2010

Pleading in Ohio after Bell Atlantic v. Twombly and Ashcroft v. Iqbal: Why Ohio Shouldn't Notice a Change

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PLEADING IN OHIO AFTER *BELL ATLANTIC V. TWOMBLY* AND *ASHCROFT V. IQBAL*: WHY OHIO SHOULDN'T "NOTICE" A CHANGE

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I. INTRODUCTION

With the audacity of Nietzsche, some have declared "notice pleading is dead."[1] "Notice pleading," which has long been the hallmark of the Federal Rules of Civil Procedure since their adoption in 1938, requires that a plaintiff need only state enough about his or her claim in a complaint to put a defendant on "notice" as to what the claim is. It is true that the text of Rule 8 of the Federal Rules of Civil Procedure has not changed; a "short and plain statement of the claim" is all that is supposedly required for a pleading to suffice.[2] Nor has the text of the 12(b)(6) motion to dismiss been altered, which nips a controversy in the bud by preventing a pleading from proceeding if the plaintiff has "fail[ed] to state a claim upon which relief can be granted."[3] But none can deny that when the Supreme Court handed down *Bell Atlantic Corp. v. Twombly*[4] in the spring of 2007, the standard for pleading and the motion to dismiss had been transformed from the longstanding endorsement of notice pleading expressed in the 1957 case of *Conley v. Gibson*.[5] In *Bell Atlantic*, the Court abrogated the low-threshold pleading standard outlined in *Conley*, which held that a complaint was sufficient to survive a motion to dismiss unless the plaintiff could prove "no set of facts" to support his or her claim,[6] and

[1] A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) ("Notice pleading is dead. Say hello to plausibility pleading."); Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 138 (2007) ("The best reading of *Bell Atlantic* is that the new standard is absolute, that mere notice pleading is dead for all cases and causes of action.").

[2] FED. R. CIV. P. 8. In December 2007, a new version of the Federal Rules of Civil Procedure went into effect that attempted to clarify the wording and format of the Rules. No substantive changes were made to the Rules.

[3] FED. R. CIV. P. 12(b)(6).

[4] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[5] Conley v. Gibson, 355 U.S. 41 (1957).

[6] *Id.* at 45.

replaced it with a new pleading standard that required a complaint to be "plausible on its face."[7] But what would this change look like in application? Despite the Supreme Court's second attempt at outlining the parameters of "plausibility" pleading in its 2009 decision of *Ashcroft v. Iqbal*,[8] courts, scholars, and professors of civil procedure continue to wrestle with whether the vaguely presented "plausibility" standard is the death-knell to notice pleading at the federal level.

Federal circuit and district courts have readily adopted the "plausibility" language of *Bell Atlantic* in interpreting motions to dismiss, as they must. However, within the federal courts, multiple and divergent interpretations as to what a "plausible" complaint actually looks like have emerged. Still, if there is truth in the assertion that notice pleading is dead, it is only a half-death in Ohio and other states whose local rules of civil procedure were initially created to mirror the Federal Rules. Ohio, along with twenty-five other states, adopted the interpretive "no set of facts" language of *Conley* to decide whether a pleading passes muster to survive a motion to dismiss.[9] When *Bell Atlantic* disavowed that language as having "earned its retirement,"[10] states like Ohio were faced with a decision: Must we, too, retire our Conley standard? The short answer is, no. States are free to have rules of civil procedure that are distinct from the Federal Rules or to interpret rules differently even if textually identical. Yet, the question of whether to align with the new, but vague, *Bell Atlantic* plausibility standard for pleading is a far more complex question to which states must give great consideration. Courts must take into account issues of forum shopping, the interplay of pleading standards and methods of regulating discovery, consider practitioner familiarity with the *Conley* threshold, and access to the courts to plaintiffs.

Ohio has only briefly addressed the entrance of *Bell Atlantic* onto the pleading stage, and, thus far, Ohio state courts have mostly retained the *Conley* standard for determining pleadings. However, multiple pleading standards are emerging, making the issue ripe for a determination by the Supreme Court of Ohio as to what the true pleading standard is for Ohio. This Note will explain why Ohio should preserve *Conley*, even if doing so diverges from the original intent of federal-state uniformity embodied by the Federal Rules of Civil Procedure. Part II outlines a brief history of pleading at the federal level and within Ohio, including an overview of the similarity of the Ohio Rules of Civil Procedure as compared to its Federal counterpart. Part III examines the majority decision and dissent of *Bell Atlantic v. Twombly* and the Supreme Court's first reference to *Bell Atlantic* in *Erickson v. Pardus*.[11] Part IV surveys the landscape of pleading after *Bell Atlantic*, with special emphasis on the adoption of *Bell Atlantic* in recent decisions in the Sixth Circuit and Ohio district courts—as well as the noteworthy absence of discussion of *Bell Atlantic* within Ohio state courts. Part V discusses the importance of *Ashcroft v. Iqbal*, which confirmed that *Bell Atlantic* represents a significant shift away from notice pleading. Finally, Part VI argues that Ohio should resist the urge to adopt *Bell Atlantic*'s standard

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[7] *Bell Atl.*, 550 U.S. at 570.

[8] Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

[9] *Conley*, 355 U.S. at 45; *see supra* note 76 and accompanying text.

[10] *Bell Atl.*, 550 U.S. at 563.

[11] Erickson v. Pardus, 551 U.S. 89 (2007).

because the differences between the Ohio Rules and the Federal Rules reflect state policy choices, forum shopping is unlikely, and *Bell Atlantic* offers no clear advantages over *Conley*.

II. A BRIEF HISTORY OF PLEADING

A. The Path to Unified Federal Rules

The Federal Rules of Civil Procedure were adopted in 1938 with the twin goals of establishing a set of uniform rules among all federal courts and establishing uniform rules between state and federal courts.[12] Yet, the Federal Rules were not the first response to a call for uniformity among rules of court. In 1847, the New York state legislature called "for a uniform course of proceeding in all cases whether of legal or equitable cognizance."[13] The New York Code of 1848 was born only a year later and created "a single form of action . . . known as the civil action," in which parties were to plead facts in a simple and concise form.[14] Although the new "code pleading" was a great step forward because it abolished the distinction between courts of law and courts of equity, it did not prove to be as simple as planned: "codifiers and the courts failed to appreciate that the difference between statements of fact and statements of law is almost entirely one of degree only."[15] And although code pleading continued to spread among the jurisdictions,[16] a unified system of procedure was still not achieved.

Federal procedure remained extremely complicated and required a skilled practitioner in order to navigate through the distinct proceedings of the federal courts at law and the federal courts at equity.[17] Courts at equity enjoyed uniform rules due to a rule-making power granted by the Supreme Court by express statute.[18] The success of this unified system of procedure, embodied in the Equity Rules of 1912, influenced later reform in the court of law, where little uniformity existed.[19] Congress recognized a desire for uniformity of procedures for common law claims through its creation of the federal courts in the Conformity Act of 1789, although it, too, did not subsequently result in procedural consistency.[20] The Conformity Act of

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[12] Edson R. Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116, 1117 (1934).

[13] CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 7, at 22 (2d ed. 1947) (citing N.Y. LAWS 1847, c. 59, § 8) (quotations omitted).

[14] *Id.* at 22-23.

[15] *Id.* at 23.

[16] *Id.* § 8, at 23. States continued to adopt the code, and by 1947, it was in force in thirty-two states and territories. *Id.* Other jurisdictions could be described as "quasi-code and common-law jurisdictions" due to a varying degrees in which they embraced the code and maintained common law systems. *Id.*

[17] *Id.* § 9, at 31.

[18] *Id.* at 32-33 (citing 28 U.S.C. §§ 723, 730 (2006)).

[19] *Id.* at 33.

[20] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93; *see also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1002, at 11 (3d ed. 2002).

1789 required the federal procedures for common law to "be the same in each state respectively as are now used or allowed in the supreme courts of the same."[21] To increase federal-state intrastate uniformity, Congress passed the Conformity Act of 1792, which "wedded federal procedure to a state's procedure as it existed in 1789, creating 'static' uniformity" among the federal and state courts.[22] In other words, under the 1792 Conformity Act, federal courts were supposed to align their "forms of writs, executions and other process" with those that had been used by state courts under the Conformity Act of 1789.[23] However, the Conformity Act of 1792 also allowed federal courts to make "such alterations and additions as the said courts respectively shall in their discretion deem expedient,"[24] which allowed "disuniformity to surface" as the courts evolved and used their discretion to vary from state procedures.[25]

The American Bar Association (ABA) adopted a resolution calling for the establishment of federal procedural rules in 1912,[26] which eventually led to Congress passing the Rules Enabling Act (REA) in 1934.[27] The Supreme Court promulgated the Federal Rules of Civil Procedure, which were adopted in 1938.[28] Again, the central purpose of the rules was to promote uniformity both among federal courts and in court proceedings between the state and federal courts.[29] Although the states had no legal obligation to adopt the new rules and had, in fact, been functioning under non-uniform standards for decades, reformers believed that the new federal

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[21] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93.

[22] Z.W. Julius Chen, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1434 (2008).

[23] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

[24] *Id.*

[25] Chen, *supra* note 22, at 1434.

[26] Report of the Committee on Judicial Administration and Remedial Procedure, *in* REPORT OF THE THIRTY-FIFTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 434, 434-35 (1912).

[27] *See* Chen, *supra* note 22, at 1435. Senator Thomas J. Walsh of Montana was a critic of promulgating uniform rules at the federal level and prevented the passage of the REA until after his death in 1933. *Id.* at 1436. Chen describes the period of tension between the passage of the ABA's resolution in 1911 and the REA's passage in 1934:

> Establishing federal rules would clearly create federal interstate uniformity, but arguably at the cost of federal-state intrastate uniformity. Echoing arguments supporting the early Conformity Acts, Senator Walsh, the chief critic of federally led uniformity, clung to the notion that the status quo prevented the evils inherent in a dual system, one state and one federal, and defeated the ABA's proposals over the next twenty years. . . .
> With Senator Walsh's death in 1933, the scene became ripe for the passage of the REA, and soon after, the Federal Rules.

Id.

[28] *See* Charles E. Clark, *The Federal Rules of Civil Procedure 1938-1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 436-38 (1958).

[29] Sunderland, *supra* note 12.

rules would serve as a model for states and would be embraced by them.[30] Indeed, a substantial majority of state civil court procedural systems adopted the Federal Rules of Civil Procedure in total or have allowed the Federal Rules to strongly influence their state procedural systems.[31]

B. Pleading Under the Federal Rules of Civil Procedure

1. Rule 8

Rule 8(a)(2) of the Federal Rules requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[32] In what has been characterized as the "keystone" of the pleading system embodied by the Federal Rules, Rule 8 was meant to simplify the complicated technical pleading requirements of earlier systems by being "construed liberally so as to do substantial justice."[33] Gone were the days of the common law practice in which successive rounds of pleading were entertained in an attempt to reduce the dispute to a single issue of law or fact.[34] Also replaced were the subsequent code pleading requirements, which demanded the pleading of facts but not evidence, and which placed an emphasis on distinguishing among "evidentiary facts," "ultimate facts," and "conclusions."[35] Pleadings were no longer the insurmountable hurdle that a plaintiff had to overcome in order to bring an action to court. Instead, Rule 8 established "notice pleading," the purpose of which was to put defendants on notice of the claims that were being asserted against them.[36] Discovery and pretrial motions became the new forum in which issues were to be managed and potentially eliminated before trial.[37]

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[30] *See* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

[31] John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1369, 1377 (1986).

[32] FED. R. CIV. P. 8(a)(2).

[33] 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 87 (3d ed. 2004).

[34] Ettie Ward, *The After-Shocks of* Twombly*: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 896 (2008).

[35] 5 WRIGHT & MILLER, *supra* note 33, § 1216, at 207; *see also Bell Atl.*, 550 U.S. at 574 (Stevens, J., dissenting) ("'it is virtually impossible logically to distinguish among "ultimate facts," "evidence," and "conclusions.". . . The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described.'") (citing Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520-21 (1957)).

[36] 5 WRIGHT & ARTHUR R. MILLER, *supra* note 33, § 1216, at 234.

[37] *See* Ward, *supra* note 34, at 898.

2. *Conley v. Gibson*

Although it was not the first Supreme Court case to address the new pleading standard,[38] the key case that defined the pleading standard at the federal level for half a century was *Conley v. Gibson*.[39] In *Conley*, the Supreme Court, speaking through Justice Black, established 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."[40] This famous "no set of facts" language was quoted, cited, and applied as the threshold for a motion to dismiss thousands of times before the Supreme Court deemed that such language had "earned its retirement" in *Bell Atlantic Corp. v. Twombly*.[41]

The facts of Conley presented a straightforward situation that became the touchstone for analyzing the sufficiency of a complaint. In *Conley*, African-American members of a Railway Union brought a class suit against the Union after the railroad where the plaintiffs worked purportedly abolished forty-five jobs held by the plaintiffs and other African-Americans.[42] The complaint alleged that the jobs were not in fact abolished, but were instead filled by whites.[43] Despite a contract between the Union and the Railroad that gave the employees in the bargaining unit protection against discharge or loss of seniority, the complaint alleged that the Union refused to represent the African-American employees against the discriminatory discharges.[44] The complaint charged that such discrimination violated the plaintiffs' rights to fair representation under the Railway Labor Act, and the complaint requested relief in the form of a declaratory judgment, injunction, and damages.[45] The Union moved to dismiss the complaint on several grounds, including through a

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[38] The Supreme Court first addressed the pleading standard for Rule 8(a) of the Federal Rules of Civil Procedure in *Dioguardi v. Durning*, 139 F.2d 774 (1944). The Court examined the sufficiency of a "home drawn" *pro se* complaint in which the plaintiff alleged that some of the "tonics" he had imported from Italy were unlawfully stolen and others sold at auction by the Collector of Customs. *Id.* at 774. The plaintiff's first complaint was dismissed by the District Court for failure to "state facts sufficient to constitute a cause of action" with leave to amend. *Id.* When the plaintiff returned with a second complaint that demonstrated a "heightened conviction that he was being unjustly treated," the district court dismissed again on the same grounds without leave to amend. *Id.* at 775. Although acknowledging that the plaintiff "comes to us with increased volubility, if not clarity," the Court held that the plaintiff had stated enough to withstand a motion to dismiss. *Id.* at 775. The Court explained that under the new rules of civil procedure, only a "short and plain statement of the claim" was necessary, not the pleading of "facts sufficient to constitute a cause of action." *Id.* The Court held that "however inartistically they may be stated, the plaintiff has disclosed his claims" and refused to deprive the plaintiff of his day in court. *Id.*

[39] Conley v. Gibson, 355 U.S. 41 (1957).

[40] *Id.* at 45-46.

[41] *Bell Atl.*, 550 U.S. at 563.

[42] *Conley*, 355 U.S. at 43. Shepardizing of the "no set of facts" language revealed that it had been cited more than 20,000 times as of February 21, 2010.

[43] *Id.*

[44] *Id.*

[45] *Id.*

12(b)(6) motion to dismiss for "failure to state a claim upon which relief can be granted."[46]

Although the Court reversed the action on other grounds, the Court took the opportunity to address the arguments as to the sufficiency of the complaint.[47] The *Conley* Court declared that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."[48] Instead, all that is necessary for a complaint to survive a motion to dismiss 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."[49] Echoing the liberal pleading standard embodied by the Rules, the Court noted that "[t]he 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."[50]

The *Conley* standard embodied the liberal philosophy underpinning the Federal Rules by reiterating that only in the rarest of circumstances—"unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim"—would the pleading stage be the proper place to dispose of a case.[51] To those who still clung to the more complicated pleadings of the past, "The immediate effect of *Conley* was to put an end to the murmurs of opposition to the new pleading standard of the Federal Rules and to clarify that yes, the new liberal rules mean what they say."[52] Indeed, one scholar distilled the *Conley* pleading doctrine down to four key aspects.[53] First, the statements of the complaint were explicitly to put the defendant on notice of the plaintiff's claim and the basis for that claim.[54] Second, no factual detail was necessary at the pleading stage to flesh out the claim.[55] Third, only if absolutely no claim existed—meaning that a plaintiff could prove no facts to support liability—would dismissal be warranted.[56] Finally, the pleading stage was not the

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[46] FED. R. CIV. P. 12(b)(6).

[47] *Conley*, 355 U.S. at 45. It is interesting to note that *Conley*'s famous "no set of facts" language is arguably dicta. The Court actually reversed the case by holding that it was error for the lower courts to have dismissed the complaint for lack of jurisdiction. *Id.* at 44. There was no need for the Court to have reached the motion to dismiss issue, but the Court went on to consider the issue anyway: "Although the District Court did not pass on the other reasons advanced for dismissal of the complaint we think it timely and proper for us to consider them here." *Id.* at 45.

[48] *Id.* at 47.

[49] *Id.* (citing FED. R. CIV. P. 8(a)(2)).

[50] *Id.* at 48.

[51] *Id.* at 45-46.

[52] Spencer, *supra* note 1, at 435-36.

[53] *Id.* at 438-39.

[54] *Id.* at 438.

[55] *Id.*

[56] *Id.* at 438-39.

proper forum for screening out claims on the merits.[57] These liberal core components of pleading supported the ideals of open access to justice by permitting plaintiffs to have their day in court. The pre-trial functions of discovery and summary judgment became the vehicles for analyzing the merits of a claim. This ensured that considerably more time and energy would be devoted to the substance of a claim than would be given at the pleading stage.

C. Ohio's Rules of Civil Procedure

1. The Ohio Civil Rules

With the adoption of the Ohio Civil Rules in 1970,[58] Ohio's Rules became one of twenty-three state rules that were "replicas" of the Federal Rules of Civil Procedure.[59] By adopting state rules that mirrored the Federal Rules, Ohio created "'but one procedure for state and federal courts.'"[60] Previously, Ohio was a code pleading jurisdiction, having followed the lead of New York by adopting the New York Code in 1853.[61] In a 1986 comprehensive survey of state court rules of civil procedure, procedural experts Professor Oakley and Professor Coon sought to identify the level of uniformity among state court rules of civil procedure with the Federal Rules.[62] Because of the importance that the Federal Rules placed on pleadings being liberally construed, the Professors placed special emphasis on examining the state civil rules governing pleadings and motions directed at pleadings. [63] Thus, one of their criteria for classification of a state as a "Federal Rules Replica" [64] included that the pleading rules "as written and interpreted provide without qualification for the liberal conception of 'notice pleading' practiced in federal courts under the aegis of *Conley v. Gibson*." [65] Ohio's conformity to the

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[57] *Id.* at 439.

[58] 1 JAMES M. KLEIN & STANTON G. DARLING II, BALDWIN'S OHIO PRACTICE: CIVIL PRACTICE ix (2d ed. 2004) (containing annotated civil rules 1-16). The Ohio Civil Rules went into effect July 1, 1970.

[59] Oakley & Coon, *supra* note 31, at 1413. A state's rules of civil procedure were considered a "replica" of the Federal Rules of Civil Procedure if the two were essentially identical in certain key aspects. *Id.*; *see supra* note 64.

[60] *Id.* at 1372 (citing W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 9, at 45 (Wright ed. 1960)).

[61] CLARK, *supra* note 13, § 8, at 24.

[62] Oakley & Coon, *supra* note 31, at 1368.

[63] *Id.* at 1373; *see also* CLARK, *supra* note 13, § 11, at 54. A major difference between the old ways of Code Pleading and the Federal Rules of Civil Procedure was how each procedure approached pleadings. *Id.* Under the Federal Rules, emphasis was placed on giving "fair notice of the pleader's case to the opposing party and to the court." *Id.* Under Code Pleading, emphasis was placed on outlining the issue to be tried with the material facts of the case. *Id.*

[64] Oakley & Coon, *supra* note 31, at 1374. This was one criterion of nine used to distinguish state court rules of procedure from the Federal Rules of Civil Procedure and determine the degree of symmetry between the two.

[65] *Id.*

Federal Rules, including its adoption of the *Conley* standard, created a federal-state uniformity of practice and earned Ohio the status of a Federal Rules Replica.[66]

Like the Federal Rules of Civil Procedure, Ohio Rule 8(a) requires only that a pleading contain "a short and plain statement of the claim showing that the party is entitled to relief."[67] Likewise, Ohio Rule 12(B)(6) permits dismissal of a claim for the "failure to state a claim upon which relief can be granted."[68] After the adoption of these rules, Ohio cases embraced the liberal pleading standard embodied by the Federal Rules right from the start.[69] In 1974, an Ohio Court of Appeals, citing *Conley* and numerous federal court of appeals cases, noted that "few complaints fail to meet the liberal standards of Rule 8 and become subject to dismissal."[70] One year later, the Supreme Court of Ohio formally adopted the "no set of facts" language of *Conley* in *O'Brien v. University Community Tenants Union*.[71]

2. *O'Brien v. University Community Tenants Union*

In *O'Brien*, the plaintiff sued a Union alleging that the Union had created a "blacklist" with defamatory statements against the plaintiff and other landlords for the purpose of deterring tenants from leasing from those landlords.[72] In examining the sufficiency of the complaint, the court adopted *Conley* and held that a complaint should survive a motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim.'"[73] The court acknowledged that the plaintiff's claim might indeed be difficult to prove in later stages of litigation.[74] Yet, because the court reasoned that "there can be a set of facts which would entitle appellee to relief," the court held that the complaint was adequate to survive a motion to dismiss: "Since it does not appear beyond doubt that appellee can prove no set of facts which would entitle him to relief, the judgment . . . must be affirmed."[75]

O'Brien has been continually cited for its adoption of *Conley*'s "no set of facts" as the pleading standard in Ohio.[76] Additionally, as discussed by Justice Stevens'

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[66] *See id.*

[67] OHIO R. CIV. P. 8(A)(1).

[68] OHIO R. CIV. P. 12(B)(6).

[69] *See* Slife v. Kundtz Props., Inc., 318 N.E.2d 557, 560 (Ohio Ct. App. 1974).

[70] *Id.* (italics omitted).

[71] O'Brien v. Univ. Cmty. Tenants Union, Inc., 327 N.E.2d 753 (Ohio 1975).

[72] *Id.* at 753.

[73] *Id.* at 755 (citing *Conley*, 355 U.S. at 45).

[74] *Id.* at 755.

[75] *Id.* at 755-56.

[76] Shepardizing revealed that, as of February 22, 2010, *O'Brien* has been cited more than 1,350 times for its recitation of the "no set of facts" standard for a motion to dismiss. Specifically, the Supreme Court of Ohio has cited *O'Brien* approvingly over fifty times. *See, e.g.*, Doe v. Archdiocese of Cincinnati, 849 N.E.2d 268, 272 (Ohio 2006) ("In order for a court to dismiss a complaint under *Civ.R. 12(B)(6)* for failure to state a claim upon which relief may be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief."); Taylor v. City of London, 723 N.E.2d 1089, 1091 (Ohio 2000) ("'In order for a court to dismiss a complaint for

dissent in *Bell Atlantic*, twenty-five other states adopted *Conley* as the state standard for evaluating a pleading's ability to survive a motion to dismiss.[77]

III. ENTER *BELL ATLANTIC V. TWOMBLY*

One of the difficulties in trying to understand the reach and impact of *Bell Atlantic Corp. v. Twombly* is that it was a fairly complex antitrust case dealing specifically with the telecommunications industry; yet, the language used by the Supreme Court in its holding extended far beyond the antitrust realm.[78] *Bell Atlantic* was a class-action antitrust case brought in the Southern District of New York by

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failure to state a claim upon which relief can be granted (*Civ.R.12(B)(6)*), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.'"); Cleveland Elec. Illum. Co. v. Pub. Utils. Comm'n of Ohio, 668 N.E.2d 889, 891 (Ohio 1996) ("In a civil case before a court, 'it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery' before a motion to dismiss can be granted.") (citing *O'Brien*, 327 N.E.2d at 753).

[77] *Bell Atl.*, 550 U.S. at 578 (Stevens, J., dissenting). These states—in addition to Ohio—include Alabama, Alaska, Colorado, District of Columbia, Florida, Georgia, Hawaii, Idaho, Louisiana, Maine, Massachusetts, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Tennessee, Vermont, Wisconsin, West Virginia, and Wyoming. *Id.* at n.5. Additionally, at least eight other states adopted standards substantially similar to that posed in *Conley*: Delaware, Indiana, Iowa, Kentucky, Michigan, Missouri, Utah, and Virginia. *Id.*

The Ohio case cited by Justice Stevens in his dissent is *State ex rel. Turner v. Houk*, 862 N.E.2d 104 (Ohio 2007) (per curiam). *Bell Atl*., 550 U.S. at 578 n.5. In *Turner*, the Court granted the respondents' motion to dismiss because "it appears beyond doubt that [the plaintiff] could prove no set of facts warranting the requested extraordinary relief in mandamus." 862 N.E.2d at 105. *Turner* was a curious choice to cite as an example of Ohio's use of *Conley* in that *Turner* does not cite *O'Brien* for the "no set of facts" standard. *Id.* (citing State *ex rel.* Rashada v. Pianka, 857 N.E.2d 1220, p.*2 instead). The case was also a per curiam decision. *See id.* It is likely that Justice Stevens cited *Turner* to show the contemporary nature of the *Conley* "no set of facts" pleading standard in Ohio because *Turner* had been decided by the Supreme Court of Ohio only two months before *Bell Atlantic*.

[78] *Bell Atl.*, 550 U.S. at 544. A brief explanation of the telecommunications industry is helpful in understanding the situation presented in *Bell Atlantic*. The telecommunications industry underwent a major transformation in 1984 when the American Telephone & Telegraph Company (AT&T) was divested into a system of regional telephone service monopolies, formally called "Incumbent Local Exchange Carriers" (ILECs) and commonly known as "Baby Bells." *Id.* at 548. While the AT&T monopoly was eliminated by this 1984 action in regard to long distance services, the ILECs continued to maintain a local telephone service monopoly. *Id.* at 548.

In response to these monopolies, Congress enacted the Telecommunications Act of 1996 in order to restructure the market and "facilitate market entry" by other competitors. *Id.*; *see also* Ward, *supra* note 34, at 902 (giving a concise history of the AT&T monopoly breakup).

Under this Act, the ILECs had an obligation to share their networks with competitors called "Competitive Local Exchange Carriers" (CLECs). *Bell Atl.*, 550 U.S. 549. However, after this 1996 Act and several subsequent revisions to its terms by the Federal Communications Commission, the ILECs allowed some CLECs into their territories, but the ILECs did not actively compete with CLECs in each other's territories. *Id.*

local telephone and Internet subscribers against several major ILECs.[79] The plaintiffs sought damages as well as declaratory and injunctive relief claiming violations of Section One of the Sherman Antitrust Act, which prohibits agreeing to engage in conduct unfavorable to competition.[80] Essentially, the plaintiffs claimed that the Incumbent Local Exchange Carriers (ILECs) had "engaged in parallel conduct" in their respective areas of service in order to inhibit the growth of Competitive Local Exchange Carriers (CLECs).[81] Plaintiffs also claimed that the defendant ILECs had entered into an illegal conspiracy to refrain from competing against each other.[82]

The federal district court granted the defendant's motion to dismiss, holding that the allegations of parallel conduct, absent additional information, were not alone sufficient to state a claim under Section One of the Sherman Act for which relief could be granted.[83] The Second Circuit reversed, holding that such additional "plus factors" were not required at the pleading stage, and that the allegations of parallel conduct were adequate to support the claim unless "no set of facts . . . would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."[84] The Supreme Court granted certiorari "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct" more generally.[85] The Court reversed the Second Circuit in a 7-2 decision written by Justice Souter and dismissed the complaint for failure to state a claim upon which relief could be granted.[86] Despite this narrow question presented on certiorari, the Court addressed much more than the pleading standard for antitrust cases: it abrogated the crucial "no set of facts" language of *Conley* that applied to all pleading standards, which the Court had endorsed for the previous half-century.

A. The Majority Decision

The main question that the Supreme Court set out in *Bell Atlantic* was "what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act."[87] Specifically, the question presented was "whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action."[88] The Court held that "an allegation of parallel conduct and a bare assertion of conspiracy will

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[79] *Bell Atl.*, 550 U.S. at 550.

[80] *Id*.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 552.

[84] *Id.* at 553 (citing the lower court's decision, Twombly v. Bell Atlantic Corp., 425 F.3d 99, 114 (2d Cir. 2005)).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 554-55 (emphasis omitted).

[88] *Id.* at 548-49.

not suffice" and that the complaint for such a claim "requires . . . enough factual matter (taken as true) to suggest that an agreement was made."[89]

But instead of stopping after articulating this requirement of pleading "plausible grounds to infer an agreement" within the antitrust conspiracy context, the Court went on to examine the "no set of facts" language presented in *Conley*—language that is not limited merely to pleading in antitrust cases but affects pleading standards as a whole.[90] The Court explained that reading *Conley*'s "no set of facts" language in isolation would result in all pleading statements being rendered sufficient unless they were factually impossible to prove.[91] The Court "retired" the language of *Conley*, declaring that "after puzzling the profession for 50 years, this famous observation has earned its retirement."[92] In its place, the Court articulated a new standard: A complaint requires the pleading of "enough facts to state a claim to relief that is plausible on its face."[93] The Court explicitly rejected that this new standard required any "heightened fact pleading of specifics."[94] Instead, plaintiffs—presumably those presenting antitrust issues or otherwise—would now have to "nudge[] their claims across the line from conceivable to plausible," lest their complaint be dismissed.[95]

B. Justice Stevens' Dissent

Finding that the majority opinion reflected a "dramatic departure from settled procedural law,"[96] Justice Stevens, joined by Justice Ginsberg, authored a lengthy dissent, noting that "[i]f *Conley*'s 'no set of facts' language is to be interred, let it not

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[89] *Id.* at 556.

[90] *Id.* at 556.

[91] *Id.* at 561.

[92] *Id.* at 563. The Court went on to explain that "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.*

[93] *Id.* at 570.

[94] *Id.* ("In reaching this conclusion, we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of *Federal Rule of Civil Procedure 9*, which can only be accomplished '"by the process of amending the Federal Rules, and not by judicial interpretation."'" (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) and quoting Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))). The Court specifically claimed that its decision was not contrary to *Swierkiewicz*, in which the Court held that the pleading of specific facts was not necessary to establish a prima facie case of discrimination. *Id*. According to the Court, *Swierkiewicz* was distinguishable because, in that case, the Court of Appeals had "impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." *Id.* "Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* The Court did not, however, define what constitutes "plausible." *Id.*

[95] *Id.*

[96] *Id.* at 573.

be without a eulogy."[97] Among other practical concerns with the holding,[98] Justice Stevens specifically noted the effect that the Court's unanticipated departure from *Conley* could have on the many states that had adopted the *Conley* standard within their own interpretations of rules of procedure: "I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so."[99] The dissent proposed that such a change to the pleading standard should only be made via the rulemaking process for the Federal Rules of Civil Procedure and that it was wholly unnecessary for the Court to have reached a discussion of *Conley* at all.[100]

C. The First Reference to Bell Atlantic*:* Erickson v. Pardus

Only fourteen days after deciding *Bell Atlantic*, the Court added another twist to the pleading landscape when it released the per curium decision *Erickson v. Pardus*.[101] In *Erickson*, a *pro se* prisoner plaintiff alleged that he had a liver condition resulting from hepatitis C and that prison officials had wrongfully terminated his treatment for the condition.[102] The prisoner had commenced the year-long treatment, which required weekly self-injections of medication through the use of a syringe. However, he was removed from the treatment when prison officials suspected that the prisoner had been using or allowing others to use the syringe for illegal drugs.[103] According to prison protocol, a prisoner using illicit drugs during the treatment is banned from the treatment for one year.[104] Facing a lengthy

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[97] *Id.* at 577 (Stevens, J., dissenting).

[98] The dissenters would come to the opposite conclusion as to the actual antitrust question presented as well:

> If the defendants acted independently, their conduct was perfectly lawful. If, however, that conduct is the product of horizontal agreement among potential competitors, it was unlawful. Plaintiffs have alleged such agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why then does the case not proceed? Does a judicial opinion that the charge is not "plausible" provide a legally acceptable reason for dismissing the complaint? I think not.

Id. at 573. The dissent identified "[t]wo practical concerns" that "presumably explain" the Court's decision. *Id.*. First, antitrust litigation can be extremely expensive. *Id.* Second, evidence of parallel conduct can confuse jurors into believing that such evidence is *proof* that the parties acted under an unlawful agreement, when in fact they simply acted in a similar manner independently. *Id.* (Stevens, J., dissenting). While the dissent argues these concerns "merit careful case management . . . they do not . . . justify the dismissal of an adequately pleaded complaint without even requiring the defendant to file answers denying [the] charge." *Id.*

[99] *Id.* at 579.

[100] *Id.*

[101] Erickson v. Pardus, 551 U.S. 89 (2007). *Bell Atlantic* was decided on May 21, 2007, and *Erickson* was decided only a few days later on June 4, 2007.

[102] *Id.* at 89.

[103] *Id.* at 90-91.

[104] *Id.*

eighteen-month delay in his treatment, the prisoner denied that he took the syringe for any illicit purpose and filed a complaint against the doctor alleging that removing him from his hepatitis C treatment would put his life in danger in violation of his Eighth Amendment rights.[105]

The district court dismissed the complaint for failing to allege that the doctor had caused the prisoner "substantial harm."[106] The court of appeals affirmed, holding that the prisoner had made "only conclusory allegations" that he suffered harm as a result of removal from the treatment.[107] The Supreme Court vacated and remanded the decision, holding that it was error for the court of appeals to conclude that the allegations were "too conclusory" to demonstrate, at the pleading stage, that the prisoner had not suffered a cognizable harm as a result of the suspension from his course of treatment.[108]

In an attempt to demonstrate what of *Conley* had survived *Bell Atlantic*, the Court cited language in *Bell Atlantic* that was quoted from *Conley*, that a statement in a complaint "need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[109] The Court explicitly stated that "[s]pecific facts are not necessary" in order to satisfy Federal Rule 8(a), perhaps endeavoring to reinforce that notice pleading survived *Bell Atlantic*.[110] However, this proposition is undercut by the fact that the prisoner in *Erickson* was a *pro se* litigant, and as the Court acknowledged, "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."[111] *Pro se* pleadings have always been held to a less stringent standard than have pleadings by those with counsel.[112] It is difficult to construe from *Erickson* how the Court intended *Bell Atlantic* to be applied to non-*pro se* pleadings in light of this fact.[113]

Erickson is viewed by some as an attempt by the Court to mitigate the significance of Bell Atlantic.[114] The fact that the case was issued so quickly after *Bell Atlantic* suggests that the Court may have anticipated the confusion surrounding the pleading standard that would result from *Bell Atlantic* and wished to strategically

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[105] *Id*.

[106] *Id.* at 92 (quotations omitted) (citing Recommendation on Defendants' Motion To Dismiss p. 12 in Civ. Action No. 05-CV-00405-LTB-MJW).

[107] *Id.* (quotations omitted) (citing Erickson v. Pardus, 198 F. App'x 694, 698 (10th Cir. 2006)).

[108] *Id.* at 93.

[109] *Id.* (quoting Bell Atl.v. Twombly, 550 U.S. 544, 555 (2007) and Conley v. Gibson, 355 U.S. 41, 47 (1957)).

[110] *Id.*

[111] *Id.* at 94 (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

[112] *See* Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944); *Estelle*, 429 U.S. at 106.

[113] Hon. Colleen McMahon, 41 SUFFOLK U. L. REV. 851, 861 (2008) (suggesting that "*Erickson* simply means that *Twombly*'s 'plausibility' standard, like all pleading standards, is to be applied less stringently to *pro se* plaintiffs.") *Id.* (emphasis added).

[114] *See The Supreme Court, 2006 Term: Leading Cases*, 121 HARV. L. REV. 305, 310-11 n.51 (2007).

reinforce that notice pleading under *Conley* had not been eliminated.[115] Not all have been convinced.[116] In addition to the fact that the plaintiff appeared *pro se*, the prisoner's claim presented a fairly straightforward case: the prisoner pleaded that the termination of his hepatitis C treatment endangered his life, which is a claim under the Eight Amendment.[117] Such a claim is also plausible because he did in fact suffer from hepatitis C, which is commonly understood to have fatal consequences if left untreated.[118] Put simply, *Erickson* was too easy of a case to attempt to flesh out the relationship between *Conley* and the new plausibility standard post *Bell Atlantic*.[119]

IV. THE LANDSCAPE AFTER *BELL ATLANTIC*: "NOTICE-PLUS"[120] PLEADING

A. The Second Circuit Attempts to Apply "Plausiblity": Iqbal v. Hasty

The Second Circuit was the first court to discuss the impact of *Bell Atlantic* on pleading in *Iqbal v. Hasty*.[121] In *Iqbal*, the court began its analysis by acknowledging that "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic*."[122] The *Iqbal* court identified four signals which "point toward a new and heightened pleading standard": (1) the Court's disavowal of *Conley*'s "no set of facts" language; (2) the Court's use of numerous phrases to indicate that more than mere notice of a claim is needed to satisfy a Section One antitrust violation; (3) the Court's disregard that "careful case management" alone could sufficiently dispose of a groundless case early in the discovery process; and (4) the Court's use of the word "plausibility" fifteen times to suggest a new standard.[123]

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[115] *Id.*

[116] *See, e.g.*, Dodson, *supra* note 1, at 139. Dodson "doubt[s *Erickson*] will temper the import of *Bell Atlantic.*" *Id.* at 140; *see also* Spencer, *supra* note 1, at 456. Although Spencer says "[t]he *Erickson* Court's nod to notice pleading . . . do[es] soften the edges of *Twombly*, seeming to assure readers that not all of *Conley*'s legacy has been discarded," Spencer goes on to explain that the nature of *Erickson* makes it "not a proper case in which to test how the Court will apply *Twombly* in subsequent cases." *Id.* at 456-57.

[117] *Erickson*, 551 U.S. at 90. ("[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the *Eighth Amendment*." (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976))).

[118] *Id.* at 92.

[119] *See* Spencer, *supra* note 1, at 456 ("*Erickson*'s brief homage to notice pleading and the liberal ethos ring hollow in the context of this clear-cut case . . . .").

[120] Dodson, *supra* note 1, at 138.

[121] Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007). After hearing oral arguments for *Iqbal* in early October, the Second Circuit required the parties to submit supplemental briefs addressing "whether this Court should await the Supreme Court's decision in *Twombly v. Bell Atlantic* [sic] . . . before deciding this appeal." Supplemental Brief for Appellants John Ashcroft & Robert Mueller at 1, Iqbal v. Ashcroft, 490 F.3d 143 (2d Cir. 2007) (Nos. 05-5768-cv, 05-5844-cv, 05-6379-cv, 05-6352-cv, 05-6378-cv, 05-6368-cv, 05-6358-cv, 05-6388-cv). *Twombly v. Bell Atlantic* had been decided by the Second Circuit, which may explain why the court was eager to know the Supreme Court's ruling in *Bell Atlantic*.

[122] *Iqbal*, 490 F.3d at 155.

[123] *Id.* at 155-56.

The court then considered five aspects of *Bell Atlantic* which "point away from a heightened pleading standard and suggest" a narrow reading of the case as applicable only to Section One allegations: (1) the Court's specific disclaimer that it was imposing a heightened pleading of specific facts; (2) the Court's explicit approval of the general allegation of negligence exemplified in Form 9 of the Federal Civil Rules;[124] (3) the Court's concern with the "sprawling" costs of discovery in antitrust conspiracy cases and fear that defendants will be pressed to settle "even anemic cases" that survive the motion to dismiss stage; (4) the Court's failure to disclaim its prior statement that "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later"; and, (5) the fact that the Court cited *Bell Atlantic* as standing for the traditional pleading requirement that "[s]pecific facts are not necessary" under Rule 8 only two weeks later in *Erickson*.[125]

After balancing these competing signals, the Second Circuit concluded that *Bell Atlantic* was not limited to the context of antitrust cases due to its sweeping rejection of *Conley*'s "no set of facts" language, which had been a key aspect of notice pleading.[126] Instead, the Second Circuit concluded that the Supreme Court had changed the pleading standard to 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."[127] This early interpretation of *Bell Atlantic* predicted that the Court had in fact intended to alter the pleading standard generally, despite discussion among scholars that *Bell Atlantic* was limited to the realm of antitrust cases.[128] The Supreme Court granted certiorari to the Second Circuit and, as discussed in Part VI, confirmed that the change to pleading was permanent and pervasive, but not quite as "flexible" as the Second Circuit had hoped.[129]

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[124] *Id.* at 156. Form 9 (currently Form 11) exemplifies a "Complaint for Negligence," giving the hypothetical allegation that a defendant "negligently drove a motor vehicle against plaintiff who was then crossing [an identified] highway." *Id.* (citing FED. R. CIV. P. APP. FORM 9). Although this exemplary allegation does not include specific allegations as to *how* the driver was negligent, the *Bell Atlantic* Court approved this type of general allegation as adequate, while finding that the plaintiffs in *Bell Atlantic* had fallen short by alleging "merely legal conclusions" of conspiracy. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007).

[125] *Iqbal*, 490 F.3d at 156-57.

[126] *Id.* at 157.

[127] *Id.* at 157-58.

[128] *See* Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. COLLOQUY 117, 117 (2007) ("The Court used 'plausibility' in its antitrust context, to resolve an existing problem in antitrust law, and it is a misreading of *Twombly* to extend 'plausibility' beyond that context."). The Supreme Court expressly rejected this interpretation in *Ashcroft v. Iqbal*, 129 S. Ct 1937, 1953 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." (citation omitted)).

[129] *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *see infra* Part VI.

B. Divergent Views of Plausibility Emerge

After the Second Circuit's decision, other circuits followed suit, attempting to address the meaning of *Bell Atlantic* in their review of motions to dismiss.[130] Several vague interpretations and applications have emerged, ranging from findings that *Bell Atlantic* significantly changed the pleading standards of Rule 8,[131] to not at all,[132] to only "in some cases."[133] For example, after a lengthy analysis of *Bell Atlantic* in *Phillips v. County of Allegheny*, the Third Circuit concluded that the Supreme Court intended *Bell Atlantic* to stand for the proposition that Rule 8 "requires not merely a short and plain statement, but instead mandates a statement 'showing that the pleader is entitled to relief.'"[134] Instead of finding a standard similar to the Second Circuit's "flexible plausibility standard," the Third Circuit interpreted *Bell Atlantic* to require "some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation."[135] Thus, at least one circuit court views *Bell Atlantic* as having specifically added requirements beyond the text of Rule 8.[136]

Other courts have focused on the aspects of *Conley* that *Bell Atlantic* retained.[137] In *Barclay White Skanska, Inc. v. Battelle Memorial Institute*, the Fourth Circuit did not cite the "plausibility" language of *Bell Atlantic* and cited only the portions of *Bell Atlantic* that referenced *Conley* favorably.[138] This suggests that the Fourth Circuit did not view *Bell Atlantic* as having significantly altered the pleading standard at all. Likewise, in *McZeal v. Sprint Nextel Corp.*, the Federal Circuit expressly stated that *Bell Atlantic* did not change the pleading standard under the

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[130] *See generally* Clark v. Boscher, 514 F.3d 107 (1st Cir. 2008); Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007); Phillips v. County of Allegheny, 515 F.3d 224 (3d Cir. 2008); Barclay White Skanska, Inc. v. Battelle Mem'l Inst., 262 F. App'x 556 (4th Cir. 2008); Burnette v. Bureau of Prisons, 277 F. App'x 329 (5th Cir. 2007); Midwest Media Prop., L.L.C. v. Symmes Twp., 512 F.3d 338 (6th Cir. 2008); Jervis v. Mitcheff, 258 F. App'x 3 (7th Cir. 2007); Abdullah v. Minnesota, 261 F. App'x 926 (8th Cir. 2008); Grabinski v. Nat'l Union Fire Ins. Co. of Pittsburgh, 265 F. App'x 633 (9th Cir. 2008); Burris v. U.S. Dep't of Justice, 262 F. App'x 103 (10th Cir. 2008); Davis v. Coca Cola Bottling Co., 516 F.3d 955 (11th Cir. 2008); Powers v. Wickline, 252 F. App'x 324 (D.C. Cir. 2007); McZeal v. Sprint Nextel Corp., 501 F.3d 1354 (Fed. Cir. 2007).

[131] *See, e.g.*, *Iqbal*, 490 F.3d at 157-58; *Phillips*, 515 F.3d at 234; *Davis*, 516 F.3d at 974 n.43.

[132] *See Barclay*, 262 F. App'x at 560; *McZeal*, 501 F.3d at 1357 n.4.

[133] *See Midwest Media Prop.*, 512 F.3d at 341 n.1.

[134] *Phillips*, 515 F.3d at 234.

[135] *Id.* at 234-35.

[136] *See id.*

[137] *See Grabinski*, 265 F. App'x at 635; *Barclay*, 262 F. App'x at 560.

[138] *Barclay*, 262 F. App'x at 560 ("Rule 8 'requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."'" (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) and quoting Conley v. Gibson, 355 U.S. 41, 47 (1957))). *Id.*

Federal Rule.[139] After briefly analyzing *Bell Atlantic*, the Federal Circuit concluded "[t]his does not suggest that *Bell Atlantic* changed the pleading requirement of Federal Rule of Civil Procedure 8 as articulated in *Conley*."[140]

On the other hand, in *Midwest Media Property v. Symmes Township*, the Sixth Circuit interpreted the case as standing for the proposition that "in some cases, a plaintiff must plead particular facts in their complaint."[141] While acknowledging that *Bell Atlantic* had not defined what these "some cases" included, it read *Bell Atlantic* to require the pleading of "specific facts" in cases likely to produce expansive and expensive litigation.[142] Still other circuit courts have cited language from *Bell Atlantic* acknowledging that it represents a new pleading standard for evaluating a motion to dismiss, but without providing analysis as to what, if any, change it embodies.[143]

V. THE SUPREME COURT CONFIRMS *BELL ATLANTIC* IN *ASHCROFT V. IQBAL*

The Supreme Court granted certiorari to the Second Circuit in the *Iqbal* case in November 2008, which was viewed by many as an indication that the Court would shed light on its true intent in *Bell Atlantic*.[144] The Court confirmed that it had in fact altered the standard for reviewing a motion to dismiss.[145] Yet, the Court's explanation as to how "plausibility" pleading should be applied in federal court does not present a desirable standard and does not change the fact that Ohio should retain *Conley*'s "no set of facts" language for evaluating a motion to dismiss.[146]

A. Ashcroft v. Iqbal

The facts of *Iqbal* demonstrate the burden plaintiffs must now overcome due to the Court embracing heightening pleading and disregarding notice pleading. After the September 11, 2001 terrorist attacks, Iqbal, a Pakistani Muslim, was arrested on

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[139] McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1357 n.4 (Fed. Cir. 2007).

[140] *Id.* The Federal Circuit continued: "In fact, as illustrated above, *Bell Atlantic* favorably quoted *Conley*." *Id.* While *Bell Atlantic* did quote aspects of *Conley* favorably, it is difficult to interpret the Court's rejection of *Conley*'s key "no set of facts" language as not altering the pleading standard under Rule 8 at all.

[141] Midwest Media Prop., L.L.C. v. Symmes Twp., 512 F.3d 338, 341 n.1 (6th Cir. 2008).

[142] *Id.*

[143] *See, e.g.*, Burnette v. Bureau of Prisons, 277 F. App'x 329, 331 (5th Cir. 2007) ("Burnette's pleadings contain 'enough facts to state a claim to relief that is plausible on its face' with respect to some of the BOP officials named in his lawsuit." (quoting *Bell Atl.*, 550 U.S. at 570)); Burris v. U.S. Dep't of Justice, 262 F. App'x 103, 106 (10th Cir. 2008) (finding that the complaint's allegations "failed to meet [the] basic requirements" of being raised above the "'speculative level'" (quoting *Bell Atl.*, 550 U.S. at 555)); Davis v. Coca Cola Bottling Co., 516 F.3d 955, 974 n.43 (11th Cir. 2008) ("The main Rule 8(a) standard now seems to be whether the 'allegations plausibly suggest[] ([and are] not merely consistent with)' a violation of the law." (alterations in original) (quoting *Bell Atl.*, 550 U.S. at 557)).

[144] Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008).

[145] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.").

[146] *See infra* Part VI.

criminal charges and detained by federal officials.[147] Iqbal filed a *Bivens* action[148] against federal officials, claiming that the officials subjected him to harsh conditions and confinement based upon his race, religion, or national origin.[149] The twenty-one count complaint set forth allegations detailing harsh treatment by his jailors as well as contentions that former Attorney General John D. Ashcroft was the architect of a policy of unconstitutionally "holding post-September 11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI."[150] The allegations against Ashcroft were the only allegations considered before the Court in *Iqbal*.[151]

Both the trial court and the Second Circuit denied Ashcroft's motion to dismiss for failure to state a claim.[152] The trial court based its decision upon the then-intact *Conley* standard.[153] As discussed in Part IV.A, the Second Circuit attempting to apply the newly announced plausibility standard, denied the motion to dismiss by holding that the context of the case did not require Iqbal to amplify his claim with factual allegations in order to render the claim "plausible."[154]

The Supreme Court reversed and granted the motion to dismiss.[155] In examining the requirements for a *Bivens* action, the Court explained that one must "plead and prove that the defendant acted with discriminatory purpose."[156] The Court interpreted this element to require—at the pleading stage—that the plaintiff "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."[157] Focusing on the government's strong defense of qualified immunity, the Court explained that

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[147] *Iqbal*, 129 S. Ct. at 1942.

[148] *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971).

[149] *Iqbal*, 129 S. Ct. at 1942.

[150] *Id.* at 1944.

[151] *Id.* Specifically, the Court later clarified:

> [W]e express no opinion concerning the sufficiency of respondent's complaint against eh defendants who are not before us. Respondant's account of his prison ordeal alleges serious official misconduct that we do not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from [Aschcroft, et. al].

Id. at 1952.

[152] *Id.* at 1944.

[153] *Id.*

[154] *Id.*; *see supra* Part IV.

[155] *Iqbal*, 129 S. Ct. at 1954. The Court left the decision to the Second Circuit whether to allow Iqbal to "seek leave to amend his deficient complaint." *Id.*

[156] *Id.* at 1948.

[157] *Id.* at 1948-49. (emphasis added).

"purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination . . . ."[158]

The immediate problem with this interpretation is that, although a plaintiff's *Bivens* claim will ultimately hinge on whether discovery reveals evidence of a discriminatory purpose, such evidence is in the possession of the defendant at the time of filing a complaint. Without addressing this important issue, the Court nevertheless analyzed whether the complaint sufficiently demonstrated a discriminatory purpose through the lens of *Bell Atlantic*.

The Court re-examined *Bell Atlantic* and explained that it calls for a "two-pronged approach" for analyzing the sufficiency of a complaint.[159] First, a court must accept as true all of the allegations in a complaint, but not legal conclusions.[160] Second, all complaints must state plausible claims for relief in order to survive a motion to dismiss.[161]

In applying this two-pronged approach to the facts of *Iqbal*, the Court held that the complaint's assertions failed the first prong because they were "bare" and "conclusory."[162] In a statement that harkens the days of code pleading, the Court reasoned, "It is the conclusory nature of respondent's allegations rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."[163]

In what amounts to a blending of the summary judgment standard with a motion to dismiss, the Court held that the complaint failed the second "plausibility" prong because the allegations were not "plausible" when considered in light of the Court's own reasoning, not in light of any evidence.[164] Iqbal pled that the petitioners crafted a policy of detaining individuals "of high interest" in extremely restrictive conditions because of their race, religion, or national origin.[165] The Court admitted that Iqbal's allegation, taken as true, is consistent with a plan of purposefully designating detainees "of high interest" because of their race, religion, or national origin. But the Court went on to conclude on its own—at the pleading stage without the benefit of discovery, argument, or briefing—that "given more likely explanations, they do not plausibly establish this purpose."[166]

The Court continued its reasoning that, in a post-September 11th world, it is unsurprising that "a legitimate policy directing law enforcement to arrest and detain

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[158] *Id.* at 1949.

[159] *Id.* at 1950.

[160] *Id.* at 1949.

[161] *Id.* at 1950.

[162] *Id.* at 1951. Iqbal pled that the petitioners "'knew of, condoned, and willfully and maliciously agreed to subject [him]' 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.'" *Id.* Although the Court noted that these assertions were not "unrealistic or nonsensical," it held that they were legal conclusions that were not entitled to be assumed to be true.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

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."[167] By essentially conducting a review for summary judgment based upon its own conclusions, the Court held that the complaint did not plead any "factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind."[168]

Unfortunately, such evidence is not readily accessible to the plaintiff until the commencement of discovery. The Court emphasized that the purpose of the defense of governmental qualified immunity "is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"[169] By expecting plaintiffs to be "omniscient"[170] as to their defendant's state of mind at the pleading stage, the Court gave significant weight to the government's defense of qualified immunity at an inappropriate time in the proceedings.

VI. OHIO DISTRICT COURTS AND THE SIXTH CIRCUIT AFTER *BELL ATLANTIC* AND *IQBAL*

A. Nicsand v. 3M*: A Case Similar to* Bell Atlantic

Federal courts within the Sixth Circuit have readily applied *Bell Atlantic* to motions to dismiss in the antitrust realm and to motions to dismiss generally, discarding the *Conley* "no set of facts" threshold and implementing the plausibility standard. However, the implementation of *Bell Atlantic* can hardly be characterized as seamless or without objections. In the antitrust case *NicSand, Inc. v. 3M Co.*,[171] the Sixth Circuit noted that the U.S. Supreme Court had made clear that "a 'naked assertion' of antitrust injury . . . is not enough" and went on to hold that "NicSand simply has not alleged facts establishing that the agreements in and of themselves created market-entry barriers that caused it a cognizable antitrust injury."[172] The Sixth Circuit viewed the case to be analogous to *Bell Atlantic* in that the plaintiff's complaint had not alleged enough facts to establish that 3M was plausibly engaging in illegal competition against NicSand in the sandpaper market.[173] Also similar to *Bell Atlantic* was the lengthy dissent by Judge Boyce F. Martin, Jr. accompanying the opinion, which argued that "it is difficult to see how any antitrust plaintiff—short of those few omniscient plaintiffs that happen to know every relevant factual detail before the inception of litigation and without the benefit of discovery—will be able to overcome a motion to dismiss."[174] Like Justice Stevens' dissent in *Bell Atlantic*,

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[167] *Id.*

[168] *Id.* Instead, the Court concluded that the complaint could only be read to "plausibly suggest that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.*

[169] *Id.* at 1953.

[170] *See* NicSand, Inc. v. 3M Co., 507 F.3d 442, 461 (6th Cir. 2007) (Martin, J., dissenting).

[171] NicSand, Inc. v. 3M Co., 507 F.3d 442 (6th Cir. 2007).

[172] *Id.* at 451, 455.

[173] *Id.* at 458.

[174] *Id.* at 461 (Martin, J., dissenting).

Judge Martin argued that the court is moving away from the intention of the Federal Rule of Civil Procedure by implementing a standard that requires more than mere notice.[175]

B. Muddled Applications by Federal Courts

Most district court and Sixth Circuit appellate decisions have acknowledged that *Conley*'s "no set of facts" standard was superseded by *Bell Atlantic*'s plausibility standard, even if the courts are less than certain as to how to apply the new standard.[176] Yet, some have erroneously continued to reference *Conley*'s "no set of facts" language as if unaware that *Bell Atlantic* was decided.[177] And at least one Sixth Circuit decision runs the risk of perpetuating confusion as to the current pleading standard in federal courts due to a blending of *Conley* and Bell Atlantic. In *Ferron v. Zoomego, Inc.*, the Sixth Circuit examined the sufficiency of the complaint by a plaintiff who had alleged that the defendant committed unfair or deceptive acts in violation of the Ohio Consumer Sales Practices Act (OCSPA).[178] The case was heard in federal court under diversity jurisdiction, requiring that the court apply Ohio law. However, as the seminal case *Hanna v. Plumer* instructs, even when applying state law in federal court, the federal court must apply its own procedural rules.[179] Thus, the Sixth Circuit attempted to apply the *Bell Atlantic* gloss upon Federal Rule 8, rather than Ohio's "no set of facts" standard, but instead confused the two by construing them together as one standard.

The court began its analysis of the defendant's motion to dismiss by stating that the court must "determine whether the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief."[180] Only a few sentences later, the court linked this *Conley* language to the plausibility standard outlined in *Bell Atlantic*, explaining that, although detailed factual allegations are not necessary,

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[175] *See id.* at 460-61.

[176] *See* United States *ex rel.* Snapp, Inc. v. Ford Motor Co., 532 F.3d 496, 503 n.6 (6th Cir. 2008) (acknowledging that "there is some confusion as to when a court should require particular facts to be pled, as required by *Twombly*, and when a court should apply a more liberal pleading standard," but making no mention of *Conley*); *see also* CGH Transport, Inc. v. Quebecor World, Inc., 261 F. App'x 817, 819 n.2 (6th Cir. 2008) ("[T]he Supreme Court abrogated the pleading standard articulated in *Conley v. Gibson* . . . .").

[177] *See* Combs v. Crown Life Ins., No. 1:07-CV-00151, 2008 U.S. Dist. LEXIS 16702, at *4-6 (S.D. Ohio March 4, 2008) (referencing *Conley v. Gibson* as the proper pleading standard without citing to *Bell Atlantic v. Twombly* at all).

[178] Ferron v. Zoomego, Inc., 276 F. App'x 473 (6th Cir. 2008).

[179] Hanna v. Plumer, 380 U.S. 460, 473-74 (1965) (holding that, in a situation of conflict between a Federal Rule of Civil Procedure and a State law for service of process, the Federal Rule is the valid procedural rule for a federal court to follow when hearing a case under diversity jurisdiction). "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress'[s] attempt to exercise that power in the Enabling Act." *Id.*

[180] *Ferron*, 276 F. App'x at 475 (emphasis added) (citing Ziegler v. IBP Hog Market, Inc., 249 F.3d 509, 511-12 (6th Cir. 2001)).

"a formulaic recitation of the elements of a cause of action will not do."[181] The court went on to analyze the plaintiff's complaint, which alleged that the defendant committed unfair or deceptive acts in violation of Ohio law.[182] The plaintiff alleged that the defendants transmitted hundreds of e-mail messages to the plaintiff's account, and the plaintiff stated that each message was a "consumer transaction" and a "direct solicitation" under Ohio law in violation of OCSPA because each e-mail indicated that the plaintiff had won a prize, but failed to fully and clearly disclose the terms and obligations necessary to collect the offer.[183] In seizing upon the allegation that the e-mails were "consumer transactions," the court held that the "[p]laintiff failed to plead sufficient allegations respecting the element of a consumer transaction to survive a motion to dismiss."[184] By pleading specific facts that demonstrated that the e-mails were "a sale, lease, assignment, award by chance"[185] or otherwise satisfied the definition of a "consumer transaction" under Ohio law, the court affirmed the decision of the district court to not construe this "legal conclusion" as true.[186] The court concluded, "We are not bound to presume as true Plaintiff's bald legal assertion that Defendants' e-mail messages to him were 'consumer transactions' under . . . the OCSPA."[187]

In *Ferron*, the court clearly applied the *Bell Atlantic* standard, which requires the pleading of facts in support of elements of the allegation to make the claim plausible, despite the court's mistaken reference to the "no set of facts" language of *Conley*.[188] The federal court was correct in its application of *Bell Atlantic* due to the procedural nature of Rule 8, even though the court would have applied Ohio law to the merits of the claim.[189] Yet, had the court actually applied the "no set of facts" language of the *Conley* standard, it would likely have come to the opposite conclusion: under notice pleading, the complaint would have adequately put the defendant on notice as to the plaintiff's claim and the basis for that claim. *Ferron* exemplifies the muddling of the pleading standard that has resulted in the wake of *Bell Atlantic*, as well as the hyper-technical pleading requirements that may be demanded when *Bell Atlantic* is applied.

C. Is Bell Atlantic *Creeping into Ohio Courts?*

Ferron demonstrates the shift at the federal level that *Bell Atlantic* has created away from notice pleading and backward into a heightened form of pleading that

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[181] *Id.* at 475 (citing *Bell Atl.*, 550 U.S. at 555).

[182] *Id.* at 475-76.

[183] *Id.* at 475.

[184] *Id.* at 476.

[185] OHIO REV. CODE ANN. § 1345.01 (West 2009).

[186] *Ferron*, 276 F. App'x at 476.

[187] *Id.*

[188] While it is true that *Conley* was not entirely abandoned by the Court in *Bell Atlantic*, as demonstrated by the court's reference to some language from *Conley* in *Erickson*, it is clear that the Court specifically disavowed the "no set of facts" language from *Conley* in *Bell Atlantic*. "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Bell Atl.*, 550 U.S. at 563.

[189] *See* Hanna v. Plumer, 380 U.S. 460 (1965).

requires the pleading of facts in order for a complaint to survive a motion to dismiss. *Ferron* shows that conclusory allegations in a complaint that are unsupported by specific facts underlying the allegation are open to attack under the new standard.[190] Although *Bell Atlantic*'s pleading standard affects only federal courts within Ohio, as a former replica of the Federal Rules, federal interpretations of the rules influence the Ohio Rules. Only a few Ohio state courts have applied *Bell Atlantic* at all, but those that have done so have applied the "plausibility" standard in a similarly confusing and incorrect fashion just as the Sixth Circuit did in *Ferron*.[191] A quick survey of Ohio state courts reveals that the majority of state courts have not strayed from *Conley* after *Bell Atlantic*; however, the fact that some state courts are muddling "plausibility" pleading with *Conley* threatens the continuation of a pure-*Conley* standard in Ohio.

1. Many State Courts Retain *Conley*

While the elusive meaning of *Bell Atlantic* has caused debate, discussion, and controversy among federal district and circuit courts, Ohio's state courts have remained notably silent on the issue until recently. Most decisions after *Bell Atlantic* reaffirm the low-threshold nature of *Conley* as the appropriate Ohio pleading standard. For example, in *Huffman v. City of Willoughby*, an Ohio appellate court affirmed the trial court's denial of a motion to dismiss.[192] In explaining the pleading standard, the court referenced *O'Brien*'s use of the *Conley* language that a complaint is sufficient unless it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim."[193] The court noted further that "[a]s long as there is a set of facts consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss."[194] In emphasizing the low bar presented by Ohio's interpretation of Rule 8, the court highlighted that

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[190] *See* Richard O. Halloran, *The Fact of the Matter: A Return to Fact Pleading?: Viable Complaints After* Twombly, 44 ARIZ. ATT'Y 20, 24 (2007).

[191] *See* Gallo v. Westfield Nat'l Ins. Co., No. 91893, 2009 Ohio App. LEXIS 879, at *P8-9 (Ohio Ct. App. 2009) ("When granting a motion to dismiss under Civ.R. 12(B)(6), it must appear beyond doubt that the plaintiff can prove no set of facts entitling her to relief. . . . However, the claims set forth in the complaint must be plausible, rather than conceivable."); Williams v. Ohio Edison, No. 92840, 2009 Ohio App. LEXIS 4786, at *P14-15 (Ohio Ct. App. 2009) ("When granting a motion to dismiss under Civ. R. 12(B)(6), it must appear beyond doubt that the plaintiff can prove no set of facts entitling her to relief. . . . However, the claims set forth in the complaint must be plausible, rather than conceivable."); Vagas v. City of Hudson, C.A. No. 24713, 2009 Ohio App. LEXIS 5714, at *P7, *P13 (Ohio Ct. App. 2009) (quoting the *Conley* standard but then citing *Bell Atlantic* for the proposition that "conclusory statements in the complaint not supported by facts are not afforded the presumption of veracity."); Parsons v. Greater Cleveland Reg'l Transit Auth., No. 93523, 2010 Ohio App. LEXIS 204, at *P10-11 (Ohio Ct. App. 2010) (When granting a motion to dismiss under Civ. R. 12(B)(6), "it must appear beyond doubt that the plaintiff can prove no set of facts entitling [her] to relief. . . . However, the claims set forth in the complaint must be plausible, rather than conceivable.").

[192] Huffman v. City of Willoughby, 2007 Ohio App. LEXIS 6236, at *P52.

[193] *Id.* at *P18 (citing O'Brien v. Univ. Cmty. Tenants Union, Inc., 327 N.E.2d 753, 754-55 (Ohio 1975)) (noting that *O'Brien* quotes *Conley*).

[194] *Id.* (citing Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1141 (Ohio 2002)).

"'[b]ecause it is so easy for the pleader to satisfy the standard of [Ohio]Civ.R.8(A), few complaints are subject to dismissal.'"[195] The court affirmed the denial of the motion to dismiss due to the sufficiency of the plaintiff's complaint on its face.[196]

2. The Eighth Appellate District's *Conley*/*Bell Atlantic* Blend

No Ohio state court reference *Bell Atlantic*'s pleading standard at all until March of 2009 in *Gallo v. Westfield National Insurance Co.* when the Ohio Eighth District Court of Appeals first applied a version of "plausibility" to pleading standards.[197] Like in *Ferron*, the court did not abandon *Conley*'s "no set of facts" language but rather linked *Conley* and *Bell Atlantic*'s "plausibility" together.[198] The same court similarly applied the mixed *Conley/Bell Atlantic* standard again in *Williams v. Ohio Edison*,[199] explaining the standard as follows:

> When granting a motion to dismiss under Civ. R. 12(B)(6), "it must appear beyond doubt that the plaintiff can prove no set of facts entitling her to relief. . . . While Williams cannot survive a motion to dismiss through the mere incantation of an abstract legal standard, she can defeat such a motion if there is some set of facts consistent with her complaint that would allow her to recover. However, the claims set forth in the complaint must be plausible, rather than conceivable. *Bell Atlantic Corp. v. Twombly* (2007)[200].

The Williams case involved a *pro se* plaintiff who inartfully drafted a complaint alleging thirteen "arguments" that her wages were unconstitutionally garnished to satisfy a debt owed to Edison.[201] Although the granting of the motion to dismiss was proper in this case under either *Conley* or *Bell Atlantic*, the case demonstrates the confusion that exists as to the correct pleading standard in Ohio. Absent guidance from the Supreme Court of Ohio or amendment to the Ohio Civil Rules of Procedure, some courts in Ohio will continue to adhere to *Conley*, others may switch to *Bell Atlantic*, and others may adopt the Eighth Appellate District's *Conley/Bell Atlantic* blend.[202]

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[195] *Id.* at *P22 (quoting Leichtman v. WLW Jacor Comm's Inc., 634 N.E.2d 697, 698 (Ohio Ct. App. 1994)).

[196] *Huffman*, 2007 Ohio App. LEXIS 6236, at *P2.

[197] Gallo v. Westfield Nat'l Ins. Co., No. 91893, 2009 Ohio App. LEXIS 879, at *P9 (Ohio Ct. App. 2009).

[198] *Id.* ("However, the claims set forth in the complaint must be plausible, rather than conceivable. *Bell Atlantic Corp., v. Twombly (2007)* . . . .").

[199] Williams v. Ohio Ediso, No. 92840, 2009 Ohio App. LEXIS 4786 (Ohio Ct. App. 2009).

[200] *Id.* at *P14-*15.

[201] *Id.* at *P2.

[202] The Eighth Appellate District continues to utilize this unique standard, as all cases emerging from the court addressing 12(B)(6) motions to dismiss cite the language articulated in *Gallo* and *Williams* verbatim. *See* Parsons v. Greater Cleveland Regional Transit Authority, No. 93523, 2010 Ohio App. LEXIS 204, at *P10-*11 (2010).

Numerous post-*Bell Atlantic* cases in Ohio have continued to reference the "no set of facts" language cited in *O'Brien*[203] as the proper standard for evaluating the complaint on a motion to dismiss, including ten Ohio Supreme Court cases.[204] However, pressures exist that may tempt Ohio to conform to the federal pleading standard. An increase in defendants filing motions to dismiss and asking the court to adopt *Bell Atlantic* might encourage Ohio courts to lean toward the plausibility test and away from *Conley*'s "no set of facts." Those who desire a return to the federal/state uniformity that Ohio attempted to achieve when it adopted the Federal Rules of Civil Procedure in 1970 could encourage Ohio courts to adopt plausibility pleading. Some judges and practitioners may simply believe that *Bell Atlantic* is a preferable standard that allows complaints doomed to fail later in litigation to be weeded out early. However, none of these reasons are sufficient for Ohio to abandon its adherence to the *Conley* standard.

VII. OHIO SHOULD NOT ADOPT *BELL ATLANTIC*

A. Federal/State Uniformity Will Not Be Achieved by Adopting Bell Atlantic *Because Ohio Is No Longer a Federal "Replica"*

When Professors Oakley and Coon conducted their key survey of the status of federal/state uniformity among states with regard to the Federal Rules of Civil Procedure in 1986, Ohio was a federal "replica" that mirrored the Federal Rules in

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[203] *See* O'Brien v. Univ. Cmty. Tenants Union, Inc., 327 N.E.2d 753, 755 (Ohio 1975).

[204] *See* Volbers-Clarich v. Middletown Management, Inc., No. 2009-933, 2010 Ohio LEXIS 1110, at *P12 (Ohio 2010) ("It must appear beyond doubt that plaintiff can prove no set of facts entitling her to relief."); Cundall v. U.S. Bank, 122 Ohio St. 3d 188, 198 (Ohio 2009) (Pfeifer, J., dissenting) ("The trial court, reviewing the complaint and nothing else, may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover."); Goudlock v. Voorhies, 894 N.E.2d 692, 694 (Ohio 2008) ("[I]t appears beyond doubt that he could prove no set of facts entitling him to the requested extraordinary relief in habeas corpus."); Ohio *ex rel*. Deiter v. McGuire, 894 N.E.2d 680, 683 (Ohio 2008) ("[I]t appears beyond doubt that they could prove no set of facts entitling them to the requested extraordinary relief in quo warranto and mandamus."); Ohio *ex rel*. Agosto v. Cuyahoga County Ct. Com. Pl., 894 N.E.2d 314, 315 (Ohio 2008) ("[I]t appears beyond doubt that he could prove no set of facts entitling him to the requested extraordinary relief in mandamus and procedendo."); Ohio *ex rel*. Gilmour Realty, Inc. v. City of Mayfield Heights, 891 N.E.2d 320, 322 (Ohio 2008) ("[I]t appears beyond doubt that Gilmour could prove no set of facts warranting the requested extraordinary relief in mandamus."); Keith v. Bobby, 884 N.E.2d 1067, 1069 (Ohio 2008) ("[I]t appears beyond doubt that he could prove no set of facts entitling him to the requested extraordinary relief in habeas corpus."); Ohio *ex rel*. Brooks v. O'Malley, 884 N.E.2d 42, 44 (Ohio 2008) ("Dismissal of the case is appropriate if, after presuming the truth of all of the material factual allegations of Brooks's complaint and making all reasonable inferences in her favor, it appears beyond doubt that Brooks could prove no set of facts entitling her to the requested extraordinary relief in prohibition."); Rosen v. Celebrezze, 883 N.E.2d 420, 425 (Ohio 2008) ("[I]t appeared beyond doubt that [this party] could prove no set of facts entitling him to the requested extraordinary writ of prohibition."); Ohio *ex rel*. Weaver v. Ohio Adult Parole Auth., 879 N.E.2d 191, 193 (Ohio 2007) ("Dismissals of mandamus actions based upon the existence of an adequate remedy in the ordinary course of law are appropriate as long as it appears beyond doubt that relator can prove no set of facts warranting relief.").

all important aspects.[205] Since that time, Ohio has varied from the Federal Rules in at least nine instances, not including the current difference in pleading standards for Rule 8.[206] A follow-up study conducted by Professor Oakley in 2002 found that Ohio was among several "replica" states tending to move against federal-state uniformity.[207] The fact that Ohio is no longer a federal replica, and has not been for several years, cuts against any argument that Ohio should adopt the pleading standard articulated in *Bell Atlantic* in order to achieve federal/state uniformity.[208] Indeed, the text as well as the standards for interpretation of several rules would have to be revisited in order to achieve true alignment with the Federal Rules of Civil Procedure again.[209]

For example, Rule 4 illustrates a textual and substantive difference that now exists between the Ohio Rules and the Federal Rules.[210] Ohio Rule 4 gives the simple directive that "[s]ervice of summons may be waived in writing by any person entitled thereto under Rule 4.2 who is at least eighteen years of age and not under

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[205] Oakley & Coon, *supra* note 31, at 1413.

[206] John B. Oakley, *Perspectives on Dispute Resolution in the Twenty-first Century: A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355-56 (2002/2003). The eight rules in Ohio discussed by Oakley that no longer align with the Federal Rules of Civil Procedure, either textually or by interpretation, include Rules 4, 11, 16, 26, 30, 33, 45, and 50. *Id.* at 369-70.

Additionally, the Federal Rule concerning voluntary dismissal is different from Ohio's Rule concerning voluntary dismissal. Federal Rule 41(a)(1)(A)(i) allows service of "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." FED. R. CIV. P. 41(a)(1)(A)(i) (West 2009). Ohio Rule 41(A)(1)(a) is more liberal and permits "filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant." OHIO R. CIV. P. 41(A)(1)(a) (West 2009). For an engaging discussion about the disparity between these two standards, see S. Ben Barnes, *Voluntary Dismissal in Ohio: A Tale of an Ancient Procedure in a Modern World*, 57 CLEV. ST. L. REV. 921 (2009).

[207] Oakley, *supra* note 181, at 356, 369-70.

[208] At least one Ohio state court decision supports an argument that courts believe they should adopt *Bell Altantic* in order to "maintain" federal-state uniformity . In *Vagas v. Hudson*, the Ohio Court of Appeals for the Ninth District cited the "no set of facts" language and *Bell Atlantic* as being applicable to determining what is required by Rule 8. Vagas v. Hudson, C.A. No. 24713, 2009 Ohio App. LEXIS 5714, *P13, n.1 (Ohio Ct. App. 2009). In a footnote, the court explained it's reference to *Bell Atlantic*: "Although *Twombly* refers to the Federal Rules and the Ohio Rules are applicable here, the pleading requirements under *Fed.R.Civ.P. 8(a)* and *Civ.R. 8(A)* are virtually identical. Additionally, the Ohio Rule was based on the Federal Rule." *Id.* at n.1.

[209] *See id.* at 369-70. The differences outlined in this section discuss substantive differences beyond any textual differences that may exist between the Ohio and Federal Rules due to the recent amendments to the text of the Federal Rules that went into effect December 1, 2007. The 2007 amendments were specifically textual in nature, and were only intended to clarify the rules stylistically and implement consistent terminology. *See* FED. R. CIV. P. 4 (West 2009) (Notes of Advisory Committee on 2007 Amendments).

[210] OHIO R. CIV. P. 4(D) (West 2009); FED. R. CIV. P. 4(d).

disability."[211] However, Federal Rule 4 includes lengthy instructions on how to request a waiver,[212] the consequences of failing to waive,[213] the time to answer after a waiver,[214] the results of filing a waiver,[215] and a note that waiver of service of summons does not waive objection to personal jurisdiction or venue.[216] Ohio did not adopt these federal provisions included in the 1993 amendments to Federal Rule 4(d), creating textual and substantive differences between the federal and state Rules of Civil Procedure regarding waiver of the service of summons.[217]

Similarly, Rule 11 presents differences in the text of the Ohio and Federal Rules as well as differences in interpretations of the Rules.[218] Both Ohio and Federal Rule 11 attempt to prevent frivolous litigation, which abuses and undermines the court system, by requiring parties to sign the pleadings and permitting courts to impose sanctions on an attorney or a *pro se* party.[219] However, the federal and state courts in Ohio use different tests to determine whether sanctions under Rule 11 are appropriate.[220] In interpreting Rule 11, federal courts impose an objective standard to determine whether an attorney has filed a frivolous pleading.[221] Ohio state courts apply a subjective standard to determine if the pleading is well grounded.[222] This difference in interpretation between Ohio's federal and state courts has existed for decades and is analogous to the situation presented by the competing federal and state interpretations of Rule 8 pleadings.

Just as different standards in Ohio's federal and state courts surrounding the interpretation of Rule 11 co-exist, so too may differing interpretations of Rule 8 survive side by side in Ohio's state and federal court systems. Ohio need not feel compelled to adopt the *Bell Atlantic* standard out of a fear that the Ohio Rules will no longer be in sync with its Federal counterpart. Rather, as noted by Professor

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[211] OHIO R. CIV. P. 4(D).

[212] FED. R. CIV. P. 4(d)(1).

[213] FED. R. CIV. P. 4(d)(2).

[214] FED. R. CIV. P. 4(d)(3).

[215] FED. R. CIV. P. 4(d)(4).

[216] FED. R. CIV. P. 4(d)(5).

[217] Oakley, *supra* note 181, at 369.

[218] OHIO R. CIV. P. 11 (West 2009); FED. R. CIV. P. 11 (West 2009).

[219] Stephen R. Ripps, *Ohio Civil Rule 11: Time for Change*, 20 U. DAYTON L. REV. 133, 133 (1994).

[220] *Id.*

[221] *See* Albright v. Upjohn Co., 788 F.2d 1217 (6th Cir. 1986) (holding that the attorney had a duty to make a reasonable inquiry into the facts before filing a pleading, and that asserting a claim before ascertaining whether the claim had any basis in fact violated that duty, requiring that sanctions be imposed under Federal Rule 11).

[222] *See* Haubeil & Sons Asphalt & Materials, Inc. v. Brewer & Brewer Sons, Inc., 565 N.E.2d 1278, 1279 (Ohio Ct. App. 1989) (emphasizing that a signature under Ohio Rule 11 represents that "to the best of his *knowledge, information, and belief* there is good ground to support it; and that it is not interposed for delay"; only willful violations of the rule will result in sanctions).

Oakley, Ohio has chosen to diverge from the Federal Rules in multiple instances since its adoption of the Rules in 1970.[223] Choosing to ignore *Bell Atlantic* is consistent with Ohio's current trend of moving away from federal/state uniformity. Additionally, continued accessibility to the court system by plaintiffs—especially at the local and state level—supports maintaining the lower-threshold presented by *Conley* as a pleading standard.

B. Forum Shopping Is Unlikely and, Should It Occur, Can Be Mitigated

Some might advocate in favor of Ohio adopting *Bell Atlantic*'s plausibility standard for fear of forum shopping due to the differing standards between federal and state courts. Arguably, plaintiffs with a choice between filing in Ohio state or federal court would choose to file in Ohio state court due to the lower, true notice pleading threshold embodied by *Conley*. However, Ohio's continuation of *Conley* is unlikely to result in forum shopping due to a mechanism that assists defendants in having the case be heard by a federal court and the complaint subsequently tested against the *Bell Atlantic* standard: Removal.[224]

Removal allows a defendant to transfer a state-court case to the federal court in certain circumstances.[225] Aside from a few situations in which claims are not removable to federal court,[226] most claims brought in Ohio state courts that present issues that initially could have been brought in federal courts may be properly removed by a defendant to federal court.[227] Forum shopping is unlikely to occur among the subset of plaintiffs who have claims under federal law or mixed state and federal claims implicating supplemental jurisdiction any more than has already occurred due to the other non-alignments of the Ohio Rules with the Federal Rules. Differences in Ohio and Federal civil procedure have continually evolved since

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[223] *See* Oakley, *supra* note 181, at 355.

[224] 28 U.S.C. § 1441 (2006). The statute provides, in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

[225] *See id.*

[226] Three general exceptions to removal exist. First, state courts are given exclusive jurisdiction over certain federal claims, such as the Telephone Consumer Protection Act of 1991. *See* Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc., 106 F.3d 1146, 1150 (4th Cir. 1997). Second, 28 U.S.C. § 1445 explicitly designates that certain claims are not removable to federal courts if brought under certain federal statutes or workmen's compensation laws. 28 U.S.C. § 1445. Finally, even if a defendant asserts a federal defense to a state-law claim, the defendant will be unable to remove the case to federal court under the well-pleaded complaint rule. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152-53 (1908).

[227] *See* 28 U.S.C. § 1441(a).

1970, reflecting procedural and policy preferences by the state. And even if a plaintiff initially attempts to secure what he or she perceives to be the more favorable arena of the state court, the defendant's interests will not be prejudiced due to the availability of removal.

It is true that Ohio state courts provide a favorable arena for plaintiffs due to the fact that notice pleading thrives in Ohio under *Conley*. To stick with *Conley* means that plaintiffs in Ohio—many of whom have claims implicating only Ohio law—will be able to access the court systems easily. Access to the court system is imperative for a just society, and indeed, the Supreme Court of Ohio has emphasized that Ohio's "public policy supports free, unhampered access to the courts for litigants."[228] Such unhampered access would be jeopardized for all plaintiffs with claims under Ohio law if the state were to adopt *Bell Atlantic*'s vague plausibility standard. Even if a marked increase in the filing of complaints at the state-level were to occur, the slight administrative burdens of processing removal requests do not outweigh the negative effects *Bell Atlantic*'s plausibility standard will have on pleading and accessibility to the courts in Ohio generally.

C. Bell Atlantic*'s Heightened Plausibility Pleading Standard Is Undesirable*

As alluded to throughout this Note, *Bell Atlantic* does not present a favorable alternative to the *Conley* standard. Having been characterized as "one of the Court's most important procedural decisions of the last decade," *Bell Atlantic* caught litigators, scholars, and judges off-guard.[229] The fragmented interpretations of its implications on pleading standards, which have resulted in its wake, have created great uncertainty in an area of civil procedure that was previously straightforward and predictable under *Conley*.[230]

Bell Atlantic presents a vague plausibility standard that moves away from notice pleading, which was the cornerstone of the liberalism embodied in the Federal Rules of Civil Procedure.[231] As one irked judge and scholar has noted, the text of "Rule 8 does not require a short and plain statement of the facts underlying a claim."[232] Yet, *Bell Atlantic* asks plaintiffs to plead just that. The very word "plausible," which is central to the *Bell Atlantic* standard, is not defined by the Court.[233] This may explain the numerous interpretations of "plausibility" that have resulted.[234] *Iqbal* offered

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[228] Crawford v. Euclid Nat'l Bank, 483 N.E.2d 1168, 1171 (Ohio 1985).

[229] *See* McMahon, *supra* note 118, at 852 ("*Bell Atlantic Corp. v. Twombly* was probably the least anticipated decision to come out of the 2007 Supreme Court. It also happens to be one of the Court's most important procedural decisions of the last decade, with massive implications for civil litigation.").

[230] *See id.* at 853 ("We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim.").

[231] 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. Supp. 2009).

[232] McMahon, *supra* note 118, at 853 (emphasis added).

[233] *See Bell Atl.*, 550 U.S. at 557-58.

[234] *Compare* United States v. Harchar, No. 1:06-cv-2927, 2007 WL 1876510, at *2 (N.D. Ohio June 28, 2007) ("*Twombly* merely held that a complaint that alleged only parallel

little helpful guidance when it tried to explain "plausible": "[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense."[235] Indeed, if "common sense" is the guide for plausibility, then courts are likely to continue to "inevitably exhibit different levels of tolerance" for the level of detail necessary to properly assert factual allegations.[236]

Before tossing their own interpretations of "plausibility" into the ring of other interpretations, Ohio courts should ask themselves this: If *Bell Atlantic* had never been decided, would they have considered abandoning *Conley*'s "no set of facts" pleading standard at all? Echoing Justice Stevens' dissent in *Bell Atlantic*, none of the Supreme Court of Ohio's more than one hundred decisions utilizing the "no set of facts" pleading standard seem to "question[]," "criticize," or express that they are "puzzl[ed]" by the "no set of facts" language.[237] Indeed, the frequency with which the language has been used suggests just the opposite: Until recently, Ohio had a well-understood and time-honored pleading standard under *Conley*. There appears to be little advantage to entering the tempest surrounding *Bell Atlantic* unprovoked.

Another problem with plausibility pleading under *Bell Atlantic* is one that Justice Stevens emphasized in his extensive dissent.[238] Like the claim at issue in *Bell Atlantic*, many claims will now require the pleading of facts that are not in the control of the plaintiff at the time of filing the complaint.[239] When discovery is necessary to uncover the facts that support the claim, *Bell Atlantic* will prevent plaintiffs from having their day in court unless they are "omniscient."[240] Discovery and case management are pre-trial procedures better suited for the weeding out of meritless claims rather than the pleading stage.[241]

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conduct did not state a claim for an antitrust conspiracy. The Supreme Court did not purport to change the applicable 12(b)(6) standards . . .") *with* CGH Transp., Inc. v. Quebecor World, Inc., 261 F. App'x 817, 819 n.2 (6th Cir. 2008) (noting that "the Supreme Court abrogated the pleading standard articulated in *Conley v. Gibson*"); *see also supra* Part IV.

[235] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1940 (2009).

[236] McMahon, *supra* note 118, at 867.

[237] *Bell Atl.*, 550 U.S. at 577-78 (Stevens, J., dissenting). Since adopting *Conley*'s "no set of facts" language in *O'Brien* in 1975, the Supreme Court of Ohio has cited the "no set of facts" language in 129 decisions based on a search through LexisNexis. http://www.lexisnexis.com (search "Find a Source" for "OH Supreme Court Cases from 1821;" then search "no set of facts"). Not a single case appears to question the validity of that language. Quite to the contrary, it appears to have become part of Ohio's common parlance regarding the review of a motion to dismiss.

[238] *Bell Atl.*, 550 U.S. at 570 (Stevens, J., dissenting).

[239] *Id.* at 572 (stating "instead of requiring knowledgeable executives . . . to respond to these 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").

[240] *Nicsand*, 507 F.3d at 461 (Martin, J., dissenting).

[241] *See Bell Atl.*, 550 U.S. at 593 (Stevens, J., dissenting).

Indeed, rather than reducing case-load management at the trial court level, imposing a plausibility standard within Ohio courts will likely increase the filing of motions to dismiss by defendants who are encouraged by the heightened standard as presented in *Bell Atlantic*.[242] Under *Conley*, Ohio courts may continue to evaluate a complaint to determine whether it states a claim for which relief may be granted under 12(B)(6) as it has for the past thirty years.[243] The low-threshold presented by *Conley*'s "no set of facts" language will ensure that plaintiffs—at least at the state level—will usually be given the chance to have their claim heard. And, state judges, litigants, and plaintiffs will be spared the uncertainty of construing what is sufficiently "plausible" to survive a motion to dismiss in the absence of meaningful guidance from the Court. Faced with the decision to align with the federal pleading standard or maintain its independence, Ohio should choose to take the path of pretending that *Bell Atlantic* and *Iqbal* simply do not exist.[244]

VIII. CONCLUSION

Notice pleading is not dead. Although the Supreme Court in *Bell Atlantic* explicitly avowed that it was not imposing a heightened pleading standard,[245] it is difficult to ignore the shift away from notice pleading embodied by the new plausibility standard. *Ashcroft v. Iqbal* confirmed the sea-change in pleading standards, but merely provided additional evidence as to why it is a step in the wrong direction away from notice pleading. While only the wraiths of notice pleading may remain in federal courts—especially those that have construed *Bell Atlantic*'s plausibility standard strictly—notice pleading can still be saved in the state courts of Ohio.

Must Ohio retire *Conley* from its prominent and well-weathered position as the pleading standard for Ohio? No. Just as Ohio has chosen over the years to vary from its Federal Rule counterparts in other areas of procedure, the difference in evaluating the sufficiency of a complaint that now exists between federal and state courts in Ohio demonstrates a difference in procedural values. By maintaining *Conley*, Ohio state courts will underscore a preference for clarity, tradition, the use of discovery as the vehicle for weeding out meritless claims, unhampered access to the courts by plaintiffs, and keeping notice pleading—the foundation of our procedural system—alive.

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[242] *See* McMahon, *supra* note 118, at 868 (commenting that "[t]he Supreme Court may have thought it was providing relief to the federal docket by making it easier to dismiss complaints, but that will not be the result" due to the increased number of motions to dismiss that will be filed and the potential complexity of interpreting them that may emerge).

[243] *See generally* O'Brien v. Univ. Cmty. Tenants Union, Inc., 327 N.E.2d 753 (Ohio 1975).

[244] *See supra* Part IV.

[245] *Bell Atl.*, 550 U.S. at 570.