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PRESUIT DISCOVERY IN A COMPARATIVE CONTEXT

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INTRODUCTION

In civil litigation around the globe, the usual process is that investigative discovery is allowed (if at all) only after the plaintiff files a substantive complaint.[1] The complaint provides a framework for future discovery and justifies the cost and intrusiveness of discovery on the defendant.

Recently, however, a growing number of jurisdictions — most notably England, Hong Kong, Singapore, Japan, and several of the states of the US — have adopted general mechanisms for presuit investigative discovery. These new procedures differ from presuit preservational discovery, which seeks to preserve information that is in danger of loss prior to discovery in a formal lawsuit. They also differ from the *Norwich Pharmacal* principle, which allows presuit discovery from an involved nonparty who possesses information pertaining to the identity of the putative defendant. In contrast to these procedures, presuit investigative discovery is designed to force or encourage a putative defendant directly to divulge information under no risk of loss to the putative plaintiff before the commencement of a formal, substantive action.

This paper is the first to probe the nature and importance of this new generation of presuit investigative discovery. It begins by comparing commonalities and contrasting differences, with sensitivity to the particular procedural system in which each mechanism is located. Although the mechanisms have a common effect, their details, functions, and successes vary. England, for example, designed its presuit mechanisms to promote a 'cards on the table' approach that facilitates informal dispute resolution before formal commencement. By contrast, Japan designed its 'inquiry' procedure to enable plaintiffs to meet its fact-pleading standard. Singapore's mechanism is broadly available whenever a court finds its use would save costs or otherwise be in the interests of justice. The varied practices and procedures provide rich fodder for comparative exploration.

[1] Terms differ across jurisdictions, but their meanings are substantially similar. For consistency purposes, I use the term 'complaint' to mean the plaintiff's initial filing; 'plaintiff' instead of 'complainant', 'petitioner', and 'applicant'; 'discovery' instead of 'disclosure'; and 'presuit' instead of 'pre-action', 'pre-suit', 'pre-complaint', and 'pre-filing'.

Evaluating these mechanisms reveals some important lessons. The first lesson is that presuit investigative discovery is surprising prevalent in common-law systems, despite their traditional resistance to it. The second is that, regardless of the purported motivation, presuit investigative discovery can be an effective tool for enabling plaintiffs to file sufficient complaints. The third lesson is that the different mechanisms have much commonality among them, including requirements for providing notice, for ensuring any presuit discovery is limited, and for providing cost sanctions and incentives to the parties for participating in good faith.

The paper then offers a place for those lessons in federal-court practice in the United States. It may be that non-US countries can learn from each other's presuit mechanisms as well, but, unlike the common-law countries surveyed in the paper, US federal rules do not permit presuit investigative discovery, and therefore the US has potentially the most to learn and consider. In addition, US pleading rules recently have undergone changes that make presuit discovery particularly attractive. In the past, presuit investigative discovery was seen as unnecessary because the US's liberal notice-pleading standard allowed complainants easy access to full discovery after formal commencement. Recently, however, the twin decisions of *Ashcroft v Iqbal* and *Bell Atlantic Corp v Twombly* have instituted a new pleading standard akin to the fact-pleading standard in other jurisdictions. A comparative assessment of presuit discovery at play in other countries suggests that such a mechanism may be useful and workable in the US as well, and that the US should look to these foreign experiments as models for its own reform.

PRESUIT DISCOVERY IN A NUTSHELL

Common-law countries generally require fact pleading and allow discovery only after the pleadings are complete. In England, for example, the complaint requires a statement of material facts on which the plaintiff relies.[2] If the complaint fails to support a claim with sufficient facts, the judge can strike the claim or prevent the party from giving evidence on that fact at trial.[3] These requirements are designed primarily to define the nature of the dispute and facilitate an orderly discovery process.[4] Other common-law systems have similar requirements, as does the hybrid system of Japan.[5]

With few exceptions, discovery comes only after the plaintiff submits a sufficient complaint. The reasons are twofold. First, a defendant ought not to be forced to bear discovery costs and the attendant invasion of its privacy without some indication of wrongdoing reflected in a formal complaint. Second, because pleadings circumscribe the scope of discovery, discovery without the guideposts of a complaint would be haphazard and inefficient.

[2] CPR 16.4; Zuckerman, A (2006) *Zuckerman on Civil Procedure: Principles of Practice* (2nd ed) Sweet & Maxwell at 238-40; Andrews, N (2003) *English Civil Procedure: Fundamentals of the New Civil Justice System* Oxford University Press at 236-64.

[3] Andrews *Civil Procedure* above n 2 at 521.

[4] Id at 253.

[5] Main, T (2006) *Global Issues in Civil Procedure* West at 28-32 (Australia); Alta R Ct 104 (Alberta); Ont R Civ P 26.05(1) (Ontario); Takwani, CK (1994) *Civil Procedure* (3rd ed) Eastern Books at 107-12 (India); O 18 R 7(1) (Hong Kong), O 18 R 7(1) (Singapore); Goodman, C (2004) *Justice and Civil Procedure in Japan* Oxford University Press at 257.

Nevertheless, common-law systems have recognized that special circumstances can justify a limited reordering of pretrial litigation. For example, countries have adopted procedures for a search order (previously known as an *Anton Piller* order[6]) if a prospective plaintiff fears that key evidence is in imminent danger of being lost.[7] The order will be granted only if the prospective plaintiff can show 'serious harm or injustice' due to a risk that the defendant will destroy or remove material evidence.[8]

Another customary presuit discovery mechanism is the *Norwich Pharmacal* principle, named after the 1973 case. There, the House of Lords revived and modified an old equitable remedy known as the presuit bill of discovery, allowing a plaintiff to obtain discovery from customs officials concerning the identity of a party that had secretly been importing the company's patented drugs.[9] The *Norwich Pharmacal* principle has been widely adopted, permitting a prospective plaintiff to obtain discovery from an involved nonparty to determine the identity of the wrongdoer. In England, courts have extended the principle to information in aid of a claim, even if the putative defendant's identity was known.[10] Other common-law countries have adopted the principle, though not all have adopted England's subsequent expansion.[11]

The search order, or Anton Piller form of presuit discovery, is preservational, not investigative. In other words, the order is designed to ensure that the evidence is available for use at trial; it is not designed to enable a prospective plaintiff to investigate facts. By contrast, the *Norwich Pharmacal* form of presuit discovery is investigative, but it can be sought only from a nonparty, not from the prospective defendant. Neither form of presuit discovery, then, provides viable relief to a plaintiff who needs to obtain facts in the hands of a defendant in order to file a sufficient complaint.

A COMPARISON OF PRESUIT-DISCOVERY MECHANISMS

Until recently, presuit investigative discovery from the putative defendant did not exist, except in certain narrow circumstances. However, since the Woolf Reforms in England and Wales, many common-law countries, and even some civil-law countries, have begun experimenting with such discovery on a much wider scale.[12]

England

In 1998, upon the Final Report and Recommendations of the Right Honorable Lord Woolf,[13] England adopted a series of procedural reforms designed to promote early and

[6] *Anton Piller KG v Mfg Processes Ltd* [1976] 1 All ER 779.

[7] Zuckerman *Zuckerman on Civil Procedure* above n 2 at 604-10.

[8] Platto, C (1990) *Pre-trial and Pre-hearing Procedures Worldwide* Graham & Trotman at 85.

[9] *Norwich Pharmacal Co v Commissioners of Customs & Excise* (1973) 2 All ER 943.

[10] *Ashworth Security Hospital v. MGN Ltd* [2002] UKHL 29; *Bankers Trust Co v Shapira* [1980] 3 All ER 353; Zuckerman *Zuckerman on Civil Procedure* above n 2 at 578-81.

[11] Malaysia, for example, has adopted Norwich Pharmacal but, unlike England, has not extended it. Compare *First Malaysia Finance Bhd v Dato' Mohd Fathi Haji Ahmad* [1993] 2 MLJ 497 with *Teoh v Wan & Co* [2001] 1 AMR 358.

[12] In addition to the countries discussed in the text, it is worth noting that certain Australian rules allow presuit investigative discovery. R Civ P 32.05 (Vict); Family LR 1.05.

[13] Available at: http://www.dca.gov.uk/civil/final/index.htm.

inexpensive dispute resolution and to relegate litigation to a last alternative. In particular, England adopted a set of pre-action Protocols for specific claims and a general pre-action Practice Direction for all claims. The Protocols and Practice Direction are designed to promote a cards-on-the-table approach that facilitates informal dispute resolution before formal commencement or, if presuit settlement fails, to make subsequent formal proceedings more efficient.[14]

Under these reforms, a prospective plaintiff must send the prospective defendant a detailed account of the prospective allegations and a summary of the evidence the plaintiff has supporting them. She may also identify the opponent's documents that she wishes to inspect. The defendant then will respond with disclosures. If the defendant disputes the case, she must explain why and detail her own supporting evidence.[15]

Parties must act reasonably in this pre-action disclosure exchange and in attempting to avoid the necessity of formal litigation.[16] Although the pre-action procedure is not mandatory, failure to follow it in good faith can result in adverse cost apportionment in a subsequent formal lawsuit.[17] This cost consequence 'provides a potent incentive for adopting reasonable attitudes' in pre-action communication and disclosure.[18]

It appears anecdotally that the pre-action reforms have had a salutary impact. In 2006, Adrian Zuckerman wrote: 'There can be little doubt that the pre-action protocols and the culture of co-operation to which they give tangible expression have changed the character of English litigation for the better.'[19]

Because the pre-action protocols are not directly enforceable, however, they may be unable to aid a prospective plaintiff faced with an uncooperative adversary, especially if the adversary possesses the information necessary for the prospective plaintiff to commence a formal action. Like most other countries, England traditionally did not allow formal pre-action disclosure, except in very limited circumstances. As Zuckerman has recognized: 'This could be a cause of considerable hardship where a victim of a wrong was unable to ascertain whether he had a cause of action against another person without access to that person's documents.'[20]

Lord Woolf's report recommended expanding formal pre-action disclosure,[21] and that recommendation has been adopted in a general pre-action disclosure mechanism in CPR 31.16. The idea is, in part, 'to assist potential claimants who could not otherwise establish whether they had grounds for action'.[22]

A court will order presuit disclosure under CPR 31.16 if the prospective parties are likely to become formal parties, if the documents requested fall into the category of standard disclosure, and if disclosure prior to action is desirable in order to dispose fairly

[14] Practice Direction: Pre-Action Conduct para 1; Zuckerman *Zuckerman on Civil Procedure* above n 2 at 42.

[15] Practice Direction: Pre-Action Conduct para 7.1 and Annex A.

[16] Id § III and Annex A.

[17] CPR 31.11, 44.3; Practice Direction: Pre-Action Conduct para 4.6.

[18] Zuckerman *Zuckerman on Civil Procedure* above n 2 at 43.

[19] Id at 43-44. This echoes the assessments of earlier commentators. Andrews *Civil Procedure* above n 2 at 8 (noting that evaluative empirical evidence of the efficacy of the reforms shows improved quality of presuit contact between parties); Byron, R (2001) 'An Update on Dispute Resolution in England and Wales: Evolution or Revolution?' (75) *Tulane Law Review* 1297 (reporting, in 2001, that the Woolf Reforms generally have been successful at changing the culture from pro-litigation to pro-mediation).

[20] Zuckerman *Zuckerman on Civil Procedure* above n 2 at 564.

[21] Final Report 127 para 48.

[22] Zuckerman *Zuckerman on Civil Procedure* above n 2 at 564.

of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs.[23] The lodestone is desirability, which is tied to the requested disclosure's scope and cost.[24] The court is more likely to issue an order if the disclosure sought is focused and limited and needed to plead a claim sufficiently.[25]

To ensure that the parties do not abuse the pre-action disclosure mechanism, the court will usually award costs to the party prevailing on the application.[26] However, the court has discretion to allocate costs differently depending upon the parties' conduct.[27]

Hong Kong

The Woolf Reforms in England spurred similar reforms in other common-law countries. Hong Kong, for example, adopted Order 24, Rule 7A, which allows a prospective plaintiff to obtain a court order for presuit investigative discovery of documents relevant to the putative claim. Although the purpose of the provision is to facilitate negotiation, trial preparation, and pre-trial settlement, a court may order only disclosure of particular documents, not general discovery.[28] To be allowed, the petition must be supported by an affidavit specifying the documents sought, demonstrating their relevance to an issue likely to arise out of the prospective claim, showing that the respondent is likely to have the documents in his possession, and stating the grounds on which the claim will be made. If the court finds that these requirements have been met, then the court may grant presuit discovery if relevant and necessary for disposing fairly of the case or for saving costs.[29]

Until recently, presuit discovery under Rule 7A was restricted to personal-injury cases because of concerns that broad presuit discovery would lead to excessive front-load costs or harassing fishing expeditions.[30] In 2004, however, the Hong Kong Working Party on Civil Justice Reform published a Final Report with recommendations that largely followed the lead of the Woolf Reforms.[31] The Final Report noted broad consensus for support for more generalized presuit investigative discovery modeled after CPR 31.16, and it recognized that 'in some cases, a plaintiff with a potentially meritorious claim may be shut out from asserting it in a sustainable form without presuit disclosure of key documents'.[32] The Working Party also recognized that presuit discovery could facilitate settlement.[33]

An initial proposal to broaden presuit investigative discovery beyond personal-injury and death cases was broadly supported by judges, masters, the Bar Association, the Law Society, a set of barrister's chambers, and three firms of solicitors. Several supporters, however, stressed the need for clearly defined limits on the scope of discovery.[34]

23 CPR 31.16.
24 Zuckerman *Zuckerman on Civil Procedure* above n 2 at 568-70.
25 Id; *First Gulf Bank v Wachovia Bank National Assn* [2005] EWHC 2827; *Snowstar Shipping v Graig Shipping PLC* [2003] EWHC 1367.
26 CPR 48.1; Andrews *Civil Procedure* above n 2 at 614.
27 Zuckerman *Zuckerman on Civil Procedure* above n 2 at 571.
28 *The Hong Kong White Book (2006)* Sweet & Maxwell at 454.
29 O 24 R 8(2) (Hong Kong).
30 CJR Final Report § 16.3(a)(i) (2004), available at: http://www.civiljustice.gov.hk/fr/paperhtml/toc_fr.html.
31 Fan, K (2011) 'Mediation and Civil Justice Reform in Hong Kong' (27) *International Litigation Quarterly* 11.
32 CJR Final Report § 16.3.
33 Ibid.
34 Ibid.

In response, the Working Party proposed: 'Parties should be empowered to seek discovery before commencing proceedings [...] along the lines provided for by the CPR.'[35] Accordingly, the Final Report recommended amending Rule 7A to broaden the court's power to order presuit discovery 'to encompass all types of cases (and not merely cases involving personal injury and death claims)'.[36] To assuage concerns about fishing expeditions, the Working Party recommended that any order should list 'specific documents or classes of documents which are "directly relevant" to the issues in the anticipated proceedings', and 'should not extend to "background" documents or possible "train of inquiry" documents'.[37] The Working Party reasoned that

> such a rule strikes a reasonable balance between the need to protect against harassment and fishing applications on the one hand and the need to enable a potentially meritorious plaintiff to bring a claim which could not effectively otherwise be brought.[38]

Following that recommendation, the Hong Kong judiciary adopted an amendment in 2008 that eliminated the personal-injury limitation. Rule 7A now allows for presuit investigative discovery in all cases.[39]

Singapore

Singapore's Rules provide for discovery of documentary and written information via originating summons in a presuit action. They also provide for sanctions for noncompliance with discovery requests in the presuit action.[40]

An application for presuit discovery must be supported by an affidavit asserting that the defendant is likely to be a party to subsequent substantive proceedings and identifying the material facts pertaining to the intended proceedings. The affidavit must also describe the information sought, explain how the information is relevant to an issue likely to arise out of the intended claim, and show that the defendant is likely to have the information in his possession. The scope of discovery is limited to what could have been obtained via normal discovery.[41] A court will order presuit discovery only if necessary for disposing fairly of the cause or for saving costs.[42]

The court may condition an order for presuit discovery on the plaintiff giving security for the costs of the defendant or on such other terms, if any, as the court thinks just.[43] Unless the court orders otherwise, the plaintiff must pay the defendant's costs.[44]

35 Ibid.

36 Id Recommendation 75.

37 Id § 16.3(c).

38 Id § 16.3(d).

39 O 24 R 7A.

40 O 24 R 6, O 24 R 16(1), O 26A R 1. The court also has an inherent power to make procedural orders in the interests of justice. Pinsler, J (2005) 'Is Discovery Available prior to the Commencement of Arbitration Proceedings?' *Singapore Journal of Legal Studies* 64.

41 O 24 R 6, O 27A R 1.

42 O 24 R 13(1), O 27A R 2.

43 O 24 R 6(6)(a), O 27A R 3.

44 O 24 R 6(9), O 27A R 5.

Japan

In 2003, the Japanese Civil Code was amended to adopt a presuit inquiry process.[45] The motivation for adopting this new presuit procedure was to enable complainants to be able to meet Japan's fact-pleading standard, which requires the complaint to be specific about underlying facts and to itemize the evidence that will be used to prove each allegation.[46]

Under this new procedure, a prospective plaintiff must notify the prospective defendant and provide the reasons for the suit. Once notification is complete, each party has four months to submit a written inquiry to the opposing party to discover facts clearly necessary for preparing the contention or proof.[47] The inquiries posed must be specific, factual, reasonable, relevant to a contested issue, non-offensive, and non-repetitive. The goal is to give a prospective plaintiff an opportunity to have some factual investigation of a claim that might otherwise be insufficient without having to pay the relatively high filing fee for a formal lawsuit. Another hope is that the inquiry process will move the parties toward presuit settlement.[48]

Answers are mandatory, but the Code does not impose a formal sanction for noncompliance.[49] Instead, the Code imposes a duty of cooperation on the parties.[50] However, because this duty is in tension with a Japanese lawyer's ethical duty to zealously represent his client, lawyers often refuse to voluntarily disclose relevant information to opponents.[51]

Although a court can consider cost-allocation sanctions for unjustified discovery refusals if the plaintiff files a formal complaint, courts have supported refusals on a variety of privacy grounds.[52] The lack of sanctions and the broad leeway for refusal have led the Japanese bar to conclude that the inquiry procedure has not been effective as a discovery device.[53]

Civil-Law Countries

Civil-law countries have little, if any, formal discovery in the first place, so one might expect nothing from them in the way of presuit discovery.[54] But even in core civil-law systems, the idea of presuit discovery is spreading. Like common-law systems, many civil-law systems permit some presuit preservational discovery. But courts in France and Italy

[45] Act to Amend Civil Procedure Act and Other Relevant Acts (2003) 15 Heisei Statute No 108 Arts 132-2 to 132-9. The Japanese Code has long allowed a plaintiff to request a presuit evidentiary hearing if necessary to preserve evidence, but this provision has never been held to encompass investigative discovery. Oda, H (1999) *Japanese Law* (2nd ed) Oxford University Press at 401-02.

[46] Chase, O and others (2007) *Civil Litigation in Comparative Context* West at 239.

[47] Oda, H (2009) *Japanese Law* (3rd ed) Oxford University Press at 415.

[48] Goodman, C (2004) 'Japan's New Civil Procedure Code: Has it Fostered a Rule of Law Dispute Resolution Mechanism?' (29) *Brooklyn Journal International Law* 511.

[49] Oda *Japanese Law* above n 47 at 4.

[50] Kojima, T (1998) 'Japanese Civil Procedure in Comparative Law Perspective' (46) *University of Kansas Law Review* 687.

[51] Goodman 'Japan's New Civil Procedure Code' above n 48 at 573.

[52] Oda *Japanese Law* above n 47 at 415.

[53] Goodman 'Japan's New Civil Procedure Code' above n 48 at 572-73.

[54] Merryman, JH and Pérez-Perdomo, R (2007) *The Civil Law Tradition* (3rd ed) Stanford University Press at 114-17.

have indicated a recent willingness to extend that power to circumstances in which the discovery is not truly necessary for preservation of evidence but rather would facilitate resolution of the dispute.[55] It is unclear whether this practice is fleeting or indicative of more concrete change, but it at least provides additional support for presuit discovery.

US States

In addition to foreign nations, several states of the United States have experimented with presuit-discovery mechanisms. Texas is perhaps the strongest proponent. It allows presuit investigative discovery whenever justice or some other benefit outweighs the burden and expense of the discovery requested.[56] Plaintiffs routinely use the presuit-discovery procedure to assist in drafting their complaints.[57]

Alabama, like Texas, has a strong policy favoring presuit discovery for claim investigation. Alabama Rule 27 allows preaction discovery for any 'person who desires to perpetuate his own testimony or that of another person or to obtain discovery under Rule 34 or 35'.[58] The Alabama Supreme Court has construed the rule to allow preaction discovery 'regardless of any need to perpetuate evidence' if the plaintiff wishes to use it to determine whether she has a reasonable basis for filing a lawsuit.[59]

Similarly, Ohio allows a petitioner to bring an action for discovery when she is otherwise unable to file a complaint without the discovery. Ohio Rule 34(D) provides that 'a person who claims to have a potential cause of action may file a petition to obtain discovery as provided in this rule'.[60] Under this rule, an action for discovery may be used 'to uncover facts necessary for pleading',[61] including facts that would allow a plaintiff to determine if she has a valid cause of action.[62] The Ohio Court of Appeals has added:

> The rule acts as a safeguard against charges that the plaintiff filed a frivolous lawsuit in a case where the wrongdoer or a third party has the ability to hide the facts needed by the plaintiff to determine who is the wrongdoer and exactly what occurred.[63]

Pennsylvania also allows presuit discovery for purposes of composing a complaint. The Pennsylvania rules allow a plaintiff to take testimony or propound interrogatories '*for* preparation of pleadings'.[64] The Pennsylvania Supreme Court has interpreted this rule to allow presuit discovery when necessary to formulate a legally sufficient complaint.[65]

55 Chase *Civil Litigation in Comparative Context* above n 46 at 238-39.
56 Tex R Civ P 202.1 & 202.4.
57 Hoffman, L (2007) 'Access to Justice, Access to Information: The Role of Presuit Investigatory Discovery' (40) *University of Michigan Journal of Law Reform* 217 (estimating that Texas presuit discovery has been used approximately 4,500 times from 1999-2005 and that over 50% of Texas attorneys were involved in presuit discovery during that same period).
58 Ala R Civ P 27.
59 *Ex parte Anderson*, 644 So 2d 961, 965 (Ala 1994).
60 Ohio R Civ P 34(D)(1).
61 *Huge v Ford Motor Co*, 803 NE2d 859, 861 (Ohio App 2004).
62 *Benner v Walker Ambulance Co*, 692 NE2d 1053, 1055 (Ohio App 1997).
63 Id.
64 Pa R Civ P 4001(c) (emphasis added).
65 *McNeil v Jordan*, 894 A2d 1260, 1275-78 (Pa 2006).

Other states are less overt about the availability of presuit discovery but nonetheless appear to recognize it.[66] In addition, most US states allow equitable bills of discovery.[67] Courts generally have restricted the bill to instances in which discovery cannot otherwise be had under the applicable rules and statutes and where discovery is necessary to secure justice in the underlying proceeding.[68] Thus, most states that do not permit presuit investigative discovery by statute or rule instead allow an equitable action for a bill of discovery.

Connecticut, for example, recognizes an independent equitable action for a bill of discovery. The bill is designed to obtain evidence for use in an action for affirmative relief. The plaintiff must demonstrate that the discovery 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. He must show that he has no other adequate means of enforcing discovery of the desired material, where 'adequate' takes into consideration convenient, effective, and full relief. Courts presumptively grant the bill absent some well-founded objection.[69]

EVALUATIVE LESSONS

The first takeaway from this survey of presuit discovery around the world is that presuit discovery is surprisingly prevalent among common-law systems. Once seen as something exceptional and carefully limited — as with *Anton Piller* and *Norwich Pharmacal* orders—presuit discovery appears to be experiencing a surge in popularity, with a broadening and emboldening trend.

The second takeaway is that although the asserted goals of presuit discovery fall into two discrete categories—promoting efficiency and rectifying information asymmetry—all investigatory presuit-discovery mechanisms help equalize information in practice. The Hong Kong experience illuminates this point. Hong Kong's pre-2004 presuit-discovery mechanism was designed to promote efficiency and settlement, but in broadening it in light of the Woolf Reforms, the stated goals expanded to add information equalization.[70] Thus, whatever its stated rationale, presuit discovery generally is information equalizing.

The third takeaway is that the details of presuit discovery are strikingly similar across countries. In part, this similarity may reflect the habit of common-law countries to follow England's lead, though that follow-the-leader tendency does not adequately explain the adoption of presuit discovery in US states, which typically avoid looking to international models. The common features of presuit-discovery mechanisms include the following:

1. Notice: the plaintiff must identify the claim, defendant, and information sought.
2. Focus: the information sought must be relevant and discoverable but no broader than what is necessary to enable the plaintiff to file a formal complaint, to facilitate the resolution of the dispute, or to save costs.

[66] Dodson, S (2010) 'Federal Pleading and State Presuit Discovery' (14) *Lewis & Clark Law Review* 43 (identifying New York and Vermont).
[67] Barron, R (1996) 'Existence and Nature of Cause of Action for Equitable Bill of Discovery' (37) *American Law Reports 5th* 645.
[68] Id.
[69] *Berger v Cuomo*, 644 A2d 333, 337 (Conn 1994).
[70] CJR Final Report § 16.3(a)(i).

3. Cost Allocation: except in U.S. states, the plaintiff bears some risk of having to pay costs if she loses her petition for presuit discovery or the subsequent substantive lawsuit.
4. Compliance: the defendant has some legal duty or financial incentive to comply with the presuit-discovery request.

Can other systems use these lessons profitably? The next section considers that question, with particular attention to the US, which lacks a robust pre-action mechanism.

APPLICATION IN THE US

Although the US rarely looks outward for procedural reform, the US federal system could benefit from foreign experiments with presuit discovery. The balance of this paper focuses on how the US system might profitably use those lessons.

Pleading in the US

Despite the gulf between the civil-law and common-law traditions,[71] the global norm of pleading is fact pleading.[72] Different pleading rules require varying levels of detail and evidence, but they coalesce around a common emphasis on facts.

For years, the US followed a different model. According to the 1957 case *Conley v Gibson*, the US Federal Rules 'do not require a claimant to set out in detail the facts upon which he bases his claim'.[73] Indeed, unlike most fact-pleading regimes, Rule 8 deliberately avoids the word 'fact'. Instead of fact pleading, the US federal system has followed 'notice pleading', which requires only that the complaint give 'fair notice' of the claims and the 'grounds' upon which they rest.[74] To be sure, proper notice requires some factual setting, but it requires only enough to differentiate the claim, not to detail or substantiate it. Notice pleading, therefore, is fundamentally different from the fact pleading practiced by the rest of the world.[75]

In 2007, however, the US Supreme Court dramatically changed federal pleading from a system founded on notice to one founded on facts. *Bell Atlantic Corp v Twombly* held that a complaint failed to meet the pleading standard—despite providing sufficient notice—because it did not supply sufficient facts to support the 'plausibility' of the claim.[76] In the 2009 case of *Ashcroft v Iqbal*, the Supreme Court reaffirmed this factual-sufficiency standard, and added a requirement that conclusory allegations without factual support

[71] Of course, individual systems within one of these great traditions differ widely and are themselves dynamic. Thus, I will necessarily use some generalities and extrapolations in this section.

[72] Murray, PL and Stürner, R (2004) *German Civil Justice* Carolina Academic Press at 198 (Germany); Schlosser, PF (1996) 'Lectures on Civil-Law Litigation Systems and American Cooperation with those Systems' (45) *University of Kansas Law Review* 9 (France); Main *Global Issues* above n 5 at 28-32 (Spain, Austria, and Australia), Taruffo, M (2002) 'Civil Procedure and the Path of a Civil Case' in Lena, JS and Mattei, U (eds) (2002) *Introduction to Italian Law* Aspen (Italy); ALI/UNIDROIT, Principles of Transnational Civil Procedure Rule 12.3.

[73] *Conley v Gibson*, 355 US 41, 47-48 (1957).

[74] Id.

[75] Dodson, S (2010) 'Comparative Convergences in Pleading Standards' (158) *University of Pennsylvania Law Review* 441.

[76] *Bell Atlantic Corp v Twombly*, 550 US 544, 556 (2007).

should be disregarded by the court when assessing plausibility.[77] *Iqbal* specifically referred to the need for facts more than twenty times in the opinion. There can be no doubt that these decisions require, both formally and functionally, the pleading of facts. These cases move US federal pleading away from its exceptionalist corner and toward a fact-pleading regime fundamentally more akin to that of the rest of the world.

This new pleading regime does differ instrumentally from the fact pleading practiced in most other countries.[78] The new US fact pleading is a screening device, designed to weed out claims suspected of being meritless. The fact pleading practiced in most countries is an information-forcing, issue-narrowing mechanism, designed to focus the case early on for efficiency purposes. In this respect, then, the pleadings trend in the US is not moving in a straight line directly toward foreign pleading regimes.

Although one ought not let similarities mask differences,[79] one also ought not let differences mask similarities. *Twombly* and *Iqbal* reject mere notice pleading and demand factual sufficiency. Although the new US pleading differs from traditional fact pleading on an instrumental level, it looks quite similar in practice and in effect.

Further, the instrumental differences are not particularly meaningful. For starters, the general purpose of both traditional fact pleading and the new US pleading is the same: efficiency. And, although the two mechanisms purport to achieve that efficiency in different ways, fact pleading in practice ends up having a screening effect. Thus, although they purport to be instrumentally different, the two mechanisms are more instrumentally similar than their stated motives presume.

The primary difference is that other countries recognize the fallibility of the fact-pleading screening effect and have attempted to ameliorate it,[80] while US pleading assumes that a plaintiff's failure to plead supporting facts establishes the meritlessness of the claim. That assumption is wrong. In many cases, particularly those involving secretive conduct or mental state, the plaintiff will lack critical facts because they are in the hands of a defendant who is unwilling to share them. A plaintiff's failure to plead those facts indicates information asymmetry, not necessarily meritlessness.[81]

In the US, plaintiffs facing information asymmetry cannot get the facts that they need from the defendant without discovery, but they cannot get to discovery without first pleading those facts. This catch-22 affects plaintiffs with meritorious claims just as strongly as those with meritless claims. The problem is especially pernicious in the US, which encourages private litigation as a way to enforce public norms.

[77] *Ashcroft v Iqbal*, 556 US 662 (2009).

[78] Clermont, K (2010) 'Three Myths about Twombly-Iqbal' (45) *Wake Forest Law Review* 1337.

[79] Marcus, R (2010) 'Exceptionalism and Convergence: Form versus Content and Categorical Views of Procedure' (49) *Supreme Court Law Review* 521.

[80] In some civil-law countries, for example, if the factual information is largely in the defendant's hands, the judge is less likely to require detailed substantiation in the plaintiff's pleadings. Murray, PL and Stürner, R *German Civil Justice* above n 72 at 231 n 211 and 595; Carchiette, A (2010) 'Responsabilita Civile del Medico e Della Struttura Sanitaria e Canoni di Repartizione dell'Onere Probatorio tra Vittima e Convenuto [Liability in Torts of the Doctor and the Hospital and the Criteria for Distributing the Burden of Proof Between the Plaintiff and the Defendant]' *Diritto e Giustizia* (It.). By contrast, US courts have held that the pleading standard does not lessen in cases of information asymmetry. *Chesbrough v VPA PC*, 2011 WL 3667648 at *9 (6th Cir Aug 23, 2011); *Santiago v Warminster Twp*, 629 F.3d 121, 134 n 10 (3d Cir 2010); *South Cherry St, LLC v Hennessee Group LLC*, 573 F.3d 98, 113-114 (2d Cir 2009).

[81] Miller, A (2010) 'From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure' (60) *Duke Law Journal* 1.

Presuit discovery holds a solution. The idea is simple: give plaintiffs caught in this catch-22 a limited opportunity for presuit discovery, carefully circumscribed and targeted at the missing facts causing the catch-22 in the first place. Such discovery would benefit plaintiffs with meritorious claims who otherwise would be screened out by a fact-pleading standard. It also could benefit innocent defendants by providing a low-cost opportunity to demonstrate that a claim is meritless. Finally, it should benefit the system as a whole by focusing the pleading screen on truly meritless cases rather than on information-asymmetry cases (some of which could be meritorious).[82]

The US federal rules, however, currently do not permit any presuit, investigative discovery.[83] Accordingly, US rulemakers should consider adopting a presuit-discovery mechanism, modeled on the mechanisms of other countries, that allows plaintiffs to access discovery for purposes of investigating those critical facts needed to file a sufficient pleading. I and others have urged such adoption, but this paper is the first to offer support from a comparative perspective.[84]

Presuit Discovery in the US

Presuit, investigative discovery in the US should have several features, each of which garners support from existing presuit-discovery mechanisms in other countries. Recall that presuit-discovery mechanisms have four common characteristics:

1. Notice: the plaintiff must identify the claim, defendant, and information sought.
2. Focus: the information sought must be relevant and discoverable but no broader than what is necessary to enable the plaintiff to file a formal complaint, to facilitate the resolution of the dispute, or to save costs.
3. Cost Allocation: except in US states, the plaintiff bears some risk of having to pay costs if she loses her petition for presuit discovery or the subsequent substantive lawsuit.
4. Compliance: the defendant has some legal duty or financial incentive to comply with the presuit discovery request.

Presuit discovery in US federal courts should draw upon these principles, with some modifications to reflect the unique structures of US civil procedure.

First, notice. The plaintiff should identify the putative defendant, the anticipated claim, and the information sought. Doing so will give the defendant notice of the anticipated lawsuit and the opportunity to settle the dispute, to provide any requested information informally, or to contest the presuit-discovery request. It also will supply the court with the basic information needed to adjudicate the presuit-discovery request. This requirement is consistent with most other presuit-discovery mechanisms, and there is nothing to suggest that American procedure should deviate from them.

[82] A full defense of these benefits is set out in Dodson, S (2010) 'New Pleading, New Discovery' (109) *Michigan Law Review* 55.
[83] Hoffman 'Access to Justice' above n 57 at 227.
[84] Bone, R (2010) 'Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal' (85) *Notre Dame Law Review* 849; Clermont, K and Yeazell, S (2010) 'Inventing Tests, Destabilizing Systems' (95) *Iowa Law Review* 821; Dodson 'New Pleading' above n 82; Hoffman 'Access to Justice' above n 57 at 227; Spencer, A (2009) 'Understanding Pleading Doctrine' (108) *Michigan Law Review* 1.

Second, focus. Presuit discovery in US federal courts should be restricted to the minimum discovery necessary to rectify the information asymmetry that prevents a plaintiff from filing a sufficient pleading. To achieve this narrow focus, the plaintiff should be required to certify that, without certain facts, she cannot file a sufficient pleading because of information asymmetry. To illustrate, a plaintiff who believes she was fired for unlawful race discrimination could petition for presuit discovery by certifying that she cannot file a sufficient pleading without obtaining from the defendant some evidence supporting a plausible inference of unlawful discriminatory animus.

A critical effect of this requirement is that it forces the plaintiff to evaluate her claim honestly; if she seeks presuit discovery, she essentially concedes dismissal of her claim if the discovery reveals no evidence of unlawful conduct. Thus, a plaintiff will not seek presuit discovery unless she truly needs it. Forcing this concession from the plaintiff should keep presuit discovery confined to those cases in which it is truly needed to serve its purposes.

This requirement finds support from the presuit-discovery mechanisms of several US states. Alabama, for example, requires the petitioner must file a verified petition that identifies the information the petitioner desires to obtain, and that states that he presently is unable to bring the action without the information.[85] A Connecticut petitioner must show that the discovery sought 'is material and necessary' for proof of the claim and that there are no other adequate means of enforcing discovery of the desired material.[86] A Pennsylvania petitioner is required to describe the materials sought and 'state with particularity the 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'.[87] Ohio permits presuit discovery 'to uncover facts necessary for pleading'.[88] These state analogues indicate that similar requirements in federal court should be adequate and workable. No study of which I am aware has suggested otherwise.

The requirement also gathers support from the mechanisms of Japan, which allows discovery of those facts clearly necessary for preparing the contention or proof,[89] and Victoria, which allows presuit discovery only if, after making all reasonable inquiries, the applicant lacks sufficient information to decide whether to file a formal lawsuit, and the defendant is likely to possess that information.[90] Tying presuit discovery to the inability to file a legally sufficient complaint—as opposed to the inability to *decide* to file—is slightly more concrete than Victoria's rule.

England, Hong Kong, and Singapore allow presuit discovery more broadly—to facilitate resolution of the dispute or to save costs.[91] And Texas allows presuit discovery whenever justice or some benefit outweighs its burden and expense.[92] I am not necessarily opposed to considering broader presuit discovery under the right circumstances. But

[85] Ala R Civ P 27(a), *Ex parte Anderson*, 644 So 2d 961, 965 (Ala 1994).
[86] *Berger v Cuomo*, 644 A2d 333, 337 (Conn 1994).
[87] *McNeil v Jordan*, 894 A2d 1260, 1278 (Pa 2006).
[88] *Huge v Ford Motor Co*, 803 NE2d 859, 861 (Ohio App 2004).
[89] Oda *Japanese Civil Procedure* above n 47 at 419.
[90] R Civ P 32.05.
[91] CPR 31.16 (England), O 24 R 8(2) (Hong Kong), O 24 R 13(1), O 27A R 2 (Singapore).
[92] Tex R Civ P 202.1 & 202.4.

expansive presuit discovery would fundamentally alter the current litigation structure in US federal courts, which presumes that pleadings precede discovery. I seek, therefore, only a mild reordering based on the specific problem of the new US pleading regime. It is worth noting that even the liberal forms of presuit discovery are more likely to be granted if the request is narrow and limited to the most critical information.[93]

A corollary is that the discovery ordered should be relevant to the claim and no broader than normal discovery. This requirement tracks the spirit of all other presuit-discovery mechanisms. Presuit discovery in US federal courts, however, generally should be more limited in order to keep costs down and to safeguard against the risk that presuit discovery will be overblown before any formal pleadings have framed the dispute. To cabin presuit discovery, a federal court should define stepwise progressions, set default limits, or restrict initial discovery to certain types of discovery vehicles. These additional limits are modeled after the practice of Texas courts, which routinely impose limits on presuit discovery,[94] though the better course would be to codify the preference for such limits ex ante. The idea is that when presuit discovery provides an advance look at the key facts needed to state a claim, it ought to be quick and cheap.

Third, cost allocation. The plaintiff should bear the risk that presuit discovery will reveal no evidence of unlawful conduct. The plaintiff, after all, is the party seeking information about the merit of her claim; the defendant compelled to answer may be truly innocent. Accordingly, the presumption should be that the plaintiff must pay for the costs of presuit discovery.

However, if the plaintiff discovers information that enables her to plead her claim sufficiently, then she was correct to seek presuit discovery (and the defendant was wrong to resist it). In that event, the cost allocation should revert to the normal cost-allocation rule in the US that the parties bear their own costs.

This cost-allocation proposal draws on several examples in other countries but reflects slight modifications to accommodate the default 'American Rule' of cost allocation.[95] Other presuit-discovery mechanisms generally follow a 'loser pays' rule. English courts, for example, typically allocate costs to the party who prevails on a presuit-disclosure application.[96] But Singapore requires the plaintiff to foot the bill and even post a bond in advance as a condition precedent to seeking presuit discovery.[97] My cost-allocation proposal begins with Singapore's presumption but allows that presumption to be overcome—and revert back to the American Rule—if the plaintiff 'prevails' by successfully obtaining the information she needs to file a sufficient complaint. The retention of this US cost-allocation norm makes adoption in the US more palatable.

Fourth, compliance. If the defendant stonewalls proper presuit-discovery requests, then a court should have the authority to shift costs back on the defendant as a sanction for the defendant's unreasonable conduct. The experience of other countries suggests that the availability of cost shifting for obstructionist conduct is critical; the Japanese Code's

[93] *Briggs & Forrester Electric Ltd v Governors of Southfield School for Girls* [2005] EWHC (TCC) 1734; *Snowstar Shipping v Graig Shipping PLC* [2003] EWHC 1367; *First Gulf Bank v Wachovia Bank National Assn* [2005] EWHC 2827; CJR Final Report § 16.3 (2004).

[94] Hoffman 'Access to Justice' above n 57 at 259.

[95] *Alyeska Pipeline Service Co v Wilderness Society*, 421 US 240 (1975).

[96] Above n 26.

[97] O 24 R 6, O 27A R 3.

failure to provide for formal sanctions for noncompliance with presuit-discovery requests has rendered its presuit-discovery mechanism largely ineffective. Formal sanctions are important, then, and cost shifting seems to be the easiest way to impose them. The normal discovery rules in the US already allow cost shifting as a sanction for obstructionist discovery tactics, and that sanction should continue to be available for presuit discovery as well.[98] This type of sanction also is in line with the way other countries deal with discovery sanctions.

Caveats and Responses

I acknowledge that urging procedural reform based on foreign models is dangerous business, particularly for a country as exceptionalist as the US. The American federal civil-justice system is like no other, with its history of notice pleading, its long commitment to the most liberal discovery on the world, its love affair with juries, its relative openness to class actions and punitive damages, its liberal joinder rules, and its embrace of public litigation.[99] Civil procedure draws from cultural and social norms that run deep,[100] and the longstanding uniqueness of American procedure makes transplantation tricky.[101] Further, procedure within a system is interconnected, such that the exceptionalist features of US procedure drive and influence other features,[102] thereby making change to one feature difficult.[103]

Despite these barriers, I hold out hope that the US federal system could profitably adopt a presuit-discovery mechanism of the type I propose above, modeled on the experiences of other countries. There are three reasons why.

First, a fundamental change has already happened in the US: The Supreme Court's recent decisions in *Twombly* and *Iqbal* have moved the US away from notice pleading and toward a fact-pleading model more akin to that of the global norm. That change ought to make comparative reform in this area more plausible and less jarring.[104] Further, this pleading change tugs at the interconnected procedural web, suggesting that a conforming change to discovery might be appropriate and have real advantages for the new pleading system in the US.

[98] Fed R Civ P 37.

[99] Dodson, S (2008) 'The Challenge of Comparative Civil Procedure' (60) *Alabama Law Review* 133. Some, however, see a waning of U.S. exceptionalism in a number of areas. Dodson, S and Klebba, J (2011) 'Global Civil Procedure Trends in the Twenty-First Century' (34) *Boston College International and Comparative Law Review* 1; Marcus, R (2007) 'Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform' (35) *Western State University Law Review* 103; Rowe, T (2007) 'Authorized Managerialism under the Federal Rules—and the Extent of Convergence with Civil-Law Judging' (36) *Southwestern University Law Review* 191.

[100] Clermont, K (2003) 'Why Comparative Civil Procedure?' in Huang, K (2003) *Introducing Discovery into Civil Law* Carolina Academic Press; Kötz, H (2003) 'Civil Justice Systems in Europe and the United States' (13) *Duke Journal of Comparative and International Law* 61.

[101] Marcus, R (2005) 'Putting American Procedural Exceptionalism into a Global Context' (53) *American Journal of Comparative Law* 709; Miller, G (1997) 'The Legal-Economic Analysis of Comparative Civil Procedure' (45) *American Journal of Comparative Law* 905.

[102] Wright, CA and Kane, MK (2002) *Law of Federal Courts* (6th ed) West at 470.

[103] Marcus 'American Procedural Exceptionalism' above n 101 at 710; Reitz, J (1990) 'Why we probably cannot Adopt the German Advantage in Civil Procedure' (75) *Iowa Law Review* 987.

[104] Dodson 'Comparative Convergences' above n 75 at 468-69.

Second, the adoption of a limited presuit-discovery mechanism is a relatively modest reform. Comparativists have warned—rightly so—that transplantation must be 'limited in scope and sensitive to context'.[105] The presuit-discovery mechanism that I have proposed fits those requirements.

Third, the US need not look solely outward in considering presuit-discovery models.[106] As discussed above, several states of the US have their own. Domestic practice thus supports and enhances the viability of emulating other countries' experiences.

CONCLUSION

At a minimum, a comparative approach suggests that it would be wrong to think of presuit investigative discovery in US federal courts as novel or outlandish. As other countries have proposed, a pleading system that requires facts before discovery needs some release valve for critical facts that the plaintiff otherwise cannot obtain before discovery. US rulemakers should consider presuit-discovery reform based on the mechanisms adopted in other countries.

105 Clermont 'Why Comparative Procedure' above n 100.

106 Dubinsky, P (2008) 'Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law' (44) *Stanford Journal of International Law* 1 (suggesting that U.S. proceduralists tend to look inward rather than outward for reform and interpretive purposes); Gidi, A (2006) 'Teaching Comparative Civil Procedure' (56) *Journal of Legal Education* 502 ("American proceduralists are among the most parochial in the world.").