

# Jurisdictional Discovery in United States Federal Courts

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## *Table of Contents*

I. Introduction .....	490
II. Disclosure and Discovery Regarding Jurisdictional Facts .....	497
A. Establishing Jurisdictional Facts in the United States .....	497
1. A Brief History of Jurisdictional Discovery in the United States .....	497
2. Discovery Under the Federal Rules of Civil Procedure .....	501
3. U.S. Federal Courts' Inherent Power to Determine Jurisdiction .....	503
4. Practical Options Regarding Jurisdictional Discovery .....	507
B. Establishing Jurisdictional Facts in England .....	509
1. Similarities Between English and U.S. Policies and Procedures .....	509
2. Standards Regarding English Jurisdiction .....	512
3. Objecting to English Jurisdiction .....	520
III. Standards and Scope Regarding Jurisdictional Discovery .....	523
A. Standards Regarding Whether to Grant Jurisdictional Discovery .....	524

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1.	The Various Standards at Issue.....	524
2.	Procedures and Presumptions .....	528
3.	The Effect of a Standard Based Largely on Judicial Discretion.....	530
B.	The Scope of Jurisdictional Discovery .....	532
1.	Jurisdictional Discovery in Theory .....	532
2.	Jurisdictional Discovery in Practice.....	535
a.	Personal Jurisdiction .....	537
(1)	Legislative Authority.....	537
(2)	Constitutional Authority.....	545
b.	In Rem and Quasi-in-Rem Jurisdiction .....	553
c.	Subject Matter Jurisdiction.....	555
IV.	Practical Problems and Proposals.....	558
A.	Problems.....	558
1.	Excessive Judicial Discretion .....	558
2.	Multi-Factor, Fact-Intensive Inquiries .....	562
B.	Proposals .....	564
1.	Judicial Solutions.....	564
a.	Extension of Recent Supreme Court Precedent to Cases Involving Jurisdictional Discovery.....	565
b.	A Hierarchy of Facts .....	576
2.	Legislative Solutions.....	578
a.	Legislative Adoption of the Plausibility Standard .....	579
b.	Adoption of a Form of Service Out.....	580
c.	Viability of Legislative Solutions.....	581
V.	Conclusion .....	583

### I. Introduction

For decades, discovery practices have been a cause of concern for courts, commentators, legislators, and practitioners.<sup>1</sup> However, virtually all of the

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1. See, e.g., THOMAS E. WILLGING ET AL., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 3 (1997), available at [http://www.fjc.gov/public/pdf.nsf/lookup/discovery.pdf/\\$file/discovery.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/discovery.pdf/$file/discovery.pdf) ("Bench and bar have debated for the last thirty years how discovery in civil litigation operates and how it should operate and whether the Federal Rules of Civil Procedure regulate it too much or not enough."); Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND.

discussions have focused on discovery of the merits, with scant attention being paid to the special problems relating to jurisdictional discovery.<sup>2</sup> Jurisdictional discovery—defined herein as any preliminary discovery to establish whether a United States federal court has jurisdiction over the person, the *res*, or the subject matter of the dispute<sup>3</sup>—takes place prior to discovery on the merits,

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RES. J. 787 *passim* [hereinafter Brazil, *Civil Discovery*] (including extensive empirical data); *see id.* at 832 n.73 (citing earlier commentary concerning civil discovery); Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217 *passim* [hereinafter Brazil, *Front Lines*] (highlighting concerns about the effectiveness and efficiency of pretrial discovery in civil litigation); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 *passim* (1978) [hereinafter Brazil, *Adversary Character*] (acknowledging elaborate struggles relating to discovery); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636 (1989) (stating that a significant portion of the legal field believes that there are major problems with the discovery system); John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 *passim* (1989) (presenting a game theory analysis of discovery abuse).

2. The issue of jurisdictional discovery has been neglected at all levels. For example, a major study by the Federal Judicial Center—the federal courts' research and education agency—on discovery and disclosure failed to even mention the unique issues relating to jurisdictional discovery. *See generally* WILLGING ET AL., *supra* note 1 (failing to explore issues relating to jurisdictional discovery). Papers published from a conference convened by the Civil Rules Advisory Committee prior to the 2000 amendments on discovery practices also failed to raise this particular issue. *See generally* FED. R. CIV. P. 26, cmt. 2000 amend. (citing papers published in 39 B.C. LAW REVIEW 517–840 (1998)). The Manual for Complex Litigation (Fourth) only mentions jurisdictional discovery sparingly, granting it one sentence in passing. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 32.41 (2009) ("In some cases, discovery may be necessary on factual issues underpinning a motion to dismiss for lack of subject-matter jurisdiction."). Furthermore, the scholarly literature on jurisdictional discovery is extremely narrow in focus or out of date. *See, e.g.*, Jesse Anderson, *Toys "R" Us, the Third Circuit, and a Standard for Jurisdictional Discovery Involving Internet Activities*, 9 B.U. J. SCI. & TECH. L. 471 *passim* (2003) (focusing on internet issues); Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973 *passim* (2006) (focusing on the standards of proof that must be met to establish jurisdiction); Steven R. Swanson, *Jurisdictional Discovery Under the Foreign Sovereign Immunities Act*, 13 EMORY INT'L L. REV. 445 *passim* (1999) (relating to foreign sovereign immunities issues); J.E.C., Note, *Use of Discovery to Obtain Jurisdictional Facts*, 59 VA. L. REV. 533 *passim* (1973) (writing prior to numerous important U.S. Supreme Court cases). No known empirical studies of jurisdictional discovery exist, and most empirically oriented research into merits-based discovery does not focus on questions relevant to jurisdictional discovery. *See generally* WILLGING ET AL., *supra* note 1 (failing to address jurisdictional discovery); James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998) (same).

3. For reasons of space, this Article focuses exclusively on matters involving jurisdiction over the person, the *res*, or the subject matter of the dispute, although some of the observations made herein may be equally applicable to other preliminary procedural questions (such as those relating to venue and forum non conveniens) that involve questions of fact. These additional matters are discussed separately in a forthcoming companion article. *See generally* S.I. Strong, *Jurisdictional Discovery in Transnational Litigation* (forthcoming 2011).

typically in response to the plaintiff's request for information following the defendant's motion to dismiss for lack of jurisdiction under Rule 12(b)(1) or 12(b)(2).<sup>4</sup> Because jurisdictional discovery takes place prior to a determination that the court actually has jurisdiction over this dispute and this defendant, it is particularly important to avoid imposing undue burdens on a party who may not even be subject to the court's power.

There are several reasons why issues relating to jurisdictional discovery have been ignored. First, jurisdictional discovery is one of those areas of law that remains largely hidden from view,<sup>5</sup> since it is extremely discretionary<sup>6</sup> and unlikely to be the subject of published trial court opinions.<sup>7</sup> Appellate decisions are even less common, given the high degree of deference shown to trial judges in these matters.<sup>8</sup> Indeed, no case concerning the scope or standards relating to jurisdictional discovery has yet reached the U.S. Supreme Court, though certiorari in this area was sought in 2004 and 2008.<sup>9</sup> The only

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4. FED. R. CIV. P. 12(b); FED. R. CIV. P. 26(a). Unlike merits-based discovery—which proceeds without judicial intervention pursuant to the general timetable laid out in Rule 26—jurisdictional discovery typically requires some sort of court order under Rule 26(d)(1), since the plaintiff is seeking discovery prior to the discovery conference described under Rule 26(f). FED. R. CIV. P. 26; *see also infra* notes 85–86 and accompanying text (regarding the mechanics of seeking jurisdictional discovery). There are exceptions, of course, depending on the procedural posture of the case. *See, e.g.,* Shawnee Terminal R.R. Co. v. J.E. Estes Wood Co., No. 01:09–CV–00113–KD–N, 2009 WL 3064973, at \*10 (S.D. Ala. Sept. 18, 2009) (concerning defendant's request for jurisdictional discovery on grounds that plaintiff had provided "selective" evidence vis-à-vis its place of corporate citizenship).

5. Discovery requests are not routinely filed with the court, making research regarding the content of jurisdictional discovery difficult. *See* FED. R. CIV. P. 5(d)(1) (outlining discovery procedures under the Federal Rules of Civil Procedure).

6. *See infra* notes 157–221 and accompanying text (stressing problems with jurisdictional discovery arising from the high level of discretion afforded to judges on this issue).

7. Disputes about jurisdictional discovery often constitute interim proceedings that are not subject to immediate appeal. *See infra* note 87 and accompanying text (asserting that a defendant may raise the lack of jurisdiction issue later in the proceedings if the defendant's timely jurisdictional objection has been rejected). Alternatively, a dispute may not even make it to the hearing stage. For instance, a judge may strong-arm parties into an agreed discovery plan, and the parties may not choose, for tactical reasons, to oppose the judge so visibly early in the proceeding. *See* FED. R. CIV. P. 26(f)(2)–(3) (requiring pre-trial discovery conference).

8. *See, e.g.,* Patterson v. Dietze, Inc., 764 F.2d 1145, 1148 (5th Cir. 1985) (stating "jurisdictional discovery is within the trial court's discretion and will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse" (quoting Wyatt v. Kaplan, 686 F.2d 276, 283 (5th Cir. 1982))); *see also infra* notes 197–203 and accompanying text (describing why a high level of deference has traditionally been given to trial judges in jurisdictional discovery matters). Furthermore, parties who object to jurisdiction but win on the merits are unlikely to appeal the jurisdictional issue.

9. The 2004 petition for certiorari sought to resolve a circuit split regarding whether and in what circumstances district courts should grant jurisdictional discovery. *See* Petition for a

Supreme Court case to raise even a related issue was heard in 1978.<sup>10</sup> However, recent precedents suggest that the Supreme Court is well aware of the burdensomeness of jurisdictional discovery, making the issue ripe for reconsideration.<sup>11</sup>

Second, jurisdictional discovery is an inherently difficult and complex issue to analyze. Proper consideration of jurisdictional discovery requires an understanding of several different areas of civil procedure, including the law regarding jurisdiction, the law regarding discovery practices, and the law regarding pleading standards.<sup>12</sup>

Third, those who are best qualified to analyze jurisdictional discovery (i.e., lawyers trained in the United States) are also the ones who are least likely to see it as problematic, due to their having become accustomed or "acculturated" to the practice.<sup>13</sup> Parties, too, can become desensitized to certain procedural

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Writ of Certiorari, *Dever v. Hentzen Coatings, Inc.*, 543 U.S. 1147 (2005) (No. 04-730) (requesting the Court to grant a review of the decision of the Eighth Circuit to determine whether and under what circumstances district courts should grant discovery relevant to personal jurisdiction prior to deciding a motion to dismiss for lack of personal jurisdiction). The 2008 petition sought guidance on the availability of jurisdictional discovery regarding the amount in dispute. Petition for a Writ of Certiorari, *Lowery v. Ala. Power Co.*, 483 F.3d 1994 (11th Cir. 2007), *cert. denied sub nom.*, *Hanna Steel Corp. v. Lowery*, 128 S. Ct. 2877 (2008).

10. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354–55 (1978) (discussing the availability of non-merits-based discovery); *infra* notes 30–50 (examining past litigation concerning jurisdictional discovery issues in the United States).

11. These cases enable district courts to use any means necessary to dismiss a case to avoid or minimize jurisdictional discovery. See, e.g., *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 435 (2007) ("Discovery concerning personal jurisdiction would have burdened Sinochem with expense and delay."); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) (noting no "unyielding jurisdictional hierarchy" regarding the order in which motions to dismiss must be decided). Furthermore, recent cases regarding pleadings standards implicitly affect jurisdictional discovery, as discussed further below. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) ("We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process."); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (discussing the pleading standard outlined by Rule 8); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (discussing the pleading standards embodied in the Federal Rules of Civil Procedure); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569–70 (2007) (solidifying requisite pleading standards); see also *infra* notes 344–97 and accompanying text (examining recent court decisions concerning pleading standards and relating them to issues involving jurisdictional discovery).

12. See *Hensen v. Neumueller*, 163 F.R.D. 471, 473 (D. Del. 1995) (noting jurisdictional discovery implicates interaction between Rule 8, regarding a well-pleaded complaint, and Rule 26, regarding discovery).

13. See *Brazil, Civil Discovery*, *supra* note 1, at 792, 797 (noting overexposure to problematic practices dulls perception of impropriety); Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 475 (2006) (noting lawyers "tend to overlook their own countries' excesses"). Judges also overlook problematic tactics because they, too, were

issues, which can affect their motivation to object to a practice or pursue an appeal.<sup>14</sup> Interestingly, jurisdictional discovery is one of those areas of law where the United States is distinctly out of step with global practice.<sup>15</sup> Indeed, the author is unaware of any other legal system that undertakes this type of labor-intensive, adverse proceeding before the jurisdiction of the court is even established.<sup>16</sup> While there is no requirement that U.S. domestic practices conform with any international customary standards,<sup>17</sup> the extraordinary nature of jurisdictional discovery suggests that further investigation into whether jurisdictional discovery is the best or only way to establish the jurisdiction of U.S. federal courts would be useful.

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litigators once. *See* Brazil, *Adversary Character*, *supra* note 1, at 1343 ("It is hardly surprising . . . that judges who respect these rules, who were acculturated professionally under the adversary system, and who understand the pressures it generates, tend to err on the side of lenience when asked to sanction counsel who have fought perhaps too vigorously to protect their clients.").

14. Domestic defendants are more likely to see jurisdictional discovery in a very different light than foreign defendants. Domestic defendants are not only conditioned to accept the legitimacy of the U.S. approach to discovery, they are also likely to view jurisdictional discovery as narrower in scope than full-fledged discovery and consider the likelihood that at some point they may benefit from the practice if they ever become plaintiffs in a lawsuit. Foreign defendants—who do not anticipate becoming plaintiffs in U.S. court—enjoy little or no hope of reciprocity, nor do they consider jurisdictional discovery as either narrow or the best (or only) method of proceeding when jurisdiction is disputed. *See infra* note 15 and accompanying text (discussing differences in perception between domestic defendants and foreign defendants concerning the legitimacy of the U.S. approach to discovery). However, all defendants, regardless of their location, suffer from the inability to anticipate whether and to what extent jurisdictional discovery will be ordered, as well as the often significant costs associated with complying with such orders. *See infra* note 380 and accompanying text (discussing the allocation of jurisdictional discovery costs).

15. *See, e.g.*, DAVID EPSTEIN ET AL., INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY §§ 1.01, 3.02 (2008) (stressing the uniqueness of the U.S. legal system compared to those of other countries); Jan W. Bolt & Joseph K. Wheatley, *Private Rules for International Discovery in U.S. District Court: The U.S.-German Example*, 11 UCLA J. INT'L L. & FOREIGN AFF. 1, 5 (2006) (emphasizing the heavy burdens experienced by foreigners involved in international litigation in U.S. courts); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 306 (2008) (acknowledging that personal jurisdiction and pretrial discovery in the United States are substantially different than practices in other legal systems). The special issues facing foreign defendants are addressed separately by the author. *See generally* Strong, *supra* note 3.

16. Several other common law nations use a procedure called "service out" instead of jurisdictional discovery. *See infra* notes 103–56 and accompanying text (examining jurisdictional practices in the English legal system).

17. However, there are several good reasons to consider international procedural norms when non-domestic defendants are involved that will be discussed in a forthcoming Article. *See generally* Strong, *supra* note 3.

There are two major areas of concern regarding jurisdictional discovery. First, the standards of jurisdictional discovery are not well defined.<sup>18</sup> As this Article demonstrates, no reliable and easily identifiable legal standard regarding the availability of jurisdictional discovery appears to exist<sup>19</sup> despite recent amendments to the Federal Rules of Civil Procedure that were meant to establish a nationally uniform practice regarding disclosure and discovery.<sup>20</sup> The situation is further exacerbated because "[t]he exact procedure for resolving jurisdiction issues is subject to considerable variation. There is no statute prescribing the procedure for resolving the issue in the federal courts, and so the mode of its determination is left to the trial court."<sup>21</sup>

Second, courts, parties, and practitioners are given scant guidance regarding what the scope of jurisdictional discovery should be once it is ordered.<sup>22</sup> The problems are the result of the need to tie jurisdictional discovery to one of the most complex and convoluted areas of law imaginable: the law of federal jurisdiction.<sup>23</sup>

This Article addresses both of these concerns by describing the current state of affairs regarding jurisdictional discovery in U.S. federal courts<sup>24</sup> and evaluating the extent to which the approach now used adequately meets the

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18. See *supra* notes 5–6 and accompanying text (discussing the amorphous standards of the jurisdictional discovery process).

19. See *infra* notes 157–206 and accompanying text (discussing the lack of useful standards regarding jurisdictional discovery).

20. FED. R. CIV. P. 26, cmt. 2000 amend. Significant amendments to the federal rules concerning discovery and disclosure were made in 2000 to help assuage the difficulty many lawyers experienced "in coping with divergent disclosure and other practices" and the desire among lawyers to adopt a uniform national rule on disclosure. *Id.*; see also Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13 *passim* (2001) (commenting on the 2000 amendments and their effects on the scope of discovery in federal civil cases). Additional amendments to the disclosure and discovery provisions of the Federal Rules of Civil Procedure were made in 2005, 2006, and 2007. See generally FED. R. CIV. P. 26–37, 45, and the comments following the rules.

21. ROBERT C. CASAD & WILLIAM B. RICHMAN, *JURISDICTION IN CIVIL ACTIONS* 9 (1998) (citations omitted).

22. See *infra* notes 209–22 and accompanying text (describing problems associated with attempts to tailor jurisdictional discovery narrowly).

23. See *infra* notes 222–309 and accompanying text (asserting that courts have tied the scope of discovery to the relevant jurisdiction inquiry, which leads to discovery abuse and problematic exercises of discretion).

24. Although many of the observations and analyses made herein may also apply to jurisdictional discovery in state courts, that discussion is beyond the scope of the current Article. One area of future inquiry might involve the extent to which a change in the federal courts' approach to jurisdictional discovery would require a similar shift in state court practice.

needs of parties, courts, and society at large. As it turns out, jurisdictional discovery is no longer a useful or defensible mechanism for establishing federal jurisdiction.<sup>25</sup> Furthermore, several alternatives are available, all of which are superior to the method now used by district courts.<sup>26</sup> This Article, therefore, suggests the elimination of jurisdictional discovery in U.S. federal courts and provides suggestions on other means of ensuring that federal courts assert their power only over proper parties and disputes.

The structure of the Article is as follows. First, Part II outlines the historical development of jurisdictional discovery in U.S. federal courts and identifies the jurisprudential grounds on which the device is based. The discussion also includes an analysis of how another common law nation—England—deals with the problem of establishing jurisdiction over a distant defendant, thus putting United States practices into context.

Next, the Article discusses the current standards regarding whether and to what extent jurisdictional discovery should be ordered by a court. Part III demonstrates the various uncertainties and ambiguities in existing law and indicates how a procedure that sounds good in theory has become unmanageable in practice. This discussion also analyzes actual discovery requests that have been filed in federal court to understand how the law regarding federal jurisdiction necessitates immensely broad discovery requests that cannot be limited in any reasonable way.

Part IV describes how the structural problems identified in Parts II and III have created a procedural device permeated with excessive judicial discretion and multi-factor, fact-intensive inquiries. The discussion lays out why and how those characteristics are problematic under the rule of law and provides four different proposals—two judicial, two legislative—to resolve current difficulties involving jurisdictional discovery.

Part V concludes the Article, drawing together the diverse strands of law and policy and demonstrating why now is an optimal time to address the often-ignored problems of jurisdictional discovery. Part V also indicates which of the various reform proposals are best and why.

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25. See generally EPSTEIN, *supra* note 15.

26. See *infra* notes 345–438 and accompanying text (describing alternatives to current approach to jurisdictional discovery).



## II. Disclosure and Discovery Regarding Jurisdictional Facts

Every court in the United States must have jurisdiction over the person and the subject matter of the dispute before it can adjudicate on the merits.<sup>27</sup> Federal courts have adopted the view that jurisdictional discovery is the most appropriate means of establishing the necessary jurisdictional facts.<sup>28</sup> Before discussing the problems inherent in that approach and the possible solutions to those problems, it is important to understand how jurisdictional discovery developed and the jurisprudential bases for the device.

### A. Establishing Jurisdictional Facts in the United States

Jurisdictional discovery is not explicitly discussed in the Federal Rules of Civil Procedure. Instead, the practice of taking limited discovery to establish whether jurisdiction is proper has been judicially created through reliance on (1) the broad principles of discovery established in the Federal Rules of Civil Procedure in 1938 and expanded upon in subsequent years and (2) courts' inherent power to establish their own jurisdiction.<sup>29</sup>

#### 1. A Brief History of Jurisdictional Discovery in the United States

Jurisdictional discovery does not appear to have existed in the federal system prior to 1938.<sup>30</sup> Indeed, the first reported decision to use the phrase

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27. See *supra* notes 2–4 and accompanying text (stating that a determination of jurisdictional discovery takes place prior to discovery on the merits).

28. See CASAD & RICHMAN, *supra* note 21, at 16–17 (stating "the use of discovery to obtain evidence to prove the existence of jurisdiction appears inherently contradictory").

29. See *Gen. Indus. Co. v. Birmingham Sound Reproducers, Ltd.*, 26 F.R.D. 559, 561 (E.D.N.Y. 1961) (announcing that the court has jurisdiction to determine its own jurisdiction).

30. A limited principle of jurisdictional discovery may arguably have existed prior to 1938, though not under that name and only in certain rare types of cases. See, e.g., *Hovland v. Farmers' State Bank of Christine, N.D.*, 10 F.2d 478, 480 (8th Cir. 1926) (discussing deposition testimony regarding defendant's residence and domicile in bankruptcy matter); *McCarthy Sheep Co. v. S. Silberman & Sons*, 290 F. 512, 512–13 (D. Wyo. 1923) (discussing personal jurisdiction in a contract claim established pursuant to pleadings, responses to interrogatories attached to the pleadings, and affidavits); *In re Perry Aldrich Co.*, 165 F. 249, 250 (D. Mass. 1908) (discussing referee's reports on facts, including jurisdictional facts, in bankruptcy matter). But see J.E.C., *supra* note 2, at 535–59 (discussing cases that cast doubt on legitimacy of jurisdictional discovery prior to 1938); *id.* at 542 (noting early versions of the rules "offered the defendants greater protection from the expense and worry of submitting to jurisdictional discovery"); Swanson, *supra* note 2, at 458–59 (discussing early caselaw on jurisdictional discovery).

"jurisdictional discovery" did not appear until 1961, when the district court for the Eastern District of New York handed down *General Indus. Co. v. Birmingham Sound Reproducers, Ltd.*,<sup>31</sup> although some federal courts appear to have contemplated use of the device beginning in the 1950s.<sup>32</sup>

*General Industries Co.* involved two defendants who were allegedly subject to the jurisdiction of the court either by virtue of "doing business" in the forum or as the alter egos of defendants who were indisputably subject to the court's control.<sup>33</sup> In deciding the matter, the court held that it had jurisdiction to determine its own jurisdiction and the fact that the defendants had not yet properly been determined to be "parties" did not allow them to avoid discovery procedures that were analogous to procedures concerning discovery on the merits.<sup>34</sup>

The device gained further credence in 1973, when the U.S. Supreme Court stated in *Oppenheimer Fund, Inc. v. Sanders*<sup>35</sup> that "where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."<sup>36</sup> Citing the seminal case of *Hickman v. Taylor*<sup>37</sup> for the proposition that relevance in discovery is and should be construed broadly, the Court held that:

Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the

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31. See *Gen. Indus. Co. v. Birmingham Sound Reproducers, Ltd.*, 26 F.R.D. 559, 561 (E.D.N.Y. 1961) (requiring the plaintiff to complete jurisdictional discovery before proceeding).

32. See, e.g., *Monteiro v. San Nicholas, S.A.*, 254 F.2d 514, 515 (2d Cir. 1958) (involving request for deposition of a New York entity regarding its actions as possible agent for a Panamanian corporation and tramp ship flying the Liberian flag that claimed they were not jurisdictionally present in New York); J.E.C., *supra* note 2, at 545 & n.61 (identifying cases dating from 1953).

33. See *Gen. Indus. Co.*, 26 F.R.D. at 559–60 (seeking production of documents and interrogatories).

34. See *id.* at 560–61 & n.1 (citations omitted) ("[I]f a court has jurisdiction to determine its jurisdiction it also has the necessary process to insure a determination based upon meaningful data.").

35. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 342 (1978) (holding that Rule 23(d) empowered the Court to direct petitioners to help compile a list of the names and address of the members of the plaintiff so that the individual notice required by Rule 23(c)(2) could be sent).

36. *Id.* at 351 n.13.

37. See *Hickman v. Taylor*, 329 U.S. 495, 513–14 (1947) (concluding that the Federal Rules of Civil Procedure protect the discovery of information obtained or produced by attorneys in preparation for litigation).

merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.<sup>38</sup>

Tellingly, perhaps, the Court cited no authority other than *Hickman* and two commentators—*Moore on Federal Practice* and a student note from 1973—in asserting that discovery concerning issues other than the merits per se was proper.<sup>39</sup>

Although *Oppenheimer* has become a leading authority regarding the propriety of jurisdictional discovery in a wide variety of contexts,<sup>40</sup> it is in some ways a rather dubious precedent for such a broad proposition. Rather than attempting to discover information that would establish the court's jurisdiction over the dispute, the plaintiffs in *Oppenheimer* were asking the court to order the defendant to help compile the list of class members in a class action suit so that the plaintiff could send individual notices.<sup>41</sup> The defendant was already subject to the jurisdiction of the court, and the only question was whether this sort of discovery—being non-merits-based—could properly be made the subject of an order by the district court.<sup>42</sup>

However, in deciding that the district court did in fact have the power to order non-merits-based discovery, the Supreme Court held that the issue was more properly addressed under Rule 23(d) regarding class notification rather than the discovery provisions of the Federal Rules.<sup>43</sup> Furthermore, the Court noted that the request for contact details regarding the purported class could not be forced into even the broad definition of "relevance" adopted in *Hickman*.<sup>44</sup> The Court also rejected an argument saying that this information was relevant because it could potentially become an issue, since the potential issue could not

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38. *Id.* at 500–01; see also Brazil, *Adversary Character*, *supra* note 1, at 1335 (noting that "modern rules of notice pleading and broad discovery were developed not only in chronological tandem, but also . . . in self-conscious functional interdependence").

39. *Oppenheimer*, 437 U.S. at 350.

40. See, e.g., *Kansas Hosp. Ass'n v. Whiteman*, 167 F.R.D. 144, 145 (D. Kan. 1996) ("While *Oppenheimer* addressed notice at the beginning stage of litigation, the Supreme Court's reasoning is applicable to the instance case."); *In re Victor Techs. Sec. Litig.*, 792 F.2d 862, 863–64 (9th Cir. 1986) (citing *Oppenheimer* and determining that it strongly supports a holding of jurisdiction); *Oscar Gruss & Son v. Geon Indus., Inc.*, 89 F.R.D. 32, 37 (S.D.N.Y. 1980) (examining *Oppenheimer* principles to determine whether the plaintiff or defendant should bear the burdens of identifying and notifying a class as well as the allocation of expenses).

41. *Oppenheimer*, 437 U.S. at 344.

42. *Id.* at 351.

43. *Id.* at 350.

44. See *id.* at 352 ("Respondents' attempt to obtain the class members' names and addresses cannot be forced into the concept of 'relevancy.'").

arise until the plaintiffs obtained the very information that they sought from the defendants.<sup>45</sup>

Thus *Oppenheimer*'s precedential value for run-of-the-mill jurisdictional discovery is questionable, though the case is widely cited as permitting jurisdictional discovery into a variety of factual matters.<sup>46</sup> Furthermore, the principles on which the Court in *Oppenheimer* relied—i.e., *Hickman* and the notice-pleading provisions of the Federal Rules—have both come under considerably scrutiny and limitation in recent years.<sup>47</sup> For example, the scope of what is considered "relevant" under the Federal Rules of Civil Procedure has been curtailed through amendments adopted in 2000.<sup>48</sup> Furthermore, the Supreme Court has recently produced a line of cases dealing with pleading standards that may have some bearing on jurisdictional issues as well.<sup>49</sup> These matters will be discussed in more detail below.<sup>50</sup>

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45. *Id.* at 354.

46. *See* cases cited *supra* note 40 (identifying courts that have used *Oppenheimer* to resolve jurisdictional discovery dilemmas).

47. *See infra* notes 345–81 and accompanying text (discussing the problems associated with the current practice of jurisdictional discovery).

48. In particular, the language of Rule 26 relied on in *Hickman* and quoted in *Oppenheimer* has been narrowed to include only matters regarding "any party's claim or defense," at least as an initial matter. *See* FED. R. CIV. P. 26(b)(1) (limiting initial discovery to those grounds); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) ("Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues."). The modification was made to allow courts to more actively "regulat[e] the breadth of sweeping or contentious discovery." FED. R. CIV. P. 26(b)(1) cmt. 2000 amend.

49. *See* FED. R. CIV. P. 8 (describing general rules of pleading); FED. R. CIV. P. 12(b)(1)–(5) (describing grounds for motions to dismiss); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940–41 (2009) (holding that detainee failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (finding that the pleading requirements under the Private Securities Litigation Reform Act of 1995 require an inference of scienter that is "cogent and at least as compelling as any opposing inference of nonfraudulent intent"); *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (holding that petitioner's pro se complaint, alleging that the termination of his medical treatment in prison endangered his life, was enough to satisfy the liberal pleading requirements of Federal Rule of Civil Procedure 8(a)(2)); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–56 (2007) (finding that a pleading relating to § 1 of the Sherman Act must allege plausible facts that "raise a reasonable expectation that discovery will reveal evidence of illegal agreement"). Other recent Supreme Court cases provide district courts with ways to avoid or minimize jurisdictional discovery. *See, e.g., Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 435 (2007) (permitting immediate dismissal based on forum non conveniens rather than requiring expensive jurisdictional discovery); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) (noting no "unyielding jurisdictional hierarchy" regarding the order in which motions to dismiss must be decided).

50. *See infra* notes 310–59 and accompanying text (describing the heightened pleading standards of *Iqbal* and *Twombly*).

*Oppenheimer* is not the only means of support for jurisdictional discovery, however. Two independent principles, taken in combination, also rationalize the use of this device. Each is discussed in turn.

## 2. *Discovery Under the Federal Rules of Civil Procedure*

Jurisdictional discovery is based, in part, on the right to discovery arising under the Federal Rules of Civil Procedure.<sup>51</sup> Rule 26(b)(1) states:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.<sup>52</sup>

This standard has been "liberally" construed, even in the context of jurisdictional discovery.<sup>53</sup>

Widespread concerns about discovery abuse led to a narrowing of the federal disclosure and discovery provisions in 2000,<sup>54</sup> although the scope of available discovery under the Federal Rules remains very broad.<sup>55</sup> However,

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51. See FED. R. CIV. P. 26(b)(1) (explaining the scope and limits on discovery under the Federal Rules).

52. FED. R. CIV. P. 26(b)(1). The scope of discovery permitted without a showing of good cause was narrowed in 2000. STEPHEN N. SUBRIN & MARGARET Y.K. WOO, *LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT* 148–50 (2006) ("Only in cases of 'good cause,' can the court order broader discovery into 'any matter, not privileged, which is relevant to the subject matter involved in the pending action.'"); Rowe, *supra* note 20, at 13 (discussing the narrowing of the definition of scope of discovery). The structure of subsection (b)(1) was changed in 2007. FED. R. CIV. P. 26(b)(1) cmt. 2007 amend.

53. Hansen v. Neumueller, 163 F.R.D. 471, 473 (D. Del. 1995) (permitting liberal discovery of any facts which are relevant, including jurisdictional facts); see also Theodore V.H. Mayer & Peter Sigler, *Personal Jurisdiction over Foreign Defendants in the United States and England*, in *TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION* 79, 110 (John Fellas ed., 2004) ("The scope of permissible discovery is limited by the requirement of relevance, although relevance is broadly defined in the context of discovery." (citing Wyatt v. Kaplan, 686 F.2d 276, 284 (5th Cir. 1982))); J.E.C., *supra* note 2, at 544 (describing the breadth of Rules 26 and 33).

54. SUBRIN & WOO, *supra* note 52, at 148–50 ("The next set of discovery amendments, in 2000, refined the attempts to limit wide open, liberal discovery."); Rowe, *supra* note 20, at 13 (noting the changes to the discovery provisions in the 2000 amendment to the Federal Rules of Civil Procedure).

55. For example, Rule 26 still allows discovery of information that is "reasonably

the primary limitation under the 2000 amendments—that discovery should focus on "the claim or defense of any party," with more extensive discovery on "any matter relevant to the subject matter involved in the action" only available for good cause<sup>56</sup>—does not affect jurisdictional discovery, which is, in any event, supposed to be narrowly focused on a discrete set of jurisdictional facts.<sup>57</sup>

Even the staunchest proponent of U.S.-style discovery will admit that the obligation to provide relevant information can be burdensome.<sup>58</sup> Thus, "discovery, like all matters of procedure, has ultimate and necessary boundaries."<sup>59</sup> How those boundaries are to be enforced is a matter of some dispute, however.

Some have claimed that the burden can be eased through proper case management techniques, although this view is by no means universally held.<sup>60</sup> Others note that defendants can seek protection from excessive discovery requests—including those regarding jurisdiction—pursuant to Rule 26(b)(2)(C) of the Federal Rules of Civil Procedure,<sup>61</sup> although some courts and

calculated to lead to the discovery of admissible evidence," even if the discovered information might itself not be admissible at trial. FED R. CIV. P. 26(b)(1).

56. See FED. R. CIV. P. 26(b)(1) (2000) (setting out the limitations on discovery under the 2000 amendments to the Federal Rules of Civil Procedure).

57. See *infra* notes 223–32 and accompanying text (discussing the increasingly expansive definition of jurisdictionally relevant factors in jurisdictional discovery rulings).

58. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 593 n.13 (2007) (Stevens, J., dissenting) (noting possibility of "'sprawling, costly, and hugely time-consuming' discovery" but claiming case management can resolve issues); see also *infra* notes 223–309 and accompanying text (demonstrating the scope of jurisdictional discovery).

59. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)).

60. See *Twombly*, 550 U.S. at 593 n.13 (Stevens, J., dissenting) (stating that a district court's "case-management arsenal" can limit the burdens associated with discovery). The Chief Judge of the Seventh Circuit has severely questioned judges' ability to manage discovery. Easterbrook, *supra* note 1, at 638 ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves."); see also Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 878 (2009) [hereinafter Bone, *Twombly*] ("[T]he *Twombly* Court is correct to question the efficacy of case-specific discretion.").

61. See, e.g., *J.E.C.*, *supra* note 2, at 546 (claiming discretionary limits on discovery are sufficient to protect the defendant and minimize the conflict between the plaintiff's interest in going forward and the defendant's "legitimate and protectable interest in avoiding the time, effort, and expense of discovery when the court's jurisdiction to hear the merits may be lacking"). The Rules currently state that the court can limit the request if:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

commentators doubt whether this language provides any real protection, given the prevalence of federal policies in favor of broad discovery.<sup>62</sup> Additionally, federal courts are admonished to "take care to ensure that litigation of the jurisdictional issue does not undermine the purposes of personal jurisdiction law in the first place."<sup>63</sup>

Most of the attempts to limit discovery have focused unilaterally on the breadth of the discovery rules themselves.<sup>64</sup> However, "[t]he problem of jurisdictional discovery . . . is closely related to the decreased emphasis on the pleadings and the corresponding ascension of the role of pre-trial discovery."<sup>65</sup> It may be that increased attention to pleading rules and standards could address some of the dilemmas that exist in jurisdictional discovery. Those issues will be discussed in Part IV below.<sup>66</sup>

### 3. U.S. Federal Courts' Inherent Power to Determine Jurisdiction

The second principle used to justify jurisdictional discovery relates to the courts' inherent power to determine their own jurisdiction. Cases concerning the jurisdiction to determine jurisdiction prior to 1938 appear to have contemplated only a limited ability to inquire into fact-based matters.<sup>67</sup> Other

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- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
  - (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(C).

62. *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 310 (S.D. Ind. 1997) (applying former Rule 26(b)(2)(iii) to jurisdictional discovery); Bolt & Wheatley, *supra* note 15, at 7 ("[T]he absence of an obligation on the parties to state specific facts in their pleadings, the necessities of the jury trial, and a general political trend towards more transparency in government and corporate transactions have led the courts to construe the rule broadly and allow extensive discovery.").

63. *Ellis*, 175 F.R.D. at 312 ("[A] plaintiff is not always entitled to discovery to respond to a motion to dismiss for lack of personal jurisdiction.").

64. See SUBRIN & WOO, *supra* note 52, at 148–50 (discussing the amendments to the Federal Rules to attempt to contain discovery methods).

65. J.E.C., *supra* note 2, at 533.

66. See *infra* notes 310–438 and accompanying text (describing the current problems in jurisdictional discovery and potential solutions).

67. See, e.g., *Hovland v. Farmers' State Bank of Christine, N.D.*, 10 F.2d 478, 480 (8th Cir. 1926) (noting deposition testimony regarding defendant's residence and domicile in bankruptcy matter); *McCarthy Sheep Co. v. S. Silberman & Sons*, 290 F. 512, 512 (D. Wyo. 1923) (noting personal jurisdiction in a contract claim established pursuant to pleadings, and

early precedents appear to have held that a court that does not have jurisdiction has no power to order or command a putative defendant.<sup>68</sup>

However, early in the twentieth century and particularly after the promulgation of the Federal Rules of Civil Procedure, Supreme Court precedent began to suggest that courts possess a limited power over the parties to decide whether jurisdiction is proper.<sup>69</sup> The rationale was based on the notion that if the court was to fulfill its mandate to preserve the status quo until the dispute was decided, it had to have jurisdiction to determine its own jurisdiction, complete with the ability to issue orders and sanction noncompliance with those orders.<sup>70</sup>

When federal courts began to develop the concept of jurisdictional discovery, they did so by combining this robust view of a court's jurisdictional powers with a notice-based approach to pleading that takes the view that a plaintiff may not be in possession of all of the necessary facts at the time the case is brought but can instead develop those facts through discovery as the case progresses.<sup>71</sup> In such a system, denying reasonable discovery on jurisdiction is inherently unfair, since a plaintiff with an otherwise legitimate claim could find its case dismissed as a result of the defendant's simply withholding information about its relevant contacts with the forum.<sup>72</sup>

However, jurisdictional discovery, as originally envisaged and implemented, was likely very different than what is occurring in practice now. There are two reasons for this conclusion. First, the type of cases that were filed in federal court changed radically between 1938 and the late twentieth century. Small, local disputes were replaced by large, complex matters

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responses to interrogatories attached to the pleadings and affidavits); *In re Perry Aldrich Co.*, 165 F. 249, 250 (D. Mass. 1908) (noting referee's reports on facts, including jurisdictional facts, in bankruptcy matter).

68. See J.E.C., *supra* note 2, at 535–39 (distinguishing nineteenth century cases due to different definitions of the term "jurisdiction").

69. See *id.* at 539–42 (noting that two cases, *United States v. Shipp*, 203 U.S. 563 (1906), and *United States v. United Mine Workers*, 330 U.S. 258 (1947), gave courts increased power to determine jurisdictional issues).

70. See *id.* at 541 ("If a court faced with doubt as to its jurisdiction to proceed to the merits order the defendant to submit to discovery, it requires more than the mere maintenance of the status quo. Here, indeed, the court must have 'jurisdiction to determine its own jurisdiction.'").

71. See SUBRIN & WOO, *supra* note 52, at 132–33 (describing change from code pleading to notice pleading).

72. See *Mother Doe I v. Al Maktoum*, 632 F. Supp. 2d 1130, 1144 (S.D. Fla. 2007) (noting that a plaintiff is entitled to reasonable discovery on jurisdiction "lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum").



involving massive law firms with national practices.<sup>73</sup> Not only do complex cases often require more discovery, they are also staffed by large-firm lawyers who are both inclined and able to handle massive document reviews and deposition schedules.<sup>74</sup>

Although it might have been logical in 1938 "to assume relatively manageable discovery . . . for most cases,"<sup>75</sup> the drafters were, perhaps, overly optimistic about how lawyers and judges would operate in a system permitting broad discovery.<sup>76</sup> Furthermore, although "[t]hose responsible for the original Federal Rules recognized at least some of the potential for abuse in the equity-driven system they created[,] [t]hey failed to adopt . . . some of the equilibrating devices that were proposed at the time,"<sup>77</sup> perhaps due to unrealistic expectations that future generations would make any necessary amendments as the need arose.<sup>78</sup> Furthermore, even to the extent that protective devices were reflected in the Rules, "federal judges, accustomed to a relatively passive role in common law cases, were loath to use the tools that were given them in 1938 to control the abuses . . . that the new system spawned."<sup>79</sup>

Second, the legal tests for federal jurisdiction have become much more complex and fact-specific than the drafters of the Federal Rules might ever have contemplated.<sup>80</sup> As such, plaintiffs have found it necessary to adduce ever-increasing amounts of information to establish federal jurisdiction. Since some of that information is within the exclusive purview of the defendant,

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73. Bone, Twombly, *supra* note 60, at 895–96 (describing changes in the legal profession during the nineteenth century); Brazil, *Adversary Character*, *supra* note 1, at 1307 (noting the increased complexity of litigation since 1962). For more information on historical developments in this area, see Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. REV. 691 *passim* (1998) (describing the changes and reasons behind the shift in the discovery process in civil cases after the creation of the 1938 Federal Rules).

74. See Brazil, *Civil Discovery*, *supra* note 1, at 790, 792 (noting that large firm lawyers have ample resources and many motives to pursue large scale discovery).

75. Bone, Twombly, *supra* note 60, at 896.

76. See Brazil, *Adversary Character*, *supra* note 1, at 1299–1301 (noting drafters incorrectly believed discovery would reduce antagonism in litigation).

77. Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 700 (1997).

78. See Bone, Twombly, *supra* note 60, at 878 ("The drafters were pragmatists who assumed that procedural rules would be 'continually changed and improved' as litigation conditions changed.").

79. Burbank & Silberman, *supra* note 77, at 700.

80. See *infra* notes 223–32 and accompanying text (noting that the law concerning jurisdictional discovery has become increasingly complex and that courts have taken a more expansive view of jurisdictional discovery).

jurisdictional discovery has become increasingly necessary to meet the new jurisdictional tests.

Today, it is commonly accepted that "a federal district court has the power to require a defendant to respond to discovery requests relevant to his or her motion to dismiss for lack of personal jurisdiction."<sup>81</sup> Failure to comply with an order regarding a jurisdictional matter can lead to sanctions that can range from the court's shifting the burden to the defendant to prove that jurisdiction does not exist to deeming certain matters to have been conceded.<sup>82</sup> Courts can even go so far as to determine that jurisdiction does, in fact, exist, so long as doing so is "fair" and "just" in the circumstances.<sup>83</sup>

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81. *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 311 (S.D. Ind. 1997); *see also* CASAD & RICHMAN, *supra* note 21, § 6-1 ("The Supreme Court expressly held in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee* that a foreign corporation that fails to cooperate in discovery on the question of jurisdiction may be sanctioned by finding that jurisdiction exists over the corporation."); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067.6 (3d ed. 2002) (noting that federal district courts may require defendants to respond to discovery requests relevant to a Rule 12(b)(2) motion to dismiss); Swanson, *supra* note 2, at 459 ("Where the defendant appears to defend and fails to follow the rules (including discovery rules) for determining jurisdiction, the defendant may waive her right to complain that the court lacks jurisdiction.").

82. *See* FED. R. CIV. P. 37 (listing the sanctions available for failure to make disclosures or cooperate in discovery); *Saudi v. Marine Atl., Ltd.*, 306 Fed. App'x 653, 654 (2d Cir. 2009) (noting that the magistrate judge shifted the burden of proof on personal jurisdiction to defendant in response to its failure to produce documents in a prior discovery ruling); William H. Baker, *Obtaining Evidence: International Discovery Techniques—The Taking of Evidence Abroad for Use in U.S. Courts*, 704 PLI/Lit 173, 179 (2003) ("The sanctions could be up to and including the entry of a default judgment."). Courts can also order non-compliant parties to pay reasonable expenses, including attorneys' fees, associated with the failure to adhere to discovery or disclosure requirements. FED. R. CIV. P. 37(c); *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982). Parties or attorneys may also be subject to sanctions or other disciplinary measures imposed by other sources of authority. *See* FED. R. CIV. P. 11 (listing sanctions relating to the signing of court documents and representations to the court); *see also* FED. R. CIV. P. 37, cmt. 2006 amend (discussing the use of sanctions from the loss of electronically stored information); *Willy v. Coastal Corp.*, 503 U.S. 131, 137–38 (1992) (allowing Rule 11 sanctions in case involving dispute over subject matter jurisdiction).

83. *See Ins. Corp. of Ir.*, 456 U.S. at 709 (holding that the court's presumption of personal jurisdiction over a defendant after defendant refused to produce evidence was "just"); *see also* Swanson, *supra* note 2, at 459 (noting that defendants have an individual liberty interest in personal jurisdiction, but this right can be waived by failure to follow the rules for determining jurisdiction). *But see* J.E.C., *supra* note 2, at 547–48 (arguing default judgment on jurisdiction is inappropriate and claiming contempt is the only legitimate sanction). In determining sanctions, courts can consider whether a non-compliant party has nevertheless taken all available steps towards compliance. *See* FED. R. CIV. P. 37 (listing sanctions for failing to make disclosures or to cooperate in discovery); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204–06 (1958) (holding that dismissal of a complaint with prejudice was not justified when the failure of defendant to comply with a pretrial production order was due to circumstances outside of defendant's control); EPSTEIN ET

#### 4. Practical Options Regarding Jurisdictional Discovery

Given federal courts' broad power to order jurisdictional discovery and sanction non-compliance, parties seem to have few options upon being named as defendants in federal court. However, a defendant who

receives a complaint and summons from a court in another jurisdiction and believes she is not subject to that court's jurisdiction . . . has several alternatives available to her. First, she may ignore the complaint and summons and then, if a default judgment is issued against her, may challenge the issuing court's jurisdiction in a collateral proceeding (presumably closer to home or other assets) when the plaintiff seeks to enforce the judgment. Second, she may voluntarily waive any lack of personal jurisdiction and submit to the distant court's jurisdiction. Third, she may appear in the distant court to assert the lack of personal jurisdiction. By taking this third route, . . . the defendant submits herself to the jurisdiction and power of the court for the limited purpose of deciding the jurisdictional issue. That court's decision in the jurisdictional issue will be *res judicata* in future proceedings to enforce a judgment. On this third route, the defendant also submits to the procedures of the distant court, including discovery, for orderly resolution of the jurisdictional issue.<sup>84</sup>

When the defendant chooses to take the third route by formally objecting to the court's jurisdiction, "the trial court has three procedural alternatives: 'it may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions.'"<sup>85</sup>

The court's decision to grant jurisdictional discovery does not mark the end of a defendant's jurisdictional battle. The defendant can still argue that the plaintiff has not made its case even after discovery has closed.<sup>86</sup> Even if the court rules against the defendant's jurisdictional objection at that stage, the defendant can raise the lack of jurisdiction later in the proceedings, through a

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AL., *supra* note 15, § 10.16 ("The good faith test addressed in *Rogers* concerns whether a party has undertaken all efforts of a reasonable person in the circumstances to comply with a production order.").

84. *Ellis v. Fortune Seas Ltd.*, 175 F.R.D. 308, 311 (S.D. Ind. 1997) (quoting *Mull v. Alliance Mortgage Banking Corp.*, 215 F. Supp. 2d 895, 903 (W.D. Tenn. 2002)).

85. *Hagen v. U-Haul Co. of Tenn.*, 613 F. Supp. 2d 986, 1002 n.10 (W.D. Tenn. 2009).

86. *See, e.g., Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 448 (S.D.N.Y. 2008) (noting that even when jurisdictional discovery is granted, the defendant can still argue that there is no factual basis for defendant's liability); *Powerstation LLC v. Sorensen Research & Dev. Trust*, No. 6:07-4167, 2008 WL 5431165, at \*2 (D.S.C. Dec. 31, 2008) (granting a motion for jurisdictional discovery while also noting that defendant may later refile motions to dismiss).

renewed motion to dismiss or even on appeal, although a defendant who wins on the merits is unlikely to raise the jurisdictional dispute on appeal.<sup>87</sup>

Interestingly, the court's decision to refuse jurisdictional discovery does not necessarily mark the end of defendant's battle either. In cases involving a single defendant, the denial of a request for discovery (if accompanied by dismissal of the dispute for lack of jurisdiction, as is typically the case) is immediately appealable, since it constitutes the final disposition of the matter.<sup>88</sup> In cases involving multiple defendants, an immediate appeal of the denial of a request for discovery is not possible (since the case itself continues, making the denial of discovery a non-appealable interlocutory order), but a court could give the plaintiff leave to renew the motion for jurisdictional discovery should facts suggestive of jurisdiction regarding the dismissed party emerge during merits-based discovery against the remaining defendants.<sup>89</sup>

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87. See, e.g., *Maersk*, 554 F. Supp. 2d at 448 (noting that defendant is free to renew a motion to dismiss based on a lack of jurisdiction after the completion of discovery); *Powerstation*, 2008 WL 5431165, at \*2 ("Upon the completion of jurisdictional discovery, the parties may refile any motions concerning this court's personal jurisdiction over the Defendant or lack thereof."). Cases against foreign sovereigns are the exception to the rule. Orders allowing jurisdictional discovery against a foreign state or instrumentality are immediately appealable, due to the important policy issues involving foreign sovereign immunity. Swanson, *supra* note 2, at 477 ("[T]he court felt that jurisdictional discovery on the immunity issue . . . should be subject to immediate appeal." (citing *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998))).

88. See *CASAD & RICHMAN*, *supra* note 21, at 22–23 ("When a defendant successfully challenges the basis for personal jurisdiction, the court usually orders dismissal of the action, normally a final decision that is appealable as such."); Edward B. "Teddy" Adams, Jr., *Personal Jurisdiction over Foreign Parties*, in *INTERNATIONAL LITIGATION: DEFENDING AND SUIING FOREIGN PARTIES IN U.S. FEDERAL COURTS* 113, 130 (David J. Levy ed., 2003) (noting that a denial of a defendant's jurisdictional challenge cannot be appealed until the court makes a final judgment). *But see* *Hansen v. Neumueller*, 163 F.R.D. 471, 477 (D. Del. 1995) (involving a motion to dismiss with a single defendant that was postponed pending nonparty discovery where the nonparty was represented by the same attorney as the defendant, and where a letter from the nonparty appeared to be the only basis for asserting jurisdiction over the defendant).

89. *Barrett v. H & R Block, Inc.*, 652 F. Supp. 2d 104, 116 (D. Mass. 2009) ("[P]laintiffs will be getting discovery from the remaining defendants. If that discovery develops evidence demonstrating the existence of personal jurisdiction over H & R Block in Massachusetts, plaintiffs may move to have it added as a party again."); *In re Novagold Res. Inc. Sec. Litig.*, 629 F. Supp. 2d 272, 306 (S.D.N.Y. 2009) ("Should facts emerge during fact discovery on plaintiff's claims suggesting the existence of subject-matter jurisdiction over foreign plaintiffs . . . any decision on class certification could be altered to include those plaintiffs."). "Changed circumstances" may also allow a party to refile a case that was dismissed against a particular defendant for lack of personal jurisdiction, overcoming usual rules about issue preclusion. See *Harris v. Lloyds TSB Bank PLC*, No. 09-0650, 2009 WL 3048639, at \*5 (M.D. Tenn. Sept. 17, 2009) ("[W]hen a court dismisses a plaintiff's claim . . . for lack of personal jurisdiction in the forum and that plaintiff attempts to assert the same litigation in the same forum, issue preclusion will present a . . . bar to the litigation that can be overcome . . . only

### B. Establishing Jurisdictional Facts in England

The preceding sections describe the jurisprudential basis for jurisdictional discovery, which appears relatively straightforward as a matter of theory. Indeed, it is only when the principles are put into practice that the procedure's deep-seated, fundamental problems become apparent, as Part III describes in detail.

However, it is by no means clear that jurisdictional discovery is necessary, even as a matter of theory. Indeed, the exceptional nature of jurisdictional discovery may not be appreciated without some comparative context. Therefore, this section describes how another legal system—England<sup>90</sup>—approaches the issue of establishing jurisdictional facts.

#### 1. Similarities Between English and U.S. Policies and Procedures

Although every U.S.-trained lawyer knows that the American legal system has its roots in the English common law, very few U.S. judges or practitioners

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through clear evidence of changed circumstances.").

90. England has been chosen for several reasons. First, the author of this Article has first-hand experience with the English system, having practiced in London for several years as an English solicitor. Second, "English procedure is arguably an important half-way house between the USA and European systems." NEIL ANDREWS, *THE MODERN CIVIL PROCESS* ¶ 13.01 (Mohr Siebeck 2008). Third, the English system acts as a model for a number of other common law jurisdictions. For example, both Australia and Canada appear to utilize some version of England's "service out" approach to jurisdiction. *See* Federal Court Rules, Order 8, R. 2–3 (Austl.) (stating when and how originating process may be served outside Australia); Federal Court Rules, Order 9, R. 7 (Austl.) (stating the set-aside procedures); *Armcel Pty Ltd. v. Smurfit Stone Container Corp.* (2007) F.C.R. 1928 ¶ 8 (Austl.) ("It will be noted that Giles J drew attention to the consideration that a respondent seeking to challenge the jurisdiction of the Court should not have imposed upon it one of the Court's compulsory processes in aid of establishing the jurisdiction."); OSCAR G. CHASE ET AL., *CIVIL LITIGATION IN COMPARATIVE CONTEXT* 522–23 (2007) (explaining the English basis for Canadian jurisdictional provisions). Fourth, other American commentators have pointed to the English system as a possible model regarding jurisdictional issues. Linda J. Silberman, *"Two Cheers" for International Shoe (and None for Asahi): An Essay on the Fiftieth Anniversary of International Shoe*, 28 U.C. DAVIS L. REV. 755, 762 (1995) (stating that English laws offer more jurisdictional precision than the laws of the United States); *see also* Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1007–09 (2007) (discussing fundamental differences between U.S. and European conceptions of jurisdiction); Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States: Opportunity for Learning from "Civilized" European Procedure Instead of Continued Isolation?*, 42 AM. J. COMP. L. 147, 147 (1994) (suggesting that the United States could learn from European civil law procedures). Fifth and most importantly, however, the fundamental principles and policies of the English approach to civil procedure mirror those of the United States. *See infra* notes 91–156 (comparing the English and U.S. legal systems).

are conversant with the modern structure of English courts and civil procedure. In fact, English<sup>91</sup> civil procedure is just coming out of a period of rapid change, having been entirely revamped in 1998 pursuant to the Woolf Reforms, which created the new Civil Procedure Rules (CPR).<sup>92</sup>

The purpose behind the restructuring of the English code of civil procedure was to move "from an antagonistic style to a more co-operative ethos" that avoids the "relentless and aggressive" pursuit of a client's interest in disregard of all other concerns.<sup>93</sup> Accordingly, the CPR has as its "overriding objective" the notion of dealing with cases "justly," which requires courts to ensure that parties "are on an equal footing"; save expenses; deal with cases proportionally with respect to the amount of money involved, the importance and complexity of the case, and the financial position of the parties; deal with disputes "expeditiously and fairly"; and allocate judicial resources appropriately.<sup>94</sup> These principles are essentially identical to those espoused by the U.S. Federal Rules of Civil Procedure, which encourage the "just, speedy, and inexpensive determination of every action and proceeding."<sup>95</sup>

Both the United States and England have taken measures to reduce litigation and encourage settlement, both through increased case management of disputes by judicial officers and the creation of advocate-driven pretrial

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91. The United Kingdom is made up of several constituent jurisdictions, which include England and Wales (which together comprise a single legal system), Scotland, and Northern Ireland. These different component units not only constitute different legal jurisdictions, they also—in the case of Scotland—incorporate different legal principles. See Elizabeth G. Thornburg, *Detailed Fact Pleading: The Lessons of Scottish Civil Procedure*, 36 INT'L LAW. 1185, 1186 (2002) (noting Scotland's mixed common law-civil law roots). Furthermore, the law of the European Union applies throughout the United Kingdom, including England. This Article focuses on English law, which governs in England and Wales.

92. See ANDREWS, *supra* note 90, ¶ 1.03 ("English civil procedure is governed by the new procedural code, the Civil Procedure Rules (1998) ('CPR')."); Valerie Davies & Thomas N. Pieper, *English Disclosure and U.S. Discovery*, in TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION, *supra* note 53, at 233, 258 (explaining that the obligations on a party subject to the CPR are more limited than those under the previous civil procedure regime). The Woolf reforms were named after Lord Woolf, the key architect of the new CPR. See ANDREWS, *supra* note 90, ¶ 2.13 (explaining Lord Woolf's aims in drafting the new civil procedure regime).

93. ANDREWS, *supra* note 90, ¶ 1.03.

94. Civil Procedure Rules (Eng.) [hereinafter CPR] 1.1; see ANDREWS, *supra* note 90, ¶ 1.04 (explaining the "Overriding Objective" and Rule 1.1).

95. FED. R. CIV. P. 1; *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 310 (S.D. Ind. 1997) (explaining that all the rules in the Federal Rules of Civil Procedure are subject to the Rule 1 provisions). Some commentators have noted that the current approach to discovery does not meet the goals enunciated in the Federal Rules. Brazil, *Adversary Character*, *supra* note 1, at 1296 ("The adversary character of civil discovery, with substantial reinforcement from the economic structure of our [U.S.] legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed.").

procedures, including those regarding automatic disclosure.<sup>96</sup> Furthermore, both systems embrace the principle of "scrupulous disclosure by each party to the other of relevant documentation."<sup>97</sup> Disclosure is considered necessary to "achieve equality of access to information; . . . facilitate settlement of disputes; . . . avoid[ ] so-called 'trial by ambush' . . . ; and . . . assist[ ] the court in reaching accurate determinations of fact when entering judgments on the merits."<sup>98</sup> Again, these are identical to rationales underlying broad American-style discovery, and both legal systems take the view that parties should disclose even that information that is harmful to them so as to avoid surprise and gamesmanship and to further the rational search for truth.<sup>99</sup> Furthermore, both systems have adopted a liberal notice pleading standard rather than a more rigorous code- or fact-based approach to pleading.<sup>100</sup>

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96. See CPR 1.4 (describing the court's duty to manage cases to obtain its overriding objectives); ANDREWS, *supra* note 90, ¶ 1.05 ("The main function of these protocols is to assist the parties to settle the case."); *id.* ¶ 3.13 (claiming goal of the court's case management is to encourage parties to pursue mediation, proceed at an efficient speed, and ensure that judicial resources are allocated proportionately); Toby J. Stern, Comment, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 390 (2003) (describing increase in case management in U.S. courts). Both systems also have recently restricted the definition of "relevance" in disclosure or discovery situations. See ANDREWS, *supra* note 90, ¶ 6.30 (stating that part of a lawyer's job is to help determine what is relevant); *supra* note 20 and accompanying text (explaining the reforms to the Federal Rules of Civil Procedure to narrow discovery). Interestingly, disclosure of information is required in the English system even prior to the initiation of the case under many pre-action protocols, though this is not analogous to U.S.-style jurisdictional discovery, since both parties are required to list and, if necessary, provide documents on which they intend to rely. See Practice Direction Annex A to the CPR, Pre-action Conduct, ¶ 2 (describing claimant's letter before action); *id.* ¶ 4–5 (describing defendant's full response and claimant's reply); ANDREWS, *supra* note 90, ¶¶ 3.02–3.03 (stating that, in all cases not covered by any approved protocol, the English courts expect the parties to act reasonably in exchanging information and documents relevant to the claim).

97. See ANDREWS, *supra* note 90, ¶ 6.02 (regarding English procedure); see also Bone, Twombly, *supra* note 60, at 875 (describing U.S. discovery practice).

98. See ANDREWS, *supra* note 90, ¶ 6.02 (describing English aims).

99. See SUBRIN & WOO, *supra* note 52, at 133 (describing movement to broaden discovery to focus controversies on the real and disputed issues); see also Brazil, *Adversary Character*, *supra* note 1, at 1298–1303 (discussing the history and purposes of discovery). But see Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1991 (2007) [hereinafter Bone, *Who Decides*] ("The conventional assumption underlying the commitment to adversarial fact-finding is that competition between adversaries is likely to ferret out the truth. . . . But this assumption is excessively optimistic.")

100. See ANDREWS, *supra* note 90, ¶ 3.04 (describing English "statements of case" (i.e., pleadings) and noting "[t]here is no need to include . . . any detailed evidence or details of legal argument" in such statements); *id.* ¶ 3.08 ("The claimant is not required to adduce at this early stage the details of his intended evidence."); Bone, Twombly, *supra* note 60, at 875 (describing new U.S. Supreme Court precedent requiring plaintiffs to "state facts in their complaint sufficient to support a 'plausible' inference" of the claimed action). Both English and U.S.

Thus, the underlying policies and goals of the English judicial system are very similar to those espoused in the United States.<sup>101</sup> Despite these fundamental similarities, courts in the United States and England nevertheless differ significantly in the manner in which they establish and exercise jurisdiction over defendants who are not within the territorial reach of the court.<sup>102</sup>

## 2. Standards Regarding English Jurisdiction

In England, personal jurisdiction is inextricably related to service of process.<sup>103</sup> "When process cannot legally be served upon a defendant, the court can exercise no jurisdiction over him."<sup>104</sup> This is somewhat similar to the U.S. approach, which also implicitly considers amenability to service of process when making determinations regarding in personam jurisdiction.<sup>105</sup>

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courts require parties to make some assertion as to the truth of the initial papers, although the standard of practice appears higher in England because the requirement is both explicit (rather than implicit) and does not seem to be as lenient towards possible inferences of fact. Compare FED. R. CIV. P. 11(b) (describing representations to the court under the U.S. system), with CPR 22.1 (stating the statement of truth provisions in the English system). See Practice Direction—Supp. to CPR 22, Statements of Truth (stating what documents need a statement of truth, who may sign the statement of truth, the consequences of a failure to certify, and what form a statement of truth should take); ANDREWS, *supra* note 90, ¶ 3.08 (regarding the English statement of truth and noting that statements of case must be verified by a statement of truth and a dishonest statement can lead to contempt proceedings); see also Brian Daley et al., *Pre-trial Proceedings in Patent Infringement Actions: A Comparison Among Canada, the United Kingdom, and the United States*, 35 AIPLA Q.J. 113, 165 (2007) (providing a table comparing Canadian, English, and American pretrial procedures). This higher standard may give English jurists a higher degree of confidence in the veracity of a defendant's claim that jurisdiction does not exist, absent adverse and mandatory jurisdictional discovery. See CPR 22.1 (providing the standard for English statements of truth).

101. See *supra* notes 94–98 and accompanying text (explaining the similar policies of English and U.S. procedural rules regarding objectives, relevancy of discovery, and avoiding trial by ambush).

102. In England, "the summoning of an absent defendant to the court is an exercise of sovereign power, and it is something which the claimant has no untrammelled right to do." ADRIAN BRIGGS & PETER REES, CIVIL JURISDICTION AND JUDGMENTS 346 (2005).

103. DICEY, MORRIS, AND COLLINS ON THE CONFLICT OF LAWS ¶ 11-003 (Lawrence Collins ed., 2006) [hereinafter DICEY & MORRIS] (stating "the rules as to service define the limits of the court's jurisdiction").

104. *Id.*

105. See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (noting "before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum" and stating that "there also must be a basis for the defendant's amenability to service of summons"); see also *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622–23 (1925) ("In a civil



English courts allow service of an in personam claim—and thus will assert jurisdiction over the person—in three different circumstances.<sup>106</sup> First, service may be made if a defendant is physically present in the jurisdiction and is amenable to service.<sup>107</sup> Second, service may be made on a defendant who is located outside the jurisdiction if the defendant submits to English jurisdiction (as through the appointment of an agent for service of process, a forum selection clause, or voluntary appearance).<sup>108</sup> Both of these concepts are consistent with U.S. practices.<sup>109</sup> However, it is the third category of cases—

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suit in personam, jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons." *But see* Colin Joseph & Peter S. Selvin, *Service of Process Under United States and English Law*, in *TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION*, *supra* note 53, at 37, 77 (stating England "thrusts jurisdictional and forum non conveniens issues to the fore when considering issues relating to service, and to a degree intermingles them," whereas in the United States, "the rules as to service are entirely distinct from those governing jurisdiction and forum non conveniens").

106. *ANDREWS*, *supra* note 90, ¶ 6.03; *Davies & Pieper*, *supra* note 92, at 258; *see infra* notes 107–10 and accompanying text (explaining the methods for service of in personam claim by English courts: to defendant physically present in jurisdiction and amenable to service, to defendant outside the jurisdiction who submits to English jurisdiction, and to defendant outside jurisdiction who does not submit to jurisdiction).

107. *See* CPR 6.3, 6.5–6.15 (describing service of the claim form); Practice Direction 6, Supp. to CPR, 22, Service Within the United Kingdom [hereinafter Practice Direction 6] (describing service of process requirements and procedures); *see also* JONATHAN HILL, *INTERNATIONAL COMMERCIAL DISPUTES IN ENGLISH COURTS* (2005) ¶¶ 7.01–7.1.26 (describing the traditional English jurisdiction rules); Mayer & Sigler, *supra* note 53, at 109 (listing the three situations in which English courts will assume jurisdiction based on common law principles). The CPR defines the "jurisdiction" as England and Wales; parties located in Scotland and Northern Ireland are subject to different rules than parties in England and Wales. *See* CPR 2.3 (defining jurisdiction as England and Wales); CPR 6.32 (stating the rules for the service of the claim form in Northern Ireland and Scotland); CPR 6.33 (stating the rules for the service of the claim form outside the United Kingdom).

108. *See* CPR 6.33 (stating the rules for the service of the claim form outside the United Kingdom); Practice Direction 6b, Supp. to CPR 22, Service out of the Jurisdiction [hereinafter Practice Direction 6b] (providing further instructions for service of the claim form outside of the United Kingdom); *DICEY & MORRIS*, *supra* note 103, ¶¶ 11–130 to 138 (describing proper use of service out provisions); *HILL*, *supra* note 107, ¶¶ 7.01–7.02 (stating that under traditional English jurisdiction rules, the court will exercise jurisdiction over a defendant that submits to the jurisdiction of the court), *id.* ¶¶ 7.2.1–2.8 (describing traditional English jurisdictional rules dealing with submission to jurisdiction); Mayer & Sigler, *supra* note 53, at 109 (stating that English courts will exercise jurisdiction over a defendant that is not within the jurisdiction, but submits to the jurisdiction of the English courts).

109. *See* FED. R. CIV. P. 4(k)(A) (stating that serving the defendant within the state where the district court is located establishes jurisdiction); FED. R. CIV. P. 12(h) (stating that personal jurisdiction may be obtained over a defendant through waiver).

those involving what is called "service out"—that is the most relevant to this Article since it involves defendants who are outside the jurisdiction.<sup>110</sup>

As a matter of English law, plaintiffs can only serve defendants who are not present in the jurisdiction and who have not submitted to the jurisdiction of the English courts if the "courts are satisfied that there are appropriate grounds for giving permission for proceedings to be served on the defendant out of the jurisdiction."<sup>111</sup> This procedure—called "service out" to reflect the need to serve the claim form outside the jurisdiction<sup>112</sup>—addresses the kinds of

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110. "Service out" is typically required on parties outside the European Union (including Scotland and Northern Ireland), Gibraltar, Iceland, Norway, and Switzerland. See Joseph & Selvin, *supra* note 105, at 56, 67–68 (discussing English procedures for service out of the jurisdiction). Some analogies could be drawn to service of defendants who can be found in other parts of the United Kingdom (i.e., Scotland or Northern Ireland) or to service of defendants found in one of a number of European nations who are signatories to certain European agreements on jurisdiction. See, e.g., CPR 6.32–6.33 (noting instances in which permission to serve out is not necessary); Practice Direction 6, *supra* note 107 (providing instructions on how to serve in Scotland and Northern Ireland); HILL, *supra* note 107, ¶¶ 4.0.1–6.2.13 (discussing *in personam* jurisdiction under the Brussels Regime and Schedule 4 to the Civil Jurisdiction and Judgments Act of 1982); see also Brussels I Regulation, Council Regulation 44/2001, 2001 O.J. (L 12) 1 (EC) (providing for jurisdiction and recognition and enforcement of judgments in civil and commercial matters in the European Union); Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9 (providing rules for jurisdiction and enforcement of judgments); Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, O.J. L/299/32 (providing measures for the simplification of formalities governing reciprocal recognition and enforcement of judgments of courts or tribunals for European nations). This Article, however, takes the view that the better analogy is to service out provisions, as described below, since the European agreements on jurisdiction are tied closely to a code-based approach that would be difficult to implement in the United States, given the complexity of U.S. law on federal jurisdiction. See Silberman, *supra* note 90, at 762–66 (comparing the U.S., English, and European regimes). Furthermore, the traditional service-out provision combines some bright-line elements with a common law *forum non conveniens* analysis that should be both familiar and useful to U.S. jurists.

111. DICEY & MORRIS, *supra* note 103, ¶ 11-146; see also Mayer & Sigler, *supra* note 53, at 109 (discussing limitations on jurisdiction over persons not present in the territory); CPR 6.33 (stating the rules for service of the claim form outside the jurisdiction when the permission of the court is not required); Practice Direction 6b, *supra* note 108 (providing supplemental direction for service of claim form and other documents outside the jurisdiction).

112. CPR 6.36 (providing that one seeking permission of the court to serve the claim form outside the jurisdiction must follow paragraph 3.1 of Practice Direction 6b); Practice Direction 6b, *supra* note 108 (stating the different procedures and provisions for service of claims made outside the jurisdiction); DICEY & MORRIS, *supra* note 103, ¶ 11-070; HILL, *supra* note 107, ¶¶ 7.3.1–7.3.46 (describing the application of service out under CPR 6.20); Mayer & Sigler, *supra* note 53, at 109 (stating that there are different rules for obtaining permission to serve the claim form on individuals and corporations not in the jurisdiction).

questions that arise in the most well-known form of U.S. jurisdictional discovery, i.e., discovery regarding the defendant's contacts with the forum.<sup>113</sup>

To initiate service out proceedings, the plaintiff (called the "claimant" in English legal parlance) makes an application to the court without notice to the defendant, seeking permission to serve the claim form out of the jurisdiction.<sup>114</sup> The court then considers the propriety of the request based on the claimant's pleadings alone and, if satisfied that the requisite jurisdictional facts exist, permits the claimant to attempt service on the defendant.<sup>115</sup> If the claimant cannot convince the court that service out should be allowed, the claim cannot proceed.<sup>116</sup> Furthermore, if the claimant cannot achieve proper service (even after having received the court's permission to serve out), the claim cannot proceed.<sup>117</sup>

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113. Notably, English courts do not undertake the kind of "minimum contacts" analysis that U.S. courts do. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–292 (1980) (explaining that a state may exercise jurisdiction over a nonresident defendant if minimum contacts exist between the defendant and the forum). Instead, the relevant facts are laid out in Practice Direction 6b, which reflects a codified approach to jurisdictional concerns. *See Practice Direction 6b, supra* note 108, ¶ 3.1 (providing the different provisions for serving claims outside the jurisdiction for different types of claims); HILL, *supra* note 107, ¶ 7.3.1 (noting "CPR 6.20 contains bases of jurisdiction which are exorbitant—the sense that they are not founded on a close connection between the defendant and the forum").

114. *See Mayer & Sigler, supra* note 53, at 109, 142 (describing the initiation of a service out claim); *see also* CPR 6.36–6.37 (providing instructions and the necessary parts of the application for claims of service of the claim form outside the jurisdiction); Practice Direction 6b, *supra* note 108 (providing the procedures for service out). However, the initiation of the lawsuit likely will not come as a complete surprise to the defendant since English claimants are under a duty in most cases to provide defendants with a "letter before action," describing the details of the dispute and seeking resolution outside of legal action. *See Practice Direction Annex A to the CPR, Pre-Action Conduct*, ¶ 2 (providing what should be including in the claimant's letter to the defendant before service of the claim form); *see also* Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 2003–04, 2011 (2004) (noting suggestions to use a similar procedure in the United States, although such efforts are only voluntary at this point). Methods of service are discussed in Rules 6.40 through 6.47. CPR 6.40–6.47; Joseph & Selvin, *supra* note 105, at 74–76 (explaining the procedures after permission is granted by the court to serve process outside the jurisdiction).

115. Joseph & Selvin, *supra* note 105, at 56 (noting that when the claimant seeks permission to serve outside the jurisdiction, "the onus will be on him to persuade the court that it is clearly the appropriate forum for the trial").

116. *See id.* (stating that the claimant must persuade the court to grant permission for service or else the claim cannot proceed).

117. *See id.* (stating that the claimant must perform proper service for the claim to proceed); Mayer & Sigler, *supra* note 53, at 129 (stating that the claimant must be granted permission by the court and follow the procedures for actually serving the process).

The standards associated with service out are discussed in Rules 6.36 and 6.37 of the CPR.<sup>118</sup> For example the applicant must indicate that it "believes the claim has a reasonable prospect of success."<sup>119</sup> This means that "[i]n respect of each claim, the claimant must show that he has a good arguable case. This is a test lower than the 'balance of probabilities,' which is the civil burden after a full trial, but is higher than showing 'a serious U.S. question' to be tried."<sup>120</sup>

Furthermore, the CPR states that the court may not grant permission to serve out unless it is "satisfied that England and Wales is the proper place to bring the claim."<sup>121</sup> The considerations here are the same as those used in a forum non conveniens analysis.<sup>122</sup> "Because of the extraordinary nature of the

118. Leading commentators note that permission to serve out is often granted in practice. BRIGGS & REES, *supra* note 102, at 346.

119. CPR 6.37(1)(b); *see* *Seaconsar Far East Ltd. v. Bank Markazi Jomhouri Islami Iran*, [1994] 1 A.C. 438, 439 (Engl.) (concerning burden of proof regarding merits of the claim); BRIGGS & REES, *supra* note 102, at 237 (stating that all that is required to show that the plaintiff's claim falls within one of the heads of the rule is a good arguable case that the elements of the subrule are satisfied).

120. Joseph & Selvin, *supra* note 105, at 72 (citations omitted); *see also* BRIGGS & REES, *supra* note 102, at 237 (stating that the on balance of probabilities standard is too high and the proper standard is the lower standard of a good arguable case); HILL, *supra* note 107, ¶ 7.3.36 (explaining the different formulations for the standard necessary for a plaintiff to bring a claim). Some say "this threshold is the same as if the claimant were resisting an application by the defendant for summary judgment." DICEY & MORRIS, *supra* note 103, ¶ 11-152. In any event, a very strong case on the merits cannot offset a weak case regarding the propriety of the forum. *See Seaconsar Far East Ltd.*, [1994] 1 A.C. at 456 (concerning burden of proof regarding merits of claim); DICEY & MORRIS, *supra* note 103, ¶ 11-153 ("A case particularly strong on the merits could not compensate for a weak case on *forum non conveniens*."). *But see* BRIGGS & REES, *supra* note 102, at 382 (noting the highest evidentiary hurdle relates to whether the case falls into the different factual headings).

121. CPR 6.37(3); *see also supra* note 120 and accompanying text (regarding relative weights of elements of the test).

122. *See* BRIGGS & REES, *supra* note 102, at 373–83 ("The fundamental question (as it is in cases of staying of actions on forum non conveniens grounds) is to identify the forum in which the case can suitably be tried for the interests of all the parties and the ends of justice."); DICEY & MORRIS, *supra* note 103, ¶ 11-149 ("[T]hose matters described above which indicate whether the foreign forum is clearly or distinctly more appropriate than England, apply equally when the plaintiff is seeking to show that England is, clearly and distinctly, the appropriate forum."); Joseph & Selvin, *supra* note 105, at 73–74 (describing the principles that the court looks at for determining forum non conveniens); *see also* *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] 1 A.C. 460 (Engl.) (containing forum non conveniens analysis). England continues to recognize a robust version of forum non conveniens, although its application has been somewhat limited by European law in cases involving multiple defendants, one of which is domiciled in England. *Owusu v. Jackson*, [2005] Q.B. 801 (Engl.) (restricting the court's ability to decline jurisdiction based on forum non conveniens); John Fellas & David Warne, *Choice of Forum Under United States and English Law*, in *TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION*, *supra* note 53, at 333, 373–88 (providing the historical development and the current condition of

extended jurisdiction . . . , it [is] necessary for a claimant to show that England [is] ‘clearly’ the appropriate forum for the trial of the action.”<sup>123</sup> Furthermore, “[i]t has . . . been long established that full and fair disclosure is required in any application of this sort and that where there is any doubt as to the construction of any of the permissible sub-heads of claim [sic], ‘it ought to be resolved in favour of the foreigner.’”<sup>124</sup> The substance of the test looks at the nature of the dispute, including the legal and practical issues involved, as well as issues involving local knowledge, availability of witnesses and their evidence and expense, and whether justice will be done in a distant forum.<sup>125</sup> Again, these criteria are similar to the traditional forum non conveniens analysis undertaken in U.S. federal courts.<sup>126</sup>

Additionally, an English court must determine that the claimant can bring its request to serve out under one of the substantive grounds outlined in Practice Direction 6b, Service out of the Jurisdiction.<sup>127</sup> That Practice Direction states the following:

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forum non conveniens doctrine in England); Mayer & Sigler, *supra* note 53, at 129–34 (describing the common law of forum non conveniens and how various international conventions have changed or limited these doctrines); Stacie I. Strong, *Backyard Advantage: New Rules Mean That U.S. Companies May be Forced to Litigate Across the Pond*, 28 LEGAL TIMES 43 (May 23, 2005) (discussing *Owusu* and how the forum non conveniens restrictions of the Brussels Convention apply to parties that are from non-contracting states).

123. Joseph & Selvin, *supra* note 105, at 73; *see also* DICEY & MORRIS, *supra* note 103, ¶ 11-148 (noting concerns about “interference with the sovereignty of other countries”).

124. Joseph & Selvin, *supra* note 105, at 72 (quoting *The Hagen*, [1908] P. 189, 201 (Engl.)); *see also* Demirel v. Tasarruff Mevduati Sigorta Fonu, [2007] EWCA Civ. 799 ¶ 13 (quoting *The Hagen* and stating that full and fair disclosure is necessary and construing doubts in favor of the foreign party); DICEY & MORRIS, *supra* note 103, ¶ 11-148 (same).

125. HILL, *supra* note 107, ¶ 7.3.41–7.3.43 (describing the multiple factors that the court must consider regarding the determination of jurisdiction).

126. *See, e.g.*, *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 429–36 (2007) (describing forum non conveniens doctrine and finding an immediate dismissal based on forum non conveniens appropriate); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981) (stating that a court may not deny a motion to dismiss for forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs); *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 504 (1947) (stating that the court has retained the right to decline cases based on the doctrine of forum non conveniens).

127. *See* Practice Direction 6b, *supra* note 108 (defining the conditions for service under the different substantive heads). The substantive grounds for service out included in Practice Direction 6b are exclusively applied. *Id.*; *see also* BRIGGS & REES, *supra* note 102, at 221–36 (explaining substantive subrules under which a plaintiff can serve out and cases that have interpreted these provisions); DICEY & MORRIS, *supra* note 103, ¶¶ 11-181–11-226 (discussing case law relating to service out); HILL, *supra* note 107, ¶ 7.3.9 (stating that the court must determine if the claim form can be served under one of the jurisdictional heads found in paragraphs one through eighteen); Joseph & Selvin, *supra* note 105, at 70–71 (explaining the different jurisdictional heads).

The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where—

...

- (6) A claim is made in respect of a contract where the contract—
  - (a) was made within the jurisdiction;
  - (b) was made by or through an agent trading or residing within the jurisdiction;
  - (c) is governed by English law; or
  - (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.
- (7) A claim made in respect of a breach of contract committed within the jurisdiction.
- (8) A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6).
- (9) A claim is made in tort where
  - (a) damage was sustained within the jurisdiction; or
  - (b) the damage sustained resulted from an act committed within the jurisdiction.<sup>128</sup>

English courts may also grant permission to serve out in cases when "[a] claim is made for a remedy against a person domiciled within the jurisdiction" or "[a] claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction."<sup>129</sup> The Practice Direction also discusses other types of claims and when service can be obtained against a necessary or proper party.<sup>130</sup>

In a service out proceeding, the claimant carries the burden of proof on all elements, and failure to discharge that burden will lead to denial of permission to attempt service, thus effectively denying the claim.<sup>131</sup> This demonstrates an

128. Practice Direction 6b, *supra* note 108, ¶ 3.1(6)–(9); *see also* BRIGGS & REES, *supra* note 102, at 348–72 (discussing various heads); HILL, *supra* note 107, ¶¶ 7.3.10–7.3.34 (explaining jurisdiction under the various heads).

129. Practice Direction 6b, *supra* note 108, ¶ 3.1(1)–(2).

130. *Id.* ¶ 3.1(3), (10)–(20).

131. Joseph & Selvin, *supra* note 105, at 56 (describing the burden on the claimant to persuade the court that England is clearly the appropriate forum); Mayer & Sigler, *supra* note 53, at 129 (noting that the claimant must show that England is not merely the appropriate forum, but "that this is clearly so"); *see also* Spiliada Mar. Corps v. Cansulex Ltd. [1987] A.C. 460, 481 (Engl.) (per Lord Goff) ("The effect is, not merely that the burden of proof rests on the [claimant] to persuade the Court that England is the appropriate forum for the trial of the action,

interesting element of English civil procedure. Under English law, the presumption is that England and Wales is the proper forum for any case involving service in, and the burden of demonstrating otherwise is on the defendant.<sup>132</sup> In service out cases, the "position is . . . exactly reversed," and the claimant must "clearly" show that England and Wales is the appropriate forum.<sup>133</sup>

Obtaining permission to serve out is not prohibitively difficult because English judges are typically inclined to grant permission "[u]nless the application is plainly bad, or the written evidence can be regarded as incredible."<sup>134</sup> Nevertheless, some analysis by the judge presiding over the request to serve out must be made and some offer of evidence must be submitted at the initial stages.<sup>135</sup> This is more than what happens in the United States, where judges make no initial determinations about the propriety of a case; instead, plaintiffs file and serve their actions without any judicial oversight.<sup>136</sup>

This approach may be possible because English courts explicitly recognize that care must be taken in proceedings to grant permission to serve out, lest damage be suffered by the defendant between the time of service and the time service is set aside.<sup>137</sup> Furthermore, the system creates certain incentives for

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but that he has to show that this is clearly so."); DICEY & MORRIS, *supra* note 103, ¶ 11-151 (noting claimant has "the burden of showing good reason why service should . . . be permitted on a foreign defendant").

132. Joseph & Selvin, *supra* note 105, at 56 ("[W]here a defendant has been served as of right within the jurisdiction of the English Court, the burden will be on him to satisfy the court not only that England is not the . . . appropriate forum for the trial but also that there is another available forum that is . . . more appropriate.").

133. *See id.* ("[W]here . . . the claimant has obtained or is seeking permission to serve outside England and Wales, the onus will be on him to persuade the court that it is 'clearly' the appropriate forum for the trial.").

134. BRIGGS & REES, *supra* note 102, at 346 n.365. This may be similar to the type of frivolous or nonmeritorious claim of jurisdiction that would not even suffice to obtain jurisdictional discovery in the United States. *See infra* notes 163–83 and accompanying text (discussing the various standards U.S. federal courts apply when deciding whether to grant jurisdictional discovery).

135. *See ABCI (formerly Arab Bus. Consortium Int'l Fin. & Invest. Co.) v. Banque Franco-Tunisienne*, [2002] 1 Lloyd's Rep. 511, 521–22 (Eng.) (Comm.) (noting the need for supporting evidence).

136. *See infra* notes 157–232 and accompanying text (discussing the standards regarding when jurisdictional discovery should be ordered and the guidelines which govern the scope of jurisdictional discovery).

137. *Network Telecom (Europe) Ltd. v. Telephone Systems Int'l Inc.*, [2003] EWHC (QB) 2890, [58]–[59] (Eng.) (noting how the English court handles *ex parte* applications for service out).

English lawyers to be entirely truthful in their disclosures at the initial hearing stage.<sup>138</sup> For example, practitioners are aware that less than full and frank disclosure at the application stage can, of itself, create grounds for setting aside service.<sup>139</sup> English rules of professional conduct also encourage lawyers to exercise a high degree of diligence and veracity in submissions to the court.<sup>140</sup>

As the preceding demonstrates, the standards associated with obtaining jurisdiction over a nonresident defendant are clearly identified under English law. This is in sharp distinction to the situation in the United States, where courts have grave difficulties in even enunciating the appropriate jurisdictional standard, let alone applying it.<sup>141</sup>

### 3. Objecting to English Jurisdiction

Even if jurisdiction is asserted and permission for service out is granted, the defendant can nevertheless "dispute the court's jurisdiction to try the claim" or "argue that the court should not exercise its jurisdiction."<sup>142</sup> The reason for this second look at the question of jurisdiction has to do with the level of inquiry made at the initial stages. Although the service out procedure requires a judge to give permission for the claimant to attempt service, a highly detailed analysis has not been made at that time.<sup>143</sup> Indeed, it has been said that at the time the objection is lodged

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138. See *Tajik Aluminium Plant v. Ermatov*, [2006] EWHC (Comm.) 2374, [123] (Eng.) (describing the duty of candor before the court and the penalties that may be imposed as a result of any sort of non-disclosure).

139. See, e.g., *id.* (summarizing common principles of law); *Pearson Educ. Ltd. v. Prentice Hall of India Private Ltd.*, [2005] EWHC (QB) 655, [38] (Eng.) (noting the fact that more information subsequently came to light was not enough to conclude the initial disclosures were insufficient).

140. See, e.g., SOLICITORS REGULATION AUTHORITY, SOLICITORS' CODE OF CONDUCT, R. 10.5 (stating the rule governing undertakings); *id.* R. 11 (regarding proper behavior in litigation). Solicitors who fail to live up to an undertaking may be personally liable for compensatory damages, even if the fulfillment of the undertaking was beyond his or her personal control. See, e.g., *Udall v. Capri Lighting Ltd.*, [1988] Q.B. 907, 916–17 (Ct. App.) (Eng.) (describing the conduct that the English court expects from solicitors).

141. See *infra* notes 157–232 and accompanying text (discussing the standards applied in the United States regarding the grant of jurisdictional discovery and the guidelines governing the scope of jurisdictional discovery).

142. CPR 11(1). The first of these concepts relates to whether the claim falls properly under one of the grounds allowing for service out described in Practice Direction 6b and the second relates to whether England is clearly the proper forum for this dispute, using the forum non conveniens analysis. See *supra* note 131 and accompanying text (describing service out proceedings).

143. See BRIGGS & REES, *supra* note 102, at 403 (stating that even when the claimant is



there will still have been no detailed investigation of whether it is a proper case in respect of which the court has, or should, exercise, jurisdiction: all the court will have seen will be the claim form (or a draft), and the witness statement in support of the application for permission to be granted for service out.<sup>144</sup>

Should the defendant wish to object to the jurisdiction of the court (as opposed to simply ignoring service),<sup>145</sup> "he will be admitting the technical jurisdiction of the court which results from the fact of service, but will say that the court should declare that there is no legal basis for that jurisdiction and grant such consequential relief as flows from the declaration that it has no jurisdiction."<sup>146</sup> This method of establishing temporary or partial jurisdiction to determine jurisdiction is similar to the approach used in the United States.<sup>147</sup>

Jurisdictional defenses include not only those based on the position that permission ought not have been granted for service out (based on the criteria discussed above) but on other grounds as well.<sup>148</sup> For example, the defendant can claim to be immune from the jurisdiction of the English courts based on state or diplomatic immunity.<sup>149</sup>

Procedurally, a defendant who wishes to dispute the jurisdiction of the English court only needs to file an acknowledgement of service and an application for an order declaring that there is no jurisdiction or that the court should not exercise its jurisdiction.<sup>150</sup> Significantly, however, the CPR does not

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granted permission by the court to serve a defendant outside the court's jurisdiction, there has been no detailed investigation by the court as to whether jurisdiction is proper).

144. *Id.*

145. A default judgment may be issued immediately in a case proceeding under traditional service rules, although cases proceeding under various European conventions on jurisdiction require the court to satisfy itself that it indeed does have jurisdiction before entering a default judgment. *See id.* at 404 ("According to Article 26 . . . the court is obliged to examine the basis of its jurisdiction if the defendant is domiciled in another Member State but does not appear. . . . [T]he court must satisfy itself that it does have [jurisdiction].").

146. *Id.*

147. *See supra* notes 67–83 and accompanying text (discussing the inherent power of the federal courts to determine jurisdiction).

148. BRIGGS & REES, *supra* note 102, at 409 (listing other jurisdictional challenges made by defendants).

149. *See id.* ("For example, if the defendant is immune from the jurisdiction of the English courts on the ground of state or diplomatic immunity, an application may be made under this procedure."). There might even be a way for defendants in English courts to object to subject matter jurisdiction. *See id.* ("Also, if the claim is one over which the court has no subject-matter jurisdiction . . . an application may be made under this procedure.").

150. CPR 11 (stating that a defendant that disputes the court's jurisdiction "may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have").

provide for jurisdictional discovery or disclosure of the defendant as part of this process,<sup>151</sup> nor does any English case even contemplate requiring such disclosures.<sup>152</sup> Instead, the court decides the question of whether jurisdiction exists based on the initial request to serve out, which was supported by evidence, and any evidence that the defendant wishes to adduce in support of its motion to set aside service.<sup>153</sup>

Notably, this position holds true even for evidence that is within the exclusive purview of one of the parties. However, such discovery is not necessary given the requirement (made real through the various sanctions and

151. Although the CPR considers the possibility of some limited disclosure prior to the initiation of proceedings, the rule is both narrowly drafted and strictly construed, and does not apply to what would be considered jurisdictional discovery in the United States. See CPR 31.16 (noting restrictions on type of disclosure that can be made on court order); ANDREWS, *supra* note 90, ¶ 6.12 (same); *id.* ¶ 6.19 (noting English antipathy to "fishing expeditions"); Davies & Pieper, *supra* note 92, at 268–69 (noting the limited scope of the disclosure that is required to be given). Other countries also appear to permit some form of pre-action disclosure or discovery in situations where the claimant might not have sufficient evidence to mount a claim. See ANDREWS, *supra* note 90, ¶¶ 6.12–15 (describing mechanisms in England, Germany, Israel, and The Netherlands). However, these activities appear to relate to the merits, rather than to jurisdictional facts. See *id.* (noting how pre-action disclosure focuses on the merits of the case). Interestingly, a defendant in English court may in some cases be entitled to request that the claimant disclose the documents referred to in the particulars of claim (the initial pleadings filed by the claimant) before the defendant is required to assert a jurisdictional defense. See *Kurz v. Stella Musical Veranstaltungen GmbH*, [1992] Ch. 196 (Engl.) (concerning German defendant); see also HILL, *supra* note 107, ¶ 7.2.6 ("Whereas a request for disclosure of documents referred to in the particulars of claim does not amount to submission, the position is different if the application is for disclosure of all the documents relevant to the substantive issue . . .").

152. Although no English cases discuss this particular issue, the Federal Court of Australia has recently considered the possibility of jurisdictional discovery under a service out provision somewhat similar to that of the CPR. Federal Court Rules, Order 8, R. 2–3 (Austl.) (noting when and how originating process may be served outside Australia); *id.* Order 9, R. 7 (concerning set-aside procedures). In *Armcel Pty Ltd. v. Smurfit Stone Container Corp.*, the Federal Court not only denied service out, but also denied the plaintiff the ability to seek disclosure or discovery that would help it meet its burden, stating that the interests of international comity meant "a foreign defendant served outside Australia should not lightly be subjected to the jurisdiction of this Court, but more importantly should not have imposed upon him one of the Court's compulsory processes in aid of establishing the jurisdiction itself." *Armcel Pty Ltd. v. Smurfit Stone Container Corp.*, [2007] F.C.A. 1928, ¶ 8 (Austl.) (citing *News Corp. Ltd. v. Lenfest Commc'ns Inc.*, [1996] 40 N.S.W.L.R. 250, 261 (Giles, J.) (Austl.)); see also *Armcel Pty Ltd. v. Smurfit Stone Container Corp.*, [2008] F.C.A. 592, ¶¶ 43–55 (Austl.) (regarding whether a prima facie case was made as part of the service out request concerning subject matter jurisdiction). Canada seems to take an intermediary position, with many provinces permitting plaintiffs to cross-examine defendants on any affidavits submitted in support of a motion to dismiss for lack of jurisdiction. See CHASE ET AL., *supra* note 90, at 522–23 (regarding Canadian legislation).

153. See BRIGGS & REES, *supra* note 102, at 403–08 (discussing how English courts approach jurisdictional disputes).

consequences that will ensue should the necessary behavior not be forthcoming) that each party provide full and frank disclosure of relevant information. The type of problems considered most problematic from a U.S. lawyer's perspective—intentional omissions of relevant information and finely parsed phrases obscuring the truth of the matter—do not arise in the English system because such omissions violate the requisite duty to provide complete and honest disclosure to the courts.<sup>154</sup>

As the preceding demonstrates, jurisdictional discovery is entirely alien to the English legal system, despite significant similarities between it and the U.S. federal system in terms of goals and fundamental principles regarding civil procedure.<sup>155</sup> Therefore, it can be said that jurisdictional discovery is not the only way to establish jurisdictional facts, even in legal systems that adopt a notice pleading standard, encourage the free flow of information between parties prior to trial, and advocate the "just, speedy, and inexpensive determination of every action and proceeding."<sup>156</sup>

Furthermore, there are significant problems with the way that U.S. federal courts invoke jurisdictional discovery in practice. These issues are discussed further in the following sections.

### *III. Standards and Scope Regarding Jurisdictional Discovery*

Jurisdictional discovery, as it currently exists, faces two major problems: (1) nebulous standards regarding when jurisdictional discovery should be ordered; and (2) vague guidelines regarding the proper scope of jurisdictional discovery.<sup>157</sup> Each of these issues is taken in turn.

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154. See *Tajik Aluminium Plant v. Ermatov*, [2006] EWHC 2374 (Comm.), [123] (Eng.) (describing the duty of candor that is required in the English system and the penalties that may result from any sort of nondisclosure).

155. See *supra* notes 142–54 and accompanying text (comparing how the English and U.S. legal systems treat jurisdictional challenges).

156. See FED. R. CIV. P. 1 (stating that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"); *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 310 (S.D. Ind. 1997) (emphasizing the purpose of discovery under the Federal Rules); see also *supra* notes 93–100 and accompanying text (discussing the similarities between the policies and procedures governing jurisdictional matters in England and the United States).

157. These issues were the subject of a 2004 petition for certiorari. See *Petition for Writ of Certiorari, Dever v. Hentzen Coatings, Inc.*, 543 U.S. 1147 (2005) (No. 04-730) (petitioning the Supreme Court to consider issues surrounding the standards and scope of jurisdictional discovery).

### A. Standards Regarding Whether to Grant Jurisdictional Discovery

According to the Supreme Court decision in *Oppenheimer Fund, Inc. v. Sanders*, "where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."<sup>158</sup> However, there is no consensus regarding the circumstances in which jurisdictional discovery will be granted.<sup>159</sup> Several concepts are bandied about by courts, but the precise meaning behind those words is murky, and it is difficult, if not impossible, for parties to anticipate the outcome of any particular dispute.<sup>160</sup> As a result of such ambiguities, plaintiffs are more inclined to request broad discovery,<sup>161</sup> which eviscerates the protective principle underlying judicial restraint in matters where jurisdiction is in doubt.<sup>162</sup>

#### 1. The Various Standards at Issue

As discussed above, jurisdictional discovery has developed to the point where trial courts are now considered to have broad discretion to decide whether to grant jurisdictional discovery and on what terms.<sup>163</sup> Procedurally,

158. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978).

159. *See* *Mother Doe I v. Al Maktoum*, 632 F. Supp. 2d 1130, 1144 (S.D. Fla. 2007) ("The standards for permitting jurisdictional discovery vary by circuit."); *see also Ellis*, 175 F.R.D. at 312 (outlining various standards courts have applied when determining whether to limit or deny discovery on jurisdictional issues); *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1074 (8th Cir. 2004) (noting the court's discretion in allowing jurisdictional discovery). The extent of problems regarding circuit splits and the lack of useful guidelines is glossed over by one of the leading treatises on this subject. *See* 4 WRIGHT & MILLER, *supra* note 81, § 1067.6 (discussing burden of meeting minimum contacts standard).

160. *See* Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound's Structural Solution*, 15 J. L. & POL. 515, 524–25 (1999) (noting increased judicial discretion leads to less predictability in law).

161. *See* Easterbrook, *supra* note 1, at 643–44 ("The principal facilitators of impositional discovery requests are rules . . . that make everything relevant and nothing dispositive. Such approaches engender endless search . . . for something that may turn out to be useful, once lawyers learn what the tribunal thinks important.").

162. *See* CASAD & RICHMAN, *supra* note 21, at 13 (noting how U.S. practice can impinge on "the very right the jurisdictional basis requirements are designed to protect: the right not to have to litigate that case in that forum").

163. *See supra* notes 30–83 and accompanying text (discussing the history of jurisdictional discovery in the United States and the current rules governing the discovery process); *Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1160 (D. Nev. 2009) ("The Court has broad discretion in deciding whether to grant jurisdictional discovery."); 10 FED. PROC., L. ED. § 26:120 ("A court is vested with broad discretion in determining whether discovery should be allowed on the issue of whether personal jurisdiction exists in an action."); 4 WRIGHT & MILLER, *supra* note 81, § 1067.6 (discussing the various approaches by the courts when dealing with

"[t]he party seeking discovery [typically the plaintiff] bears the burden of showing its necessity"<sup>164</sup> as well as the ultimate burden of demonstrating that the jurisdiction of the court is proper.<sup>165</sup> However, the plaintiff does not need to outline its jurisdictional facts until the defendant has put them into issue through some sort of challenge.<sup>166</sup> This is precisely opposite to the approach used in England, where the claimant has to demonstrate grounds for the jurisdiction of the court before obtaining permission to serve out of the jurisdiction.<sup>167</sup>

Thus, the question in this section is what the party seeking discovery must show to demonstrate the need for jurisdictional discovery. This is different than the standard needed to establish that jurisdiction does, in fact, exist.<sup>168</sup>

No national consensus exists regarding the standards for granting jurisdictional discovery.<sup>169</sup> Instead, each district court follows the precedent in

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jurisdictional discovery issues).

164. *Freeman v. United States*, 556 F.3d 326 (5th Cir. 2009); *see also* 10 FED. PROC., L. ED., § 26:120 ("In order to get jurisdictional discovery, a plaintiff must have at least a good faith belief that such discovery will enable it to show that the court has personal jurisdiction over the defendant, and must reasonably demonstrate that it can supplement its jurisdictional allegations through discovery."); 4 WRIGHT & MILLER, *supra* note 81, § 1067.6 (discussing the shifting burdens which accompany the jurisdictional discovery inquiry).

165. *See Maersk, Inc. v. Neevra, Inc.*, 554 F. Supp. 2d 424, 440 (S.D.N.Y. 2008) (stating that the plaintiff bears the burden of establishing the court's jurisdiction over the defendant); 10 FED. PROC., L. ED., *supra* note 163, § 26:120 ("A plaintiff must make out a prima facie case for personal jurisdiction before being allowed to conduct discovery on the issue."); 4 WRIGHT & MILLER, *supra* note 81, § 1067.6 (discussing the shifting burdens which accompany the jurisdictional discovery inquiry).

166. *See, e.g., Hagen v. U-Haul Co. of Tenn.*, 613 F. Supp. 2d 986, 1001 (W.D. Tenn. 2009) ("The burden of establishing the existence of personal jurisdiction lies with the party asserting such jurisdiction, i.e. the plaintiff. Although, a plaintiff is only required to meet this burden when challenged by a motion under Rule 12(b)(2) . . ."); *Hansen v. Neumueller GmbH*, 163 F.R.D. 471, 474–75 (D. Del. 1995) (noting Rule 8 does not require plaintiffs to state grounds on which personal jurisdiction is alleged and that the plaintiff's pleading burden changes once the defendant challenges personal jurisdiction).

167. *See supra* notes 111–41 and accompanying text (discussing standards regarding English jurisdiction).

168. Cases that discuss jurisdictional discovery sometimes confuse two different standards. *See, e.g., Metcalfe v. Renaissance Marine, Inc.* 566 F.3d 324, 330–36 (3d Cir. 2009) (distinguishing between granting the opportunity to conduct jurisdictional discovery and making a final determination with respect to jurisdiction); *Maersk, Inc.*, 554 F. Supp. 2d at 440 (demonstrating that courts discussing jurisdictional discovery sometimes confuse the two different standards). For a discussion of the standard of proof needed to establish jurisdiction (as opposed to that needed to obtain jurisdictional discovery), *see Clermont, supra* note 2, at 984–86.

169. *See Mother Doe I v. Al Maktoum*, 632 F. Supp. 2d 1130, 1144 (S.D. Fla. 2007) ("The standards for permitting jurisdictional discovery vary by circuit."); *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 312 (S.D. Ind. 1997) (outlining various standards courts have applied when

its own circuit to the best of its ability, assuming that some sort of standard has been enunciated.<sup>170</sup> Often the judicial discussions revolve around whether a prima facie showing of jurisdiction must first be made or not.<sup>171</sup>

For example, "the standard for permitting jurisdictional discovery is 'quite liberal' in the D.C. Circuit," in that "a plaintiff need not make out a prima facie case of jurisdiction before obtaining jurisdictional discovery."<sup>172</sup> The Fifth Circuit also appears to embrace a relatively low threshold showing, based on statements in various decisions that a qualified right to jurisdictional discovery exists.<sup>173</sup> The Eleventh Circuit also speaks of a qualified right to jurisdictional discovery.<sup>174</sup> At least one decision claims that the Second Circuit follows a similarly permissive approach, suggesting that courts there may order jurisdictional discovery "where plaintiff made less than a prima facie showing but 'made a sufficient start toward establishing personal jurisdiction.'"<sup>175</sup>

Other decisions state that both the Second and Seventh Circuits are supposedly among those jurisdictions that require the plaintiff to establish a prima facie case before jurisdictional discovery will be permitted.<sup>176</sup> Similarly, courts in the Third Circuit have stated that "[a]s a general rule, courts are wary

determining whether to limit or deny discovery on jurisdictional issues); *Hansen*, 163 F.R.D. at 475 ("While it is not entirely clear how much evidence is required, there must be *some* competent evidence to demonstrate that personal jurisdiction over the defendant might exist before allowing discovery to proceed."). In 2004, certiorari was sought from the Supreme Court on this precise issue. *See* Petition for Writ of Certiorari, *Dever v. Hentzen Coatings, Inc.*, 543 U.S. 1147 (2005) (No. 04-730) (noting circuit conflict "regarding when a district court should grant a plaintiff the right to conduct jurisdictional discovery to defend a motion to dismiss for lack of personal jurisdiction").

170. *See Mother Doe I*, 632 F. Supp. 2d at 1144 (recognizing that the standards governing jurisdictional discovery are not uniform within the circuits).

171. The emphasis on a prima facie showing dates back to the early 1970s and beyond. *J.E.C.*, *supra* note 2, at 534.

172. *Mother Doe I*, 632 F. Supp. 2d at 1144.

173. *See id.* at 1145 (listing several cases decided in the Fifth Circuit that reaffirm the qualified right to jurisdictional discovery).

174. *See Eaton v. Dorchester Dev., Inc.*, 632 F.2d 727, 729 n.7 (11th Cir. 1982) (discussing the benefits of jurisdictional discovery which support the finding that such discovery should be considered a qualified right). The Eleventh Circuit is also said to vary its approach according to the factual records presented by the plaintiff and by the method and timing of the discovery request. *See Mother Doe I*, 632 F. Supp. 2d at 1145 ("Two reported decisions of the Eleventh Circuit address the issue of jurisdictional discovery, with varying outcomes based primarily on the records presented in each case.").

175. *Hollins v. U.S. Tennis Ass'n*, 469 F. Supp. 2d 67, 70 (E.D.N.Y. 2006) (quoting *Uebler v. Boss Media*, 363 F. Supp. 2d 499, 506 (E.D.N.Y. 2005)).

176. *See Mother Doe I*, 632 F. Supp. 2d at 1145 ("In contrast, the Second and Seventh Circuits require that a plaintiff first establish a prima facie case of jurisdiction over the defendant before the plaintiff is entitled to jurisdictional discovery.").

of allowing discovery absent *some* showing of personal jurisdictional facts if a defendant has challenged plaintiff's assertion of personal jurisdiction over him, because basic fact-finding should precede discovery."<sup>177</sup>

What constitutes a prima facie showing—let alone a lower-than-prima-facie showing—is not clear. Some courts that permit discovery even in the absence of a prima facie showing have stated that they look for "a colorable claim of jurisdiction."<sup>178</sup> Other courts have stated that so long as the plaintiff's claims regarding personal jurisdiction are not "clearly frivolous," the court "should ordinarily allow discovery on jurisdiction in order to aid the plaintiff" in discharging its burden of proof in establishing jurisdiction.<sup>179</sup> The reason this "threshold showing" to obtain jurisdictional discovery is "relatively low" goes back to the basic principle that "[a]s a general matter, discovery . . . should be freely permitted"<sup>180</sup> as being "consistent with both the purpose of the due process requirement of minimum contacts and the district court's obligation to control discovery under Rule 26(b)(2)."<sup>181</sup>

These are very plaintiff-friendly rules, and at first blush it would seem unlikely that a request for jurisdictional discovery would ever be denied. However, some are. For example, a request for discovery that is "based on

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177. See *Hansen v. Neumueller*, 163 F.R.D. 471, 474 (D. Del. 1995) (citing cases adopting the prima facie standard); *Shanks v. Wexner*, No. 02-7671, 2003 WL 1343018, at \*2 (E.D. Pa. Mar. 18, 2003) (citing the prima facie standard but noting that the law "is not clear as to what a Court should consider in deciding whether the Plaintiff has met this burden").

178. *Hollins*, 469 F. Supp. 2d at 70 (citing *Ayyash v. Bank Al-Madina*, No. 04 Civ. 9201 (GEL), 2006 WL 587342, at \*5 (S.D.N.Y. Mar. 9, 2006)). But see *Hansen*, 163 F.R.D. at 475 ("[A] court cannot permit discovery as a matter of course simply because a plaintiff has named a particular party as a defendant.").

179. See, e.g., *Metcalfe v. Renaissance Marine, Inc.*, 566 F.3d 324, 336 (3d Cir. 2009) ("We have explained that if 'the plaintiff's claim is not clearly frivolous as to the basis for personal jurisdiction, the district court should ordinarily allow discovery on jurisdiction in order to aid the plaintiff in discharging that burden.'" (quoting *Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances*, 723 F.2d 357, 362 (3d Cir. 1983))); *Regan v. Loewenstein*, 292 F. App'x 200, 205 (3d Cir. 2008) (stating that "[j]urisdictional discovery should be allowed unless the plaintiff's claim is 'clearly frivolous,' which might be the case if a plaintiff makes 'a mere unsupported allegation that the defendant 'transacts business' in an area'" and holding that the alleged physical presence of defendants during occasional concerts is "plainly not a 'continuous and systematic' contact" (citations omitted)); *CASAD & RICHMAN*, *supra* note 21, at 10 (stating that "[t]he plaintiff normally will be afforded an opportunity for discovery" before any evidentiary hearings are held and noting various presumptions and inferences made in plaintiff's favor).

180. *Blair v. City of Worcester*, 922 F.3d 105, 111 (1st Cir. 2008); *Ticketreserve, Inc. v. Viagogo, Inc.*, 656 F. Supp. 2d 775, 782 (N.D. Ill. 2009) ("At minimum, the plaintiff must establish a prima facie showing of personal jurisdiction before discovery will be permitted."); *Edmond v. U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 425 (D.C. Cir. 1991).

181. *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 312 (S.D. Ind. 1997).

little more than a hunch that it might yield jurisdictionally relevant facts" may be properly denied.<sup>182</sup> Similarly, a claim of personal jurisdiction that appears to be both "attenuated and based on bare allegations in the face of specific denials made by defendants"<sup>183</sup> will not suffice to support an order of jurisdictional discovery in the Ninth Circuit, at least when there has been no showing that further discovery would assist in demonstrating that personal jurisdiction existed.

## 2. Procedures and Presumptions

Not only are the relevant standards very pro-plaintiff, but so, too, are the procedures and presumptions surrounding the decision whether to grant jurisdictional discovery. For example, courts typically agree that they must accept the plaintiff's factual allegations as true and construe disputed facts in favor of the plaintiff, although this position is not universally adopted.<sup>184</sup> Thus, "[d]iscovery may be appropriately granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary."<sup>185</sup>

Of course, some plaintiffs may not even wish to seek discovery, since at least one court has stated that "[p]laintiffs may rely entirely on allegations of fact, and they will prevail even if the moving party makes contrary allegations which controvert their prima facie case."<sup>186</sup> This is contrary to the approach

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182. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (holding the district court did not abuse its discretion by denying plaintiff's request for jurisdictional discovery); *see also* *Mayer & Sigler*, *supra* note 53, at 109 (noting "[d]iscovery should not be allowed when the lack of personal jurisdiction is clear, since such discovery would serve no purpose").

183. *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1023 (Fed. Cir. 2009).

184. *See, e.g., Metcalfe*, 566 F.3d at 330 ("It is well established that in deciding a motion to dismiss for lack of jurisdiction, a court is required to accept the plaintiff's allegations as true, and is to construe disputed facts in favor of the plaintiff." (quoting *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 457 (3d Cir. 2003))). *But see* *Hansen v. Neumueller*, 163 F.R.D. 471, 476 (D. Del. 1995) ("This Court is *not* bound to accept as true the allegations in plaintiff's complaint for the purposes of determining whether plaintiff has made a minimal showing so as to entitle him to discovery on the issue of personal jurisdiction.").

185. *Boschetto*, 539 F.3d at 1020 (concluding plaintiff did not provide enough pertinent facts necessary to grant jurisdictional discovery); *accord Blair*, 522 F.3d at 111 (noting that "where a plaintiff can demonstrate the existence of a plausible factual disagreement or ambiguity, our jurisprudence favors permitting the litigants the opportunity to flesh out the record"); *Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1160 (D. Nev. 2009) (concluding that "the Court should grant discovery when the jurisdictional facts are contested or more facts are needed").

186. *Hollins v. U.S. Tennis Ass'n*, 469 F. Supp. 2d 67, 70 (E.D.N.Y. 2006) (noting that the district court can order "jurisdictional discovery where plaintiff made less than a prima facie



taken in England, where claimants must provide some evidentiary support along with their request to serve out of the jurisdiction.<sup>187</sup>

Plaintiffs seeking discovery must also show that the requested material is likely to produce facts that would preclude dismissal of the defendant.<sup>188</sup> Although the scope of discovery is discussed in the following section, it appears clear that a request that bears no relationship to relevant jurisdictional facts will not be granted.<sup>189</sup>

Other presumptions relate to the relationship between the parties, though again the case law reflects some divergence. For example, some courts have indicated that "where the facts necessary to establish personal jurisdiction . . . lie exclusively within the defendant's knowledge," discovery will typically be permitted.<sup>190</sup> Furthermore, jurisdictional discovery has been said to be "particularly appropriate where the defendant is a corporation," since the plaintiff—as a "total stranger" to the defendant—"should not be required . . . to try such an issue [i.e., jurisdiction] on affidavits without the benefit of full discovery."<sup>191</sup>

Alternatively, some courts note that not all corporate defendants can be considered strangers to the plaintiff.<sup>192</sup> Thus, "[i]n cases based on alleged contracts between the parties, it would be an unusual case where the plaintiff

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showing but made a sufficient start toward establishing personal jurisdiction"). In these cases, the jurisdictional issues will be considered during the trial on the merits, though "[t]his approach is somewhat anomalous," in that, even if the case is then dismissed after trial on the merits, "the defendant will have lost much of the very right the jurisdictional basis requirements are designed to protect: the right not to have to litigate that case in that forum." *CASAD & RICHMAN*, *supra* note 21, at 13.

187. *See supra* notes 111–41 and accompanying text (discussing English law and procedure).

188. *See Freeman v. United States*, 556 F.3d 326, 342 (5th Cir. 2009) (noting "a party is not entitled to jurisdictional discovery if the record shows that the requested discovery is not likely to produce the facts needed to withstand" a motion to dismiss).

189. *See infra* notes 209–32 and accompanying text (discussing the scope of discovery).

190. *Hollins*, 469 F. Supp. 2d at 71 (quoting *Winston & Strawn v. Dong Won Sec. Co.*, No. 02 Civ. 0183(RWS), 2002 WL 31444625, at \*5 (S.D.N.Y. Nov. 1, 2002)).

191. *Metcalf v. Renaissance Marine, Inc.*, 566 F.3d 324, 336 (3d Cir. 2009) (citing *Surpitski v. Hughes-Keenan Corp.*, 362 F.2d 254, 255–56 (1st Cir. 1966)); *accord* *Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances*, 723 F.2d 357, 362 (3d Cir. 1983) ("The condemnation of plaintiff's proposed further activities as a 'fishing expedition' was unwarranted. When the fish is identified, and the question is whether it is in the pond, we know no reason to deny a plaintiff the customary license."); *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 312 n.3 (S.D. Ind. 1997) (distinguishing a contractual relationship from the "total stranger" situation); *Hansen v. Neumueller*, 163 F.R.D. 471, 474 (D. Del. 1995) (concluding that there is a "presumption in favor of allowing discovery to establish personal jurisdiction").

192. *See Ellis*, 175 F.R.D. at 312 (noting that a corporate defendant is not a stranger to the plaintiff when the lawsuit arises out of a contractual relationship).

should need discovery to show specific jurisdiction linking the defendant and the controversy to the forum," since the plaintiff should be in possession of the necessary facts.<sup>193</sup>

Courts are also split as to whether a formal request for jurisdictional discovery needs to be made.<sup>194</sup> In the Ninth and Eleventh Circuits, for example, "it is not necessarily an abuse of discretion to reject a request for jurisdictional discovery because no formal motion was made."<sup>195</sup> However, the Third Circuit has adopted a much more lenient position on what constitutes a request for jurisdictional discovery, apparently taking the view that the plaintiff need do no more than "mention the possibility of conducting such discovery in their opposition to the motion to dismiss."<sup>196</sup>

### 3. *The Effect of a Standard Based Largely on Judicial Discretion*

Obviously, the current approach to jurisdictional discovery vests a great deal of discretion in trial judges, an approach that has, until now, often been considered a good thing. However, commentators have begun to criticize this type of approach to fact-finding. For example, Professor Robert Bone has recently noted that "[i]f we were not so accustomed to broad trial judge discretion over procedure, we would probably think it a rather strange way to manage the litigation environment."<sup>197</sup> He, with others, believes that judges are quite probably not in the best position to make decisions of this nature.<sup>198</sup> Instead:

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193. *Id.*

194. *See, e.g., id.* (outlining various standards applied by courts); *Mother Doe I v. Al Maktoum*, 632 F. Supp. 2d 1130, 1146 (S.D. Fla. 2007) ("The decision to allow jurisdictional discovery is very much a product of the timing and nature of any jurisdictional discovery request.").

195. *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1022 (Fed. Cir. 2009); *see also* *United Tech. Corp. v. Mazer*, 556 F.3d 1260, 1280–81 (11th Cir. 2009) (noting "UTC should have taken every step possible to signal to the district court its immediate need for such discovery"); *Mother Doe I*, 632 F. Supp. 2d at 1144 (noting delay of nearly a year); *Metcalfe*, 566 F.3d at 341 (Stapleton, C.J., dissenting) (concluding that the plaintiffs "never requested jurisdictional discovery in the District Court, and it would clearly be unfair to [the defendant] to allow them to successfully insist upon it in the course of this appeal").

196. *Metcalfe*, 566 F.3d at 336 n.9; *see also* *Ciulli v. Iravani*, 625 F. Supp. 2d 276, 292 (E.D. Pa. 2009) (noting that "many jurisdictional facts are in the exclusive control of the defendant and that, without the benefit of discovery, the plaintiff may be unable to meet his burden in establishing personal jurisdiction").

197. Bone, *Who Decides*, *supra* note 99, at 1963.

198. *See id.* at 1963–64 (noting "bounded rationality, information access obstacles, and strategic interaction effects frustrate case-specific decision-making"); Easterbrook, *supra* note 1,

committee-based rulemakers are often in a better position to evaluate the options and craft stricter rules that do a superior job across the class of cases to which they apply. Accordingly, rulemakers should be much more skeptical of delegating discretion to trial judges and should seriously consider adopting rules that limit or channel discovery more aggressively.<sup>199</sup>

Furthermore, to the extent that certain issues "are sufficiently homogeneous to fit a protocol, the better approach would be to codify the protocol. Doing so would ease the burden on trial judges and reduce the risk of mistakes."<sup>200</sup>

There appear to be at least three reasons why broad judicial discretion in matters of discovery has continued unabated. First, discretion may be considered necessary for fostering judicial roles regarding case management and settlement promotion.<sup>201</sup> Second, reliance on judicial discretion allows rulemakers—some of whom may be subject to political pressures—to avoid making difficult decisions regarding standards in civil procedure.<sup>202</sup> Third, judges dominate the Civil Rules Advisory Committee, and judges tend to embrace judicial discretion.<sup>203</sup>

However, not one of these rationales appears to be a good reason to continue to grant unbridled discretion in matters of jurisdictional discovery, particularly since jurisdictional discovery involves complex, multi-factored analyses relating to ever-changing standards regarding the jurisdiction of courts.<sup>204</sup> A system that permits excessive judicial discretion—either by choice or as a result of legal standards that are so vast and nebulous as to provide no realistic guidance to parties or courts as to the basis of the legal determination to be made—fails to meet the standards required by the rule of law.<sup>205</sup>

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at 647–48 ("Moving supervision from judges to magistrates, or magistrates to judges, will not help much; neither can detect problematic requests, so that neither supervision nor sanctions will make a dent in the problem.").

199. Bone, *Who Decides*, *supra* note 99, at 1964.

200. *Id.* at 1995.

201. *See id.* at 1974 (noting "it is very likely that reliance on discretion is partly a byproduct of the enthusiasm for case management and settlement promotion").

202. *See id.* ("[D]elegating discretion allows rulemakers to dodge difficult and controversial normative choices by handing them to trial judges in individual cases, where they are less transparent and less likely to trigger public debate.").

203. *See id.* ("[J]udges have come to dominate membership on the Civil Rules Advisory Committee in recent years and judges tend to favor broad discretion."); Burbank & Silberman, *supra* note 77, at 701 ("[I]t was in the 1970's that federal judges came to dominate the membership of the Civil Rules Advisory Committee.").

204. *See infra* notes 209–309 and accompanying text (discussing the complexity of jurisdictional discovery).

205. *See* LON L. FULLER, *THE MORALITY OF LAW* 47–48 (1964) (criticizing ad hoc or

Later, this Article discusses different ways to address the problem of discretion in jurisdictional discovery.<sup>206</sup> However, as the preceding discussion shows, it is necessary to provide courts and parties with more realistic guidelines and boundaries regarding the circumstances in which jurisdictional discovery will be granted.<sup>207</sup>

## B. *The Scope of Jurisdictional Discovery*

### 1. *Jurisdictional Discovery in Theory*

The second problem associated with jurisdictional discovery involves the scope of discovery. Though standard catchwords are often used to describe the type and extent of discovery that is permitted, deeper investigation shows that there is no real understanding of what is appropriate in any particular set of circumstances.<sup>208</sup>

Authorities agree that the party requesting discovery must be specific in what it seeks and that "amorphous" or "general" discovery requests will be denied.<sup>209</sup> The most typical judicial provisos are that jurisdictional discovery is to be "narrowly tailored" and "limited" in nature, although the precise definition of the term "limited" does not appear to have ever been discussed.<sup>210</sup> Two alternatives exist. First, the term could be used relatively, as compared to the

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inconsistent adjudication); Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 854 (1989) ("If we fashion rules of law—substantive or procedural—that are too vague and leave too much to the decisionmaker's exercise of discretion, they will tend to produce inconsistent decisions.").

206. See *infra* notes 310–438 and accompanying text (discussing different ways to create a more structured and predictable system). As with Professor Bone, this Article does not intend to eliminate discretion entirely but simply to create a more structured and predictable system. Bone, *Who Decides*, *supra* note 99, at 1965 (indicating he does not intend to forestall all discretion).

207. See *infra* notes 310–438 (discussing the practical problems with jurisdictional discovery and suggesting proposals).

208. See *infra* notes 310–44 (discussing the problematic aspects of jurisdictional discovery).

209. See, e.g., *Freeman v. United States*, 556 F.3d 326, 342–43 (5th Cir. 2009) (noting that vague discovery requests will be denied); 4 WRIGHT & MILLER, *supra* note 81, § 1067.6 (discussing the procedural aspects of personal jurisdiction and plaintiff's burden to state specific facts to demonstrate a need for discovery).

210. See, e.g., *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 457 (3d Cir. 2006) (concluding that limited discovery would shed light on whether the exercise of personal jurisdiction is appropriate); *Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790, 792 (6th Cir. 1996) (noting that the district court allowed limited jurisdictional discovery).

nearly unlimited scope of merits-based discovery.<sup>211</sup> Second, it could be used objectively, meaning a small amount, viewed from a reasonable person's perspective.<sup>212</sup> The first definition is more likely to justify the current approach to discovery—which, as discussed below, can be extensive—but it is at least equally likely that the original architects of jurisdictional discovery meant the latter definition to apply.<sup>213</sup> If that is true, then current practices violate the intended rule.

Furthermore, discovery requests must be shaped so as to be likely to produce information relevant to the jurisdictional inquiry.<sup>214</sup> However, as shall be seen in the next section, the need to tailor the discovery to the inquiry at hand tends to win out over the edict that the discovery be of a "limited" nature, resulting in extremely wide-ranging requests.<sup>215</sup>

Courts are not required to reform discovery requests to help them meet the necessary requirements.<sup>216</sup> Nevertheless, some courts have taken extensive affirmative steps to help the plaintiff formulate acceptable discovery requests.<sup>217</sup> Not only do such efforts create circuit splits regarding local practice (contrary to the enunciated goals of the recent amendments to the discovery provisions of the Federal Rules of Civil Procedure),<sup>218</sup> but they also skew an already pro-plaintiff process even more heavily to one side.

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211. See *infra* notes 223–309 (discussing jurisdictional discovery in practice).

212. See *supra* notes 30–38 and accompanying text (discussing modifications that limit discovery).

213. See *supra* notes 30–83 and accompanying text (discussing original drafters' views and early interpretation of the Federal Rules); see also *infra* notes 233–309 and accompanying text (discussing the extensive nature of jurisdictional discovery today).

214. See, e.g., *Freeman*, 556 F.3d at 342 ("[A] party is not entitled to jurisdictional discovery if the record shows that the requested discovery is not likely to produce the facts needed to withstand a Rule 12(b)(1) motion."); *NuTone, Inc. v. Jakel, Inc.*, No. 8:07CV305, 2009 WL 1974441, at \*2 (D. Neb. July 6, 2009) ("To determine if a matter is discoverable, the analysis requires the court to first determine whether the sought discovery is relevant to a claim.").

215. See *infra* notes 230–309 and accompanying text (discussing how the different jurisdictional discovery standards lead to wide-ranging discovery requests).

216. See, e.g., *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (interpreting plaintiff's discovery request narrowly and holding that the district court did not abuse their discretion by refusing jurisdictional discovery).

217. See *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1022 (Fed. Cir. 2009) (noting "the district court attempted to contact counsel for Autogenomics to advise him of how to properly request jurisdictional discovery"); see also *PowerStation, LLC v. Sorensen Research & Dev. Trust*, No. 6:07-cv-4167-RBH, 2008 WL 5431165, at \*2 (D.S.C. Dec. 31, 2008) (noting that parties should attempt to agree on the scope of discovery, but the court is available to assist if problems arise).

218. See *supra* note 20 and accompanying text (discussing how the 2000 amendments should have helped assuage the difficulties many lawyers experienced with discovery).

Some courts require the parties to agree on the scope of jurisdictional discovery between themselves, but there are times when a judge must step in to make a ruling on contested issues.<sup>219</sup> For example, a defendant might lodge an objection based on burdensomeness.<sup>220</sup> In such cases, courts may require plaintiffs to use less-intrusive processes, such as interrogatories instead of depositions and/or document production, to make the procedure easier on the defendant.<sup>221</sup> Courts will also curtail or deny jurisdictional discovery if plaintiffs have access to the relevant facts through other means.<sup>222</sup>

In theory, the standards regarding the scope of jurisdictional discovery appear reasonable. It is only in practice that the problems come to light, as discussed in the next section.

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219. See, e.g., *In re Chocolate Confectionary Antitrust Lit.*, 602 F. Supp. 2d 538, 573 n.39 (M.D. Pa. 2009) ("The court expects that the parties will meet and confer to tailor all jurisdictional discovery to the issues raised in this memorandum."). Notably, the transaction costs associated with obtaining an agreement on the scope of discovery may be high. See Brazil, *Adversary Character*, *supra* note 1, at 1346 (noting that attempts to obtain broad discovery can be costly and attempts to limit the agreement's scope will be frustrated by the adversarial relationship). Furthermore, judges may very well not have the requisite degree of knowledge, early in the case, to limit jurisdictional discovery in any useful way. See *id.* at 1347 (noting that unless there are "major changes in the adversary rules that shape the pretrial environment, there can be no effective judicial control of discovery"); *infra* notes 312–44 and accompanying text (discussing how broad judicial discretion fails to result in truly narrow jurisdictional discovery).

220. See FED. R. CIV. P. 26(b)(2)(C) ("On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit . . .").

221. See, e.g., *Cram v. Elec. Data Sys. Corp.*, No. 07cv1842-LAB, 2008 WL 115438, at \*2 (S.D. Cal. Jan. 8, 2008) (noting that "the Court shall limit not only the scope and duration of jurisdictional discovery, but also shall restrict the discovery method to the use of interrogatories only, in the interest of judicial economy").

222. For example, some documents or facts may be available through public sources. See, e.g., *D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft, Inc.*, 566 F.3d 94, 100 (3d Cir. 2009) (noting publicly available information on jurisdictional contacts); *Mother Doe I v. Al Maktoum*, 632 F. Supp. 2d 1130, 1146 (S.D. Fla. 2007) ("Much of the information gathered by Plaintiffs concerning Defendants' contacts with the United States comes from publicly-available documents, websites, and news accounts."). Alternatively, the plaintiff may have conducted discovery of the defendant in an earlier litigation. See *Wiwa v. Shell Petroleum Dev. Co. of Nig. Ltd.*, 335 F. App'x 81, 81–83 (2d Cir. 2009) (noting that earlier discovery must be on point regarding the jurisdictional issues).

## 2. Jurisdictional Discovery in Practice

When fashioning an order for jurisdictional discovery, courts explicitly tie the scope of discovery to the relevant jurisdictional inquiry.<sup>223</sup> This approach is supposed to limit the amount of discovery needed and decrease the burden on the defendant, particularly in situations when the court's jurisdiction has not yet been fully established.<sup>224</sup> However, many of the factual issues in a jurisdictional inquiry cannot be answered through a few simple questions. In many cases, neither the parties nor the courts know precisely what combination of facts will tip the balance in one direction or the other.<sup>225</sup>

This result occurs because the law regarding jurisdiction has, over the last thirty years, become increasingly complex and fact-intensive, creating something of a "perfect storm" for discovery abuse and problematic exercises of discretion.<sup>226</sup> Most of the key cases regarding the constitutional scope of federal jurisdiction over the person—seminal decisions such as *World-Wide Volkswagen Corp.*, *Burger King Corp.*, and *Asahi Metal Industry Co.*—arose after the 1978 U.S. Supreme Court decision in *Oppenheimer* that ostensibly legitimized jurisdictional discovery as a procedural device in U.S. federal courts.<sup>227</sup> Similarly, the law regarding certain aspects of subject matter

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223. See, e.g., *Freeman v. United States*, 556 F.3d 326, 342 (5th Cir. 2009) ("Even if we assume that some relevant jurisdictional fact may not be available outside of discovery, plaintiffs have not made the requisite showing entitling them to such discovery."); *NuTone, Inc. v. Jakel, Inc.*, No. 8:07CV305, 2009 WL 1974441, at \*2 (D. Neb. July 6, 2009) (limiting the scope of discovery to matters relating to the court's exercise of personal jurisdiction over the third-party defendant, a citizen of Japan); Swanson, *supra* note 2, at 482 ("In any judicial consideration of whether to grant jurisdictional discovery, the first step for the court is to clearly understand the plaintiff's jurisdictional claim.")

224. See, e.g., *NuTone*, 2009 WL 1974441, at \*2 ("Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.")

225. See *id.* (discussing the need to include "any matter that could bear on, or that reasonably could lead to other matter that could bear on the jurisdictional discovery issues")

226. See, e.g., EPSTEIN ET AL., *supra* note 15, § 3.06 ("In advising the client whether the U.S. courts provide a proper jurisdictional basis to adjudicate the dispute, the lawyer is faced with reconciling the myriad of standards and concepts developed by the Supreme Court in the past fifty-plus years since *International Shoe Co. v. Washington*"); Easterbrook, *supra* note 1, at 644 (noting difficulties associated with discovery of fact-intensive issues).

227. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 106 (1987) (determining whether the defendant, a Japanese corporation, had minimum contacts with the state of California); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464–66 (1985) (examining the structure of Burger King's business operations to determine where the corporation was subject to personal jurisdiction); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–15 (1984) (describing the analytic framework for when a court may assert personal jurisdiction over a foreign corporation); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S.

jurisdiction—particularly that addressing citizenship of juridical entities—has become increasingly complex in recent years.<sup>228</sup>

Because the Supreme Court has not addressed the matter since 1978, lower federal courts have had to meld the pro-plaintiff, pro-discovery presumptions enunciated in *Oppenheimer* (as read) with the increasingly expansive definitions of jurisdictionally relevant factors described in opinions on federal jurisdiction.<sup>229</sup> Lacking any theoretical principles that would allow a more restrictive approach and operating on a case-by-case basis, ever cognizant of the possibility of being overturned on appeal, district judges have tended to exercise their discretion to the fullest extent possible, allowing discovery on any fact that might possibly be relevant to the question of jurisdiction.<sup>230</sup> As a result, jurisdictional discovery has become extremely wide-ranging and comprehensive, despite the edict that jurisdictional discovery is to be limited in nature.<sup>231</sup>

A comprehensive discussion of the many nuances regarding jurisdiction in the federal courts is beyond the scope of this Article.<sup>232</sup> However, it is sufficient for the purposes of the current discussion to outline the types of facts

286, 295 (1980) (discerning a "total absence" of contacts between the defendant car dealership and the forum state); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."). Only one key case on federal jurisdiction predates *Oppenheimer*. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (creating the minimum contacts test for personal jurisdiction).

228. See, e.g., *Wachovia Bank v. Schmidt*, 546 U.S. 303, 306 (2006) (determining the citizenship of a federally chartered national bank for diversity purposes); *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 588–90 (2004) (Ginsburg, J., dissenting) (debating whether both limited and general partners' citizenship should be considered in determining a partnership's citizenship in a diversity case); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195–96 (1990) (reaffirming the rule that the citizenship of all members of a partnership must be considered in determining whether complete diversity exists); *Boustead v. Barancik*, 151 F.R.D. 102, 104–05 (E.D. Wis. 1993) (using the "nerve center" test to determine a corporation's principal place of business for purposes of diversity jurisdiction).

229. See *Oppenheimer*, 437 U.S. at 351 n.12 ("The court should and ordinarily does interpret 'relevant' very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation."); see, e.g., *Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1160 (D. Nev. 2009) (construing the relevant jurisdictional inquiry expansively as "parallel[ing] the discovery required for the merits of the case").

230. See *Bone, Who Decides*, *supra* note 99, at 1974 ("[J]udges tend to favor broad discretion.").

231. See *infra* notes 233–306 and accompanying text (discussing the increasing scope of discovery in the areas of personal jurisdiction, in rem and quasi in rem jurisdiction, and subject matter jurisdiction).

232. Further reading is readily available. See, e.g., EPSTEIN ET AL., *supra* note 15, §§ 5.01–6.09 (providing an in-depth analysis of issues relating to jurisdiction in the federal courts).



and issues that could be made the subject of a request for jurisdictional discovery, since this demonstrates the truly burdensome nature of current practice in this area of law.

*a. Personal Jurisdiction*

Personal jurisdiction is often the first issue that comes to mind when one considers the need for jurisdictional discovery, though it is by no means the only area of inquiry.<sup>233</sup> However, discovery regarding personal jurisdiction is particularly complicated because courts must consider both legislative and constitutional authority when deciding whether personal jurisdiction exists over a party.<sup>234</sup> Each type of authority is discussed in turn.

*(1) Legislative Authority*

Legislative authority for personal jurisdiction may exist in one or more forms. First, courts may rely on a long-arm statute enacted by the state in which the federal court sits and "adopt" it into use through Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure.<sup>235</sup> Second, courts can depend on any jurisdictional grants contained in any substantive federal law on which the plaintiff relies.<sup>236</sup> Third, courts faced with defendants from outside the United States can look to Rule 4(k)(2), which creates a type of federal long-arm statute in certain federal question cases.<sup>237</sup>

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233. See *infra* notes 292–309 and accompanying text (considering jurisdictional discovery as it relates to in rem and quasi in rem jurisdiction and subject matter jurisdiction).

234. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 290–91 (1980) (describing the two-prong test for personal jurisdiction, requiring analysis of (1) the forum state's long-arm statute and (2) the jurisdictional limits of the United States Constitution).

235. See FED. R. CIV. P. 4(k)(1)(A) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.").

236. FED. R. CIV. P. 4(k)(1)(C) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: . . . (C) when authorized by a federal statute.").

237. FED. R. CIV. P. 4(k)(2) (noting that personal jurisdiction is available in federal question cases when "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction" and "exercising jurisdiction is consistent with the United States Constitution and laws"); Jeffrey R. Armstrong, *Guaranteed Jurisdiction: The Emerging Role of Fed. R. Civ. P. 4(k)(2) in the Acquisition of Personal Jurisdiction of Foreign Nationals in Internet Intellectual Property Disputes*, 5 MINN. INTELL. PROP. REV. 63, 71 (2003) (noting that federal courts interpret this rule expansively). For the author's discussion of the special international issues relating to Rule 4(k)(2), see Strong, *supra* note 3.

The most striking problem with jurisdictional discovery that arises in the context of federal courts' legislative authority involves state long-arm statutes, particularly those that use a "laundry list" approach to jurisdiction that enumerates the specific activities that permit personal jurisdiction over the defendant.<sup>238</sup> In some instances, these statutes require federal courts to undertake complex, fact-specific jurisdictional analyses that mimic the type of inquiries that must be made on the merits.<sup>239</sup>

For example, some state long-arm statutes assert jurisdiction over defendants based on principles of agency or corporate law.<sup>240</sup> Thus, jurisdictional discovery might be sought in a federal court regarding the existence or scope of an agency relationship or regarding the extent to which an affiliate acted as the alter ego of another corporate entity because the state long-arm statute will allow jurisdiction over a defendant on those grounds.<sup>241</sup>

These issues are not only quite broad, giving rise to extensive (and expensive) discovery, but they also go to the defendant's liability on the merits.<sup>242</sup> As such, the defendant is burdened by having to consider merits-based arguments even in advance of any determination on jurisdiction.<sup>243</sup>

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238. State long-arm statutes typically take one of two approaches: (1) an expansive view that permits jurisdiction to the fullest extent permitted by the Constitution (or sometimes both the United States Constitution and the state constitution); or (2) a narrower view that lists the circumstances in which personal jurisdiction may be asserted. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (2004) (extending jurisdiction to the full extent of state and federal constitutional limits); N.Y. C.P.L.R § 302 (2009) (using the enumerated grounds approach); UTAH CODE ANN. § 78B-3-201 (2008) (extending jurisdiction to the full extent of the federal Constitution).

239. *See* CASAD & RICHMAN, *supra* note 21, at 14–15 (suggesting various ways to resolve jurisdictional issues that are also substantive in nature); *see also* Eaton v. Dorchester Dev., Inc., 692 F.2d 727, 733 (11th Cir. 1982) (noting cases in which jurisdictional issues are intertwined with the merits).

240. *See* EPSTEIN ET AL., *supra* note 15, § 6.06 (cataloging cases in which courts used principles of agency or corporate law to assert personal jurisdiction over foreign corporations).

241. *See, e.g.*, Anderson v. Dassault Aviation, 361 F.3d 449, 452–55 (8th Cir. 2004) (concluding from an analysis of the corporate relationship that the Arkansas business activities of the defendant corporation's wholly owned subsidiary impute to the defendant for jurisdictional purposes); Doe v. Unocal Corp., 248 F.3d 915, 925–31 (9th Cir. 2001) (exploring the corporate relationship between a parent corporation and a subsidiary to determine whether the alter ego exception to the separate entity rule applied and whether the subsidiary was acting as an agent of the parent corporation).

242. *See, e.g.*, Tex. Int'l Magnetics, Inc. v. BASF Aktiengesellschaft, 31 Fed. App'x 738, 739–40 (2d Cir. 2002) (ordering jurisdictional discovery regarding successor liability, regardless of the fact that the jurisdictional issues merged with the merits); Freres v. SPI Pharma, Inc., 629 F. Supp. 2d 374, 383–86 (D. Del. 2009) (applying analysis based on agency jurisdiction).

243. Proponents of jurisdictional discovery may argue that defendants cannot hide problematic documents at any stage of the proceedings, and that therefore there is no downside to early disclosure so long as the documents are relevant to the jurisdictional issue. However,

Furthermore, the plaintiff receives the benefit of early discovery of the defendant's documents and information at a stage when the defendant is not in a position to request similar discovery in return.<sup>244</sup>

Another problematic type of federal jurisdiction based on state or federal legislative authority involves allegations of a conspiracy involving the defendant. "Conspiracy jurisdiction"<sup>245</sup> is in some ways even more troubling than jurisdiction based on agency or corporate law because the ties between the parties and the forum are even more attenuated and nuanced than in cases involving corporate or agency relationships (and thus more difficult to establish through limited discovery).<sup>246</sup> Furthermore, conspiracy jurisdiction reflects the same problems as jurisdiction based on theories involving agency or corporate liability, in that it involves early disclosure of numerous facts that are intimately associated with liability on the merits.<sup>247</sup>

Additionally, there are jurisprudential issues to consider. Numerous courts and commentators have identified the impropriety of attributing the

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defendants are also asked to respond to interrogatories and submit to depositions as part of jurisdictional discovery. Failure to consider the defense on the merits, even at such an early stage, can lead to major difficulties should the case continue to the merits. *See* Brazil, *Adversary Character*, *supra* note 1, at 1308–09 (noting tactical uses of early discovery efforts).

244. Ordinarily, discovery by both the plaintiff and defendant proceeds simultaneously, subject to rules regarding automatic disclosure and the timing of the discovery conference. *See* FED. R. CIV. P. 26(a)(1), (d), (f) (governing initial disclosures, timing and sequence of discovery, the conference of the parties, and planning for discovery). However, a party who has disputed the jurisdiction of the court may not take any affirmative steps on the merits, including discovery of the other party, lest the jurisdictional objections be considered waived. *See* 4 WRIGHT & MILLER, *supra* note 81, § 1344 (discussing waiver of defenses under Rule 12); *see also* Frank's Casing Crew & Rental Tools, Inc. v. PMR Tech., Ltd., 292 F.3d 1363, 1371–72 (Fed. Cir. 2002) (concluding that the defendant waived its personal jurisdiction defense by attempting to join new parties on claims unrelated to the underlying action).

245. Conspiracy jurisdiction can be based on state long-arm statutes made applicable in federal court through Rule 4 of the Federal Rules of Civil Procedure or it can be based on a jurisdiction-granting federal statute such as the Racketeer Influenced and Corrupt Organizations Act (RICO). *See, e.g.*, Noble Sec., Inc. v. MIZ Eng'g, Ltd., 611 F. Supp. 2d 513, 538–41, 548–53 (E.D. Va. 2009) (discussing state long-arm jurisdiction and RICO jurisdiction); Hollins v. U.S. Tennis Ass'n, 469 F. Supp. 2d 67, 72 (E.D.N.Y. 2006) (analyzing the defendant international tennis organization's ties to the forum state based in part on its connections with other defendant domestic tennis organizations operating in the state). Courts also may need to undertake jurisdictional discovery regarding subject matter jurisdiction under RICO. *See* Wiwa v. Shell Petroleum Dev. Co. of Nig., 335 F. App'x 81, 83 (2d Cir. 2009) (noting that the RICO subject matter jurisdiction discovery that occurred in related actions did not include information relevant to personal jurisdiction over the defendant).

246. *See* Noble Sec., 611 F. Supp. 2d at 536–38 (outlining numerous facts alleged to assert conspiracy jurisdiction).

247. *See, e.g., id.* (listing detailed facts that the plaintiff wished to later use to establish guilt).

jurisdictional contacts of one defendant to another.<sup>248</sup> Indeed, the U.S. Supreme Court stated in *Hanson v. Denckla* that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."<sup>249</sup> However, this edict has not halted the development of either of these types of jurisdiction,<sup>250</sup> nor has it affected the amount or type of jurisdictional discovery that can be requested to establish the necessary jurisdictional facts.

What appears clear is that jurisdictional discovery will likely be considered highly appropriate in these types of cases because the relevant facts are typically in the exclusive control of the defendant.<sup>251</sup> However, courts may find it challenging to craft a narrow discovery order concerning jurisdiction, since the issues mirror those of liability.<sup>252</sup> In some cases, the court has given up on the task altogether and instead has permitted the plaintiff to address jurisdictional issues as part of the regular course of discovery rather than try to

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248. See, e.g., *McMullen v. Eur. Adoption Consultants, Inc.*, 109 F. Supp. 2d 417, 421 (W.D. Pa. 2000) (stating that the defendant adoption agency's contacts with the forum state were not relevant in determining whether the court could assert personal jurisdiction over the agency's director); *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 313 (S.D. Ind. 1997) ("Although Ms. Lake's late husband might have had sufficient contacts with Indiana, that does not mean that she does. Personal jurisdiction is, after all, specific to the person."); Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 *FORDHAM L. REV.* 234, 235–36 (1983) ("Courts facing this proposed wedding of liability and jurisdiction law have responded in a variety of ways, ranging from unexamined acceptance to complete rejection.").

249. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); see also *Noble Sec.*, 611 F. Supp. 2d at 539 (stating that a defendant must purposefully avail itself of the benefits of doing business in the forum state to be subject to the personal jurisdiction).

250. No hard and fast rules exist regarding what will suffice to permit courts to exercise jurisdiction of this nature. See *Hanson*, 357 U.S. at 253 ("The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . ."); *Noble Sec.*, 611 F. Supp. 2d at 539–40 (discussing courts' increasing willingness to recognize conspiracy jurisdiction); Althouse, *supra* note 248, at 241–43 ("As a result of both the basic assumption that the theory exists and its case-by-case application, the standards governing it have been built up by accretion.").

251. See Althouse, *supra* note 248, at 248–49 ("It is difficult before discovery for a plaintiff to come forward with detailed allegations about something as inherently hidden as conspiracy.").

252. See *id.* at 248–50 ("When conspiracy theory underlies the jurisdiction issue, however, that discovery may be coextensive with the discovery on the merits and may involve hotly contested issues central to the plaintiff's cause of action."). It is possible that merging jurisdictional discovery with merits-based discovery constitutes a violation of due process rights, although that issue is outside the scope of this Article. See *id.* at 257 ("If submission of the conspiracy-jurisdiction question to the court results in its merger with the trial on the merits and no serious threshold scrutiny [sic], the defendant's due process rights are relegated to the scant protection available in the default process.").

issue a suitably limited jurisdictional discovery order.<sup>253</sup> This, of course, has the effect of putting the defendant through the burden of broad discovery before the question of jurisdiction is even settled, an approach that violates the protective principle encouraging judicial restraint in matters wherein jurisdiction is in doubt.<sup>254</sup>

Even if jurisdictional discovery is ordered on these issues, the inquiry is quite broad as a result of the vast scope of relevant jurisdictional facts. For example, a party seeking to assert jurisdiction over a defendant because of its alleged corporate contacts with a defendant properly in the jurisdiction could request depositions on the following topics:

- (1) Defendants' activities in forming Freedom Wireless, Freedom Strategic, and the Nevada Partnerships.
- (2) The responsibilities and activities of each Individual Defendant in connection with raising investor money and overseeing the 067 patent litigation.
- (3) Defendants [sic] ownership interest in Freedom Wireless, Freedom Strategic, and the Partnerships.
- (4) Defendants [sic] communications with Nevada investors.
- (5) Defendants [sic] business activities in Nevada, including the identity of documents signed by Defendants that relate to Nevada activities.
- (6) Defendants [sic] activities in arranging and participating in the November 26, 2007 meeting described in Plaintiff Johnson's affidavit.
- (7) Defendants [sic] solicitations, communications, and meetings with potential and actual Nevada investors.
- (8) The dates and circumstances under which Defendants have been present in Nevada.<sup>255</sup>

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253. See *Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1160 (D. Nev. 2009) (ordering jurisdictional discovery regarding the fiduciary shield doctrine to be joined with merits discovery on grounds of efficiency).

254. See *CASAD & RICHMAN*, *supra* note 21, at 13 (noting how this practice can impinge on "the very right the jurisdictional basis requirements are designed to protect: the right not to have to litigate that case in that forum").

255. Exhibit A to Plaintiffs' Preliminary Opposition to Motion to Dismiss for Lack of

The same plaintiff could simultaneously seek to obtain the following documents, using a broad definition of the term "document" that includes both print and electronic material:<sup>256</sup>

- (1) All documents regarding the formation of Freedom Wireless, Freedom Strategic, and the Nevada Partnerships.
- (2) All documents that Freedom Wireless, Freedom Strategic, and any of the Partnerships have filed with the State of Nevada, or any of its governmental subdivisions, since their inceptions. This request includes, but is not limited to, all annual lists required to be filed by Freedom Strategic and Freedom Wireless under N.R.S. 86.263 and N.R.S. 78.150.

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Personal Jurisdiction and Motion to Conduct Jurisdictional Discovery at 1, *Klein*, 595 F. Supp. 2d 1152 (No. 2:08-cv-01369-PMP-PAL).

256. Document requests typically define "documents" by incorporating the "same broad meaning as in Rule 34 of the Federal Rules of Civil Procedure" and including, by way of example rather than limitation:

letters, electronic mail (email), tape recordings, video and audio recording, reports, agreements, communications including intracompany communications, correspondence, telegrams, memoranda, summaries, forecasts, photographs, micrographics, models, statistical statements, graphs, schematics, circuit diagrams, software and firmware and printouts of instructions contained therein, flow charts, state diagrams, engineering specifications, hardware specifications, software and firmware specifications, requirements specifications, systems specifications, assembly drawings, system guides, engineering reports and notebooks, charts, results of tests, plans, drawings, minutes or records of meetings including project team and directors' meetings minutes or records of conferences, project development timelines, expressions or statements of policy, lists of persons attending meetings or conferences, customer lists, reports and/or summaries of interviews, reports and/or summaries of investigations, opinions or reports of consultants, appraisals, records, reports or summaries of negotiations, brochures, pamphlets, advertisements, circulars, trade letters, press releases, drafts of any documents, revisions of drafts of any documents, cancelled checks, bank statements, invoices, receipts and originals of promissory notes, surveys, computer printouts, computer disks and all other electronic or magnetic storage media.

Exhibit A to Declaration of Matthew S. Jorgenson in Support of Plaintiff Synthes' Motion to Compel Jurisdictional Discovery at 1–2, *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico*, 2007 WL 2238900 (S.D. Cal. Aug. 2, 2007) (No. 3:07-cv-00309-L-AJB); *see also* FED. R. CIV. P. 34 (including "any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form"). Furthermore, any documents with mark-ups that are "not a part of the original text" are considered separate documents, and attachments to any item are considered part of the document. *Id.*

- (3) All agreements among any of the Individual Defendants that relate to the 067 patent litigation.
- (4) All employment or compensation agreements between the Individual Defendants on the one hand and Freedom Strategic or Freedom Wireless on the other hand.
- (5) All documents that reflect compensation or other remuneration paid by Freedom Strategic, Freedom Wireless, or the Partnerships on the one hand to any of the Individual Defendants on the other hand from the inception of each entity.
- (6) All documents that reflect any of the Individual Defendants' individual ownership or control interests in Freedom Strategic, Freedom Wireless, or the Partnerships from the inception of each entity.
- (7) All documents used by the Defendants to solicit investment for the partnerships.
- (8) A list of the names and address [sic] of each Nevada resident who invested in a Partnership.
- (9) A list of the names and address [sic] of each Nevada resident who was solicited for a Partnership investment but who did not invest. This request also includes providing copies of all correspondence and written communications with the potential Nevada investors.
- (10) The complete file for each Nevada investor including all correspondence and documents circulated between the investor and Defendants.
- (11) All documents signed by any Defendant in connection with business in Nevada, including, for example, leases, bank accounts, hotel facilities, document storage, compliance with Nevada corporation, LLC, and Partnership laws, and compliance with Nevada tax laws.
- (12) All documents to which any Defendant is a party that provides for application of Nevada law.
- (13) Calendars, expense reports, plane tickets, and hotel receipts that show the date of each business visit by Defendants to Nevada regardless of whether personal activities were mixed with business activities.

- (14) The billing records for each Nevada law firm employed by the Defendants for any matter other than this lawsuit and the Crown litigation.
- (15) A list of the names and addresses of each Nevada person hired by Defendants for any full or part-time work. This request includes copies of all documents that will show the nature of the work or services provided.
- (16) The pleadings from all litigation in Nevada court to which defendants have been a party (exclusive of those in this case and the Crown litigation).
- (17) Documents showing the dates and amount of money raised from Nevada investors.<sup>257</sup>

The court in question granted both the deposition and document production requests in full.<sup>258</sup>

Even without an in-depth understanding of the underlying litigation, one can see how these discovery orders require defendants to undertake extensive efforts to produce the necessary persons and documents. Furthermore, this example is by no means unusual in its scope. Other jurisdictional discovery requests in this area of law are similarly broad.<sup>259</sup> One party has even gone so far as to argue that personal jurisdiction should be based on "equitable grounds," although the request was denied.<sup>260</sup>

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257. Exhibit B to Plaintiffs' Preliminary Opposition to Motion to Dismiss for Lack of Personal Jurisdiction and Motion to Conduct Jurisdictional Discovery at 1–2, *Klein*, 595 F. Supp. 2d 1152 (No. 2:08-cv-01369-PMP-PAL).

258. See *Klein*, 595 F. Supp. 2d at 1160 ("Although jurisdictional issues might increase the scope of discovery to some extent, granting jurisdictional discovery separate from general discovery would be inefficient. The Court therefore orders the parties to consider jurisdictional issues in the regular course of discovery.").

259. See, e.g., *N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 18 (1st Cir. 2009) (noting possibility of agency or joint venture jurisdiction); *D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.* 566 F.3d 94, 108–09 (3d Cir. 2009) (describing elements of agency jurisdiction); *Noble Sec., Inc. v. MIZ Eng'g, Ltd.*, 611 F. Supp. 2d 513, 536–38 (E.D. Va. 2009) (outlining facts associated with conspiracy jurisdiction); *Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 442–51 (S.D.N.Y. 2008) (discussing factual issues involved in conspiracy and agency jurisdiction); *In re Terrorist Attacks on Sept. 11, 2001*, 440 F. Supp. 2d 281, 285–87 (S.D.N.Y. 2006) (concerning conspiracy jurisdiction); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 307 F. Supp. 2d 145, 157–58 (D. Me. 2004) (concerning conspiracy jurisdiction).

260. See *MIZ Eng'g, Ltd.*, 611 F. Supp. 2d at 545–46 ("Noble has provided no case law to support its arguments that equitable grounds may serve as the sole basis for personal jurisdiction. In addition, none of these arguments have any merit.").



(2) *Constitutional Authority*

Legislative authority for federal jurisdiction is only one part of the analysis. Federal courts must also undertake a constitutional inquiry into the propriety of exercising jurisdiction over the defendant.<sup>261</sup>

The central inquiry is one of fairness, which "recognizes both the practical expenses and burdens of subjecting a party to a lawsuit in a distant court and the sometimes substantial differences among the laws of the several states."<sup>262</sup> Although the fundamental test regarding the extent of constitutional limits of federal courts was enunciated in 1945 in *International Shoe Co. v. Washington* (i.e., the "minimum contacts" test),<sup>263</sup> no one thought at the time to consider the decision's impact on jurisdictional discovery, quite possibly for the simple reason that jurisdictional discovery had not yet even begun to develop.<sup>264</sup> Furthermore, when jurisdictional discovery began to achieve some legitimacy in the 1970s, courts and commentators failed to consider how a purposefully vague and highly fact-specific constitutional analysis<sup>265</sup> would affect jurisdictional discovery—something that was, in retrospect, a bit of an oversight.<sup>266</sup>

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261. See EPSTEIN ET AL., *supra* note 15, § 6.04 (examining issues that may arise when addressing the constitutional prong of the personal jurisdiction inquiry, including minimum contacts, general and specific jurisdiction, transient jurisdiction, and virtual jurisdiction). One area where change with respect to constitutional limits is occurring rapidly involves internet jurisdiction. Although a discussion of these issues is beyond the scope of this Article, it is interesting to see how courts and commentators have struggled (often unsuccessfully) to deal with fact patterns that do not easily fit into traditional models of jurisdiction. See, e.g., *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (suggesting a need for a deferential approach to jurisdictional discovery in internet cases); INTERNET JURISDICTION SUB-COMM., AMERICAN BAR ASS'N, GLOBAL INTERNET JURISDICTION: THE ABA/ICC SURVEY *passim* (2004), available at [http://meetings.abanet.org/webupload/commupload/CL320060/newsletterpubs/ABA\\_Jurisdiction\\_Survey\\_Results\\_2004.pdf](http://meetings.abanet.org/webupload/commupload/CL320060/newsletterpubs/ABA_Jurisdiction_Survey_Results_2004.pdf) (cataloging results from a survey examining "the practical effects of Internet jurisdiction on companies worldwide"); Anderson, *supra* note 2, at 474–75 (discussing the "seminal" case of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)); Armstrong, *supra* note 237, at 66–69, 83–85 (discussing appropriate jurisdictional standard in internet cases).

262. *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 311 (S.D. Ind. 1997).

263. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (noting "due process requires only that . . . to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

264. See *supra* notes 30–83 and accompanying text (regarding historical development).

265. See, e.g., *Int'l Shoe Co.*, 326 U.S. at 319 (noting that the adjudication of personal jurisdiction "cannot be simply mechanical or quantitative").

266. See, e.g., *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353–54 (1978) (deciding that discovery rules are not the proper tool for obtaining the names and addresses of the class

The other reason why *International Shoe* did not raise any alarms regarding any nascent right to jurisdictional discovery relates to the way in which the minimum contacts test was viewed and implemented at the time.<sup>267</sup> Although federal cases had been growing in size and complexity since the 1940s,<sup>268</sup> the effects of increased national and international commerce and travel had not yet been felt at the highest levels of the judiciary.<sup>269</sup> That would not happen until the 1980s, with a string of cases beginning with *World-Wide Volkswagen Corp. v. Woodson*.<sup>270</sup>

Ever since *World-Wide Volkswagen* was handed down, the Supreme Court and lower federal courts have struggled to provide an appropriate definition of minimum contacts with the forum.<sup>271</sup> Some attempts to clarify the test have been made—primarily by differentiating between general jurisdiction and

members in a class action); J.E.C., *supra* note 2, *passim* (failing to discuss the minimum contacts test).

267. See Silberman, *supra* note 90, at 755–56 (claiming the test in *International Shoe* was and remains relatively easy to implement).

268. See Bone, Twombly, *supra* note 60, at 895–96 ("The 1938 drafters' choices also made pragmatic sense in light of the way litigation actually worked in the early twentieth century. Many cases were rather small affairs; the huge, complex case of today was relatively unknown."); see also Brazil, *Adversary Character*, *supra* note 1, at 1307 ("Since 1962 there has been a staggering rate of inflation in all aspects of litigation-related costs, including attorneys' fees, transportation, document reproduction, and transcripts of oral depositions.").

269. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (addressing the conflict between the "increasing nationalization of commerce" and the "economic interdependence of the States . . . desired by the Framers").

270. See *id.* at 286, 295 (noting that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause;" instead, courts must find "purposeful contacts" and the "reasonable" exercise of jurisdiction).

271. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112–13 (1987) (agreeing that the two-part test in *International Shoe* should be applied but failing to provide a clear description of whether minimum contacts requires the defendant to "purposefully direct" its conduct toward the forum); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985) (requiring exercise of jurisdiction to be reasonable); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 413–15 (1984) (distinguishing between specific and general jurisdiction); EPSTEIN ET AL., *supra* note 15, § 6-14.1 ("Despite the Supreme Court's numerous attempts to identify the minimum contacts required to establish personal jurisdiction, a definitive standard remains elusive."); LAWRENCE W. NEWMAN & MICHAEL BURROWS, *THE PRACTICE OF INTERNATIONAL LITIGATION* III-104 (JurisNet, LLC) (2009) ("The extent to which a foreign defendant who places goods into the 'stream of commerce' in the United States is subject to jurisdiction in United States courts is unclear."); Linda J. Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 578 (1991) ("Admittedly, the *International Shoe* test produced a rather unclear constitutional standard, although later Supreme Court cases introduced additional refinements such as a requirement that the defendant not only have 'contacts,' but that they be 'purposeful' contacts and that the defendant intentionally direct activity toward the forum.").

specific jurisdiction<sup>272</sup>—but this development had nothing to do with easing the burden of jurisdictional discovery on defendants.<sup>273</sup> Indeed, the ability to argue both jurisdictional grounds, in the alternative, means that defendants often need to produce information in response to requests regarding both types of jurisdiction.<sup>274</sup>

The current constitutional inquiry constitutes a multi-factor, fact-specific inquiry that provides little or no guidance as to what facts or factors are most persuasive.<sup>275</sup> The central features of what is fair, just, and reasonable in a constitutional due process analysis involve highly subjective, natural law principles, which makes the jurisdictional discovery process extremely difficult and involved.<sup>276</sup> Even if the parameters of the minimum contacts test itself could be discerned and narrowed, the analysis—and the realm of discoverable facts—would nevertheless be subsequently expanded by the need for courts to determine that the exercise of jurisdiction is "reasonable" through the use of various "gestalt factors."<sup>277</sup> Notably, reasonableness inquiries can both expand

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272. See *Helicopteros Nacionales de Colom., S.A.*, 466 U.S. at 413–15 (distinguishing between specific and general jurisdiction). General jurisdiction looks at whether the defendant has established some sort of "presence" in the forum through "continuous and systematic" business activity within the relevant territory, whereas specific jurisdiction looks at claims that "arise out of" or "relate to" a defendant's activity in that forum. *Id.*

273. See EPSTEIN ET AL., *supra* note 15, § 6.04.2 (noting that instead "[t]he distinction arose as an analytical device to distinguish the degree of contact with the forum in any given case"). Slight differences in approach exist, depending on whether the claim involves tort claims, including product liability, or contract claims. See, e.g., *Asahi*, 480 U.S. at 112 (regarding tort and contract claims related to the sale of valves for tire tubes); *Burger King*, 471 U.S. at 478–79 (regarding contract claims relating to a franchise agreement); *World-Wide Volkswagen*, 444 U.S. at 297–98 (regarding tort and contract claims relating to the manufacture and sale of automobiles).

274. See, e.g., *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico*, 563 F.3d 1285, 1291 (Fed. Cir. 2009) ("[T]he court performed a due process analysis considering contacts between GMReis and the nation as a whole pursuant to Rule 4(k)(2). The court considered the nation as the forum for its analysis of both general and specific jurisdiction." (citations omitted)).

275. See Easterbrook, *supra* note 1, at 643–44 ("If we want to cope with the 'problem' of discovery, we must do away with multi-factor standards, replacing them with rules that call for inquiry into a limited number of objectively ascertainable facts."); Silberman, *supra* note 90, at 759 (noting the minimum contacts test looks at "the level of contacts required depend[ing] on the particular nature of the claim, the type of litigation, and possibly the parties").

276. See Silberman, *supra* note 90, at 763 (comparing the European approach to the Supreme Court's need to "reach for some natural justice principle brooding omnipresent in the sky"); Silberman, *supra* note 271, at 572 (noting "Justice Scalia's concern that 'this subjective standard, . . . necessarily involves a detailed factual inquiry for a question that should be settled quickly and at the outset of the litigation'").

277. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (listing factors courts may consider to "establish the reasonableness of jurisdiction"); *United States v. Swiss Am.*

and contract a court's jurisdiction, so they are an important part of the current constitutional analysis.<sup>278</sup>

The types of facts that can be relevant to a constitutional inquiry regarding personal jurisdiction are virtually innumerable.<sup>279</sup> However, a typical jurisdictional discovery request regarding both general and specific jurisdiction might include a request for the following documents:<sup>280</sup>

- (1) All documents relating to the sale of any GMReis product to any person or entity in the United States. . . .
- (2) All documents relating to the sale of GMReis products to a veterinary medical supply company located in Massachusetts. . . .
- (3) All documents relating to any discussions, negotiations, inquiries, offers or communications occurring, in whole or in part, in the United States relating to the purchase, sale, possible purchase or possible sale of GMReis products. . . .
- (4) All documents relating to any discussions, negotiations, inquiries, offers or communications relating to the purchase, sale, possible

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Bank, Ltd., 274 F.3d 610, 635 (1st Cir. 2001) (Lipez, J., dissenting) ("Even if they do not alter the constitutional balance, the gestalt factors can be important in determining whether the plaintiff's jurisdictional showing is 'colorable' enough to support a request for jurisdictional discovery."); *Tom's of Me. v. Acme-Hardesty Co.*, 247 F.R.D. 235, 239 (D. Me. 2008) ("[A]n exercise of jurisdiction must not offend traditional notions of fair play and justice as measured by a collection of 'gestalt factors.'"); EPSTEIN ET AL., *supra* note 15, § 6.01 (discussing the constitutional requirement of an "overall reasonableness test" when "reviewing questions of in personam jurisdiction"); NEWMAN & BURROWS, *supra* note 271, at III-105 ("The court found that 'exceptional circumstances' justified a stay, based on a number of factors, including the following: (1) the similarity of the two actions; (2) the promotion of judicial efficiency; (3) the adequacy of the relief available in the alternative forum . . ."); Silberman, *supra* note 271, at 579-81 (noting the bifurcated approach to reasonableness is "certain to cause mischief" and result in "increased transaction costs that are inappropriate for issues which need to be determined quickly and efficiently at the outset of litigation"). Professor Linda Silberman favors a clear rule approach to jurisdiction that avoids "a 'reasonableness' inquiry in every situation." *Id.* at 576.

278. See Silberman, *supra* note 271, at 579 n.49 (noting Justice Brennan's "two roles for 'reasonableness'" inquiries).

279. See, for example, *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 312 (S.D. Ind. 1997), claiming that "[i]n cases based on alleged contracts between the parties, it would be an unusual case where the plaintiff should need discovery to show specific jurisdiction linking the defendant and the controversy to the forum" because the plaintiff should already be in possession of the necessary facts. However, discovery could still be sought to establish specific jurisdiction outside the contractual setting. See *id.* at 311 ("It is well established that a federal district court has the power to require a defendant to respond to discovery requests relevant to his or her motion to dismiss for lack of personal jurisdiction.")

280. Again, "documents" are defined very broadly. *Supra* note 256.

purchase or possible sale, in the United States, of GMReis products. . . .

- (5) All documents relating to any discussions, negotiations, inquires, offers or communications relating to the purchase, sale, possible purchase or possible sale of GMReis products involving any person in the United States. . . .
- (6) All documents concerning any discussions, negotiations, inquiries, offers or communications occurring in San Diego, California relating to the purchase, sale, possible purchase or possible sale of GMReis products. . . .
- (7) All documents relating to the February 2007 American Association of Orthopaedic Surgeons Annual Meeting in San Diego, California. . . .
- (8) Documents sufficient to show what products were displayed by GMReis at the February 2007 American Association of Orthopaedic Surgeons Annual Meeting in San Diego, California. . . .
- (9) All documents and information, including product literature, displayed or distributed at the February 2007 American Association of Orthopaedic Surgeons Annual Meeting in San Diego, California. . . .
- (10) All communications with any individual or entity that visited the GMReis booth at the February 2007 American Association of Orthopaedic Surgeons Annual Meeting in San Diego, California and all documents related thereto. . . .
- (11) All documents concerning any Trade Show in the United States attended by GMReis. . . .
- (12) Documents sufficient to show what products were displayed by GMReis at any Trade Show in the United States. . . .
- (13) All documents and information, including product literature, displayed or distributed at any Trade Show in the United States. . . .
- (14) All communications with any individual or entity that visited the GMReis booth or display area at any Trade Show in the United States. . . .

- (15) All documents relating to the transport of GMReis products into and out of the United States in February 2007 including, without limitation, customs forms. . . .
- (16) All documents relating to the transport of GMReis products into and out of the United States at any time including, without limitation, customs forms. . . .
- (17) All documents, including drafts, related to or that form the basis for any statements made in the April 4, 2007 declaration of Geraldo Marins Dos Reis, Jr. . . .
- (18) All documents, including drafts, related to or that form the basis for any statements made in the April 4, 2007 declaration of Jose Luiz Landa Lecumberri. . . .
- (19) All documents relating to or concerning U.S. Patent No. 7,128,744.<sup>281</sup>

The plaintiff in this dispute also sought discovery of a Rule 30(b)(6)<sup>282</sup> witness on the following subjects:

- (1) GMReis' attendance at the February 2007 American Association of Orthopaedic Surgeons Annual Meeting in San Diego, California.
- (2) Communications regarding GMReis' products with anyone who visited the GMReis booth at the February 2007 American Association of Orthopaedic Surgeons Annual Meeting in San Diego, California, both during the meeting and subsequently.
- (3) The sale of any GMReis product to anyone who attended the February 2007 American Association of Orthopaedic Surgeons Annual Meeting in San Diego, California.
- (4) Any discussions, negotiations, inquiries, offers or communications relating to the purchase, sale, possible purchase or possible sale of GMReis products with any individual or entity that attended the February 2007 American Association of Orthopaedic Surgeons Annual Meeting in San Diego, California.

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281. Exhibit A to declaration of Matthew S. Jorgenson in Support of Plaintiff Synthes' Motion to Compel Jurisdictional Discovery Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico, 563 F.3d 1285 (Fed. Cir. 2009) (No. 07-CV-309-L-AJB).

282. See FED. R. CIV. P. 30(b)(6) (describing the procedures necessary when a notice or subpoena is directed to an organization for a deposition).

- (5) GMReis' attendance at any Trade Show in the United States.
- (6) Communications regarding GMReis products with anyone who visited the GMReis booth or display area at any Trade Show in the United States, both during the Trade Show and subsequently.
- (7) The sale of any GMReis product to anyone who attended a Trade Show in the United States.
- (8) Any discussions, negotiations, inquiries, offers or communications relating to any purchase, sale, possible purchase or possible sale of GMReis products with any individual or entity that attended a Trade Show in the United States.
- (9) The sale of any GMReis product (1) in the United States or (2) to any individual or entity in the United States.
- (10) The transport of any GMReis products into the United States at any time.
- (11) Any discussions, negotiations, inquiries, offers or communications occurring, in whole or in part, in the United States relating to the purchase, sale, possible purchase or possible sale of GMReis products.
- (12) Any discussions, negotiations, inquiries, offers or communications relating to the purchase, sale, possible purchase or possible sale, in the United States, of GMReis products.
- (13) Any discussions, negotiations, inquiries, offers or communications relating to the purchase, sale, possible purchase or possible sale of GMReis products involving any person in the United States at the time of said discussions, negotiations, inquiries, offers or communications.
- (14) The subject matters addressed in the April 4, 2007 declaration of Geraldo Marins Dos Reis, Jr. and the April 4, 2007 declaration of Jose Luiz Landa Lecumberri.<sup>283</sup>

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283. Exhibit B to declaration of Matthew S. Jorgenson in Support of Plaintiff Synthes' Motion to Compel Jurisdictional Discovery, *Synthes*, 563 F.3d 1285 (No. 07-CV-309-L-AJB).

Depositions of two named individuals were sought as well.<sup>284</sup> The court granted both the document and deposition requests in full.<sup>285</sup>

This example is by no means unusual. Other jurisdictional discovery requests in this area of law are similarly broad.<sup>286</sup> Some go even further, requesting information concerning:

- (1) the physical presence of the defendant and/or its employees, agents or independent contractors in the forum, including but not limited, to any offices maintained in the forum, the presence and activities of any general or limited-purpose agent who is resident or operates in the forum, and/or any travel (regardless of duration or purpose) of the defendant and/or its employees in the forum;
- (2) any and all assets of the defendant in the forum, including but not limited to, bank accounts, real property and personal property of any type (including but not limited to inventory), whether held individually or jointly;
- (3) any and all corporate affiliates (including subsidiaries, parents, branch offices or associated firms) based in the forum; and/or
- (4) any and all contacts and/or customers based in the forum who logged onto the defendant's website.<sup>287</sup>

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284. Exhibits C–D to declaration of Matthew S. Jorgenson in Support of Plaintiff Synthes' Motion to Compel Jurisdictional Discovery, *Synthes*, 563 F.3d 1285 (No. 07-CV-309-L-AJB) (requesting depositions of Geraldo Marins Dos Reis, Jr., and Jose Luiz Landa Lecumberri).

285. See *Synthes*, 563 F.3d at 1290 ("[A] magistrate judge granted Synthes's motion to compel jurisdictional discovery relating to GMReis's contacts with the United States for purposes of Rule 4(k)(2).").

286. Furthermore, some questions exist regarding "the appropriate time frame for assessing whether a defendant's contacts with the forum are sufficient for purposes of personal jurisdiction," but "there is a dearth of caselaw" on that subject. *McMullen v. Eur. Adoption Consultants, Inc.*, 109 F. Supp. 2d 417, 419 (W.D. Pa. 2000); see *id.* at 420 (using a "fact-specific, case-by-case" inquiry); see also *In re Terrorist Attacks on Sept. 11, 2001*, 440 F. Supp. 2d 281, 285 (S.D.N.Y. 2006) (noting "[t]here is no bright line rule capable of helping a court fix the appropriate look-back period for every case" but stating six years had been used in several different instances).

287. See, e.g., *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984) ("Helicol's contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters . . . ; and sending personnel to Bell's facilities . . ."); *Synthes*, 563 F.3d at 1289 (concerning attendance at trade shows); *Wiwa v. Shell Petroleum Dev. Co. of Nig. Ltd.*, 335 Fed. App'x 81, 81–82 (2d Cir. 2009) (concerning barrels of oil imported to the United States, a public relations claim targeting the United States, and travel to the United States for training and development); *FC Inv. Group LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1091 (D.C. Cir. 2008) (concerning "maintenance of an interactive web-site



Some jurisdictional discovery requests even go so far as to simply ask for all documents concerning the contention regarding jurisdiction.<sup>288</sup>

Again, the breadth of these discovery requests and the amount of preparation the defendant must undertake to comply with the order are staggering. Although defendants can seek some protection from the court,<sup>289</sup> there is no guarantee that such protection will be forthcoming, as indeed it was not in the examples cited above. Furthermore, many district courts will be loath to limit jurisdictional discovery on constitutional issues given Supreme Court precedent indicating that "even a single act can support jurisdiction."<sup>290</sup>

As the preceding shows, the constitutional tests regarding the outer limits of U.S. federal courts' jurisdiction have become a leading cause for extensive jurisdictional discovery, far beyond any sort of limited inquiry that might have been initially contemplated. However, the courts' inquiries are not limited to the realm of personal jurisdiction alone.

#### *b. In Rem and Quasi-in-Rem Jurisdiction*

Though most cases proceed in personam, it is also possible for a plaintiff to assert jurisdiction in rem and quasi-in-rem. According to the Supreme Court

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accessible—and used—in the District" and regular telephone calls to the defendant at his District of Columbia office); *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1074–76 (8th Cir. 2004) (describing facts relating to general jurisdiction); *CollegeSource, Inc. v. AcademyOne, Inc.*, No. 08-cv-1987 H(CAB), 2009 WL 2705426, at \*4 (S.D. Cal. Aug. 24, 2009) (noting required production of all registered users of a website and phone records for a three year period); *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 573 n.38 (M.D. Pa. 2009) (outlining issues the court thought relevant to explore during jurisdictional discovery); *Hansen v. Neumueller*, 163 F.R.D. 471, 476 n.4, 477 (D. Del. 1995) (outlining contents of affidavit in support of jurisdiction and contents of discovery request); *NEWMAN & BURROWS*, *supra* note 271, at III-104 ("With regard to foreign defendants, courts have generally found the requisite minimum contacts where the foreign defendant has engaged in some purposeful activity in the forum, including marketing and advertising in the forum.").

288. See Defendant AmTRAN's Motion to Compel Jurisdictional Discovery at 5, *Sony Corp. v. AmTRAN Tech. Co.*, 2009 WL 2634481 (N.D. Cal. Aug. 24, 2009) (No. 5:08-cv-05706-JF-HRL) (requesting all documents concerning jurisdiction under the Declaratory Judgments Act).

289. See FED. R. CIV. P. 26(c) (concerning the availability of protective orders during discovery).

290. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 n.18 (1985); see *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (noting such single contact must nevertheless be "substantial"). Other inquiries—such as those regarding domicile—also require a court to do a "review of the totality of the evidence," since "no single factor is conclusive." *Comprehensive Care Corp. v. Katzman*, No. 8:09-CV-1375, 2009 WL 3157634, at \*2 (M.D. Fla. Sept. 25, 2009) (quotations omitted).

case of *Shaffer v. Heitner*,<sup>291</sup> courts considering quasi-in-rem (and possibly in rem) jurisdiction must undertake the same kind of constitutional inquiries that they do in cases involving personal jurisdiction.<sup>292</sup> Therefore, jurisdictional discovery regarding the reasonableness of the forum, including the defendant's relationship to the forum, may be required in cases involving in rem and quasi-in-rem jurisdiction.<sup>293</sup> The scope of these inquiries would be the same as in disputes involving personal jurisdiction.<sup>294</sup>

However, defendants in cases involving in rem and quasi-in-rem jurisdiction may be subject to other kinds of jurisdictional discovery as well. For example, plaintiffs in such cases could request jurisdictional discovery to help them ascertain the presence of property currently located in the United States that would give rise to this type of jurisdiction.<sup>295</sup> This sort of jurisdictional inquiry is similar to some of the issues that arise with respect to subject matter jurisdiction, which is discussed in the next section.

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291. See *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (concluding that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny").

292. *Id.*; see also CASAD & RICHMAN, *supra* note 21, at 48 ("For the most part, the same principles govern challenges to jurisdiction in actions in rem and quasi in rem as apply in actions in personam."); EPSTEIN ET AL., *supra* note 15, § 3.05 ("In *Shaffer v. Heitner*, the Supreme Court determined that the presence of property in a state might bear on jurisdiction by providing the necessary contacts when the claims to the property itself were the source of the underlying controversy between the parties to the suit."). But see *Burnham v. Superior Court*, 495 U.S. 605, 619–22 (1990) (discussing limitations to the holding in *Shaffer*); *id.* at 620 ("*Shaffer*, like *International Shoe*, involved jurisdiction over an absent defendant, and it stands for nothing more than the proposition that when the 'minimum contact' that is a substitute for physical presence consists of property ownership it must, like other minimum contacts, be related to the litigation.").

293. See *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 213, 216 (4th Cir. 2002) (affirming the district court's denial of jurisdictional discovery in case involving in rem jurisdiction after finding that "the plaintiff simply want[ed] to conduct a fishing expedition in hopes of discovering some basis of jurisdiction"); LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION 44 (1996) (stating quasi-in-rem jurisdiction requires minimum contacts and fairness under *Shaffer* and that the Supreme Court "explicitly left open" the question of whether in rem jurisdiction could survive without minimum contacts).

294. See *supra* notes 261–90 and accompanying text (discussing the scope of jurisdictional discovery relevant to a constitutional inquiry regarding personal jurisdiction).

295. See, e.g., *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1128 (9th Cir. 2002) (noting there was no known property on which to base jurisdiction, but noting the situation could change if the plaintiff were to discover property owned by the defendant in the forum); see also Clermont, *supra* note 2, at 1004 (describing jurisdictional facts to be proven in in rem and quasi-in-rem proceedings); S.I. Strong, *Invisible Barriers to the Enforcement of Foreign Arbitral Awards in the United States*, 21 J. INT'L ARB. 439, 450 (2004) (discussing *Glencore Grain* and *Base Metal Trading* in the context of jurisdiction).

*c. Subject Matter Jurisdiction*

In addition to jurisdiction over a person or property, federal courts must also confirm their jurisdiction over the subject matter of a dispute before proceeding to an adjudication on the merits.<sup>296</sup> Analyses regarding subject matter jurisdiction in federal courts often involve questions of law rather than questions of fact.<sup>297</sup> However, this is not always the case.

For example, jurisdictional discovery may be necessary to help the court confirm that the jurisdictional minimum exists in a diversity case.<sup>298</sup> Though the factual matters might be relatively easy to ascertain in some instances (as would be the case if the jurisdictional amount were based on a mathematical calculation involving an employee's annual salary or arising out of a contractually designated damages provision), they can quickly expand to require inquiries into a multitude of issues. For example, discovery might be requested to ascertain whether the defendant engaged in "'malicious, willful or outrageous' conduct" that would support an award of treble damages, since those damages could be used to help make up the jurisdictional amount.<sup>299</sup>

Other jurisdictional discovery requests relate to whether a claim falls under a particular federal statute.<sup>300</sup> In some cases, jurisdictional discovery

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296. See EPSTEIN ET AL., *supra* note 15, § 5.02 ("[U]nder U.S. law, a court may not consider a case unless it has both subject matter and in personam jurisdiction."). Notably, a defendant may be simultaneously subjected to discovery regarding personal jurisdiction and subject matter jurisdiction.

297. See *id.* § 5.04 (discussing both the constitutional and statutory requirements that a party must meet in order to obtain federal jurisdiction).

298. See 28 U.S.C. § 1332(a) (2006) (defining the statutory minimum amount in controversy required for diversity jurisdiction); *Kovacs v. Chesley*, 406 F.3d 393, 395 (6th Cir. 2005) (discussing the proper standard for evaluating whether the amount in controversy has been satisfied after jurisdictional discovery and finding that "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal"); EPSTEIN ET AL., *supra* note 15, § 5.04 (referring to the \$75,000 amount in controversy requirement); *Clermont*, *supra* note 2, at 1006–08 (discussing the prima facie standard of proof to determine jurisdictional amount); Layne E. Kruse & Rebecca H. Benavides, *Subject Matter Jurisdiction in Federal Court in International Cases*, in INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 133, 157–50 (David J. Levy ed., 2003) ("Section 1332 provides that district courts shall have original jurisdiction of all civil actions when the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states.").

299. See, e.g., *Anthony v. Sec. Pac. Fin. Serv., Inc.*, 75 F.3d 311, 317 (7th Cir. 1996) (finding that "[t]he district court correctly concluded that by failing to be able to allege 'malicious, willful, or outrageous' conduct" after jurisdictional discovery, "plaintiffs disqualified themselves from punitive damages").

300. See, e.g., *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 730–31 (11th Cir. 1982) (noting a request for jurisdictional discovery to demonstrate the Interstate Land Sales Full

regarding a federal cause of action mirrors that of merits-based discovery, creating the same sorts of problems that were discussed earlier with respect to certain state long-arm statutes.<sup>301</sup>

Perhaps the most involved discovery requests concerning subject matter jurisdiction involve whether a corporate or other juridical person is a "citizen" of a particular state for purposes of diversity.<sup>302</sup> Investigations can involve, among other things, the "nerve center" for the corporation, the "operations center," or whether the entity is part of a "web of corporate entities," all highly fact-specific inquiries.<sup>303</sup> Interestingly, some courts have suggested that the standard for permitting jurisdictional discovery on diversity of citizenship may be higher than it is with respect to questions involving personal jurisdiction or subject matter jurisdiction involving a federal question.<sup>304</sup>

Disclosure Act applied).

301. *See, e.g.*, *Freeman v. United States*, 556 F.3d 326, 341–43 (5th Cir. 2009) (concerning immunity under the Stafford Act); *Wiwa v. Shell Petroleum Dev. Co. of Nig.*, 335 F. App'x 81, 82 (2d Cir. 2009) (concerning jurisdictional discovery for suit instituted under the Alien Tort Claims Act, a federal statute); *DDB Tech., L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1291 (Fed. Cir. 2008) (concerning jurisdictional discovery for claims instituted under federal patent laws); *see supra* notes 235–59 and accompanying text (discussing legislative authority for federal jurisdiction).

302. *See* 28 U.S.C. § 1332(c)(1) (2006) (defining how citizenship is determined for corporations); *id.* § 1348 (concerning jurisdiction over national banking associations); *see, e.g.*, *Wachovia Bank v. Schmidt*, 546 U.S. 303, 306 (2006) ("For diversity jurisdiction purposes, therefore, Congress has discretely provided that national banks 'shall . . . be deemed citizens of the States in which they are respectively located.' The question presented turns on the meaning, in § 1348's context, of the word 'located.'" (citations omitted)); *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 574–78 (2004) (finding that a change in the citizenship of the partnership after the time of filing could not cure the jurisdictional defect); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990) ("[W]e reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members."); *Koehler v. Bank of Bermuda (N.Y.) Ltd.*, No. 96 Civ. 7885(JFK), 1998 WL 557595, at \*7 (S.D.N.Y. Sept. 2, 1998) (finding that the defendants were not "citizens of a foreign state for purposes of diversity jurisdiction" after relying on a Department of State announcement that "the United States does not regard the Islands of Bermuda as an independent sovereign nation or foreign state"); *Boustead v. Barancid*, 151 F.R.D. 102, 105 (E.D. Wis. 1993) (permitting the plaintiffs to conduct limited discovery "in the form of interrogatories and requests for production of documents on the jurisdictional issue"). This is one area where a defendant might seek jurisdictional discovery. *See, e.g.*, *Shawnee Terminal R.R. Co. v. J.E. Estes Wood Co.*, No. 01:09-cv-00113-KD-N, 2009 WL 3064973, at \*10 (S.D. Ala. Sept. 18, 2009) (claiming plaintiff had provided "selective" evidence with regard to its place of corporate citizenship).

303. *Boustead*, 151 F.R.D. at 104–05.

304. *See Savis, Inc. v. Warner Lambert, Inc.*, 967 F. Supp. 632, 641 (D.P.R. 1997) (suggesting that the federal courts will order discovery "generally only where the challenge has been directed at personal jurisdiction" as opposed to subject matter jurisdiction). The *Savis* court stated the following:

Jurisdictional discovery regarding subject matter jurisdiction might also be sought in class action suits pursuant to the Class Action Fairness Act (CAFA).<sup>305</sup> Courts permit limited jurisdictional discovery regarding the amount in dispute so as to allow the dispute to remain in federal court, rather than being remanded to state court under CAFA's removal provision.<sup>306</sup>

Interestingly, the Senate Committee on the Judiciary has stated that jurisdictional discovery under CAFA is to be of a very limited nature and "should be made largely on the basis of readily available information. Allowing substantial, burdensome discovery on jurisdictional issues would be contrary to the intent" of CAFA.<sup>307</sup> Furthermore, the Committee reported that courts should choose to require "[l]ess burdensome means (e.g., factual stipulations)" to the extent possible.<sup>308</sup> This development is significant in that it suggests that legislators are both aware of the problems associated with jurisdictional discovery and prepared to address them, at least in some contexts. It may be that soon rulemakers will be ready to address the problems of jurisdictional discovery as a more general matter.<sup>309</sup>

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We distinguish the propriety of ordering discovery on the issue of jurisdiction where the dispute is over personal jurisdiction or subject matter jurisdiction hinging on the interpretation of a federal statute. The notion of personal jurisdiction is quite distinct from that of subject matter jurisdiction and the ramifications of a lack of personal jurisdiction likewise wholly unlike the consequences of a lack of subject matter jurisdiction. . . . Similarly, the rationale for ordering discovery on the issue of subject matter jurisdiction when jurisdiction depends on the genuinely disputed application of a substantive federal statute does not apply when subject matter jurisdiction depends on diversity. While we will not here fully expound on the distinction, suffice it to say that when a party invokes subject matter jurisdiction based on diversity of citizenship, that party must have a solid factual basis supported by evidence in order to assert that the parties are indeed diverse.

*Id.* (citing *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701–02 (1982)).

305. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 1, 119 Stat. 4, 4 (codified as amended in scattered sections of 28 U.S.C.) ("An Act [t]o amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, and for other purposes.").

306. See, e.g., *Cram v. Elec. Data Sys. Corp.*, No. 07CV1842, 2008 WL 115438, at \*2 (S.D. Cal. Jan. 8, 2008) ("Plaintiffs immediately filed a Motion to Remand . . . , arguing that the amount in controversy requirement of CAFA could not be satisfied . . . . [T]he Court allowed expedited discovery to go forward on the single issue of amount in controversy . . . .").

307. *Rippee v. Boston Mkt. Corp.*, 408 F. Supp. 2d 982, 985 (S.D. Cal. 2005) (emphasis omitted).

308. *Id.*

309. See *infra* notes 409–38 and accompanying text (discussing potential legislative solutions).

#### IV. Practical Problems and Proposals

##### A. Problems

At one time, jurisdictional discovery may have seemed an acceptable solution to the question of whether a court had jurisdiction over a particular dispute. However, the current state of affairs is highly problematic. Vague standards regarding the availability and scope of jurisdictional discovery fail to provide sufficient guidance for courts and lead to jurisdictional splits and inconsistencies despite recent admonitions that national practices regarding discovery need to be more predictable and uniform.<sup>310</sup>

Many of the difficulties currently experienced by parties and courts involved in jurisdictional discovery can be traced back to the failure, over time, to consider how three separate policies interact. These three policies—notice pleading, scope of discovery, and the exercise of federal jurisdiction—lie at the center of the U.S. federal judicial system and are unlikely to be significantly changed themselves.<sup>311</sup> However, the problems associated with jurisdictional discovery can be addressed without disturbing these underlying policies.

As the preceding discussions show, the unchecked confluence of these three fundamental policies has created a procedural device that is marked by excessive judicial discretion and multi-factor, fact-intensive inquiries. The following section discusses the extent to which excess discretion and fact-intensive standards contributed to the problems associated with jurisdictional discovery and whether it is possible to cure those problems by addressing one or the other of these two factors.

##### 1. Excessive Judicial Discretion

As indicated above, trial courts are given nearly boundless discretion to decide whether and to what extent jurisdictional discovery is proper, with very little appellate oversight.<sup>312</sup> This discretion is necessary because of the lack of

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310. See *supra* note 20 and accompanying text (explaining that the Civil Rules Advisory Committee adopted amendments to the Federal Rules of Civil Procedure to create a uniform national rule on discovery).

311. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (requiring the necessary standard for notice pleading); *Rowe*, *supra* note 20, at 13 (noting that recent amendments to the Federal Rules of Civil Procedure narrowed the scope of discovery in federal cases); *supra* note 228 and accompanying text (discussing a series of decisions regarding the role of jurisdiction in federal procedure).

312. See *supra* notes 158–232 and accompanying text (discussing the requirements for ordering jurisdictional discovery, as well as the scope of jurisdictional discovery).

discernable standards regarding jurisdictional discovery and because of the belief that every dispute is unique and requires a uniquely crafted discovery plan tied directly to the particular jurisdictional facts at issue.

Numerous jurists, including Justice Stevens of the U.S. Supreme Court, have enunciated their faith in the courts' ability to manage discovery in a useful and effective manner.<sup>313</sup> However, Chief Judge Easterbrook of the Seventh Circuit has challenged that position, identifying several reasons why judges are actually not in a very good position either to manage discovery or understand in advance how various requests can be abusive.<sup>314</sup> Professor Robert Bone has similarly argued that "[m]ost critics [of discovery] focus on risk of abuse and give short shrift to competency concerns," which he views as a mistake, given that trial judges "face serious problems fashioning case-specific procedures to work well in the highly strategic environment of litigation."<sup>315</sup>

Although Judge Easterbrook and Professor Bone focused their observations primarily on merits-based discovery, their conclusions are equally applicable to jurisdictional discovery. Furthermore, they are not alone in their concerns. In 2007, the Supreme Court "openly and directly questioned the effectiveness of judicial discretion in managing litigation problems during the pre-trial phase."<sup>316</sup> "This marks a significant change of course,"<sup>317</sup> and one that should be considered in the context of jurisdictional discovery.

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313. See, e.g., *Twombly*, 550 U.S. at 593 n.13 (Stevens, J., dissenting) ("The potential for 'sprawling, costly, and hugely time-consuming' discovery is no reason to throw the baby out with the bathwater. The Court vastly underestimates a district court's case-management arsenal."); Bone, *Who Decides*, *supra* note 99, at 1974 ("[J]udges tend to favor broad discretion. Discretion gives them more control over their own courtrooms and cases, and makes judging more interesting and potentially more rewarding.").

314. Easterbrook, *supra* note 1, at 638–39 (noting that judges cannot know the motives and results of discovery requests, which makes it difficult to identify "abusive" discovery); see also Martin H. Redisch, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 566–67 (2001) (outlining problems with discretion in traditional and electronic discovery).

315. Bone, *Who Decides*, *supra* note 99, at 1963; see also Brazil, *Civil Discovery*, *supra* note 1, at 873 ("Unfortunately, the ability of the courts, as presently funded and staffed, to provide fair and firm guidelines for the conduct of discovery and to resolve discovery disputes promptly and intelligently appears to decrease directly as the need increases."); Brazil, *Front Lines*, *supra* note 1, at 246 ("[L]awyers vehemently complained that most of the magistrates are woefully underequipped in talent, time, and temperament to resolve the complex discovery disputes that are referred to them."); Burbank & Silberman, *supra* note 77, at 676 (noting litigation reform effects have focused on expense and delay).

316. Bone, *Twombly*, *supra* note 60, at 898–99; see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559–60 & n.6 (2007) (stating the belief that judicial discretion alone cannot overcome discovery abuse).

317. Bone, *Twombly*, *supra* note 60, at 899.

The idea of limiting judicial discretion in discovery is not new.<sup>318</sup> For example, Professor Bone has written in favor of a shift from discretion to rules, noting that "[r]ulemakers should treat case-specific discretion as an explicit policy choice rather than an implicit default, evaluate its costs and benefits in each procedural context, and make a considered judgment about how much discretion to grant what controls or guidelines to include."<sup>319</sup> Furthermore, recent Supreme Court precedent suggests that there are matters that are "better handled by rulemaking committees (and Congress) than by individual trial judges."<sup>320</sup>

In many ways, diminishing the amount of discretion given to judges will set the balance of power back to earlier levels. For example, Professors Stephen Burbank and Linda Silberman have noted:

At the level of prospective procedural lawmaking, . . . history reveals a power grab by the judiciary, one that was remarkably successful for many years. It was successful, we believe, for a number of reasons.

First, the notion of uniform and trans-substantive procedure . . . was always to some extent a myth. Many if not most Federal Rules make no policy choices. Rather, they confer discretion on the trial judge, thereby (1) insulating the Rules from effective challenges under the statute delegating rulemaking power to the Supreme Court, (2) enabling tailored justice at a level where policy choices—made by judges—may not be noticed, and (3) . . . insulating those choices from effective appellate review.<sup>321</sup>

Although it is possible to contemplate a system that eliminates discretion as much as possible,<sup>322</sup> what might be more effective is an approach that guides

318. See Easterbrook, *supra* note 1, at 647–48 ("Moving supervision from judges to magistrates, or magistrates to judges, will not help much; neither can detect problematic requests, so that neither supervision nor sanctions will make a dent in the problem."); Carl Tobias, *More Modern Civil Process*, 56 U. PITT. L. REV. 801, 832–33 (1995) (discussing effect of excessive discretion in trial judges).

319. Bone, *Who Decides*, *supra* note 99, at 2002; see also Bone, Twombly, *supra* note 60, at 878 ("The drafters [of the Federal Rules] were pragmatists, who assumed that procedural rules would be 'continually changed and improved' as litigation conditions changed."); Burbank & Silberman, *supra* note 77, at 699 ("Many if not most Federal Rules make no policy choices.").

320. Bone, *Who Decides*, *supra* note 99, at 2005.

321. Burbank & Silberman, *supra* note 77, at 699–700 (citations omitted).

322. A strict rule-based approach to discovery would eliminate some of the gamesmanship that results when parties are not sure where they fall on the discretionary line but would create problems with over- or under-inclusion at the edges of the rules. Bone, *Who Decides*, *supra* note 99, at 2007–09.



judicial discretion by providing relevant criteria for rules that currently have none.<sup>323</sup> To some extent, jurisdictional discovery would benefit from this approach because there are currently no discernable standards regarding when jurisdictional discovery is appropriate or what the scope of discovery should be once it is granted.<sup>324</sup>

The problem with this method is "the efficacy of balancing depends on the judge's ability to acquire and evaluate accurate information about the relevant factors, and this is bound to be difficult," particularly early in the proceedings.<sup>325</sup> Furthermore:

to strike a sound balance, the judge must assign weights and compare values across the various factors. Without clear principles to guide this normative task, the resulting process can easily turn into ad hoc weighing that lacks meaningful constraint and jeopardizes principled consistency over the system as a whole. This is especially true when, as is so often the case, the factors listed in a Rule encompass everything conceivably relevant to the decision. While a comprehensive list of factors might restrain judges from relying on illegitimate considerations, it does nothing to constrain judges who act in good faith, at least not without some normative direction to guide the balancing process.

Thus, multi-factor balancing as a way to channel discretion requires either limitations on the factors listed, or normative principles to guide the weighing process—or both.<sup>326</sup>

At this point, judges have some factors that they can consider—i.e., those governing jurisdictional standards—but they have no limitations on the number of factors listed, nor do they have any normative principles to assign relative weights to the individual factors.<sup>327</sup> This, of course, is problematic, for the reasons suggested in the next section.

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323. *See id.* at 2015–16 (proposing that judges' discretion be bounded by general principles). However, this is the approach currently used—with negligible results—with respect to jurisdictional discovery. *See id.* at 2016–17 ("This much reliance on discretion is not optimal.").

324. *See supra* notes 157–309 and accompanying text (discussing the standards and scope of jurisdictional discovery).

325. Bone, *Who Decides*, *supra* note 99, at 2016.

326. *Id.*

327. *See supra* notes 157–309 and accompanying text (discussing the standards and scope of jurisdictional discovery).

## 2. *Multi-Factor, Fact-Intensive Inquiries*

The second problem in the realm of jurisdictional discovery involves the multi-factor, fact-intensive jurisdictional tests that trigger the need for jurisdictional discovery in the first place.<sup>328</sup> As indicated earlier, these tests provide no way of limiting the jurisdictional inquiry; instead, they promote and even require an ever-broadening discovery process at a stage where jurisdiction has not even been proven to exist.<sup>329</sup>

Judge Easterbrook has described how the lack of certainty about the relevant standards encourages parties to seek discovery on an ever-broader scope of issues and facts, stating:

Multi-factor standards cut down on loopholes—the bane of rules—but at great cost. When there is no rule of decision but only an injunction to consider everything that turns out to matter, lawyers and clients cannot tell in advance—that is, when planning conduct and conducting litigation—what the judge or jury will think matters. Lawyers cannot limit their search for information in discovery, because they do not know what they are looking for. They do not know when to stop, because they never know when they have enough. . . . Lawyers practicing in good faith, therefore, engage in extensive discovery; anything less is foolish. . . . [O]ur system of legal rules induces lawyers to make requests that are extensive but justified, and therefore cannot be called abusive . . . .<sup>330</sup>

Although “[l]egal uncertainty is the godfather of discovery abuse,”<sup>331</sup> uncertainty can be triggered in a variety of ways. For example, it can arise “not only from nebulous rules . . . but also from attempting to handle in the courts, problems amenable to no simple solution.”<sup>332</sup> Though Judge Easterbrook was not speaking directly to the issue of jurisdictional discovery per se, his observations accurately capture the problem in this area of law.

Indeed, Judge Easterbrook’s concerns are even more relevant given the timing of decisions about jurisdictional discovery. For example, Professor Bone notes:

When judges make decisions early in a case, those decisions can significantly affect settlement bargaining, the efficacy of summary judgment and other pretrial options, and the quality of a judgment should

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328. See *supra* notes 223–309 and accompanying text (discussing jurisdictional discovery in practice).

329. *Id.*

330. Easterbrook, *supra* note 1, at 641.

331. *Id.* at 644.

332. *Id.*

the case be tried. To predict these effects, the judge has to know a great deal about the case and the parties.<sup>333</sup>

However, judges know very little about a case at the time when jurisdictional discovery occurs.<sup>334</sup> The problem is exacerbated in cases where jurisdictional discovery overlaps with liability on the merits, since plaintiffs in those cases are receiving a tactical advantage through jurisdictional discovery.<sup>335</sup>

Judge Easterbrook identifies several possible solutions to this issue. First, courts could "do away with multi-factor standards, replacing them with rules that call for inquiry into a limited number of objectively ascertainable facts."<sup>336</sup> This is similar to the approach taken in England during service out proceedings.<sup>337</sup>

Second, pleadings could be used—as in other countries, or as in the United States prior to 1938—to focus legal and factual disputes before discovery begins.<sup>338</sup> This approach recognizes that "American pretrial has been criticized for encouraging 'easy' pleadings . . . and 'broad' discovery, thereby allowing the commencement of a lawsuit without sufficient investigation and encouraging a war of attrition to force settlement."<sup>339</sup> Interestingly, this

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333. Bone, *Who Decides*, *supra* note 99, at 1993; *see also* Brazil, *Adversary Character*, *supra* note 1, at 1322–23 (discussing how abuse of discovery techniques can force a settlement that does not reflect the merits of the case); Easterbrook, *supra* note 1, at 638–39 (noting that judges typically lack the requisite knowledge to reduce abusive discovery). The Supreme Court itself has recognized that "discovery expense will push cost-conscious defendants to settle even anemic cases." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007); *see also* Bone, *Twombly*, *supra* note 60, at 898 ("The Court first notes that 'discovery expense will push cost-conscious defendants to settle even anemic cases' . . .").

334. *See, e.g.*, Easterbrook, *supra* note 1, at 638–39 (noting that judges typically lack the requisite knowledge to abate abusive discovery).

335. *See supra* notes 235–60 and accompanying text (discussing the problems of jurisdictional discovery).

336. Easterbrook, *supra* note 1, at 643.

337. *See supra* notes 106–30 and accompanying text (discussing jurisdictional standards in England).

338. *See* Easterbrook, *supra* note 1, at 644 ("If pleadings were used to focus legal and factual disputes before discovery began . . . the process would be more tolerable."). An iterative process, such as those in use in many civil law countries, would also work. *See id.* (noting "if discovery alternated with legal resolution, constantly pairing away issues, the process would be more tolerable").

339. *Burbank & Silberman*, *supra* note 77, at 678; *see also* *Comprehensive Care Corp. v. Katzman*, No. 8:09-CV-1375-T-24TBM, 2009 WL 3157634, at \*2 (M.D. Fla. Sept. 25, 2009) ("A person's domicile is determined by a review of the 'totality of the evidence' and 'no simple factor is conclusive.'" (citations omitted)).

approach appears consistent with that taken recently by the Supreme Court in cases involving motions to dismiss under Rule 12(b)(6).<sup>340</sup>

Third, parties could be required to bear the costs of their discovery requests through automatic reversal of all or part of the discovery costs.<sup>341</sup> Even Judge Easterbrook envisioned problems with this approach, however, noting that "[t]he source of 'discovery abuse' does not lie in the rules regulating discovery. It cannot be fixed by tinkering with Rule 26, Rule 37, or any of their companions. . . . The source lies elsewhere," such as with the structure of nebulous legal rules and standards.<sup>342</sup>

If excessive judicial discretion and multi-factor legal inquiries both contribute to the problems associated with jurisdictional discovery, then limiting one or both should improve the situation. As it turns out, that is precisely the case.<sup>343</sup> Furthermore, reforms can be undertaken through either judicial or legislative means.<sup>344</sup> The following sections discuss four possible options.

## B. Proposals

### 1. Judicial Solutions

Two possible reforms could be made at the judicial level. Both reduce the amount of discretion exercised by the trial judge, albeit through different means. Each is discussed below.

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340. See FED. R. CIV. P. 12(b)(6) (discussing motions for "failure to state a claim upon which relief can be granted"); *infra* notes 345–98 and accompanying text (discussing recent Supreme Court precedent regarding Rule 12(b)(6)). *But see* Bone, Twombly, *supra* note 60, at 876–77 (claiming the Supreme Court cannot undertake the necessary empirical research or overarching view to provide a clear and comprehensive solution to problems of these sorts).

341. Easterbrook, *supra* note 1, at 645–46 ("We could require the demander to pay the costs of discovery on the spot . . . . If the person making the demand prevails . . . he would recover the costs at the end of the case.").

342. *Id.* at 647–48.

343. See *infra* notes 345–438 (discussing proposed judicial and legislative solutions).

344. Commentators often prefer legislative to judicial solutions in this area of law. See, e.g., Bone, Twombly, *supra* note 60, at 876–77 (noting that the courts are in a poor position to implement reforms); Easterbrook, *supra* note 1, at 645–48 (offering various legislative proposals). *But see* Clermont, *supra* note 2, at 999–1000 (favoring neither legislative nor judicial reform).

*a. Extension of Recent Supreme Court Precedent to Cases Involving  
Jurisdictional Discovery*

Recently, the Supreme Court handed down several cases reflecting arguably new thinking about the pleading standards.<sup>345</sup> This line of cases involves Rule 8(a)(2) of the Federal Rules of Civil Procedure, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief,"<sup>346</sup> and advances what has been called the "plausibility standard."<sup>347</sup> The

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345. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), in which the Court stated the following:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." 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. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

*Id.* (citations omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (establishing that a court faced with a 12(b)(6) motion must accept the factual allegations in the complaint as true, must consider the complaint in its entirety, and must take into account opposing inferences); *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (citations omitted)); Bone, *Twombly*, *supra* note 60, at 875 ("Pleading rules are once again a hot topic in civil procedure circles."). The majority in *Twombly*, the first of the cases, took pains to describe why the decision asserted neither a new nor a "heightened" pleading standard. See *Twombly*, 550 U.S. at 555 n.3 ("While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant 'set out in detail the facts upon which he bases his claim,' Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief.").

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

347. See Bone, *Twombly*, *supra* note 60, at 881 (stating the plausibility standard requires that "a complaint's allegations must support a 'plausible' and not merely a 'possible' inference, one that rises above a 'speculative level'"). This standard has been said not to have had as drastic an effect on pleading standards as some commentators have supposed. *Id.* at 877 ("[T]he Supreme Court's decision in *Twombly* does not alter pleading rules in as drastic a way as many critics, and even some of its few defenders, suppose."). For the Supreme Court's subsequent pleadings cases, see *supra* note 345. This view, however, is not by any means universally held, although it is beyond the scope of this Article to review or address all the issues raised in the literature. See, e.g., Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1059–60 (suggesting that the plausibility paradigm is a "vague and undefined standard" and proposing a unified approach in the Title VII context); Douglas G. Smith, *The Twombly Revolution?*, 36

decisions focus heavily on the identification of the amount and type of factual matter that must be contained in the pleadings under Rule 8 sufficient to withstand a motion to dismiss for failure to state a claim under Rule 12(b)(6).<sup>348</sup>

At this point, it is not clear precisely how courts will apply the plausibility standard. Some say that factual allegations must be tied to each element of the legal claim in question.<sup>349</sup> Others believe that the plaintiff must allege "objective facts" that raise "a presumption of impropriety."<sup>350</sup> Still others take the view that the pleadings must describe a set of allegations "that supports a stronger correlation to wrongdoing than for baseline conduct."<sup>351</sup> In any event, there seems to be some need to go beyond a reading that the facts *could* support the claim (or, in the case of jurisdictional issues, jurisdiction) to a reading that the facts *should* support the claim.<sup>352</sup>

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PEPP. L. REV. 1063, 1100 (2009) (concluding that increased judicial scrutiny is likely to have a beneficial effect); Charles B. Campbell, *A "Plausible" Showing After Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 31 (2008) (noting that *Twombly* will not have the effect of freeing lower courts from a thorough examination of the text of the Federal Rules of Civil Procedure); Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power of Pleadings*, 88 B.U. L. REV. 1217, 1235 (2008) (noting most commentary post-*Twombly* has criticized the Court for tightening pleading requirements); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 26–36 (2009) (positing a comprehensive pleading doctrine); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 494 (2008) (noting that the plausibility standard will inevitably screen out valid claims); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. 135, 137–41 (2007) (offering commentary on the implications of the *Twombly* decision); Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts—Again*, FINDLAW'S WRIT, Aug. 13, 2007, <http://writ.news.findlaw.com/dorf/20070813.html> (last visited Mar. 21, 2010) (arguing that the ambiguity of the *Twombly* decision has caused confusion among lower courts) (on file with the Washington and Lee Law Review); Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rules of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 639 (2007) (offering a pleading standard to help clarify the existing standard in the post-*Twombly* era). What is certain is that this will be an area of rapid commentary and inquiry in coming years, with many divergent opinions. Indeed, a symposium on this subject has already been scheduled by Dickinson School of Law at Penn State University for March 2010.

348. See, e.g., *Iqbal*, 129 S. Ct. at 1948–50 (discussing how specific the complaint's factual allegations must be in order to withstand a motion to dismiss).

349. Bone, *Twombly*, *supra* note 60, at 888; see also Smith, *supra* note 347, at 23 (saying that *Twombly* seemingly requires that a plaintiff's allegations "contain a set of factual assertions that, if taken as true, are both necessary and sufficient to establish defendants' liability").

350. Bone, *Twombly*, *supra* note 60, at 888.

351. *Id.* at 888–89. This final reading appears proper, given the Supreme Court's insistence in both *Twombly* and *Iqbal* that the facts in question not merely support parallel conclusions.

352. See *Iqbal*, 129 S. Ct. at 1949 ("The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative

There are at least two connections between this line of cases and the matters under discussion in this Article. First, these decisions openly challenge "the effectiveness of judicial discretion in managing litigation problems during the pre-trial phase."<sup>353</sup> Second, "[t]he problem of jurisdictional discovery . . . is closely related to the decreased emphasis on the pleadings and the corresponding ascension of the role of pre-trial discovery."<sup>354</sup> Third, the language of Rule 8(a)(2) is very similar to that of Rule 8(a)(1), which states that a pleading must contain "a short and plain statement of the grounds for the court's jurisdiction."<sup>355</sup> Although Rule 8(a)(1) has been said not to apply to facts regarding personal jurisdiction,<sup>356</sup> it does appear to apply to other jurisdictional issues, including subject matter jurisdiction.<sup>357</sup> If the newly enunciated Supreme Court rule on pleadings were extended to matters involving Rule 8(a)(1), including questions of jurisdiction over the person, the res and the subject matter of the dispute, it might affect the availability of jurisdictional discovery in a wide variety of cases.

Such an extension does not seem outside the realm of possibility. For example, many of the principles cited by the Supreme Court as relevant to the Rule 8(a)(2) and Rule 12(b)(6) determinations are similar to those cited in

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level . . .").

353. Bone, *Twombly*, *supra* note 60, at 898–99; *see also Twombly*, 550 U.S. at 559–60 & n.6 ("It is no answer to say that [groundless claims can] be weeded out early in the discovery process . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.").

354. J.E.C., *supra* note 2, at 533.

355. FED. R. CIV. P. 8(a)(1).

356. *See, e.g., Hagen v. U-Haul Co. of Tenn.*, 613 F. Supp. 2d 986, 1002 (W.D. Tenn. 2009) (noting that Rule 8(a) does "not even require that the complaint allege facts supporting personal jurisdiction"); *In re Teknek, LLC*, 354 B.R. 181, 190 (Bankr. N.D. Ill. 2006) ("[A] complaint commencing a civil proceeding must allege the basis for subject matter jurisdiction but need not allege the basis for personal jurisdiction."); *Shanks v. Wexner*, No. 02-7671, 2003 WL 1343018 at \*2 (E.D. Pa. Mar. 18, 2003) ("When a complaint is filed there is no affirmative duty to plead personal jurisdiction . . ."); *Hansen v. Neumueller*, 163 F.R.D. 471, 474 (D. Del. 1995) (saying that Rule 8 lacks "a requirement of a statement setting forth the grounds" for personal jurisdiction); *Stirling Homex Corp. v. Homasote Co.*, 437 F.2d 87, 88 (2d Cir. 1971) (stating that Rule 8(a) pertains only to subject matter jurisdiction). Early precedent in this area relied on Form 2, which has been replaced by Form 7. *Compare* FED. R. CIV. P. Form 7 (outlining the jurisdiction of the court; not requiring basis for personal jurisdiction), *with* FED. R. CIV. P. Form 40 (outlining possible defenses, including lack of personal jurisdiction). However, some precedents do suggest the need for sufficient factual pleadings regarding personal jurisdiction. *See Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004) (stating that the complaint must allege sufficient facts on which personal jurisdiction can rest), *cert. denied*, 543 U.S. 1147 (2005).

357. *See, e.g., Walden v. Bartlett*, 840 F.2d 771, 775 (10th Cir. 1988) (applying Rule 8(a)(1) to federal question jurisdiction).

motions to dismiss for lack of jurisdiction and the associated requests for jurisdictional discovery.<sup>358</sup> For example, the most recent of the Supreme Court cases, *Ashcroft v. Iqbal*, stated that:

the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."<sup>359</sup>

This language is highly reminiscent of the type of determinations concerning whether a *prima facie* showing has been made sufficient to support an order of jurisdictional discovery.<sup>360</sup> Because plaintiffs (1) currently do not need to assert jurisdictional facts in their pleadings (sometimes at all, and not, in any case, with any sort of specificity), and (2) can typically obtain jurisdictional discovery on incredibly minimal showings of jurisdiction, more detailed delineations of what constitutes a proper jurisdictional pleading would be very useful in decreasing confusion about whether jurisdictional discovery is merited.<sup>361</sup>

This line of cases not only gives courts some real guidance with regard to the initial pleadings, it also provides a useful response to the problem of the scope of jurisdictional discovery. In both *Twombly* and *Iqbal*, the Supreme Court rejected what it called the "careful case management approach" and "decline[d] respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery."<sup>362</sup> Essentially, this line of cases suggests that judges are not in a good position to order discovery prior to the determination that the case should proceed to the merits and thus could be read to eliminate jurisdictional

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358. Compare *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948–50 (2009) (detailing the minimum requirements for sufficient factual allegations to withstand a Rule 12(b)(6) motion to dismiss), with *supra* notes 157–233 and accompanying text (exploring the question of what constitutes a *prima facie* showing of jurisdiction to support an order of jurisdictional discovery).

359. *Iqbal*, 129 S. Ct. at 1949–50 (citations omitted).

360. See *supra* notes 157–206 and accompanying text (discussing the question of what a plaintiff must show in order to demonstrate the need for jurisdictional discovery).

361. See *supra* notes 157–309 and accompanying text (discussing the low threshold plaintiffs must cross in order to obtain jurisdictional discovery and the broad discretion held by judges deciding this question).

362. *Iqbal*, 129 S. Ct. at 1953–54. Justice Breyer believed that limited discovery was appropriate in these circumstances. *Id.* at 1961–62 (Breyer, J., dissenting); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 593 (2007) (Stevens, J., dissenting) (noting his preference for limited discovery, in contrast to the majority approach).



discovery altogether, instead placing the cost, effort, and risk of the initial factual investigation on a defendant who may not even be subject to the jurisdiction of the court.<sup>363</sup>

Although extending *Twombly* and *Iqbal* to situations involving jurisdictional matters may seem harsh to those who are used to easily available jurisdictional discovery, the proposed approach has far less effect on plaintiffs' ability to recover than the original precedents do. *Twombly* and its progeny involve the failure to state a claim upon which relief is granted.<sup>364</sup> If, under the plausibility standard, the plaintiff fails to allege sufficient facts under Rule 8(a)(2) to survive a Rule 12(b)(6) motion,<sup>365</sup> then it is unlikely that the plaintiff will be able to revive that cause of action elsewhere. Dismissal under Rule 12(b)(6) is likely a final disposition of the plaintiff's claim in any venue.<sup>366</sup>

However, extending the plausibility standard to include jurisdictional facts under Rule 8(a)(1) and then applying that standard to motions to dismiss for lack of jurisdiction under Rule 12(b)(1) or 12(b)(2)<sup>367</sup> would not have the same effect of eliminating the plaintiff's cause of action altogether, at least in most cases involving domestic defendants.<sup>368</sup> Instead, the plaintiff would merely be required to sue the defendant in another federal court (in cases involving lack of

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363. For example, the plaintiffs in *Iqbal* attempted to get past their factual difficulties through something similar to jurisdictional discovery, an approach that the Second Circuit Court of Appeals would have embraced. *Iqbal*, 129 S. Ct. at 1953. *Twombly*, too, rejected "a plan of 'phased discovery'" that the Second Circuit would have permitted. *Twombly*, 550 U.S. at 593 (Stevens, J., dissenting) (internal punctuation and citation omitted).

364. See *Iqbal*, 129 S. Ct. at 1954 (finding the respondent's complaint deficient for failing to state a claim); *Twombly*, 550 U.S. at 554–55 (discussing the question of what a plaintiff must plead in order to survive a motion to dismiss for failure to state a claim); see also *Phillips v. County of Allegheny*, 515 F.3d 224, 230–34 (3rd Cir. 2008) (discussing the impact of *Twombly* on the resolution of motions to dismiss for failure to state a claim under Rule 12(b)(6)).

365. Notably, the "original" pleading referred to here would include any subsequent amendments, which are usually liberally allowed. FED. R. CIV. P. 15(a)(2) ("[A] party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."). Identifying a meritless suit can be difficult. See *Bone*, *Twombly*, *supra* note 60, at 919 ("We actually know very little about meritless litigation.").

366. See, e.g., *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) (stating that a dismissal under Rule 12(b)(6) is a final judgment on the merits that implicates the doctrine of *res judicata*).

367. As mentioned previously, the plausibility standard arguably applies to some motions to dismiss under Rule 12(b)(1) already. See FED. R. CIV. P. 12(b)(1) (providing for motions to dismiss for "lack of subject-matter jurisdiction"); see *supra* note 365 and accompanying text (addressing the impact of a motion to dismiss under Rule 12(b)(6) on a plaintiff's ability to revive the same cause of action elsewhere).

368. The situation might be different with foreign defendants. Those issues are discussed elsewhere. See generally *Strong*, *supra* note 3.

personal jurisdiction) or in state court (in cases involving lack of subject matter jurisdiction).<sup>369</sup> Although those may not be the plaintiff's preferred venues, the cause of action would nevertheless survive.<sup>370</sup>

At this point, the plausibility standard is currently limited to matters arising under Rule 8(a)(2) and thus, by extension, to motions to dismiss for failure to state a claim under Rule 12(b)(6).<sup>371</sup> However, this area of law is changing rapidly and there is room to argue that the plausibility standard can and should be extended to jurisdictional matters arising under Rule 8(a)(1) and motions to dismiss for lack of jurisdiction under Rule 12(b)(1) and 12(b)(2).<sup>372</sup>

369. See *Rolls-Royce Corp. v. Heros, Inc.*, 576 F. Supp. 2d 765, 777 (N.D. Tex. 2008) ("Dismissals for lack of jurisdiction 'are not considered adjudications on the merits and ordinarily do not, and should not, preclude a party from later litigating the same claim, provided that the specific defect has been corrected.'" (quoting *Baris v. Sulpicio Lines, Inc.*, 74 F.3d 567, 571 (5th Cir. 1996))); see also FED. R. CIV. P. 41(b) (stating that a dismissal under Rule 12(b)(1) or 12(b)(2) does not operate as a final adjudication on the merits).

370. Venue shopping often has as much to do with choice of law issues as it does with convenience. See Silberman, *supra* note 271, at 587–90 (comparing the relative impact of choice of law with convenience in forum shopping). Thus a rule limiting jurisdictional discovery could result in a limitation of plaintiffs' choice of law options. In some cases, plaintiffs prefer not to proceed in more "logical" venues, either because their claims are barred on procedural grounds, such as statutes of limitation, or are less likely to prevail because of different lines of precedent. However, it has never been said that plaintiffs have a right to afford themselves of the benefits of certain laws without a legitimate jurisdictional connection to the forum. See, e.g., *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (noting that "before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum"; and further stating that "[t]here also must be a basis for the defendant's amenability to service of summons"); see also Antonin I. Pribetic, "Bringing *Locus into Focus*": A Choice-of-Law Methodology for CISG-based Concurrent Contract and Product Liability Claims, in *REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2004–2005*, 179, 202–05 & n.81 (2005) (citing a Supreme Court of Canada case stating fairness requires consideration of jurisdictional matters, not whether the plaintiff will receive more or less compensation in a particular venue).

371. See, e.g., *Burchette v. Abercrombie & Fitch Stores, Inc.*, No. 08 Civ. 8786, 2009 WL 856682, at \*4–5 (S.D.N.Y. Mar. 30, 2009) (undertaking different analyses for 12(b)(2) and 12(b)(6) motions); *RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 383 (S.D.N.Y. 2009) (same).

372. See, e.g., *Arar v. Ashcroft*, 532 F.3d 158, 174 (2d Cir. 2008) (distinguishing between the standards for deciding a motion to dismiss for failure to state a claim and a motion to dismiss for lack of personal jurisdiction). The court stated the following:

The plausibility standard applicable to a Rule 12(b)(6) motion to dismiss is, of course, distinct from the *prima facie* showing required to defeat a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction . . . . However, because our inquiries into the personal involvement necessary to pierce qualified immunity and establish personal jurisdiction are unavoidably 'intertwin[ed],' . . . we now consider whether in light of the considerations set forth in *Iqbal*'s qualified immunity analysis, Arar has made a *prima facie* showing that personal jurisdiction exists.

Perhaps significantly, if the courts were to adopt this approach, a more consistent rule regarding the need to plead jurisdictional facts would also need to be established. For example, there is precedent stating that facts sufficient to support personal jurisdiction must be pleaded in the complaint itself, even though that is not required under the Federal Rules themselves.<sup>373</sup> These cases hold that the claim will be dismissed if conclusory statements in the pleadings are not sufficiently supported by affidavits or other evidence after jurisdiction is challenged by the defendant.<sup>374</sup> That outcome is essentially the same as would arise under the extension of the plausibility standard proposed herein. However, the more common understanding is that facts regarding personal jurisdiction need not be pleaded under Rule 8(a)(1).<sup>375</sup>

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*Id.* (citations omitted). This extension could only appropriately be undertaken by the U.S. Supreme Court, consistent with the Rules Enabling Act. *See* 28 U.S.C. § 2072(a) (2006) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals."); Bone, *Who Decides*, *supra* note 99, at 2004 ("The United States Supreme Court has made clear that trial judges cannot tailor stricter pleading standards to the circumstances of specific cases . . ."). However, existing Supreme Court precedent does not constitute a *per se* bar, for "[i]f notice pleading is best understood as a judicial interpretation of Rule 8(a)(2), then it is hardly illegitimate for the [U.S. Supreme] Court to revisit this earlier interpretation and qualify or revise it." Bone, Twombly, *supra* note 60, at 893.

373. *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004) (stating that "[t]o survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must state sufficient facts in the complaint to support a reasonable inference that [the defendants] can be subjected to jurisdiction within the state"), *cert. denied*, 543 U.S. 1147 (2005); *Strojnik v. Signalife, Inc.*, No. CV-08-1116-PHX-FJM, 2009 WL 605411, at \*4–5 (D. Ariz. Mar. 9, 2009) (construing the pleadings very broadly to capture the defendant in question in a case involving a Rule 12(b)(6) motion claim that the pleadings failed to include allegations pertaining to a specific defendant); *Osborn & Barr Comm'n, Inc. v. EMC Corp.*, No. 4:08-CV-87 CAS, 2008 WL 341664, at \*2 (E.D. Mo. Feb. 5, 2008) (stating that plaintiff must meet his or her burden of meeting the minimum jurisdictional requirements in the pleadings). The court said the following:

The discovery process established by the Federal Rules is not intended to establish jurisdiction. "It is the obligation of the plaintiff to undertake at least enough minimal investigation prior to filing a complaint as to permit it to allege a basis for jurisdiction in the complaint. It would be an abuse of the discovery process to allow discovery when the plaintiff fails to meet the minimal jurisdictional requirements."

*Id.* (quoting *Milligan Elec. Co. v. Hudson Const. Co.*, 886 F. Supp. 845, 850 (N.D. Fla. 1995)); 4 WRIGHT & MILLER, *supra* note 81, § 1067.6 (stating that plaintiffs seeking to "bring a defendant into federal court under a state statute . . . must first set forth sufficient facts in the complaint to support a reasonable inference that the defendant can be subjected to in personam jurisdiction," even though Rule 8(a) does not expressly include such a requirement).

374. *Dever*, 380 F.3d at 1072–73.

375. *See* FED. R. CIV. P. 8(a)(1) (requiring only a "short and plain statement of the grounds for the court's jurisdiction"). However, plaintiffs currently need to plead the factual basis for

This proposal will likely meet with some opposition, particularly among plaintiffs, who want broad and easy access to federal courts. In part, this is due to the nature of *Twombly* and *Iqbal* themselves. It has been said that these cases are more about access to courts than they are about pleading standards,<sup>376</sup> and it is certainly true that they cast significant doubt on the longstanding view that pleadings should not act as a case screening device.<sup>377</sup>

Indeed, it has long been recognized that "a pleading specificity standard involves balancing two conflicting goals: screening frivolous suits (which favors stricter pleading) versus facilitating meritorious suits (which favors more liberal notice pleading)."<sup>378</sup> This is similar to the type of balancing that takes place in jurisdictional discovery, where courts must screen improper suits (i.e., those where jurisdiction does not exist) while also making sure that meritorious suits (i.e., those where jurisdiction does exist) go forward.<sup>379</sup>

A strict rule regarding jurisdictional pleading—particularly when it is combined with the limitation or elimination of jurisdictional discovery—puts the burden of jurisdictional fact-finding on the plaintiff rather than allowing the plaintiff to shift the effort and cost to the defendant through discovery requests.<sup>380</sup> Some might find this approach acceptable, whereas others might take the view that it "gives too much latitude to district judges, who are eager to screen cases."<sup>381</sup> Interestingly, the apprehension about case screening

subject matter jurisdiction.

376. See Bone, *Twombly*, *supra* note 60, at 876 (claiming that the *Twombly* decision essentially makes a determination regarding "institutional design: how best to prevent undesirable lawsuits from entering the court system").

377. *Id.* at 880–83 (discussing the continued viability of *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

378. Bone, *Who Decides*, *supra* note 99, at 2005. Stricter pleading standards have been imposed in certain types of actions. See Burbank & Silberman, *supra* note 77, at 703 (discussing changes in pleading requirements under the Private Securities Litigation Reform Act of 1995); see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318–24 (2007) (discussing the pleading standard regarding the "strong inference" test in the securities context under Rule 9(b)); John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 346 (1996) (describing the "strong inference" test regarding pleadings under Rule 9(b)).

379. See J.E.C., *supra* note 2, at 545–46 (noting three types of cases involving jurisdictional discovery).

380. As it currently stands, there is no requirement that the plaintiff must exhaust all possible sources of information prior to requesting jurisdictional discovery. See Brazil, *Civil Discovery*, *supra* note 1, at 828 (noting hidden costs of discovery); Brazil, *Adversary Character*, *supra* note 1, at 1358–59 (noting social costs); J.E.C., *supra* note 2, at 546 (noting defendant's "legitimate and protectable interest in avoiding the time, effort, and expense of discovery when the court's jurisdiction to hear the merits may be lacking"). But see FED. R. CIV. P. 26(b)(2)(C)(i) (allowing courts to order discovery from "more convenient" sources).

381. Bone, *Twombly*, *supra* note 60, at 889. This is an interesting criticism to make, given

demonstrates some of the problems associated with excessive judicial discretion, but focuses on the possibility that the discretion will be used to decrease the number of borderline cases that go forward rather than increase them. At this point, there is no indication that judges involved in jurisdictional discovery are using their discretion to screen cases from going forward. Quite the opposite is true—most disputed cases go forward to jurisdictional discovery regardless of the minimal nature of the plaintiff's factual basis for jurisdiction.

The concern about improper preemptive screening is consistent with the increasingly pro-plaintiff approach seen in jurisdictional discovery.<sup>382</sup> However, this position seems neither necessary nor wise. As Professor Bone notes:

When proceduralists discuss pleading standards, they tend to assume that fairness applies just to plaintiffs and that any pleading standard stricter than liberal notice pleading can be justified only on efficiency grounds. This is a mistake. Fairness applies to both parties. . . . fairness in the pleading context has something to say not only about a plaintiff's ability to sue, but also about when the defendant must respond to the plaintiff's demands.<sup>383</sup>

For decades, plaintiffs have been given increasing deference as a means of striking back against defendants who were considered to have been benefitting unfairly from the rules of civil procedure.<sup>384</sup> However, the pendulum seems to have swung too far.<sup>385</sup> It now "appears that we have been too successful in

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that the Supreme Court was adopting the view, espoused by numerous jurists and commentators, that judges cannot effectively act as case managers in light of the "severe informational constraints impeding effective discovery management." *Id.* at 883; *see also* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (citing the often counterproductive nature of strategic decisions regarding how litigation should proceed); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007) (stating that the "hope of judicial supervision is slim" due to the information constraints faced by judges). This underscores what may be at the heart of jurisdictional discovery: The fear that trial judges will use the lack of information about jurisdictional facts as a means of illegitimately screening otherwise legitimate cases.

382. *See supra* notes 157–309 and accompanying text (discussing judicial approaches to the question of jurisdictional discovery).

383. Bone, *Twombly*, *supra* note 60, at 900–01.

384. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1126–28 (1966) (noting in 1966 that "[f]or purely domestic situations a general and almost universally accepted maxim favors the attacked over the complainant" and further noting "[t]he *status quo* as between the parties is not to be lightly changed, and the burden is thus on the plaintiff"); *see also supra* notes 157–309 and accompanying text (generally addressing the various standards applied to the question concerning whether to grant jurisdictional discovery).

385. *See* Bone, *Twombly*, *supra* note 60, at 908–09, 913–15 (discussing various fairness arguments in light of *Twombly*). Granted, some procedural restrictions have been placed on plaintiffs in recent years, including limitations in CAFA, heightened pleadings standards in the

opening the courthouse door. . . . Having opened the courthouse door wide, we now seek to divert some of the traffic to other spaces. Due process of law, the most visible repository of American procedural values, is changing shape."<sup>386</sup>

In fact, the "changing shape" of due process would explain the cases outlining the plausibility standard very well. Overall, "there seems to be something unfair about a plaintiff forcing a defendant to shoulder the burden of litigation without giving the defendant any reason why he should do so."<sup>387</sup> This is particularly true in the case of jurisdictional discovery, when the court's right to exercise its power over the defendant has not even been conclusively established.<sup>388</sup> Furthermore, recent precedents suggest that the Supreme Court is well aware of the troubling nature of jurisdictional discovery and is willing to consider ways to avoid imposing that particular burden on defendants.<sup>389</sup> A minimal alteration in the jurisdictional pleading standard—such as the plausibility standard—in conjunction with a stricter approach to jurisdictional discovery would appear to strike an adequate balance between plaintiffs' and defendants' interests.

Although this approach might seem alarmingly pro-defendant (or anti-plaintiff) to those who are comfortable with the current approach to jurisdictional discovery,<sup>390</sup> it is important to recognize that, although notice pleading is now the norm in the United States, the various provisions have not always been interpreted as liberally as they are now.<sup>391</sup> Indeed, for almost twenty years after the adoption of the Federal Rules of Civil Procedure, "jurists and politicians sharply divided on the pleading issue, some insisting that

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Private Securities Litigation Act, and the 2000 amendments to the Federal Rules of Civil Procedure. See *supra* notes 1–2, 305–09, 378 and accompanying text (addressing increased procedural restrictions on plaintiffs).

386. Burbank & Silberman, *supra* note 77, at 683.

387. Bone, Twombly, *supra* note 60, at 901. Though it is beyond the scope of this Article to discuss this issue in depth, Professor Bone undertakes a detailed analysis of the deference due to a defendant under both utilitarian and rights-based analyses. *Id.* at 901–08, 913–15.

388. See CASAD & RICHMAN, *supra* note 21, at 13 (noting protective principles).

389. These cases enable district courts to use any means necessary to dismiss a case to avoid or minimize jurisdictional discovery. See, e.g., *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 435 (2007) (noting "[d]iscovery concerning personal jurisdiction would have burdened Sinochem with expense and delay"); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999) (noting no "unyielding jurisdictional hierarchy" regarding the order in which motions to dismiss must be decided).

390. See *supra* note 13 and accompanying text (discussing acculturation).

391. See Bone, Twombly, *supra* note 60, at 891–94 (discussing history of approaches to pleading in the United States); Burbank & Silberman, *supra* note 77, at 678–84 (discussing various procedural reforms).

specific pleading was essential to properly framing the lawsuit and rendering it manageable."<sup>392</sup>

"A skeptical reader might wonder whether the burden of discovery is substantial enough to trigger a moral obligation to give reasons" for bringing suit against the defendant in question.<sup>393</sup> This Article takes the view, along with others,<sup>394</sup> that it is. "Discovery can be very costly . . . . Moreover, filing can also impose serious reputational and psychological harms."<sup>395</sup> Even if jurisdictional discovery could truly be considered limited—which it demonstrably cannot<sup>396</sup>—the current approach to jurisdictional pleading and discovery gives an entirely unfair advantage to plaintiffs who can, in a large number of cases, bring their suit elsewhere in the United States.<sup>397</sup>

The solution proposed in this section is useful because it is consistent with a number of the policy choices made recently at the highest levels of the legislative and judicial branches regarding pleadings, discovery, and federal jurisdiction.<sup>398</sup> Furthermore, by eliminating much of the excessive discretion that goes into determinations regarding jurisdiction, this solution makes the procedure fairer and more predictable for the defendant while also helping promote judicial efficiency by making the pleading standards consistent across the board.

As useful as this first solution is, it does not really address the problems associated with multi-factor, fact-intensive legal standards. The next judicially oriented reform proposal does.

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392. Bone, Twombly, *supra* note 60, at 892; *see id.* at 893 (noting it was not until 1957 that notice pleading became the standard); *see also* Burbank & Silberman, *supra* note 77, at 700 (noting judges were initially slow in exercising the powers granted under the 1938 Rules).

393. Bone, Twombly, *supra* note 60, at 907 n.161; *see id.* at 909 (noting "the defendant is entitled to receive . . . some reason why his situation is special enough to require a defense").

394. *See id.* at 909 (noting "the defendant is entitled to receive . . . some reason why his situation is special enough to require a defense"); United States *ex rel.* Snapp, Inc. v. Ford Motor Co., 532 F.3d 496, 503 (6th Cir. 2008) (discussing "a need to ensure fundamental fairness for defendants" through pleading requirements).

395. Bone, Twombly, *supra* note 60, at 907 n.161; *see also* Brazil, *Civil Discovery*, *supra* note 1, at 828 (noting hidden costs of discovery); Brazil, *Adversary Character*, *supra* note 1, at 1358–59 (noting social costs); Silberman, *supra* note 271, at 581–82 (noting that reasonableness analysis could result in "increased transaction costs that are inappropriate for issues which need to be determined quickly and efficiently at the outset of litigation"); J.E.C., *supra* note 2, at 546 (noting defendant's "legitimate and protectable interest" in avoiding discovery costs).

396. *See supra* notes 233–309 and accompanying text (discussing the potential scope of jurisdictional discovery).

397. *See supra* note 370 and accompanying text (discussing venue shopping by plaintiffs).

398. *See supra* notes 30–83 and accompanying text (providing an overview of the evolution of discovery and jurisdictional law).

*b. A Hierarchy of Facts*

As noted earlier, neither judges nor parties have a firm grasp on what facts are most probative to jurisdictional analyses.<sup>399</sup> Such uncertainty often leads parties to believe that everything is fair game for discovery and inspires them to do everything within their power to obtain every possible scrap of information.<sup>400</sup>

One way to minimize the need for broad-ranging, all-inclusive jurisdictional discovery would be to identify explicitly which facts are most persuasive to the determinations at issue.<sup>401</sup> This is something of a pragmatic approach to the issue, for although the Supreme Court has resisted the mechanical application of the minimum contacts test,<sup>402</sup> Professor Kevin Clermont stated that:

as much as any theoretician would dislike the messiness of a hierarchy of facts, courts are implicitly going to invoke one when they apply the prima facie standard in real cases. And the law would be wise to concede, by recognizing the hierarchy explicitly and then trying to control it.<sup>403</sup>

Furthermore:

The task for the law, then, is to assign an appropriate standard of proof to each contested jurisdictional element, one that reflects the direct costs of applying the standard and the element's importance in terms of the expected value of resultant errors, giving due weight to the differential between the policy against failing to provide a forum to the plaintiff . . . and the policy against failing to limit the burden on the defendant . . . . The aim

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399. See *supra* notes 235–309 and accompanying text (discussing jurisdictional discovery in practice). For example, in one instance the Sixth Circuit remanded a case for further consideration, requiring the district court to obtain evidence that was "more probative and reliable" without stating what that evidence might be. See *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988) (noting defendants had refused to comply with a jurisdictional discovery order), *abrogated on other grounds by Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992); Swanson, *supra* note 2, at 462–63 (discussing the Sixth Circuit's order in *Gould*).

400. Easterbrook, *supra* note 1, at 643–44 (describing the problem of the discovery as an "endless search for . . . well, for something that may turn out to be useful").

401. The three relevant issues are the following: (1) when to order jurisdictional discovery; (2) what the scope of jurisdictional discovery should be; and (3) what is necessary to establish the jurisdiction of the court.

402. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (noting the adjudication of personal jurisdictional "cannot be simply mechanical or quantitative").

403. Clermont, *supra* note 2, at 999 (speaking in the context of establishing jurisdictional facts).



is to minimize the sum of all the costs, but the trick is to specify properly the sources and magnitudes of all the various costs.<sup>404</sup>

While Professor Clermont was speaking in the context of proving the necessary jurisdictional facts, his analysis can also be applied to questions involving the standard needed to trigger jurisdictional discovery. It could also be used to address problems of scope by creating a "phased" system of discovery that gives first priority to those items that would be determinative or highly persuasive to the question of jurisdiction. Although the Supreme Court rejected a phased system of discovery in *Twombly* and *Iqbal*,<sup>405</sup> that principle will not be applicable to many types of jurisdictional discovery unless the plausibility standard is extended beyond the context of Rule 12(b)(6).<sup>406</sup>

Some difficulties exist with the creation of a hierarchy of facts. For example, *International Shoe* clearly states that jurisdictional analyses are not to proceed in a mechanical fashion.<sup>407</sup> Furthermore, ranking the relevant facts in each of the necessary areas of inquiry—that is, when to order jurisdictional discovery, what the scope of jurisdictional discovery should be, and what is ultimately necessary to establish the jurisdiction of the court—would be a complicated endeavor that would likely require either action by the Supreme Court or the legislature rather than action on the district or appellate court level.<sup>408</sup> Thus, the first reform option—extension of the plausibility standard—appears preferable for the simple reason that it is easier to implement in the existing legal structure than a hierarchy of relevant facts would be. Nevertheless, this solution might be a way to minimize excessive judicial discretion and give some realistic guidelines to parties and courts regarding the

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404. *Id.* at 1000.

405. *See* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) ("Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 593 (2007) (Stevens, J., dissenting) ("Respondents in this case proposed a plan of 'phased discovery' limited to the existence of the alleged conspiracy and class certification."). The phased approach to discovery of at least some matters was found acceptable by the Second Circuit in both those cases. *See Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007) (permitting "some limited and tightly controlled reciprocal discovery" after "a complaint survives a motion to dismiss"); *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 116 n.12 (2d Cir. 2005) (noting Federal Rules' procedures "to do away with non-meritorious claims as the litigation progresses").

406. *Supra* note 371 and accompanying text.

407. *See Int'l Shoe*, 326 U.S. at 319 ("[T]he criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.").

408. *See supra* note 372 (discussing the requirements of the Rules Enabling Act).

availability and scope of jurisdictional discovery while still retaining the current overarching structure regarding the determination of jurisdictional facts.

## 2. Legislative Solutions

Because jurisdictional discovery is an almost entirely court-created phenomenon, with the only legislative authority being drawn by analogy from the discovery provisions of the Federal Rules of Civil Procedure,<sup>409</sup> it may be that efforts to limit and reform the practice should most appropriately come from the judiciary.<sup>410</sup> However, given judicial language regarding a "qualified right" to jurisdictional discovery,<sup>411</sup> it may at this point be too difficult for the courts to undertake significant revisions in this area by themselves.<sup>412</sup> Thus, legislative options for reform (meaning that taken by Congress or, more likely, the relevant rulemaking committees) must be considered in addition to the judicially oriented solutions above.

Many commentators believe that legislative reform is superior to judicial reform in procedural matters.<sup>413</sup> For example, rulemaking bodies are privy to better information, including empirical studies, to help guide their decision-making processes.<sup>414</sup> Legislators and committee members are also less likely to become "another strategic player in the litigation game,"<sup>415</sup> as is true of judges involved in ongoing cases.<sup>416</sup>

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409. See FED. R. CIV. P. 26 (providing one of the rules of discovery); *supra* notes 52–66 and accompanying text (discussing the scope of discovery under the Federal Rules of Civil Procedure).

410. See Bone, Twombly, *supra* note 60, at 893 (noting that the Supreme Court can cut down judicially created conventions as well as expand them).

411. See, e.g., *Mother Doe I v. Al Maktoum*, 632 F. Supp. 2d 1130, 1146 (S.D. Fla. 2007) (stating that the right is qualified by "the timing and nature of any jurisdictional discovery request"); *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 729–30 n.7 (11th Cir. 1982) ("[I]t is appropriate to speak in terms of a qualified 'right' to jurisdictional discovery when a court's jurisdiction is genuinely in dispute." (quoting J.E.C., *supra* note 2, at 547)).

412. See Easterbrook, *supra* note 1, at 648 (suggesting legislative efforts may be necessary to cure discovery abuse).

413. See, e.g., *id.* at 647–48 ("[N]either [judges nor magistrates] can detect problematic requests, so that neither supervision nor sanctions will make a dent in the problem."); Bone, *Who Decides*, *supra* note 60, at 1995 (describing "the informational advantage rulemaking has over case-specific discretion").

414. See Bone, *Who Decides*, *supra* note 60, at 1995, 2005–11 (explaining why legislative bodies are "in a much better position than the trial judge to collect and process empirical data").

415. *Id.* at 1996.

416. See *id.* at 1996–2001 (discussing various strategic forces at work on judges and rulemakers). For a discussion of the relative roles and powers of Congress, the Supreme Court,

Legislative action appears particularly appropriate given recent amendments to the discovery provisions of the Federal Rules of Civil Procedure.<sup>417</sup> These efforts suggest that there is both the will and the ability to effectuate necessary change at the legislative level. Although those measures did not reach jurisdictional discovery,<sup>418</sup> there are at least two narrowly targeted solutions that rulemakers can take to address the problems in this field.

*a. Legislative Adoption of the Plausibility Standard*

The first possible legislative reform would involve an enactment requiring federal courts to apply the plausibility standard to jurisdictional pleadings under Rule 8(a)(1) of the Federal Rules of Civil Procedure.<sup>419</sup> As discussed above, there are numerous benefits to this approach and few downfalls, especially when the defendant is based in the United States.<sup>420</sup> Furthermore, Congress has already taken incremental steps in this direction with various enactments regarding pleading standards in certain types of cases.<sup>421</sup>

As a practical matter, the procedure envisioned under this measure would still require the defendant to bring the appropriate motion to dismiss under Rule 12(b)(1) or 12(b)(2). However, the plaintiff at this point would be unable to request jurisdictional discovery. Instead, the court would judge the sufficiency of the jurisdictional allegations either on the face of the pleadings and/or subject to any affidavits or other evidence the plaintiff wished to present to the court, counterbalanced by any evidence adduced by the defendant. If jurisdiction were found not to be proper, the case would be dismissed, although

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and rules committees in the area of federal procedural reform, see Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 *passim* (2004).

417. See *supra* notes 1–2, 20 and accompanying text (discussing amendments to the Federal Rules of Civil Procedure regarding discovery).

418. *Supra* note 57 and accompanying text.

419. FED. R. CIV. P. 8(a)(1). However, there are already legislative efforts to eliminate the advances made by the Supreme Court vis-à-vis the plausibility standard. See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (proposing a return to the pre-*Twombly* pleading standard).

420. See *supra* notes 345–47 and accompanying text (discussing the plausibility standard).

421. See, e.g., Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.) (enacting reforms to reduce abusive litigation); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–24 (2007) (discussing pleading standards regarding "strong inference" test in securities context under Rule 9(b)); Avery, *supra* note 378, at 346 (describing the "strong inference" test regarding pleadings under Rule 9(b)); Burbank & Silberman, *supra* note 77, at 703 (discussing Private Securities Litigation Reform Act of 1995).

in many cases involving a lack of jurisdiction, the plaintiff would be able to refile the case in another state or federal venue.

Although it is disheartening to admit that U.S. practitioners might behave with less rectitude towards the courts than lawyers in other countries, it is important to note that those who claim that jurisdictional discovery is necessary to curb falsehoods and omissions on the part of defendants are really saying that U.S. lawyers cannot be trusted to be full and frank in their disclosures to the court.<sup>422</sup> Indeed, one of the reasons why discovery practices became so abusive in the first place is because the drafters of the Federal Rules failed to recognize how U.S. lawyers' competitive nature would affect pretrial proceedings.<sup>423</sup> However, if legislators continue to be concerned about the truthfulness of the defendant in asserting its positions regarding jurisdiction, a rule might be created, similar to that in effect in several Canadian provinces, allowing cross-examination of any affiants for the defense (or, indeed, the plaintiff).<sup>424</sup> That might constitute an appropriate safeguard for those concerned about mendacity, if the existing rules of civil procedure and professional ethics are considered insufficient protections.

#### *b. Adoption of a Form of Service Out*

A second legislative solution to the problem of jurisdictional discovery would involve the adoption of some form of service out, similar to the approach used in England and Australia.<sup>425</sup> This approach would require a more significant alteration to the Federal Rules' structural approach than the other reform proposals, since it would require plaintiffs to seek the court's permission prior to attempting service on a defendant who was not physically present or amenable to service in the jurisdiction, but it would still be consistent with the principles and policies of the Federal Rules as they currently stand.<sup>426</sup>

Permission would likely be liberally granted, as it is in English courts, but there would still be an initial judicial determination as to whether jurisdiction is

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422. *See supra* notes 100, 140 and accompanying text (noting that the English rules of professional conduct appear to set a higher standard than the U.S. rules).

423. *See supra* note 99 and accompanying text (noting that discovery in the United States is premised on the overly optimistic view that competition between adversaries will facilitate the search for truth).

424. *See supra* note 152 and accompanying text (describing the rules in effect in Canada).

425. *See supra* notes 103–41 and accompanying text (describing English service out provisions).

426. *See supra* notes 52–83 and accompanying text (reviewing discovery practices under the Federal Rules and reviewing the power of federal courts to determine jurisdiction).

conceivably proper.<sup>427</sup> If permission to serve out were granted and the defendant nevertheless objected to jurisdiction, then a more intensive determination would be made, based on evidence adduced by each of the parties.<sup>428</sup> This model would also eliminate jurisdictional discovery but would also permit most parties to refile their claims in another state or federal court.

*c. Viability of Legislative Solutions*

The two legislative solutions outlined herein may seem unusual to those who have trained and practiced exclusively in the United States, but both proposals (1) provide reasonable methods of minimizing the ambiguity and uncertainty that currently plagues the establishment of jurisdictional facts and (2) create an appropriate balance between the plaintiff's and defendant's interests.<sup>429</sup> Furthermore, the legislative solutions proposed herein do not disturb decades of U.S. constitutional law regarding federal jurisdiction. Instead, they address the problems associated with jurisdictional discovery by guiding and minimizing judicial discretion rather than by attempting to minimize the problems associated with multi-factor, fact-intensive inquiries by creating a hierarchy of relevant jurisdictional factors.

Though different from current practice, there is nothing inherently illegitimate about requiring plaintiffs to plead jurisdiction with particularity and provide evidence to demonstrate to the court's minimal satisfaction that jurisdiction is proper without resorting to the defendant's own files. First, numerous other legal systems—many of which are premised on the same pro-discovery, pro-notice pleading principles embraced by U.S. federal courts—have adopted methods of dealing with the problem of establishing jurisdiction

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427. See *supra* notes 134–36 and accompanying text (noting that although English judges are inclined to grant permission, they must first review the plaintiff's application and make an initial determination that jurisdiction is proper).

428. See *supra* notes 142–56 and accompanying text (describing the procedure that applies when the defendant objects to a grant of permission for service out).

429. See *supra* notes 378–95 and accompanying text (analyzing the competing interests of plaintiffs and defendants in setting a jurisdictional pleading standard); Burbank & Silberman, *supra* note 77, at 678 (noting that "American pretrial has been criticized for encouraging 'easy' pleadings . . . and 'broad' discovery, thereby allowing the commencement of a lawsuit without sufficient investigation and encouraging a war of attrition to force settlement"); Silberman, *supra* note 271, at 582 n.68, 583 n.73, 590 (suggesting a new rules-based approach to jurisdiction that advocates a reasonableness evaluation similar to discretionary forum non conveniens analysis, seemingly similar to the English approach); J.E.C., *supra* note 2, at 542 (noting that "early versions of the Federal Rules offered the defendants greater protection from the expense and worry of submitting to jurisdictional discovery").

that are similar to the legislative solutions proposed herein.<sup>430</sup> Many of these legal systems are held in high regard by the global legal community. Thus, it cannot be said that U.S.-style jurisdictional discovery is the only way to establish jurisdiction in questionable cases, nor, given the extensively detailed problems of ambiguity and uncertainty, can it be said that it is the best way to do so.<sup>431</sup>

Second, the proposals outlined herein promote the principles currently enunciated in the Federal Rules of Civil Procedure, including the "just, speedy, and inexpensive determination of every action and proceeding"<sup>432</sup> as well as liberal discovery and notice pleading.<sup>433</sup> No one has yet suggested that the plausibility standard reflects a full-fledged retreat to the strict code pleading that was considered so problematic prior to 1938 (although, of course, the post-*Iqbal* jurisprudence is still in very early stages), and no such charges can be aimed at the reforms suggested herein.<sup>434</sup> Instead, the suggestions described in this Article focus on the need to promote "just, speedy, and inexpensive" determinations of jurisdiction by giving due weight to the defendant's interest in not being haled into a distant court and balancing that interest against the plaintiff's desire to be in a particular venue.<sup>435</sup>

Third, the reforms discussed in this section still allow most plaintiffs to bring their suit in another state or federal court.<sup>436</sup> Thus, one of the major rationales supporting liberal notice pleading and broad discovery—i.e., the desire to see legitimate claims proceed to the merits—will not be affected by the suggested changes to the rules regarding jurisdictional discovery. The vast

430. See *supra* notes 90–156 and accompanying text (describing the approach used in the English legal system).

431. See *supra* notes 157–309 and accompanying text (detailing the problems associated with jurisdictional discovery in the United States).

432. FED. R. CIV. P. 1.

433. See *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 310 (S.D. Ind. 1997) (reviewing the discovery provisions of the Federal Rules); Brazil, *Adversary Character*, *supra* note 1, at 1296 (noting that the current approach to discovery does not meet the goals of the Federal Rules); *supra* notes 91–102 and accompanying text (noting how English service out provisions promote these aims). Furthermore, the two legislative options described here also retain current constitutional standards regarding jurisdiction.

434. Cf. Thornburg, *supra* note 91, at 1187 (arguing against a return to detailed fact pleading as a general matter).

435. See *supra* notes 91–102 and accompanying text (noting that English service out provisions promote the aims of the Federal Rules and balance the interests of plaintiffs and defendants).

436. See *supra* note 370 and accompanying text (noting that even if a plaintiff's case is dismissed for lack of jurisdiction, the cause of action survives and can be brought in another federal or state court).

majority of defendants will not escape liability under any of the proposals made herein. Although some plaintiffs may find it difficult to bring their cases elsewhere due to choice of law issues, the effect is nowhere near as harsh as that imposed by the Supreme Court recently in the *Twombly* and *Iqbal* line of cases.<sup>437</sup> Furthermore, courts are not in the business of curing every possible detriment caused by choice of law concerns. However, courts are required to abide by legitimate restrictions of their power, as defined by the law regarding personal and subject matter jurisdiction.<sup>438</sup>

### V. Conclusion

Jurisdictional discovery involves the confluence of three important federal policies: a broad definition of relevance in discovery, a liberal interpretation of notice pleading, and a permissive approach to determine jurisdiction. The complex interactions between these different areas of law makes analysis difficult. As such, commentators have hesitated to address the special problems that arise in this area of law.

Courts have been similarly negligent in discussing the issues associated with jurisdictional discovery. Historically speaking, the practice was adopted silently, by degrees, and without any real debate about the issues and policies underlying its use. Although the concept of limited jurisdictional discovery may have made sense in 1938 or in the years immediately following the adoption of the Federal Rules of Civil Procedure, much has changed in the last seventy years. The law of federal jurisdiction has become vastly more complex. Interstate and international travel and commerce have become the norm rather than the exception. Federal cases have become larger and more complicated, and lawyers have become increasingly willing and able to adopt broad and aggressive tactics regarding discovery. Furthermore, the universe of potentially relevant information has expanded exponentially as a result of

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437. See *supra* note 366 and accompanying text (noting that a dismissal under that line of cases will likely be a final disposition of the plaintiff's claim in any venue).

438. *Osborn & Barr Commc'ns, Inc. v. EMC Corp.*, No. 4:08-CV-87 CAS, 2008 WL 341664, at \*2 (E.D. Mo. Feb. 5, 2008) (noting limits on a court's power to grant discovery). The court stated the following:

The discovery process established by the Federal Rules is not intended to establish jurisdiction. "It is the obligation of the plaintiff to undertake at least enough minimal investigation prior to filing a complaint as to permit it to allege a basis for jurisdiction in the complaint. It would be an abuse of the discovery process to allow discovery when the plaintiff fails to meet the minimal jurisdictional requirements."

*Id.* (quoting *Milligan Elec. Co. v. Hudson Constr. Co.*, 886 F. Supp. 845, 850 (N.D. Fla. 1995)).

technological improvements, ranging from the advent of easy and cost-effective photocopying and word processing to the routine use of the internet, electronic mail, and similar devices.

As a result, there is nothing "limited" about jurisdictional discovery today. This is highly problematic, given that parties request jurisdictional discovery at a time when it is unclear whether the court even has jurisdiction over the parties and the dispute.

Furthermore, jurisdictional discovery creates numerous practical and due process concerns as a result of the lack of clearly identified standards regarding availability and scope. What is more, courts have adopted an extremely pro-plaintiff approach to jurisdictional discovery, based on the perceived need to promote easy and open access to justice.<sup>439</sup>

However, jurisdictional discovery is not the only way to deal with questionable cases regarding jurisdiction. Moreover, limiting or even eliminating jurisdictional discovery in U.S. federal courts will typically not affect a plaintiff's ability to bring a cause of action. Though some parties may find their options limited as a result of a rule that curtails or forbids jurisdictional discovery, giving plaintiffs the best possible choice of substantive or procedural law has never been considered a legitimate aim of the law of federal jurisdiction. Instead, the emphasis has always been on fairness to both the plaintiff and the defendant.<sup>440</sup> A legal system that allows one party to request potentially vast and burdensome amounts of information from a party who may not even be subject to the power of the court is inherently suspect, particularly when there are other means of establishing the jurisdiction of the court.

In many ways, it is highly appropriate that the question of reforming jurisdictional discovery should come now. Not only has the U.S. Supreme Court recently signaled that it is concerned about the burdens that are placed on parties prior to a determination that they are properly subject to the jurisdiction of the court, but it has also lately cast doubt on the capacity of district courts to exercise managerial control over discovery, particularly in the early stages of a case.<sup>441</sup> Explicitly extending some of these recent precedents to apply to

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439. *See supra* notes 158–309 and accompanying text (describing the standards and scope of jurisdictional discovery).

440. *See supra* note 262 and accompanying text (noting that in deciding whether jurisdiction is proper, the central inquiry concerns the fairness to both parties).

441. *See, e.g.*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Erickson v. Pardus*, 551 U.S. 89 (2007); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 435 (2007); *Ruhrgas AG v Marathon Oil Co.*, 526 U.S. 574, 578 (1999).



jurisdictional matters may prove useful in limiting jurisdictional discovery or even eliminating it altogether, all while remaining consistent with current approaches to U.S. federal law and practice.<sup>442</sup>

Recent changes in the nation's social reality may also reflect a reduced need for a procedural device that increases the number of federal venues available to plaintiffs. For example, it has been said that "ease of travel and communications may just as easily support restrictions on jurisdiction, since plaintiffs can more easily seek out defendants without incurring severe hardship."<sup>443</sup>

Similarly, changes in technology have made it much easier to obtain, through public sources, information that was once exclusively within the purview of the party to be subjected to the discovery order.<sup>444</sup> The Internet, for example, can provide a wealth of information, if the plaintiff will only take the time and effort to find it.<sup>445</sup> This may be particularly true in cases involving corporate defendants (i.e., the kind of entities that courts and commentators have argued to be the most appropriate recipients of requests for jurisdictional discovery in the first place<sup>446</sup>), since many corporations have dedicated websites that can reflect their amenability to suit in a particular jurisdiction. For example, a corporation may use a website to tout its nationwide clientele, post press releases regarding recent activities, and make corporate documents publicly available.<sup>447</sup>

Small businesses and individuals have also become increasingly likely to broadcast their activities over the Internet through shared or dedicated websites, blogs, and social networking sites. While these sorts of electronic resources will not be available in every situation, they nevertheless go to show that the

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442. See *supra* notes 348–98, 419–24 and accompanying text (reviewing the plausibility standard and proposing to extend it to jurisdictional matters).

443. Silberman, *supra* note 271, at 576 n.35.

444. The phrase "exclusively within the purview" of a particular party can be deceiving. In some cases, the information is truly not available elsewhere (i.e., purely internal memoranda), while in other cases, the information can be obtained from other (third party) sources, but only with great difficulty. For example, correspondence can be obtained from either party, but it is often easier and more efficient to go to the common source rather than requiring the party requesting discovery to attempt to identify and track down the many other correspondents.

445. See *supra* note 243 and accompanying text (discussing strategic use of jurisdictional discovery by plaintiffs); see also *Osborn & Barr Commc'ns, Inc. v. EMC Corp.*, No. 4:08-CV-87 CAS, 2008 WL 341664, at \*2 (E.D. Mo. Feb. 5, 2008) ("The discovery process established by the Federal Rules is not intended to establish jurisdiction.").

446. See *supra* note 191 and accompanying text (presenting the argument for why jurisdictional discovery is especially appropriate for corporate defendants).

447. See, e.g., Walmart Corporate Website, <http://walmartstores.com> (last visited Mar. 20, 2010) (including international store locator, press releases, and corporate documents) (on file with the Washington and Lee Law Review).

social and legal context in which jurisdictional discovery is now sought is very different than it was in the past.

Hence, there are many good reasons to consider reform of jurisdictional discovery. Of the various alternatives discussed herein, this Article takes the view that any of the alternatives that eliminates the device entirely would be appropriate. The mechanism is no longer working in the way in which it was originally intended (to the extent any original intent can even be divined), and there is no realistic way of fixing the problem piecemeal.<sup>448</sup> Although this Article discusses the creation of a hierarchy of jurisdictional facts, possibly in conjunction with phased jurisdictional discovery, there are significant problems with that proposal. For example, while such a measure would diminish judicial discretion and help parties create truly limited discovery requests, it would also require a rethinking of certain important constitutional norms, not the least of which is *International Shoe's* view that jurisdictional tests should not be mechanically applied.<sup>449</sup>

Of the remaining proposals, this Article is most in favor of a service out provision, similar to the type used in England.<sup>450</sup> That particular approach has proven effective in jurisdictions with legal systems very similar to that of the United States, and the procedure could be easily and clearly implemented in this country. Furthermore, service out provisions address several of the problems associated with jurisdictional discovery, particularly in the way that they embrace (1) clear rules created by drafters operating outside of the litigation process, which allows for reasoned deliberation regarding optimal standards, and (2) structured judicial discretion, which increases parties' ability to anticipate outcomes and decreases the opportunity for gamesmanship during the process.<sup>451</sup> A service out provision would also help overcome the problems

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448. See Easterbrook, *supra* note 1, at 647–48 (arguing that discovery suffers from systemic problems which cannot be solved by "tinkering" with the rules).

449. See *supra* note 265 and accompanying text (noting that early courts and commentators failed to consider how *International Shoe* would affect jurisdictional discovery). But see Silberman, *supra* note 90, at 766–67 (suggesting the constitutional minimum contacts test could be refined to create "predictable, legislative standards").

450. The English approach to jurisdictional matters has been proposed as a model before. See, e.g., Silberman *supra* note 90, at 766 (suggesting statute for asserting jurisdiction in state and federal court concerning foreign defendants); Silberman, *supra* note 271, at 583 n.73 (proposing a model that "resembles aspects of the English system for 'service outside of the jurisdiction'").

451. See Silberman, *supra* note 90, at 763 (noting "the European Court confronts the text of the Convention in rendering an interpretation to effectuate its policies [regarding jurisdiction], whereas the Supreme Court can only reach for some natural justice principle brooding omnipresent in the sky"). At least one Supreme Court justice has gone on record as favoring a more rule-based approach to jurisdiction. See Silberman, *supra* note 271, at 576

of multi-factor standards by giving clearer guidance regarding relevant jurisdictional facts.

Those who prefer a more "home-grown" alternative would likely prefer either a judicial or legislative extension of the plausibility standard to the pleading of jurisdictional issues. Under this approach, whenever jurisdiction was challenged pursuant to a motion to dismiss under Rule 12(b)(1) or 12(b)(2), the court would decide the issue based on the pleadings and any facts adduced by the parties without the benefit of jurisdictional discovery. Although this approach is consistent with that taken in the context of Rule 8(a)(2) and motions to dismiss under Rule 12(b)(6) in *Twombly* and *Iqbal*, there may be those who continue to voice concerns about the ability or willingness of parties and their counsel to provide full and fair disclosure to the court. If necessary, therefore, it would be possible to build in the right of cross-examination of affiants, similar to the approach currently used in Canada as part of its service out procedure.<sup>452</sup>

Regardless of whether the plausibility standard were to be imposed in jurisdictional matters by virtue of legislative or judicial means, the effect and content of the reform would be the same. To some extent, the legislative approach might be preferred, since it could be imposed clearly and in a wholesale, rather than piecemeal, manner. It might also be easier to build in a limited right of cross-examination if the procedure were legislatively created. Nevertheless, either option appears possible.

So often, reform efforts focus on substantive law, but procedural reform—such as that regarding jurisdictional discovery—cannot be ignored. Jurisdictional discovery touches on disputes involving every substantive area of law, and the current approach is not only burdensome and expensive, but it is also ineffective in promoting the goals of the Federal Rules of Civil Procedure. It is also demonstrably unfair to defendants. Thus, courts, commentators, legislators, and practitioners should consider whether there is a better way to handle questions involving the jurisdiction of federal courts. As has been said elsewhere, "[p]rocedure makes a difference. Some would say all the difference in the world."<sup>453</sup>

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(noting "Justice Scalia's search for rule-oriented standards of jurisdiction"). Notably, Professor Silberman takes the view that the U.S. constitutional standard cannot be equated with the judicial determination on service out. See Silberman, *supra* note 90, at 762–63 ("The difference between the constitutional standard of 'reasonableness' in the United States and the 'leave-to-serve-out discretion' of Order 11 in England is significant."). However, that is not to say that the U.S. constitutional concerns cannot be grafted onto the service out procedure.

452. See CHASE ET AL., *supra* note 90, at 522–23 (describing the Canadian approach to jurisdiction).

453. Geoffrey C. Hazard, Jr., *Preliminary Draft of the ALI Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 489, 496 (1998).