation to a judge or jury.<sup>2</sup>

The framers of the Federal Rules of Civil Procedure were seeking to balance these two forms of access in 1938. Reacting to longstanding concerns that meritorious claims were being dismissed on procedural technicalities, they fashioned a system in which initial access to the courthouse would be virtually guaranteed. Pleadings, which for centuries had been the primary means of narrowing disputed issues, were stripped of that function entirely. In their place, parties needed only to provide a “short and plain statement of the claim showing that the pleader is enti-

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1. On the general point about multiple dimensions of access, see Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 *TOURO L. REV.* 347, 365–66 (2009).

2. Several commentators have noted that narrowing issues is one of the central objectives in civil procedure. See Nat’l Comm’n Staff Paper, *The Early Narrowing and Resolution of Issues*, 48 *ANTITRUST L.J.* 1041, 1042 (1979) (“Clearly defined issues direct the efforts of counsel and guide the court in ruling on ancillary questions such as the scope of discovery. By clarifying the areas of agreement and disagreement the parties may be better able to assess their positions and this may in turn promote rapid settlement or adjudication. Poorly defined issues create problems of delay and unnecessarily diffused efforts.”); see also Michael Moffitt, *Pleadings in the Age of Settlement*, 80 *IND. L.J.* 727, 757 (2005) (“Without a mechanism for narrowing the issues in dispute, a legal system and the disputants would strain under the weight of the nearly infinite number of potential grievances and legal theories conceivably stemming from parties’ interactions.”); Sidney Post Simpson, *A Possible Solution of the Pleading Problem*, 53 *HARV. L. REV.* 169, 172 (1939) (noting that early issue-narrowing allows both the parties and the judge to channel their time and energy away from identifying the dispute and toward resolving it).

tled to relief.”<sup>3</sup> To compensate for the loss of issue narrowing at the outset of a case, the framers championed discovery, judicial management, and summary judgment as credible tools to help the parties collect information and focus their dispute for trial.

The new system was innovative, and the theory behind it reasonable. In hindsight, however, removing the issue-narrowing function from pleadings has proven to be a serious mistake. Failing to focus issues from the outset of litigation has encouraged parties to seek out discovery that is both voluminous and only tangentially relevant to their dispute. In many cases—particularly complex cases—discovery and motion practice have become so expensive and burdensome that parties cannot afford adequate trial preparation and instead are forced to settle cases regardless of the merits.<sup>4</sup> Complaints about the costs of discovery and motion practice—both in time and money—have grown louder and louder in the last sixty years, reaching a crescendo in the past decade, when the cost of exchanging electronically stored information (“ESI”) developed the potential to exceed the entire amount in controversy in a case.<sup>5</sup>

The relationship between the two forms of access is currently far out of balance, and both plaintiffs and defendants are poorer for it. We need a civil justice system that encourages the filing of meritorious claims *and* one that allows those claims to be honed and resolved efficiently. We need, in other words, a process that begins to narrow and focus issues as soon as a legitimate claim is filed. The most effective way to accomplish this goal is by reinvesting the pleading stage with the responsibility of narrowing issues, by requiring the parties to plead material facts that support their claims, counterclaims, and affirmative defenses.

As we describe below, a move to fact-based pleading need not upset the general structure and values of the existing pretrial process. It would simply provide more information up front than is usually available under the current pleading regime, allowing the parties and the court to better focus discovery and motion practice on the issues that are truly in dis-

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3. FED. R. CIV. P. 8(a)(2).

4. In a recent survey of the American College of Trial Lawyers, seventy-one percent of respondents indicated their belief that counsel use discovery as a tool to force settlement. See AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS A-4 (2008), <http://www.du.edu/legalinstitute/pubs/Interim%20Report%20Final%20for%20web1.pdf> [hereinafter ACTL/IAALS, INTERIM REPORT]. There is merit to these concerns. Judge Scheindlin, for example, noted a case in which a party admitted in an e-mail to deliberately extending litigation in the hope of achieving a high settlement. See Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 339 n.42 (2000) (citing Karen Donovan, *E-mails Helped Microsoft in Connecticut Victory*, NAT'L L.J., Aug. 2, 1999, at A1).

5. Robert E. Altman & Benjamin Lewis, Note, *Cost-Shifting in ESI Discovery Disputes: A Five Factor Test to Promote Consistency and Set Party Expectations*, 36 N. KY. L. REV. 569, 569 (2009).

pute. Under our proposed fact-based pleading system, motions to dismiss for failure to state a claim would be granted only if a party does not plead any objectively reasonable fact to support an element of a claim. Motions for a more definite statement would be the favored approach to handling claims where facts were omitted or unclear, and amendment of claims would still be allowed. Discovery would still be available to flesh out evidence on disputed issues, albeit in a more focused manner. The pleading of material facts, in other words, would not be designed to restrict access to the courts; to the contrary, it would *increase* access by making participation in civil litigation economically more feasible.

To flesh out our proposal, we begin in Part I by examining two pervasive myths about the relationship between pleading and court access. The first myth holds that issue-narrowing need not take place at the pleading stage, because other procedural tools—in particular, discovery, judicial management, and summary judgment—can focus the issues in dispute as efficiently and effectively as pleadings can. In fact the opposite is true, at least in a significant number of civil cases. We describe the problems associated with assigning the issue-narrowing task to discovery and summary judgment, and chronicle more than sixty years of warnings that the existing system does not meet its core objective of focusing the parties' dispute. We then address the second myth, that fact-based pleading is simply a mechanism for keeping cases out of court. As we explain, the requirement to plead material facts can actually increase meritorious filings by making the overall litigation process more focused and more affordable.

In Part II we examine a number of state court systems (and two foreign common law jurisdictions) that require fact-based pleading, and find that such pleading is embraced both as the most efficient and effective means for the parties to narrow their dispute, and as a mechanism that is entirely consistent with assuring full access for meritorious claims. We also examine state court rules governing pre-suit discovery, a tool designed to preserve initial court access in fact-based pleading jurisdictions by allowing a putative plaintiff to seek limited discovery before the filing of a lawsuit if she would otherwise be unable to plead sufficient facts in her complaint.

Building upon the lessons learned from both federal and state systems, in Part III we set out our proposal that parties be required to plead material facts sufficient to support each element of an asserted claim, counterclaim, cross-claim or affirmative defense. This proposal would replace the current language of Federal Rule 8(a)(2), but is not intended to overhaul the current federal rules regime. The dismissal of claims would still be the exception rather than the rule, and courts would still be encouraged to resolve confusion or inconsistency in pleadings wherever possible by granting motions for a more definite statement or by allowing the pleading party to amend his or her claims.

Our proposal is designed to be a starting point for discussion. A lasting solution will require input from many different constituencies, no doubt representing diverse points of view. We welcome that input; we do not claim to have all the answers. The goal of this Article is to lay the groundwork and convey the urgency of the matter. For a wide variety of civil cases, the system of notice pleading, broad discovery, and summary judgment practice is economically impractical and unsustainable. Fact-based pleading may be the best hope for creating a system that truly provides a “just, speedy, and inexpensive”<sup>6</sup> process for resolving disputes.

### I. TWO MYTHS ABOUT ACCESS AND PLEADING

This Part examines two common misconceptions about access and pleading: (1) that broad “notice” pleading is sufficient to ensure full access to litigants because parties in every case have the ability to narrow the issues efficiently through other procedural tools; and (2) that requiring the pleading of facts shuts out some meritorious claims. Both of these beliefs are largely unsupported myths. With respect to the first myth, for more than fifty years judges, lawyers and commentators have pointed out the inability of discovery and motion practice to narrow issues effectively. Indeed, far from promoting efficient resolution of issues by the court, discovery and motion practice have too often forced settlement because costs and delays in the discovery process proved too burdensome for one or more parties. Courts, too, have grown increasingly aware of the risks that excessive and expensive discovery poses to meritorious claims and defenses. The much-discussed recent Supreme Court cases *Bell Atlantic Corp. v. Twombly*<sup>7</sup> and *Ashcroft v. Iqbal*<sup>8</sup> are only the latest manifestations of this concern.

Similarly pervasive but also devoid of any real support is the belief that fact-based pleading will inhibit the filing of meritorious claims. Advocates of this belief point to so-called “heightened pleading” requirements that demand detailed pleadings for certain types of claims, and that are designed mostly to prevent an influx of cases into the court system. As we explain, however, “heightened pleading” is qualitatively different from the fact-based pleading we propose, which is designed solely for issue-narrowing purposes. Furthermore, in the rare case in which initial court access might be hampered because relevant material facts are exclusively in the possession of another, we endorse procedures to help potential plaintiffs gain access to such facts before the case is filed.

These two myths have long interposed resistance to any serious consideration of introducing fact-based pleading to assure better court

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6. FED. R. CIV. P. 1.

7. 550 U.S. 544 (2007).

8. 129 S. Ct. 1937 (2009).

access for all litigants. Real world experience with existing pleading standards, however, tells another story altogether.

*A. The Difficulty of Narrowing Issues in a Notice Pleading Regime*

According to the standard narrative, the Federal Rules' approach to narrowing issues through discovery and summary judgment rather than through pleadings was welcomed both before and after the Supreme Court affirmed the process in the 1957 case of *Conley v. Gibson*.<sup>9</sup> In fact the story is much more complicated. From almost the very outset of the Federal Rules regime in 1938, the removal of the issue-narrowing function from the pleading stage was met with skepticism and concern by many in the judiciary and the bar. And far from settling the issue, the *Conley* case simultaneously exacerbated confusion about what should be expected of pleadings and generated anxiety that truly meritless cases would wreak havoc before they could be removed from the system. For more than half a century after *Conley*, judges and lawyers struggled to develop effective ways to focus issues after the pleading stage. The Supreme Court's recent decisions in *Twombly* and *Iqbal* represent only the latest efforts to compensate for the loss of pleadings' pre-1938 role in narrowing issues.

Initially, lawyers seemed to be on board with the approach taken by the Federal Rules. One practicing attorney, writing a year into the new rules, rather idyllically announced that in contrast to detailed pleadings that had evolved under the previous code system,<sup>10</sup> there was a "better way" to get information from an opposing party: "All you need [to] do is to send around a series of relevant questions to your opponent for him to answer, and he is expected to answer to the extent that the answers are not privileged."<sup>11</sup> The Supreme Court agreed, noting in 1947 that "[t]he various instruments of discovery now serve . . . to narrow and clarify the basic issues between the parties."<sup>12</sup> One much later commentator re-

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9. 355 U.S. 41 (1957).

10. Code pleading was introduced in the mid-nineteenth century as a simplified and less technical approach to the common law pleading that had been in use for centuries. Under the most celebrated code, developed by David Dudley Field and first adopted in New York in 1848, the plaintiff had to plead facts sufficient to constitute a cause of action "in ordinary and concise language without repetition." See 1848 N.Y. LAWS, ch. 379, §§ 120(2), 128(2), 131; see also Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 933–34 (1987). Over time, however, code pleading ossified, and the precise form of acceptable pleadings became confused. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437 (1986); Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1326–1334 (1942) (explaining the technical differences between those facts that were required to be pleaded and those that were impermissible). One commentator has noted that the intent of the framers of the Federal Rules was "in large part to restore" the original objectives of code pleading. See Fleming James, Jr., *The Objective and Function of the Complaint: Common Law—Codes—Federal Rules*, 14 VAND. L. REV. 899, 918 (1961).

11. Elmo Hunter, *One Year of Our Federal Rules*, 5 MO. L. REV. 1, 8 (1940).

12. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

marked that the new system had a “splendid simplicity”<sup>13</sup>—claims could not be frustrated at the outset by technicalities, and the discovery and summary judgment processes would sift out claims for which the law was clear and the facts undisputed, leaving only real, material disputes for trial.<sup>14</sup>

Despite this general optimistic tone, however, many still struggled with the transfer of the issue-narrowing function from pleadings to discovery and summary judgment. Judge James Alger Fee, writing only ten years after the rules were promulgated, was forced to conclude that:

[I]t is still not clear that the pleadings therein authorized, including not only complaint and answer but also all motions, affidavits and depositions, advise the court, lawyers and parties prior to trial what questions are to be decided. If this be true, the ultimate objective of all proceedings before trial is lost.<sup>15</sup>

The former Chair of the Illinois Committee on Civil Practice and Procedure was even less charitable, decrying in 1951 the “weasel wording” of Rule 8 and advocating that pleadings “disclose the elements of the claim or defense in sufficient detail to inform the opposing party of the nature of the case which he is called upon to meet.”<sup>16</sup>

These voices were not alone. During the 1950s, entire courts attempted to graft tighter pleading standards onto Rule 8 in order to restore their traditional issue-narrowing function. In 1952, the Ninth Circuit Judicial Conference adopted a resolution suggesting that Rule 8(a)(2) be amended to require a pleading to “contain the facts constituting a cause of action.”<sup>17</sup> In doing so, the court expressed its skepticism about the ability of discovery alone to narrow the issues effectively before trial:

Evils flowing from this uncertainty as to the issues may be briefly summarized: . . . If counsel do not know what *all* the issues will be, counsel by discovery process (interrogatories, depositions, inspection of documents, requests for admissions) cannot protect against surprise or inadequate preparation save by greatly expanding all discovery to meet all possible issues. As remarked by Judge Fee: “There is always the peril of an undisclosed issue, which may not arise until trial. It is true the discovery procedures help, but, unless the adver-

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13. Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554 (2002).

14. *Id.*

15. James Alger Fee, *The Lost Horizon in Pleading Under the Federal Rules of Civil Procedure*, 48 COLUM. L. REV. 491, 491 (1948).

16. Edward W. Cleary, *The Uses of Pleading*, 40 KY. L.J. 46, 56 & n.18 (1951).

17. Judicial Conference of the Judges of the Ninth Circuit, *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule (8)(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 253 (1952).

sary's case is known at the outset, *there is difficulty in discovering about what to inquire.*"<sup>18</sup>

The same sentiment was brewing among several judges in the Southern District of New York, who began a push to require greater specificity in antitrust complaints.<sup>19</sup> Judge Archie Dawson, for example, dismissed such an action in 1956, arguing that:

If a complaint contains nothing more than general allegations that defendants have violated various provisions of the anti-trust laws combined with a prayer for relief, such a pleading . . . "becomes a springboard from which the parties dive off into an almost bottomless sea of interrogatories, depositions, and pre-trial proceedings on collateral issues, most of which may have little relationship to the true issue in the case."<sup>20</sup>

These reactions did not sit well with Charles Clark, the chief architect of the Federal Rules. In 1957, Clark—by then a judge on the Second Circuit Court of Appeals—authored an opinion designed to put an end to the Southern District's rebellion. In *Nagler v. Admiral Corp.*,<sup>21</sup> Clark rejected the notion of special pleading standards for antitrust cases, arguing that "the federal rules contain no special exceptions" for certain types of cases.<sup>22</sup> But the *Nagler* decision did little to quell dissent. At a presentation in August 1958, Judge Dawson again blasted the broad pleading standard of Rule 8(a), asserting that the "filing of a complaint in federal court is, in effect, a license to the plaintiff to subject the defendant to the expense and difficulties of extensive discovery proceedings."<sup>23</sup> Judge Dawson pointed specifically to the 1951 Prettyman Report on complex cases, in which the Judicial Conference concluded that unnecessary delay, volume and expense in such cases were attributable in part to the fact that "the complaint and answer cannot in most [such] cases . . . be relied upon as a means of framing the issues with sufficient definiteness."<sup>24</sup> The judge bemoaned, "at both the bar and bench, there is considerable perplexity as to the proper procedure for securing a definition of issues in this type of case."<sup>25</sup>

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18. *Id.* at 255 (quoting Fee, *supra* note 15, at 495).

19. Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 924 (1976).

20. *Baim & Blank, Inc. v. Warren-Connelly Co.*, 19 F.R.D. 108, 109–10 (S.D.N.Y. 1956) (quoting *New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corp.*, 16 F.R.D. 203, 206 (S.D.N.Y. 1954)); *see also* *United Grocers' Co. v. Sau-Sea Foods, Inc.*, 150 F. Supp. 267 (S.D.N.Y. 1957); *Dublin Distribs., Inc. v. Edward & John Burke, Ltd.*, 109 F. Supp. 125 (S.D.N.Y. 1952).

21. 248 F.2d 319 (2d Cir. 1957).

22. *Id.* at 323.

23. Hon. Archie O. Dawson, *The Place of the Pleading in a Proper Definition of the Issues in the "Big Case,"* in PROCEEDINGS OF THE SEMINAR ON PROTRACTED CASES FOR UNITED STATES JUDGES, 23 F.R.D. 319, 431 (1958).

24. Hon. Leon R. Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41, 66 (1951).

25. Dawson, *supra* note 23, at 432.



It was in the midst of this debate that the Supreme Court decided *Conley v. Gibson*,<sup>26</sup> a case that cemented broad “notice” pleading as an acceptable approach in the federal courts for the next half-century.<sup>27</sup> In *Conley*, African-American railway workers in Texas brought suit against their labor union, alleging that the union had failed in its duty as their bargaining agent to protect them against workplace discrimination.<sup>28</sup> The union moved to dismiss the complaint on several grounds, including lack of jurisdiction and failure to state a claim upon which relief could be granted.<sup>29</sup> The district court dismissed for lack of jurisdiction, and the Fifth Circuit affirmed.<sup>30</sup> In a short opinion, the Supreme Court reversed, holding first that jurisdiction was proper and then turning its attention to the sufficiency of plaintiffs’ allegations.<sup>31</sup> The Court found the allegations sufficient under a broad reading of Rule 8, holding that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>32</sup>

On its face, *Conley*’s “no set of facts” standard did not appear to require the recitation of any facts at the pleading stage; it would be enough that plaintiff could prove *some* set of facts prior to summary judgment or trial that would support his claim.<sup>33</sup> But such a standard creates an impossibly circular relationship between pleadings and discovery. The scope of discovery is determined by the pleadings; parties may obtain non-privileged material “that is relevant to any party’s claim or defense.”<sup>34</sup> “If a claimant can proceed to discovery without any legally relevant allegations at all . . . the pleading sets no standard” whatsoever for what constitutes relevant discovery.<sup>35</sup> Accordingly, under *Conley*, “an opposing party and the court can ascertain the limits on what is being sought in discovery only by ascertaining what is being sought in discovery.”<sup>36</sup>

The problems associated with mere “notice” pleading are not confined to the plaintiff’s submissions. Unfortunately, answers and counterclaims are equally unhelpful at narrowing disputed issues. In two recent

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26. 355 U.S. 41 (1957).

27. *Id.* at 47–48.

28. *Id.* at 42–43.

29. *Id.* at 43.

30. *Id.* at 43–44.

31. *Id.* at 44.

32. *Id.* at 45–46.

33. Put another way, dismissal under Rules 12(b)(6) would be proper only if discovery would be moot from the outset, because no conceivable set of facts obtained through discovery could create a viable claim. *Id.* at 47. One commentator has referred to this standard as a “loosey-goosey rule.” Charles B. Campbell, *A “Plausible” Showing After Bell Atl. Corp. v. Twombly*, 9 NEV. L.J. 1, 1 (2008).

34. FED. R. CIV. P. 26(b)(1).

35. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998).

36. *Id.*

surveys of litigators, only about one-fifth of respondents agreed with the assertion, “In notice pleading, the answer to a complaint shapes and narrows the issues.”<sup>37</sup> In a third survey conducted by the Federal Judicial Center, less than fifteen percent of plaintiffs’ lawyers and less than ten percent of defense lawyers indicated their belief that by the time the answer was filed, “disputed issues central to the case were adequately narrowed and framed for resolution.”<sup>38</sup>

With issues remaining unfocused after the submission of pleadings by both plaintiffs and defendants, the impact on cost and delay in the pretrial process has been manifest. With the potential scope of discovery so wide open, neither discovery nor summary judgment has proven capable of handling the issue-narrowing task efficiently and the costs effectively in every case. Instead, discovery today can be a brutally expensive enterprise, exacerbated by advances in technology and transportation. In the 1930s, the sum total of discovery in a federal case might have amounted to a few interrogatory responses, a file folder (or perhaps a bankers’ box) of documents, and one or two local depositions. There were no word processors, cell phones, e-mail accounts, voice messages, or computers.<sup>39</sup> Even if they had wanted to, parties could not have sought out much information; there simply was not that much available, and it was difficult to track down. By contrast, today ninety-nine percent of information generated is electronic,<sup>40</sup> and most of it is stored in a way that makes it accessible to those who truly demand it. Law firms have grown to a national scale,<sup>41</sup> and depositions are taken anywhere in the world. For many lawyers and potential parties, an astonishing amount of information is technically available, but the cost of completing discovery and moving to summary judgment or trial is simply prohibitive. Far from actually narrowing issues, the discovery process may prevent parties from ever getting to the facts that lie at the heart of their dispute.<sup>42</sup>

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37. ACTL/IAALS, INTERIM REPORT, *supra* note 4, at A-3 (noting that only twenty-one percent of respondents were in agreement); AM. BAR ASS’N, ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT 50 & tbl.4.1 (2009) <http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf> (finding less than twenty-two percent of respondents in agreement).

38. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY 47 fig.22 (2009), [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).

39. Richard Marcus provides a good litany of technological advances that are taken for granted today but were unimaginable in the 1930s—including perhaps most importantly the photocopier. See Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 *FORDHAM L. REV.* 1, 4 (2004).

40. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 5 (2008), <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf>.

41. See Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 *IOWA L. REV.* 873, 896–97 (2009).

42. See ACTL/IAALS, INTERIM REPORT, *supra* note 4, at A-1, A-6 (noting that in a survey of over 1,500 experienced plaintiff and defense counsel, eighty-one percent reported that their firms turn away cases when it is not cost-effective to handle them).

And this is when the discovery rules are followed. Abuses of the discovery process are well-documented, at least anecdotally. Excessive requests,<sup>43</sup> refusal to respond to legitimate requests,<sup>44</sup> overproduction of irrelevant documents,<sup>45</sup> unnecessary depositions,<sup>46</sup> “Rambo” tactics,<sup>47</sup> and the like have all been identified as factors that may contribute to additional cost and delay in the pretrial process.<sup>48</sup> As one court pithily noted, “The federal rules envision that discovery will be conducted by skilled gentlemen of the bar, without wrangling and without the intervention of the court. The vision is an unreal dream.”<sup>49</sup> The consequence is that much time, money and energy is expended in many cases without adequate narrowing of issues.

Since the mid-1970s, rulemakers have focused on runaway discovery, but usually without explicitly acknowledging its connection to loose pleading standards.<sup>50</sup> A frenzy of discovery rules were promulgated between 1980 and 2000, each designed to address the problems of expense and abuse: over two decades, lawyers and judges were introduced to mandatory pretrial conferences,<sup>51</sup> proportionality limitations,<sup>52</sup> presumptive limits on interrogatories<sup>53</sup> and depositions,<sup>54</sup> sanctions,<sup>55</sup> and initial disclosures.<sup>56</sup> Yet complaints about the discovery process are as perva-

43. See, e.g., *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 358 (D. Md. 2008) (explaining that “one of the most prevalent of all discovery abuses [is] kneejerk discovery requests served without consideration of cost or burden to the responding party”).

44. See, e.g., *Exact Software N. Am., Inc. v. Infocon, Inc.*, 479 F. Supp. 2d 702, 703 (N.D. Ohio 2006).

45. W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 61 (1999).

46. David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 371, 407 (2000).

47. Eugene A. Cook et al., *A Guide to the Texas Lawyer’s Creed: A Mandate for Professionalism*, 10 REV. LITIG. 673, 675 (1991) (describing “Rambo” litigators as those who practice “unprofessional courtroom conduct” that “drive[s] the price of competent legal assistance beyond the means of middle America”).

48. E.g., Lisa J. Trembly, *Mandatory Disclosure: A Historical Review of the Adoption of Rule 26 and an Examination of the Events that Have Transpired Since Its Adoption*, 21 SETON HALL LEGIS. J. 425, 430 (1997) (“Discovery is sometimes used as a weapon against the opposing party to discourage the adversary from pursuing his claim, to exhaust him financially, or to force him into a settlement.”).

49. *Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc.*, 54 F.R.D. 551, 553 (S.D.N.Y. 1972).

50. One notable exception is the rule governing the scope of discovery. Several prominent attorneys’ groups pushed rulemakers to narrow discovery’s scope to that which is relevant to the claims or issues presented by the pleadings. See Section of Litig. Am. Bar Ass’n, *Second Report of the Special Committee For the Study of Discovery Abuse*, 92 F.R.D. 137, app. at 158 (1980); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 557–58 (2001) (discussing a proposal by the American College of Trial Lawyers). Twenty-three years after the ABA’s initial proposal in 1977, rulemakers changed the scope to allow discovery “that is relevant to any party’s claim or defense.” FED. R. CIV. P. 26(b)(1).

51. FED. R. CIV. P. 16(a), 26(f).

52. *Id.* 26(b)(2)(C)(iii).

53. *Id.* 33(a)(1).

54. *Id.* 30.

55. *Id.* 37(b).

56. *Id.* 26(a)(1).

sive as ever.<sup>57</sup> Discovery is simply not equipped to narrow issues efficiently in many cases, especially when the pleadings fail to provide a meaningful foundation to frame the issues in dispute.

Summary judgment, too, was originally extolled by the rule framers as an efficient tool for narrowing claims prior to trial. Judge Clark expressed his view that the summary judgment procedure was “an important and necessary part of the series of devices designed for the swift uncovering of the merits and either their effective immediate disposition or their advancement toward prompt resolution by trial.”<sup>58</sup> In twenty-first century litigation, however, summary judgment is not a particularly efficient or cost-effective way to separate the strong claims from the weak.<sup>59</sup>

First, as noted above, the process of collecting sufficient information through discovery to ascertain the strength of a claim can be very expensive—sometimes prohibitively so. The additional cost (in time and money) of preparing a summary judgment motion may also factor into a party’s calculations about how far to extend litigation. Furthermore, even if the relevant information could be gathered, sorted, and presented to the judge without transaction costs, there is no guarantee that a judge’s ruling will sufficiently narrow and clarify the remaining issues.<sup>60</sup>

Summary judgment also comes too late in the pretrial process to be an effective mechanism to narrow issues in many cases. In a recent study of nearly 7,700 federal civil cases in eight federal courts, the mean time to rule on a summary judgment motion after it was filed was more than five months.<sup>61</sup> For complex cases—the cases most in need of issue-narrowing—the mean time to rule on summary judgment was even longer: 273 days in antitrust cases, 234 days in environmental cases, 222 days in securities cases, and 206 days in trademark cases.<sup>62</sup> When the three to six months that typically elapse before the start of discovery and the six to nine months of actual discovery are tacked onto this time, an ordinary litigant in a complex case faces eighteen to twenty-four months in litigation before summary judgment is decided. This reality hardly

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57. See, e.g., ACTL/IAALS, INTERIM REPORT, *supra* note 4, at A-4 (finding that less than forty-four percent of respondents thought current discovery mechanisms work well, and only thirty-four percent of respondents thought that the cumulative effect of changes to the discovery rules since 1976 has significantly reduced discovery abuse).

58. Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 579 (1952).

59. See E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 320 (1986) (noting that “in general the combination of discovery and summary judgment has proved inadequate to narrow the issues in litigation prior to trial.”); Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 992 (1998).

60. Indeed, there is not even the guarantee that all judges will apply the “reasonable jury” standard for dismissal of claims on summary judgment in the same manner. Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760 (2009).

61. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 51 tbl.11 (2009), <http://www.du.edu/legalinstitute/pubs/PACER%20FINAL%201-21-09.pdf>.

62. *Id.* at app. D.

comports with the “swift uncovering of . . . merits” and immediate disposition or advancement that Judge Clark had hoped summary judgment would provide.<sup>63</sup>

As it became increasingly clear that discovery and summary judgment could not perform the issue-narrowing function that the framers of the Federal Rules had intended—at least, not without significant transaction costs—judicial pretrial management emerged as the strongest alternative. The original version of Rule 16 allowed the court to hold a more or less informal conference at the close of pleadings in order to set out a pretrial memorandum to govern the future course of action.<sup>64</sup> With the 1983 amendments to Rules 16 and 26, however, judges were given expanded discretion to restrict discovery and otherwise curtail lines of inquiry previously open to the parties.<sup>65</sup> But case management has also been critiqued as a suboptimal means of cutting away matters not central to the dispute. Unlike motions to dismiss and motions for summary judgment, whose results (and concomitant effect on narrowing the issues on the case) ostensibly are tied to the merits of the claims, judicial management is by definition discretionary and effectively unappealable.<sup>66</sup> Moreover, even the most well-meaning judge faces a host of obstacles when exercising his or her discretion, including imperfect information, cognitive bias resulting from the use of heuristics to quickly process complex information, and the judge’s own (often unintended) role as a strategic player in the litigation.<sup>67</sup>

We do not mean to suggest that discovery, summary judgment, and judicial management are not worthwhile pretrial tools; quite the opposite. As compared to pleadings, however, they are simply overmatched in the task of focusing the issues in dispute. Discovery is a costly way to extract information, even when it works as intended. Summary judgment relies on efficient discovery to itself be efficient, and judicial management is most effective if the judge has a firm grasp of the salient issues in the case from the outset. Fact-based pleading would not supplant these tools, but would augment their collective capacity to move cases toward resolution more efficiently.

The tension between broad notice pleading on the one hand and the inability of discovery, summary judgment, and judicial management alone to narrow issues adequately on the other has been evident in a

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63. Clark, *supra* note 58, at 579.

64. FED. R. CIV. P. 16 (1938 adoption), *reprinted in* 3 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 16 app. 01 (3d ed. 2009); Simpson, *supra* note 2, at 193.

65. FED. R. CIV. P. 16(a), 26(b)(2)(C); ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 34–36 (1984).

66. See Elliott, *supra* note 59, at 317.

67. See Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1986–2002 (2007).

number of lower court cases issued in the five decades following the *Conley* decision. The tone of each case is very similar: *We recognize what the Court said in Conley about “no set of facts,” but . . .* This was most clearly demonstrated in the Seventh Circuit’s 1984 decision in *Car Carriers, Inc. v. Ford Motor Co.*<sup>68</sup> The plaintiffs in *Car Carriers* alleged, among other things, that Ford violated section 1 of the Sherman Antitrust Act by conspiring to deny plaintiffs adequate published tariff rates for their services, thereby making plaintiffs’ businesses unprofitable.<sup>69</sup> Nowhere in the complaint, however, did plaintiffs allege—directly or inferentially—the requisite element of anticompetitive effect.<sup>70</sup> In upholding the district court’s dismissal of the claim, the Seventh Circuit expressly acknowledged the “no set of facts” standard, but went on to conclude that “*Conley* has never been interpreted literally. In practice, ‘a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory.’”<sup>71</sup> The Court then expounded upon its concern that time-consuming and expensive discovery should not be granted in cases that were hopeless from the start: “When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.”<sup>72</sup>

The primary message of *Car Carriers* was clear: discovery cannot possibly serve an issue-narrowing function if the parties cannot state, even very broadly, what the factual and legal issues are at the pleading stage. Other circuits wrestling with *Conley* reached the same conclusion. In *O’Brien v. DiGrazia*,<sup>73</sup> the First Circuit upheld the district court’s dismissal of a civil rights suit brought by police officers who refused to supply their personal financial information to their employer, alleging that the request violated their “right to privacy.”<sup>74</sup> Seeing no allegations that the plaintiffs’ financial affairs would be broadcast to the public, or even to other government agencies, the court concluded that *Conley* does not impose “a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional official action into a substantial one.”<sup>75</sup> Similarly, and based in part on the reasoning in *O’Brien*, the Sixth Circuit upheld the dismissal of a CERCLA claim in which plain-

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68. 745 F.2d 1101 (7th Cir. 1984).

69. *Id.* at 1104–05.

70. *See id.* at 1109–10.

71. *Id.* at 1106 (alteration in original) (citation omitted) (quoting *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984)).

72. *Id.*

73. 544 F.2d 543 (1st Cir. 1976).

74. *Id.* at 545–47.

75. *Id.* at 546 n.3.

tiffs had failed to allege in their complaints that they incurred “response costs” as required by the statute.<sup>76</sup>

Even the Supreme Court appeared conflicted about how far it really meant to go in *Conley*. On more than one occasion, the Court acknowledged that the pleading of some specific facts would indeed be warranted in some cases, particularly where the parties and the court otherwise anticipated unfettered and cumbersome discovery. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*,<sup>77</sup> for example, the Court held that “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”<sup>78</sup> The clear tension in the Court’s pleadings jurisprudence did not escape the attention of lower courts; the Ninth Circuit has referred to the Supreme Court’s subsequent steps away from *Conley* as “unfortunately . . . conflicting guideposts.”<sup>79</sup>

This tension finally found (some) resolution in 2007, when the Supreme Court directly addressed the ramifications of the *Conley* rule in *Twombly*, another antitrust action.<sup>80</sup> The plaintiffs in *Twombly* brought a putative consumer class action against regional phone monopolies—known as “Incumbent Local Exchange Carriers” (“ILECs”), or more colloquially, the “Baby Bells”—alleging a conspiracy in violation of the Sherman Act to prevent upstart competitors from entering local telephone and Internet service markets and to avoid competing with each other in their respective markets.<sup>81</sup> Specifically, the complaint alleged that: (1) the ILECs “engaged in parallel conduct in their respective service areas to inhibit the growth of [new competitors]”; and (2) the ILECs refrained from competing with each other in their respective markets despite “attractive business opportunities” to do so.<sup>82</sup> Ultimately, the complaint alleged that:

In the absence of any meaningful competition between the [ILECs] in one another’s markets, and in light of the parallel course of conduct that each engaged in to prevent competition . . . within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a

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76. *McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39, 43 (6th Cir. 1988).

77. 459 U.S. 519 (1983).

78. *Id.* at 528 n.17; *see also, e.g.*, *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (“We concede that ordinary pleading rules are not meant to impose a great burden upon a plaintiff. But it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind. At the same time, allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would bring about harm of the very sort the statutes seek to avoid.” (citation omitted)).

79. *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989).

80. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

81. *Id.* at 550.

82. *Id.* at 550–51 (internal quotation marks omitted).

contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.<sup>83</sup>

The district court dismissed the complaint, concluding that the allegations at most revealed knowing parallel business conduct, which did not in itself violate section 1 of the Sherman Act.<sup>84</sup> The district court explained that “conscious parallelism” was not enough to form a conspiracy; read alone, the pleaded facts could be explained equally well as “independent self-interested conduct.”<sup>85</sup> Relying in part on *Conley*, the Second Circuit reversed, holding that “to rule that allegations of parallel anti-competitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”<sup>86</sup>

The Supreme Court reversed the Second Circuit, holding that pleading a section 1 claim “requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.”<sup>87</sup> In so holding, the Court noted the growing criticism and confusion over *Conley*’s “no set of facts” standard, and concluded that “after puzzling the profession for 50 years, this famous observation has earned its retirement.”<sup>88</sup> The Court further explained that “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>89</sup>

The reversal of *Conley*’s “no set of facts” standard did not occur in a vacuum. Rather, *Twombly* demonstrated the Court’s familiarity with other courts’ struggles to apply *Conley* in the antitrust context, and acknowledged that it was troubled by the potential cost to litigate a case in which the issues were undetermined and perhaps undeterminable.<sup>90</sup> Noting the “costs of modern federal antitrust litigation,”<sup>91</sup> the Court explicitly rejected both “careful case management” and “careful scrutiny of evidence at the summary judgment stage” as stand-alone methods to pre-

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83. *Id.* at 551 (first and third alterations in original) (internal quotation marks omitted).

84. *Id.* at 544–45.

85. *Id.* at 552.

86. *Id.* at 553 (internal quotation marks omitted) (quoting *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2005)).

87. *Id.* at 556.

88. *Id.* at 562–63.

89. *Id.* at 556.

90. 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, 1231 (2008) (calling “the problem of costly discovery” the “first and most patent policy justification” for the Court’s approach in *Twombly*).

91. *Twombly*, 550 U.S. at 558 (internal quotation marks omitted) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).



vent cost-conscious defendants from settling “even anemic cases” before reaching the dispositive motion stage.<sup>92</sup> The majority concluded that only narrowing the issues at the pleading stage could prevent extraordinary costs or settlement of non-meritorious suits:

Probably, then, it 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.<sup>93</sup>

The “plausibility” standard set forth in *Twombly* was reiterated in the Supreme Court’s decision in *Ashcroft v. Iqbal*<sup>94</sup> two years later. While the context was very different, once again the Court seemed motivated in large part by issue-narrowing considerations. The plaintiff in *Iqbal* was a Pakistani Muslim who had been arrested on criminal charges and detained by federal officials in the wake of the September 11, 2001 attacks.<sup>95</sup> Iqbal filed a complaint against more than 50 known and unknown federal officials and corrections officers, alleging unconstitutional treatment while he was detained in a maximum security facility.<sup>96</sup> Among the named defendants were then-Attorney General John Ashcroft and then-FBI Director Robert Mueller, whom the plaintiff alleged approved a policy of holding post-September 11 detainees in highly restrictive conditions of confinement until they were cleared by the FBI.<sup>97</sup> The complaint further alleged that “knew of, condoned, and willfully and maliciously agreed to subject” Iqbal to allegedly harsh conditions “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”<sup>98</sup>

Ashcroft and Mueller moved to dismiss for failure to state sufficient allegations to show their involvement in clearly established unconstitutional conduct.<sup>99</sup> The district court denied the motion, and that decision was upheld by the Second Circuit on interlocutory appeal.<sup>100</sup> The Supreme Court disagreed, relying explicitly on its holding in *Twombly* (and thereby putting to rest any belief that *Twombly* might be limited to its facts).<sup>101</sup> Once again, the majority expressly rejected the notion that “careful case management” would be a sufficient prophylactic to protect

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92. *Id.* at 559.

93. *Id.* (alteration in original) (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

94. 129 S. Ct. 1937, 1940 (2009).

95. *Id.* at 1942.

96. *Id.* at 1943–44.

97. *Id.* at 1944.

98. *Id.* (alteration in original) (internal quotation marks omitted).

99. *Id.*

100. *See id.*

101. *See id.* at 1950–51, 1953.

the named defendants from the temporal and monetary costs of discovery:

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.

Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including “avoidance of disruptive discovery.” . . . Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of Government. . . .

It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.<sup>102</sup>

In *Twombly* the motivating concern was the potential expense of discovery in antitrust cases (echoing the admonitions of the Prettyman report, Judge Dawson, and the Seventh Circuit in *Car Carriers*),<sup>103</sup> while in *Iqbal* the concern was the potential drain on human resources within the federal government.<sup>104</sup> In both cases, however, the underlying apprehension was the same: discovery and judicial case management could not meaningfully and efficiently focus the claims suggested by the complaint.<sup>105</sup> Nothing, in other words, could adequately perform the issue-narrowing function.

The holdings of *Twombly* and *Iqbal* have caused a sensation among some members of the bar and the academy. Some see them as setting forth an uncertain, confusing, or radical change in the pleading standard.<sup>106</sup> Others have argued that *Twombly* and *Iqbal* represent only a

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102. *Id.* at 1953 (citations omitted).

103. *See supra* notes 24, 72, 90 and accompanying text.

104. *See Iqbal*, 129 S. Ct. at 1953.

105. *See generally* 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>.

106. *See, e.g.*, Edward D. Cavanagh, *Twombly*, *The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 889 (2008) (noting the “uncertainty of the *Twombly* holding”); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 5 (2009) (discussing the “broad and confusing pronouncements of *Twombly*”); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 432 (2008) (describing *Twombly* as “a remarkable departure from estab-

modest tweak of the pleading standard, a mere clarification that is entirely consistent with previous understandings of Rule 8.<sup>107</sup> From our perspective, the degree of departure from prior caselaw—and even whether the “plausibility” standard is the right one—is less important than the unmistakable message of both cases that the issue-narrowing function of current pretrial procedure is broken. The Court’s announcement of a “plausibility” standard for pleadings was an overt admission that the long-held assumption that discovery could compensate for the loss of issue-narrowing at the pleadings stage is simply not true for at least some types of cases. Requiring some degree of fact-based pleading in support of a party’s claim or defense is merely a nod to the reality—anticipated by several lower courts and at least twice by the Supreme Court itself<sup>108</sup>—that allowing discovery to proceed without a reasonable sense of direction is simply irresponsible.

### *B. Courthouse Access and the Pleading of Facts*

The second myth about pleading and access suggests that requiring parties to plead material facts slams the door of the courthouse to meritorious claims. Such pleading requirements, the argument goes, effectively create a heightened standard designed to prevent cases—particularly cases alleging civil rights violations by government officials—from going forward. But while access to the court for all meritorious claims is a critical consideration, there is no reason to believe that merely requiring the recitation of material facts at the pleading stage will prevent valid cases from being filed or will lead to greater rates of dismissals. Indeed, there is a competing argument that allowing issues to be narrowed earlier in the litigation would streamline the litigation process, reduce cost, and thereby allow a *greater* number of meritorious claims to be filed.

There is no particular inconsistency between the pleading of facts and initial access to the courts. In fact, the framers of Rule 8 anticipated that the parties *would* include salient facts in their pleadings. George Donworth, an original Advisory Committee member, stressed that “the requirement as to what a pleading shall contain does not by any means imply that the facts are not to be stated.”<sup>109</sup> Charles Clark, too, observed that “you would have to have at least some allegations of fact” in a pleading under Rule 8.<sup>110</sup> Indeed, the decision not to include the word

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lished doctrine”); Andrée Sophia Blumstein, *Twombly Gets Iqbal-ed*, TENN. B.J., July 2009, at 23, 23.

107. See, e.g., Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 932 n.185 (2009) (arguing that *Twombly* is likely not “a major change to general standards of dismissal motions”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010) (manuscript at 49–51), available at <http://ssrn.com/abstract=1442786>.

108. See *supra* text accompanying note 68.

109. Campbell, *supra* note 33, at 14.

110. *Id.*

“facts” in Rule 8 seems to have been a matter of expediency rather than rigorous opposition to a fact-based pleading regime.<sup>111</sup>

Subsequent amendments to the Federal Rules strengthen the notion that in most cases, the material facts necessary to support claims are known or knowable before a claim is ever filed. Rule 11(b) requires a party to have factual and legal support for the allegations in his or her pleadings,<sup>112</sup> and Rule 26(a)(1) authorizes initial disclosures in part because the parties are expected to have available baseline facts necessary to narrow issues from the outset of litigation.<sup>113</sup>

Those who oppose fact-based pleading tend to respond that requiring the parties to recite facts at the pleading stage will provide judges looking for an easy way to shrink their dockets with an excuse to dismiss cases. They point in particular to “heightened pleading” standards that impose additional constraints on plaintiffs alleging employment discrimination or other civil rights violations.<sup>114</sup> In the past, some lower courts have indeed justified such “heightened pleading” standards as necessary to limit “frivolous” cases,<sup>115</sup> but the Supreme Court has made clear that such standards are impermissible. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>116</sup> for example, the Court struck down a Fifth Circuit requirement that in civil rights claims against government officials involving the likely defense of immunity,<sup>117</sup> the plaintiff’s complaint must state “with factual detail and particularity the basis for the claim which necessarily includes why the defendant-

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111. Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 12 (1938).

112. FED. R. CIV. P. 11(b).

113. See Steven S. Gensler, *Some Thoughts on the Lawyer’s E-evolving Duties in Discovery*, 36 N. KY. L. REV. 521, 530–31 (2009).

114. See, e.g., Nancy J. Bladich, *The Revitalization of Notice Pleading in Civil Rights Cases*, 45 MERCER L. REV. 839, 851 (1994); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003); Fairman, *supra* note 13, at 551–52; Paul J. McArdle, *A Short and Plain Statement: The Significance of Leatherman v. Tarrant County*, 72 U. DET. MERCY L. REV. 19, 33–34 (1994).

115. The courts have been candid that docket control was the primary motivation for heightened pleading standards in civil rights cases. See, e.g., *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976) (“In recent years there has been an increasingly large volume of cases brought under the Civil Rights Acts. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants[,] public officials, policemen and citizens alike, considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.” (internal quotation marks omitted) (quoting *Valley v. Maule*, 297 F. Supp. 958, 960–61 (D. Conn 1968))); Fairman, *supra* note 13, at 577–82 (collecting similar cases). The same motivation was at least partially behind the passage of the Private Securities Litigation Reform Act of 1995. Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 914 (2003) (“The Reform Act was designed to address a number of perceived abuses in these cases. In large part, its solution was to create a series of procedural hurdles that make it more difficult for plaintiffs’ attorneys to bring and maintain nonmeritorious securities fraud class actions.”).

116. 507 U.S. 163 (1993).

117. See *id.* at 168–69.

official cannot successfully maintain the defense of immunity.”<sup>118</sup> In so holding, the Court noted that it was “impossible to square” the Fifth Circuit’s rule with “the liberal system of ‘notice pleading’ set up by the Federal Rules.”<sup>119</sup> More recently, in *Swierkiewicz v. Sorema N.A.*,<sup>120</sup> the Court rejected the Second Circuit’s imposition of a heightened pleading standard for employment discrimination cases brought under Title VII and the Age Discrimination in Employment Act (“ADEA”).<sup>121</sup> Again the Court reiterated that a heightened pleading requirement conflicted with the “simplified pleading standard” of Rule 8(a).<sup>122</sup>

It would be a mistake, however, to conflate “heightened pleading” designed to remove certain types of cases from court dockets with fact-based pleading designed explicitly to deliver earlier narrowing of issues for both parties. The former is motivated by a desire for gatekeeping; it is designed to limit access to the civil justice system from the outset. “Heightened pleading” also potentially hinders access by sometimes requiring very particular facts to be pled in order to overcome an anticipated affirmative defense (such as the immunity defense in *Leatherman*).<sup>123</sup> General fact-based pleading, by contrast, is not about docket control. It views access to the courts as a question that extends throughout the life of the case, from the initial filing of the complaint to the final disposition of the matter. The claimant’s true access to the court system requires that valid claims be permitted at the outset, and also requires that the claimant be able to follow the claim through until disposition on the merits. In other words, fact-based pleading is premised on the belief that the civil justice system should preserve economic access for meritorious claims at all phases of the case: filing, scrutiny of initial pleadings, discovery, summary judgment, and trial.<sup>124</sup>

Opponents of fact-based pleading also argue that it shuts out meritorious claims in cases—such as employment discrimination or *Bivens* actions—in which the potential defendant has exclusive possession of some or all of the key facts.<sup>125</sup> But procedural mechanisms already exist to secure access to relevant facts for such claims.<sup>126</sup> In a number of states

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118. *Id.* at 167 (internal quotation marks omitted) (quoting *Elliott v. Perez*, 751 F.2d 1472, 1473 (1985)).

119. *Id.* at 168.

120. 534 U.S. 506 (2002).

121. *Id.* at 509, 515.

122. *See id.* at 513.

123. *See, e.g., Leatherman*, 507 U.S. at 168.

124. *See* AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT 5–7 (2009), <http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Final%20Report%20Revised%204-15-09.pdf>.

125. *Cavanagh, supra* note 106, at 892; *see also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

126. For an extensive discussion of various state approaches, *see generally* Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217 (2007).

(including Pennsylvania and Connecticut, which we discuss in more detail in Part II), the courts may allow a putative plaintiff to seek limited discovery on a matter before a case is formally initiated.<sup>127</sup> As long as parties have meaningful ways to identify or confirm otherwise hidden facts, a fact-based pleading standard should not inhibit initial access to the courts.

In summary, opponents of fact-based pleading rely on two myths about pleading and access that are simply not true. The most basic form of access—merely getting into court and staying there past the pleading stage—is not necessarily hindered by the requirement to plead material facts supportive of a party’s claims or defenses. By contrast, the more extensive form of access—the ability to afford to see a case through to a judicial resolution—is plainly hindered by a system in which issues are not narrowed and focused at the pleading stage.

These lessons are evident from a review of the federal system. A comparison to state and foreign jurisdictions, however, makes the point even more powerfully. In Part II, we show how fact-based pleading has evolved into a workable standard that supports both access and issue-narrowing at the state level.

## II. FACT-BASED PLEADING OUTSIDE OF THE FEDERAL RULES

Outside of the federal system, the benefits of fact-based pleading have long been understood and are continually reaffirmed. A number of state court systems in the United States have retained their longstanding fact-based pleading requirements to motivate the early narrowing of issues, even as they adopted other aspects of federal procedure.<sup>128</sup> Similarly, many other common law countries have recently reaffirmed that the pleading of facts from the outset of a case is indeed the fastest and most cost-effective way to establish and focus the issues in dispute. A review of these jurisdictions—both domestic and foreign—suggests that fact-based pleading is beneficial, sensitive to and compatible with the need to maintain full access to the court for meritorious claims.

We focus in this Part on state and international common law jurisdictions<sup>129</sup> in which fact-based pleading is considered to be consistent

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127. See e.g., N.Y. C.P.L.R. LAW § 3102(c) (McKinney 2009); OHIO REV. CODE ANN. § 2317.48 (West 2009); PA. R. CIV. P. 4003.8.

128. John B. Oakley and Arthur F. Coon’s seminal review of state court rules of civil procedure identified 17 states that employ “some higher standard of factual specificity in pleading” than the notice pleading standard of the Federal Rules—Arkansas, Delaware, South Carolina, Florida, Maryland, Missouri, New Jersey, Oregon, Pennsylvania, Texas, Virginia, California, Connecticut, Illinois, Louisiana, Nebraska and New York. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1378 (1986). But see L.B. 876, 97th Leg., 2d Sess. (Neb. 2002) (overturning Nebraska’s fact-pleading standard in favor of the Federal Rules’ notice pleading).

129. For the purposes of a more meaningful comparison, only common law jurisdictions will be discussed; however, a number of civil law countries have been involved in civil justice review

with—and often essential to—meaningful court access. We look first to the many courts that have emphasized fact-based pleading’s ability to narrow issues efficiently. We then examine states in which special procedural tools have been developed in order to assure that the requirement to plead facts does not inhibit the filing of meritorious lawsuits.

### *A. Appreciating the Role of Pleadings in Narrowing Issues*

Several state and foreign courts have made abundantly clear that pleadings play a central role in narrowing issues, and that this role cannot be abdicated. As these courts have explained, fact-based pleading inures to the benefit not only of judges and lawyers, but the parties themselves.

#### 1. Oregon

The Oregon Rules of Civil Procedure require that pleadings contain a “plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition.”<sup>130</sup> The Oregon Supreme Court has repeatedly reaffirmed the state’s commitment to fact pleading.<sup>131</sup> In *Adams v. Oregon State Police*,<sup>132</sup> the Court addressed the sufficiency of pleading notice under Oregon Statute 30.275 and noted that the “purpose of requiring an exchange of pleadings is not to produce perfection in the statement of the issue but only to bring forth into the light the points that are in dispute.”<sup>133</sup> According to the Court, the pleadings have served this function “[w]hen those points are sufficiently revealed so that the opponent is apprised of what he must meet and the trial judge is given sufficient information so that he can rule advisedly during the progress of the trial.”<sup>134</sup> The Court reaffirmed the role of pleadings several years later in

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and reform. In the last decade, substantial reviews have been undertaken in Spain, Germany, France and the Netherlands. Furthermore, in these and most other civil law jurisdictions, parties are required to comport with pleading standards far more strict than those characteristic of common law jurisdictions; often requiring parties to plead facts and the proof on which the parties intend to rely to support these facts. PETER L. MURRAY & ROLF STRÜNER, *GERMAN CIVIL JUSTICE* 158 (2004) (citing Zivilprozessordnung [ZPO] [civil procedure statute] Jan. 30, 1877, § 139(2)). Amendment of the pleadings in many civil law jurisdictions is also strict. In Spain, for example, once the respondent files a response to a claim or counterclaim, the pleadings cannot be amended or modified. Iñigo Quintana et al., *Spain*, in *INTERNATIONAL CIVIL PROCEDURE* 677, 682 (Shelby R. Grubbs ed., 2003).

130. OR. R. CIV. P. 18(A).

131. Throughout this Part II, we refer to “fact-based pleading” to designate the general concept of introducing facts at the pleading stage in order to narrow and focus disputed issues. Most states with such requirements, however, refer to the process as “fact pleading” in deference to the form of pleading that originated with the 1848 Field Code and has been carried over to this day. Out of respect for the traditional language, we use “fact pleading” when referring to specific state statutes and rules.

132. 611 P.2d 1153 (1980).

133. *Id.* at 1157 (internal quotation marks omitted) (quoting *Perkins v. Standard Oil Co.*, 383 P.2d 107, 113 (1963)).

134. *Id.* (internal quotation marks omitted) (quoting *Perkins*, 383 P.2d at 113).

*Davis v. Tye Industries, Inc.*<sup>135</sup>—a case that some commentators believe reached the Oregon Supreme Court solely for this purpose.<sup>136</sup>

The benefits of fact pleading have also been affirmed by those who practice in Oregon courts every day. In a recent survey undertaken by the Institute for the Advancement of the American Legal System, members of the Oregon State Bar endorsed fact-based pleading by large margins. Among the findings:

- Fifty percent of respondents said fact pleading increased the efficiency of the litigation process; only seventeen percent said it decreased efficiency.<sup>137</sup>
- Fifty-five percent of respondents said that fact pleading increased counsel's ability to prepare for trial; only seven percent said it decreased that ability.<sup>138</sup>
- Thirty-nine percent of respondents said that fact pleading increased the fairness of the litigation process; only thirteen percent said it decreased fairness.<sup>139</sup>
- Sixty-four percent of respondents agreed or strongly agreed with the statement, "Fact pleading helps narrow the issues early in the case."<sup>140</sup>

Many comments to the open-ended sections of the survey also extolled the virtues of fact-based pleading. One respondent indicated a preference for Oregon state court over federal court because pleadings "actually mean something" in state court.<sup>141</sup> As one respondent noted, "Fact pleading . . . cleans up the process and makes the parties focus on what the case is really about."<sup>142</sup>

## 2. New Jersey

New Jersey courts have long recognized that, although the technical and formal requirements for pleadings have been abandoned, the requirement that parties plead facts and the primary role of pleadings in narrowing issues have not. The Supreme Court of New Jersey has held that:

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135. 668 P.2d 1186 (1983).

136. See Maurice J. Holland, *Some Contributions of Justice Peterson to Oregon's Civil Procedure*, 73 OR. L. REV. 785, 811 (1994).

137. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE OREGON BENCH AND BAR ON THE OREGON RULES OF CIVIL PROCEDURE fig.11 (2010).

138. *Id.*

139. *Id.* fig.13.

140. *Id.* fig.8.

141. *Id.* at 24.

142. *Id.*



[T]he objective of reaching an issue of law or of fact in two or at the most three simple pleadings has been attained, but not at the sacrifice of stating the elements of a claim or of a defense. They remain the same as at common law as a matter of substantive law as well as of good pleading.<sup>143</sup>

And while New Jersey's fact pleading standard—which requires “a statement of the facts on which the claim is based”<sup>144</sup>—is to be liberally construed, the New Jersey Superior Court has held that “a party's pleadings must nonetheless fairly apprise an adverse party of the claims and issues to be raised at trial.”<sup>145</sup> While New Jersey courts understand that amendment of the pleadings to conform to new evidence should be liberally permitted, this liberal practice

does not justify the pleading of mere conclusions without facts, followed by reliance upon subsequent discovery (without a frame of reference) to justify a lawsuit.

It is just inexcusable to plead merely a conclusion and thereafter attempt to justify this action by an attempt to resort to the discovery practice permitted by our rules. Such discovery is intended as an aid to every litigant to avoid surprise and make a lawsuit an inquiry into truth and justice. It is *not* (and was not intended) to be a substitute for good pleading, a shield for the lazy pleader or a means of avoiding the requirements of pleading legally sufficient *facts*. . . . Our discovery practice is no more a cure to legally deficient pleadings than aspirin is to cancer.<sup>146</sup>

### 3. Florida

The Florida Rules of Civil Procedure require “a short and plain statement of the ultimate facts showing that the pleader is entitled to relief.”<sup>147</sup> Florida courts have held that this pleading rule “forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort.”<sup>148</sup> In *Continental Banking Co. v. Vincent*,<sup>149</sup> the Fifth District Court of Appeal found “cause for concern” where the lower court's ruling on a motion to dismiss and motion for summary judgment took into consideration federal district court rulings that were made prior to the

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143. *Grobart v. Soc'y for Establishing Useful Mfrs.*, 65 A.2d 833, 839 (N.J. 1949); *see also* *Gruccio v. Baxter*, 343 A.2d 145, 147 (N.J. Super. Ct. Law Div. 1975) (discussing *Grobart*).

144. N.J. CT. R. 4:5-2.

145. *Miltz v. Borroughs-Shelving, a Div. of Lear Siegler, Inc.*, 497 A.2d 516, 519 (N.J. Super. Ct. App. Div. 1985).

146. *Grobart*, 65 A.2d at 835.

147. FLA. R. CIV. P. 1.110(b).

148. *Cont'l Banking Co. v. Vincent*, 634 So. 2d 242, 244 (Fla. Dist. Ct. App. 1994).

149. *Id.*

federal court's remand of the case to state court.<sup>150</sup> The Court noted that the

quality of pleading that is acceptable in federal court and which will routinely survive a motion to dismiss for failure to state a claim upon which relief may be granted will commonly not approach the minimum pleading threshold required in our state courts. . . . The fact that a pleading of a state law claim in a diversity case in federal court has survived a motion to dismiss says nothing about whether the claim meets the pleading standard required in our state courts.<sup>151</sup>

The practical distinction, therefore, between the fact pleading requirement in Florida state courts and notice pleading in federal court is more than illusory. In *Vincent*, had the record not indicated that the motions were considered on their merits, it appears that the Fifth District Court of Appeals would have reconsidered the lower court's ruling.<sup>152</sup>

Furthermore, while Florida courts permit parties to amend the pleadings to incorporate evidence that supports new causes of action, parties are precluded from recovering under claims where they do not plead a cause of action with sufficient particularity to narrow the issues in dispute—or attempt to later prove a cause of action not pleaded or insufficiently supported in the pleadings. To this effect, the Florida Supreme Court has held that “litigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared. Our growing, complex society and diminishing resources mandate the requirement that litigants present all claims to the extent possible, at one time, and one time only.”<sup>153</sup>

#### 4. Maryland

Despite a move in 1984 to rules that more closely resemble those of their federal counterparts, Maryland state courts also remain loyal to fact pleading.<sup>154</sup> According to *Modern Maryland Civil Procedure*, the “retention of the trappings of code or fact pleading . . . quite probably indicates an intention that the pleadings play a broader role in defining the issues

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150. *Id.*

151. *Id.*

152. *See id.*

153. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988); *see also* *Horowitz v. Laske*, 855 So. 2d 169, 172–73 (Fla. Dist. Ct. App. 2003) (reciting the language in *Arky* and *Cont'l Banking Co.* in reversing the trial court's denial of the motion to dismiss on the basis that the third-party complaint did not state a cause of action).

154. The 1984 revisions to the Maryland Rules were substantial. One of the major changes was the merger of law and equity that eliminated many of the technical requirements of common-law pleadings. Overall, the changes to the Maryland pleading rules resulted in a pleading system that “embodies the spirit of federal pleading” but retained the requirement that parties plead facts. 1-2 Md. Rules Commentary (MB) § 300 (2009); *see also* MD. RULE 2-303 (2009) (requiring in pleadings “only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense”).

... than in federal practice.”<sup>155</sup> The Maryland Court of Appeals has held as much, recognizing that notice to the parties as to the nature of the claim or defense is the paramount role of pleadings, but nonetheless pointing to three additional roles of pleadings: (1) to state the facts upon which the claim or defense allegedly exists; (2) to define the boundaries of litigation; and (3) to provide for the speedy resolution of frivolous claims and defenses.<sup>156</sup> Further—as is the case in New Jersey, Oregon, and Florida—in Maryland pleading facts provides not only notice to the parties as to the nature of the claim or defense, it also provides notice as to the precise facts that support the claim or defense, allowing parties to focus their efforts when going forward with discovery.

#### 5. The Recent Reaffirmation of Fact-Based Pleading in Other Common Law Countries

Generally speaking, the world of pleadings outside the United States is a world of fact-based pleading. Civil law jurisdictions are characterized by their strict pleading standards, often requiring parties to plead facts and the proof on which the parties intend to rely to support those facts.<sup>157</sup> Amendment of the pleadings in many civil law jurisdictions is often not allowed.<sup>158</sup> Common law jurisdictions outside of the United States, while employing a considerably more relaxed pleading standard than their civil law counterparts, nevertheless require parties to plead facts.<sup>159</sup>

In the last fifteen years, several common law countries—among them England, Canada, Australia and Hong Kong—have undertaken comprehensive reviews of their civil justice systems, driven by concerns about growing cost and delay, and a corresponding decrease in access to the court system.<sup>160</sup> As part of their review, each of these jurisdictions has taken a fresh look at the value of fact-based pleadings, and each has reaffirmed the importance of pleading facts to narrow the issues in dispute. We offer here illustrations from two common law systems most similar to that of the United States: Canada and England.

##### a. Canada

A number of Canadian provinces—each having the authority to promulgate its own rules of civil procedure—have been active in civil

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155. 1-6 Modern Md. Civil Procedure (MB) § 6.1 (2009).

156. *Scott v. Jenkins*, 690 A.2d 1000, 1003 (Md. 1997).

157. *See, e.g.*, MURRAY & STRÜNER, *supra* note 129, at 158.

158. In Spain, for example, once the respondent files a response to a claim or counterclaim, the pleadings cannot be amended or modified. Quintana et al., *supra* note 129, at 682.

159. *See, e.g.*, FED. CT. R. 11.2 (Austl.); ALTA. R. CT. 104 (Can. Alta.); ONT. R. CIV. P. 25.06(1) (Can. Ont.); CPR 16.4(1)(a) (U.K.).

160. For the purposes of a more meaningful comparison, only common law jurisdictions will be discussed; however, a number of civil law countries have been involved in civil justice review and reform. In the last decade, substantial reviews have been undertaken in Spain, Germany, France and the Netherlands.

justice reform. The Alberta Rules of Court Project commenced in 2001, with the goals of making the rules of civil procedure more clear, user-friendly, and efficient. Pleadings were one of the major topics of review and under consideration was whether Alberta's fact pleading standard<sup>161</sup> should be retained or replaced by a standard similar to that in the U.S. Federal Rules of Civil Procedure.<sup>162</sup>

The majority view that emerged from consultations with the Alberta legal community<sup>163</sup> was that detailed pleadings—the purpose of which is to “define precisely the matters in dispute in an action”<sup>164</sup>—were valuable enough to outweigh the initial costs associated with preparing, filing, and exchanging them.<sup>165</sup> The pleadings were thought to keep the parties on track, and respondents voiced concern that relaxing formal pleading requirements might increase the costs and delay associated with defining the facts and issues in a case.<sup>166</sup> Some respondents suggested that issues should be more clearly defined in pleadings,<sup>167</sup> while others noted that the filing of more detailed particulars (details specifying the nature of certain alleged facts) would increase the efficiency of disclosure and discovery.<sup>168</sup> Respondents commenting on particulars also suggested including an automatic right to receive better particulars or the ability to serve a request on the opposing party for better particulars without the need for a court order.<sup>169</sup>

The Rules of Court Project ultimately rejected the proposition that Alberta move to notice pleading,<sup>170</sup> with the Project's General Rewrite Committee concluding that a move to notice pleading would be “a move in the wrong direction.”<sup>171</sup> The Proposed Rules of Court, published in October 2008 but yet to be approved by the legislature, require that pleadings state “the facts on which a party relies,” “a matter that defeats,

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161. ALBERTA LAW REFORM INSTITUTE, ALBERTA RULES OF COURT PROJECT: PLEADINGS, CONSULTATION MEMORANDUM NO. 12.8, at 1 (2003), <http://www.law.ualberta.ca/alri/docs/cm12-8.pdf> [hereinafter ALRI] (referencing that the pleading standard in Alberta at the time the Project commenced required a “statement in summary form of the material facts on which the party pleading relies for his claim or defence”).

162. *Id.* at 1–6.

163. See ALBERTA LAW REFORM INSTITUTE, ISSUES PAPER FOR THE LEGAL COMMUNITY: ALBERTA RULES OF COURT PROJECT 1 (2001), <http://www.law.ualberta.ca/alri/docs/arcissue.pdf>. The Alberta Rules of Court Project circulated a short issues paper, inviting feedback on, among other issues, the following two pleadings questions: “Do the cost and delay associated with formal pleadings outweigh their value?” and “Should pleadings be abolished and replaced by a less formal narrative of fact and law provided by each party?” *Id.* at 6.

164. *Id.* at 5.

165. *Id.*

166. ALBERTA LAW REFORM INSTITUTE, ALBERTA RULES OF COURT PROJECT: REPORT ON LEGAL COMMUNITY CONSULTATION 7 (2002), [http://www.law.ualberta.ca/alri/docs/db\\_report.pdf](http://www.law.ualberta.ca/alri/docs/db_report.pdf).

167. *Id.*

168. *Id.*

169. *Id.*

170. ALRI, *supra* note 161, at 6.

171. *Id.*

or raises a defence to, a claim or the claim of another party,” and “the remedy claimed.”<sup>172</sup>

b. England

In the mid-1990s, a substantial review of the civil justice system in England and Wales resulted in new rules that, while simplified, still require the pleading of facts. The English review, commissioned by the Lord Chancellor and undertaken by one of England’s most senior judges, the Right Honorable Lord Woolf, identified a number of problems with the English system of pleadings. The pleadings failed to set out the facts and therefore impeded the identification of issues, were often long-winded, and concentrated too much on causes of action and defenses.<sup>173</sup> In short, Lord Woolf concluded that “the basic function of pleadings—to state succinctly the facts relied on—has been lost sight of.”<sup>174</sup> Accordingly, Lord Woolf’s suggestions for reforming the pleading system were centered on the need “to ensure that the basic function of pleadings—to state facts—is restored to primacy.”<sup>175</sup>

In formulating his recommendations for reform, Lord Woolf engaged in an extensive review of rules and procedures in several foreign common law jurisdictions by seeking in-person consultations with practitioners and judges in these jurisdictions, including the United States.<sup>176</sup> Given the uniqueness of notice pleading to the U.S. system, Lord Woolf was exposed to this alternative but nevertheless opted to retain fact-based pleading, envisioning that the role of pleadings under the new rules would enable the court and the parties to identify and define the issues in dispute.<sup>177</sup> He recommended that a “claim”—synonymous with a complaint in the U.S. civil justice system—should “set out a short description of the claim and a succinct statement of the facts relied on.”<sup>178</sup> And a defense should contain indications as to which parts the defendant admits, denies, doubts to be true or neither admits nor denies, insofar as they differ from the version set forth by the claimant.<sup>179</sup> In large part,

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172. ALBERTA LAW REFORM INSTITUTE, RULES OF COURT PROJECT: FINAL REPORT NO. 95 app. H (2008), <http://www.law.ualberta.ca/alri/docs/1.%20Appendix%20H%20-%20Proposed%20Rules%20of%20Court.pdf>.

173. RIGHT HONOURABLE LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES ch. 20, para. 4 (1995), <http://www.dca.gov.uk/civil/interim/chap20.htm>.

174. *Id.* (citation omitted).

175. *Id.* at ch. 20, para. 8.

176. *See* RIGHT HONOURABLE LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES annex II (1996), <http://www.dca.gov.uk/civil/final/annex1&2.htm>.

177. *See id.* at sec. III, ch. 9, para. 5.

178. *Id.* at ch. 12, para. 11.

179. *Id.* at para. 16.

these recommendations were implemented into Part 16 of the 1998 Civil Procedure Rules (“CPR”).<sup>180</sup>

Although Lord Woolf’s proposals, as implemented in the CPR, radically simplified the way in which parties commence an action,<sup>181</sup> the “Woolf Reforms” added certain procedural requirements that actually *increased* the amount of factual information parties are required to set forth in the period before discovery. A series of pre-action protocols instituted procedural requirements with which parties must comply prior to filing a claim in court. Included in these requirements is the exchange of pleading-like documents called Letters of Claim that must set forth facts on which the potential claim is based.<sup>182</sup> The specialized pre-action protocols identify particular facts and documents that must be exchanged;<sup>183</sup> claims not covered by a specialized protocol are subject to the Practice Direction, which requires among other things that the Letter of Claim contain “a clear summary of the facts on which the claim is based.”<sup>184</sup>

### *B. Balancing Fact-Based Pleadings and Initial Court Access*

State and international jurisdictions have not only affirmed their commitment to fact-based pleading as a valuable tool for narrowing disputed issues, but have also developed procedural mechanisms to ensure that the pleading standard does not adversely impact initial access to the courts. While these mechanisms vary, their purpose is the same: to address those situations in which the facts necessary to meet the pleading standard are in the hands of the opposing party. These mechanisms ensure access to the courts without sacrificing the requirements—and there-

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180. Under Part 16.2(1)(a), the parties are required to file a claim form that contains “a concise statement of the nature of the claim.” CPR 16.2(1)(a) (U.K.). Under Part 16.4(1)(a), the claimant must also provide the opposing party with the particulars of the claim, including “a concise statement of the facts on which the claimant relies.” *Id.* 16.4(1)(a). The Practice Direction supplement for Part 16 directs that the particulars of claim can be included with the claim form, served alongside the claim form, or served at a later date. *Id.* 16 PD paras. 3.1–3. The Practice Direction further lists additional particulars that parties must include, tailored to certain claim types. *See id.* paras. 4.1, 5.1, 6.1.

181. The complications in the English system of pleadings prior to the Woolf reforms arose from the highly technical requirements of commencing a claim. For example, in the High Court alone there were four methods of starting proceedings—writ, originating summons, originating motion and petition in the High Court. A similar situation existed in the country courts, where proceedings could be commenced by summons, originating application, petition and notice of appeal. Further complication existed in the varying forms of each method—for example, there were three types of forms of originating summons. As each method of commencing proceedings had different consequences, determining how to commence an action became very complicated. WOOLF, *supra* note 176, at sec. III, ch. 12, para. 1, <http://www.dca.gov.uk/civil/final/sec3b.htm#c12>.

182. *See e.g.*, CPR Pre-action Protocol for Housing Disrepair Cases para. 3.3(a) (U.K.); *id.* Pre-action Protocol for Disease and Illness para. 6.2; *id.* Pre-action Protocol for Judicial Review para. 10; *id.* Pre-action Protocol for the Resolution of Clinical Disputes para. 3.16.

183. *See, e.g., id.* Pre-Action Protocol for Housing Disrepair Cases paras. 3.2–5; *id.* Pre-Action Protocol for Disease and Illness Claims paras. 4.1–5; *id.* Pre-Action Protocol for Resolution of Clinical Disputes paras. 3.14–19; *id.* Pre-Action Protocol for Personal Injury Claims paras. 3.2–20.

184. *Id.* Pre-action Conduct PD sec. IV, annex A, para. 2.1(3).

fore the benefits—of a fact-based pleading standard. We briefly describe how these processes work in three state courts.

### 1. Pennsylvania

Pennsylvania's pleading standard requires that parties plead the "material facts on which a cause of action or defense is based . . . in a concise and summary form."<sup>185</sup> In numerous opinions Pennsylvania courts have further established the importance of the pleadings in narrowing the issues. In *Smith v. Wagner*,<sup>186</sup> the Superior Court held that a sufficient complaint "must do more than give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. It should formulate the issues by fully summarizing the material facts."<sup>187</sup> In *Miketic v. Baron*,<sup>188</sup> the Superior Court held that "the pleader must define the issues; every act or performance essential to that end must be set forth in the complaint."<sup>189</sup>

Pennsylvania courts have been firm in their commitment to fact-based pleading, and the Superior Court has held that parties cannot escape their duties under this standard "by a general averment that the facts are in the possession of the defendant."<sup>190</sup> However, Pennsylvania civil procedure recognizes that in limited situations the facts necessary to craft a complaint may be exclusively in the hands of the defendant and, where this is the case, a requirement that parties plead facts may prohibit plaintiffs from being able to bring a claim.<sup>191</sup> To protect a plaintiff's ability to access the court in such situations, the Pennsylvania rules allow depositions or interrogatories "for preparation of pleadings" under certain circumstances.<sup>192</sup> "Pre-complaint discovery" is available to prospective plaintiffs "where the information sought is material and necessary to the filing of the complaint."<sup>193</sup> The Pennsylvania Supreme Court has held that "because of the need for specificity in pleading," the pre-complaint discovery mechanism "play[s] a critically important role in Pennsylvania's pleading scheme."<sup>194</sup>

Where a plaintiff is not in possession of the facts needed to craft a complaint, he or she may commence the action by filing a writ of summons—in lieu of a complaint—and then seek pre-complaint discovery to

185. PA. R. CIV. P. 1019(a).

186. 588 A.2d 1308 (Pa. Super. Ct. 1990).

187. *Id.* at 1310 (internal quotation marks omitted) (quoting *Baker v. Rangos*, 324 A.2d 498, 505–06 (Pa. Super. Ct. 1974)) (referencing *Conley* and the federal notice pleading standard).

188. 675 A.2d 324 (Pa. Super. Ct. 1996).

189. *Id.* at 330 (internal quotation marks omitted) (quoting *Santiago v. Pa. Nat'l Mut. Cas. Ins. Co.*, 613 A.2d 1235, 1238 (Pa. Super. Ct. 1992)).

190. *Krajsa v. Key punch, Inc.*, 622 A.2d 355, 358 (Pa. Super. Ct. 1993) (internal quotation marks omitted) (quoting *Burnside v. Abbott Labs.*, 505 A.2d 973, 980 (Pa. Super. Ct. 1985)).

191. *See* PA. R. CIV. P. 4001(c).

192. *See id.*

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

194. *McNeil v. Jordan*, 894 A.2d 1260, 1269 (Pa. 2006).

obtain facts sufficient to support the complaint.<sup>195</sup> Trial courts have discretion as to whether to allow this form of early discovery, and they take into consideration whether it will “cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.”<sup>196</sup> Where opposed by the party from whom it is sought, the court may require the plaintiff “to state with particularity how the discovery will materially advance the preparation of the complaint” and “shall weigh the importance of the discovery request against the burdens imposed on any person or party from whom the discovery is sought.”<sup>197</sup> In *McNeil v. Jordan*,<sup>198</sup> the definitive case governing pre-complaint discovery, the Pennsylvania Supreme Court provided trial courts with the following guidance when considering a plaintiff’s request to obtain pre-complaint discovery:

[A] litigant should be required to demonstrate his good faith as well as probable cause that the information sought is both material and necessary to the filing of a complaint in a pending action. A plaintiff should describe with reasonable detail the materials sought, and state with particularity probable cause for believing the information will materially advance his pleading, as well as averring that, but for the discovery request, he will be unable to formulate a legally sufficient pleading. Under no circumstance should a plaintiff be allowed to embark upon a “fishing expedition,” or otherwise rely on an amorphous discovery process to detect a cause of action he lacks probable cause to anticipate prior to the pre-complaint discovery process under this standard.<sup>199</sup>

The standard that a plaintiff must meet to obtain pre-complaint discovery is a relatively strict one.<sup>200</sup> In *McNeil*, the Court recognized that the emergent consensus in Pennsylvania trial courts at the time of its ruling was that “pre-complaint discovery should be restrictively allowed, narrowly drafted, and permitted only when a complaint capable of surviving preliminary objections cannot be filed without aid of the requested discovery.”<sup>201</sup> However, this standard is not impossible to meet where a

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195. See PA. R. CIV. P. 1007.

196. *Id.* 4003.8(a).

197. *Id.* 4003.8(b).

198. 894 A.2d 1260.

199. *Id.* at 1278.

200. See *e.g.*, *Potts v. Consol. Rail Corp.*, 37 Pa. D. & C.4th 196, 199–200 (1998) (detailing Judge Stanton Wettick’s typical experience on Fridays where he generally received at least one order, in response to a plaintiff’s request for pre-complaint discovery, seeking a stay of discovery “until the pleadings are closed.” Judge Wettick generally granted these orders on the basis that the “discovery rules should be applied in a manner consistent with these pleadings rules that are based on the premise that discovery will be narrowed if the contours of the dispute are initially defined through fact pleading”); see also *Speicher v. Toshok*, 63 Pa. D. & C.4th 435, 438 (2003) (“[A] plaintiff seeking to depose parties or witnesses before filing a complaint is usually faced with a motion for a protective order requesting that such discovery be barred until the filing of the complaint. In most instances, the motion is granted.”).

201. *McNeil*, 894 A.2d at 1274.



plaintiff has a valid cause of action, but lacks a necessary fact to support a complaint under the Pennsylvania fact pleading standard.<sup>202</sup> Moreover, evidence suggests that a more lax standard may invite numerous problems, and may be subject to abuse without careful focusing and supervision by a judge.<sup>203</sup>

## 2. Connecticut

Like Pennsylvania, Connecticut employs pleadings for the purpose of developing the material facts at the beginning of litigation.<sup>204</sup> According to a state law treatise, “The Federal practitioner relies on discovery to develop the material facts in respect of the cause of action, whereas the Connecticut lawyer expects to find these facts in the pleading and may compel the pleading of material facts.”<sup>205</sup> As a fact pleading jurisdiction, “[i]n Connecticut issue is joined on the pleadings, with important consequences for discovery and issues of relevancy at trial.”<sup>206</sup> Therefore, interrogatories and requests for production “are not intended to serve as devices for discovery of those material facts which a Connecticut pleader must allege at the outset.”<sup>207</sup>

Connecticut allows a similar process for pre-suit discovery under which parties are authorized to file a bill of discovery, defined by Connecticut courts as “an independent action in equity for discovery . . . designed to obtain evidence for use in an action other than the one in which discovery is sought.”<sup>208</sup> The requesting party “must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought *or about to be brought*.”<sup>209</sup> A party can, therefore, file a bill of discovery to obtain discovery for evidence to use in a subsequent action.

Like Pennsylvania, Connecticut uses a probable cause standard under which parties attempting to obtain discovery must demonstrate good faith and “by detailed facts” that probable cause exists to bring a potential cause of action.<sup>210</sup> In this context, “[p]robable cause is the knowledge of facts sufficient to justify a reasonable man in the belief that he has

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202. See, e.g., *Potts*, 37 Pa. D & C.4th at 199 (noting that pre-complaint discovery may be granted when a plaintiff seeks a copy of the “written employment agreement with the defendant” or requests “medical records [from] a medical provider”).

203. See *Hoffman*, *supra* note 126, at 242–44 (discussing the impact of TEX. R. CIV. P. 737 (repealed 1998)).

204. CONN. GEN. STAT. ANN. § 52-91 (West 2009) (requiring “a statement of the facts constituting the cause of action”).

205. 1-10 Dupont on Conn. Civil Practice (MB) § 10-1.2 (2009).

206. 1-13 *id.* § 13-2.1.

207. *Id.*

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

209. *Id.* (emphasis added).

210. *Id.*

reasonable grounds for presenting an action.”<sup>211</sup> The facts provided by the plaintiff must “fairly indicate that he has some potential cause of action,”<sup>212</sup> The party must also show that the information sought is both material and necessary and must further be able to describe the material “with such details as may be reasonably available.”<sup>213</sup> Connecticut courts have expressly stated that a plaintiff “should not be allowed to indulge a hope that a thorough ransacking of any information and material which the defendant may possess would turn up evidence helpful to [his] case.”<sup>214</sup>

### 3. Missouri

Missouri’s pleading rule requires that pleadings contain “a short and plain statement of the facts showing that the pleader is entitled to relief.”<sup>215</sup> A proposal was made in 1943 that would have adopted the noticing pleading standard of the Federal Rules; however, the fact pleading standard survived and occupies a primary role in the state’s courts. According to the Missouri Supreme Court, “The goal of fact pleading is the quick, efficient, and fair resolution of disputes” by identifying, narrowing, and defining the issues “so that the trial court and the parties know what issues are to be tried, what discovery is necessary, and what evidence may be admitted at trial.”<sup>216</sup> In *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*,<sup>217</sup> the court clearly distinguished the role of pleadings in the Missouri state system from that in the Federal Rules, stating:

Where the federal courts now use *discovery* to identify the triable issues, such has always been the role of the *pleadings* in Missouri. Where the federal courts now use *discovery* to identify the facts upon which the plaintiff’s claim rests, such has always been the role of *pleadings* in Missouri.<sup>218</sup>

The Missouri Supreme Court has taken a slightly different approach in situations where a party does not have access to the information necessary to frame the pleadings, pointing out that the rules allow parties to plead on “the best of the [party’s] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances.”<sup>219</sup> Further-

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211. *Id.* (internal quotation marks omitted) (quoting *Cosgrove Dev. Co. v. Cafferty*, 427 A.2d 841, 842 (Conn. 1980)).

212. *Id.*

213. *Id.* (internal quotation marks omitted) (quoting *Pottetti v. Clifford*, 150 A.2d 207, 213 (Conn. 1959)).

214. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Pottetti*, 150 A.2d at 213).

215. Mo. R. Civ. P. 55.05.

216. *State ex rel. Harvey v. Wells*, 955 S.W.2d 546, 547 (Mo. 1997).

217. 854 S.W.2d 371 (Mo. 1993).

218. *Id.* at 380 (citations omitted).

219. Mo. R. Civ. P. 55.03(c); *see also Wells*, 955 S.W.2d at 548.

more, a Rule 55.27(d) motion for more definite statement allows the trial court, in its discretion, to allow a party whose pleading has been challenged more time to discover facts that will enable the party to support the claims in the pleading. The Missouri Supreme Court has held, however, that in exercising this discretion trial courts are directed to be “sensitive to the reasons that Missouri remains a fact pleading state” and to ensure that “[u]nnecessary expense should be eliminated by requiring parties, as early as possible, to abandon claims or defenses that have no basis in fact.”<sup>220</sup>

Fact-based pleading has met with considerable satisfaction in many states, due in part to the ability of such pleadings to narrow issues and focus claims early. Given the apparently successful method of assuring both initial court access and long-term access in the civil justice system, further exploration of a fact-based pleading approach at the federal level is warranted.

### III. TOWARD A NEW APPROACH

#### *A. A Proposed New Pleading Standard*

The time is right to consider narrowing the issues at the pleading stage in federal court. In *Iqbal* and *Twombly*, the Supreme Court clearly fretted over a system that leaves issue narrowing to the discovery phase or later.<sup>221</sup> Attorneys mostly agree with this sentiment. In a 2008 survey of the Fellows of the American College of Trial Lawyers, over sixty-four percent of respondents indicated that fact pleading can narrow the scope of discovery.<sup>222</sup> Similarly, in a 2009 survey of the American Bar Association Section of Litigation, just under sixty-five percent of respondents who self-identified as representing both plaintiffs and defendants indicated the same belief.<sup>223</sup> And in a 2009 case-based survey of attorneys conducted by the Federal Judicial Center, a plurality of respondents who self-identified as representing roughly equal numbers of plaintiffs and defendants agreed that disputed issues would be identified earlier with fact pleading.<sup>224</sup> It is time to discard the old structure of waiting to focus issues until the discovery phase of litigation, and install in its place a new system in which meaningful access to the courts is guaranteed both at the outset of a case and throughout its lifetime.

Pleadings that require the recitation of facts directly bearing on the elements of a claim or affirmative defense will better address current problems of pervasive cost and delay by commencing the issue-narrowing process at the start of the case. It bears repeating that embrac-

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220. *Wells*, 955 S.W.2d at 548.

221. *See supra* Part I.A.

222. ACTL/IAALS, INTERIM REPORT, *supra* note 4, at A-3.

223. AM. BAR ASS'N, *supra* note 37, at 52 & tbl.4.3.

224. LEE & WILLGING, *supra* note 38, at 49 fig.24.

ing fact-based pleading does not mean a return to code or common law pleading, or a rejection of the basic structure of the Federal Rules. Discovery, judicial management, and summary judgment would still be available to further focus the parties as the case moved along. Indeed, far from replacing these tools, development of facts at the pleading stage would *enhance* their use and allow cases to move toward meaningful resolution more effectively.

### 1. Improvements for Discovery

Discovery is most effective when the parties are able to think comprehensively about the evidence necessary to prove their claims or defenses from a very early stage in the litigation. Early identification of the specific issues in dispute allows a party to craft a discovery plan to uncover specific, relevant evidence in the most efficient manner possible. Early issue-narrowing through fact-based pleading also makes discovery gamesmanship less likely. Under a notice pleading regime, it is more difficult to ascertain whether a disproportionate discovery request was motivated by an innocent effort to collect all the relevant facts or a more sinister desire to drive up the costs of responding and force a settlement. This blurred line renders impotent most rules that would otherwise control abusive discovery. Rule 37 and Rule 26(g) sanctions are rarely issued, in part because determining malicious intent is so difficult.<sup>225</sup> Rule 26(b) proportionality determinations are necessarily ad hoc and difficult to predict because judges must navigate and balance a thicket of mostly unquantifiable factors<sup>226</sup>—and because even the most earnest judges know less about the facts of the case than do the parties.<sup>227</sup> A requirement to plead facts from the outset would remove many of the “innocent” excuses associated with excessive discovery, and would make truly malicious efforts to overuse discovery easier to spot and sanction.

### 2. Improvements for Judicial Management

Effective judicial management of a case depends on the judge having sufficient understanding of the relevant facts and issues. While the judge cannot be expected to know everything that the parties and their counsel know, neither can the judge afford to be ignorant of case specifics. The introduction of facts at the pleading stage will help the judge identify the specific issues in dispute, which in turn will increase the judge’s ability to make comprehensive and informed decisions about the scope of discovery and pretrial practice.

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225. See Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 645 n.404 (2002).

226. See FED. R. CIV. P. 26(b)(2)(C)(iii) (basing proportionality determinations on a consideration of “the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues”).

227. See Bone, *supra* note 67, at 1990.

### 3. Improvements for Summary Judgment

The well-known standard for a grant of summary judgment is that “the pleadings, the discovery and disclosure materials on file, and any affidavits [must] show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”<sup>228</sup> Too often, however, summary judgment motions become an exercise in competing affidavits and lengthy document appendices. Fact-based pleading can help streamline the summary judgment process in two ways. First, by focusing discovery and making the process leading up to summary judgment faster and more cost effective, fact-based pleading makes the actual filing of a summary judgment motion more economically palatable. Second, where facts are pled and admitted, the parties and the court can simply rely on the pleadings to establish the presence of a fact, obviating the need for affidavits or documentary proof. The result should be faster and more streamlined summary judgment rulings.

### 4. The New Standard

After more than seventy years, is it hard to remember that pleadings were once the primary vehicle for narrowing disputed issues in federal civil actions. The move to notice pleading in the federal system in 1938 was a break from this centuries-old tradition—a noble experiment that unfortunately has proven to have too many negative side effects. Discovery, judicial management, and summary judgment may well be useful tools for narrowing issues, but in too many civil cases they cannot achieve that goal on their own. Narrowing issues through the pleading of material facts is the traditional, effective, and all-too-often overlooked solution.

Accordingly, we propose the following new standard:

- A party must plead material facts sufficient to support each element of an asserted claim, counterclaim, cross-claim, or affirmative defense. A material fact would be defined as a fact that is essential to the claim or defense and without which it could not be supported.
- In answering a claim, counterclaim, or cross-claim, any statement of fact that is not specifically denied would be deemed admitted. General denials would not be permitted, and any denials based on lack of information of knowledge would have to be so pleaded.
- If a responding party determines that a claim or affirmative defense lacks sufficient facts to support each element, the preferred response would be a motion for a more definite statement. The court would be instructed to grant liberally the ability to amend a claim or defense to insert sufficient material facts to support each claim.

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228. FED. R. CIV. P. 56(c).

- If a claiming party could not provide at least one material fact for every element of the claim, dismissal of the claim would be proper.
- The claiming party would be free to plead more than one material fact for a claim element if such facts were known. Unlike the more rigid pleading requirements of the common law or the codes, there would be no punishment for incidental pleadings of evidentiary facts or conclusions of law—although conclusions of law would of course be ignored for purposes of determining whether the claim or defense satisfied the pleading standard. Similarly, a “fact” that was objectively fanciful could not serve to support a claim on a motion to dismiss.

This proposed pleading standard would also narrow the scope of discovery, consistent with the reintroduction of the issue-narrowing role to the pleading stage. Rather than deeming discoverable “any nonprivileged matter that is relevant to any party’s claim or defense,”<sup>229</sup> as the rule currently allows, we propose limiting discovery to non-privileged matter that is directly relevant to developing, proving, or disproving disputed material facts as established by the pleadings. Accordingly, if a material fact is admitted in the pleadings (either directly or by failure to set forth a specific denial), discovery related to that fact would be unnecessary and therefore precluded. For those material facts that are in dispute, however, discovery would still be permitted both with respect to the material facts actually asserted, and the so-called “evidentiary facts” that help establish material facts. In other words, the proposed scope of discovery standard is designed to focus discovery on those issues that are especially germane to the facts and issues still in dispute, but maintain parties’ ability to explore those facts with a certain degree of latitude.

Our proposed fact-based pleading regime would also include an outlet for pre-suit discovery to collect relevant material facts that lie exclusively in the possession of another. It would be recommended to courts to permit such discovery—after notice and an opportunity to be heard by a potential opposing party—upon a showing by the petitioning party that: (1) the petitioner cannot prepare a legally sufficient complaint without the information sought; (2) the petitioner has probable cause to believe that the information sought will enable preparation of a legally sufficient complaint; (3) the petitioner has probable cause to believe that the information sought is in the possession of the person or entity from whom it is sought; (4) the proposed discovery is narrowly tailored to minimize expense and inconvenience; and (5) the petitioner’s need for the discovery outweighs the burden and expense to other persons and entities.<sup>230</sup>

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229. *Id.* 26(b)(1).

230. This proposed approach to pre-suit discovery has been codified in pilot rules developed by the Institute for the Advancement of the American Legal System and the American College of Trial Lawyers Task Force on Discovery and Civil Justice. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE,

This pre-suit discovery rule is designed to balance the need for access to the discovery process with the acknowledged burdens that discovery imposes. The party from whom pre-suit discovery is sought would have the opportunity to be heard before any ruling was issued,<sup>231</sup> and the court would have the power to impose limitations and conditions on the scope of pre-suit discovery consistent with the petitioner's demonstrated needs.

*B. The Proposed Standard in Practice: An Example*

To better illustrate how the proposed new standard would work in connection with the existing Federal Rules of Civil Procedure, we examine a typical claim for patent infringement. We choose a patent case simply because it provides a relatively clean and concise illustration. The same principles would apply to a wide range of civil cases, both straightforward and complex.

The elements of an infringement claim are clearly established in Title 35 of the U.S. Code: "Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent."<sup>232</sup> Civil Form 18 sets out the minimally sufficient patent infringement complaint under the current system, which requires only four paragraphs after the jurisdictional statement: (1) a statement that the plaintiff owns the patent; (2) a statement that defendant has been infringing the patent "by making, selling, and using" the device embodying the patent; (3) a statement that the plaintiff has given the defendant notice of its infringement; and (4) a demand for an injunction and damages.<sup>233</sup>

The most notable thing about Form 18 is how little must actually be stated in the complaint. Parties tend to take advantage of the loose requirement. As one court has pointed out, "[c]omplaints and counterclaims in most patent cases are worded in a bare-bones fashion."<sup>234</sup> But the ultimate success or failure of a claim for patent infringement must turn on specific facts—facts that require time, energy, and money to uncover during the discovery phase. Some facts are indeed complex and more appropriate for discovery. But many other facts are simply stated and fundamental to the case—facts such as the identities of the patentee(s) and assignee(s); patent number; dates of application and issue;

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21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM—PILOT PROJECT RULES, at PPR 3.1 (2009).

231. For a discussion of the importance of an express notice requirement for pre-suit discovery, see Hoffman, *supra* note 126, at 270.

232. 35 U.S.C. § 271 (2006).

233. See FED. R. CIV. P. Form 18; see also *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007).

234. N.D. ILL. LOCAL PATENT R. preamble.

efforts to mark products or processes covered by the patent; the specific products allegedly made, sold or used in violation of the patent; and the patent claims that are allegedly infringed. Stating such facts at the pleading stage either takes them off the table for discovery (because they are admitted) or focuses the discovery on information relevant to the remaining disputed facts and issues.

Facts such as these should be readily available to a party asserting patent infringement. Indeed, the local patent rules of several federal district courts presume that such information has been collected and considered before a case ever commences. The new Local Patent Rules of the Northern District of Illinois, for example, require a plaintiff alleging infringement to disclose within fourteen days after an answer is filed all documents pertaining to the disclosure, sale, transfer or embodiment of the claimed invention; the conception and development of the claimed invention; communications with the Patent and Trademark Office concerning each patent in suit; and ownership of patent rights by the asserting party.<sup>235</sup> Similarly, the Northern District of California requires disclosure of asserted claims and infringement contentions within ten days after an initial case management conference.<sup>236</sup>

We do not suggest that infringement contentions and claim charts be included in the initial pleadings. Because the background investigation has presumably taken place by the time of filing, however, surely a claimant could recite facts in the complaint concerning the claims of the patent that are allegedly infringed, as well as identify all known allegedly infringing products. Likewise, a party alleging patent invalidity as an affirmative defense should be expected to identify in the initial pleadings the factual basis for the alleged invalidity. A defendant alleging obviousness,<sup>237</sup> for example, would be expected to provide material facts to show that the asserted invention was a combination of known elements that would have been obvious to a person having ordinary skill in the relevant art<sup>238</sup>—including identification of the known prior art upon which defendant will rely for its defense.

Even this brief example suggests that bringing facts to light at the pleading stage is feasible and can promote cost-effective litigation. Information that is essential to the narrowing and resolution of the infringement dispute would be presented at an early stage, obviating the need for additional discovery requests, costly depositions, or even a separate round of automatic disclosures. To the extent there is ensuing discovery, motion practice, or judicial involvement in managing the case,

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235. *See id.* 2.1(a).

236. N.D. CAL. PATENT LOCAL R. 3-1.

237. To receive a valid patent, a claimed invention must not have been obvious to a person having ordinary skill in the relevant art. *See* 35 U.S.C. § 103 (2006).

238. *See* *Princeton Biochemicals, Inc. v. Beckman Coulter, Inc.*, 411 F.3d 1332, 1337–38 (Fed. Cir. 2005).



these tools would already be informed by a better understanding of the issues in play.

#### CONCLUSION

Charles Clark's vision of the Federal Rules of Civil Procedure was driven by two fundamental principles: that all cases should be decided on their merits rather than on procedural maneuverings, and that "a basic goal in litigation should be economy of time and resources."<sup>239</sup> Sadly, after more than seventy years of experience under the Federal Rules, we appear to be further away from achieving those principles than ever before. The potential cost of discovery and motion practice may force plaintiffs with meritorious claims to settle because they cannot afford to vindicate their rights, and likewise may force defendants who are not at fault to settle because doing so is less expensive than slogging through the broad discovery and motion practice process.

The Federal Rules are littered with efforts to compensate for the loss of efficiency and cost effectiveness that are so ably handled by the introduction of facts at the pleading stage. The controversial sanctions permitted by Rules 11 and 37, the judicial management provisions of Rule 16, the labyrinthine proportionality provisions of Rule 26, the presumptive discovery limits of Rules 30 and 33, the electronically stored information provisions of Rules 26, 34 and 45, and the summary judgment procedures of Rule 56 all represent attempts to focus parties on the real issues in dispute. Many of these rules would still be beneficial in a system in which fact-based pleading focused the issues from the outset. If anything, they would be more effective, the equivalent of chisels to hone already focused issues rather than sledgehammers trying to give even basic shape to the controversy.

Opposition to fact-based pleading appears to stem primarily from two concerns: fears that meritorious claims will not get into court, and worries that the burden of marshaling facts at the outset of the case will outweigh the issue-narrowing benefits.<sup>240</sup> As we have tried to demonstrate, neither concern is insurmountable. Properly used, fact-based pleading should open the courthouse door to meritorious claims, because claimants will be able to see their rights through to vindication and increase the chances for full compensation of damages through a formal judicial process. And from an objective viewpoint, the cost of a pre-filing

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239. Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 357 (1987).

240. See LEE & WILLGING, *supra* note 38, at 50 fig.25 (finding that sixty percent of self-identified plaintiff attorneys responding to the survey indicated agreement or strong agreement with the statement, "Even if raising the pleading standards would help to identify and frame disputed issues at an earlier stage in litigation, the added burdens for plaintiffs would outweigh any benefits," and about fifty-eight percent of self-represented defendant attorneys disagreed or strongly disagreed with the statement).

investigation to pull together salient facts should be far less than the alternative costs of discovery and motion practice under the current Federal Rules.

There is work to be done in this area. Nearly all attorneys practicing in the United States District Courts today have known only notice pleading, and most have spent the entirety of their professional lives in a post-1970 system where discovery is the dominant aspect of civil litigation.<sup>241</sup> Resistance to change is therefore understandable, even as large percentages of the active bar grumble about costs to their clients, discovery abuse, and diminishing trial rates. But there is too much dissatisfaction with the current system—both from within and from outside the legal profession—to be complacent. Changes to the rules, and to attitudes about what the rules should be designed to accomplish, have become necessary. Restoring the issue-narrowing function to the pleading stage would be a good start.

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241. According to a 2000 census of lawyers practicing in the United States, the most recent available, seventy-five percent of then-practicing attorneys were born after 1946, meaning they likely did not enter practice until at least 1970. *See* Am. Bar Ass'n, *Lawyer Demographics* (2009), [http://new.abanet.org/marketresearch/PublicDocuments/Lawyer\\_Demographics.pdf](http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf). In the ensuing ten years, the number of still-practicing lawyers whose experience predates either the Federal Rules or the 1970 discovery amendments has only become smaller.