

# Heightened Procedure

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*ABSTRACT: When it comes to combating meritless litigation, how much should procedure matter? Conventional wisdom holds that procedure should be uniform, with the same rules applying in all civil cases. Yet the causes of meritless litigation are not uniform, making it difficult for identical procedures to address the problem. As a result, lawmakers frequently turn to what this Article calls “heightened procedure”—additional procedures applicable only in designated areas of the law. Across a variety of substantive areas, lawmakers have adopted heightened pleading standards, stays of discovery, agency review, and a multitude of other tools from the heightened procedural toolbox. Despite the prevalence of heightened procedure, there has been no comprehensive examination of its role across the legal system, leaving lawmakers with little understanding of what specific heightened procedures do and what specific areas of the law need. This Article aims to provide that framework, explaining how lawmakers can match the causes of meritless litigation with the appropriate heightened procedural tools. In the end, meritless litigation is not one-size-fits-all, and its procedural solutions should not be either.*

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## I. INTRODUCTION

In certain corners of the legal system, meritorious cases are like needles in a haystack—the problem is finding them. Meritless cases impose real costs on the legal system; they burden courts, inflict unnecessary expense on defendants, and give litigation a bad name. Yet, at the same time, meritorious cases confer real benefits; they hold wrongdoers accountable, deter future misconduct, and drive legal reform. If meritorious cases are worth finding, how should we go about finding them?

In theory, procedure should help. Procedural rules help sort the good

cases from the bad, allowing meritorious claims to go forward while weeding out the meritless ones.<sup>1</sup> Pleadings, discovery, motions for summary judgment, Rule 11 filings—these tools all help identify claims that are unlikely to succeed at trial.

The problem is that procedural rules are transsubstantive—they apply in all civil cases.<sup>2</sup> Yet the causes of meritless litigation are not one-size-fits-all. The challenges of prisoner litigation are different from the challenges of securities class actions, which are different still from the challenges of medical malpractice and patent cases.<sup>3</sup> Different types of cases pose different types of challenges, which transsubstantive rules by their very nature cannot fix.<sup>4</sup>

But what transsubstantive rules cannot fix, legislatures can (or so they think).<sup>5</sup> In a variety of substantive areas, federal and state legislatures have used what this Article calls “heightened procedure”—additional procedures applicable in designated areas of the law to reduce meritless litigation. In securities class actions, for example, Congress has raised pleading standards

1. See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 577 (1997) (“The goal of any regulatory scheme, whether it involves strict pleading, penalties or judicial screening, is, loosely stated, to minimize the problems of frivolous litigation without creating too many new problems along the way.”); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 74 (1990) (discussing the “screening function” of summary judgment rules).

2. See FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.”); see also Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2080–81 (1989) (“Generalism in civil procedure is, in the Anglo-American tradition, about a century older than the Federal Rules . . .” (footnote omitted)); see also generally David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191 (examining the rise of transsubstantive procedural rules).

3. A number of eminent scholars have recognized the limits of transsubstantive rules. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules”*, 2009 WIS. L. REV. 535, 536; Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 370 (2013); see also generally Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).

4. By describing procedural rules as transsubstantive, I do not mean to imply that procedural rules never vary across subject areas. There are a handful of Federal Rules of Civil Procedure that apply only in certain types of cases, such as the exemptions to the initial disclosure requirements in Rule 26(a) or the procedures in Rule 23.1 that are applicable only in shareholder derivative suits. See FED. R. CIV. P. 26(a), 23.1. Moreover, judges have limited discretion to alter the application of these rules in specific situations. See Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 700 (2010) (“The Civil Rules leave it to the individual judge to custom-fit the procedure to the case.”). These limited exceptions, however, do not change the broader commitment to transsubstantive procedures, making it difficult to address the problems in specific areas of the law.

5. See David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 416 (2010) (“Congress and state legislatures have embraced substance-specific procedural rules as tools functionally indistinct from substantive legal changes in order to achieve particular goals of public policy.”).

and limited access to discovery.<sup>6</sup> In prison litigation cases, Congress has authorized limited cost-shifting and required inmates to exhaust administrative remedies before filing suit.<sup>7</sup> And in patent litigation, Congress is currently considering whether to adopt heightened pleading standards, expand joinder rules, and authorize fee shifting.<sup>8</sup> A number of state legislatures have joined in the fray, adopting additional procedural hurdles in medical malpractice and product liability cases.<sup>9</sup> As these examples indicate, lawmakers often use heightened procedure to fix the problems that transsubstantive rules cannot.

Despite the importance of heightened procedure, scholars have analyzed only pieces of this larger phenomenon. Some scholars have examined the role of heightened procedure in specific areas of law, from screening panels in medical malpractice cases<sup>10</sup> to agency review in employment discrimination suits.<sup>11</sup> Other scholars have examined specific heightened procedural tools, from fee-shifting statutes<sup>12</sup> to pre-suit discovery<sup>13</sup> to mandatory Rule 11 inquiries.<sup>14</sup> And more recently, there has been a legion of valuable articles examining heightened pleading requirements—but even this is just a single tool in the heightened procedural toolbox.<sup>15</sup> Still lacking is a comprehensive

6. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (2012).

7. Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (2012).

8. 42 U.S.C. § 2000e-5(b) (2012).

9. See, e.g., FLA. STAT. § 766.203 (West 2004); 735 ILL. COMP. STAT. ANN. § 5/2-622 (West 2013); N.C. R. CIV. P. 9(j) (West 2011).

10. See, e.g., CATHERINE T. STRUVE, EXPERTISE IN MEDICAL MALPRACTICE LITIGATION: SPECIAL COURTS, SCREENING PANELS, AND OTHER OPTIONS, PEW PROJECT ON MEDICAL LIABILITY 52 (2003); see also generally Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181 (1990); Mary Markle, Comment, *How Affidavit of Merit Requirements Are Ruining Arizona's Medical Liability System*, 46 ARIZ. ST. L.J. 407 (2014).

11. See generally Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401 (2004); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375 (1995).

12. See generally Mark Liang & Brian Berliner, *Fee Shifting in Patent Litigation*, 18 VA. J.L. & TECH. 59 (2013); Douglas C. Rennie, *Rule 82 & Tort Reform: An Empirical Study of the Impact of Alaska's English Rule on Federal Civil Case Filings*, 29 ALASKA L. REV. 1 (2012).

13. See Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 57 (2010); see also generally Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217 (2007) (discussing the limited role of pre-suit discovery in most jurisdictions).

14. See generally M. Todd Henderson & William H.J. Hubbard, *Judicial Noncompliance with Mandatory Procedural Rules Under the Private Securities Litigation Reform Act*, 44 J. LEGAL STUD. S87 (2015) (analyzing the requirement in the PSLRA that judges conduct a mandatory Rule 11 review in every securities class action).

15. See generally, e.g., Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009); Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189 (2010); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767 (2014); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response*

examination into the role of heightened procedure across the legal system.

This gap in the literature has consequences of its own. When Congress turned its attention to heightened procedure in securities class actions, for example, there was little debate about whether discovery stays or heightened pleading requirements were the right procedural tools for the problems in these complicated cases.<sup>16</sup> Likewise, when Congress overhauled the rules governing prisoner litigation, it spent almost no time examining whether prison grievance systems would be effective in identifying meritorious claims.<sup>17</sup> Even now, as Congress considers heightened procedure in patent litigation, it has failed to consider the interplay between the specific procedural reforms on the table and the problems it is trying to solve.<sup>18</sup> In short, lawmakers are using heightened procedure, but without any overarching sense of what the specific tools in their procedural toolbox do, and what particular areas of law require.

This Article aims to provide that overarching framework.<sup>19</sup> A necessary part of that framework is understanding the three main *causes* of meritless litigation. The first cause is *asymmetric information*—plaintiffs in these cases do not have access to the information they need to evaluate the merits of their claims.<sup>20</sup> The second cause is *asymmetric cost*—plaintiffs in these cases may suspect that their claims lack merit, but they file them anyway because the

to Twiqbal *Apologists*, 60 UCLA L. REV. 1710 (2013); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010).

16. The legislative history of the PSLRA is extensive, but includes almost no discussion of the merits of different procedural options. Congress did debate the possibility of including fee-shifting rules in the PSLRA, but ultimately decided on mandatory Rule 11 inquiries instead. Otherwise, the discussion focused on the problems in securities class actions, not on which procedural tools were best able to solve these problems. See generally H. REP. NO. 104-369 (Nov. 28, 1995); S. REP. NO. 104-98 (June 1, 1995).

17. See, e.g., Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) (“[I]t is worth noting that some believe that this legislation which has a far-reaching effect on prison conditions and prisoners’ rights deserved to have been the subject of significant debate. It was not.”); Susan N. Herman, *Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1277 (1998) (“The legislative process leading to the passage of the PLRA was characterized by haste and lack of any real debate [and therefore] the Act takes a scattershot approach to reducing the cost and volume of prison litigation in the federal courts.”).

18. See *Patent Progress’s Guide to Federal Patent Reform Legislation*, PAT. PROGRESS, <http://www.patentprogress.org/patent-progress-legislation-guides/patent-progress-guide-patent-reform-legislation> (last visited Sept. 11, 2016) (summarizing the patent reform statutes introduced in the Senate and House of Representatives over the past several years).

19. Some scholars may argue that Congress should *never* adopt heightened procedural rules and therefore that such a nuanced discussion is unnecessary. As explained in Part II, transsubstantive rules solve many problems, but create others, especially in areas involving information or cost asymmetries, and therefore it makes sense for Congress to adopt heightened procedures in these areas. Even those who may disagree with this premise, however, will likely acknowledge that, whether they like it or not, Congress has and will likely continue to adopt these rules. As a result, it makes sense for Congress to do so with a more developed understanding of when such rules are appropriate.

20. See *infra* Part II.A.

defendants' costs to litigate far exceed their own.<sup>21</sup> Others have recognized these two main causes of meritless litigation, but a third explanation is vastly unappreciated in the literature. In this third category—which involves *hybrid asymmetries of information and cost*—plaintiffs do not have access to the information necessary to evaluate their claims, yet they can obtain a nuisance settlement regardless of this lack of information because it will cost the defendant more to litigate the case than to settle.

This Article's central claim is that heightened procedure can reduce meritless litigation, but only if lawmakers match the causes of meritless litigation with the right procedural tools. When the cause of meritless litigation is asymmetric information, lawmakers should adopt agency review or pre-suit discovery, but not heightened pleading requirements or fee shifting. Conversely, when the cause is asymmetric costs, heightened pleading requirements and fee shifting are appropriate procedural options, while pre-suit discovery or mandatory sanctions are not. In hybrid asymmetry cases, the problem is more complex because reforms that reduce one type of asymmetry often exacerbate the other. Lawmakers should address this complexity by combining different procedural options, such as allowing plaintiffs to obtain limited pre-suit discovery at their own expense.

This Article proceeds in three Parts. Part II provides an in-depth examination into the main causes of meritless litigation. Part III explores how legislators can ameliorate these causes by matching them with the appropriate heightened procedures. Part IV applies this analysis to three case studies—one where lawmakers used the right procedural tools, one where lawmakers used the wrong procedural tools, and one where they have not decided yet. These case studies offer an opportunity to bring the theoretical discussion from the prior Parts to bear on the use of heightened procedure in practice.

## II. THE CAUSES OF MERITLESS LITIGATION

Few things bring people together like the opportunity to rail against meritless litigation. On both sides of the aisle, politicians relish the opportunity to criticize those who file lawsuits with little hope of success.<sup>22</sup> Yet

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21. See *infra* Part II.B. This category reflects what we commonly refer to as frivolous litigation. Frivolous litigation includes those cases in which “a plaintiff files suit knowing facts that decisively establish little or no chance of the defendant’s objective liability *on the basis of any of the legal theories plaintiff alleges*.” Bone, *supra* note 1, at 531. As explained below, many frivolous cases are filed because of cost asymmetries between the parties. In contrast, meritless litigation is a broader category, encompassing all cases in which “a court determines, after adversarial briefing or discovery, that a plaintiff’s theory of relief is insufficient or that a reasonable jury could not find facts that would allow a plaintiff to recover.” Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1203 (2014). My focus here is on areas of the law in which there is a disproportionate number of meritless cases, even if these cases are not obviously frivolous.

22. See, e.g., *Hearing Before the Comm. on Commerce, Sci., & Transp.*, 106th Cong. (1999) (statement of John McCain, U.S. Senator from Arizona) (decrying “opportunistic lawyers [who] represent ambulance chasing at its worst”); Press Release, Congressman Lamar Smith, Smith Bill Combats

it has been far more difficult to agree on the *causes* of meritless litigation. Some scholars argue that meritless litigation is a result of information asymmetries.<sup>23</sup> Others argue that it is a result of cost asymmetries.<sup>24</sup> This Part argues that there is no single cause to the problem of meritless litigation. Some meritless cases are caused by information asymmetries, others are a result of cost asymmetries, and still others are caused by both information and cost asymmetries.<sup>25</sup> These diverse roots in turn provide a foundation for the heightened procedural rules discussed in Part III.

#### A. INFORMATION ASYMMETRIES

As scholars have long recognized, many meritless cases are filed as a result of information asymmetries.<sup>26</sup> Plaintiffs in these cases do not have access to the facts they need to evaluate the merits of their claims.<sup>27</sup> As a result, some plaintiffs file suit hoping to use the discovery process to determine whether their claims have merit.<sup>28</sup> In other words, part of the plaintiff's motivation in filing suit is to uncover what really happened to them.

Many employment discrimination cases fall into this category.<sup>29</sup> Imagine,

Lawsuit Abuse (July 11, 2013), <http://lamarsmith.house.gov/media-center/press-releases/smith-bill-combats-lawsuit-abuse> (calling for mandatory sanctions on those who file frivolous lawsuits, claiming that “lawsuit abuse is common in America” and constitutes “legalized extortion”); *FACT SHEET: White House Task Force on High-Tech Patent Issues*, WHITE HOUSE (June 4, 2013), <https://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues> (announcing executive action “designed to protect innovators from frivolous litigation”).

23. See Bone, *supra* note 1, at 524 (“Frivolous litigation is most likely to occur under conditions of asymmetric information.”); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 74 (2010) (“[A] plaintiff confronted with information asymmetry faces a substantial ex ante uncertainty about his claims, and this uncertainty gives rise to significant error costs, either by the filing of a frivolous claim or by the inability to file a meritorious claim.”).

24. See, e.g., Carrington, *supra* note 2, at 2088 (“That a system must inhibit the making of unfounded contentions is a function of the gross economic costs that disputants are otherwise able to impose on one another.”).

25. There are also more idiosyncratic causes of meritless litigation. Some plaintiffs, for example, may be overconfident about the merits of their claims or willing to file a meritless claim out of spite. See generally Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 PSYCHOL., PUB. POL’Y, & L. 133 (2010) (finding lawyers consistently overestimate their likelihood of success in trial and make strategic decisions based on those overconfident estimates). Such cases, however, are unlikely to be concentrated in particular areas of the law and thus are not addressed by heightened procedures targeting particular areas.

26. See Bone, *supra* note 15, at 922 (“The key to explaining much of meritless litigation is to introduce asymmetric information about the merits at the pleading stage.”); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 175 (2000) (“[T]he asymmetric information models present a persuasive account of frivolous litigation.”).

27. See Bone, *supra* note 15, at 922.

28. See Bone, *supra* note 1, at 561 (explaining that “plaintiffs sometimes litigate through discovery to learn” whether their case has merit, especially in cases that turn on evidence that is difficult to obtain prior to filing).

29. See, e.g., Dodson, *supra* note 13, at 67 (discussing asymmetric information problems in employment discrimination cases); Keith N. Hylton, *An Asymmetric-Information Model of Litigation*,

for example, a plaintiff who suspects that he was fired because of his age. Despite this suspicion, the plaintiff may not have concrete evidence to support it, nor any way to get such evidence before filing suit. As a result, he may file a lawsuit with the hope of uncovering such evidence during the discovery process. In some cases, this hope will turn out to be warranted, and the plaintiff will be able to substantiate his claims with documents or deposition testimony. In other cases, the plaintiff may discover that there was no discriminatory intent and that his initial claims were unsupported by the facts. In both cases, the plaintiff faces the same information asymmetry at the start of the case with no obvious way of determining whether the claims have merit before filing suit.

Plaintiffs in medical malpractice cases can face a similar information deficit.<sup>30</sup> Patients may know that they suffered an adverse medical event, but they may not know whether the cause was malpractice or simply bad luck. Patients do have access to their medical files,<sup>31</sup> and some patients may find all the information they need to build their case in these files. In other cases, however, the information they need may lie in the heads of the doctors and nurses in the operating room. As a result, just like plaintiffs in employment discrimination suits, these plaintiffs may have to sue to gain access to the information they need to determine whether their claims have merit.

In short, plaintiffs face an information asymmetry in any case in which the information they need to evaluate their claims rests within the control of the defendant. This discussion assumes that defendants have the information advantage in the litigation. The reverse is also possible, however, such as when plaintiffs have information about their damages that is not available to the defendants. This analysis focuses on information asymmetries that favor defendants because information asymmetries are generally “a much more formidable concern for plaintiffs than for defendants.”<sup>32</sup> For these plaintiffs, the information they need may be in the defendant’s files, or it may be in the minds and recollections of the defendant or its employees. Given that it is defendants who are accused of misconduct, however, it is not unusual for the facts relating to such misconduct to lay within their control.<sup>33</sup>

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22 INT’L REV. L. & ECON. 153, 154 (2002) (“[A]symmetric-information models provide the better account of trial outcomes in . . . employment discrimination . . . and other areas of litigation where plaintiff win rates are consistently below 50 percent.”); Arthur R. Miller, Keynote Address, McIntyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 474 (2012) (arguing that employment discrimination cases “provide a useful example” of information asymmetries because “[o]ne of the first rules of [firing an employee] is don’t tell the employee why”).

30. See *infra* Part IV.A.

31. See 45 C.F.R. § 164.524 (2016) (allowing individuals to obtain copies of their medical records, subject to certain limited exceptions).

32. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 45 (2010).

33. See Paul Stancil, *Balancing the Pleading Question*, 61 BAYLOR L. REV. 90, 115 (2009) (noting that “defendants in many circumstances do know more than plaintiffs about the facts



The rise of the Internet has given litigants a variety of options to reduce this asymmetry.<sup>34</sup> Most companies trumpet their business activities on their websites, as well as their Facebook and Twitter accounts.<sup>35</sup> Public companies are required under the federal securities laws to file quarterly and annual reports detailing their financial results and business risks, and these reports are easily accessible online.<sup>36</sup> Plaintiffs can even use the Internet to track down the defendant's current or former employee or other individuals who may be willing to give them the inside information they need to corroborate their claims, as has become common in certain types of class actions.<sup>37</sup>

Yet, although the Internet has brought a significant amount of information into the public realm, much remains behind closed doors. Plaintiffs do not have access to information that exists inside someone's head, such as an employer's motive for firing an employee. Nor can a plaintiff reliably obtain information about events that occur in private, such as in an operating room. To the extent that some types of litigation depend on such information, the Internet has only solved part of the problem.

Litigants therefore face a choice. They can opt not to file their lawsuit, deciding that they are not willing to gamble on factually uncertain claims. Or they can file despite this uncertainty, hoping to uncover the facts they need during the discovery process. In cases involving an information asymmetry, there is no other choice. Plaintiffs must either abandon claims that may well be meritorious, or they must file claims that lack factual support at the time of filing. Given this choice, it is not surprising that at least some plaintiffs choose to file. Nor is it surprising that some of these claims later turn out to be meritless.

If the claims are truly meritless, however, it is fair to ask why defendants do not simply share exculpatory evidence with plaintiffs. In most of these cases, the defendants have the information that the plaintiffs lack. The defendants know why the plaintiff was fired or what really happened in the operating room. They could therefore eliminate the information asymmetries—and potentially avoid a lawsuit—by voluntarily turning over

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relevant to the claim" because "[i]t is the defendant, after all, who is accused of wrongdoing").

34. See, e.g., Colin T. Reardon, *Pleading in the Information Age*, 85 N.Y.U. L. REV. 2170, 2171–72 (2010) ("Search costs for information are lower because of new technologies like the Internet. Equally important, the modern regulatory state has taken an active role in promoting the dissemination of information. Laws forcing or facilitating the disclosure of once-private information have proliferated in recent decades.").

35. See Wells M. Engledow, *Handicapping the Corporate Law Race*, 28 J. CORP. L. 143, 157 (2002) (stating that there is an "endless amount of information that is available via the Internet . . . (typically free of charge on a company's webpage), including: historical stock price trends, SEC and stock exchange filings, and press releases").

36. See THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* 340–41 (5th ed., 2006).

37. See Gideon Mark, *Confidential Witnesses in Securities Litigation*, 36 J. CORP. L. 551, 552 (2011) ("The use of confidential witnesses in class action securities litigation has become ubiquitous in the years since Congress enacted the Private Securities Litigation Reform Act of 1995.").

evidence that shows that they are not liable.

One explanation is that many defendants face strategic reasons not to share evidence that disproves the plaintiff's claims.<sup>38</sup> Defendants want plaintiffs to know when their claims *lack* merit, but just as crucially, they do not want plaintiffs to know when their claims *have* merit.<sup>39</sup> If a defendant turned over evidence to a plaintiff in one case to show that the plaintiff's claims lacked merit, but then did not do so in another case, the plaintiff in the second case could logically infer that their case had merit and therefore demand a higher settlement. This rationale explains why defendants, especially those who are repeat players, can be reluctant to put their cards on the table, even when they know a claim is meritless.

In addition to signaling concerns, even defendants who are not repeat players may be unable to convince a plaintiff that a claim is meritless. In many cases, for example, the plaintiff is looking for a smoking gun—for example, an email confirming that the plaintiff was indeed fired because of his age. Or the plaintiff may be looking for evidence showing a pattern of discrimination or other unlawful conduct. A defendant cannot easily prove that such evidence does not exist, at least not without turning over all of its files and allowing all of the relevant employees to be deposed, which it understandably will be reluctant to do.<sup>40</sup>

In sum, some meritless cases are filed by plaintiffs who do not have access to the information they need to assess the merits of their case before filing suit. And defendants may be reluctant or unable to credibly share exculpatory information with these plaintiffs. As a result, some plaintiffs file suit at least in part to find out what really happened to them. As we will see, this is a very different motivation than the incentive behind the filing of cost asymmetric cases.

### B. COST ASYMMETRIES

In a second category of cases, the asymmetries concern costs, not information. In cost asymmetric cases, both sides know or strongly suspect that the case lacks merit. Yet the plaintiff files the case anyway because he knows that the defendant's costs to litigate the case far exceed his or her own. As a result, it will be cheaper for the defendant to settle than to defend against

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38. See Bone, *supra* note 1, at 552 (“Defendants want plaintiffs to know the truth when their suit is meritless, but not when their suit is meritorious. Thus, defendants in meritorious cases try to deceive plaintiffs by pooling, that is, by making the same offer they would make if the suit was meritless.”).

39. See generally Alon Klement, *Threats to Sue and Cost Divisibility Under Asymmetric Information*, 23 INT’L REV. L. & ECON. 261 (2003).

40. To take this point one step further, the defendant may have control over the relevant information, but may not have easy access to it. Even if the relevant information is somewhere in the defendants' files, it may be extremely costly and time-intensive for the defendant to locate it, especially if the defendant is a large organization with multiple offices and/or thousands of employees.

the claims.<sup>41</sup>

Many merger cases fall into this category. In 2014, shareholders challenged approximately 93% of large mergers and acquisitions.<sup>42</sup> Shareholders in these cases typically alleged that the directors who approved these transactions breached their fiduciary duties by failing to disclose material information to shareholders or by failing to negotiate for a higher price.<sup>43</sup> Some of these lawsuits likely had merit, but it is hard to believe that corporate directors breached their fiduciary duties in nearly every major deal over this twelve-month period.

Meritorious or not, however, these cases are profitable for plaintiffs' lawyers for at least two reasons, both having to do with cost asymmetries. First, it is relatively inexpensive for plaintiffs' attorneys to file many of these cases. The complaints tend to be fairly cookie-cutter, and they are often filed within hours of the merger announcement.<sup>44</sup> Second, almost all discovery is in the hands of the defendants. The plaintiffs are shareholders who typically have information about their own investment in the company, but no other information relevant to the underlying allegations. Given that each party pays its own discovery costs, plaintiffs can file cases relatively inexpensively and then serve extensive discovery requests on the defendant. Even more importantly, the plaintiff can threaten to seek an injunction delaying the close of the merger, exponentially increasing the defendants' costs related to the litigation.<sup>45</sup> Faced with these cost asymmetries, it is often cheaper to pay a few hundred thousand dollars to settle the case, even if the defendant does not think that the case has merit. Indeed, as one New York judge recently stated, "[n]o one, not even plaintiffs, disputes [the] reality[] [that] [t]he defendant corporation's cost-benefit calculus almost always leads the company to

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41. See, e.g., William H. Wagener, *Modeling the Effect of One-Way Fee-Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1902–03 (2003) (“If a plaintiff credibly can threaten to pursue a trial that will prove disproportionately costly to the defendant, a defendant may be willing to settle even a suit known to be meritless by both parties to avoid the legal costs of fighting the suit.”).

42. See OLGA KOUMRIAN, *SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2014 M&A LITIGATION 1* (2015), <https://www.cornerstone.com/GetAttachment/897c61ef-bfde-46e6-a2b8-5f94906c6ee2/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf>.

43. See Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 563–64 (2015) (“State court merger litigation is premised upon the traditional fiduciary duties that target-company officers and directors owe to the company’s shareholders in connection with an acquisition, merger, or other business combination.” (footnote omitted)).

44. See, e.g., Brian JM Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 155 (2011) (discussing legal rules that create incentives for plaintiffs’ attorneys “to quickly file cookie-cutter complaints”).

45. See Jill E. Fisch et al., *supra* note 43, at 565 (“Because claims that are not resolved on motions or settled prior to closing can theoretically be litigated long after closing, creating a potentially significant contingent liability, defendants have a strong incentive to resolve merger claims before the merger closes.”).

settle.”<sup>46</sup>

Not all defendants will make the choice to settle under these circumstances. A repeat player may decide to defend against the claim to ward off similar claims by other plaintiffs in the future.<sup>47</sup> This strategy will cost the defendant more money in the short run, but may be cost-effective in the long-run. Similarly, a defendant may choose to fight a meritless claim to make a moral stand that he or she will not give in to extortionate demands. Such a defendant would be making an economically irrational decision in order to make a moral point. Rational defendants who are not repeat players, however, face strong economic incentives to settle for any amount less than the expected defense costs, even if they feel confident about their chances of success at trial.

This category of cases is often in the minds of legislators when they decry frivolous litigation. In 1995, for example, Congress justified sweeping changes to securities class actions on the ground that “the abuse of the discovery process to impose costs [on defendants in these cases] is so burdensome that it is often economical for the victimized party to settle.”<sup>48</sup> More recently, Congress raised the same concerns regarding patent litigation, citing concerns that “too many specious claims or defenses are filed solely for the purpose of forcing an unjust settlement, typically at a cost that is less than the cost of successfully completing the litigation.”<sup>49</sup> And legislators are not the only ones to bemoan the economic incentives of cost asymmetric cases. In *Bell Atlantic Corp. v. Twombly*, the Supreme Court justified heightened pleading standards for *all* federal claims on the ground 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>50</sup>

To be fair, the vast majority of cases do not involve voluminous discovery or significant cost asymmetries. Multiple studies have found that the cost of discovery in most cases is fairly minimal. For example, a study by the Federal Judicial Center found that the median discovery costs for plaintiffs were \$15,000, while the median discovery costs for defendants in these same cases were \$20,000.<sup>51</sup> These costs are far lower than the lore that dominates policy

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46. See Decision & Order, *City Trading Fund v. Nye*, No. 651668/2014 (N.Y. Sup. Ct. Nov. 20, 2014).

47. See Bone, *supra* note 1, at 540 (“By litigating instead of settling the first few frivolous suits, a repeat-player defendant can build a reputation for fighting. Once established, this reputation will signal other frivolous plaintiffs not to expect a settlement, and so they will not sue.” (footnote omitted)); Stancil, *supra* note 33, at 132 (arguing that the risk of nuisance settlements increases in claims in which the plaintiff’s attorneys are unlikely to be repeat players in the same court or against the same insurer/payer).

48. H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.).

49. H.R. REP. NO. 113-279, at 19 (2013).

50. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 558 (2007).

51. See EMERY G. LEE III & THOMAS E. WILLGING, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1–2

debates would suggest.<sup>52</sup> Moreover, even where discovery is voluminous, its burdens may fall roughly evenly on both sides. In most cases, therefore, there is not a significant cost asymmetry, either because discovery costs are relatively small, or fall evenly on both parties. As a result, there is no basis for sweeping transsubstantive rules to address concerns about cost asymmetries because the problem itself is likely not transsubstantive.

In some types of cases, however, the cost asymmetry is substantial. These cases tend to share two key characteristics. First, the defendants in these cases typically have possession of the vast majority of the documents relevant to the case.<sup>53</sup> These claims often turn almost entirely on the defendant's conduct, making the defendant's record of key importance in the case.<sup>54</sup> Second, in cost-asymmetric cases, it is often difficult and therefore costly for the defendant to identify the relevant documents. In a case that turns on a single transaction or event, defendants can pinpoint the key custodians and identify the relevant documents fairly easily. In cases in which the allegations sweep more broadly, however, the defendant will have to search through far more records and interview far more employees to identify the relevant information.<sup>55</sup> The necessity of such a broad review increases the defendant's discovery costs, as well as the corresponding incentives to enter into a nuisance settlement.<sup>56</sup>

Putting these factors together, cost asymmetric cases rest on the plaintiff's ability to demand expansive, one-sided discovery from the defendant. Whether a case makes it to discovery is thus of great import. Professor Robert Bone has argued that defendants should be able to settle cost-asymmetric lawsuits for small nuisance payments because a patently frivolous case will never get to discovery. For cases that are frivolous on their face and thus will

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(2009), <http://www.uscourts.gov/file/document/fjc-national-case-based-civil-rules-survey>.

52. See Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994) (arguing that "the massive discovery reform agenda" in the political branches of government "is based on questionable social science, 'cosmic anecdote,' and pervasive, media-perpetuated myths" (footnote omitted)).

53. See Stancil, *supra* note 33, at 124 ("Intuition, common sense, and the available data suggest that most pretrial costs are either roughly equal as to plaintiffs and defendants, or that they favor defendants rather than plaintiffs.").

54. See *id.* at 127 ("[C]laims in which the plaintiff's internal pretrial costs are low tend to be claims for which there will be little inquiry into the plaintiff's activities or damages.").

55. See *id.* at 130 ("[T]he cases with the largest internal defense costs tend to be those (1) in which the scope and depth of genuinely discoverable information under Rule 26(b)(2) is significant, and (2) without an obvious factual transaction around which to limit discovery.").

56. This cost asymmetry may be exacerbated by an asymmetry of risk between the parties. Studies have found that a plaintiff who has a low chance of winning will be risk seeking, while a defendant who has a low chance of losing will be risk averse. This analysis helps explain why even defendants who feel fairly confident that they will win at trial may settle to avoid even a small possibility of having to pay a large judgment. See Guthrie, *supra* note 26, at 168 (arguing that "the decision frame in frivolous litigation induces risk-seeking behavior in plaintiffs and risk-averse behavior in defendants").

be dismissed at the Rule 12(b)(6) stage, this point is undoubtedly true. There are some costs associated with filing a Rule 12(b)(6) motion to dismiss, but these costs rarely amount to millions of dollars. And any small amounts that defendants are willing to pay to make a case go away at these early stages are unlikely to draw legislative attention.<sup>57</sup>

It is possible, however, for even a meritless case to survive a motion to dismiss. A motion to dismiss is limited to the legal sufficiency of the plaintiffs' allegations.<sup>58</sup> So as long as the plaintiff can allege a plausible claim, the defendant will be unable to get the case dismissed at the Rule 12(b)(6) stage. And, once the case survives a motion to dismiss, the next opportunity for dismissal typically does not come until summary judgment, which occurs in most cases after the parties have completed discovery and incurred the associated costs.<sup>59</sup> These economic concerns explain why the motion to dismiss takes on such importance in high-stakes cases, and why defendants are often willing to settle for substantial amounts if the case survives this hurdle.

In short, there are cases in which economically rational plaintiffs will file claims that they know have little merit and economically rational defendants will pay to settle them. These cases tend to be in areas in which litigation costs fall disproportionately on the defendants, especially if the defendants are not repeat players and the cases are not easily dismissed at the pleadings stage.

### C. HYBRID ASYMMETRIES

The analysis thus far has set up a dichotomy of meritless litigation. Plaintiffs file meritless cases because of either an information asymmetry *or* a cost asymmetry. These two types of cases are frequently discussed in the law-and-economics literature, with scholars debating which cause is more prevalent.<sup>60</sup> Largely missing from this literature, however, is a recognition that cases can have both an information *and* a cost asymmetry—a third category of meritless litigation that requires unique procedural solutions.

In these hybrid cases, plaintiffs do not have access to the information they need to evaluate fully the merits of their claim. They can, however, obtain a nuisance settlement regardless of this lack of information because it will cost the defendant more to litigate the case than to settle it.

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57. Cf. Bone, *supra* note 1, at 541 (“[C]omplete information models do not provide a convincing explanation for why frivolous suits are problematic, at least not an explanation that justifies costly regulatory intervention.”).

58. See FED. R. CIV. P. 12(b)(6).

59. See, e.g., Stancil, *supra* note 33, at 108 (“A defendant faced with even the most ridiculous imaginable substantive claim—assuming it is properly pleaded—cannot typically move for summary judgment until there has been adequate time for discovery.”). Either side may file a motion for summary judgment on particular issues before significant discovery has occurred, but the nonmoving party can defeat the motion by showing that it needs additional discovery to respond properly to the motion. See FED. R. CIV. P. 56(a), (d).

60. See, e.g., Guthrie, *supra* note 26, at 170–76 (2000) (explaining the different theories of meritless litigation).

Securities class actions exemplify these characteristics. First, securities class actions often involve a cost asymmetry.<sup>61</sup> The central questions in these cases are whether the targeted corporation made false statements to the investing public, and whether the corporation's top executives knew these statements were false at the time the statements were made. The defendants in these cases have almost all of the information relevant to these issues, including internal e-mails and other correspondence.<sup>62</sup> The plaintiffs, in contrast, tend to have few documents relevant to the case.<sup>63</sup> Typically shareholders who purchased shares in the defendant corporation, these plaintiffs may have documentation relating to their individual investments, but they are unlikely to have other information relevant to the claims, including specific facts to support the falsity of the public statements or the defendants' knowledge of this falsity.

Moreover, the claims in these cases tend to be sweeping, often encompassing entire product lines or business areas.<sup>64</sup> Specifically, many securities class actions challenge virtually all of a company's public filings during the class period, alleging that these filings are all false and misleading. As a result, a vast number of documents may fall within the scope of discovery, making it difficult and expensive for the defendants to identify the relevant documents.

A recent securities class action filed against Fiat Chrysler Automobiles illustrates this point.<sup>65</sup> In a complaint filed on September 11, 2015, the shareholder plaintiff alleged that Fiat Chrysler failed to disclose flaws in its manufacturing processes that rendered millions of Chrysler cars and trucks unsafe to drive.<sup>66</sup> According to the plaintiff, Chrysler also failed to disclose its

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61. See Stancil, *supra* note 33, at 130 (explaining why securities class actions often involve cost asymmetries).

62. See, e.g., Janet Cooper Alexander, *Do the Merits Matter?: A Study of Settlements in Securities Class Actions*, 43 STAN L. REV. 497, 549 (1991) ("Since discovery in securities class actions is almost completely one-sided, plaintiffs['] attorneys] control the discovery agenda." (footnote omitted)); Patrick M. Garry et al., *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. REV. 275, 283 (2004) ("Trying to produce all documents pertaining to the knowledge of corporate management over a period of years can be 'a massive undertaking.'" (footnote omitted) (quoting A.C. Pritchard, *Markets as Monitors: A Proposal to Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 VA. L. REV. 925, 953 (1999))).

63. See, e.g., Martin Cunniff, *Integrating All Aspects of Securities Litigation in a Challenging and Shifting Environment*, in NEW DEVELOPMENTS IN SECURITIES LITIGATION (2012), 2012 WL 1197180, at \*6. (describing discovery in securities class actions as a "one-sided process, since the class representative plaintiffs usually have very little in the way of documents to produce"); Stancil, *supra* note 33, at 127 (explaining that a securities class action is the "paradigmatic case" in which there is "little inquiry into the plaintiff's activities or damages").

64. See Stancil, *supra* note 33, at 130 (explaining the sweeping allegations in many fraud actions).

65. See generally *Pirnik v. Fiat Chrysler Autos. N.V.*, No. 1:15-cv-07199 (S.D.N.Y. Sept. 11, 2015) (Stan. L. Sch. Secs. Class Action Database).

66. See Class Action Complaint for Violations of the Federal Securities Laws, *Pirnik*, No. 1:15-cv-07199, at ¶ 4.

allegedly slow completion rates for recalls and other improper actions by dealers in responding to recall notices.<sup>67</sup> To support its claims, the plaintiff pointed to a \$105 million fine imposed by the National Highway Traffic Safety Administration in connection with the Company's handling of 23 previous recalls affecting more than 11 million vehicles.<sup>68</sup>

Although this case is still in its early stages,<sup>69</sup> it will be no easy task for Chrysler to identify all of the documents relevant to the plaintiff's allegations. There is not a short list of keywords that it can use to pull up all documents that relate to the alleged flaws in the manufacturing processes for 11 million vehicles. Nor is there likely to be a discrete subset of documents showing the effectiveness of the company's 23 prior recalls. These documents are instead likely spread throughout the company in the electronic and written files of dozens, if not hundreds, of employees. As a result, while the plaintiff may only have to locate a few pages from his investment records, the defendant will have to spend millions of dollars to conduct a sweeping search of its own documents.

Yet the plaintiffs in securities class actions also often suffer from an information asymmetry, as the *Pirnik* case itself demonstrates. The plaintiff in the *Pirnik* litigation must allege in his complaint why each challenged statement was false or misleading. He must also allege facts showing that Chrysler's top officers knew that the statements were false at the time they were made. In other words, the plaintiff must be able to allege specific facts regarding: (1) the flaws in Chrysler's manufacturing processes; (2) how these flaws made Chrysler's public statements false and/or misleading; and (3) the knowledge of Chrysler's top executives regarding the falsity of these statements. Yet the plaintiff is unable to obtain discovery on any of these points before surviving a motion to dismiss.

Hybrid cases are not limited to securities class actions. The allegations in *Bell Atlantic Corp. v. Twombly*, the Supreme Court's case that raised pleading standards in all federal civil cases, typify the hybrid nature of many complex cases.<sup>70</sup> The plaintiff in *Twombly* alleged a far-reaching conspiracy among several regional Bell companies to divide the national market for local telephone and high-speed Internet services.<sup>71</sup> From the defendants' perspective, it likely would be difficult to identify a list of keywords that would identify such a conspiracy. Nor was there an obvious list of employees who may have been involved in such a conspiracy. As a result, to prove that such a conspiracy did not exist, the defendants would have to search through millions of emails, memos, and other corporate records created by hundreds,

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67. *See id.*

68. *See id.* at ¶ 9.

69. *See generally id.*

70. *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

71. *See id.* at 550.



if not thousands, of employees. Given the discovery costs facing the defendants, it is understandable that the Court was concerned about allowing the case to proceed to discovery.<sup>72</sup>

On the other hand, it likely was impossible for the plaintiffs to get the information necessary to support their claims *except* through the formal discovery process. The plaintiffs alleged that the regional Bell companies had entered into an illegal agreement to divide the market for telephone service. This agreement, if it in fact existed, would have been made behind closed doors, far from the public eye. Absent serendipitous help from an employee whistleblower or government investigation, the plaintiff would have had no way to obtain concrete evidence of such an agreement without formal discovery.

The example of securities class actions, and the *Pirnik* and *Twombly* cases more specifically, demonstrate why information and cost asymmetries often arise together. In cases in which plaintiffs do not have access to the information they need to evaluate their claims, this information will often rest in the hands of the defendant. Locating and producing it, however, can be costly, and these costs will fall largely on defendants because they have the majority of the information. The plaintiffs' lack of information, in other words, results in defendants facing a cost asymmetry to produce the relevant information.

As the above analysis indicates, there are three distinct categories of meritless lawsuits: information-asymmetric cases, cost-asymmetric cases, and hybrid information/cost-asymmetric cases. And, as we will now see, each category requires unique procedural solutions, carving out a previously unexplored role for heightened procedural rules.

### III. HEIGHTENED PROCEDURE AS A RESPONSE TO MERITLESS LITIGATION

Meritless litigation is not one-size-fits-all, and its procedural solutions should not be either. This Part explains how lawmakers can use heightened procedural rules to address the different causes of meritless litigation. It first describes the appropriate tools to deal with information asymmetries and then sets out a very different set of tools to address cost asymmetries. Finally, it explains how lawmakers can combine heightened procedural tools to address the cost and information asymmetries present in hybrid cases.

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72. *See id.* at 559 (“That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America’s largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.”). It is less understandable why the court assumed that a similar cost asymmetry exists in civil cases across the board, thus justifying the sweeping change to federal pleading standards.

A. *REDUCING INFORMATION ASYMMETRIES*

When legislators enact procedural changes to the law, they often draw from a familiar menu of options, with heightened pleading standards, fee shifting, and stays of discovery topping the list.<sup>73</sup> These options, however, are particularly ill-suited for information asymmetric cases. Instead, these cases are best addressed by less common procedural tools that provide plaintiffs with an opportunity to obtain relevant information about their claims before they file suit. This Subpart explains how these tools can remedy information asymmetries and then explores how other, more commonly used procedural tools do not offer the same benefits.

1. Effective Procedural Tools

If lawmakers want to address the information asymmetry in certain types of litigation, they should adopt procedural tools that give plaintiffs more information about their claims at the start of the lawsuit. This Subpart discusses two such tools—pre-suit discovery and agency review.

*i. Pre-Suit Discovery*

Few jurisdictions in the United States allow pre-suit discovery.<sup>74</sup> Instead, plaintiffs must generally rely on their own knowledge and investigation to draft their complaint.<sup>75</sup> Absent exceptional circumstances, plaintiffs do not get access to the defendant's files and testimony until later in the litigation.<sup>76</sup> These rules make it difficult for plaintiffs facing an information asymmetry to survive a motion to dismiss.<sup>77</sup>

Lawmakers could reduce this information asymmetry by allowing limited

73. See, e.g., Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (2012) (adopting heightened pleading standards and a stay of discovery, among other procedural reforms, in securities class actions); Innovation Act, H.R. 3309, 113th Cong. § 3 (2013) (proposing heightened pleading standards and fee shifting in patent litigation).

74. For example, several states have developed form interrogatories for medical malpractice and product liability suits. See, e.g., ARIZ. R. CIV. P. 84, Form 4 (uniform medical malpractice interrogatories); FLA. R. CIV. P. app. I, Forms 3, 4 (medical malpractice standard interrogatories to plaintiff and defendant); MD. R. app. Form 9-10 (uniform product liability definitions and interrogatories); N.J. CT. R. app. II, Form A(2), C(4) (uniform interrogatories for certain classes of products liability cases).

75. See Hoffman, *supra* note 13, at 222 (discussing the “the cramped limits of pre-suit investigatory discovery” in most jurisdictions).

76. The Federal Rules of Civil Procedure only allow pre-suit discovery to perpetuate testimony. See FED. R. CIV. P. 27. Although some states allow a more expensive form of pre-suit discovery, many state rules mirror the federal rules. See Dodson, *supra* note 13, at 57; Hoffman, *supra* note 13, at 235 (“Most states have adopted the federal version of Rule 27 and have given their state rule a similarly cramped interpretation.”).

77. See Dodson, *supra* note 13, at 54 (stating that, although Rule 27 of the Federal Rules of Civil Procedure allows depositions to perpetuate testimony, “[c]ourts are nearly uniform in holding that it does not authorize discovery for the purpose of obtaining new facts needed to survive a motion to dismiss”).

pre-suit discovery. For example, as discussed in Part II, a plaintiff contemplating a medical malpractice case might not know whether her injury was caused by malpractice or bad luck.<sup>78</sup> To prove malpractice, she will need broad discovery into a host of issues, from details about her procedure to the doctor's experience and outcomes in other similar procedures. Before filing, however, she only needs enough information to confirm that malpractice may well have caused her injuries.<sup>79</sup> With this more limited target, she does not need access to the full panoply of discovery tools. Instead, she can get a better sense of the merits of her claim by getting access to the doctor's records and notes about her specific procedure and interviewing the doctor.

These limits should be relatively easy to establish because the rules would be subject-specific. Lawmakers can determine what information plaintiffs in specific types of cases need prior to filing their lawsuit. To aid in this process, lawmakers can refer to standard interrogatories that many jurisdictions have already developed for specific types of cases. For example, many states have standard interrogatories for employment discrimination claims that lawmakers could use as a starting point.<sup>80</sup> They could then discuss whether to augment these standard interrogatories with a limited number of depositions or other forms of discovery. This discovery would be less than the plaintiff would be entitled to during the normal discovery process, but it would nonetheless help to address the information asymmetry that these plaintiffs face.

This proposal is unlikely to open the floodgates of discovery. Pre-suit discovery is already available in a small number of jurisdictions,<sup>81</sup> and the empirical evidence indicates that courts have been able to cabin it appropriately. In Texas, for example, Rule 202 of the Rules of Civil Procedure

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78. See discussion *infra* Part IV.A.

79. See FED. R. CIV. P. 11(b)(3) (requiring that “factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery”).

80. See, e.g., JUDICIAL COUNCIL OF CAL., DISC-002 FORM INTERROGATORIES-EMPLOYMENT LAW (2009), <http://www.courts.ca.gov/documents/disc002.pdf>. At the federal level, the Federal Civil Rules Advisory Committee joined together with the National Employment Lawyers Association and the Institute for the Advancement of the American Legal System to develop protocols and pattern forms for initial disclosures in employment cases. See FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION 4-9 (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/\\$file/DiscEmpl.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/DiscEmpl.pdf/$file/DiscEmpl.pdf).

81. Texas and Alabama both allow parties to obtain pre-suit discovery to investigate the merits of their claims. See ALA. R. CIV. P. 27; TEX. R. CIV. P. 202.1, 202.4; *Driskill v. Culliver*, 797 So.2d 495, 497-98 (Ala. Civ. App. 2001) (allowing pre-suit discovery “to determine whether the plaintiff has a reasonable basis for filing an action”). Other states, including New York and Ohio, allow the plaintiff to petition the court to obtain pre-suit discovery. See N.Y. C.P.L.R. § 3102(c) (McKinney 2016) (“Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order.”); OHIO CIV. R. 34(D)(1) (“[A] person who claims to have a potential cause of action may file a petition to obtain discovery as provided in this rule.”).

allows a party to petition the court to take a deposition “to investigate a potential claim or suit.”<sup>82</sup> Before granting the petition, the court must determine that the benefit of the requested deposition outweighs its potential cost.<sup>83</sup> The court can include in its order any protections or limitations that it deems necessary to protect the deponent or others.<sup>84</sup>

Empirical review of the Texas rule illustrates that it has not led to an onslaught of abusive litigation. A survey of more than 600 lawyers in Texas reveals that only half had either filed or received a Rule 202 petition at some point in the past.<sup>85</sup> In approximately 60% of these instances, the purpose of the Rule 202 petition was to investigate the claim prior to filing, while the remaining 40% were filed to perpetuate testimony.<sup>86</sup> Moreover, Texas courts have made clear that pre-suit depositions should not be the norm, with the Texas Supreme Court stating that “[t]he intrusion into otherwise private matters authorized by Rule 202 outside a lawsuit is not to be taken lightly” and “judges should maintain an active oversight role to ensure that [the rule is] not misused.”<sup>87</sup>

Corporate law also offers opportunities for pre-suit discovery. Section 220 of the Delaware General Corporation Law allows shareholders to inspect the books and records of a corporation as long as the inspection is made for a “proper purpose.”<sup>88</sup> Courts have held that investigating wrongdoing by the corporation’s managers is a “proper purpose” within the scope of the statute.<sup>89</sup> The Delaware Supreme Court has encouraged plaintiffs to use section 220 as an “information-gathering tool” to obtain the facts they need to plead a breach of fiduciary duty claim.<sup>90</sup> There is no empirical evidence regarding the use of section 220, but courts have emphasized the “rifled precision” of this pre-suit discovery tool compared to the broad discovery available during the normal course of litigation.<sup>91</sup>

These examples highlight the promise of pre-suit discovery in areas of

82. See TEX. R. CIV. P. 202.1.

83. See *id.* R. 202.4. Alternatively, the court can allow the deposition if it determines that allowing the deposition “may prevent a failure or delay of justice in an anticipated suit.” *Id.*

84. See *id.*

85. See Hoffman, *supra* note 13, at 222.

86. See *id.* at 254.

87. *In re Does 1 & 2*, 337 S.W.3d 862, 865 (Tex. 2011) (per curiam).

88. DEL. CODE ANN. tit. 8, § 220(b) (2011); see also *Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 917 (Del. Ch. 2007) (“Before shareholders may inspect books and records, they must . . . demonstrate a proper purpose for seeking inspection.”).

89. See *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 777 (Del. Ch. 2016) (“A stockholder’s desire to investigate wrongdoing or mismanagement is a ‘proper purpose.’” (citing *Seinfeld v. Verizon Commc’ns, Inc.*, 909 A.2d 117, 121 (Del. 2006))); *Melzer*, 934 A.2d at 917 (“There is no shortage of proper purposes under Delaware law, but perhaps the most common ‘proper purpose’ is the desire to investigate potential corporate mismanagement, wrongdoing, or waste.” (footnote omitted)).

90. See, e.g., *Rales v. Blasband*, 634 A.2d 927, 935 n.10 (Del. 1993).

91. See *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997).

law where information asymmetries are common. In these areas, lawmakers could allow pre-suit discovery subject to specific limitations. They could, for example, require plaintiffs to acquire the court's permission before obtaining pre-suit discovery and establish presumptive limits on the information that the plaintiff would be allowed to request. Either party should also be able to ask the court to modify these limits if they are not appropriate in a given case. With such limits, lawmakers could address information asymmetries without opening the floodgates to full discovery.

*ii. Pre-Filing Agency Review*

Lawmakers can also address information asymmetries by giving administrative agencies the authority to review claims before they are filed in court.<sup>92</sup> As detailed below, however, the devil is truly in the details when it comes to crafting meaningful agency review. This Subpart argues that agencies need three specific things to be effective in their pre-suit review of information asymmetric cases: (1) the ability to investigate claims during the administrative process; (2) proper procedural safeguards to ensure that the claim is investigated fairly; and (3) adequate funding to support the agency's investigatory efforts.

*a. Ability to Investigate Claims*

Agency review can only address information asymmetries if the agency has the power to investigate the plaintiffs' claims. The example of medical malpractice claims illustrates this point. Many states require patients to file malpractice claims with a medical review board before going to court.<sup>93</sup> In many instances, however, these review boards confine their review to the evidence that the patients already have, determining whether they can proceed to court without giving them any opportunity to get additional information about their claims. In these jurisdictions, pre-suit review does nothing to alleviate the information asymmetries.

In a handful of jurisdictions, however, these review boards have the power to investigate claims and address any underlying information asymmetries.<sup>94</sup> For example, patients in the Virgin Islands who wish to file a

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92. See, e.g., David F. Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 619 (2013) ("In recent years, a growing chorus of commentators has offered an intriguing answer: vest administrative agencies with the power to oversee and manage private litigation efforts.")

93. See Jean M. Eggen, *Medical Malpractice Screening Panels: An Update and Assessment*, J. HEALTH & LIFE SCI. L., June 2013, at 8 n.21 (collecting statutes adopting medical screening boards); see also ALASKA STAT. § 09.55.536 (2014); DEL. CODE ANN. tit. 18, §§ 6803–6814 (2015); FLA. STAT. § 766.106 (2015); HAW. REV. STAT. §§ 671-11 to 671-19 (1993 & Supp. 2013); IDAHO CODE §§ 6-1001 to 6-1011 (2010 & Supp. 2016); IND. CODE ANN. § 34-18-8-4 (West 2011); KAN. STAT. ANN. §§ 65-4901 to 65-4908 (2002 & Supp. 2015); LA. STAT. ANN. § 1231.8 (2016); ME. STAT. tit. 24, §§ 2851–2859 (2015); MASS. GEN. LAWS ch. 231, § 60B (2014).

94. See, e.g., ME. STAT. tit. 24, § 2852(5) ("The panel, through the chairman, shall have the same subpoena power as exists for a Superior Court Judge. The chairman shall have sole

medical malpractice claim must first file their claim with the Medical Malpractice Review Committee.<sup>95</sup> This Committee, which includes legal and medical representatives, then determines what type of medical expert or experts should review the claim.<sup>96</sup> The Committee, at the territory's expense,<sup>97</sup> arranges for such experts to review the claim and then submit a written opinion regarding whether the defendants acted in accordance with "the appropriate standard of medical care."<sup>98</sup> The Committee also has the power "to request all necessary information from health care providers," and the providers are required by statute to provide the Committee with the requested information.<sup>99</sup> As a result, this process gives the plaintiffs a better understanding of precisely what happened to them and whether it constituted negligence, both of which are critical to enabling plaintiffs and their attorneys to weigh the merits of their claims prior to filing suit.

While these procedures will provide plaintiffs with more information regarding the merits of a possible suit, agencies should not have unlimited power to investigate claims. If parties are allowed extensive discovery in the administrative proceedings, both sides will have to litigate their cases twice—once before the administrative agency and once before the court. These dual proceedings will create additional costs that will impact both sides' ability to litigate the claims efficiently. As a result, lawmakers should be careful to use agency review only in areas where the agencies will be able to make informed decisions based on review of a discrete set of information, as opposed to the full record that may be relevant if and when the case gets to court.<sup>100</sup>

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authority, without requiring the agreement of other panel members, to issue subpoenas."); MASS. GEN. LAWS ch. 231, § 60B ("The tribunal may upon the application of either party or upon its own decision summon or subpoena any such records or individuals to substantiate or clarify any evidence which has been presented before it and may appoint an impartial and qualified physician or surgeon or other related professional person or expert to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report or to testify as a witness thereto.").

95. V.I. CODE ANN. tit. 27, § 166i(b) (2016) ("No action against a health care provider may be commenced in court before the claimant's proposed complaint has been filed with the Committee . . .").

96. *Id.* § 166i(d) ("The Committee shall determine, after expiration of the date for receipt of the defendant's proposed answer, the type of medical expert or experts who are needed to review the malpractice claim.").

97. *Id.* § 166i(d)(3) ("The cost of obtaining expert opinion as required by this section shall be funded by the Medical Expert Fund created by 33 Virgin Islands Code, section 3042.").

98. *See id.* § 166i(d)(1) ("The Committee shall arrange for the expert to review the medical records and the legal papers submitted to the Committee and to submit to the Committee an opinion in writing concerning whether or not the defendant acted or failed to act within the appropriate standards of medical care as charged in the proposed complaint.").

99. *See id.* § 166i(d)(2) ("In order to fulfill its duties under this section, the Committee shall have the right and duty to request all necessary information from health care providers including hospitals, and said providers shall have the duty to supply such information to the Committee.").

100. *See, e.g.,* Engstrom, *supra* note 92, at 668 ("[T]here is little reason to believe that agencies wielding gatekeeper powers or courts will systematically vary in their capacity to judge a

### b. Proper Procedural Safeguards

Even with investigatory powers, agency review accomplishes little if the claimants are not protected by minimal due process protections. The Prison Litigation Reform Act (“PLRA”) serves as a cautionary tale of the potential downside of administrative review. Under the PLRA, prisoners who seek to challenge the conditions of their confinement must first exhaust administrative remedies within the prison.<sup>101</sup> On its face, this requirement seems reasonable. Prisons should have the opportunity to address prisoner grievances in-house before these grievances end up in court.

The problem is that the PLRA does not include any procedural requirements for these grievance systems.<sup>102</sup> As long as these systems are “available” to prisoners, they must be exhausted before a prisoner can file a lawsuit.<sup>103</sup> As scholars have documented, prison grievance systems vary widely.<sup>104</sup> The prisoner may or may not get a hearing. The designated factfinder may or may not be independent. And the rules may or may not provide the type of relief that the prisoner is seeking. Moreover, this exhaustion requirement operates like a procedural default rule, which means that a district court must dismiss any prisoner claims that have not been through the full gauntlet of administrative options.<sup>105</sup> These detailed and often technical procedural requirements fall on the members of our society least able to comply with them—prisoners who are typically unrepresented by counsel and who may be mentally ill, underage, illiterate, and/or unable to

claim’s factual sufficiency based on collected evidence or the weight to be accorded specific evidentiary showings, except perhaps in the most technical of areas.”).

101. See 42 U.S.C. § 1997e(a) (2012) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

102. See Lynn S. Branham, *The Prison Litigation Reform Act’s Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 498 (2001) (“The only substantive requirement remaining on the face of the statute that administrative remedies must meet in order for the exhaustion requirement to apply is that the remedies be ‘available.’”).

103. 42 U.S.C. § 1997e(a). In contrast, the predecessor statute to the PLRA, the Civil Rights of Institutionalized Persons Act, required prisoners to exhaust administrative procedures that were “plain, speedy, and effective” and met specified federal guidelines. 42 U.S.C. § 1997e (1994); see also *Porter v. Nussle*, 534 U.S. 516, 523 (2002). It also did not apply if the prisoner was only seeking money damages and such relief was not available through the prison’s grievance policy. *Porter*, 534 U.S. at 524.

104. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1650 (2003) (“[T]he PLRA imposes no constraints on the structure or rules of any grievance processing regime.”); Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 315–18 (2007) (discussing the differences among prison grievance systems nationwide).

105. See, e.g., *Minix v. Pazera*, No. 1:04 CV 447 RM, 2005 WL 1799538 (N.D. Ind. July 27, 2005) (dismissing a claim that a teen inmate had suffered serious abuse by other inmates because the teen had failed to report the abuse within two business days, as required by the juvenile detention facility’s grievance procedure).

speak English.<sup>106</sup>

The PLRA illustrates the potential danger of administrative review. If lawmakers want to use agency review to address information asymmetries, they must ensure that this review offers procedural safeguards—including an independent decision-maker and clear instructions for filing a claim—to protect the rights of litigants. These safeguards should ensure that potential plaintiffs have a meaningful opportunity to present their claims.

### c. Adequate Funding

Inadequate funding can also stymie administrative review, as the example of employment discrimination litigation demonstrates. Under Title VII, an employee who wants to file a claim of employment discrimination must first file the claim with the Equal Employment Opportunity Commission (“EEOC”) or related state agency.<sup>107</sup> After the claim is filed, the EEOC or other relevant agency interviews the claimant and makes a preliminary assessment of the merits of the claims.<sup>108</sup> For those claims that the agency deems most likely to be meritorious, it will then investigate the claim by interviewing relevant witnesses, requesting documents, and even conducting an on-site visit of the employer’s office.<sup>109</sup> The agency then determines whether there is probable cause to believe that discrimination occurred.<sup>110</sup>

Again, in theory, this procedure appears sound. Employees have an opportunity to present their grievances to an agency that specializes in evaluating these types of claims. The agency then has the power to investigate the claims, addressing the information asymmetry that plagues plaintiffs. Yet the EEOC review process has sparked more than its fair share of criticism.<sup>111</sup> Over the decades since the EEOC was established, the EEOC has struggled with a formidable backlog of claims. At the end of 2014, for example, the

106. See Shay & Kalb, *supra* note 104, at 319–20.

107. See 42 U.S.C. § 2000e–5(e)(1) (2012).

108. See Michael C. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 327–30 (2001) (discussing the EEOC’s claim review process).

109. See 42 U.S.C. § 2000e–5(b) (“Whenever a charge is filed by or on behalf of a person claiming . . . an unlawful employment practice, the Commission . . . shall make an investigation thereof.”).

110. If the EEOC does not find reasonable cause, it will dismiss the administrative claim and the employee can file the claim in court. If the EEOC finds reasonable cause, it can invite the parties to participate in mediation or prosecute the claim itself. See Engstrom, *supra* note 92, at 696 (discussing the EEOC review process); Sternlight, *supra* note 11, at 1410–21 (discussing the same process).

111. See, e.g., Gilbert F. Casellas, *The Equal Employment Opportunity Commission: Challenges for the Twenty-First Century*, 1 U. PA. J. LAB. & EMP. L. 1, 12 (1998) (former EEOC Chairman describing the agency’s “fundamental problem” as “too few resources for an increasing number of complaints”); Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1143 (2015) (“A significant constraint on the EEOC’s ability to pursue systemic litigation is its limited resources given its statutory responsibilities.”).



EEOC had 73,134 claims waiting to be reviewed.<sup>112</sup>

These issues reflect a deeper point about agency review. In some areas of the law, the volume of claims can be so overwhelming that agencies will struggle to investigate them properly or in a timely manner. In these situations, the legislature must decide whether to devote the funds necessary to process these claims. If the legislature is unwilling to do so, agency review may not be the best procedural option. Instead, it may be better to give plaintiffs other tools, such as pre-suit discovery, to allow them to evaluate their own claims.

## 2. Ineffective Procedural Tools

Lawmakers frequently turn to their standard menu of procedural tools to address cases involving information asymmetries. Yet many of these tools do not address the underlying reason that plaintiffs file information asymmetric cases. This Subpart discusses why two common procedural reforms—heightened pleading standards and fee-shifting—are not appropriate for information asymmetric cases.

### *i. Heightened Pleading*

It may seem obvious that legislatures should not adopt heightened pleading requirements in areas involving information asymmetries. The cases that survive under a heightened pleading regime are those in which plaintiffs have access to the information they need to support their claims before they file. The remaining cases—some of which may be meritorious and some of which may not be—will never make it past the pleading stage. As a result, in areas of the law where information asymmetries are common, heightened pleading will indiscriminately screen out a significant number of both meritorious and nonmeritorious claims.

This fact, however, has not dampened the appeal of heightened pleading among lawmakers, even in areas of the law involving information asymmetries. In securities class actions, for example, plaintiffs must plead facts establishing a “strong inference” of scienter to survive a motion to dismiss.<sup>113</sup> Information about scienter, or the defendant’s intent to defraud, is particularly difficult for plaintiffs to access prior to discovery because it concerns the defendant’s

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112. See OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2016 APPENDIX, BUDGET OF THE U.S. GOVERNMENT 1251–53 (2015), <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/appendix.pdf>. The EEOC review process has also come under fire because it reviews individual cases one at a time, rather than addressing more systemic evidence of discrimination in the workplace. See Engstrom, *supra* note 92, at 692–93. Administrative review may be less equipped to address these structural issues. See *id.* at 693 (“[R]egulatory efforts that successfully implement the structural approach will tend to be large-scale and systemic in nature and will also rely upon aggregate forms of proof as a way to reveal discriminatory decision-making structures.”).

113. 15 U.S.C. § 78u–4(b)(2) (2012).

internal thoughts.<sup>114</sup>

Similarly, in many states, a plaintiff cannot file a medical malpractice claim without first including in the complaint a certification from a medical expert that the plaintiff's claim has merit.<sup>115</sup> For cases in which the details of malpractice are clearly laid out in the plaintiff's medical records, the plaintiff may easily be able to find a medical expert willing to make the required certification.<sup>116</sup> For cases in which the details of malpractice were not documented in the records, however, certification requirements can pose an insurmountable problem.<sup>117</sup> No plaintiff will be able to find an expert willing to certify that a case has merit when neither the expert nor the plaintiff has access to the information necessary to make this determination.

Not surprisingly, empirical studies have demonstrated that heightened pleading requirements have especially harsh effects in cases in which plaintiffs do not have access to essential facts prior to discovery. At least some studies have revealed, for example, that heightened pleading standards have a significant impact in civil rights cases, including employment discrimination cases, which often involve information asymmetries.<sup>118</sup> Some of these cases may well have been meritless; others might have been proven to be meritorious had the plaintiffs only had access to the facts necessary to support their claims. In areas involving an information asymmetry, heightened pleading indiscriminately restricts both types of cases.

114. See, e.g., John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403, 1410 n.35 (2002) (arguing that plaintiffs in securities class actions face a "Catch 22," especially against outsider defendants, because a plaintiff "cannot plead fraud with particularity until it obtains discovery, and it cannot obtain discovery under the PSLRA until it pleads fraud with particularity").

115. See, e.g., FLA. STAT. § 766.203(2) (2015) (requiring a plaintiff to provide to the defendant a verified medical expert opinion corroborating that the plaintiff has reasonable grounds to support his or her claim); GA. CODE ANN. § 9-11-9.1 (2015) (requiring the plaintiff to file with the complaint an affidavit by a medical expert setting forth "at least one negligent act or omission claimed to exist and the factual basis for each such claim"); N.C. R. CIV. P. 9(j) (requiring a plaintiff to allege in the complaint that the plaintiff's medical records have been reviewed by a medical expert who is willing to testify that the plaintiff's treatment "did not comply with the applicable standard of care").

116. Or they may not be. See, e.g., STRUVE, *supra* note 10, at 60 (discussing other problems with certificate of merit requirements, including the additional costs of obtaining such a certificate).

117. See *id.* at 59 (arguing that the "availability of information" creates a "risk of unfairness" to plaintiffs required to obtain certificate of merit in medical malpractice cases); Markle, *supra* note 10, at 420 ("Affidavit of merit requirements often require the plaintiff to find an expert willing to attest to the merits of their case without fully knowing the facts, and many experts are uncomfortable doing so.")

118. See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010). The empirical record is mixed, however, with other studies showing that *Twombly* and *Iqbal* have had a more limited impact. Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 2330-32 (2012). See generally JOE S. CECIL ET AL., MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* (2011), <http://www.uscourts.gov/file/17889/download>. This mixed record likely reflects the fact that *Twombly* and *Iqbal* changed filing patterns in significant ways.

*ii. Fee Shifting*

Fee shifting is an even worse fit for cases involving an information asymmetry. In a handful of areas, legislatures have adopted or are currently considering laws allowing the prevailing party to recover its attorneys' fees from the losing party.<sup>119</sup> These laws stand in stark contrast to the so-called American rule, which requires each party to pay its own costs.<sup>120</sup>

These laws go one step farther than heightened pleading rules. Rather than merely dismissing cases that lack factual support at the outset, these laws affirmatively punish plaintiffs who file these cases. Yet, as set out above, cases involving information asymmetries are essentially a gamble.<sup>121</sup> Some of these cases will turn out to have factual support after discovery, while others will not. Given the lack of available information, however, plaintiffs must either make this gamble or abandon their claim entirely. Plaintiffs in these cases are not acting in bad faith or trying to game the system. Instead they are acting within the constraints of a system that does not allow them access to necessary information until after they file their claim. It does not make sense to punish these plaintiffs by forcing them pay their opponents' legal fees.

*B. REDUCING COST ASYMMETRIES*

As explained above, the most common procedural tools—including heightened pleading and fee shifting—are not a good match for information asymmetric cases. These tools, however, are much better fit for cost asymmetric cases. This Subpart explores how lawmakers can use heightened procedures to reduce cost asymmetries and then turns to heightened procedures that are not a good match for these cases.

1. Effective Procedural Tools

This Subpart explores six procedural tools that lawmakers should consider in cost asymmetric cases—heightened pleading, fee shifting, cost shifting, stays of discovery, agency review, and prohibitions on settlement.

*i. Heightened Pleading*

One possible reform that may be appropriate in cost asymmetric cases is heightened pleading. Heightened pleading came under fire in the wake of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, but most of this criticism relates to its impact in information asymmetric cases.<sup>122</sup> As these

119. See, e.g., Innovation Act, H.R. 3309, 113th Cong. § 3 (2013) (proposing fee shifting in patent litigation).

120. See Liang & Berliner, *supra* note 12, at 84 (“The default rule in litigation in U.S. federal courts is the American Rule under which both sides, win or lose, must bear their own attorneys’ fees.”).

121. See *supra* Part II.A.

122. See Alex Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 29 (2012) (“Where the informational asymmetry favors the responding party . . . there is little

critics note, *Twombly* sweeps too broadly, requiring many plaintiffs to plead facts that they cannot obtain prior to discovery.<sup>123</sup> As a result, and as discussed above, heightened pleading requirements are particularly ill-suited for cases involving asymmetries in information.<sup>124</sup>

These requirements are a better fit, however, in cases involving asymmetries in cost. In these cases, it makes sense to require plaintiffs to put their cards on the table early in the litigation, as long as such facts are available to them. If the plaintiffs are able to state a viable claim, they should be allowed to proceed to discovery. If, however, they do not have the facts to support their claims, even though such facts should be available to them, they should not be allowed to proceed to discovery and make the accompanying settlement demands.

As with any procedural reform, heightened pleading requires careful consideration of a number of factors. First, lawmakers should only consider adopting heightened pleading requirements if plaintiffs with meritorious claims will have access to the information necessary to plead their claim. Otherwise, these pleading requirements risk eliminating meritorious and meritless claims alike. Procedural reforms should aim to sort the good cases from the bad ones, not simply limit litigation across the board.

One way to avoid exacerbating information asymmetries is to include an explicit exception in the legislation for information that the plaintiff cannot reasonably obtain. Several bills pending in Congress to reform patent litigation include such an exception. The Innovation Act proposed in the House, for example, require plaintiffs to plead certain specified facts about their claim “unless the information is not reasonably accessible.”<sup>125</sup> The PATENT Act—the Senate’s counterpart to the Innovation Act—includes the same language.<sup>126</sup> These provisions allow pleading to serve a more stringent gatekeeping role in cost asymmetric cases without simultaneously exacerbating information asymmetries.

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justification for applying an information-forcing principle to the pleader.”); Stancil, *supra* note 33, at 114 (“If the operative pleading standard required plaintiff to allege facts that she cannot reasonably be expected to know at the case’s inception, this informational asymmetry would in turn prevent proper functioning of the litigation market.”).

123. See Miller, *supra* note 3, at 345 (arguing that *Twombly* and *Iqbal* were “two substantively highly unique cases” and therefore “[i]t makes no sense to apply the new pleading standard to the wide swath of relatively simple lawsuits that do not require extensive fact pleading or gatekeeping—with their attendant cost, delay, and risk of premature termination”).

124. See *supra* notes 113–18 and accompanying text.

125. Innovation Act, H.R. 9, 114th Cong. § 3 (2015) (“If information required to be disclosed under [the Act’s heightened pleading requirements] is not readily accessible to a party after an inquiry reasonable under the circumstances, as required by Rule 11 of the Federal Rules of Civil Procedure, that information may instead be generally described, along with an explanation of why such undisclosed information was not readily accessible, and of any efforts made by such party to access such information.”).

126. Protecting American Talent and Entrepreneurship (PATENT) Act of 2015, S. 1137, 114th Congress § 3.

Second, heightened pleading need not be an all-or-nothing proposal. Lawmakers can require heightened pleading for some elements, but not others.<sup>127</sup> In 2013, for example, Florida enacted heightened pleading requirements in foreclosure cases.<sup>128</sup> These new requirements followed a series of cases in which banks initiated foreclosure proceedings even though they did not own the mortgage to the property.<sup>129</sup> In other words, banks were trying to foreclose on mortgages they did not own. In response, the Florida legislature took targeted action, requiring heightened pleading on the legal elements creating the problem. Specifically, the new law requires banks and other mortgage holders to “allege with specificity the factual basis by which the claimant is a person entitled to enforce the note” under Florida law.<sup>130</sup> The plaintiff must also either attach a copy of the original promissory note or allege an affidavit “detail[ing] a clear chain of all endorsements, transfers, or assignments of the promissory note.”<sup>131</sup> With respect to all other elements of a foreclosure claim, normal pleading rules apply. These requirements therefore targeted the specific abuses that the legislature identified without raising pleading standards across the board.

Third, lawmakers should be clear about exactly what the plaintiff is required to plead. One of the primary complaints about *Twombly* and *Iqbal* is that it is difficult to determine exactly what plaintiffs must allege to survive a motion to dismiss.<sup>132</sup> This confusion is a result of the vague language that the Supreme Court used to explain its new pleading requirements. In *Iqbal*, for example, the Court held that a plaintiff must “state a claim to relief that is plausible on its face” and that “a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>133</sup> This language sounds good in theory, but it is difficult for a plaintiff in a breach of contract case, for example, to know exactly what facts are required in the complaint to make it “plausible on its face.” As a result, the Supreme Court’s effort to

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127. Rule 9 of the Federal Rules of Civil Procedure takes this approach, requiring plaintiff to plead fraud with particularity, but allowing the element of scienter to be alleged generally. FED. R. CIV. P. 9.

128. FLA. STAT. § 702.015 (2015).

129. See, e.g., *Lindsey v. Wells Fargo Bank, N.A.*, No. 1D12-2406 (Fla. Dist. Ct. App. Feb. 27, 2013) (dismissing a foreclosure claim because the bank did not own the mortgage in question); Harriet Johnson Brackey, *Lauderdale Man’s Home Sold out from Under Him in Foreclosure Mistake*, SUN SENTINEL (Sept. 23, 2010), [http://articles.sun-sentinel.com/2010-09-23/business/fl-wrongful-foreclosure-0922-20100921\\_1\\_foreclosure-defense-attorney-foreclosure-case-jumana-bauwens](http://articles.sun-sentinel.com/2010-09-23/business/fl-wrongful-foreclosure-0922-20100921_1_foreclosure-defense-attorney-foreclosure-case-jumana-bauwens).

130. FLA. STAT. § 702.015(2)(b) (2015).

131. See *id.* § 702.015(4)-(5).

132. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 110 (2009) (stating that *Iqbal* “exacerbated confusion about pleading standards”); Spencer, *supra* note 15, at 1733 (arguing that, under *Twombly* and *Iqbal*, “inconsistent and inappropriate applications of the [heightened pleading standard] are inevitable” (footnote omitted)).

133. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

streamline cases has spawned satellite litigation as litigants try to determine how the new requirements work in practice.<sup>134</sup>

The Supreme Court in *Twombly* may not have been able to avoid this problem because it was trying to establish a rule that applies across the board. When lawmakers raise pleading standards in particular types of cases, however, they are better able to specify exactly what plaintiffs need to plead to survive a motion to dismiss. The Florida statute described above is one example of this specificity.<sup>135</sup> Similarly, the Innovation Act requires the plaintiff to identify, among other things, “each patent allegedly infringed,” each accused “process, machine, manufacture, or composition of matter . . . alleged to infringe any claim,” and “the principal business, if any, of the party alleging infringement”—detailed requirements that leave less room for ambiguity.<sup>136</sup>

Legislatures have not always taken this detailed approach when it comes to heightened pleading. The Private Securities Litigation Reform Act (“PSLRA”), for example, used vague language in raising the pleading standard for scienter, or the defendants’ intent to defraud.<sup>137</sup> The relevant provision of the PSLRA requires plaintiffs to plead “with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind.”<sup>138</sup> This requirement sparked confusion in the lower courts as they tried to determine exactly what a “strong inference” of scienter requires.<sup>139</sup> The Supreme Court ultimately weighed in more than ten years after the PSLRA was enacted,<sup>140</sup> but even then its opinion did not resolve all of the ambiguity.<sup>141</sup>

Legislatures should keep these examples in mind when trying to enact

134. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 846 (2010) (“[W]e can expect a long period, perhaps a decade or more, of sorting and jostling before we have even a slightly clearer idea about what allegations must appear in complaints.”).

135. See *supra* notes 130–31.

136. Innovation Act, H.R. 9, 114th Cong. § 3 (2015).

137. 15 U.S.C. § 78u-4(b)(2)(A) (2012). In contrast, another provision of the PSLRA did include detailed pleading requirements. See 15 U.S.C. § 78u-4(b)(1) (2012). This provision instructs plaintiffs to “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.” *Id.* This provision, like the mortgage and patent statutes above, clearly tells plaintiffs what they need to prove and has sparked little satellite litigation.

138. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2)(A) (2012) (emphasis added).

139. Aron Hansen, Comment, *The Aftermath of Silicon Graphics: Pleading Scienter in Securities Fraud Litigation*, 34 U.C. DAVIS L. REV. 769, 784 (2001) (describing “a three-way split of authority” among the circuit courts regarding the meaning of the PSLRA’s heightened pleading standard).

140. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321–22 (2007) (interpreting the PSLRA’s “strong inference” language).

141. See generally Marvin Lowenthal, Note, *Revitalizing Motive and Opportunity Pleading After Tellabs*, 109 MICH. L. REV. 625 (2011) (discussing pleading strategies after *Tellabs*).

meaningful procedural reforms. Heightened pleading is designed to streamline the litigation process. It will not achieve this objective if the requirements themselves cause a new wave of satellite litigation. Pleading requirements that detail specifically what the plaintiff must allege are better able to avoid interpretative fights than the vaguer standards of *Twombly* and the PSLRA.

*ii. Fee Shifting*

Fee shifting is another procedural option that has received its fair share of criticism.<sup>142</sup> In cost asymmetric cases, however, fee-shifting rules can be a valuable tool to rebalance the costs of litigation. This Subpart explores the benefits of fee shifting in this class of cases and then examines how to address possible concerns.

a. General Benefits of Fee Shifting

Under the American rule, the parties in a lawsuit each pay their own attorney's fees.<sup>143</sup> By statute, however, state or federal lawmakers can reverse this rule, allowing prevailing parties to recover their attorneys' fees from their opponents.<sup>144</sup> In the right circumstances, a fee-shifting statute could help address the types of cost asymmetries discussed above. The problem in cost asymmetric cases is that the plaintiff has far less at stake than the defendant. The plaintiff can simply file a lawsuit and then sit back while the defendant racks up considerable discovery costs. As a result, the plaintiff has little to lose by filing a meritless lawsuit.

Fee-shifting rules change this calculus.<sup>145</sup> Plaintiffs who know that they

142. See, e.g., Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1106–07 (1993) (arguing against two-way fee-shifting rules). As one example, Delaware recently prohibited corporations from including provisions in their bylaws after institutional investors argued that “these bylaws effectively make corporate directors and officers unaccountable for serious wrongdoing.” See Letter from Institutional Investors to Norm Monhait, Chair, Delaware Corporation Law Council (Nov. 24, 2014), [http://www.cii.org/files/issues\\_and\\_advocacy/legal\\_issues/Letter%20to%20Norm%20Monahit%20\(Final%20Revised%20December%2018\).pdf](http://www.cii.org/files/issues_and_advocacy/legal_issues/Letter%20to%20Norm%20Monahit%20(Final%20Revised%20December%2018).pdf); see also DEL. CODE ANN. tit. 8, § 115 (2011).

143. See Macon Dandridge Miller, *Catalysts as Prevailing Parties Under the Equal Access to Justice Act*, 69 U. CHI. L. REV. 1347, 1349 (2002).

144. In a variety of federal statutes, Congress has altered the American rule. HENRY COHEN, CONG. RESEARCH SERV., ORDER CODE 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 64–114 (2008). In most of these statutes, however, the fee shifting only applies to prevailing plaintiffs, giving these plaintiffs extra incentives to file lawsuits in areas of particular public concern, including civil rights, environmental, or consumer cases. See *id.* (listing federal statutes that authorize awards of attorneys' fees).

145. Companies are quite attentive to this point when negotiating commercial contracts. An empirical study by Theodore Eisenberg and Geoffrey Miller examining more than 2000 commercial contracts found that the contracting parties opted out of the American rule in more than 60% of the contracts. See Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 353 (2013). This study suggests that sophisticated parties prefer fee-shifting rules, likely because they discourage meritless

will have to pay their opponents' legal fees if they lose will be far more reluctant to file a meritless case.<sup>146</sup> Along the same lines, defendants who know that they will be able to recover their legal fees if they prevail will no longer see these fees as sunk costs in the case.<sup>147</sup> As a result, they will have a greater incentive both to defend against the claims and oppose nuisance settlements. Fee-shifting rules can therefore make plaintiffs less eager to file meritless claims and defendants less eager to settle them.

b. Addressing Concerns about Fee Shifting

Despite these benefits, however, fee shifting is not appropriate in all cost asymmetric cases. This Subpart will explore several common objections to fee-shifting rules and discuss ways to shape fee shifting to address these objections.

One oft-cited concern is the fact that fee shifting can reduce access to the courts.<sup>148</sup> Litigants who face financial ruin if they are unsuccessful may be unwilling to file lawsuits, even if they think their claims would be meritorious. This concern may be less pressing in the areas of law addressed in this Article because these areas by definition involve primarily meritless claims. Yet within each of these areas are hidden meritorious claims that society should protect. Fee-shifting statutes risk sweeping too broadly, discouraging both meritless and meritorious claims alike.

These concerns apply most acutely to claims filed by low and middle-income litigants.<sup>149</sup> The wealthiest plaintiffs will still be willing to file claims they believe to be meritorious because they know that, even if they turn out to be wrong, they will be able to pay their opponent's legal fees without too much financial difficulty. Low and middle-income plaintiffs, however, risk financial ruin if they lose. As a result, they may be unwilling to file even

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claims and more fully compensate the prevailing party for their litigation costs.

146. See Liang & Berliner, *supra* note 12, at 91 ("There is a general consensus that the British Rule, as used in Britain, encourages high-merit, low-damage cases, while discouraging low-merit, high-damage cases. . . . The American Rule, by comparison, encourages plaintiffs with questionable claims, but large claimed damages, to file suit." (footnotes omitted)).

147. See *id.*; Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345, 349 (1990) ("Under the English rule, the nuisance suit strategy is less credible since a defendant who recognizes that a claim lacks merit has a valuable counterclaim given his costs are likely to be shifted if the case goes to trial." (footnotes omitted)).

148. See, e.g., Jonathan T. Molot, *Fee Shifting and The Free Market*, 66 VAND. L. REV. 1807, 1818 (2013) ("By increasing the stakes of litigation—so that a losing plaintiff is stuck not only with its own legal fees but also with its opponent's—fee shifting may render litigation just too expensive and risky for plaintiffs to bear."); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1878 (2002) ("Fee- and cost-shifting may, of course, exacerbate, not ameliorate, the negative procedural consequences of unequal litigant wealth.").

149. See, e.g., NANCY MEADE, ATTORNEY'S FEE SHIFTING: PERCEPTIONS ON ITS IMPACT IN ALASKA 34–37 (2012) (discussing survey results that reflected particular concern about the impact of fee-shifting rules on middle-income litigants); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1619–20 (1993).



meritorious cases if there is some chance that they will lose.

The market may provide a solution to this concern. In England, fee shifting is the norm, allowing prevailing parties in a lawsuit to recover their attorneys' fees from their opponents as a matter of course.<sup>150</sup> A robust after-the-event ("ATE") insurance market has developed in response, allowing a party who is nervous about the consequences of losing at trial to purchase insurance to cover his opponent's legal fees in event of a loss.<sup>151</sup> The parties can typically collect their own premiums for this insurance if they win,<sup>152</sup> reflecting the prevailing wisdom that ATE insurance is simply another type of litigation cost.

ATE insurance is premised on the insurance carrier's ability to price the risk. The carrier assesses the claims' likelihood of success, evaluating the legal and factual arguments as well as the likely costs of litigation. Such screening prevents a moral hazard problem in which only individuals with weaker cases seek insurance. Because insurance carriers can price their risk, they can charge riskier litigants a higher premium, which shifts the costs of meritless claims back to plaintiffs.<sup>153</sup>

Aside from this market-based option, lawmakers can also respond to concerns about fee shifting in the rules themselves. First, lawmakers can attempt to narrowly define the category of cases in which fee shifting applies. Rather than imposing a fee-shifting rule in all patent cases, for example, they can identify those most likely to be meritless and impose fee shifting on only this subset of cases. This option obviously depends on the ability of lawmakers to distinguish between meritless and meritorious cases and then write this distinction into the fee-shifting statute, which itself depends on the specific circumstances in that area of the law.

Second, lawmakers may be able to tailor the fee award to the party's ability to pay. Rather than face financial ruin if they lose, a fee-shifting statute could require losing parties to pay an amount based on a sliding scale tied to their net worth. Under this approach, plaintiffs would still feel a financial bite if they file meritless claims, but it would not be severe enough to discourage them from filing all claims.

Finally, lawmakers can give judges discretion to award fees in particular cases, trusting judges to identify the truly meritless cases. As discussed in greater detail below, however, judges are often reluctant to order losing

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150. See Molot, *supra* note 148, at 1816–17.

151. See *id.*

152. See Collin M. Davison, *Fee Shifting and After-the-Event Insurance: A Twist to a Thirteenth-Century Approach to Shifting Attorneys' Fees to Solve a Twenty-First Century Problem*, 59 DRAKE L. REV. 1199, 1204 (2011).

153. Litigation finance agreements could also provide a market-based solution to concerns over fee shifting, with investment financiers agreeing to pay litigation costs if their client loses but also receiving a share of the proceeds if the case is successful. See generally Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011).

parties to pay their opponents' legal fees, especially if the loser is an individual, rather than a corporation.<sup>154</sup> As a result, although judges may be able to tailor fee-shifting rules better than a fee-shifting statute that applies across the board, judges could use their discretion in ways that could undermine the larger statutory scheme. Legislators may be able to avoid this concern by limiting judicial discretion to specified types of situations.

In short, there are both market and statutory options to ameliorate concerns that fee-shifting rules will reduce access to justice. In areas where these options do not provide enough reassurance, lawmakers may want to use a different procedural tool. With heightened pleading, for example, plaintiffs risk dismissal, but not financial ruin. If lawmakers are concerned about deterring cases that have significant social value, they may want to choose a lower-stakes procedural tool like heightened pleading rather than the high-stakes tool of fee shifting.

Fee-shifting rules are also inappropriate if plaintiffs do not have enough money to pay the defendants' expenses. This point is illustrated by efforts to reform medical malpractice law in the 1980s. In 1980, the Florida Medical Association ("FMA") successfully lobbied the state legislature to adopt a mandatory two-way fee-shifting rule in medical malpractice cases.<sup>155</sup> Within five years, however, the FMA returned to the Florida legislature, asking it to repeal the statute. They reversed course in part because the unsuccessful plaintiffs in these cases were often insolvent and thus, under the statute, were excused from paying their opponents' fees.<sup>156</sup> A statute that nominally applied to plaintiffs and defendants alike had turned into a one-way fee-shifting statute against doctors and nurses—exactly the opposite result that lawmakers had intended.

The Florida example illustrates that fee-shifting statutes have little teeth if plaintiffs do not have enough money to pay their opponents' legal fees. Circling back to a proposal discussed above, one way to avoid this risk is to require low-income and even middle-income plaintiffs to pay a smaller percentage of their opponents' legal fees. These amounts could be tied to the plaintiffs' income or net worth. Such limits would still impose some cost on plaintiffs who file meritless lawsuits, but it would not impose liability that they have little or no ability to pay.

Fee-shifting rules are also difficult to implement in class actions. This difficulty arises because plaintiff class members may not know that they are part of the class, especially if the class is an opt-out class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure.<sup>157</sup> It is one thing to allow

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154. See *infra* notes 166–73 and accompanying text.

155. See Snyder & Hughes, *supra* note 147, at 355.

156. See Rennie, *supra* note 12, at 21–22.

157. FED. R. CIV. P. 23(b)(3). In opt-out class actions, class members are automatically part of the class upon class certification, and they can only get out of the class and avoid being bound by the judgment by affirmatively opting out. See, e.g., 14 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE &

opt-out class actions when the class members stand only to benefit from the litigation. It is another thing altogether to make individuals parties to a lawsuit without their knowledge when they could lose a considerable amount of money. Even aside from due process concerns, it would be a logistical nightmare to collect attorneys' fees from thousands of class members.

Nor can we avoid these concerns by placing the risk of loss on class representatives, rather than individual class members. At first glance, class representatives are a more attractive target than absent class members because they chose to participate in the suit and therefore would know that they stand this risk of loss. It would also be easier to collect from a few named representatives than from the entire class. In practice, though, this option would almost certainly discourage putative class members from participating in class actions because it would dramatically change the financial calculus of doing so. If a class action is successful, the class representatives only recover their pro rata share of the total judgment, which is often a fairly small amount of money.<sup>158</sup> If the class action is not successful, however, the class representative would be liable for the entire fee award, which could amount to millions of dollars.<sup>159</sup> Faced with this imbalance, few class representatives would agree to lend their name to a lawsuit.

There are at least two ways to address these risks. First, as explained above, litigants may be able to purchase after-the-event insurance similar to the model seen in England and other European countries.<sup>160</sup> Class counsel could buy this insurance on behalf of class representatives to protect them from personal liability if the class action were unsuccessful.<sup>161</sup> In such cases, the insurance company would effectively serve as the gatekeeper of frivolous litigation by pricing policies based at least in part on the suit's likelihood of success.

A second way around this problem is to put the risk of loss on class counsel.<sup>162</sup> Instead of making class representatives liable for the defendants'

PROCEDURE § 1787 (4th ed. 2015) (discussing opt-out rights in Rule 23(b)(3) class actions).

158. See Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 153 (2001) ("Such fee liability, if routinely imposed on named class representatives, would likely bring that necessary species close to extinction, because the representatives could hope for only a small share of the recovery while facing liability for all defense fees (even assuming continuation of the contingent fee on the plaintiffs' side, sparing the representatives from liability for fees of the class's own counsel).").

159. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorneys' Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 20 (1991).

160. See, e.g., Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign-Attorney Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. 125, 144 (2003) ("If class counsel are unlikely to act as insurers against the down-side risk of fee liability for a losing class, protection against the risk might come from commercial insurers.").

161. See *id.*

162. See Hensler & Rowe, *supra* note 158, at 153 ("As a threshold matter, it seems clear that the liability for shifted attorney fees in any loser-pays system would have to rest on attorneys for the class, rather than on the class representatives or the class as a whole.").

costs, lawmakers could require class counsel to pay the defendant's legal fees if the lawsuit is unsuccessful. These potential losses could be offset by higher fees awarded to class counsel in successful cases. One concern with this approach, however, is that it could create a conflict of interest between class counsel and members of the class.<sup>163</sup> Situations could arise in which class counsel would be better off with a lower settlement rather than risk having to pay their opponents' legal fees if the case continues, even if the class itself, facing no such risk of loss, would rather roll the dice on a judgment at trial.<sup>164</sup> Such a conflict already exists to a lesser extent in any class action, given that class counsel often advances the costs of the lawsuit and, through contingency fee arrangements, may stand to gain more than any individual class member.<sup>165</sup> Nonetheless, putting such a large risk of loss on class counsel runs the risk of exacerbating this conflict.

Judicial discretion may also act as a roadblock to implementing fee-shifting schemes. Studies from the United States and abroad demonstrate that judges are often reluctant to enforce fee-shifting statutes, especially against individual plaintiffs.

In Israel, for example, courts have limited discretion in deciding whether to order a losing party to pay its opponents' legal fees.<sup>166</sup> Judges are *supposed* to award all prevailing parties their fees unless doing so would unreasonably impair access to justice and equality or cause over-deterrence.<sup>167</sup> Yet, at least one empirical study concluded that judges apply these rules in ways that protect individual plaintiffs.<sup>168</sup> When an individual plaintiff wins a tort case against a corporate defendant, for example, the corporate defendant has to pay both its own fees and the fees of its opponent 99% of the time.<sup>169</sup> Yet, when a corporate defendant wins against an individual plaintiff, they only recover their own costs 52% of the time.<sup>170</sup>

This study is consistent with even more modest fee-shifting rules in the United States. Although the United States does not have rules requiring fee shifting across the board, it has enacted fee-shifting statutes in specific areas of the law.<sup>171</sup> In patent cases for example, 35 U.S.C. § 285 allows the court to

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163. See, e.g., Marc I. Gross, *Loser Pays—Or Whose “Fault” Is It Anyway: A Response to Hensler-Rowe’s “Beyond ‘It Just Ain’t Worth It’”*, 64 LAW & CONTEMP. PROBS. 163, 168 (2001) (arguing that “allocating the risk of loss to plaintiffs’ counsel, rather than to the plaintiffs themselves, creates a conflict of interest between attorney and client”).

164. See *id.*

165. See Macey & Miller, *supra* note 159, at 41–44 (discussing conflicts of interest between class counsel and class representatives).

166. Theodore Eisenberg et al., *When Courts Determine Fees in a System with a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 UCLA L. REV. 1452, 1464–66 (2013).

167. See *id.*

168. See generally *id.*

169. See *id.* at 1488.

170. See *id.*

171. See, e.g., 35 U.S.C. § 285 (2012) (authorizing fee shifting in patent litigation); OKLA.

award attorneys' fees to the prevailing party in "exceptional cases."<sup>172</sup> Empirical studies have found, however, that judges award attorneys' fees under this statute in an extremely small percentage of cases and that plaintiffs are far more likely to recover their fees than defendants.<sup>173</sup>

These studies suggest that courts both here and abroad may be reluctant to order the losing parties in litigation to pay their opponents' legal fees, especially if the losing party is an individual plaintiff. This complicates the use of fee-shifting rules, especially because the losing parties in these cases should, by definition, be the plaintiffs. Put bluntly, if the goal of fee-shifting rules is to eliminate meritless cases, judges may be the biggest hurdle.

Legislators can get around this issue by enacting mandatory fee-shifting rules except in clearly defined situations. The Equal Access to Justice Act serves as an example of such a statute, albeit in a very different context.<sup>174</sup> This Act was designed to encourage plaintiffs to file civil rights claims against the government—rather than to discourage meritless litigation—but it provides an example of a mandatory fee-shifting statute with very few exceptions.<sup>175</sup> The Act provides that a court "shall" award fees to prevailing plaintiffs in a suit filed against the government.<sup>176</sup> The statute includes few exceptions to this mandatory fee-shifting rule,<sup>177</sup> and judges are therefore not able to implement the statute in ways that undercut its core mission. Fee-shifting statutes in cost asymmetric cases could similarly require judges to order the losing party to pay the winner's attorneys' fees, unless a narrowly drawn exception applies.

STAT. tit 18 § 1126(C) (Supp. 2015) (authorizing fee shifting in shareholder derivative suits).

172. 35 U.S.C. § 285 (2012). The Supreme Court recently overturned Federal Circuit precedent sharply restricting the cases in which the district court was authorized to award fees to the prevailing party, instead holding that "an 'exceptional' case is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).

173. See James Bessen & Michael J. Meurer, *Lessons for Patent Policy from Empirical Research on Patent Litigation*, 9 LEWIS & CLARK L. REV. 1, 18 (2005) (finding that courts shifted fees to the alleged infringer in approximately "1% of patent suits that terminated via pre-trial motion or trial" over the last ten years); Liang & Berliner, *supra* note 12, at 87 (finding that "fees were awarded in about 6 percent of all patent cases ending in judgment [i.e., those that did not settle] . . . or 0.6 percent of all patent cases").

174. 28 U.S.C. § 2412 (2012).

175. See, e.g., 14 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3660.1 (4th ed. 2015) ("In enacting the EAJA, Congress responded to concerns that the expense of litigation could deter individuals from defending against or seeking review of Government action that was regarded as unreasonable or illegal.").

176. 28 U.S.C. § 2412(b).

177. See *id.*

*iii. Cost Shifting*

Legislators could also rebalance cost asymmetries by requiring the parties in a lawsuit to share discovery costs. In the typical civil case, each party pays its own discovery costs.<sup>178</sup> As explained above, this approach creates a cost asymmetry if one side's discovery costs are far greater than their opponents' costs.<sup>179</sup> Litigants can exploit this asymmetry by filing a meritless lawsuit, serving extensive discovery requests on their opponents, and then offering to settle for less than the cost of discovery.

To avoid this situation, legislatures could authorize limited cost shifting. Rather than requiring each side to pay its own costs, the legislature could require the party requesting discovery to pay for some or all of the other side's costs in producing that discovery. Such a requirement would eliminate the ability to exploit cost asymmetries in discovery and give both sides an incentive to tailor their discovery requests to the specific needs of the litigation.

This proposal has important differences from the fee-shifting rules described above. First, unlike fee-shifting rules, which only require *losing* parties to contribute to their opponents' attorneys' fees, cost-shifting rules would require each side to share the costs of litigation more evenly, regardless of which side ultimately prevails. Second, this proposal would only apply to discovery costs. Other litigation costs—including the costs of filing and responding to motions and the costs of preparing for trial—would remain on the party incurring the costs. Cost shifting is therefore a more targeted approach to address the specific cost asymmetries in discovery.

Like the other heightened procedural tools outlined above, this option is not without risks. Cost-shifting rules, like their fee-shifting counterparts, could raise access-to-justice concerns. If a party cannot afford the high costs of discovery, it may not be able to pursue its claims, creating the possibility that some meritorious claims will not be filed. One way to avoid this possibility is to impose a sliding scale for cost sharing, with a party's required contribution to depend on their financial resources. Alternatively, the legislature could give judges the discretion to waive cost-sharing rules in cases that raise access-to-justice concerns, although this discretion could raise the same concerns outlined above in connection with fee shifting.

Additionally, cost-shifting rules could give defendants an incentive to drive up their discovery costs. If defendants know they can bill their opponents for half of the discovery costs, they may spend more. This is especially true if their opponent is an individual with limited means who may choose to settle or walk away from a meritorious suit rather than risk having to pay exorbitant costs. In this way, cost shifting could create the opposite

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178. The Federal Rules of Civil Procedure provide that the prevailing party can recover its court costs from their opponent, but not attorneys' fees or other expenses, including discovery costs. See FED. R. CIV. P. 54(d)(1).

179. See *supra* Part II.B.

problem from that which exists now. Rather than defendants agreeing to nuisance settlements to avoid high discovery costs, plaintiffs might accept less than their claim is worth to avoid paying their share of high discovery costs.

Courts could try to avoid this problem by managing the discovery process more closely. Rule 26(f) of the Federal Rules of Civil Procedure already requires parties to meet early in the litigation to develop a joint discovery plan.<sup>180</sup> In cases with required cost shifting, the parties could also be required to agree on the projected costs of each phase of discovery. If they disagree on these projected costs, either side could ask the court to intervene. If either party exceeds the costs set out in the plan, they would not be able to shift any of the additional costs to their opponent. This approach could resolve disputes over costs early before any such costs are incurred. It could also make it more difficult for the defendants to impose excessive costs on plaintiffs because the parties would have to agree on these costs early in the litigation.

*iv. Stays on Discovery*

Lawmakers can also target cost asymmetric cases by staying discovery until the plaintiff survives a motion to dismiss. Congress used this procedural tool in the PSLRA.<sup>181</sup> Under the PSLRA, courts can only allow discovery during the pendency of a motion to dismiss if the plaintiff can establish that “particularized discovery is necessary to preserve evidence or to prevent undue prejudice.”<sup>182</sup> Congress is considering whether to impose a similar stay on discovery in patent litigation.<sup>183</sup>

This tool, however, is unlikely to be a panacea for lawmakers seeking to rein in meritless litigation. Even under the current rules, plaintiffs are not automatically entitled to discovery upon filing a lawsuit. Discovery in a federal civil case may not commence until “the parties have conferred as required by Rule 26(f).”<sup>184</sup> This conference must occur at least 21 days before a Rule 16 scheduling conference with the judge,<sup>185</sup> which itself must occur “within the earlier of 90 days after any defendant has been served . . . or 60 days after any defendant has appeared.”<sup>186</sup> Putting all of these rules together, it may be more than three months after the filing of the complaint before the plaintiff can serve the first discovery requests. During this time period, it is certainly possible for the parties to brief a motion to dismiss.

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180. FED. R. CIV. P. 26(f).

181. See 15 U.S.C. § 77z-1(b)(1) (2012).

182. See 15 U.S.C. § 78u-(b)(3)(B) (2012); see also *Winer Family Tr. v. Queen*, No. 03-4318, 2004 WL 350181 (E.D. Pa. Feb. 6, 2004) (lifting the stay of discovery to allow a deposition of a witness diagnosed with Stage IV brain cancer, but denying any other discovery during the pendency of the motion to dismiss).

183. See Innovation Act, H.R. 9, 114th Cong. (2015).

184. See FED. R. CIV. P. 26(d)(1).

185. See *id.* R. 26(f).

186. See *id.* R. 16(b)(2).

That said, there is no automatic stay on discovery under the federal rules.<sup>187</sup> If the parties hold their Rule 16 scheduling conference relatively quickly, the plaintiff may be able to serve early discovery requests and drive up the costs of litigation before the defendant has a chance to file a motion to dismiss.<sup>188</sup> A plaintiff could also serve discovery while a motion to dismiss is pending, putting pressure on the defendant to settle.<sup>189</sup> While a defendant could petition the court for a stay during this period, it would not be automatically entitled to one.<sup>190</sup>

A stay of discovery such as that used in the PSLRA is most helpful in cases in which the plaintiff will not survive a motion to dismiss. In these cases, the plaintiff will not have access to discovery at all and will therefore be unable to exploit a cost asymmetry. As a result, lawmakers considering discovery stays should evaluate whether the specific area of law is one in which most plaintiffs are able to survive a motion to dismiss.

#### *v. Agency Review*

Lawmakers can also consider using administrative agencies to screen cases that present a cost asymmetry. As discussed above, agency review is frequently used as a tool to screen legal claims,<sup>191</sup> and scholars have recommended expanding the screening function of administrative agencies in additional areas of the law.<sup>192</sup>

Administrative review offers some benefits in addressing cost asymmetries compared to the other procedural tools discussed above. First, administrative agencies are intended to be experts in their field. As a result, they may be better able to sort the good cases from the bad ones than a judge. Second, administrative review can be more flexible than other procedural tools. With heightened pleading, for example, all plaintiffs who file specific types of claims must allege the necessary facts before getting access to discovery. The judge does not have the discretion to give particular plaintiffs who cannot allege these facts access to discovery even if the judge thinks that a particular plaintiff may well have a meritorious claim. With administrative review, on the

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187. See *id.* R. 26(d)(1).

188. See Dodson, *supra* note 13, at 54 (“If discovery is allowed pending the motion to dismiss, plaintiffs may obtain the information they need to survive *Twombly* and *Iqbal* in an amended complaint.”); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 507 (2010) (“While the opinions in *Twombly*, as well as most commentators, seem to assume that surviving a 12(b)(6) motion is a prerequisite to discovery, this is simply not the case.” (citation omitted)).

189. See Hartnett, *supra* note 188, at 507 (“The mere filing of a motion to dismiss does not trigger a stay of discovery.”).

190. See FED. R. CIV. P. 26(d)(1).

191. See *supra* Part III.A.1.ii.

192. See, e.g., Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5*, 108 COLUM. L. REV. 1301, 1301 (2008) (proposing that the Securities & Exchange Commission exercise greater oversight over securities class actions).



other hand, the agency can evaluate the cases on a more individualized basis, using its expertise and experience to determine which ones should be allowed to proceed to discovery and which ones should be dismissed at a more preliminary stage.

Yet administrative review does present some risks in cost asymmetric cases. To review cases effectively, agencies need at least some information about the claims. They also need to establish procedures that give both sides an opportunity to be heard. As a result, this process could be expensive for both the agency and the parties involved. If the costs fall disproportionately on the defendant, as they might if the agency allows even limited discovery, they could exacerbate the already-existing cost asymmetries. This is especially true if the agency determination is simply advisory and thus plaintiffs who lose before the agency can still proceed with their claims in court. Furthermore, even if the costs fall equally on the parties, they could increase the cost of litigation across the board, raising concerns about efficiency and access to justice.

Careful design of any administrative review scheme is therefore essential, with a few points meriting particular note here. First, any review scheme should be designed in a way that does not increase the cost asymmetries. For example, the parties may be required to share the costs associated with the review, including discovery costs. Second, agency review may be best suited for cases that are likely to survive a motion to dismiss. If the defendant can get the case dismissed prior to discovery, there is no need for lawmakers to create a complicated administrative regime. Instead, a stay of discovery may be sufficient to prevent parties in these cases from exploiting cost asymmetries.

Finally, lawmakers should consider how much power administrative agencies should have to decide which cases can proceed to court. In some areas of the law, agencies make a preliminary judgment about the merits of claims, but they cannot bar plaintiffs from proceeding to court.<sup>193</sup> The agency's review is advisory and ultimately nonbinding. Perhaps, however, if the agency believes that the case does not have merit and was filed solely to exploit a cost asymmetry, the agency should be able to bar the plaintiff from filing the case.

It is fair to ask whether we want agencies to decide who gets inside the courthouse doors. In some cases, however, this form of gatekeeping review may be better than the current reliance on pleading rules. Under current federal rules, the only way to screen a case before discovery is to file a motion

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193. For example, even if the EEOC does not think that a claim has merit, it still cannot bar the employee from filing the claim. See *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/lawsuit.cfm> (last visited Sept. 11, 2016). Similarly, medical screening panels typically do not bar patients from proceeding to court, although the panels' decisions may be admissible in court. See Eggen, *supra* note 93, at 13 (stating that "admissibility of panel findings gives a panel statute the teeth that it otherwise may lack as a nonbinding device").

to dismiss, typically on the grounds that the complaint does not state a viable claim. If the complaint can include enough factual detail, it will typically survive a motion to dismiss even if the claims are unlikely to be proven at trial. An agency can look behind the pleadings to the merits of the case, conducting a review that may allow more accurate judgments.

*vi. Prohibitions on Settlements*

A final, and more radical, procedural option in cost asymmetric cases is a complete ban on settlements, at least prior to summary judgment. This tool has never been used by lawmakers, but it has been proposed in various iterations by a number of scholars.<sup>194</sup> Professors Randy Kozel and David Rosenberg, for example, argue that, in areas of law prone to nuisance settlements, defendants should be required to file summary judgment motions before they can enter into enforceable settlement agreements.<sup>195</sup> This proposal is based on the idea that a truly meritless case should be dismissed at the summary judgment stage because the plaintiff will be unable to establish a genuine issue of material fact.<sup>196</sup> Yet many meritless cases do not get to this stage because defendants settle early in the litigation rather than incur the discovery costs that precede most summary judgment motions.<sup>197</sup> By removing the option of settlement, these scholars hope to take away the incentive to file these cases in the first instance.

Such a proposal, however, could be politically unpopular because it constrains the purported victims in these cases—the defendants. Lawmakers may be hesitant to tell defendants that they cannot settle on the ground that such a ban will discourage future meritless cases. Rather than constraining defendants' options in this way, defendants could fairly ask legislatures to use other heightened procedural tools that apply to plaintiffs, such as heightened pleading requirements or fee shifting.

An alternate proposal attempts to address these concerns by giving defendants the option to tie their own hands in cost asymmetric cases.<sup>198</sup> Under this proposal, in those areas of the law where nuisance suits are common, defendants would be able to exercise an option at the start of the case to have any subsequent settlement agreements rendered unenforceable, essentially ensuring that the option of settlement is taken off the table.<sup>199</sup> After the defendant exercises this option, so the theory goes, the plaintiff will know

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194. See Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1853 (2004); Megan M. La Belle, *Against Settlement of (Some) Patent Cases*, 67 VAND. L. REV. 375, 432-41 (2014).

195. See Kozel & Rosenberg, *supra* note 194, at 1860.

196. See *id.* at 1851-52.

197. See *id.* at 1851.

198. See David Rosenberg & Steven Shavell, *A Solution to the Problem of Nuisance Suits: The Option to Have the Court Bar Settlement*, 26 INT'L REV. L. & ECON. 42, 42 (2006).

199. See *id.* at 43.

that it will not be able to get a nuisance settlement and will drop the case.<sup>200</sup> This proposal would only work if the defendant was fairly sure that the plaintiff was not willing to take the case to trial.

One benefit of both mandatory summary judgment motions and options to bar settlement is that they operate with little involvement from the court. Unlike Rule 11 sanctions, judges do not need to conduct a lengthy inquiry into the plaintiff's motive for filing suit or the reasonableness of the plaintiff's position.<sup>201</sup> And unlike heightened pleading or cost shifting, judges would not need to spend time applying or implementing these tools because the tools themselves would be largely self-executing. Once the defendant exercised the option to bar settlement, for example, that option would be off the table without requiring any review or decision-making from the court.

## 2. Ineffective Procedural Tools

This Subpart addresses two procedural tools that are inappropriate for cost asymmetric cases. The first of these tools—pre-suit discovery—obviously does not make sense in cases in which asymmetric discovery costs created the underlying problem. The second tool—mandatory Rule 11 sanctions—intuitively has more appeal because sanctions raise the stakes for plaintiffs who engage in bad-faith litigation. As explained below, however, such sanctions are unlikely to be a panacea in cost asymmetric cases.

### *i. Pre-Suit Discovery*

Perhaps it goes without saying that pre-suit discovery—a promising procedural tool for cases involving an *information* asymmetry—is inappropriate in cases involving a *cost* asymmetry.<sup>202</sup> As detailed in Subpart III.A, it is difficult for plaintiffs to obtain formal discovery prior to filing a complaint.<sup>203</sup> Unlike with information asymmetrical cases, there is no reason for lawmakers to change standard rules barring pre-suit discovery in cases in which defendants settle meritless claims to avoid the high cost of litigation.

This point has potential real-world implications. In the wake of *Twombly* and *Iqbal*, some scholars have suggested that lawmakers relax the rules prohibiting pre-suit discovery in civil cases generally in federal court.<sup>204</sup> Although this proposal could ameliorate the harsh effects of *Twombly* and *Iqbal* in many cases, it could also exacerbate the cost asymmetries in other cases. As a result, pre-suit discovery does not make sense as a transsubstantive rule, and lawmakers open to this procedural option should consider exempting cases

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200. *See id.*

201. *See id.* at 49.

202. As discussed in Part III.C.2, modified versions of these tools may be appropriate in cases involving both a cost and information asymmetry.

203. *See supra* Part III.A.1.i.

204. *See, e.g.,* Dodson, *supra* note 23.

that are likely to involve a significant cost asymmetry.

ii. *Mandatory Rule 11 Review*

Mandatory Rule 11 reviews are also not an effective way to address cost asymmetric cases, although this point is less obvious. Under Rule 11 of the Federal Rules of Civil Procedure, attorneys must sign all pleadings, motions, and other papers submitted to the court certifying that, to the best of their knowledge, the submissions have a good faith basis in law and fact.<sup>205</sup> Courts typically conduct a Rule 11 inquiry only upon motion of a party, but they also have the discretion to conduct the inquiry *sua sponte*.<sup>206</sup> Sanctions are typically discretionary as well, although the rule sets out some limits on this discretion.<sup>207</sup>

The PSLRA took aim at the discretionary nature of Rule 11. Under the PSLRA, courts must conduct a Rule 11 inquiry upon the final adjudication of *every* securities class action.<sup>208</sup> They must also make specific findings on the record regarding the compliance of the parties and the attorneys with the rule.<sup>209</sup> Finally, if the court determines that a party or attorney violated Rule 11, it must impose sanctions.<sup>210</sup> As a result, in securities class actions, both the inquiry and the award of sanctions are mandatory.

The PSLRA is the only federal statute to modify Rule 11 in this way. Yet many scholars have argued for greater use of Rule 11 and its statutory counterparts to combat frivolous litigation in other areas of the law. Some scholars have argued, for example, that judges should make greater use of 35 U.S.C. § 285, which allows the court to award attorneys' fees to the prevailing party in exceptional patent cases.<sup>211</sup> Congress has also experimented with different versions of Rule 11, including a version that was effective between 1983 and 1993 that made sanctions mandatory under certain circumstances.<sup>212</sup>

At first glance, this enhanced role for Rule 11 has promise in addressing meritless litigation fueled by cost asymmetries. Like heightened pleading and fee shifting, it gives plaintiffs a greater incentive to screen their claims at the outset of the case. It also allows for the possibility that a case may have merit even if the plaintiff does not know all of the relevant facts at the outset. As a

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205. FED. R. CIV. P. 11(b)(2)-(3).

206. *Id.* R. 11(c)(2)-(3).

207. *Id.* R. 11(c)(1), (4)-(5).

208. 15 U.S.C. § 78u-4(c) (2012).

209. *Id.* § 78u-4(c)(1).

210. *Id.* § 78u-4(c)(2).

211. See, e.g., Liang & Berliner, *supra* note 12, at 66 (arguing that, "to discourage frivolous patent cases, fee shifting should be used more liberally under section 285 in cases where the merits are clear").

212. See Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48 AM. U. L. REV. 1007, 1010-12 (1999) (explaining the amendments to Rule 11).

result, mandatory Rule 11 sanctions could allow the filing of meritorious cases that heightened pleading rules might screen out. Finally, the mandatory nature of the inquiries addresses the risk of underdeterrence that exists under the current version of Rule 11. Under this version, litigants know that their opponents may not bother to file a Rule 11 motion and that courts may award little or no sanctions, undercutting the rule's utility. A mandatory rule would increase the deterrent effect of the rule.

Yet the reality of mandatory Rule 11 reviews has not matched their promise. Todd Henderson and William Hubbard recently examined over a thousand securities class actions to determine whether the presiding judges complied with their Rule 11 obligations.<sup>213</sup> They found that judges conducted Rule 11 inquiries in only 14% of securities class actions.<sup>214</sup> In other words, despite the statutory obligation to conduct a Rule 11 inquiry at the end of every securities class action, judges rarely do.<sup>215</sup>

This finding is not entirely surprising. Many judges may not be aware of their obligation to conduct a Rule 11 inquiry in securities class actions. Used to the discretionary nature of Rule 11 in other federal cases, judges may not know that Congress eliminated their discretion in securities class actions, especially if they rarely handle these cases.<sup>216</sup> And the parties may not want to remind the court, especially if the case settles. Few defendants will want to risk upending the deal by asking for a Rule 11 inquiry. They may simply be glad that the fight is over and may not want to spend more time and money on an uncertain sanctions battle.

Additionally, even judges who know about their Rule 11 obligations under the PSLRA may not want to prolong the case. Most securities class actions settle, and most proposed orders accompanying these settlement agreements include boilerplate language stating that the parties have complied with Rule 11.<sup>217</sup> Judges may believe that they can comply with their own Rule 11 obligations by simply signing the orders. Moreover, judicial dockets are so full that judges may not feel that they have the luxury of looking for fights where there are none. And just as judges are hesitant to order fee shifting even when they are statutorily allowed to do so,<sup>218</sup> judges may also not

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213. See generally Henderson & Hubbard, *supra* note 14.

214. See *id.* at S90.

215. See *id.* Two more limited studies reached the same conclusion. See Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers, Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1506 (2006); Wendy Gerwick Couture, Remarks, *Around the World of Securities Fraud in Eighty Motions to Dismiss*, 45 LOY. U. CHI. L.J. 553, 567 (2014).

216. See Henderson & Hubbard, *supra* note 14, at S93 ("Federal district court judges are generalists, and it is probable that the minutiae of a specialty area, like securities law, are beyond the ken of the average judge.").

217. See *id.* at S93, S99 (finding that most of the Rule 11 inquiries conducted by courts occur in the settlement context in which "the effort involved is minimal" and the judge can get away with "boilerplate findings").

218. See *supra* notes 166–73.

be very interested in ordering sanctions under Rule 11.

The PSLRA is just one example of a mandatory sanctions rule, but it does demonstrate that such sanctions are not the most effective tool to combat meritless litigation. Given the promise of heightened pleading and fee shifting, lawmakers may be better served by using these tools rather than placing their faith in altered versions of Rule 11.

### C. REDUCING HYBRID ASYMMETRIES

Cases with both information and cost asymmetries present the most difficult procedural challenges. In these hybrid cases, lawmakers cannot simply choose from the traditional menu of procedural tools because many of these tools alleviate one type of asymmetry while exacerbating the other. As a result, lawmakers need to be more creative in devising procedural solutions to apply in this subset of cases. This Subpart first explains why many traditional procedural tools are not appropriate in cases with both information and cost asymmetries. It then turns to ways that lawmakers can combine procedural tools to simultaneously address both types of asymmetries.

#### 1. Ineffective Procedural Tools

The traditional menu of procedural tools does not work in hybrid cases. Most procedural tools target only one type of asymmetry, and, in doing so, risk intensifying the other asymmetry. As a result, traditional procedural tools can make the problems in hybrid cases even worse, exacerbating the dynamics that lead to meritless litigation in the first place.

Pre-suit discovery illustrates this point. As explained in Subpart III.A, pre-suit discovery is a promising solution in *information asymmetric* cases because it gives plaintiffs access to the information they need to evaluate their claims.<sup>219</sup> In *cost asymmetric* cases, however, pre-suit discovery would make the cost asymmetry worse by forcing defendants to incur discovery costs before they have the opportunity to file a motion to dismiss.<sup>220</sup> As a result, allowing pre-suit discovery in cases with both information and cost asymmetries would offer *some* information advantages to plaintiffs, but would also increase the cost imbalance between the parties.

Heightened pleading presents the opposite problem. Heightened pleading rules can be appropriate in cost asymmetric cases because these rules make it more difficult for plaintiffs to exploit a cost asymmetry by filing a meritless lawsuit.<sup>221</sup> Yet, heightened pleading would have a deleterious effect on information asymmetric cases because the plaintiffs in these cases do not

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219. See *supra* Part III.A.1.i.

220. See *supra* Part III.B.2.i.

221. See *supra* Part III.B.1.i.

have access to the information they need to evaluate their claims.<sup>222</sup> Forcing plaintiffs to plead information they do not have will keep them out of court regardless of the merits of their claims.

As these examples demonstrate, the most common tools for procedural reform work for one category of cases, but not the other. It is not surprising, therefore, that most of heightened procedures described as good options for information asymmetric cases are listed as bad options for cost asymmetric cases, and vice versa. This state of affairs makes it especially difficult to address hybrid information/cost asymmetric cases.

This point has implications in the legislative arena. Lawmakers often choose procedural tools appropriate for cost asymmetric cases even if the targeted lawsuits have both cost and information asymmetries.<sup>223</sup> The tools used in cost asymmetric cases help lawmakers appear tough on frivolous litigation. In contrast, the tools used in information asymmetric cases make it easier for plaintiffs to pursue their claims—a politically unpopular outcome in many areas of the law. These political dynamics mean that lawmakers run the risk of overemphasizing cost asymmetries, while underemphasizing information asymmetries.

This risk is more problematic than it may first appear. In focusing on cost asymmetries to the exclusion of information asymmetries, lawmakers are not solving half of the problem. Instead, they are exacerbating the problem in significant ways because the solutions designed to address the cost asymmetries will typically increase information asymmetries. As a result, lawmakers who focus only on cost asymmetries may well increase the number of plaintiffs with meritorious claims who cannot make it through the courthouse doors.

## 2. Effective Procedural Tools

How then can lawmakers promote litigation reform in this particularly challenging category of cases? Ideally, the legal system would find a way to give plaintiffs more information about the merits of their claims without increasing the defendants' relative litigation costs. This task is harder than it sounds. Providing plaintiffs with more information about their claims necessarily involves costs, and, under normal procedural rules, these costs are typically borne by defendants. This Subpart examines three ways to address this challenge. In doing so, the discussion builds on the detailed examination of specific heightened procedures in prior Parts, allowing this Subpart to focus on ways to combine heightened procedural tools to address hybrid

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222. See *supra* Part III.A.2.i.

223. See *infra* Part IV.B (discussing legislative efforts targeting securities class actions). Lawmakers may also prefer cost asymmetric tools because these tools are generally cheaper for the government. Setting up an administrative review scheme to provide plaintiffs with more information about their claims imposes greater costs on the government than heightened pleading requirements or fee-shifting rules.

asymmetries.

The first way to address hybrid cases is to make plaintiffs bear the costs of increased access to information. Lawmakers, for example, could allow plaintiffs access to pre-suit discovery, but only if they are willing to pay for it. This proposal would be subject to the caveats about pre-suit discovery and cost shifting addressed in the prior Parts. Any pre-suit discovery, for example, should be subject to strict limits so the defendants do not have to open their files upon only the barest of suspicions.<sup>224</sup> The rules would also have to be crafted in such a way that they could not be watered down by well-intentioned judges hesitant to shift costs to plaintiffs.<sup>225</sup> And in class actions, it would need to be structured to place the costs on attorneys or insurance companies rather than class members to avoid deterring these suits altogether.<sup>226</sup>

Even with these safeguards, requiring plaintiffs to pay for early access to discovery raises some concerns. Under this regime, plaintiffs who cannot afford to pay for pre-suit discovery will find it more difficult to survive a motion to dismiss compared to plaintiffs with deeper pockets. On the other hand, under current rules, *all* plaintiffs in cases involving information asymmetries have difficulty surviving a motion to dismiss. A procedural regime in which at least some of these plaintiffs make it through the courthouse doors is arguably an improvement, even if not all plaintiffs are able to take advantage of this new procedural option.

An alternative way to address hybrid cases is to make the parties share the costs of increased access to information. Under this approach, lawmakers could allow the plaintiff to obtain limited discovery before filing, but only if the plaintiff agreed to pay a specified percentage of the defendants' costs in providing this discovery. Any subsequent discovery after the case is filed would be subject to the normal rule that each side pays its own discovery costs. This approach would reduce concerns about access to justice because the plaintiff would not have to incur the entire cost of early discovery. It would not eliminate these concerns, however, especially if the plaintiffs' share of the costs is significant.

A third and final way to address hybrid cases is for the government to pay the costs associated with early access to information, either through administrative screening of cases or by direct funding of pre-suit discovery costs. Administrative review is proposed above in both information and cost asymmetric cases, although in different forms. In information asymmetric cases, the administrative agency charged with reviewing the claims must have the power to investigate the claims by conducting interviews and obtaining relevant documents.<sup>227</sup> In cost asymmetric cases, the agency must be able to

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224. *See supra* Part III.A.1.i.

225. *See supra* Part III.B.1.ii.

226. *See supra* Part III.B.1.ii.b.

227. *See supra* Part III.A.1.ii.



review claims in a cost effective manner so as not to exacerbate the existing financial incentives of the litigation.<sup>228</sup> In cases that include both information and cost asymmetries, agency review must thread the needle of both models. The agency must be able to get the information that it needs without worsening the cost asymmetries.

Lawmakers could accomplish this goal by using government funds to pay for limited investigation of the plaintiffs' claims. Some states have funded agency review in the past, but this funding is usually limited to the cost of the agency's own investigation.<sup>229</sup> It generally does not compensate the parties for their own costs of complying with the investigation, and it is unclear whether this approach would be politically palatable. It remains a promising option, however, in areas where plaintiffs are unable to pay for some or all of the pre-suit discovery costs.

In sum, heightened procedure can help address meritless litigation, but only if lawmakers target their legislative efforts to the specific *causes* of the meritless claims. In information asymmetric cases, lawmakers should adopt heightened procedural tools that give plaintiffs more information about their claims. In cost asymmetric cases, lawmakers should use tools that rebalance the cost of litigation between the parties. And in hybrid cases involving both information and cost asymmetries, lawmakers should combine heightened procedural tools to give plaintiffs more information about the merits of their claims without exacerbating the cost asymmetry between the parties. As we will now see, this conceptual framework has implications for procedural reform on the ground.

#### IV. HEIGHTENED PROCEDURE IN ACTION: THREE CASE STUDIES

This Part explores how heightened procedure can work in practice. It first describes how lawmakers in Massachusetts used effective heightened procedural tools to reform medical malpractice laws. It then explains how Congress used ineffective heightened procedural tools to reform the procedures governing federal securities class actions. Finally, it provides guidance for lawmakers who are currently evaluating proposed procedural changes in patent litigation.

##### A. *THE USE OF PROCEDURE IN MEDICAL MALPRACTICE LITIGATION*

Few types of litigation have experienced as much procedural reform as medical malpractice litigation. Nearly every state has adopted procedural reforms to help screen medical malpractice lawsuits.<sup>230</sup> In a number of states,

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228. See *supra* Part III.B.1.v.

229. See, e.g., V.I. CODE ANN. tit. 27 § 166i(d)(3) (2015) (providing that the government will pay for certain investigatory costs incurred by medical malpractice screening panels).

230. See, e.g., Catherine T. Struve, *Doctors, The Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 *FORDHAM L. REV.* 943, 945 (2004) (surveying state reforms related to medical malpractice litigation).

injured patients must convince a panel of state-appointed experts that they have a viable case.<sup>231</sup> In other jurisdictions, patients must obtain a certificate from a doctor verifying that their claim likely has merit before they can proceed to court.<sup>232</sup> Lawmakers also continue to explore additional reforms, including caps on damages and mandatory arbitration.<sup>233</sup> These reform efforts have even gotten federal attention, with President Obama stating in his State of the Union speech in 2011 that he was open to “medical malpractice reform to rein in frivolous lawsuits.”<sup>234</sup>

Yet the problem is more complicated than President Obama and others have recognized. The problem is not that *too many* patients are filing malpractice claims, but rather that the *wrong* patients are filing malpractice claims. A landmark study by the Harvard Medical School demonstrated this point.<sup>235</sup> Researchers examined the medical files from all of the medical malpractice lawsuits filed over a one-year period in the state of New York.<sup>236</sup> Although all of the plaintiffs alleged negligence by a medical professional, the researchers determined that less than 20% of the lawsuits actually arose from negligence.<sup>237</sup> This data suggests that many plaintiffs were filing nonmeritorious cases.

Just as striking, however, was their analysis of a selection of hospital records from New York hospitals during this same time period. This analysis uncovered hundreds of additional incidents in which patients were injured by the negligence of a doctor or nurse. Almost none of these incidents resulted in litigation.<sup>238</sup> Based on this data, researchers concluded that medical malpractice suffers from a “tort gap.”<sup>239</sup> Patients and their lawyers too often do a poor job of determining when to sue—they sue too often when they do not have a meritorious claim, and too seldom when they do have a meritorious claim.

One likely explanation for this gap is that many patients lack the

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231. *See id.*

232. *See, e.g.*, GA. CODE ANN. § 9-11-9.1(a)(3) (2015); W. VA. CODE § 55-7B-6(b) (2002 & Supp. 2015).

233. *See, e.g.*, Kyle Miller, Note, *Putting the Caps on Caps: Reconciling the Goal of Medical Malpractice Reform with the Twin Objectives of Tort Law*, 59 VAND. L. REV. 1457, 1473 (2006) (“Probably the most popular version of medical malpractice reform since the medical malpractice insurance crisis of the 1970s has been caps on jury awards.”); *see also id.* 1482 (“Another popular method of tort reform in medical malpractice cases has been the use of state-sponsored arbitration or screening panels.” (citation omitted)).

234. President Barack H. Obama, Address Before a Joint Session of the Congress on the State of the Union (Jan. 25, 2011).

235. *See generally* PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION (1993).

236. *See generally id.*

237. *See id.* at 71.

238. *See id.* at 71–73.

239. *See id.*

information necessary to determine when they have a meritorious claim. The Health Insurance Portability and Accountability Act requires medical providers to provide patients with a copy of their medical records within 30 days of receiving a request for such records.<sup>240</sup> This statute is helpful to patients if the information they need is contained within their medical records, but not if key evidence lies only in the recollections of doctors or nurses or in other files. Without a chance to question their medical providers, many patients will be unable to fully understand what caused their injuries.<sup>241</sup>

As a result, the goal of any reforms in this area should not be simply to rein in frivolous litigation. Instead, it should be to better sort the good cases from the bad, such that patients injured by negligence receive appropriate compensation while doctors who do not commit malpractice are protected from meritless lawsuits.

Massachusetts has tried to do just that. In 2012, Massachusetts passed comprehensive health care reform legislation, which aims in part to improve communication between patients and their doctors after an unexpected medical outcome.<sup>242</sup> Under this law, health care providers must disclose to patients when unanticipated adverse outcomes occur.<sup>243</sup> They must also investigate and explain to the patient what happened, establish systems to prevent the recurrence of such incidents, and, where appropriate, apologize and offer fair financial compensation.<sup>244</sup> The law also includes a 180-day cooling-off period during which the patient cannot file suit, allowing the investigation to occur before the matter goes to court.<sup>245</sup>

This law was lauded as a “historic and unprecedented partnership” between doctors and attorneys in Massachusetts—two groups that often find themselves on opposite sides of any medical malpractice debate.<sup>246</sup> The cooperation between these two groups started early, with the Massachusetts

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240. 45 C.F.R. § 164.524 (2016). States may also have their own statutes requiring medical providers to turn over the records within a shorter time period. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123110 (West 2012) (requiring a health care provider to provide access to patient records within five days of a request and to provide copies of such records within 15 days).

241. *See* Struve, *supra* note 230, at 977 (“[T]he data on malpractice lawsuits resolved prior to trial are consistent with the view that some malpractice plaintiffs lack information concerning the merits of the claim and must sue to obtain it . . . [which] would be true, for example, if necessary evidence were contained not just in medical records but also in the recollections of those present during a medical procedure.”).

242. *See* An Act Improving the Quality of Health Care and Reducing Costs through Increased Transparency, Efficiency and Innovation, 2012 Mass. Acts ch. 224 (codified as amended in scattered sections of MASS. GEN. LAWS ch. 3–6D (2014)).

243. MASS. GEN. LAWS ch. 233, § 79L(b) (2014).

244. *Id.* ch. 231, § 60L(g).

245. *Id.* ch. 231, § 60L(a).

246. *See* Press Release, Massachusetts Bar Association, Massachusetts Medical Society, and Massachusetts Academy of Trial Attorneys, Landmark Agreement Between Physicians and Attorneys Provides for Medical Liability Reforms in Massachusetts (Aug. 7, 2012), <http://www.massbar.org/media/1272674/08.07.12%20mba%20mms%20release.pdf>.

Medical Society, the Massachusetts Bar Association, and the Massachusetts Academy of Trial Attorneys all working together to approve the language of the bill.<sup>247</sup> It was not surprising that the law garnered the support of patients and their lawyers because it provided them with access to information that they would otherwise lack when evaluating potential claims. Patients no longer need to rely on their medical records alone to determine whether they have a viable claim. They can instead receive an explanation of what happened to them from their own doctors and nurses. This explanation will allow them to make a more informed decision regarding the merits of potential claims before filing suit.

Ironically, doctors likely supported this law for many of the same reasons. This law tapped into their desire to talk to their patients after an adverse event. While they may be nervous about saying too much out of fear that it may be used against them in a future lawsuit, they still have the more basic desire to talk to their patients and explain what happened.<sup>248</sup> Indeed, a hospital system that piloted a similar program before Massachusetts passed its law found that “the most commonly cited factor supporting the model across constituencies is that it was morally and ethically the ‘right thing to do.’”<sup>249</sup> In short, the Massachusetts law gave doctors and other medical professionals an incentive to do what they already want to do: talk to their patients about what had happened to them.

This law was only passed in 2012, and no empirical evidence is available yet on its effectiveness. Based on similar voluntary programs adopted at hospitals around the country,<sup>250</sup> however, researchers expect the number of meritless claims to fall.<sup>251</sup> Moreover, even plaintiffs with meritorious claims may not sue because the Massachusetts statute encourages doctors and

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247. *See id.*

248. *See* Thomas H. Gallagher et al., *Patients’ and Physicians’ Attitudes Regarding Disclosure of Medical Errors*, 289 J. AM. MED. ASSOC. 1001, 1003 (2003) (disclosing the complex feelings of doctors following an adverse medical event, but noting that they generally “agreed in principle that patients should be told about any error that caused harm” and that “many said such disclosure was ethically imperative”).

249. MASS. MED. SOC’Y, A ROADMAP FOR REMOVING BARRIERS TO DISCLOSURE, APOLOGY AND OFFER IN MASSACHUSETTS: EXECUTIVE SUMMARY (2012), [https://www.massmed.org/Advocacy/State-Advocacy/A-Roadmap-for-Removing-Barriers-to-Disclosure,-Apology-and-Offer-in-Massachusetts-Executive-Summary-\(pdf\)](https://www.massmed.org/Advocacy/State-Advocacy/A-Roadmap-for-Removing-Barriers-to-Disclosure,-Apology-and-Offer-in-Massachusetts-Executive-Summary-(pdf)).

250. *See generally* Michelle M. Mello & Thomas H. Gallagher, *Malpractice Reform—Opportunities for Leadership by Health Care Institutions and Liability Insurers*, 362 NEW ENG. J. MED. 1353 (2010) (describing voluntary disclosure and offer programs around the country).

251. *See, e.g.*, Kelly Bogue, Note, *Innovative Cost Control: An Analysis of Medical Malpractice Reform in Massachusetts*, 9 J. HEALTH & BIOMEDICAL L. 87, 114 (2013) (“If the Cost Bill can reduce the frequency of malpractice claims through transparent, open discussion, as well as shrink the costs of the litigation through earlier settlement, then there is a very strong possibility the Commonwealth’s overall health care costs will be reduced.”(footnote omitted)). These laws are modeled after similar steps taken voluntarily by the University of Michigan Health System, which reduced the cost per lawsuit by almost 50%. *See* Allen Kachalia et al., *Liability Claims and Costs Before and After Implementation of a Medical Error Disclosure Program*, 153 ANNALS INTERNAL MED. 213, 217 (2010).

hospitals to offer injured plaintiffs fair compensation as part of the investigatory process. And even if the total amount paid to injured patients increases, this money will be channeled toward patients who were actually injured as a result of medical malpractice.

This approach captures the promise of procedural reform in information asymmetric cases. Under this new law, patients will have more information about their injuries before going to court. Those who learn that their injuries were not caused by malpractice will be less likely to file lawsuits, and the claims that are filed are far more likely to be meritorious, closing the “tort gap” identified in the Harvard Medical School study.

#### B. THE MISUSE OF PROCEDURE IN SECURITIES CLASS ACTIONS

Congress’s efforts to overhaul securities class actions were not as successful in sorting meritorious from nonmeritorious claims. In the early 1990s, corporate America claimed to be under siege by professional plaintiffs who filed frivolous securities claims to extort multi-million dollar settlements.<sup>252</sup> The problem was described in Congress as a classic case of cost asymmetries. One report in the House of Representatives, for example, attributed the problem to the fact that “[t]he cost of discovery often forces innocent parties to settle frivolous securities class actions.”<sup>253</sup> A Senate report similarly claimed that securities class actions “are generally settled based not on the merits but on the size of the defendant’s pocketbook.”<sup>254</sup> Even the Chairman of the Securities & Exchange Commission agreed with this assessment, stating that “[i]f a corporate defendant is unsuccessful in getting a weak case dismissed by an early dispositive motion, the economics of litigation may dictate a settlement even if the defendant is relatively confident that it would prevail at trial.”<sup>255</sup>

In response to these concerns, Congress enacted the PSLRA.<sup>256</sup> As discussed above, the PSLRA included a variety of heightened procedural reforms that directly targeted this cost asymmetry.<sup>257</sup> Most significantly, Congress imposed heightened pleading requirements for two of the most

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252. See, e.g., *Securities Litigation Reform: Hearings Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy and Commerce*, 103d Cong. 216, 499–503 (1994) [hereinafter *Hearings Before the Subcomm. on Telecomms. & Fin.*] (statement of Stephen F. Smith, General Counsel and Dir. of Investor Relations, Exabyte Corporation); *Common Sense Legal Reform Act: Hearings Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy and Commerce*, 104th Cong. 39–42 (1995) (statement of James Kimsey, Chairman, America Online, Inc.).

253. H.R. Rep. No. 104–369, at 37 (1995) (Conf. Rep.).

254. S. Rep. No. 104–98, at 9 (1995) (Conf. Rep.).

255. *Hearings Before the Subcomm. on Telecomms. & Fin.*, 103d Cong. 36.

256. Private Securities Litigation Reform Act, Pub. L. No. 104–67, 109 Stat. 737 (1995) (codified at scattered sections of 15 U.S.C.).

257. The PSLRA also included a variety of changes to the *substantive* securities laws, including a safe harbor for certain forward-looking information and limitations on joint and several liability. These reforms are beyond the scope of this Article.

crucial elements in a securities fraud claim—whether the defendants made a false or misleading statement, and whether they acted with the required state of mind.<sup>258</sup> It also prohibited plaintiffs from obtaining any discovery until after they survive a motion to dismiss.<sup>259</sup> Finally, as discussed above, the PSLRA requires the court to conduct a mandatory Rule 11 inquiry at the end of every securities class action.<sup>260</sup> If the court concludes that any party or attorney violated Rule 11, it must impose sanctions.<sup>261</sup>

These heightened procedural reforms all address the *cost asymmetry* between the parties. They did nothing, however, to address the *information asymmetry* between the parties. As detailed in Part III, securities class actions are a classic case of both cost and information asymmetries.<sup>262</sup> It is true that defendants bear a disproportionate share of the discovery costs and thus have an economic incentive to settle even meritless cases. At the same time, however, plaintiffs in these cases often lack the information they need to evaluate the merits of their claims prior to discovery. This is especially true when it comes to the element of scienter, which requires plaintiffs to allege that the defendants knew what they were saying was false at the time they said it. It is extremely difficult for the plaintiff to have evidence creating a “strong inference” that the defendant attempted to defraud the company’s investors without access to discovery. Yet the procedural reforms of the PSLRA ignored this information asymmetry, focusing solely on the cost asymmetry.

The results were predictable. The PSLRA succeeded in reducing the number of nuisance suits, exactly the result that Congress wanted. Yet it also eliminated nonfrivolous claims, as several empirical studies have demonstrated. One study, for example, examined lawsuits filed both before and after the adoption of the PSLRA. The study found that, while the PSLRA deterred some suits that would have settled for a nuisance value before the PSLRA,<sup>263</sup> it also deterred a significant number of suits that would have produced a nonnuisance value settlement before the PSLRA.<sup>264</sup> In other words, the PSLRA has made it harder for shareholders to file both meritorious and nonmeritorious claims alike.

Another study examined IPO-related lawsuits filed both before and after

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258. 15 U.S.C. §§ 78u-4(b)(1), 78u-4(b)(2)(A) (2012).

259. *Id.* § 78u-4(b)(3)(B).

260. *Id.* § 78u-4(c)(1).

261. *Id.* § 78u-4(c)(2).

262. *See supra* notes 61–69 and accompanying text.

263. Stephen J. Choi et al., *The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 64–67 (2009).

264. *See id.*; *see also* Eric Talley & Gudrun Johnsen, *Corporate Governance, Executive Compensation and Securities Litigation* 4 (Univ. of S. Cal. Law Sch., Olin Research Paper No. 04-7, USC CLEO Research Paper No. Co4-4, 2004), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=536963](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=536963) (presenting data “that even if the PSLRA reduced frivolous litigation (as its proponents claim), it likely deterred meritorious litigation as well, and in such proportions as to swamp the deterring effects on non-meritorious suits”).

the PSLRA.<sup>265</sup> The study found that shareholders are now significantly less likely to file a securities class action in situations in which there is no hard evidence of fraud, such as a restatement or SEC investigation.<sup>266</sup> Plaintiffs' attorneys have shifted their attention toward cases where the presence of such hard evidence makes it easier for them to survive a motion to dismiss.<sup>267</sup> The study concludes that "[t]he PSLRA operated less like a selective deterrence against fraud and more as a simple tax on all litigation (including meritorious suits)."<sup>268</sup>

What then should Congress have done differently back in 1995? First, it should have recognized that the problem was not simply one of cost asymmetries. It was likely true that the defendants' high discovery costs made it possible for some plaintiffs to extract settlements in meritless cases. But that does not mean that the answer was to adopt reforms that only targeted this cost asymmetry. Lawmakers should also have been on the lookout for information asymmetries that made heightened pleading and mandatory Rule 11 inquiries, at least on their own, inappropriate—exacerbating one asymmetry in the name of reducing another.

Second, after recognizing that securities class actions include both information and cost asymmetries, Congress should have adopted procedural reforms that were better suited to such hybrid cases. For example, Congress could have adopted heightened pleading for certain elements, but allowed plaintiffs limited pre-suit discovery on these elements at their own expense. Alternatively, it could have allowed pre-suit discovery at the defendants' expense and then imposed fee shifting on the plaintiffs if they chose to go forward with their claims but were ultimately unsuccessful.

Both of these procedural options would have allowed plaintiffs to get more information about their claims before filing suit, but only if they were willing to put their own money on the line. As discussed above, requiring plaintiffs to pay for pre-suit discovery costs may raise concerns about access to justice—only those able to pay for discovery would get it.<sup>269</sup> On the other hand, this option would still give plaintiffs more options than they have today. The PSLRA in its current form forces plaintiffs to run the gauntlet of heightened pleading armed only with information they can access prior to discovery. Allowing pre-suit discovery at the plaintiffs' expense would give plaintiffs with meritorious claims a far better chance of surviving a motion to dismiss.

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265. See generally Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598 (2007).

266. See *id.* at 622.

267. See *id.* at 601, 622.

268. *Id.* at 623.

269. See *supra* Part III.C.1.

*C. THE PROCEDURAL DEBATE IN PATENT LITIGATION*

If there was ever an area ripe for procedural reform, it is patent law. Between 2000 and 2013, the number of patent cases more than doubled.<sup>270</sup> Proponents of reform place the blame for this increase on nonpracticing entities (“NPEs”)—so-called patent trolls—that obtain patents, but do not develop or sell products using the patented inventions.<sup>271</sup> Over the past several years, NPEs have filed more than half of all patent cases,<sup>272</sup> and these cases have attracted scorn.<sup>273</sup> On the whole, cases filed by NPEs are less likely to result in a verdict for the plaintiff than patent infringement cases filed by other types of plaintiffs.<sup>274</sup> Moreover, there is a wide disparity in the average damages awarded to NPEs compared to other plaintiffs who file patent infringement claims, potentially reflecting the reduced merit of these claims.<sup>275</sup>

Many members of Congress agree. Representative Robert Goodlatte, a chief proponent of patent reform, recently stated that the patent system has become a “playground for litigation extortion and frivolous claims.”<sup>276</sup> Senator Chuck Grassley, Chairman of the Senate Judiciary Committee, stated that patent reform has become a “little oasis” of bipartisanship as a result of NPEs that “prey on innocent businesses.”<sup>277</sup> And President Obama has echoed these concerns, stating in his 2014 State of the Union address that the United States needs new patent reform legislation to “allow[] our businesses to stay focused on innovation, not costly, needless litigation.”<sup>278</sup>

The consensus among many lawmakers is that numerous cases filed by

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270. See CHRIS BARRY ET AL., PRICEWATERHOUSECOOPERS LLP, 2014 PATENT LITIGATION STUDY 5 (2014), <http://www.pwc.com/us/en/forensic-services/publications/assets/2014-patent-litigation-study.pdf>.

271. See, e.g., Press Release, 50 Organizations Send Letter to Congressional Leadership Urging Solutions to Patent Abuse (July 17, 2013), <http://www.patentfairness.org/media/press/50-organizations-send-letter-to-congressional-leadership-urging-solutions-to-patent-abuse>.

272. See RPX CORP., 2015 NPE ACTIVITY: HIGHLIGHTS 4 (2016), <http://www.rpxcorp.com/wp-content/uploads/sites/2/2016/01/RPX-2015-NPE-Activity-Highlights-FinalZ.pdf>.

273. See *infra* notes 276–78; BARRY ET AL., *supra* note 270, at 11 (presenting data that NPEs prevail in litigation significantly less than practicing entities, a trend that has increased over the past several years)..

274. See BARRY ET AL., *supra* note 270, at 11.

275. See *id.* at 19. This difference in damages may also reflect that NPEs: (1) bring different types of claims than other plaintiffs; and (2) cannot collect lost profits and thus have to fall back on less lucrative forms of calculating damages. See, e.g., Mark A. Lemley, *Distinguishing Lost Profits from Reasonable Royalties*, 51 WM. & MARY L. REV. 655, 656–57 (2009).

276. 159 CONG. REC. H7511 (daily ed. Dec. 5, 2013) (Statement of Rep. Goodlatte).

277. Mario Trujillo, *Grassley: Congress Should Act ‘Decisively’ on Patent Reform*, THE HILL (Mar. 18, 2015, 10:18 AM), <http://thehill.com/policy/technology/236074-grassley-congress-should-act-decisively-on-patent-reform>.

278. President Barack H. Obama, Address Before a Joint Session of the Congress on the State of the Union (Jan. 28, 2014).



NPEs fall into the cost asymmetric model.<sup>279</sup> One House Report, for example, explained that “the high cost of mounting a defense to a complaint of patent infringement can force a defendant to settle the case and pay the plaintiff—even when the defendant has good reason to believe that it would have prevailed at trial,” giving NPEs an “economic advantage over the targeted defendants.”<sup>280</sup> Other legislators criticized the “extortion racket” and “nationwide protection racket” in these suits.<sup>281</sup> Academics have similarly attributed the problem to a cost imbalance between the parties, explaining to Congress that NPEs “can sue, threaten to impose large discovery costs that overwhelmingly fall on the accused infringer, and . . . extract settlements from their targets that primarily reflect a desire to avoid the cost of fighting.”<sup>282</sup>

Lawmakers heard these complaints loud and clear. Since the beginning of 2014, members of Congress have introduced more than a dozen bills to reform patent litigation.<sup>283</sup> Although many of these bills propose substantive changes to the law,<sup>284</sup> many also propose procedural reforms, including heightened pleading requirements,<sup>285</sup> fee shifting,<sup>286</sup> restrictions on discovery,<sup>287</sup> expanded joinder rules,<sup>288</sup> and mandatory Rule 11 inquiries.<sup>289</sup> In short, procedure is proving to be a key weapon in Congress’s fight against abusive patent litigation.

At first glance, Congress appears to be on the right track. As detailed above in Subpart III.B, cost asymmetric lawsuits are best addressed by reforms that rebalance litigation costs between the parties.<sup>290</sup> Many of the reforms currently on the table do just that. Heightened pleading requires plaintiffs to

279. These cases may also be motivated by a lack of information about the validity of the patents. *See, e.g.*, La Belle, *supra* note 194, at 405 (“A common observation about patent litigation is that it is unpredictable.”). Construing patents is notoriously difficult, and two different judges may well interpret a patent in very different ways. Accordingly, even a low quality patent may be upheld as covering the defendant’s products.

280. H.R. REP. NO. 113-279, at 21 (2013).

281. 159 CONG. REC. H7519 (daily ed. Dec. 5, 2013) (Statement of Rep. DeFazio).

282. 159 CONG. REC. H7519 (daily ed. Dec. 5, 2013) (Letter to Members of the United States Congress from Professors in Support of Patent Reform Legislation).

283. *See Patent Progress’s Guide to Patent Reform Legislation, supra* note 18.

284. *See, e.g.*, Support Technology and Research for Our Nation’s Growth Patents Act of 2015, S. 632, 114th Cong. § 102 (amending the burden of proof to challenge the validity of a patent); Targeting Rogue and Opaque Letters Act of 2015, H.R. 2045, 114th Cong. § 2 (making it unlawful to send patent demand letters in bad faith).

285. *See, e.g.*, Innovation Act, H.R. 3309, 113th Cong. § 3 (2013); Patent Litigation and Innovation Act of 2013, H.R. 2639, 113th Cong. § 2; Protecting American Talent and Entrepreneurship (PATENT) Act of 2015, S. 1137, 114th Cong. § 3; Patent Abuse Reduction Act, S. 1013, 113th Cong. § 2 (2013).

286. *See, e.g.*, Innovation Act, H.R. 9, 114th Cong. § 3 (2015); S. 1137, § 7; S. 1013, § 5.

287. *See, e.g.*, H.R. 3309, § 3; H.R. 2639, § 5; S. 1137, § 5; S. 1013, § 4.

288. *See, e.g.*, H.R. 3309, § 3; H.R. 2639, § 3; S. 1013, § 3.

289. *See, e.g.*, H.R. 2639, § 6.

290. *See supra* Part III.B.

put in time investigating their claims and drafting more detailed complaints.<sup>291</sup> Fee-shifting rules give plaintiffs more skin in the game in cases where most of the costs would otherwise rest on their opponents.<sup>292</sup> Discovery stays prevent plaintiffs from serving expensive discovery requests before they have established the legal sufficiency of their claims.<sup>293</sup> And mandatory Rule 11 inquiries, although likely less effective than other possible reforms,<sup>294</sup> increase the likelihood of sanctions on plaintiffs who file meritless cases.

Moreover, at least some of these bills have taken pains to avoid creating an information asymmetry. Several bills, for example, allow plaintiffs to avoid the heightened pleading requirements if the information necessary to comply with these requirements is not reasonably accessible to them.<sup>295</sup> In these circumstances, plaintiffs can instead allege the information more generally and include a statement in the complaint as to why the more specific information is not accessible. This provision may keep patent reform from falling prey to some of the problems that have plagued securities class actions.

Despite these advantages, however, the current bills in Congress may go too far. The Innovation Act, which has garnered significant support in the House of Representatives, includes a multitude of different procedural reforms, including heightened pleading, cost-sharing in discovery, loser-pays rules, and stays on discovery.<sup>296</sup> The PATENT Act, which has broad support in the Senate, includes similar provisions.<sup>297</sup> In other words, rather than targeting meritless cases through one or two procedural reforms, the most popular proposals unleash a broad arsenal of procedural tools.<sup>298</sup> It is fair to ask whether it might make more sense to see if more limited reforms would work before enacting such a sweeping set of reforms.

Moreover, these changes come at the same time that the judicial branch is strengthening its existing procedural tools in two important ways. First, the Supreme Court recently re-interpreted a federal statute, 35 U.S.C. § 285, which (as discussed in Subpart III.B) allows district courts to award attorneys' fees to the prevailing party in "exceptional" patent infringement cases. Although the Federal Circuit had previously held that courts could only use

291. *See supra* Part III.B.1.i.

292. *See supra* Part III.B.1.ii.

293. *See supra* Part III.B.1.iv.

294. *See supra* notes 216–217.

295. *See, e.g.*, Innovation Act, H.R. 3309, 114th Cong. § 3 (2015); Protecting American Talent and Entrepreneurship (PATENT) Act of 2015, S. 1137, 114th Cong. § 3.

296. *See* H.R. 3309, § 3.

297. *See, e.g.*, S. 1137, §§ 3, 5, 7.

298. In general, the use of multiple heightened procedures should have a greater impact than the use of a single procedure on its own. In some instances, the procedures will complement one another, as with the heightened pleading requirements and stay of discovery under the PSLRA. In other instances, the procedures will act as two, independent hurdles that plaintiffs must overcome, such as heightened pleading combined with fee shifting. Given the possibility of an additive effect, lawmakers should be cautious about piling on too many heightened procedural tools.

this statute to award fees under fairly limited circumstances,<sup>299</sup> more recently, the Supreme Court interpreted the statute more broadly, giving district courts greater flexibility in combating meritless patent claims.<sup>300</sup> This new interpretation has been in place for less than two years, so its effectiveness remains to be seen.

Second, at the same time that it is strengthening sanctions law, the judiciary is also making it more difficult to survive a motion to dismiss in patent suits. In *Twombly* and *Iqbal*, the Supreme Court purported to raise pleading standards across the board in all federal civil cases.<sup>301</sup> A small category of these cases, however, remained largely untouched because they were covered by the official forms attached to the Federal Rules of Civil Procedure.<sup>302</sup> Form 18, for instance, allowed plaintiffs in patent infringement cases to survive a motion to dismiss as long as they included a few barebones allegations.<sup>303</sup> As a result, the pleading requirements in patent infringement cases have been less stringent than in most other federal cases.<sup>304</sup> Just recently, however, the Supreme Court abolished the official forms, including Form 18.<sup>305</sup> Accordingly, plaintiffs in patent infringement cases now face the same pleading requirements as plaintiffs in other federal cases.<sup>306</sup>

These steps should prompt Congress to tread lightly. Heightened procedure is unnecessary when the transsubstantive rules are capable of addressing the problems. In patent law, the transsubstantive pleading rules, as newly interpreted in *Twombly* and *Iqbal*, have had little chance to impact filing patterns. And the increased sanctions in section 285 have recently been given new life. Congress should give these rules an opportunity to address the problems in patent litigation before imposing additional procedural hurdles. If these rules prove insufficient, Congress should then consider further procedures, such as heightened pleading or cost shifting, that are targeted to the cost asymmetries in this area.

In sum, the three case studies in this Part highlight the promise and the peril

299. *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005).

300. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).

301. *See Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-57 (2007).

302. *See In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1334 (Fed. Cir. 2012) (holding that whether a plaintiff's complaint "adequately plead[s] direct infringement is to be measured by the specificity required by Form 18").

303. *See* FED. R. CIV. P. Form 18 (abrogated Dec. 1, 2015).

304. *See, e.g.*, Yoonhee Kim, Note, *Reconciling Twombly and Patent Pleadings Beyond the Text of Form 18*, 13 CHL-KENT J. INTEL. PROP. 511, 523-25 (2014) (explaining the impact of *Bill of Lading*).

305. *See* FED. R. CIV. P. 84 (abrogated Dec. 1, 2015).

306. These judicial actions, both with respect to section 285 and Form 18, may well have been influenced by calls for reform in the legislative arena. As scholars have demonstrated, the judicial and legislative branches often engage in a dialogue in which the judiciary responds to legislative calls for reform by changing their interpretation of existing law. *See generally* J. Jonas Anderson, *Patent Dialogue*, 92 N.C. L. REV. 1049 (2014) (discussing how the U.S. Court of Appeals for the Federal Circuit shapes patent law).

of heightened procedure. In each of these areas, the causes of meritless claims are different—medical malpractice involves information asymmetries, patent litigation includes cost asymmetries, and securities class actions involve a combination of the two. Yet these examples all reveal a common lesson. When lawmakers open the heightened procedural toolbox, they must take pains to choose tools that match the specific challenges at issue. This lesson may well have future repercussions. Congress has not yet decided what steps to take in patent litigation, but its actions in this area may provide a springboard to legislative action in other areas of the law, including products liability and mass torts. In each area, lawmakers have the power to use heightened procedure to sort the good cases from the bad, but only if they heed the lessons of their past reforms.

#### V. CONCLUSION

Just as not all meritless litigation is created equal, nor are all heightened procedural tools. Some tools address information asymmetries, others address cost asymmetries, and still others address a combination of the two. Heightened procedure allows lawmakers to take account of these differences, tailoring procedural rules to the problems in specific areas of the law. At the same time, however, heightened procedure places a special burden on lawmakers to understand the specific problems in these areas and target their procedural solutions accordingly. Only through this careful targeting can heightened procedure fix the problems that uniform rules leave unsolved. In the end, meritless litigation is not uniform, and the procedures to address it should not be either.