THE HEIGHTENED PLEADING STANDARD OF

BELL ATLANTIC CORP. V. TWOMBLY AND

ASHCROFT V. IQBAL: A NEW PHASE IN

AMERICAN LEGAL HISTORY BEGINS

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“I don’t know the future. I didn’t come here to tell you how this is going to end. I came here to tell you how it’s going to begin.”

—Keanu Reeves, as Neo

I. INTRODUCTION

This Article examines the United States Supreme Court’s decisions in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal* and asserts that while it is too early to know how the story of pleading standards in the federal courts will end, a thorough analysis of these two cases within historical context can tell us, at least for now, “how it’s going to begin.”

Part II of this Article traces the evolution of the modern American pleading standard from the formulaic requirements of common law pleading through the temporary improvements of the Field Code to the liberal pleading standards of the Federal Rules of Civil Procedure. Part III methodically analyzes both *Twombly* and *Iqbal* to demonstrate how the rulings, read together, mark a radical revision of the pleading standard. Part IV reports some of the early response to the *Twombly–Iqbal* standard, including scholarly commentary, conjecture about Justice Sonia Sotomayor’s role in the future of the Court, and the proposed Notice Pleading Restoration Act of 2009. Concluding, the author invites the reader to watch as the story of the most important procedural ruling since *Conley v. Gibson* unfolds.

II. A BRIEF HISTORY OF THE MODERN AMERICAN PLEADING STANDARD

In 1938, the Federal Rules of Civil Procedure (Federal Rules) were adopted in an attempt to build upon and improve two prior pleading systems: common law pleading and code pleading. An integral part of the new Federal Rules was Rule 8, which, “with its splendid simplicity, [stood] as the centerpiece of a procedural system designed to rectify the pleading abuses of the past.” To understand why the Federal Rules were hailed as the solution to a system crippled by technicalities and rendered unusable for claimants, a brief history lesson is in order.

A. The Ritualistic Standards of Common Law Pleading

A plaintiff in medieval England had to obtain a writ from the King’s Chancellor before he could initiate a suit at common law. During this time, common law pleading was oral—courts would ask the lawyers questions and the lawyers would, in turn, respond with simple oral statements. As the system developed, practitioners, litigants, and judges alike found that oral pleading consumed precious judicial resources.

6. Id.
7. See BILLY G. BRIDGES & JAMES W. SHELSON, MISSISSIPPI CHANCERY PRACTICE § 3 (2000) (“To institute an action in one of these courts, it was necessary first to obtain from the office of the chancellor an appropriate judicial writ. This writ comprised a brief statement of the nature of the action and prescribed the kind of judgment that might be awarded thereunder. The judges were expected to remain closely within the authority conferred by these writs. They had no discretionary or other power except as thereby delegated.”).
8. Fairman, supra note 5, at 555.
9. See generally ROY W. MCDONALD & ELAINE A. GRAFTON, CARLSON TEXAS CIVIL PRACTICE § 7:2 (2d ed. 2003) (“In common-law pleading, ‘issue pleading’ was the norm. Pleading originated as an informal oral discussion participated in by counsel, the court, and even bystanders.”); see also Laurie C. Kadoch, So Help Me God: Reflections on Language, Thought, and the Rules of Evidence Remembered, 9 Rutgers J.L. & Religion 1, 51–52 n.267 (2007) (“Originally, the pleadings were conducted orally in open court and entered on the record of the case by the clerk. The plaintiff’s counsel began by telling his story, whence the use of the word count [from the French, raconteur] which remained in use until the Judicature Acts for the various paragraphs in the plaintiff’s declaration (now called the statement of the claim) and is still in use for the different paragraph’s [sic] of an indictment. The plaintiff’s counts were met by the defendant’s pleas, which still remain oral in criminal proceedings. This system of oral pleadings determined the character of the Year Books which are almost entirely devoted to a detailed report of the moves of both sides until finally one
the 1500s, this system of oral pleading and common law writs gave way to written pleadings and fixed forms. \(^{10}\) There were a number of reasons for the change. As one legal scholar describes it:

First, pressure on judges' time led to the introduction of written pleadings, which produced delays based on technicalities. Second, and more importantly, pleadings became more restrictive due to the jurisdictional requirements of the common law. Jurisdiction under the common law system was based on the medieval "writ," the terms of which disclosed the general nature of plaintiff's complaint. The plaintiff was required to fit its pleading within the bounds of the writ, as the writ was the sole basis of the court's jurisdiction. \(^{11}\)

Practitioners and judges quickly discovered an inherent usefulness in written pleading. \(^{12}\) The greatest advantage of the written system was that it provided the parties a more capable vehicle through which they could isolate issues for trial, thereby avoiding the consumption of judicial time and resources that was mandated by cumbersome systems of oral pleading. \(^{13}\) Indeed, "[t]he [written] pleading scheme was premised on the assumption that by proceeding through numerous stages of denial, avoidance, or demurrer, a case eventually would be reduced to a single dispositive issue of fact or law." \(^{14}\) As a result, pleading—not trial—became the judiciary's greatest tool for resolving disputes. \(^{15}\)

Over time, however, common law pleading devolved from a concerted endeavor to isolate a single issue of fact or law into a ritualistic recitation of required verbiage. \(^{16}\) Even the simplest of disputes

\(^{10}\) Fairman, supra note 5, at 554–55.


\(^{12}\) Fairman, supra note 5, at 554.


\(^{14}\) Fairman, supra note 5, at 554.

\(^{15}\) See id. at 555–57.

necessitated precise wording. Plaintiffs routinely suffered under this formulaic system because even the smallest departure from the prescribed forms resulted in a technical dismissal on the pleadings before a decision could be reached on the merits.

Defendants suffered under this system as well. Because they were not required to be pleaded in detail, the pleadings included little or no information regarding the facts of a particular case; they stated only the requisite formula for bringing an action. This absence of factual allegations worked a disservice on defendants, who knew what type of action was being brought against them but often knew little about the plaintiff's position regarding the circumstances giving rise to it.

This paper-pushing system eventually became unworkable as lawyers, in attempts to play the system, became increasingly “anxious to get admissions without committing themselves.” Consequently, “[t]his cumbersome system of specialized allegation, saddled with such epithets as ‘the glory of the technician and the shame of the lover of justice’ and ‘the bastard formalism of pleading,’ generated popular dissatisfaction that gave rise to reform.”

B. The Factual Pleading Approach of the Field Code

In an effort to remedy the shortcomings of common law pleading, New York attorney David Dudley Field created the Field Code of Civil Procedure (the Field Code) in the mid-nineteenth century. The Field
Code was specifically “designed to eradicate decisions . . . based . . . on technicalities” alone. 24 Indeed, in place of recitals of requisite phrasings, “the Code directed that the complaint contain ‘[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.’” 25 The Field Code focused on the facts giving rise to the action instead of the procedural rituals governing its resolution. 26 In 1848, New York was the first state to officially adopt the Field Code, which became the model for other states thereafter. 27 Several other states followed in New York’s footsteps. 28

While code pleading’s fact-oriented approach addressed common law pleading’s over-emphasis on technicality, it nevertheless generated problems of its own. “Although hailed by reformers as so simple a child could explain a case to the court, the high hopes of the Field Code were unfulfilled.” 29 Notwithstanding the “simple statement” requirement, “there was great difficulty distinguishing ultimate facts from conclusions since so many concepts, like agreement, ownership and execution, contain a mixture of historical fact and legal conclusion.” 30

The trouble with distinguishing facts and legal conclusions was especially important under the Field Code because “[o]nly ultimate facts satisfied the pleading standard; evidentiary facts and conclusions within a pleading could not state a claim.” 31 The system, then, relied upon “hypertechnical distinctions and produced conflicting judicial interpretations. The ensuing confusion created a pleading system that rivaled the waste, inefficiency, and delay of the common-law practice it was

common law with legal codes. Advocates won an early victory in New York, where the legislature enlisted a commission headed by Field to codify all aspects of the common law.”

26. Fairman, supra note 5, at 555.
27. Scozzaro, supra note 13, at 410–11 (citing GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 46[A] (2d ed. 1994)).
28. Id. at 411.
29. Fairman, supra note 5, at 556.
The Heightened Pleading Standard of Twombly and Iqbal

designed to reform.” For instance, courts would often narrowly construe the code’s “statement of facts” required by the plaintiff, allowing only “ultimate facts” and refusing the inclusion of conclusions of law or evidentiary facts in the pleading. As a result, defendants often moved for a pretrial determination as to whether the “statement of facts” included in the plaintiff’s pleading stated ultimate facts, evidence, or conclusions.

C. The Liberal Pleading Standard of the Federal Rules of Civil Procedure

1. The Interplay of Federal Rules 8, 26–37, and 56

In 1938, the drafters of the Federal Rules proposed what they intended to be a more functional pleading system. Judge Charles E. Clark, the reporter of the committee that drafted the Federal Rules, described the purpose of the Rules as follows:

The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement.

After thoroughly analyzing “thousands of decisions construing the code requirements of pleading which were phrased in terms of ‘ultimate facts,’ ‘material facts,’ and ‘cause of action,’” the drafters of the Federal Rules concluded that “the terms had acquired shades of meaning—and of obscurity—wholly unwarranted by the purposes of the rules in which they were contained.” Thus, the new Federal Rules did away with restrictive code terms and adopted a more liberalized pleading standard.

32. Id. at 555–56 (citations omitted).
33. McNamara, Rothman & Pines, supra note 11.
34. Id.; see also Walter W. Cook, Statements of Fact in Pleading Under the Codes, 21 COLUM. L. REV. 416, 416 (1921); Weinstein & Distler, supra note 23, at 520–21.
37. See, e.g., Thompson v. Allstate Ins. Co., 476 F.2d 746, 749 (5th Cir. 1973) (“Ancestor worship in the form of ritualistic pleadings has no more disciples. The time when the slip of a sergeant’s quill pen could spell death for a plaintiff’s cause of action is past. Under the Federal Rules of Civil Procedure, a complaint is not an anagramatic exercise in which the pleader must find just exactly the prescribed combination of words and phrases.”).
“Sobered by the fate of the Field Code… [the] drafters of the Federal Rules set out to devise a procedural system that would install what may be labeled the ‘liberal ethos,’ in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.” This “legal realism” perspective is further reflected in the Supreme Court’s 1938 discussion in *Maty v. Graselli Chemical Co.*, in which the Court stated that

[p]leadings are intended to serve a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end. . . . Proper pleading is important, but its importance consists in its effectiveness as a means to accomplish the end of a just judgment.

Similarly, the drafters of the Federal Rules took note of the four purposes served by pleadings: “(1) providing notice of a claim or defense, (2) stating facts, (3) narrowing issues to be litigated, and (4) allowing for quick disposition of sham claims and defenses.” While one might assert that “[p]leading, both at common law and under the codes, shouldered all four of these responsibilities,” the drafters of the Federal Rules nevertheless sought to combine aspects of both common law pleading and code pleading to create a better-functioning system. This plan resulted in two groundbreaking innovations: (1) the Rule 8 notice pleading standard and its connection with Rule 12(b)(6) (motion to dismiss for failure to state a claim upon which relief could be granted); and (2) Rules 26–37 (the rules of discovery) and their relation to Rule 56 (summary judgment). It is prudent to pause in this history lesson to note that Rule 8 and Rules 26–37 were designed to work in tandem to accomplish the four purposes of pleading. Indeed, “[s]implified pleading accomplished the notice-giving

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39. See, e.g., Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOW. L.J. 73, 80–81 (2008) (“Legal Realism began with the premise that legal rules do not determine the outcome of adjudication: the abstract rules and constructs traditionally associated with law are too malleable and too far removed from the factual context of legal disputes to constrain judicial decision-making.”).
41. *Fairman, supra* note 5, at 556.
42. *Id.*
43. *Id.* at 556–58.
44. Another revolutionary aspect of the Federal Rules was the acceptance of alternative pleading. See FED. R. CIV. P. 8(a)(3).
function at a minimum cost and allowed cases to proceed through
discovery and on to trial where they could be decided based on what
actually happened rather than on legal technicalities."\textsuperscript{45}

The distinction between factual pleadings and legal conclusions has
always complicated pleading systems. Plaintiffs had to specifically
distinguish between factual and legal allegations in the complaint during
the common law era of pleading, and even the simplistic and fact-intensive
approach of code pleading made it difficult to distinguish fact from legal
conclusion on the face of the pleadings.\textsuperscript{46} Consequently, the drafters of
the Federal Rules carefully chose the language of Rule 8. In its current form,
Rule 8(a) reads as follows:

A pleading that states a claim for relief must contain: (1) a short and
plain statement of the grounds for the court’s jurisdiction, unless the
court already has jurisdiction and the claim needs no new jurisdictional
support; (2) a short and plain statement of the claim showing that the
pleader is entitled to relief; and (3) a demand for the relief sought,
which may include relief in the alternative or different types of relief.\textsuperscript{47}

As clearly observed in the text itself, Rule 8(a)(2) avoids using terms
like “fact,” “conclusion,” and “cause of action.”\textsuperscript{48} Nevertheless, Rule 8(e)
clearly incorporates code pleading simplicity and provides that each
averment of a pleading shall be simple, concise, and direct, and that no
technical forms of pleading or motions are required.\textsuperscript{49} To ensure that no

\textsuperscript{45} Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court

\textsuperscript{46} See 5 Charles Alan Wright & Arthur R. Miller, Federal
Practice and Procedure § 1216 (3d ed. 2004) (“The substitution of ‘claim showing
that the pleader is entitled to relief’ for the code formulation of the ‘facts’ constituting
a ‘cause of action’ was intended to avoid the distinctions drawn under the codes among
‘evidentiary facts,’ ‘ultimate facts,’ and ‘conclusions’ . . . .”); see also Cook, supra note
34, at 417 (“[T]here is no logical distinction between statements which are grouped by
the courts under the phrases ‘statements of fact’ and ‘conclusions of law.’”).

\textsuperscript{47} Fed. R. Civ. P. 8(a)(1)–(3).

\textsuperscript{48} Marcus, supra note 16, at 439.

\textsuperscript{49} See 35A C.J.S. Federal Civil Procedure § 318 (2009) (“It has been stated
that it is only necessary that the complaint set forth the ultimate facts, and that it is
unnecessary and improper to plead evidentiary facts. However, Rule 8 relieves the
pleader from distinguishing in advance between evidentiary and ultimate facts, but still
requires, in a practical and sensible way, that the pleader set out sufficient factual
matter to outline the elements of his or her cause of action or claim, proof of which is
essential to his or her recovery, although the complaint need not set forth every fact
essential to the plaintiff’s right of recovery, and is not rendered insufficient by the
pleadings would be dismissed for failure to recite precise verbiage, Rule 8(e) mandates that “all pleadings shall be so construed as to do substantial justice.” In furtherance of the new system’s liberal ethos that decisions on the pleadings would be kept to a minimum, courts routinely would grant leave to amend the pleadings. In fact, cases decided in the first few years following the adoption of the Federal Rules demonstrate that the common reading of Rule 8 was that it functioned to initiate a lawsuit, while any facts not known at the time of filing could be later obtained through the newly developed discovery process established by the Rules.

omission of the ultimate facts. Still, it is not enough to indicate merely that the plaintiff has a grievance, and whether a complaint is sufficient is to be determined by its contents, and not by what the defendants may know.”)

50. FED. R. CIV. P. 8(e); see also 61A AM. JUR. 2D Pleading § 192 (2009) ("[Rules 8(a)(2) and 8(e)] reflect the basic philosophy of the federal rules that simplicity, flexibility, and the absence of legalistic technicality are the touchstones of a good procedural system.").


52. See Ferrara v. Interstate Transit Lines, 5 F.R.D. 54, 55–56 (W.D. Mo. 1945) (“Rule 8(a) provides that the complaint shall consist, among other things of ‘(2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . .’ This has been construed to mean that it is unnecessary to state a cause of action. It is only necessary for the pleader to make it appear that the complainant is entitled to relief. This may be done, even though the complaint does not technically state a cause of action, and, moreover, the complaint might be filled with conclusions and even might omit ultimate facts.” (quoting FED. R. CIV. P. 8(a), and citing Dennis v. Vill. of Tonka Bay, 151 F.2d 411 (8th Cir. 1945)); see also United States v. Ascher, 41 F. Supp. 895, 897 (S.D. Cal. 1941) (“The only grounds of the motions to dismiss, a denial of which possibly ‘would work injustice’ to some defendants, are those raising laches and the statute of limitations, but we think the new rules also safeguard such an eventuality, and it is to be presumed that defendants will present such defenses as are available to them in accordance with Rule 8(e), which restricts the presentation of affirmative defenses in an exclusive manner. This new procedural scheme, with the broad rights of discovery and interrogation, as well as pretrial proceedings under Rule 16, gives ample protection to the rights of every defendant.”); Poole v. White, 2 F.R.D. 40, 41 (N.D. W. Va. 1941) (“The great weight of authority is to the effect that bills of particulars should be limited to information necessary to enable the preparation of responsive pleadings, and that other information should be secured by interrogatories or discovery.” (citations omitted)); Green v. McGaughy, 1 F.R.D. 604, 605 (E.D. Tenn. 1940) (finding a personal injury complaint pleading plaintiff “otherwise was injured” to be sufficient under Rule 8); Graziano v. Mich. Associated Express, 1 F.R.D. 530, 531 (N.D. Ill. 1940) (finding particulars requested by defendant went more to matters of evidence than pleading); Randolph v. McCoy, 29 F. Supp. 978, 979 (S.D. Tex. 1939) (noting that the complaint met requirements of Rule 8 but nevertheless requiring plaintiff to file bill of particulars); Sharp v. Pa.-Reading Seashore Lines, 1 F.R.D. 16, 17 (D.N.J. 1939) (finding “that the new rules are for the purpose of simplifying pleadings, and facts needed by plaintiff for trial are to be obtained from the rights of discovery.”).
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2. Hickman v. Taylor

In 1947, the Supreme Court commented in Hickman v. Taylor on the interplay between the pleading and discovery functions of the Federal Rules.53 The Court wrote:

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.54

Hickman is significant because the Supreme Court, for the first time, specifically stated what roles pleading and discovery serve in the ultimate resolution of civil disputes.55 Under Hickman, the initial complaint served solely to put the defendant on notice, whereas discovery was instituted for the twin purposes of (1) narrowing the issues and (2) “ascertaining the facts, or information as to the existence or whereabouts of facts, relative to [the] issues.”56 Hickman's construction of Rule 8, therefore, solidified the conclusion that Rule 8 was a remarkable shift from both common law pleading and code pleading.57 Thus, Hickman stood for the proposition

54. Id. at 500–01 (citations omitted).
55. See id. at 501.
56. Id.
that giving sufficient notice under Rule 8 opened the door to discovery for plaintiffs.58

In spite of the Court’s decision, various lower courts continued to debate the pleading standard of Rule 8(a). For example, one year after Hickman, in Bush v. Skidis, a Missouri district court refused to accept Hickman’s construction of Rule 8, thus refusing discovery to a personal-injury plaintiff.59 Noting the Court’s decision in Hickman “‘restrict[ing] the pleadings to the task of general notice-giving and invest[ing] the deposition–discovery process with a vital role in the preparation for trial,’”60 the district court nevertheless re-examined the purposes of pleadings and discovery under the then-decade old Federal Rules.61 The Bush court essentially set out to answer whether, under the Federal Rules, the particulars of a negligence charge should be set forth in the complaint by the plaintiff or ascertained by the defendant later in discovery.62

Granting the defendant’s motion for a more definite statement, the court wrote that

[A] just and fair interpretation of the rules is not violated by requiring the party charging negligence to specify the negligence in its pleading and that such information in the pleading can well come within the wording of Rule 8, that the claim of negligence show that the pleader is entitled to relief.63

The rationale underlying the Bush court’s decision lies in the rhetorical questions the court posed:

If the party making the charge of negligence could be required to set forth in answers to interrogatories or requests for admissions the specific acts of negligence relied on, why not let this information, as to the issues be set forth in the pleading? Why put the Court and the parties to the trouble of searching through various papers to determine what the issues are when the complaint and answer might serve the purpose—a purpose they have served from time immemorial.64

58. See Hickman, 329 U.S. at 501.
60. Id. at 562 (quoting Hickman, 329 U.S. at 501).
61. Id. at 562–65.
62. Id. at 562.
63. Id. at 565 (internal quotation marks omitted).
64. Id. at 564.
This refusal by some judges to “get with the system,” however, was countered by many courts’ ready and willing acceptance of the Federal Rules’ new scheme.65

3. Conley v. Gibson

In 1957, the Supreme Court decided Conley v. Gibson and upheld the Hickman interpretation of Rule 8.66 Conley involved a class action on behalf of African-American employees of a railroad against a union of which they were members, alleging that the union failed to protect their jobs in the same way that it sought to protect their white counterparts’ jobs.67 The defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted.68 The district court granted the motion, the Fifth Circuit affirmed, and the Supreme Court granted certiorari for reasons unrelated to a complaint’s sufficiency under Rule 8 or the appropriate standard for dismissal under Rule 12(b)(6).69 Nevertheless, the Court took the opportunity to address prior judicial inconsistencies regarding Rules 8 and 12(b)(6) since each party in Conley had briefed them. The Court wrote that

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified “notice pleading” is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely

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65. See Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (“[W]e do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting.”); Cont'l Collieries, Inc. v. Shober, 130 F.2d 631, 635 (3d Cir. 1942) (“No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it.”); Leimer v. State Mut. Life Assurance Co., 108 F.2d 302, 306 (8th Cir. 1940) (“No matter how improbable it may be that she can prove her claim, she is entitled to an opportunity to make the attempt, and is not required to accept as final a determination of her rights based upon inferences drawn in favor of the defendant from her amended complaint.”).


67. Id. at 42–43, 46.

68. Id. at 43.

69. Id. at 43–44.
the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.70

As it did in Hickman, the Court in Conley addressed the interplay between Rule 8 and Rule 12(b)(6) motions to dismiss as originally intended by the drafters of the Federal Rules. The Court explained that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."71 If this phrase were interpreted literally, Conley "allowed a claim to survive a motion to dismiss based on wholly conclusory statements of that claim."72 Indeed, following Conley, plaintiffs drafted complaints designed to comply with the highly liberal notice pleading standard, requiring them to merely set forth "a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."73

While the Supreme Court has clarified some issues and distinctions relevant to our discussion, as explained below, the pleading and discovery structure established by the Federal Rules generally remained intact until 2007, when the Court issued its opinion in Bell Atlantic Corp. v. Twombly.74 Several rulings handed down during the interim period are important to note, however, not only for their holdings, but also as evidence of the Court’s continued support for the structure imposed by the rules and reinforced by Conley.75

70. Id. at 47–48 (citations omitted).
71. Id. at 45–46.
73. Conley, 355 U.S. at 47 (quoting FED. R. CIV. P. 8(a)).
75. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (“When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.”).
4. Swierkiewicz v. Sorema N.A.

As recently as 2002, in *Swierkiewicz v. Sorema N.A.*, the Supreme Court embraced the *Conley* construction of Rule 8 and clarified how the rules of pleading and evidentiary standards work together in civil cases, specifically in employment discrimination cases. The specific issue in *Swierkiewicz* was “whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by [the Supreme] Court in *McDonnell Douglas Corp. v. Green*.” The Court answered in the negative.

Under the *McDonnell Douglas* standard of proof, to succeed in a discrimination claim, a plaintiff must prove: “(1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination.” Akos Swierkiewicz, however, merely alleged in his complaint that he had been fired by the defendant due to his national origin and age, in violation of federal law.

Granting the defendant’s motion to dismiss the suit under Rule 12(b)(6), the District Court for the Southern District of New York held that Swierkiewicz’s complaint failed to adequately allege a prima facie case because it failed to adequately allege circumstances supporting an inference of discrimination. Swierkiewicz appealed to the Second Circuit, which affirmed the dismissal on the grounds that Swierkiewicz failed to meet the *McDonnell Douglas* standard because the allegations in his complaint were “‘insufficient as a matter of law to raise an inference of discrimination.’” Swierkiewicz petitioned the Supreme Court, which granted certiorari “to resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases.”

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77. Id. at 508 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
78. Id. at 509–10.
79. Id. at 510.
80. Id. at 509.
81. Id.
82. Id. (quoting Swierkiewicz v. Sorema, N.A., 5 F. App’x 63, 65 (2d Cir. 2001)).
83. Id. at 509–10. There are, however, certain causes of action that require a heightened pleading standard, such as civil rights cases. “The exact genesis of a special
The Supreme Court disagreed with both the district court’s and the Second Circuit’s rulings, stating that both lower courts had confused the applicability of evidentiary and pleading standards. Importantly, the Court wrote that, “[t]he prima facie case under McDonnell Douglas . . . is an evidentiary standard, not a pleading requirement” and that the Supreme Court had never indicated that the requirements for establishing a prima facie case under McDonnell Douglas also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.

The Court went on to discuss the implications of requiring a plaintiff to satisfy the McDonnell Douglas standard in a complaint:

[Imposing the . . . heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only a short and plain statement of the claim showing that the pleader is entitled to relief. Such a statement must simply give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.]

rule of pleading applicable to civil rights actions is difficult to establish. In the early 1960s . . . courts began to dismiss civil rights complaints for failure to allege specific facts in support of conclusory allegations, particularly when claims of conspiracy were involved.” Douglas A. Blaze, Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation, 31 WM. & MARY L. REV. 935, 948 (1990) (citing Powell v. Workmen’s Comp. Bd., 327 F.2d 131, 137 (2d Cir. 1964)); see also Valley v. Maule, 297 F. Supp. 958, 960–61 (D. Conn. 1968) (“In recent years there has been an increasingly large volume of cases brought under the Civil Rights Acts. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants—public officials, policeman and citizens alike—considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.”). In addition to civil rights cases, see FED R. CIV. P. 9(b), which requires complaints alleging fraud to be pleaded with more particularity.

84. Swierkiewicz, 534 U.S. at 510.
85. Id. at 510, 511.
86. Id. at 512–13 (citations and internal quotation marks omitted).
Furthermore, while the Court made clear that “Rule 8(a)’s simplified pleading standard applies to all civil actions,” the Court also noted that there are some specific exceptions contained in the Federal Rules. For instance, Rule 9(b) requires greater particularity in the pleadings when the complaint alleges fraud or mistake. The Court noted that because Rule 9(b) is inapplicable to § 1983 and employment discrimination actions, however, the initial pleadings in such actions merely must satisfy the notice-giving pleading standard of Rule 8. In so holding, the Court again reaffirmed the *Hickman* and *Conley* interpretations of how the other Federal Rules work in conjunction with Rule 8:

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)’s simplified notice pleading standard. Rule 8(e)(1) states that “[n]o technical forms of pleading or motions are required,” and Rule 8(f) provides that “[a]ll pleadings shall be so construed as to do substantial justice.” Given the Federal Rules’ simplified standard for pleading, “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.

A mere five years later, however, the Supreme Court decided an antitrust case that signaled a grand departure from the well-settled procedural law of the preceding decades.

III. A HEIGHTENED PLEADING STANDARD IS ANNOUNCED, QUESTIONED, AND CLARIFIED

In May of 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*. In doing so, the Court significantly altered pleading standards under Rule 8 and left the legal community wondering if the changes were

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87. *Id.* at 513.
88. *Id.*
89. *Id.*
90. *Id.* at 513–14 (citations omitted).
intended only for antitrust actions, or if a new standard had been announced for all civil cases.92 Two years later, the Court decided *Ashcroft v. Iqbal*, which clearly stated that the changes *Twombly* announced apply to all civil actions.93 This Part examines the majority and dissenting opinions in *Twombly* and *Iqbal*, and also includes a brief analysis of two intervening opinions that are of import to a discussion of *Twombly* and *Iqbal*.94

A. Bell Atlantic Corp. v. Twombly

1. A New Standard Is Announced

William Twombly brought a putative class action on behalf of “at least 90 percent of all subscribers to local telephone or high-speed Internet service” (collectively referred to as Twombly).95 Twombly alleged that certain providers of these services violated section 1 of the Sherman Act,96 which “prohibits ‘[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.’”97 Twombly sought “treble damages and declaratory and injunctive relief.”98

The complaint claimed that Bell Atlantic and its competitors had entered into a grand conspiracy to restrain trade in two ways: (1) by “‘engag[ing] in parallel conduct’... to inhibit the growth” of smaller competitors in a number of ways,99 and (2) by agreeing to not compete with...
one another. Twombly alleged that the defendants’ parallel business practices proved his allegations. In antitrust cases, parallel business practice allegations are allegations that an agreement to thwart competition exists and that the agreement is evidenced by similar business behavior among the colluding parties. For example, a plaintiff might allege gas stations on opposite corners of an intersection agreed to fix prices, thereby hindering competition, and that the agreement is evidenced by the fact that when one station lowers or raises its prices, the other station adjusts its prices to match.

Focusing on Twombly’s parallel business practice allegations, the defendants moved to dismiss Twombly’s claims under Rule 12(b)(6). The district court stated that, to survive such a motion, plaintiffs must do more than allege parallel business conduct—“plaintiffs must allege additional facts that ‘ten[d] to exclude independent self-interested conduct as an explanation for defendants’ parallel behavior.’” Because Twombly failed to do so, the district court dismissed the complaint. The plaintiff appealed to the Second Circuit Court of Appeals.

The Second Circuit initially held that the district court applied the wrong standard to determine the sufficiency of Twombly’s complaint. In analyzing the sufficiency of Twombly’s complaint itself, the Second Circuit drew upon the language of Conley and the heightened plausibility standard
In reversing the district court, the Second Circuit explained that “to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”

The defendants petitioned the Supreme Court, which granted certiorari. The Court held “that stating [a section 1 claim] requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made,” rather than mere circumstantial evidence showing parallel conduct. The Court further reasoned that “at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘show[w] that the pleader is entitled to relief.’” In other words, a complaint must provide “enough facts to state a claim to relief that is plausible on its face.” Twombly, however, did not go so far as to announce a rule requiring plaintiffs to make a showing of probability. Instead, it requires the plaintiff, in the initial complaint, to plead “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” However, the Court found that Twombly failed to make this plausible showing, reversed the Second Circuit, and remanded for further proceedings.

Stated simply, Twombly stands for the most remarkable shift in pleadings requirements since the implementation of Conley’s highly liberal construction of the already generous Rule 8. Under Conley, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” The Twombly Court, however, steered “this famous observation [into] retirement.” Of course, the new

110. Twombly, 550 U.S. at 553.
111. Id.
112. Id. at 556.
113. Id. at 557 (quoting FED. R. CIV. P. 8(a)(2)).
114. Id. at 570 (Stevens, J., dissenting).
115. Id. at 557 (majority opinion).
116. Id.
117. Id. at 570.
119. Twombly, 550 U.S. at 563. However, as discussed later in this Article, the
The Heightened Pleading Standard of Twombly and Iqbal

Twombly standard is noteworthy, but even more important to our discussion here is the Court’s basis for fashioning it.

After pointing to the “practical significance of the Rule 8 entitlement requirement,” the Court explained that “something beyond the mere possibility of loss causation must be alleged.”\textsuperscript{120} In support of its new standard, the Court cautioned against forgetting “that proceeding to antitrust discovery can be expensive.”\textsuperscript{121} Finally, including judicial economy as a basis for its result, the Court cited “the increasing caseload of the federal courts” as another reason to heighten the standard for surviving a motion to dismiss.\textsuperscript{122}

2. The Dissent

The dissent, which Justice John Paul Stevens authored and which was joined by Justice Ruth Bader Ginsburg except for one part, referred to the majority’s decision as a “dramatic departure from settled procedural law.”\textsuperscript{123}

The dissent began by recognizing that “[u]nder rules of procedure that have been well settled . . . a judge ruling on a defendant’s motion to dismiss a complaint, ‘must accept as true all of the factual allegations contained in the complaint.’”\textsuperscript{124} The majority, according to the dissent, overlooked this well-settled rule by not taking all of the plaintiff’s allegations as true and not requiring the defendants to undergo discovery.\textsuperscript{125} The dissent reasoned that the majority’s departure was based upon two practical considerations: (1) that “[p]rivate antitrust litigation can be enormously expensive,” and (2) that “there is a risk that jurors may

\begin{itemize}
\item \textsuperscript{120.} Id. at 557–58.
\item \textsuperscript{121.} Id. at 558.
\item \textsuperscript{122.} Id. (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984)).
\item \textsuperscript{123.} Id. at 573 (Stevens, J., dissenting).
\item \textsuperscript{124.} Id. at 572 (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002)).
\item \textsuperscript{125.} Id. at 572 (“But instead of requiring knowledgeable executives . . . to respond to [the plaintiff’s] allegations by way of sworn depositions or other limited discovery—and indeed without so much as requiring petitioners to file an answer denying that they entered into any agreement—the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot.”).
\end{itemize}
mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions.” 126  While the dissent agreed that these two concerns warrant tight case management (such as discovery controls), “careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries . . . do not . . . justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decision making.” 127

The dissent concluded that these concerns did not warrant the majority’s focus on the plausibility of entitlement to relief instead of the sufficiency of the allegations contained in the complaint (i.e., the traditional interpretation of Rule 8). 128  For instance, the dissent pointed to the purpose of moving away from code pleading, as well as the Court’s earlier interpretation of the liberality of the Federal Rules in Swierkiewicz, noting that “[u]nder the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial.” 129  Fearing that the majority had forgotten the historical significance of Rule 8 in light of the earlier common law and code pleading, the dissent quoted Judges Charles E. Clark, “the ‘principal draftsman’ of the Federal Rules,” 130 who wrote:

Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result. 131

Notwithstanding the principles underlying the Federal Rules, the majority, according to the dissent, mislabeled the well-settled Conley standard “an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing

126.  Id. at 573.
127.  Id.
128.  Id.
129.  Id. at 575.
130.  Id. (quoting Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283 (1988)).
any set of facts consistent with the allegations in the complaint.”

Explaining its position, the dissent distinguished the standards involved with Rule 12(b)(6) motions for dismissal and Rule 56 motions for summary judgment. The Supreme Court has “developed an evidentiary framework for evaluating claims under section 1 of the Sherman Act when those claims rest on entirely circumstantial evidence of conspiracy.”

Under existing case law, to survive a motion for summary judgment, the plaintiff must present more than mere circumstantial evidence of parallel conduct; it must exclude possibilities of independent actions amongst the defendants. Nevertheless, the majority, according to the dissent, erroneously applied the post-discovery standard for deciding summary judgment motions to a pre-discovery Rule 12(b)(6) motion. Moreover, “even if the majority’s speculation [was] correct, its ‘plausibility’ standard is irreconcilable with Rule 8 and [the Court’s] governing precedents.”

The dissent criticized the majority’s purported basis, chiding that “fear of the burdens of litigation does not justify factual conclusions supported only by lawyers’ arguments rather than sworn denials or admissible evidence.” The dissent also found the fear of “costly” discovery an irrational basis for granting a Rule 12(b)(6) dismissal. Quoting Judge Clark yet again, the Court wrote that “through the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of proof, and do not need to force the pleadings to their less appropriate function.”

Finally, the dissent reminded the majority that trial courts have an “arsenal” of case-management techniques and, therefore, “[t]he potential for ‘sprawling, costly, and hugely time-consuming discovery’ . . . is no reason to throw the baby out with the bathwater.” Among this arsenal are: Rule 7(a), which “permits a trial court to require the plaintiff to reply

132. Id. at 579–80.
133. Id. at 585–86.
134. Id. (citing Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986)).
135. Id. at 586.
136. Id.
137. Id.
138. Id.
139. Id. at 593 n.13.
140. Id. at 595 (quoting Clark, supra note 131, at 977).
141. Id. at 593 n.13.
to the defendant’s answer”; 142 Rule 23, which requires rigorous analysis of motions for class certification; 143 Rule 16, which grants the trial judge power to regulate pretrial proceedings in a variety of manners; 144 Rule 26 powers over various discovery vehicles; 145 and sanctions under Rule 11. 146

3. The Response to Twombly

Following the Court’s decision in Twombly, judges, lawyers, and legal scholars recognized the importance of the decision, and it was cited over 6,000 times within the first year of its issuance. 147 The primary focus of discussion was the meaning of the newly articulated plausibility standard and what courts might do with it. 148 Indeed, plausibility was labeled “the clearest mandate coming out of Twombly,”149 and practitioners were warned that “the Court’s new ‘plausibility’ standard for notice pleading has real teeth.” 150 Attempting to address questions about applicability of the decision to cases other than antitrust cases, one author wrote that “[the] answer appears to be that the Twombly ‘plausible allegations’ standard is the standard for analysis under Rule 12 of all civil complaints. Absent factual allegations sufficient to make the claims plausible, a complaint is to

142. Id. (citing FED. R. CIV. P. 7(a)).
143. Id. (citing FED. R. CIV. P. 23).
144. Id. at 593–94 n.13 (citing FED. R. CIV. P. 16).
145. Id. at 594 n.13 (citing FED. R. CIV. P. 26).
146. Id. (citing FED. R. CIV. P. 11).
148. See Ettie Ward, The After-Shocks of Twombly: Will We “Notice” Pleading Changes?, 82 ST. JOHN’S L. REV. 893, 904 (2008) (highlighting the fact that the Supreme Court in Twombly provided inconsistent guidance on what level of factual pleading is necessary to survive a Rule 12(b)(6) motion to dismiss); Jason Bartlett, Note, Into the Wild: The Uneven and Self-Defeating Effects of Bell Atlantic v. Twombly, 24 ST. JOHN’S J. LEGAL COMMENT 73, 86 (2009) (“The Court’s meaning of ‘plausible’ is ambiguous. The term is not precisely defined in the opinion, but some rough guideposts can be gleaned from the text by implication from what the term does not mean. Most importantly, ‘plausible’ means something greater than ‘conceivable,’ but less than ‘probable.’”); Jason G. Gottesman, Note, Speculating as to the Plausible: Pleading Practice After Bell Atlantic Corp. v. Twombly, 17 WIDENER L.J. 973, 1004–05 (2008) (noting that Twombly is confusing and that lower courts have treated plausibility in different manners).
be dismissed.”151 However, “plausibility” remained an uncertain term, and its impact was unclear, so many commentators urged the Supreme Court to revisit the opinion and to clarify its purposes for *Twombly*.152

The majority’s assumptions about “groundless” lawsuits garnered scholarly criticism almost immediately.153 Writers quickly pointed to the Court’s assumption that frivolous cases are often brought to frighten defendants into settling, and highlighted the Court’s ruling that “something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.’”154 Essentially, the Court

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154. *Id.* at 1233 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) (quoting Dura Pharms., Inc. v. Broduo, 544 U.S. 336, 347 (2005))); *accord* Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1067 (2009) (“As the costs of litigation increase and the scope of discovery expands, the need for more stringent pleading standards increases. It is neither efficient nor fair to allow claims of dubious merit to proceed when so may lead to settlements that are not based on the underlying merits, but rather the potential costs associated with defending a lawsuit in our modern civil justice system. *Twombly* thus presents a welcome clarification of modern pleading standards that is likely to increase the efficiency and fairness of civil proceedings.”); *see also* Andrée Sophia Blumstein, *Twombly Gets Iqbal-ed: An Update on New Federal—and Tennessee?—Pleading Standard*, TENN. B.J., July 2009, at 23, 23 (“*Twombly* signified a remarkable change in the law of notice pleading by telling plaintiffs that they can no longer count on bare-bones, conclusory pleadings to get them past a Rule 12 motion to dismiss and into the discovery process in the hope of developing facts to support their claims.”); David G. Savage, *Narrowing the Courthouse Door: High Court Makes it Tougher to Get Past the Pleading Stage*, A.B.A. J., July 2009, available at http://www.abajournal.com/magazine/article/narrowing_the_courthouse_door/ (“In the *Twombly* majority opinion, Justice David H. Souter wrote
added a gate-keeping function to the district courts, and it did so relying primarily on a single law review article written nearly twenty years earlier.\textsuperscript{155} One scholar sums it up succinctly:

Thus, allowing the lower courts considerable authority to dismiss at the pleading stage is not only an efficient means of dealing with the problem of costly discovery. It is also a valuable way of combating the institution of “groundless” claims that otherwise will precipitate needless discovery and thereby skew the settlement equation. In other words, costly discovery is very troublesome, but costly discovery that has been triggered by a groundless suit—oh, Lordy! Now there is a reason to invest courts with the power to scrutinize and, when appropriate, dismiss cases at the pleading stage.\textsuperscript{156}

\section*{B. Inconsistent Propositions}

Immediately following its decision in \textit{Twombly}, the Court did little to clarify the confusion regarding the Rule 8 standard. Between the 2007 \textit{Twombly} decision and the 2009 \textit{Iqbal} decision, the Supreme Court cited \textit{Twombly} twice for two contrary propositions. In 2007, in \textit{Erickson v. Pardus}, the Court cited \textit{Twombly} for two contrary propositions. In 2007, in \textit{Erickson v. Pardus}, the Court cited \textit{Twombly} for Conley’s proposition that a complaint is only required to give notice, not provide detailed or specific facts.\textsuperscript{157} In 2009, in \textit{Pacific Bell Telephone Co. v. Linkline Communications, Inc.}, the Court contradicted its earlier citation of \textit{Twombly} by holding that \textit{Twombly} had retired the \textit{Conley} standard because it was too lenient.\textsuperscript{158} These contradictory opinions are briefly studied below.

1. \textit{Erickson v. Pardus} and \textit{Pacific Bell Telephone Co. v. Linkline}

In \textit{Erickson}, William Erickson, a Colorado prisoner, brought an
action against prison officials alleging violations of his Eighth and Fourteenth Amendment protections against cruel and unusual punishment. In his complaint, Erickson claimed that his hepatitis C condition required a treatment program that officials commenced yet wrongfully terminated, thereby threatening his life. Specifically, the complaint sought recovery under § 1983, alleging that Erickson’s constitutional rights were violated because his removal from the treatment program showed a deliberate indifference to his medical needs.

The District Court for the District of Colorado found the allegations conclusory and, upon defendant’s motion for dismissal, granted the same. Erickson appealed to the Tenth Circuit, which affirmed the district court’s dismissal. Erickson petitioned the Supreme Court, which granted certiorari and held that it was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered “a cognizable independent harm” as a result of his removal from the hepatitis C treatment program.

Interestingly, the Supreme Court found that the Tenth Circuit made a pronounced departure “from the liberal pleading standards set forth by Rule 8(a)(2)” especially since Erickson “ha[d] been proceeding, from the litigation’s outset, without counsel.” Noting that “all pleading shall be so construed as to do substantial justice,” the Court clarified that “a document filed pro se is ‘to be liberally construed’ . . . and ‘a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’” With regard to Erickson’s complaint, the Court specifically held that it “cannot . . . be
dismissed on the ground that petitioner’s allegations of harm were too conclusory to put these matters in issue." 169

Although Erickson could clearly be distinguished because the plaintiff was pro se, the fact unavoidably remained that the Court, in the same year it decided Twombly, cited Twombly for the following proposition: “Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” 170 In Erickson, the Supreme Court seemingly held that Twombly did not alter pleading standards, that notice pleading was still intact, 171 and that Twombly was possibly intended to be limited to the antitrust context, in which courts, in certain situations, 172 already applied different and more stringent standards of proof and pleading than those generally applicable to civil actions. 173 This conclusion, however, would

169. Id.
170. Id. at 93–94 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
172. For instance, courts apply Rule 56 in a unique manner in the antitrust context. See, e.g., Merck-Medco Managed Care, L.L.C. v. Rite Aid Corp., 201 F.3d 436, No. 98-2847, 1999 WL 691840, at *7 (4th Cir. Sept. 7, 1999) (“While the summary judgment standard of [Rule 56] for an antitrust suit is the same as that for any other action, the application of Rule 56 to antitrust cases is somewhat unique. The inferences to be drawn from underlying facts on summary judgment must be viewed in a light most favorable to [the plaintiff]. ‘But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case . . . [C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.’”) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).
173. As one legal commentator has written:

Under Conley, dismissal under Rule 12 was appropriate only when it appears beyond doubt that the plaintiff could not prove any set of facts entitling it to relief. In Twombly, the Supreme Court characterized the “no set of facts,” test as best forgotten as an incomplete, negative gloss on an accepted pleading standard.[]

Initial reactions to Twombly were quite varied. The predominant reaction was that Twombly would mark a significant reduction in antitrust
soon be challenged by the Court’s subsequent decisions.

On February 25, 2009, the Court decided *Pacific Bell Telephone Co. v. Linkline Communications, Inc.* In that case, the Court cited *Twombly* in support of its ruling that the district court applied the wrong standard in considering a motion to dismiss.

With inconsistent rulings and a concern about the real impact of *Twombly*, commentators and scholars awaited the Court’s clarification.

C. Ashcroft v. Iqbal

Almost two years to the day after deciding *Twombly*, the Supreme Court issued its opinion in *Ashcroft v. Iqbal*. Directly addressing the *Twombly* standard, the Court’s opinion led many to conclude that the

litigation, and that it was a decision limited to the antitrust context. Less common, but still not at all uncommon, were suggestions that the holding would not be limited to antitrust actions, but would and should be applied to all federal civil cases.

The suggestion that *Twombly* was to be limited to antitrust cases was not just myopic narrow-mindedness. We should remember that [*Pardus*] came down shortly after *Twombly*. In *Pardus*, the Supreme Court expressly affirmed that notice pleading had not been altered by *Twombly*. That a combination of decisions suggested that *Twombly* might be confined to the antitrust context. If so, it would not be the only special standard applicable to antitrust cases. In the context of a Rule 56 motion, for example, conspiracy claims in antitrust cases are analyzed under a different and more demanding standard than applied elsewhere in civil law. *Pardus* therefore might have been read as a signal that the Supreme Court did not intend a revolution in pleading. The question really came to this: What was the import of the discussion of *Conley* in *Twombly*? The Supreme Court certainly sought change in Rule 12 pleading standards, but just what kind of change?

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Bogart, *supra* note 92, at 23 (citations omitted) (emphasis added).


175. *See id.* at 1123 (“That order, however, applied the ‘no set of facts’ pleading standard that we have since rejected as too lenient. It is for the District Court on remand to consider whether the amended complaint states a claim upon which relief may be granted in light of the new pleading standard we articulated in *Twombly*, whether plaintiffs should be given leave to amend their complaint.”). The case has now been remanded from the Ninth Circuit “to the district court for proceedings consistent with the Supreme Court decision, including but not limited to, its consideration of the proposed amendments to the complaint.” *Linkline Commc’ns, Inc. v. SBC Cal., Inc.*, 563 F.3d 853, 853 (9th Cir. 2009).

Court did, in fact, intend Twombly to apply to all civil actions.\textsuperscript{177}

1. \textit{Factual and Procedural Background}

Javaid Iqbal, a citizen of Pakistan and a Muslim, was arrested in the United States by federal officials in the aftermath of September 11, 2001 (9/11).\textsuperscript{178} Thereafter, Iqbal “filed a complaint against several federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation” (FBI) (hereinafter collectively Petitioners), alleging deprivation of constitutional protections while in custody and claiming that Petitioners “adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin.”\textsuperscript{179}

Following 9/11, the FBI and other Department of Justice entities launched large-scale investigations to identify the 9/11 attackers and prevent further attacks.\textsuperscript{180} Thus, the FBI questioned many individuals who had suspected ties to the 9/11 attacks or to terrorism in general.\textsuperscript{181} Law enforcement agencies subsequently detained approximately 762 people on immigration charges—184 of them as high-interest individuals.\textsuperscript{182} Iqbal was one of the high-interest individuals who was detained and denied the ability to communicate with other prisoners or outsiders.\textsuperscript{183}

Pending his trial for charges on fraud relating to his “identification documents and conspiracy to defraud the United States,”\textsuperscript{184} Iqbal was held in the Administrative Maximum Special Housing Unit (ADMAX SHU), an especially high-security facility, at the Metropolitan Detention Center in Brooklyn, New York.\textsuperscript{185} Iqbal eventually pleaded guilty to the aforementioned charges, served out his prison term, and was removed from

\begin{itemize}
\item \textsuperscript{177} See infra Part IV.A–B.
\item \textsuperscript{178} \textit{Iqbal}, 129 S. Ct. at 1942.
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} \textit{Id.} at 1943.
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{Id.} (citing Iqbal v. Hasty, 490 F.3d 143, 147–48 (2d Cir. 2007)).
\item \textsuperscript{185} \textit{Id.} (“As the facility’s name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prison regulations. ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort.”).
\end{itemize}
the United States and returned to Pakistan.186 Thereafter, Iqbal filed a
*Bivens* action187 against thirty-four current or former federal officials and
nineteen federal corrections officials.188 The complaint alleged claims
based on Iqbal’s treatment while at ADMAX SHU, including purportedly
unwarranted physical violence, and the officials’ “refus[al] to let him and
other Muslims pray . . . .”189 In the opinion, however, the Court limited its
inquiry to those against Petitioners Ashcroft and Mueller.190

Petitioners moved to dismiss the complaint for failing “to state
sufficient allegations to show their own involvement in clearly established
unconstitutional conduct.”191 Relying on *Conley*, the district court held
that, in accepting all allegations in the complaint as true, “‘it cannot be said
that there [is] no set of facts on which [Iqbal] would be entitled to relief’”
against the Petitioners, and thus denied the motion.192 The Petitioners
subsequently invoked the collateral-order doctrine and filed an
interlocutory appeal in the Second Circuit.193

During the pendency of the appeal to the Second Circuit, the
Supreme Court decided *Twombly*.194 Applying the Court’s ruling in
Twombly, the Second Circuit held that *Twombly* called for “a flexible
‘plausibility standard,’ which obliges a pleader to amplify a claim with some
factual allegations in those contexts where such amplification is needed to
render the claim *plausible*.”195 The Second Circuit held that Iqbal’s

186. *Id.*
187. The term “*Bivens* action” comes from *Bivens v. Six Unknown Named
Court adopted an expansive view of the Fourth Amendment and held that a violation
of a person’s Fourth Amendment rights by federal officers, acting under color of
federal law, gives rise to a federal cause of action for damages for the unconstitutional
conduct.” 46 AM. JUR. 2D Judges § 66 n.3 (2009). For instance, a plaintiff may bring a
*Bivens* claim “based on conspiracy by showing: (1) the existence of an express or
implied agreement among the defendants to deprive him or her of constitutional rights,
and (2) an actual deprivation of those constitutional rights resulting from the
States, 927 F.2d 1504 (9th Cir. 1991)).
188. *Iqbal*, 129 S. Ct. at 1943.
189. *Id.* at 1944.
190. *Id.*
191. *Id.*
192. *Id.* (quoting Petition for Writ of Certiorari, *Iqbal*, 129 S. Ct. 1937 app. ¶
11 (No. 04-CV-1809)).
193. *Id.*
194. *Id.*
pleading adequately alleged that the Petitioners were personally involved in discriminatory decisions that, if determined to be true, violated constitutional law. Judge Cabranes, a member of the Second Circuit panel deciding the *Iqbal* appeal, issued a concurring opinion in the order, wherein he “underscore[d] that some of those [recent] precedents [covering Rule 8 issues, specifically *Twombly*] are less than crystal-clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity . . .”

2. *The Court Clarifies Twombly*

Ashcroft and Mueller filed a petition for certiorari, which was granted, and after hearing oral argument, the Supreme Court issued its opinion on May 18, 2009. Justice Kennedy began the plurality opinion by addressing jurisdictional issues, and followed with an analysis of Rule 8 pleading requirements. In order to properly address the Rule 8 issues, the plurality framed them in the context of “the elements a plaintiff [like *Iqbal*] must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity [also known as a *Bivens* claim].”

A *Bivens* claim is an implied cause of action for damages in which it is alleged that federal officers have violated an individual citizen's constitutional rights. Because it is an implied cause of action, the Court is hesitant to extend the liability contained therein to new contexts. Since the Court had not extended *Bivens* actions to situations involving the Free Exercise Clause of the First Amendment (as *Iqbal* alleged), the Court noted that that fact alone might have disposed of *Iqbal*'s religious discrimination claim. The Court nevertheless assumed *Iqbal*'s *Bivens* claims were actionable under the First Amendment because the Petitioners did not contest the same in their briefing.

196. *Id.* at 174.
197. *Id.* at 178.
199. *Id.* at 1945–47.
200. *Id.* at 1947.
202. *Id.* at 1948.
203. *Id.* (citing Bush v. Lucas, 462 U.S. 367 (1983)).
204. *Id.*
The elements that must be proven to succeed in a *Bivens* action are relative to the constitutional provision claimed to have been violated.205 “Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, [Supreme Court jurisprudence] make[s] clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose.”206 Purposeful discrimination requires more than mere “intent as volition or intent as awareness of consequences.”207 The principal decision maker must decide to take a course of action “because of [that action’s] adverse effects upon an identifiable group.”208 The Court explained that:

[T]o state a claim based on a violation of a clearly established right, [Iqbal] must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.209

In deciding this requirement, the Court rejected Iqbal’s argument that Petitioners could be liable under a supervisory liability theory—specifically, the theory that “mere knowledge of [a] subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.”210

The Court then began its analysis of Iqbal’s complaint under Rule 8(a)(2) of the Federal Rules.211 At the outset of this portion of the opinion, the Court cited *Twombly* for several general statements about pleading.212 By citing *Twombly* four times in a row in the paragraph immediately preceding its explanation of *Twombly*, the Court signaled its plan to rely on the refined standards set forth in that opinion.213 Following are the four rules the Court attributed to *Twombly*:

1. To survive a motion to dismiss, a complaint must contain

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205. *Id.*
208. *Id.*
210. *Id.* at 1949.
211. *Id.* at 1950.
212. *Id.* at 1950–51.
213. *Id.*
sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face";\textsuperscript{214}

2. 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;\textsuperscript{215}

3. 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;\textsuperscript{216} and

4. 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.'"\textsuperscript{217}

Given the confusion caused by the opinion in \textit{Twombly}, the chosen language here is especially instructive as the Court's statement of the basic rules for addressing the sufficiency of a complaint under Rule 8.\textsuperscript{218} It is also telling that all of the references were to the new plausibility requirement of \textit{Twombly}.\textsuperscript{219}

The Court then explained the two principles that guided its decision in \textit{Twombly} and directed courts to apply the same two-prong analysis when considering the sufficiency of a pleading in the context of a motion to dismiss.\textsuperscript{220} First, while a court must accept all of the complaint's allegations as true, it need not do so with legal conclusions.\textsuperscript{221} Seemingly aware of the departure from the lessons of history, and perhaps even logic, the Court stated that "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock

\textsuperscript{214} \textit{Id.} at 1949 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
\textsuperscript{215} \textit{Id.} (citing \textit{Twombly}, 550 U.S. at 556).
\textsuperscript{216} \textit{Id.} (quoting \textit{Twombly}, 550 U.S. at 556).
\textsuperscript{217} \textit{Id.} (quoting \textit{Twombly}, 550 U.S. at 557).
\textsuperscript{218} \textit{See generally} Blumstein, \textit{supra} note 154, at 23 ("A plaintiff whose complaint is deficient under [Rule 8] and thus fails to state a claim 'is not entitled to discovery, cabined or otherwise.'" (quoting \textit{Iqbal}, 129 S. Ct. at 1954)); Savage, \textit{supra} note 154 ("[T]he decision raises the hurdle to get past the pleading stage, strengthening the specificity to get into court."); Smith, \textit{supra} note 154, at 1067 (describing \textit{Twombly} as "a welcome clarification of modern pleading standards").
\textsuperscript{219} \textit{See Iqbal}, 129 S. Ct. at 1948–54; \textit{see also supra} Part III.A–B.
\textsuperscript{220} \textit{Iqbal}, 129 S. Ct. at 1950.
\textsuperscript{221} \textit{Id.} at 1949.
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the doors of discovery for a plaintiff armed with nothing more than conclusions.”222 Second, only complaints containing plausible claims for relief will survive a dismissal motion.223 This plausibility requirement announced in Twombly so baffled judges that when attempting to reconcile the new standard with precedent, more than one judge encouraged the Court to clarify its meaning.224 Attempting to explain the ruling in Twombly and the function of this second prong, the Court stated that

[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.”225

Thereafter, the Court set forth in a nutshell how to apply the plausibility standard of Twombly:

[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.226

In other words, when legal conclusions provide the framework of a plaintiff’s complaint, a court must use its judicial knowledge and common sense to determine whether the factual allegations contained in the plaintiff’s complaint “‘nudge’” the claims “‘across the line from conceivable to plausible.’”227 To make this determination, courts must engage in a two-part analysis when faced with a motion to dismiss: (1) identify the pleading’s legal conclusions and conclusory statements unsupported by specific factual allegations that are undeserving of the assumption of truth, and (2) determine if the well-pleaded factual allegations, “plausibly give

222. Id. at 1950.
223. Id.
224. See, e.g., Iqbal v. Hasty, 490 F.3d 143, 178 (2d Cir. 2007) (Cabranes, J., concurring) (describing Twombly and other relevant precedent as “less than clear” and deserving of “reconsideration by the Supreme Court at the earliest opportunity”).
225. Iqbal, 129 S. Ct. at 1950 (citations omitted).
226. Id. 
227. Id. at 1951 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
rise to an entitlement to relief.”

3. Applying the Twombly Analysis to the Facts of Iqbal

The Iqbal Court ultimately concluded that under the Twombly two-pronged construction of Rule 8, Iqbal’s complaint failed to “‘nudge[] [his] claims’ of invidious discrimination ‘across the line from conceivable to plausible.’” An analysis of the Court’s application of the newly articulated two-part framework is instructive.

First, the Court identified those of Iqbal’s allegations that were not entitled to the presumption of truth. Those allegations were that Petitioners “‘knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest,’” that Petitioner Ashcroft was the “‘principal architect’ of this invidious policy,” and that Petitioner Mueller was “‘instrumental’ in adopting and executing it.” Analogizing Iqbal’s bare assertions to the conspiracy allegations contained in the plaintiffs’ complaint in Twombly, the Court declared them “nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.” The Court therefore found Iqbal’s allegations to be legal conclusions not entitled to the assumption of truth. “It is the conclusory nature of [Iqbal’s] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”

After identifying the legal conclusions, the Court addressed whether the factual allegations in Iqbal’s complaint “plausibly suggest an entitlement to relief.” Those allegations included that

the FBI, under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11 . . . [and] that the policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI was approved by [the

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228. Id. at 1950.
229. Id. at 1951.
230. Id.
231. Id. (citations omitted).
232. Id. (quoting Twombly, 550 U.S. at 555).
233. Id.
234. Id.
235. Id.
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Petitioners] in discussions in the weeks after September 11, 2001.236

The Court stated that while these factual allegations, if taken as true, are consistent with discrimination based on the race, religion, or national origin of the detainees, the facts fail to plausibly show that such discrimination was the purpose of designating the detainees as high-interest.237 This conclusion, the Court found, was bolstered by the availability of alternative explanations. Of particular note was the fact that the 9/11 attacks were committed by Arab Muslim attackers—therefore, the Court noted, “[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.”238 The Court held that the arrests Mueller oversaw were probably lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that “obvious alternative explanation” for the arrests... and the purposeful, invidious discrimination [Iqbal] asks us to infer, discrimination is not a plausible conclusion.239

Even assuming Iqbal’s well-pleaded facts could raise a plausible inference that his arrest was the consequence of unconstitutional discrimination, the Court noted that such an inference, without more, could not possibly entitle him to relief.240 Importantly, the complaint failed to challenge the constitutionality of either his arrest or his detention.241 Instead, Iqbal focused his constitutional challenge on Petitioners’ “policy of holding post-September-11th detainees in the ADMAX SHU once they were categorized as of high interest.”242 The Court concluded that the complaint, however, failed to include facts “plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as ‘of high interest’ because of their race, religion, or national

236.      Id. (citations and internal quotation marks omitted).
237.      Id.
238.      Id.
239.      Id. at 1951–52 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
240.      Id. at 1952.
241.      Id.
242.      Id. (internal quotation marks omitted).
origin.” All the complaint plausibly suggested was that law enforcement officers, following 9/11, strived to secure suspected terrorists until they could be cleared of membership in terrorist activities.

4. Arguments Rejected—Fine Tuning the Ruling

Iqbal raised three arguments that the Court explicitly rejected. The reasons supplied by the Court to explain those rejections illustrate the nuances of the decision, especially with regard to the interplay between Twombly and Rule 8. The three arguments are outlined below.

First, Iqbal asserted that Twombly only applied to antitrust actions. The Court flatly rejected this argument, explaining that

Twombly determined the sufficiency of a complaint sounding in antitrust, [but] the decision was based on [the Court’s] interpretation and application of Rule 8, [which] governs the pleading standard “in all civil actions and proceedings in the United States district courts,” [and, therefore,] Twombly expounded the pleading standard for “all civil actions,” and it applies to antitrust and discrimination suits alike.

Second, Iqbal argued that the Court’s “construction of Rule 8 should be tempered where, as here, the Court of Appeals has ‘instructed the district court to cabin discovery in such a way as to preserve’ petitioners’ defense of qualified immunity ‘as much as possible in anticipation of a summary judgment motion.’” The Court held that the fact that a weaker case will not survive discovery has no impact on the standard to apply when considering a motion to dismiss. Moreover, the Court stated that the purpose of qualified immunity—to “free officials from the concerns of litigation, including avoidance of disruptive discovery”—lends support to its rejection of the careful-case-management approach in suits in which

243. Id.
244. Id.
245. Id. at 1953.
246. Id. (citations omitted).
247. Id. (citations omitted).
248. Id. (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.” (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007)) (citations and internal quotation marks omitted)).
government officials can assert the defense of qualified immunity. The Court, therefore, “decline[d Iqbal’s] invitation to relax the pleading requirements on the ground that the Court of Appeals promise[d] petitioners minimally intrusive discovery.” Essentially, the Court held that because Iqbal’s complaint failed to satisfy the Twombly two-pronged analysis in a motion to dismiss, discovery concerns were wholly irrelevant.

Third, Iqbal argued that the Federal Rules permitted him to allege a discriminatory intent on the part of the petitioners generally. Had the Court accepted the allegation as true, Iqbal’s complaint might have survived the Rule 12(b)(6) motion. However, courts are not required to take as true conclusory statements “without reference to [their] factual context.” The Court, therefore, held that the complaint failed to plead facts sufficient to state a claim for purposeful and unlawful detention, and directed the Court of Appeals to decide whether to remand the case to the District Court to permit Iqbal to seek leave to amend his complaint.

5. The Dissents

Justice David Souter authored a dissenting opinion, joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer. Quite simply, Justice Souter wrote, “[t]he majority . . . misapply[ed] the pleading standard under [Twombly].” Justice Souter focused first on the language in the petition, specifically the questions on which Ashcroft and Mueller petitioned for a writ of certiorari. Those questions were:

1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under Bivens.

249. Id. (internal quotation marks omitted).
250. Id. at 1953–54.
251. Id. at 1954.
252. Id.; see also 5A WRIGHT & MILLER, supra note 46, § 1301 (“[A] rigid rule requiring the detailed pleading of a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general ‘short and plain statement of the claim’ mandate in Rule 8(a) . . . should control the second sentence of Rule 9(b).”).
254. Id. (Souter, J., dissenting).
255. Id. at 1955.
2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.\textsuperscript{256}

The dissent presents each question in light of the other. According to the dissent, the issue of whether Iqbal’s complaint satisfied the Rule 8 requirements under \textit{Twombly} would seemingly hinge upon whether the well-pleaded facts could plausibly give rise to an entitlement to relief under either a theory of respondeat superior or supervisory liability.\textsuperscript{257} Importantly, Ashcroft and Mueller, in their briefing, conceded that they would be liable had they had actual knowledge of the events that could subject them to supervisory liability, but argued they could not be liable under a constructive knowledge theory.\textsuperscript{258} The dissent took issue with the fact that the majority overlooked the Petitioners’ concession as to supervisory liability within the context of the \textit{Bivens} allegations.\textsuperscript{259} According to the dissent, Iqbal could succeed under the Petitioners’ own test for supervisory liability if he could show the Petitioners “knowingly acquiesced . . . in the discriminatory acts of their subordinates."\textsuperscript{260}

Where the dissent truly differentiated itself from the majority was in the fact that the dissenting Justices would have used Petitioners’ own supervisory liability theory to determine the sufficiency of Iqbal’s complaint.\textsuperscript{261} While the dissenting Justices refused to make the determination as to whether a supervisory liability theory is permissible within the context of a \textit{Bivens} action, they nevertheless opined that Iqbal was entitled to rely on Petitioners’ theory of liability.\textsuperscript{262} The majority made the assumption that the Petitioners would either be liable under respondeat superior or could not be liable at all as supervisors, but the dissent would not have extended a ruling this far.\textsuperscript{263}

Even more unsettling for the dissenting Justices was the fact that the majority did not investigate what the appropriate test for supervisory

\begin{itemize}
\item\textsuperscript{256} \textit{Id.} at 1955–56.
\item\textsuperscript{257} \textit{Id.} at 1956–57.
\item\textsuperscript{258} \textit{Id.} at 1956.
\item\textsuperscript{259} \textit{Id.} at 1957.
\item\textsuperscript{260} \textit{Id.}
\item\textsuperscript{261} \textit{Id.}
\item\textsuperscript{262} \textit{Id.}
\item\textsuperscript{263} See \textit{id.} at 1957–58.
\end{itemize}
liability should be.264 Instead, according to the dissent, the majority quickly labeled Iqbal’s allegations as conclusory and, therefore, did not give them the presumption of truth when determining the complaint’s sufficiency.265 According to the dissent, Iqbal’s complaint was sufficient under Rule 8(a)(2) because of Ashcroft and Mueller’s concession that they would be liable if they had actual knowledge of the purportedly discriminatory conduct, or if they were deliberately indifferent to that conduct.266

Outlining the Twombly standard, the dissent asserted that “the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible,” not probable.267 The dissent distinguished the facts of Twombly, noting that in Twombly there were naked legal conclusions in the complaint.268 However, in Iqbal, the complaint, when analyzed in light of Petitioners’ concession of liability theories, alleged “enough facts to state a claim to relief that is plausible on its face.”269 The dissent argued that under no circumstances could Iqbal’s complaint have succeeded because the majority simply discarded all of Iqbal’s allegations as legal conclusions.270 The dissent wrote:

Viewed in light of these subsidiary allegations, the allegations singled out by the majority as “conclusory” are no such thing. Iqbal’s claim is not that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject” him to a discriminatory practice that is left undefined; his allegation is that “they knew of, condoned, and willfully and maliciously agreed to subject” him to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described. Taking the complaint as a whole, it gives Ashcroft and Mueller “fair notice of what the claim is and the grounds upon which it rests.”271

In addition to joining Justice Souter’s dissent, Justice Breyer drafted a

264. Id. at 1958.
265. Id.
266. Id. at 1957–58.
267. Id. at 1959.
268. Id. at 1959–60.
269. Id. at 1960 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
270. Id. at 1960–61.
271. Id. at 1961 (quoting Twombly, 550 U.S. at 555).
brief dissenting opinion of his own. While there is an appropriate policy to prevent “unwarranted litigation from interfering with” the duties of government officials, Justice Breyer wrote, this policy does not warrant the majority’s interpretation of Twombly. Moreover, Justice Breyer explained, trial courts have at their disposal other vehicles by which they can limit such interference. Concluding, Justice Breyer noted that

[a]s the Second Circuit explained, where a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case and “mindful of the need to vindicate the purpose of qualified immunity defense,” can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials.

IV. THE RESPONSE TO IqBAL—THIS IS JUST THE BEGINNING

A. Early Decisions of the Courts of Appeals

In the first five months following the Court’s decision in Iqbal, four United States Courts of Appeals issued noteworthy opinions discussing Iqbal. While the cases do shed some light on how the standard is being applied, they have not yet answered the questions and concerns of commentators, professors, and practitioners. Decisions of the Courts of Appeals for the Third, Seventh, Ninth, and Eleventh Circuits are briefly discussed below.

The Third Circuit addressed Iqbal twice in the months following the high court’s decision. In McTernan v. City of York, several protesters sued the City of York, Pennsylvania, and several public officials for alleged violations of the free exercise of religion, peaceful assembly, and freedom of speech. The action arose when a York police officer refused to permit protestors onto a small portion of a handicap access ramp that spilled onto the public right-of-way in front of the abortion clinic they were protesting. The plaintiffs sought: “(1) declaratory judgment [that] the defendants’ failure to allow plaintiffs on the ramp was unconstitutional, (2) temporary and permanent injunctions restraining defendants from

272. *Id.* at 1961–62 (Breyer, J., dissenting).
273. *Id.* at 1961.
274. *Id.* at 1961–62.
275. *Id.* at 1961 (quoting Iqbal v. Hasty, 490 F.3d 143, 158 (2d Cir. 2007)).
277. *Id.*
prohibiting [p]laintiffs access to the ramp, and (3) nominal damages, and costs and attorneys’ fees.” 278 The plaintiffs also filed a motion for a preliminary injunction. 279

Following a preliminary injunction hearing, the district court denied the motion and, in turn, granted defendant’s motion to dismiss. 280 The plaintiffs appealed these two decisions to the Third Circuit Court of Appeals. 281 The Third Circuit, however, affirmed the denial of the motion for preliminary injunction. 282 Noting that Iqbal clarified any uncertainty regarding the applicability of Twombly to all civil actions, the Third Circuit addressed the plaintiffs’ argument in light of that decision. 283

The plaintiffs alleged in their complaint that the portion of the ramp that extended into the public right-of-way was a public forum. 284 The district court held that it was not. 285 On appeal, the plaintiffs asserted that the district court failed to accept as true the complaint’s allegation that the ramp was a public forum. 286 The Third Circuit, however, rejected this argument and, quoting Iqbal, stated the district court was correct in not accepting the statement as true because it was a legal conclusion and not a factual allegation. 287 If the plaintiffs were not excluded from a public forum, then they failed to “state a [First Amendment] claim to relief that is plausible on its face.” 288

The plaintiffs also asserted that prohibiting them from the ramp was an act in violation of the First Amendment right to the free exercise of religion. 289 To make a plausible claim for this violation, the court stated the plaintiffs must sufficiently plead that “the government action is not neutral and generally applicable” and that it was not “narrowly tailored to

278. \textit{Id.}
279. \textit{Id.}
281. \textit{Id.} at 526.
282. \textit{Id.} at 524.
283. \textit{See id.} at 530.
284. \textit{Id.} at 531.
285. \textit{Id.}
286. \textit{Id.}
287. \textit{Id.} (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”)).
289. \textit{Id.} at 532.
advance a compelling government interest.”290 In the complaint, however, the plaintiffs did not claim they were treated differently than others, but alleged that “‘Defendants’ actions target and are intended to chill, restrict, and inhibit Plaintiffs from exercising their religion in this way’ and that ‘Defendants’ actions constituted a substantial burden on Plaintiffs[‘] religious exercise, and Defendants lacked a compelling justification.’”291 The Third Circuit found these allegations to be nothing more than conclusory and quoted \textit{Iqbal}’s statement that “‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.’”292

In \textit{Fowler v. UPMC Shadyside}, another Third Circuit case, the plaintiff brought an employment discrimination claim under the Rehabilitation Act.293 The district court dismissed the complaint as time-barred and, in the alternative, as insufficient under Rule 12(b)(6).294 The plaintiff appealed to the Third Circuit Court of Appeals.295 On appeal, the court cited prior Third Circuit authority, which held that the “‘plausibility paradigm announced in \textit{Twombly} applies with equal force to analyzing the adequacy of claims of employment discrimination.’”296 The Third Circuit began its analysis by observing that, following \textit{Twombly} and \textit{Iqbal}, “pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.”297 Indeed, the court noted, “\textit{Iqbal} . . . provides the final nail-in-the-coffin for the ‘no set of facts’ standard that applied to federal complaints before \textit{Twombly}.”298

With regard to the pleading in the case before it, the Third Circuit found the plaintiff had satisfied the \textit{Twombly} and \textit{Iqbal} standards because the factual allegations in the complaint were “‘more than labels and conclusions’” or “‘a formulaic recitation of the elements of the cause of action,’” and therefore the plaintiff had nudged her claims “‘across the line

\begin{itemize}
  \item \textit{Id.} at 209.
  \item \textit{Id.} at 211 (quoting Wilkerson v. New Media Tech. Charter Sch., 522 F.3d 315, 322 (3d Cir. 2008)).
  \item \textit{Id.} at 120.
  \item \textit{Id.} (quoting \textit{McTernan v. City of York}, 564 F.3d 636, 647 (3d Cir. 2009)).
  \item \textit{Id.} at 205.
  \item \textit{Id.} (quoting \textit{Iqbal}, 129 S. Ct. at 1949).
  \item Fowler v. UPMC Shadyside, 578 F.3d 203, 205 (3d Cir. 2009).
  \item \textit{Id.}
  \item \textit{Id.}
\end{itemize}
from conceivable to plausible.” 299 Looking to the district court’s rationale for dismissing the complaint, the Third Circuit found that the district court had erroneously combined the standards of pleading with those of production. 300 The district court had based its dismissal on its finding that the plaintiff’s restriction to sedentary work could not legally constitute a disability because “a restriction to a sedentary duty is only a restriction from a class of jobs, not a disability in and of itself.” 301 Accordingly, the district court found the plaintiff failed to sufficiently plead she was disabled. 302 The Third Circuit pointed to the fact that the case upon which the district court based this conclusion involved a motion for summary judgment, and not a motion to dismiss. 303 Because standards differ for Rule 12(b)(6) and Rule 56 motions, the Third Circuit held the district court improperly applied a standard of production instead of the Twombly and Iqbal pleading standards. 304

In Sinaltrainal v. Coca-Cola Co., the Eleventh Circuit held that the Twombly and Iqbal pleading standards apply to pleadings that allege torts and violence overseas and that the plaintiffs in these four consolidated cases at bar failed to state a claim because they lacked well-pleaded facts. 305 The initial complaint alleged “the systematic intimidation, kidnapping, detention, torture, and murder of Colombian trade unionists at the hands of paramilitary forces, who allegedly worked as agents of [Coca-Cola].” 306 Following the defendant’s motion to dismiss for lack of subject-matter jurisdiction, the plaintiffs filed four separate complaints alleging the same conduct but adding various Colombian private bottling facilities as defendants. 307 In so doing, the plaintiffs were trying to support their claims, which were brought under the Alien Tort Claims Act (ATCA) and the Torture Victims Protect Act (TVPA), by connecting the Coca-Cola defendant to the local bottlers’ management via agency and alter-ego relationships. 308 Again, the defendants moved to dismiss for lack of

299. Id. at 212 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007)).
300. Id. at 213.
301. Id. at 212–13.
302. Id. at 213.
303. Id. at 212–13 (citing Marinelli v. City of Erie, 126 F.3d 354, 364 (3d Cir. 2000)).
304. Id. at 214.
305. See Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1270 (11th Cir. 2009).
306. Id. at 1258.
307. Id. at 1259.
308. Id. at 1259–60; see also 28 U.S.C. § 1350 (2006) (vesting federal district courts with original jurisdiction over alien tort claims).
subject-matter jurisdiction under the statutes, raising a facial attack on whether the complaint alleged facts sufficient to invoke the court’s subject-matter jurisdiction.309

The district court found that the allegations in all four complaints failed to sufficiently plead a conspiracy between the Colombian facilities’ management and the paramilitary officers and, therefore, that the four complaints failed to plead factual allegations necessary to invoke the court’s subject matter jurisdiction under the ATCA and TVPA.310 The plaintiffs appealed to the Eleventh Circuit, which applied the Iqbal standard and rejected the plaintiffs’ allegations as too “attenuated . . . to nudge their claims across the line from conceivable to plausible.”311 The court held that the ATCA claims were properly dismissed by the district court for want of jurisdiction under Rule 12(b)(1), but that the TVPA claims should have been dismissed under Rule 12(b)(6), instead of Rule 12(b)(1) as the district court ordered.312

In Moss v. U.S. Secret Service, the Ninth Circuit granted plaintiffs leave to amend their complaints alleging viewpoint discrimination by members of the Secret Service.313 The plaintiffs, who were protestors of then-President George W. Bush, filed a Bivens action, alleging that the agents violated their First, Fourth, and Fifth Amendment rights when they relocated the protestors, but not a group of Bush supporters.314 Prior to discovery, the agents moved to dismiss; or, in the alternative, for summary judgment based on qualified immunity.315 The magistrate judge recommended denial of the motion to dismiss for qualified immunity.316 The district court accepted the magistrate’s recommendation and, while the magistrate did not address the summary judgment motion, it was implied that consideration of the motion and any fact discovery would be deferred until after the motion to dismiss.317 The defendants then appealed the denial of the motion to dismiss and the deferment of the motion for summary judgment.318

309. Sinaltrainal, 578 F.3d at 1259.
310. Id. at 1268–69.
311. Id. at 1268.
312. Id. at 1268–70.
313. Moss v. U.S. Secret Serv., 572 F.3d 962, 965 (9th Cir. 2009).
314. Id. at 965–66.
315. Id. at 966–67.
316. Id. at 967.
317. Id.
318. Id.
Before addressing the questions before it, the Ninth Circuit summarized the recent developments in pleading requirements and concluded that “for a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”319 In resolving the defendants’ appeal, therefore, the Ninth Circuit examined “whether Plaintiffs’ allegation that the Agents ordered the relocation of their demonstration because of its anti-Bush message [was] plausible, not merely possible.”320

After citing Iqbal’s “methodological approach,”321 the court first identified and rejected the conclusory allegations in the plaintiffs’ complaint that it considered undeserving of the assumption of truth.322 Specifically, the court rejected the plaintiffs’ “bald allegation” that the agents had an impermissible motive, that the relocation was in conformity with a Secret Service policy to suppress anti-Bush speech, and that there existed a “systematic viewpoint discrimination at the highest levels of the Secret Service,” finding this last allegation to be “without any factual content to bolster it.”323 While the court found that the complaint’s factual allegations, if true, raised a possibility of viewpoint discrimination, it held that this mere possibility was insufficient to allow the court “to reasonably infer that the Agents ordered the relocation of Plaintiffs’ demonstration because of its anti-Bush message.”324 While the complaint technically failed the Twombly–Iqbal pleading standard, the court granted the plaintiffs leave to amend the complaint because “[h]aving initiated the [suit] without the benefit of the Court’s latest pronouncements on pleadings, Plaintiffs deserve a chance to supplement their complaint with factual content in the manner that Twombly and Iqbal require.”325

In Smith v. Duffey, a case raising fraud allegations during the negotiation of a termination agreement, the Seventh Circuit upheld the district court’s dismissal of the case, finding the claims to be meritless.

319. Id. at 969 (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)).
320. Id. at 970.
321. Id.; see also Iqbal, 129 S. Ct. at 1950 (“[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”).
322. Id.
323. Id.
324. Id. at 971–72.
325. Id. at 972.
under any reasonable interpretation of Rule 12(b)(6). In dicta, Judge Richard Posner seemed to criticize the widespread application of the new *Twombly–Iqbal* pleading standard. In the closing paragraphs of the opinion, Posner implied that the standard should possibly be limited to complex cases in which the defendants might incur substantial discovery costs. Importantly, while the court affirmed the district court’s dismissal, Judge Posner made it clear that the court of appeals was “reluctant to endorse the district court’s citation of [*Twombly*]” as the court’s basis for the affirmation.

Judge Posner’s questions, though clearly dicta, echo the practical concerns as well as the academic questions being raised by scholars across the country.

**B. The Initial Scholarly Response**

The recent pronouncement of the *Twombly–Iqbal* pleading standard, along with the Court’s mandate that it applies to all civil cases in the federal courts, has caused quite a reaction in the legal community. However, at this early point in what nearly all scholars agree is a new phase in American legal history, we can only gather some initial reactions, generalize about some trends, and then wait to see what happens.

There does seem to be a general consensus that *Iqbal* has changed the face of pleading in all civil actions by (1) making *Twombly* applicable in all cases, and (2) explicitly instructing judges to use their “judicial experience and common sense” in deciding a motion to dismiss. For instance, an article appearing in the July issue of the American Bar Association Journal states:

In *Ashcroft v. Iqbal*, issued in May, the court set a high barrier against suits that target policymaking officials held responsible for harsh interrogation of prisoners, wiretapping without a warrant, the “extraordinary rendition” of prisoners to countries that practice torture, or the alleged abuse of “enemy combatants” held in military brigs and at Guantanamo Bay.

326. Smith v. Duffey, 576 F.3d 336, 340 (7th Cir. 2009). The court noted that *Iqbal* was decided one week after oral arguments were held in *Smith*, but that regardless of whether the standard was different before or after *Iqbal*, Smith’s complaint would fail to state a claim under any reasonable standard. *Id.*

327. *Id.*

328. *Id.* at 339–40.

But lawyers say *Iqbal* will prove even more important in ordinary civil litigation. They say the decision raises the hurdle to get past the pleading stage, strengthening the specificity needed to get into court. No one seems to doubt the court wants to make it harder for plaintiffs to get inside the door.\(^{330}\)

Many are pointing to *Iqbal* and defining its function as answering any questions the Court left open in *Twombly*; some even assert *Iqbal* effectively does away with notice pleading.\(^ {331}\)

There is certainly no shortage of warnings about the impact of the *Iqbal* ruling on the notice pleading standard that we have relied on since the Court’s decisions in *Hickman* and *Conley*. Professor Robert G. Bone cautions that “*Iqbal* does much more than clarify and reinforce key points in *Twombly*; it takes *Twombly*’s plausibility standard in a new and ultimately ill-advised direction.”\(^ {332}\) He goes on to warn of the gravity of the changes by stating that *Iqbal*’s two-pronged approach is incoherent and that “*Iqbal* screens lawsuits more aggressively than *Twombly*, and does so without adequate consideration of the policy stakes.”\(^ {333}\) Professors Kevin Clermont and Stephen Yaezell join Professor Bone and warn that “by inventing a . . . test for the threshold stage of every lawsuit, [*Twombly* and *Iqbal*] have destabilized the entire system of civil litigation.”\(^ {334}\)

In addition to warning of its impact, some scholars criticize the *Twombly–Iqbal* standard as an inappropriate solution to a much larger problem.\(^ {335}\) They assert that the decisions need to be rehashed, claiming that *Iqbal* is a result of the inefficiencies of modern litigation that are better cured through other means.\(^ {336}\) As one commentator stated:

\(^{330}\) Savage, *supra* note 154.

\(^{331}\) See, e.g., *id.*; see also Blumstein, *supra* note 154, at 23–24.


\(^{333}\) *Id.*

\(^{334}\) Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming March 2010) (manuscript at 1, Cornell Legal Studies, Research Paper No. 09-022), available at http://ssrn.com/abstract=1448796 (“*[T]he bone this Article picks with the Court is not that it took the wrong path for pleading, but that it blazed a new and unclear path alone and without adequate warning or thought.*”).

\(^{335}\) See Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, LITIG., Spring 2009, at 1, 70.

\(^{336}\) Savage, *supra* note 154.
Indeed, the Supreme Court’s summary rejection of the proposition that district judges can effectively weed out groundless claims through careful case management is not so much a criticism of district court judges as it is an acknowledgement of a systemic failure to provide a mechanism for alternative, innovative, and comprehensive approaches to pleading, discovery, and case management that might avoid the high price imposed in *Twombly* and *Iqbal*, (i.e., compelling early dismissal of potentially valid claims).

... The first step should be a more thorough examination of the extent to which discovery is being abused. That could be followed by a dialogue to explore innovative solutions to whatever problems can be documented by more than the anecdotal horror stories that we all have heard about, witnessed, or had visited upon us, but which—from a neutral perspective rather than the subjective view of the disgruntled litigant—may or may not represent the norm in our civil justice system.337

This same commentator lamented that “the Supreme Court’s response in *Iqbal* of turning district court judges into ill-defined ‘common sense’ gatekeepers of probable truth[ ]demonstrates that a quick fix is not likely to be found merely through an adjustment to the pleading requirements.”338

At least one scholar has paused to consider the source of the plausibility standard.339 Drawing a link to substantive antitrust law, Professor Edward Brunet points to the Supreme Court’s 1968 opinion in *First National Bank v. Cities Services Co.*340 and the *Matsushita* trilogy,341 asserting that “the term plausible was not intended to be a procedural yardstick in all cases but, instead, had a substantive antitrust meaning.”342

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337. Rothman, supra note 335.
338. Id.
342. Lahav, supra note 339 (noting that in *Cities Services* the Court “used the p word (plausible) when describing a plaintiff’s antitrust theory and its ability to
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Professor Brunet ultimately criticizes the Court’s use of the term plausible, asserting that the Court has totally ignored the substantive antitrust meaning of the term.343

Other writers focus on the implications of the new standard for particular types of cases, including products liability litigation.344 These commentators are waiting and watching; they are poised to identify trends and gather empirical data.345 One such commentator has already found and outlined three recent products liability cases in which plaintiffs have faced motions to dismiss based on the new heightened pleading standard346: Suarez v. Playtex Products Inc.,347 Frey v. Novartis Pharmaceuticals Corp.,348 and Pennsylvania Employees Benefit Trust Fund v. Astrazeneca Pharmaceuticals, LP.349

In Suarez, District Court Judge Joan H. Lefkow dismissed a consumer class action suit, writing that the new Twombly–Iqbal pleading standard requires a plaintiff to “plead the ‘who, what, when, where, and how: the first paragraph of any newspaper story.’”350 In Frey, District Court Judge Herman J. Weber dismissed a products liability complaint in part, concluding that the complaint failed to meet the Twombly–Iqbal pleading standard, and denied the plaintiffs’ request for leave to amend the complaint to meet the standard.351 In Pennsylvania Employees Benefit Trust Fund, District Court Judge Ann C. Conway applied the Twombly–Iqbal standard to dismiss a pharmaceutical products liability action, calling the factual allegations in the complaint “naked assertions” and concluding

343. Id.
345. See, e.g., id.
346. See id.
350. Suarez, 2009 U.S. Dist. LEXIS 63771, at **4–5 (quoting DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990)).
351. Frey, 642 F. Supp. 2d at 795–96 (holding plaintiffs “failed to demonstrate that an amendment to the complaint would not be futile”).
that “the complaint is notably devoid of facts” as required under that particular type of cause of action.352 Without waiting for more data, another commentator, noting one of the dismissals in the products liability context discussed above, announced that “[t]he Supreme Court’s May 2009 ruling in Ashcroft v. Iqbal is quickly becoming the best thing to happen to the products liability defense bar since Daubert.”353

Other writers have found merit with the new standard; many of them, however, have also expressed a concern: “The ‘Catch-22’ problem for plaintiffs . . . is that they often need discovery in order to comply with the ‘plausibility’ standard.”354 Nevertheless, at least one author asserts that the opportunity to amend should be encouraged, pointing out that

[t]he Court softened the blow to the plaintiff in two respects. First, the Court said it was “important to note” that it was not expressing any view on the sufficiency of the complaint against the subordinate officers. In addition the Court remanded the case to the circuit court to decide whether it should remand to the district court to allow plaintiff to seek “leave to amend his deficient complaint.”355

Finally, because Justice Souter was the author of the Court’s dissent, some theorists have pondered how recent changes will create “an interesting picture of the Court and what a Sotomayor-for-Souter switch might mean for the next term.”356 Others predict that the switch will have little effect on the Court’s future rulings related to this issue.357 At least one watcher of the Court advises practitioners that because Justice Sotomayor’s addition to the Court will have little impact on this new pleading standard, “plaintiffs must be very careful to craft appropriately plausible factual allegations tying each defendant to unlawful conduct. . . . Since the [C]ourt may apply judicial experience and common sense,” a defendant loses little or nothing by filing a motion to dismiss and taking a

357. See id. (noting that business and criminal procedure cases may be seen differently by Justice Sotomayor).
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chance on the new standard.358

C. The Proposed Notice Pleading Restoration Act of 2009

Legal commentators are not alone in their concern over the impact of the Twombly and Iqbal rulings. In direct response to the two cases and the propositions for which they stand, on July 22, 2009, Senator Arlen Specter introduced the Notice Pleading Restoration Act of 2009.359 The proposed Act provides that

Federal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).360

Obviously, this legislation is in direct response to the newly promulgated Twombly–Iqbal standard. In remarks delivered by Senator Specter before the Senate, he accused the Court’s majorities of making an end run around precedent with the two recent cases.361 He warned that

358. John C. Nutter, New Life for Motions to Dismiss, DAILY REC., July 16, 2009, http://www.leclairkorona.com/_docs/Nutter7.16.09.pdf (“The new standards undoubtedly will present problems for plaintiffs in federal court. One could argue, reasonably, that the majority was overly concerned with protecting high level government officials from responding to discovery demands, and that the case should be limited to its facts. The court clearly stated, however, that the principles set forth in Twombly apply in all types of cases. It is safe to conclude that a new federal pleading standard is now in place.”); see also Richard D. Bernstein & Frank M. Scaduto, Court Toughens Application of Rule 8 Pleading Standards for Civil Cases, N.Y.L.J., July 6, 2009 (“The U.S. Supreme Court’s most important decision this term affecting business litigation did not involve a business. Ashcroft v. Iqbal, will make it harder for numerous civil plaintiffs to escape dismissal of claims brought in federal court. Although the facts in Iqbal concern racial and religious discrimination claims by a post-Sept. 11 Muslim detainee, Iqbal will have a major impact in business litigation. This is because Iqbal expressly applies to the pleading of each element, including knowledge and intent, of every claim in federal court.” (citation omitted)). See generally David Frank & Alan Cooper, A Higher Hurdle: U.S. High Court Says Complaint Must State ‘Plausible’ Set of Facts, VA. LAW. WEEKLY, June 15, 2009, http://valawyersweekly.com/blog/2009/06/15/a-higher-hurdle-us-high-court-says-complaint-must-state-%E2%80%98plausible%E2%80%99-set-of-facts/ (“The U.S. Supreme Court ruling last week has set a high hurdle for a plaintiff filing a civil complaint in federal court.”).


361. See Ingram, supra note 359.
[t]he effect of the Court’s actions will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries. I think that is an especially unwelcome development at a time when, with the litigating resources of our executive-branch and administrative agencies stretched thin, the enforcement of federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants.362

Filed as Senate Bill 1504, the proposed legislation has been referred to the Senate Judiciary Committee and, “if considered, would likely be a lightning rod for debate among plaintiffs' lawyers, consumer groups and businesses.”363

On December 2, 2009, the Senate Judiciary Committee held a related hearing entitled Has the Supreme Court Limited Americans’ Access to Courts?364 Professor Steve Burbank testified at the hearing and proposed an alternative to Senate Bill 1504.365 The alternative statute, instead of citing to Conley, would require

that [rulings on] motions to dismiss, motions to strike, and motions for judgment on the pleadings “shall be in accordance with interpretations of the Federal Rules of Civil Procedure by the Supreme Court of the United States, and by lower courts in decisions consistent with such interpretations, that existed on May 20, 2007—[the day before Twombly was decided].”366

As of the date of this writing, no additional action has been taken on the Bill.

V. CONCLUSION

In conjunction with Twombly, Iqbal has been called “the most consequential decision of the Supreme Court’s last term.”367 Indeed, the

362. Id.
363. Id.
365. Id.
366. Id.
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case is both “important and dangerous,” depending on the perspective, and there can be no doubt that it marks the beginning of a new phase in the history of American pleading requirements.

As the Twombly–Iqbal standard is applied and refined by the courts, the story of its impact on American legal history will unfold. In time, that story will answer the concerns of practitioners, resolve the debate over responsive legislation, and prove the predictions of some scholars. For now, however, I must conclude, as I only “came here to tell you how it’s going to begin.”

368. Id.
369. See supra text accompanying note 1.