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### **Please Plead Me: Ashcroft v. Iqbal and Implications for Oklahoma Pleading**

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## NOTE

### Please Plead Me: *Ashcroft v. Iqbal* and Implications for Oklahoma Pleading

#### *I. Introduction*

In *Bell Atlantic Corp. v. Twombly*,<sup>1</sup> the Supreme Court first applied a plausibility pleading standard to a motion to dismiss for failure to state a claim in an antitrust case. After *Twombly* required a plaintiff to plead more than just blanket allegations and legal conclusions, circuit courts struggled to ascertain whether the *Twombly* decision applied across the board, or whether the decision was specific to the complexities of antitrust litigation.<sup>2</sup> Most recently, in *Ashcroft v. Iqbal*, the Supreme Court clarified its previous decisions regarding pleading requirements and held that under Federal Rule of Civil Procedure 8 all plaintiffs are required to plead “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>3</sup>

As a result of the *Iqbal* amplification of the *Twombly* pleading standard, there now exist major discrepancies between the new federal standard of pleading and state standards of pleading, including Oklahoma’s continued liberal interpretation of its notice pleading statute.<sup>4</sup> In addition, there is still at least one circuit which initially refused to extend the *Iqbal* decision, and at least one U.S. Senator seeking to nullify the decision through legislation.<sup>5</sup>

The discrepancies between state and federal interpretation of virtually identical pleading statutes create a system where a complaint may now be

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1. See 550 U.S. 544 (2007).

2. See Matthew A. Josephson, *Some Things Are Better Left Said: Pleading Practice After Bell Atlantic Corp. v. Twombly*, 42 GA. L. REV. 867, 887-89 (2008) (noting how courts have differed in their application of the *Twombly* decision); Saritha Komatireddy Tice, *A “Plausible” Explanation of Pleading Standards: Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), 31 HARV. J.L. & PUB. POL’Y 827, 838 (2008) (stating that the *Twombly* decision “creates uncertainty among lower courts and practitioners”).

3. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 570).

4. See *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7, 176 P.3d 1204, 1208.

5. See *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (stating that *Iqbal* may not apply because it is “special in its own way” but ultimately granting a motion to dismiss on other grounds); Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009) (proposed by Senator Arlen Specter in order “[t]o provide that Federal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)”).

found sufficient in an Oklahoma court, but insufficient in a federal court. Consider a citizen of Oklahoma who has been wrongfully convicted for rape. The falsely accused plaintiff spends nineteen years in prison while attempting to obtain the DNA evidence that eventually exonerates him.<sup>6</sup> But his post-release claim against a police chief for denying him access to DNA evidence is thrown out by the Tenth Circuit because the factual contentions in his petition addressed general allegations, and the plaintiff's alleged legal theory was not supported by any facts attributable to the police chief.<sup>7</sup>

In response to petitions which include general allegations, the Tenth Circuit has stated that “the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.”<sup>8</sup> Using the newly adopted Twombly standard, the facts that this wrongfully accused plaintiff alleged did not meet the plausibility threshold demanded at the pleading level.<sup>9</sup> Would the claim survive in an Oklahoma state court using a more liberal standard? Should it survive?

Requiring heightened pleading standards can waste judicial resources through a system of strict judicial inquiry of all petitions before the court. Yet it can preserve judicial resources by rescuing defendants from meritless claims. Conversely, more liberal pleading requirements can provide plaintiffs an avenue for gaining access to the court for remedy of a wrong, and provide them with discovery tools to extract information from the defendant to evidence the wrong committed. Yet, applying the more liberal pleading standard can also expose defendants to intrusive invasion of private documents, conversations, and interrogatories simply to allow a plaintiff to “drum up” the basis for a claim. The *Iqbal* decision addresses these difficulties and weighs them in favor of defendants, requiring what facially appears to be a more heightened standard of proof for plaintiff's claim to survive a motion to dismiss.

This note describes the possible implications of the *Iqbal* decision as it relates to state pleading standards, focusing specifically on whether it is in Oklahoma's best interest to adjust its standards to conform to this precedent. Part II discusses how statutory pleading requirements initially

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6. See *Bryson v. Gonzales*, 534 F.3d 1282, 1283-84 (10th Cir. 2008).

7. See *id.* at 1287.

8. *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citing *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)).

9. See *Bryson*, 534 F.3d at 1286-87.

evolved from code pleading to notice pleading in both federal and Oklahoma courts. Part III addresses significant Supreme Court decisions interpreting Federal Rule of Civil Procedure 8, culminating with the *Iqbal* decision. Part III then summarizes state supreme court responses to this recent shift in federal pleading standards. Part IV analyzes the *Iqbal* decision and its implications for plaintiffs and defendants if applied in a similar manner in Oklahoma courts, concluding that while it is not necessary for Oklahoma to adopt *Twombly*'s plausibility standards, a more accurate application of the current pleading standard is needed. A plaintiff must be required to plead more than elements of a cause of action in order to be given access to discovery resources. Finally, Part V will briefly summarize the main points of the note and conclude.

## *II. History of Pleading Requirements: The Evolution from Code Pleading to Notice Pleading*

### *A. The Development of Federal Pleading Standards and Federal Rule of Civil Procedure 8*

Before the adoption of the Federal Rules of Civil Procedure in 1938, federal courts used the same system of pleading as the state where the federal court was located.<sup>10</sup> Many states modeled their pleading system requirements after "The Field Code," which was drafted by David Dudley Field and which served as the New York Code for pleading.<sup>11</sup> Commonly termed "code pleading," this system required a petition to contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what [was] intended . . . ."<sup>12</sup> But a "statement of facts" was easier said than done, as the word "facts" was interpreted as "ultimate facts."<sup>13</sup> Evidentiary facts and conclusions of law, though informative, were not accepted.<sup>14</sup>

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10. See Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: Pleadings and Parties*, 44 *YALE L.J.* 1291, 1299 (1935).

11. See Josephson, *supra* note 2, at 874.

12. Charles E. Clark, *HANDBOOK OF THE LAW OF CODE PLEADING* 211 n.2 (2d ed. 1947) (quoting N.Y. Civ. Prac. Act § 255, *repealed* by Act of April 4, 1962, ch. 308, § 10001, 1962 N.Y. Laws 1297, 1549).

13. See George B. Fraser, *The Petition in Oklahoma*, 5 *OKLA. L. REV.* 423, 424 (1952).

14. See *id.*

The result created a system where “the plaintiff may not plead the facts as they happened, but must plead the conclusions that should be drawn from the actual acts or events.”<sup>15</sup> For example:

In one case which involved an action on an insurance policy, the plaintiff, relying on the statutory presumption of death, alleged that the insured had been absent and not heard from since August 4, 1914. The court stated that this allegation was insufficient since the plaintiff’s right to recover depended on the ultimate fact that the insured was dead and that the plaintiff should have alleged that the insured was dead instead of facts that would establish his death. This result is questioned in view of the fact that proof of absence for the statutory period would support a verdict.<sup>16</sup>

Because the plaintiff pleaded facts to show the insured was dead (a set of evidentiary facts) rather than pleading that the insured was dead (an ultimate fact) the claim was thrown out of court under the code pleading standard.<sup>17</sup>

When the plaintiff was trapped in this unfortunate loophole, his case was dismissed for a failure to state a claim. Though he would most likely be granted leave to amend his complaint and return to court, the plaintiff was still punished under the technicalities of code pleading. The plaintiff would be sent to reword his petition to plead ultimate, rather than evidentiary facts, a technicality that could be the product of even the most carefully plead petition. Ultimately, this produced a standard that was “easy to state but difficult to apply” as “[m]any concepts were a blend of fact and conclusion, and the Code’s rigid distinction led to inconsistent results concerning what level of detail needed to be pleaded, even for simple claims . . . .”<sup>18</sup> Charles E. Clark, a chief drafter of the Federal Rules of Civil Procedure and Second Circuit judge, commented that the distinction between facts and law or evidence was one of “generality and particularity in stating the transaction sued upon and . . . considerable flexibility should be accorded the pleader.”<sup>19</sup> However, the code pleading system of parsing a petition down to ultimate facts, evidentiary facts, and conclusions of law was all *but* flexible for the pleader.

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15. *Id.* at 425.

16. *Id.*

17. *See id.*

18. Josephson, *supra* note 2, at 875.

19. Clark & Moore, *supra* note 10, at 1301.

Because code pleading led to such inconsistent results and confusion, the Rules Enabling Act was passed, and in 1938, the Supreme Court promulgated the Federal Rules of Civil Procedure. Rule 8 of this new set of laws radically departed from code pleading requirements and instead required the plaintiff to only give the defendant “notice” of the plaintiff’s claim against him.<sup>20</sup> This procedural reform had the effect of leaving much, but not all, of the factual detail to be uncovered as the litigation continued. Specifically, the newly adopted rules stated that “a pleading that states a claim for relief must contain . . . a short plain statement of the claim showing that the pleader is entitled to relief . . . .”<sup>21</sup> Plaintiff was no longer forced to examine his statements to determine whether his ultimate fact was actually an evidentiary fact. This new standard required the plaintiff to include enough information in his petition so the defendant was aware of the nature of the suit, facilitating an answer without being boxed into the strict method of code pleading.

#### *B. The Development of Oklahoma’s Pleading Standards*

The Oklahoma Territorial Legislature first adopted code pleading in 1893.<sup>22</sup> Forty-five years after the Territory began to employ code pleading, the federal courts adopted notice pleading. Despite the federal change, Oklahoma continued to use code pleading language in its courts for over forty more years.<sup>23</sup> Oklahoma retained elements of code pleading in the pleading statute, requiring a plaintiff to include “[a] statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition”<sup>24</sup> until the state adopted the federal notice pleading standard in 1984.<sup>25</sup> In Oklahoma’s code pleading, the same three types of allegations existed as in federal code pleading: ultimate facts, evidentiary facts, and conclusions of law.<sup>26</sup>

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20. See *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated in part by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (noting that “all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests”) (footnote omitted); 2 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 8.04 (3d ed. 2010).

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

22. George B. Fraser, *Improving the Pleading Process in Oklahoma*, 53 OKLA. B.J. 495, 495 (1982).

23. See *id.* at 495; see also 12 OKLA. STAT. § 2008(A)(1)(Supp. 1984) (current version at 12 OKLA. STAT. § 2008(A)(1)(Supp. 2010)).

24. 12 OKLA. STAT. § 264 (1981).

25. See Act of May 1, 1984, ch. 164, § 8, 1984 Okla. Sess. Laws 583.

26. See 12 OKLA. STAT. ANN. § 2008 committee cmt. (West 2010).

As in the federal system, code pleading required plaintiffs to plead the ultimate facts of the claim creating similar difficulties for plaintiffs.<sup>27</sup> In order to determine the ultimate facts of the claim, the court refused to consider evidentiary facts and conclusions of law as a basis for a claim for relief in the petition.<sup>28</sup> In Oklahoma, code pleading created a system which “caused difficulty to attorneys and judges alike who . . . found themselves confused as to whether a particular allegation [was] one of fact, evidence, or law.”<sup>29</sup> If a pleading was found to be “too detailed, it may violate the rule forbidding evidentiary facts and, if too broad, may be a conclusion of law, thereby failing to state a cause of action.”<sup>30</sup> In short, while a code petition in Oklahoma would survive only if plaintiff’s facts showed he *must* recover, a federal complaint would survive if plaintiff’s facts merely showed that he *may* recover.<sup>31</sup> If the “code petition contain[ed] allegations that [were] subject to several interpretations . . . the petition [was] insufficient even though proof of the facts alleged would support a verdict for the plaintiff.”<sup>32</sup> But in federal court, if any one of various inferences drawn would allow plaintiff to succeed, the complaint survived.<sup>33</sup> Determining a prima facie case and exactly how to articulate it to the defendant and to the court was a particularized process and puzzling to many who attempted it.

After realizing the difficulties inherent in code pleading, Oklahoma did not treat petitions quite as harshly as many previous federal courts, generally allowing a petition if it was “informative;”<sup>34</sup> meaning a cause of action would successfully state a claim if it could be “inferred with sufficient clarity to advise court or counsel of the basis of her complaint.”<sup>35</sup> In Oklahoma, the petition needed to “show that the plaintiff ha[d] a claim or cause of action, but the claim d[id] not have to be alleged in a certain way. . . . Thus, Oklahoma . . . avoided many of the troubles that other courts

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27. *See id.*

28. *See id.*

29. Jimmie J. Hamilton, Note, *Pleading: Fact Pleading in Oklahoma — Time For a Change?*, 30 OKLA. L. REV. 699, 700 (1977); *see also* Fraser, *supra* note 13, at 424 (citing Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COL. L. REV. 416, 417 (1921)) (stating “[t]he results have been very arbitrary because there is no logical distinction between statements which are grouped by courts under phrases ‘statement of fact’ and ‘conclusions of law’”) (internal quotation marks omitted).

30. Hamilton, *supra* note 29, at 700.

31. *See* Fraser, *supra* note 13, at 431.

32. *Id.*

33. *See id.*

34. *See id.* at 426.

35. *Id.* (citing *Branson v. Branson*, 1942 OK 77, ¶ 49, 123 P.2d 643, 651).

. . . experienced in distinguishing between evidentiary facts, ultimate facts and conclusions of law.”<sup>36</sup>

Interestingly, on its face Oklahoma’s statute read as code pleading, but in practice, as Oklahoma courts attempted a more simple procedure, the Oklahoma Supreme Court adopted language from a Supreme Court case aimed at notice pleading in order to evaluate claims under motions to dismiss.<sup>37</sup> As Oklahoma began to adopt other provisions set forth in the Federal Rules of Civil Procedure, many in the legal field began to advocate for the statutory adoption of notice pleading, but the balance between viewing the notice standard as properly rejecting meritless claims or wasting judicial resources was a source of contention.<sup>38</sup> In addition to being confusing, because a plaintiff could appeal a dismissal of his complaint, or simply file a new action, rejecting claims for code technicalities took “much of the court’s time as well as that of the parties.”<sup>39</sup> Alternatively, by “assigning a lesser role to the pleadings as do the Federal Rules, much less time would be spent in amending pleadings.”<sup>40</sup>

Scholars also looked to other states’ modification of code pleading for guidance and options for Oklahoma change.<sup>41</sup> Concerns revolved around whether Oklahoma should keep language requiring plaintiffs to state a “cause of action” or change the language to require a “claim for relief,” and whether Oklahoma should adopt the new federal rules entirely to simplify practicing in both state and federal court. George Fraser, former professor of law at the University of Oklahoma College of Law, supposed that “[s]ince a plaintiff must show the existence of the elements of his claim whether he is required by statute to state a claim, a right to relief, or a cause

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36. *Id.* at 451-52.

37. *See* 12 OKLA. STAT. § 264 (1984), *repealed by* Act of May 1, 1984, ch. 164, § 32, 1984 Okla. Sess. Laws 628; *Powell v. Seay*, 1976 OK 22, ¶ 12, 553 P.2d 161, 164.

38. Hamilton, *supra* note 29, at 702 (noting that “[w]hile few outright miscarriages of justice have resulted through dismissal of the action when, through inadvertence or lack of skill, the pleader failed to include sufficient facts in his petition, prolonged and useless delay has undoubtedly resulted from the testing of the sufficiency of the pleading and in amendments thereof when necessary and permitted”).

39. *Id.* at 701.

40. *Id.*

41. *See id.* at 703-04 (looking at North Carolina’s altered requirements for a possible alternative to Oklahoma’s current standard); *see also* Fraser, *supra* note 22, at 497 (considering how a Texas statute retained portions of code pleading in stating a “cause of action” when adopting a notice pleading statute); *Recent Developments*, 34 OKLA. L. REV. 194, 204 n.9 (1981) (citing Illinois, New York, and Texas statutes for evidence of states who retained the phrase “cause of action” in pleading statutes adopted post-Federal Rules of Civil Procedure) (footnote omitted).

of action, any one of these phrases may be used in the Oklahoma Statutes.”<sup>42</sup> Moreover, while “[t]he adoption of all the federal rules would simplify the practice of law because attorneys would have to know only one set of rules of practice . . . . Retaining the phrase ‘cause of action’ would not require a long verbose petition . . . .”<sup>43</sup>

Ultimately, Oklahoma adopted the language of Federal Rule of Civil Procedure 8(a)(2) verbatim.<sup>44</sup> In explaining the movement to notice pleading, the Committee Comment to the new section relied on United States Supreme Court precedent for the proposition that the new rule was formulated to give “‘fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’”<sup>45</sup> Moreover, the Committee noted the new section “[did] not prohibit the pleading of facts or conclusions of law as long as the pleading [gave] fair notice of the nature of the claim asserted.”<sup>46</sup> The Committee further stated that the shift to notice pleading “‘acknowledge[d] that modern devices such as discovery, pretrial conferences, and summary judgments are more effective methods of performing the functions of disclosing the factual and legal issues in dispute, pretrial planning, and disposing of frivolous or unfounded claims and defenses which historically were performed by the pleadings.’”<sup>47</sup>

The statutory adoption of notice pleading in Oklahoma was designed to be a mirror image of Federal Rule of Civil Procedure 8 and at the time of adoption it was applied in the same manner as in federal courts. However, the recent federal shift in pleading procedure raises the specter of code pleading, leaving states like Oklahoma in a position to determine whether to continue the current liberal standard applied since the adoption of notice pleading or whether to conform to recent federal precedent.

### *III. Development of the Supreme Court’s Interpretation of Federal Rule of Civil Procedure 8*

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42. Fraser, *supra* note 22, at 497.

43. *Id.*

44. Compare FED. R. CIV. P. 8(a)(2), with 12 OKLA. STAT. § 2008(A)(1) (Supp. 1984).

45. See 12 OKLA. STAT. ANN. 2008 committee cmt. (2010) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated in part by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

46. *Id.*

47. *Id.*

Until the Supreme Court's decision in *Twombly*, federal courts applied the same interpretation of notice pleading for fifty years, following the 1957 case *Conley v. Gibson*.<sup>48</sup>

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48. *Conley*, 355 U.S. at 47.

A. *Conley v. Gibson and the Freedom to Plead as You Please*

In *Conley*, after a railroad eliminated forty-five jobs belonging to black workers, only to replace the majority of the positions with white workers, the discharged employees sued their collective bargaining agent for unfair representation based on discrimination.<sup>49</sup> While the claim was initially dismissed at trial court on a jurisdictional issue, the respondent requested that the Supreme Court take the liberty to address the failure to state a claim issue, arguing that if the jurisdictional issue was overturned, the dismissal should be upheld for failure to state a claim.<sup>50</sup> The Supreme Court affirmed the holdings of various circuit courts advising judges “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 [that] would entitle him to relief.”<sup>51</sup> The *Conley* Court found it sufficient that the petitioners had alleged they “were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes.”<sup>52</sup> To the Court, the plaintiffs had sufficiently supplemented these allegations with sufficient detail of events underlying the claim.<sup>53</sup>

If the allegations were proved true, the petitioners would have a claim, and this was adequate for survival of a motion to dismiss.<sup>54</sup> The Court did not weigh the probability of the allegations.<sup>55</sup> The Court acknowledged that discovery and pretrial procedures allowed plaintiffs and defendants an opportunity to parse away the claim and force their opponent to divulge exactly what facts evidenced the issues at stake in the claim or counterclaim.<sup>56</sup> In addition, this standard of pleading protected plaintiffs by preventing litigation from becoming a “game of skill in which one misstep by counsel may be decisive to the outcome,” ultimately “facilitat[ing] a proper decision on the merits.”<sup>57</sup> *Conley* rested on the proposition that “the truth will out” and arguably lifted the bar in the plaintiff’s favor by seeming to accommodate most any pleadings as sufficient to trigger subsequent

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49. *See id.* at 42-43.

50. *Id.* 45-46.

51. *Id.* (emphasis added).

52. *Id.* at 46.

53. *See id.* at 47.

54. *See id.* at 45-46.

55. *See id.* at 45-48.

56. *See id.* at 47-48.

57. *Id.* at 48.

litigation. The language used in *Conley* was eventually adopted by at least twenty-six states and the District of Columbia in dismissing complaints for failure to state a claim for relief.<sup>58</sup>

*B. Bell Atlantic Corp. v. Twombly and Pleading Plausibly*

In 2007, the Supreme Court revisited pleading standards in *Bell Atlantic Corp. v. Twombly*.<sup>59</sup> In *Twombly*, respondents represented a putative class suing Incumbent Local Exchange Carriers (ILECs) for violation under § 1 of the Sherman Act<sup>60</sup> which prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . .”<sup>61</sup> The respondents claimed that the ILECs generally engaged in parallel conduct by making agreements which resulted in higher prices, poorer networks, and impaired competition.<sup>62</sup> Upon reviewing a motion to dismiss, the Second Circuit Court of Appeals relied on *Conley* and found the claim sufficient, stating that a court “would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence” in order to dismiss the claim.<sup>63</sup>

Writing for the majority, Justice Souter refused to apply the *Conley* “no set of facts” standard in a 7-2 decision, claiming that the *Conley* standard was “best forgotten as an incomplete, negative gloss on an accepted pleading standard.”<sup>64</sup> Instead, the Court required antitrust plaintiffs to plead enough factual matter to “nudge[] their claims across the line from conceivable to plausible,” lest their complaints be dismissed.<sup>65</sup> This would involve “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action [would] not do.”<sup>66</sup> Because the defendant’s parallel conduct could be evidence of happenstance lawful conduct, the Supreme Court held that the complaint needed factual allegations that would “raise a reasonable expectation that discovery [would] reveal evidence of illegal agreement.”<sup>67</sup>

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58. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting).

59. 550 U.S. 544 (2007).

60. See *id.* at 550.

61. 15 U.S.C. § 1 (2000).

62. *Twombly*, 550 U.S. at 550.

63. *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005), *rev’d*, 550 U.S. 554.

64. *Twombly*, 550 U.S. at 546.

65. See *id.* at 570.

66. *Id.* at 555.

67. See *id.* at 556.

The Court formulated this rejection and replacement of *Conley* in a complex antitrust suit that presented pleading issues very different from those raised by the ordinary plaintiff. The majority relied on many issues specific to antitrust litigation, and signaled that the holding should be contextually contained.<sup>68</sup> First, the Court stated that certiorari was granted to “address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct . . . .”<sup>69</sup> Next, when analyzing the issue, the Court noted that the case “present[ed] the antecedent question of what a plaintiff must plead in order to state a claim under §1 of the Sherman Act” and further described what rule 8(a)(2) of the Federal Rules of Civil Procedure required.<sup>70</sup> It appeared that the Court was focusing its analysis on what constituted sufficient pleading specifically in an *antitrust* suit and not in federal pleadings in general.

To the Court, the primary reason for treading cautiously when allowing a factually deficient claim to survive a motion to dismiss was the potentially burdensome expense of antitrust litigation.<sup>71</sup> The Court observed that the threat of intrusive and expensive discovery could cause defendants to settle claims even when they were merely innocent victims of “anemic” cases.<sup>72</sup> The Court discounted any procedural safeguards, such as strict judicial oversight and limited initial discovery, as impractical in a realistic judicial world of loaded dockets and judges who are unfamiliar with details that may or may not be uncovered in discovery.<sup>73</sup>

Despite the majority’s concerns, the dissent pointed out that while the majority quickly dispensed of *Conley*’s reasoning, at the time of the decision, twenty-six states (including Oklahoma) used *Conley*’s language when considering dismissal of a petition for failure to state a claim.<sup>74</sup> Further, the dissent maintained that the majority’s discovery concerns called for “careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid

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68. *See id.* at 553-55.

69. *Id.* at 553.

70. *See id.* at 554-55.

71. *See id.* at 558 (“[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.”) (internal citations omitted).

72. *See id.* at 559.

73. *See id.* at 559-60 (“We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define ‘abusive’ discovery except in theory, because in practice we lack essential information.”) (quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638-39 (1989)).

74. *See id.* at 578 (Stevens, J., dissenting).

instructions to juries . . . [but did not] justify the dismissal of an adequately pleaded complaint without even requiring defendant to file answers denying a charge.”<sup>75</sup> Finally, the dissent argued that the purpose of relaxed pleading was to keep plaintiffs in court,<sup>76</sup> and if the Court wished to return to stricter standards, the Federal Rules of Civil Procedure should be *amended*, not re-interpreted.<sup>77</sup>

The *Twombly* decision shook antitrust practice with the new plausibility standard, but because the Court did not specify whether its newly articulated pleading rules applied specifically to antitrust litigation or broadly to all federal civil suits, circuit courts were left struggling to determine whether to apply the seemingly stricter standards to their own pleadings.<sup>78</sup>

### C. Erickson v. Pardus: An Attempted Clarification Ultimately Results in Confusion

Less than three weeks after the *Twombly* decision was rendered, the Supreme Court reviewed a Tenth Circuit decision affirming the District Court for the District of Colorado’s dismissal of a section 1983 complaint.<sup>79</sup> In a *per curiam* decision, the Supreme Court vacated the dismissal and remanded the case.<sup>80</sup> The complaint alleged that prison officials violated the Eighth Amendment when they wrongfully terminated a prisoner’s hepatitis C treatments which resulted in potential life-threatening consequences for the plaintiff.<sup>81</sup> The Supreme Court granted review because the dismissal “depart[ed] in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure.”<sup>82</sup>

The District Court dismissed the petition using *Conley*’s “no set of facts” language, finding that the prisoner failed to allege *facts* showing substantial harm that would not have ultimately resulted from his disease with or without treatment.<sup>83</sup> The District Court interpreted *Conley* as requiring the plaintiff to allege the facts supporting each element of his claim *in the*

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75. *Id.* at 573.

76. *See id.* at 575.

77. *See id.* at 595.

78. *See* discussion *infra* Part III.D.

79. *Erickson v. Pardus*, 551 U.S. 89 (2007) (*per curiam*).

80. *See id.* at 94-95.

81. *See id.* at 89-90.

82. *Id.* at 90.

83. *See* *Erickson v. Pardus*, No. 05-CV-00405-LTB-MJW, 2006 WL 650131, at \* 4 (D. Colo. Mar. 13, 2006), *aff’d*, 198 Fed. App’x. 694 (10th Cir. 2006), *vacated*, 551 U.S. 89 (2007).

*petition* which the plaintiff failed to do.<sup>84</sup> While it was possible to prove a set of facts *in the future* that would support his accusations, the court held that sufficient factual matter to support the allegations was absent from the petition.<sup>85</sup> The Court of Appeals for the Tenth Circuit affirmed the dismissal.<sup>86</sup>

The Supreme Court reversed the decision.<sup>87</sup> But, rather than citing the “plausibility” standard for pleadings advanced in *Twombly*, the Court reaffirmed another proposition from the *Conley* case; that in a petition, the plaintiff must only “give notice” to the defendant of the grounds on which his claim rests.<sup>88</sup> The Court also reiterated that the factual allegations in the complaint must be accepted as true.<sup>89</sup> This decision further troubled lower courts and legal scholars who were grappling with *Twombly*’s application to litigation beyond the antitrust realm.<sup>90</sup> If *Twombly* set a new requirement of pleading factual “plausibility,” it seemed unusual, if not erroneous, that the new standard was not used in a *per curiam* decision reviewing a similar motion to dismiss.

#### *D. Circuit Confusion After Twombly and Erickson Creates the Need for Iqbal*

In the wake of *Twombly*, circuit courts across the country each addressed the *Twombly* decision while pleading for clarification from the Supreme Court as they muddled through the confusing opinion.<sup>91</sup> Ultimately, each

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84. *See id.* at \*6.

85. *See id.* at \*9.

86. *See Erickson*, 198 Fed. App’x at 701.

87. *Erickson*, 551 U.S. at 94-95.

88. *See id.* at 93.

89. *See id.* at 94.

90. *See Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 16 (D.C. Cir. 2008) (maintaining that *Erickson* “emphasized the continuation of the prior Rule 8(a) standard”); *Giarratano v. Johnson*, 521 F.3d 298, 304 n.5 (4th Cir. 2008) (refusing to consider *Erickson* claiming it did not undermine *Twombly*’s pleading requirements); *Midwest Media Prop., L.L.C. v. Symmes Twp., Ohio*, 512 F.3d 338, 341 n.1 (6th Cir. 2008) (claiming that *Erickson* was a clarification of *Twombly*); *see also* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 883 (2009) (“To confuse matters even further . . . [the Court] upheld the sufficiency of a complaint in *Erickson v. Pardus* without even mentioning the plausibility standard.”); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1085-86 (2009) (suggesting that although some believe *Erickson* limited *Twombly*, this argument is “fanciful” and *Erickson* “reiterated that the plausibility standard flowed directly from the text of Rule 8”); Josephson, *supra* note 2, at 902-03 (noting that “*Erickson* was written to reassure the lower courts that Rule 8 had not been drastically revised”).

91. *See Aktieselskabet*, 525 F.3d at 15 (citing many courts who have “disagreed about the import of *Twombly*”); *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir. 2008) (considering

adopted *Twombly* either as applicable only in certain contexts or as a universal standard applying to all claims.

Initially, one set of circuits refused to give *Twombly* general application and confined the plausibility requirements to antitrust or other complex litigation. Within this set of circuits, cases in the Sixth Circuit, Seventh Circuit, and Ninth Circuit applied the same factual requirements to all complex litigation, such as all antitrust suits, or all litigation with potentially expansive discovery.<sup>92</sup> In other cases, circuits held that the amount of factual detail required depended specifically on the complexity of the case. For example, a Seventh Circuit case noted “[a] complaint must always . . . allege ‘enough facts to state a claim to relief that is plausible on its face,’ and how many facts are enough will depend on the type of case.”<sup>93</sup> Similarly, the Second Circuit claimed, “we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring 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.”<sup>94</sup>

In *Alvarado v. KOB-TV, L.L.C.*,<sup>95</sup> the Tenth Circuit first officially adopted the *Twombly* “plausibility” pleading standard for all claims before the court, but additionally noted that the decision in the case would be the same under the new or old pleading standard.<sup>96</sup> The Tenth Circuit later

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the “mixed signals” of *Twombly*); *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (“The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come.”); *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 337 n.4 (6th Cir. 2007) (noting “uncertainty concerning the scope” of *Twombly*); *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007) (evaluating “conflicting signals” identified in *Twombly*).

92. See *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009) (“Courts in and out of the Sixth Circuit have identified uncertainty regarding the scope of *Twombly* and have indicated that its holding is likely limited to expensive, complicated litigation like that considered in *Twombly*.”); *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 971 (9th Cir. 2008) (holding that *Twombly* laid to rest the *Conley* standard but limited its holding to antitrust cases); *Midwest*, 512 F.3d at 341 n.1 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007)) (“*Twombly* itself suggests that its holding may be limited to cases likely to produce ‘sprawling, costly, and hugely time-consuming’ litigation.”); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1082-83 (7th Cir. 2008) (indicating “[t]he task of applying *Bell Atlantic* to the different types of cases that come before us continues” and applying the standard to cases with costly discovery).

93. *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir. 2008) (citation omitted) (citing *Twombly*, 550 U.S. at 570).

94. *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007), *rev’d sub nom. Ashcroft v. Iqbal* 129 S. Ct. 1937 (2009) (first emphasis added).

95. 493 F.3d 1210 (10th Cir. 2007).

96. See *id.* at 1215 n.2.

used language from *Twombly* to evaluate a motion to dismiss in *Pace v. Swerdlow*,<sup>97</sup> but still seemed to give the rule liberal application, allowing the claim to survive a motion to dismiss despite a vigorous dissent countering that sufficient facts had not been pleaded under the *Twombly* standard.<sup>98</sup>

The Tenth Circuit admitted its confusion in *Robbins v. Oklahoma*,<sup>99</sup> when addressing an Eastern District of Oklahoma decision. The district court denied a motion to dismiss in a suit against daycare workers and DHS employees over the death of an eight-month-old child killed by blunt force trauma.<sup>100</sup> The *Conley* “no set of facts” standard was used to grant the motion to dismiss for the DHS employees.<sup>101</sup> Upon review, the Tenth Circuit noted that the *Twombly* standard of pleading was “less than pellucid,” citing other circuits that also struggled to ascertain the exact meaning of the Supreme Court’s holding.<sup>102</sup> Ultimately, the Tenth Circuit maintained that “the bedrock principle that a judge ruling on a motion to dismiss must accept all allegations as true” remained, and moreover, “the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depend[ed] on [the] context [of the case].”<sup>103</sup> Although the interpretation of what the plausibility standard meant differed in all of the above circuits, each found the *Twombly* holding to be limited to antitrust or complex litigation.

The remaining circuit courts applied *Twombly* universally, but disagreed as to whether *Twombly* was a new standard, or a continuation of the previous standard.<sup>104</sup> While the Third Circuit and Eighth Circuit applied a

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97. 519 F.3d 1067 (10th Cir. 2008).

98. *See id.* at 1073, 1076 (Gorsuch, J., dissenting).

99. 519 F.3d 1242 (10th Cir. 2008).

100. *See id.* at 1246.

101. *See id.*

102. *Id.* at 1247.

103. *Id.* at 1247-48; *see also* Bryson v. Gonzales, 534 F.3d 1282, 1286 (10th Cir. 2008) (citing the *Twombly* “plausibility” standard but noting that “[t]his is not to say that the factual allegations must themselves be plausible; after all, they are assumed to be true. It is just to say that relief must follow from the facts alleged”).

104. *See* Thomas v. Rhode Island, 542 F.3d 944, 948 (1st Cir. 2008) (stating that the *Conley* standard “no longer governs in light of *Twombly*”); Giarratano v. Johnson, 521 F.3d 298, 304 n.5 (4th Cir. 2008) (noting that even after *Erickson* addressed a section 1983 claim, the *Twombly* requirements were not undermined in the section 1983 claim before the court); Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 974 n.4 (11th Cir. 2008) (maintaining *Twombly* was a “further articulation of the standard by which to evaluate the sufficiency of all claims brought pursuant to Rule 8(a)”; *In re Katrina Canal Breaches Litig.* 495 F.3d 191, 205 n.10 (5th Cir. 2007) (holding that *Twombly* dispelled the *Conley* standard).

new plausibility standard to all motions to dismiss,<sup>105</sup> the District of Columbia Circuit found that although *Twombly* applied to all cases, it “[e]ft the long-standing fundamentals of notice pleading intact,” meaning that the Supreme Court did not “intend[] to tighten pleading standards.”<sup>106</sup> In essence, the Third Circuit and Eighth Circuit considered *Twombly* to be a new standard that applied to claims before the court, but the District of Columbia Circuit found that while *Twombly* applied universally, the former standard had not been changed. Even after establishing that *Twombly* applied to all litigation, the Third Circuit acknowledged that “to impose a ‘plausibility’ requirement outside the § 1 context . . . leaves us with the question of what it might mean.”<sup>107</sup> While the application differed, the Third Circuit, Eighth Circuit, and District of Columbia Circuit applied their interpretations of *Twombly* across the board to all claims and did not restrict the decision to only antitrust cases or complex litigation.

Confusion among the circuit courts gave rise to a need for the Supreme Court to revisit and clarify the application of the pleading requirements set forth in *Twombly*.

#### E. *Ashcroft v. Iqbal*

In 2009, the Supreme Court finally addressed the uncertainty rendered by *Twombly* in *Ashcroft v. Iqbal*.<sup>108</sup> In *Iqbal*, the respondent, a Pakistani man, was held on immigration charges and placed in a group of detainees labeled “of high interest” while being investigated shortly after the September 11, 2001, terrorist attacks.<sup>109</sup> *Iqbal*’s complaint focused on his treatment while at the detention center Administrative Maximum Special Housing Unit.<sup>110</sup> *Iqbal* brought a *Bivens* action, which is a “private cause of action under the Constitution . . . to recover damages against federal officers for violations of [Constitutional] rights.”<sup>111</sup> *Iqbal* alleged that the petitioners, Robert Mueller, the Director of the Federal Bureau of Investigation (FBI) and John

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105. See *Gregory v. Dillard’s, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009) (interpreting *Twombly* as “establishing a plausibility standard for [all] motions to dismiss”); *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (finding that the *Twombly* standard was “intended to apply to the Rule 12(b)(6) standard in general”).

106. *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15-16 (D.C. Cir. 2008).

107. See *Phillips*, 515 F.3d at 234.

108. 129 S. Ct. 1937 (2009).

109. See *id.* at 1943.

110. See *id.* at 1943-44.

111. *Elmaghraby v. Ashcroft*, No. 04-CV-01809-JG-SMG, 2005 WL 2375202, at \*13 (E.D. N.Y. Sept. 27, 2005), *aff’d in part, rev’d in part sub nom. Iqbal v. Hasty*, 409 F.3d 143 (2d Cir. 2007), *rev’d sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937. (2009)

Ashcroft, then Attorney General of the United States, “designated [him] a person of high interest on account of his race,” and knew of and implemented policies which resulted in harsh treatment and abuse of Iqbal on account of his race.<sup>112</sup>

The specific harsh treatment of which Iqbal complained included: (1) solitary confinement, (2) constant light within his jail cell, (3) air conditioning in his cell during winter, (4) heat in his cell during summer, (5) hours of exposure to rain followed by a return to an air-conditioned jail cell, (6) inadequate food resulting in a loss of 40 pounds, (7) name calling, (8) two separate beatings, (9) denial of medical care, (10) denial of communications with defense counsel, (11) denial of legal mail, (12) denial of participation in prayers and other religious services, (13) daily strip searches, and (14) at least four body cavity searches.<sup>113</sup> More specifically, on one occasion, officers informed Iqbal he had a visitor, but instead took him to a room filled with fifteen officers who “threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room.”<sup>114</sup> On another occasion, officers performed three consecutive strip and body-cavity searches of Iqbal all in the same room.<sup>115</sup> The same officers then turned off a recording camera and beat Iqbal while escorting him back to his jail cell when he refused a fourth body cavity search.<sup>116</sup> Before leaving Iqbal in his jail cell, one officer “urinated in the toilet in Iqbal’s cell and turned the water off so the toilet could not be flushed until the next morning.”<sup>117</sup>

### *1. Circuit to Certiorari*

When Iqbal’s case was heard before the district court, the Supreme Court had not yet decided *Twombly*.<sup>118</sup> The district court noted that the parties’ disagreement over how specific the petition must be “expose[d] a tension between the liberal pleading standards under the Federal Rules and one of the core purposes of qualified immunity — protecting public officials from the burdens of discovery against unmeritorious claims.”<sup>119</sup> But the court ultimately determined that “the qualified immunity ‘standard [would] not allow the Attorney General to carry out his national security functions

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112. See *Ashcroft v. Iqbal*, 129 S. Ct. at 1942, 1944.

113. See *Iqbal v. Hasty*, 490 F.3d at 149.

114. *Elmaghraby*, 2005 WL 2375202, at \*4.

115. See *id.* at \*5.

116. See *id.*

117. *Id.*

118. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009).

119. *Elmaghraby*, 2005 WL 2375202, at \*11.

wholly free from concern for his personal liability; he may on occasion have to pause [and] consider whether a proposed course of action can be squared with the Constitution . . . .”<sup>120</sup> Much of Iqbal’s asserted treatment, such as daily searches, was possibly consistent with either legitimate *or* illegitimate activity.<sup>121</sup> However, the district court found that this judgment was not appropriate for a motion to dismiss, because the court was to “assume the truth of the plaintiffs’ allegations and draw all inferences in their favor.”<sup>122</sup> The district judge reasoned that “[p]laintiffs should not be penalized for failing to assert more facts where, as here, the extent of defendants’ involvement is peculiarly within their knowledge.”<sup>123</sup>

By the time the decision was reviewed by the Second Circuit, the Supreme Court had modified antitrust pleading requirements in *Twombly*. The Second Circuit analyzed all conflicting signals in *Twombly*, determining that while there were many indicators for the decision to be applied narrowly to antitrust suits, there were also indicators that the decision was meant to apply more broadly.<sup>124</sup> The Second Circuit chose to apply *Twombly* only in situations “where such amplification [was] needed to render the claim plausible,”<sup>125</sup> and refused to universally impose a heightened pleading requirement as both *Twombly* and *Erickson* each denied the creation of a heightened standard in *Twombly*.<sup>126</sup>

In holding that the petition stated enough grounds to survive a motion to dismiss, the Second Circuit recognized procedural tools useful in protecting government officials during the suit, such as the use of a motion for more definite statement, limited discovery with involved and approved judicial oversight, and the use of a motion for summary judgment if discovery did not produce evidence of personal liability.<sup>127</sup> The court held that while *Twombly* could be interpreted as requiring additional facts to prove the defendant’s express approval of Iqbal’s treatment, “all of the Plaintiff’s allegations respecting the personal involvement of [defendants Hasty,

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120. *Id.* at \*14 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985)).

121. *See id.* at \*16.

122. *Id.* at \*16 (stating “the inquiry into what actions defendants took and the reasonableness of those actions in the aftermath of the September 11 attacks is not one that can be made on a motion to dismiss,” and finding “[i]n these circumstances, the objective reasonableness of defendants’ actions is a question that, in my view, is properly addressed only on a motion for summary judgment”).

123. *Id.* at \*21.

124. *See Iqbal v. Hasty*, 490 F.3d 143, 155-57 (2d Cir. 2007), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

125. *Id.* at 157-58.

126. *See id.* at 158.

127. *See id.* at 158-59.

Ashcroft, and Mueller were] entirely plausible, without allegations of additional subsidiary facts.”<sup>128</sup>

In a concurring opinion, Judge Cabranes noted that case precedent, including *Twombly*, was “less than crystal clear and fully deserve[d] reconsideration by the Supreme Court at the earliest opportunity.”<sup>129</sup> Acting upon the confusion in the circuits courts as to *Twombly*’s appropriate application, the Supreme Court granted certiorari to address these concerns in *Iqbal*.

## 2. *Twombly Confirmed as a Blanket Interpretation of Federal Rule of Civil Procedure 8*

While to many circuit courts *Iqbal* was seen as an expansion of *Twombly*, the Supreme Court expressly stated in *Iqbal* that the *Twombly* decision was an interpretation of Federal Rule of Civil Procedure 8, which provided the grounds for the sufficiency of an antitrust complaint, but that by interpreting Rule 8, the decision “expounded the pleading standard for ‘all civil actions.’”<sup>130</sup>

In evaluating *Iqbal*’s complaint, the majority first wholly rejected the argument of supervisory liability under a *Bivens* claim and held that “[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.”<sup>131</sup> The Court then broke the complaint into three sections of analysis: legal conclusions, factual allegations, and plausible inferences.<sup>132</sup> First, *Iqbal* alleged that the plaintiffs were principal architects and instrumental in the policy which singled him out for his “religion, race, and/or national origin” and subjected him to “harsh conditions of confinement.”<sup>133</sup> The majority disregarded these statements as a “formulaic recitation of the elements”<sup>134</sup> and conclusory allegations, deeming the statements as “not entitled to be assumed true.”<sup>135</sup> The Court maintained that it was “the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitle[d] them to the presumption of truth.”<sup>136</sup>

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128. *See id.* at 166.

129. *Id.* at 178 (Cabranes, J., concurring).

130. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

131. *Id.* at 1949.

132. *See id.* at 1951-52.

133. *Id.* at 1951 (internal quotation marks omitted).

134. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal quotation marks omitted).

135. *Id.*

136. *Id.*

Next, the Court considered the factual allegations of the complaint. Specifically, the complaint first stated that the FBI “arrested and detained thousands of Arab Muslim men” which was approved by defendant Mueller.<sup>137</sup> Second, the complaint stated that the policy of keeping such detainees in highly restrictive conditions was approved by both defendants Mueller and Ashcroft.<sup>138</sup> The Court recognized these as factual allegations, and acknowledged that “[t]aken as true, these allegations are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion or national origin.”<sup>139</sup> Yet, although a legitimate claim *could* be recognized, the Court then stated that “given more likely explanations, they do not plausibly establish this purpose.”<sup>140</sup> The Court recognized that “[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims . . . .”<sup>141</sup> Confusingly, the Court both claimed to take the factual allegations as true, but then drew an inference in favor of the defendant using *Twombly*’s plausibility standard.

Finally, the Court analyzed the claim in light of inferences that could be drawn from the remaining factual allegations named, mainly that “respondent’s arrest was the result of unconstitutional discrimination.” But to prevail using this inference, the Court required Iqbal to show “facts plausibly showing that petitioners purposefully adopted a policy of classifying . . . detainees as ‘of high interest’ because of their race, religion, or national origin.” Although only paragraphs before the Court recognized that the factual contentions could be consistent with this notion, the Court then chose to adopt what it considered the only *plausible* suggestion, 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.”<sup>142</sup>

The Court echoed its previous reasoning in *Twombly*, rejecting the argument that any discovery controls would be adequate protection for government officials exposed to discovery, as any discovery in the case would be time-consuming, counteracting the very purpose of qualified

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137. *Id.*

138. *See id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

immunity — “to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery.’”<sup>143</sup>

### 3. Dissent

Justice Souter, who had written for the majority in *Twombly*, took issue with the Court’s subsequent application of the plausibility standard and rejected the majority’s opinion on two grounds: (1) the majority inappropriately rejected a claim of supervisory liability<sup>144</sup> and (2) the majority misapplied the pleading standard set forth in *Twombly*.<sup>145</sup> First, the dissent pointed out that defendants Mueller and Ashcroft admitted they could be found liable under a supervisory liability standard if actual knowledge of the discriminatory practices was shown in conjunction with indifference to that policy.<sup>146</sup> Further, “the parties agreed as to a proper standard of supervisory liability, and the disputed question was whether Iqbal’s complaint satisfied Rule 8(a)(2).”<sup>147</sup> The dissent highlighted that the complete rejection of supervisory liability by the majority was determined with no briefing, and addressed *sua sponte* by the Court, which “denie[d] Iqbal a fair chance to be heard on the question.”<sup>148</sup>

Because the dissent would recognize fault based on supervisory liability, the dissent found the complaint sufficient because “[i]f these factual allegations are true, [defendants] were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it.”<sup>149</sup> The dissent maintained that the majority misapplied *Twombly*, stating that “*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are *probably true* . . . on the contrary . . . a court *must take the allegations as true*, no matter how skeptical the court may be.”<sup>150</sup> More emphatically, the dissent claimed “[t]he sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.”<sup>151</sup> In sum, the

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143. *Id.* at 1953 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)).

144. While the majority addressed the claim of supervisory liability, it is addressed in this article only to the extent that recognition of supervisory liability would affect the motion to dismiss before the Court. *See id.* at 1949, 1958 (Souter, J., dissenting).

145. *See id.* at 1955.

146. *See id.* at 1956.

147. *Id.*

148. *Id.* at 1957.

149. *Id.* at 1959.

150. *Id.* (emphasis added).

151. *Id.*

dissent would not read allegations, factual or conclusory in isolation, but rather would read the complaint as a whole, deeming the complaint sufficient to give “fair notice of what the . . . claim is and the grounds upon which it rests.”<sup>152</sup> Ironically, the Court had taken Justice Souter’s own words and applied them in a manner inconsistent with his intent in *Twombly*.

While Justice Breyer joined Justice Souter’s dissent, he also wrote separately to emphasize the many procedural devices available to trial courts to protect government officials during the discovery process, determining that the Court had not presented “convincing grounds for finding these alternative case-management tools inadequate.”<sup>153</sup>

#### F. State Pleading Standards Post *Iqbal*

Across the nation, state supreme courts, other than Oklahoma’s, have varied in their interpretation and of *Twombly* and *Iqbal*. To date, no less than eleven state supreme courts other than Oklahoma’s have addressed pleading since the *Twombly* and *Iqbal* decisions. Of those eleven decisions, two have expressly adopted the *Twombly* decision.<sup>154</sup> In Massachusetts, when plaintiffs sued the Ford Motor Company over a defect in a door handle, the Supreme Judicial Court of Massachusetts adopted *Twombly* analysis and stated that “[b]ecause the term ‘defect’ is conclusory and can be subjective as well, a bare assertion that a defendant, while representing the opposite, has knowingly manufactured and sold a product that is ‘defective,’ or suffers from ‘safety-related defects,’ does not suffice to state a viable claim.”<sup>155</sup> Also adopting *Twombly*, the South Dakota Supreme Court rejected a Jewish plaintiff’s petition based on a requirement of a “showing” at the motion to dismiss level, rejecting the claim that his constitutional rights were violated when he was served non-kosher food while in prison.<sup>156</sup>

Conversely, two state supreme courts have expressly rejected the *Twombly* decision.<sup>157</sup> The Supreme Court of Arizona reviewed the dismissal of a bad faith suit and explicitly held that in Arizona, courts were

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152. See *id.* at 1961 (omission in original) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

153. *Id.* at 1962 (Breyer, J., dissenting).

154. See *Sisney v. Best Inc.*, 2008 SD 70, ¶¶ 7-8, 754 N.W.2d 804, 808-09; *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008).

155. *Iannacchino*, 888 N.E.2d at 888.

156. See *Sisney*, ¶¶ 1, 8, 754 N.W.2d at 806, 808-09.

157. See *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344, 347 (Ariz. 2008); *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5 n.1, 184 Vt. 1, 955 A.2d 1082.

to assume the truth of plaintiff's facts and draw inferences from the facts alleged.<sup>158</sup> The Arizona court held that "Arizona has not revised the language or interpretation of Rule 8 in light of *Twombly*."<sup>159</sup> Moreover, while legal conclusions "d[id] not invalidate a complaint . . . a complaint that state[d] only legal conclusions, without any supporting factual allegations, d[id] not satisfy . . . [the] notice pleading standard."<sup>160</sup> The Supreme Court of Vermont also rejected the *Twombly* plausibility standard in a wrongful termination suit referring to a complaint as "a bare bones statement that merely provides the defendant with notice of the claims against it."<sup>161</sup> The court stated, "we have relied on the *Conley* standard for over twenty years, and are in no way bound by federal jurisprudence in interpreting our state pleading rules . . . . [we] are unpersuaded by the dissent's argument that we should now abandon it for a heightened standard."<sup>162</sup> These two state supreme courts kept the bar low for plaintiffs, allowing legal conclusions and factual allegations, so long as the defendant was put on notice of the claim against him.

Four other state supreme courts have cited *Twombly*'s reasoning in interpreting their own statute, but have not wholly adopted the decision.<sup>163</sup> The Delaware Supreme Court retained its "any set of facts" language without discussing the *Twombly* opinion, but acknowledged it through citation in a footnote.<sup>164</sup> In Maine, the Supreme Judicial Court evaluated a civil perjury claim and used an "any set of facts" standard to evaluate the complaint.<sup>165</sup> In its analysis, the court recognized the *Twombly* decision and found it applicable to the case at hand because like the suit in *Twombly*, "civil perjury claims may lead to abuse if more specificity in pleading is not required."<sup>166</sup> Likewise, the Supreme Court of Minnesota reviewed a motion to dismiss by looking only to the facts, accepted as true, drawing reasonable inferences for the plaintiff, and indicating that *Twombly* supported the proposition that a court is not bound by legal conclusions in its

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158. See *Cullen*, 189 P.3d at 346.

159. *Id.* at 347.

160. *Id.* at 346.

161. *Colby*, 2008 VT 20, ¶ 13.

162. *Id.* ¶ 5 n.1.

163. See *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009); *Bean v. Cummings*, 2008 ME 18, ¶ 11, 939 A.2d 676, 680; *Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008).

164. See *Reid*, 970 A.2d at 182 n.23.

165. See *Bean*, ¶ 7, 939 A.2d at 679.

166. *Id.* ¶ 11, 939 A.2d at 680.

determination.<sup>167</sup> In Georgia, a dissenting opinion cited *Twombly* for the proposition that a plaintiff must include “more than a formulaic recitation of the elements . . . ,” although the case was not used in the majority opinion’s analysis.<sup>168</sup>

Two state supreme courts have addressed pleading requirements, but have used some form of the “no set of facts” language from *Conley* to support their analysis, either expressly refusing to address the *Twombly* and *Iqbal* decisions, or not addressing the decisions because they were not raised in arguments.<sup>169</sup> The Supreme Court of Indiana recently noted that “dismissal is improper unless it appears to a certainty on the face of the complaint that the complaining party is not entitled to any relief,” but maintained that the plaintiff was still required to “plead the operative facts necessary to set forth an actionable claim.”<sup>170</sup> The court recognized the recent *Twombly* decision, but did not expressly address the decision because the parties in the case did not make it an issue.<sup>171</sup> Most recently, the Supreme Court of Montana used its standard “no set of facts” language to construe a complaint, maintaining that Montana precedent “reflect[ed] the principle that liberal rules of pleading allow for compliance with the spirit and intent of the law rather than a rigid adherence [for] formula or specific words.”<sup>172</sup> In the Montana case, a plaintiff whose legs were tragically amputated after a workplace accident claimed the dismissal prevented him from “develop[ing] the record through discovery sufficiently to establish the facts necessary to prove his claims.”<sup>173</sup> In response, the court recognized that “further discovery may constitute an appropriate remedy for lack of specificity in a complaint.”<sup>174</sup>

Finally, and somewhat uniquely, the Supreme Court of Tennessee did not address *Twombly* or *Iqbal* in a recent decision, but relied on its previous standard of review for motions to dismiss, which does not mirror the *Conley* “no set of facts” language.<sup>175</sup> The court looked to the facts alleged

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167. See *Herbert*, 744 N.W.2d at 229, 235.

168. See *Charles H. Wesley Educ. Found. Inc. v. State Election Bd.*, 654 S.E.2d 127, 132 (Ga. 2007) (Sears, J., dissenting) (citing *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007)).

169. See *State v. Am. Family Voices, Inc.*, 898 N.E.2d 293, 296 n.1 (Ind. 2009); *McKinnon v. W. Sugar Coop. Corp.*, 2010 MT 24, ¶¶ 12, 17, 355 Mont. 120, 225 P.3d 1221.

170. *Am. Family Voices, Inc.*, 898 N.E.2d at 296.

171. See *id.* at 296 n.1.

172. *McKinnon*, ¶ 17.

173. See *id.* ¶¶ 5, 17.

174. *Id.*

175. See *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009).

on the face of the complaint, but acknowledged that even if the facts were true they would not necessarily show a cause of action.<sup>176</sup> The court maintained that a motion to dismiss would not be sustained unless “there are no facts warranting relief.”<sup>177</sup> The court did not reference *Conley*, or reference a set of material to be proved in the future, but additionally did not refer to a plausibility standard or other language from *Twombly* or *Iqbal*.<sup>178</sup>

Currently, Oklahoma’s statutory pleading requirement for stating a claim for relief is nearly identical in language to Federal Rule of Civil Procedure 8(a)(2), with both requiring the plaintiff to provide “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>179</sup> However, even after the *Twombly* decision, the Oklahoma Supreme Court has continued to cite *Conley* and evaluate claims with liberal treatment of factual statements, legal conclusions, and inferences drawn from the claim.<sup>180</sup> The court routinely cites its standard of review for motions to dismiss stating:

[m]otions to dismiss are generally viewed with disfavor. The purpose of a motion to dismiss is to test the law that governs the claim in litigation, not the underlying facts. A motion to dismiss . . . will not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief. When considering a defendant’s quest for dismissal, the court must take as true all of the challenged pleading’s allegations together with all reasonable inferences that may be drawn from them. . . . If relief is possible under any set of facts which can be established and is consistent with the allegations, a motion to dismiss should be denied. A petition can generally be dismissed only for lack of any cognizable legal theory to support the claim *or for insufficient facts under a cognizable legal theory*.<sup>181</sup>

In addition, the Oklahoma Supreme Court noted that “[i]f [defendant] desires to elicit additional facts or wishes to challenge the claim for lack of sufficient facts to support it, it should resort to discovery or seek summary

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176. *See id.*

177. *Id.*

178. *See id.*

179. Compare FED. R. CIV. P. 8(a)(2), with 12 OKLA. STAT. § 2008(a)(1) (2001).

180. *See Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7 n.13, 176 P.3d 1204, 1208 n.13.

181. *Id.* ¶ 7, 176 P.3d at 1208-09 (second emphasis added) (footnotes omitted).

judgment.”<sup>182</sup> Most recently, the Oklahoma Supreme Court used these same standards to evaluate a claim under a motion to dismiss even after the Supreme Court clarified its opinion on the matter in *Iqbal*.<sup>183</sup>

Oklahoma will almost certainly adopt the *Twombly* decision for antitrust litigation, as the state has chosen to apply federal antitrust case precedent for purposes of the Oklahoma Antitrust Reform Act.<sup>184</sup> Apart from this legislation, the Supreme Court of Oklahoma will have discretion as to whether it is best to maintain the pleading practice in force for decades or adopt a new plausibility standard to be in uniformity with federal precedent in all civil cases. Thus far, the Oklahoma Supreme Court does not appear persuaded by the Supreme Court’s reasoning in *Iqbal* to alter its general civil pleading standards.

#### *IV. Analysis: To Plead But Not to Prove: Proposed Reform for Oklahoma*

While Oklahoma should not wholly adopt the reasoning of *Twombly* and *Iqbal*, it should protect defendants from meritless claims through a more stringent application of current standards. The most controversial phrase on which Oklahoma courts rely is derived from *Conley*’s “no set of facts” language. Oklahoma courts frequently state that “[a] motion to dismiss . . . will not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief.”<sup>185</sup> In order to determine the composition of the Oklahoma standard, and how it should be more accurately applied, this phrase should be closely examined. First, a “claim” is more than a legal theory, and Oklahoma’s statute should require at least minimal factual allegations, with or without an accompanying legal theory, in order to show plaintiff’s right to relief. Second, when considering a defendant’s motion to dismiss, the plaintiff’s factual assertions should be taken as true, giving the Plaintiff the benefit of the doubt, and not unfairly holding him to a plausibility standard.

#### *A. Stating a Claim Still Requires Enough Facts to Put the Defendant on Notice*

With the adoption of the Federal Rules of Civil Procedure and the incorporation of these rules into Oklahoma Pleading Code, Oklahoma adopted “notice pleading.”<sup>186</sup> *Twombly* accurately stated that in notice

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182. *Id.* ¶ 7 n.17, 176 P.3d at 1209 n.17 (emphasis omitted).

183. See *Kirby v. Jean’s Plumbing Heat & Air*, 2009 OK 65, ¶ 5, 222 P.3d 21, 24.

184. See 79 OKLA. STAT. § 212.

185. See *Darrow*, ¶ 7, 176 P.3d at 1208.

186. See 12 OKLA. STAT. ANN. § 2008 committee cmt. (2010) (citing *Conley v. Gibson*,

pleading “[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.”<sup>187</sup> So, while the petition cannot merely engage in a “formulaic recitation of the elements of a cause of action,”<sup>188</sup> the plaintiff is not barred from including the elements of a cause of action — he must merely support those elements with enough factual allegations to put the defendant on notice. Importantly, Oklahoma’s Committee Comment to the newly-adopted notice pleading statute stated that by “omitting any reference to facts” the new standard mirrored the federal standard and helped avoid the confusion previously experienced under code pleading.<sup>189</sup> The Committee Comment *did not eliminate* factual pleading, but rather eliminated references to factual pleading, so that pleaders are not bogged down in differentiating ultimate facts, evidentiary facts, and conclusions of law.<sup>190</sup>

*Twombly* also properly identified a problem with *Conley*’s current application in many courts. The Court noted that *Conley*’s “no set of facts” language “[could] be read in isolation as saying that *any* statement revealing the *theory* of the claim w[ould] suffice unless its factual impossibility may be shown from the face of the pleadings.”<sup>191</sup> In other words, under this misinterpretation, the plaintiff may state his claim by stating his legal theory (i.e., elements of his cause of action), relying on *Conley* to add all factual details later in the litigation. Using this reading of *Conley*, the *Twombly* court feared an abundant abuse of discovery tools and court resources, and relied on these dangers as the primary reasons for requiring more strict factual pleading.<sup>192</sup> *Twombly* cited a Memorandum which reported that “discovery account[ed] for as much as 90 percent of litigation costs.”<sup>193</sup> Similarly, the expense of discovery in antitrust cases and qualified immunity cases is also present for defendants in many other civil suits in federal court and in Oklahoma.

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355 U.S. 41, 47 (1957)) (stating that the new function of the pleadings is to “giv[e] ‘fair notice of what the plaintiff’s claim is and the grounds upon which it rests’”).

187. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007).

188. *Id.* at 555.

189. 12 OKLA. STAT. ANN. § 2008 committee cmt.

190. *See generally id.*

191. *Twombly*, 550 U.S. at 561 (emphasis added).

192. *See id.* at 558-60.

193. *Id.* at 559 (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), (192 F.R.D. 340, 357 (2000) [hereinafter Memorandum]).

A court's resources are wasted when valuable time is stolen with endless motions, requiring defendants to produce documents they do not feel the plaintiff is entitled to without sufficient basic factual matter to apprise the defendant of who is suing him for what in the first place. For these reasons, the *Twombly* Court emphasized that a meritless claim should be identified at the first available opportunity to save time and resources.<sup>194</sup> However, the *Twombly* Court did not utilize another important figure from the same Memorandum, that "in almost 40% of federal cases, discovery is not used at all, and in an additional substantial percentage of cases, only about three hours of discovery occurs."<sup>195</sup> While *Twombly* and *Iqbal* reasoning is easily applied to cases where a defendant is in danger of shelling out 90% of his funds toward discovery, for many defendants, the cost of discovery is minor or non-existent, unless these defendants are settling for the purpose of avoiding expansive discovery.

On top of potential subsection to intrusive discovery, when a defendant is only presented with a recitation of the elements of a statute, the defendant does not have adequate information to respond to allegations, and he must include a plethora of possibly meaningless defenses, lest they be waived.<sup>196</sup> To aid the pleader in determining how many facts to allege, Oklahoma and federal forms give assistance by demonstrating a typical negligence claim.<sup>197</sup> In Oklahoma, the form petition alleges: (1) a date and place of the incident, (2) an allegation that defendant was driving negligently, (3) a detailed account of plaintiff's injuries, and (4) a demand of judgment.<sup>198</sup>

If *Conley* was applied in Oklahoma in an incorrect manner, then unlike the above petition, in a suit for negligence, the plaintiff's mere legal conclusion that the defendant was negligent would suffice to survive a motion to dismiss creating much difficulty for the defendant. For example, suppose a driver has been involved in more than one auto accident, each time rear-ending the car in front of him. The driver has been served in a claim which states that he negligently drove his vehicle, causing neck injury to the plaintiff. Based on the face of the petition, the defendant may not have any idea which of the many drivers is suing him without engaging in his own "fact-finding," having been supplied with only the plaintiff's name

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194. *Id.* at 558.

195. See Memorandum, *supra* note 193, at 357.

196. See FED. R. CIV. P. 12(h)(1)(B)(ii) (stating that a defense is waived if not included in the responsive pleading); see also 12 OKLA. STAT. § 2012(B) (2001) (requiring that "[e]very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required").

197. See FED. R. CIV. P. app. Form 11; see also 12 OKLA. STAT. § 2027 Form 8.

198. See 12 OKLA. STAT. § 2027 Form 8.

and a blanket allegation of the defendant's negligence. Under a misinterpretation of *Conley's* "no set of facts," the plaintiff's claim survives a motion to dismiss and he is permitted to flesh out all details to support his legal conclusion later in the suit, instead of at a minimum apprising the defendant of the date and place of the accident as suggested by Oklahoma and federal forms. And while "statute of limitations" may be a defense for a wreck which occurred five years ago, it would not be appropriate for an accident which occurred only months before. Nevertheless, the defendant would be forced to respond with every defense, whether applicable or not, because of this lack of information.

The result could resemble "boilerplate pleading," where the plaintiff merely recites a statute, planning on engaging in later discovery to drum up a factual claim, and where the defendant is forced to plead every defense in existence because he does not know why he is being sued. The product of this "boilerplate pleading" would ultimately be a waste of judicial time and resources, yielding a petition and responsive pleading that were mere formalities, not serving any informative purpose whatsoever. Under a proper interpretation of *Conley*, plaintiff should be required, in accordance with Oklahoma forms, to plead at the minimum the date and the place of the incident. This information properly puts the defendant on notice of the accident for which he is being sued, without additional fact-finding by the defendant before his answer is due.

Requiring the plaintiff to include factual allegations in his petition is still consistent with the Supreme Court's decision in *Conley*. In *Conley*, the respondents were sued under the Railway Labor Act under which the Court required exclusive bargaining agents to "represent all employees in the bargaining unit fairly and without discrimination because of race."<sup>199</sup> In the plaintiffs' complaint, plaintiffs did not merely allege that they were employees in the bargaining unit who were discriminated against because of their race.<sup>200</sup> This allegation would have been a formulaic recitation of the elements. Rather, the complaint alleged the railroads at which plaintiffs were employed; identified the bargaining agents responsible; alleged that a contract existed protecting the plaintiffs from discharge; included facts of the plaintiff's discharge including dates of the discharge and numbers of black employees discharged and white employees hired; and finally contained further allegations that grievances from the discharged black

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199. *Conley v. Gibson*, 355 U.S. 41, 42 (1957), *abrogated in part by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

200. *See id.* at 42-43.

employees were made to, and ignored by, the bargaining agents.<sup>201</sup> This gave the Court adequate ground for holding that the plaintiffs had stated a claim for relief, and therefore the “no set of facts” language used by the Court referred to *future* factual matter needed to prove the many factual allegations already laid out in the complaint.<sup>202</sup>

In Oklahoma, the purpose of a motion to dismiss for failure to state a claim is to determine, under the facts plaintiff has alleged, if there is a legal theory on which the plaintiff may prevail if any set of facts later proves plaintiff’s factual allegations in the petition.<sup>203</sup> Like *Conley*, the reference to fact-finding in the future does not eliminate the need for factual detail in the petition, as factual allegations should be an indispensable part of the “claim.” Rather, they are two separate standards. The plaintiff must first use enough factual detail to put the defendant on notice. In Oklahoma, this means using factual allegations, possibly together with legal conclusions from which a right to relief may be inferred. The plaintiff must *later* meet a higher standard in his case by showing evidence (a set of facts) to *prove* the factual allegations contained in the petition in order to prevail on his claim. This heightened level of proof may come to play at a motion for summary judgment, or at trial, but it should not be required at the pleading stage.

The requirement of some level of factual detail in the petition is supported by the Oklahoma Supreme Court’s standard that “[a] petition can generally be dismissed *only* for lack of any cognizable legal theory to support the claim *or for insufficient facts under a cognizable legal theory.*”<sup>204</sup> This standard is two-fold. A claim may be dismissed (1) with abundant factual detail, but for which no legal theory exists to support a claim; or (2) with too little factual detail, even if a legal theory in support of those facts exists.<sup>205</sup> In either case the language seems to acknowledge that at least *some* factual detail is mandatory under Oklahoma’s current standard; otherwise, the court would not dismiss a petition for “too little factual detail.” The Oklahoma Court of Civil Appeals explains that “[p]articulate pleading requirements include ‘only the degree of specificity necessary to enable the opposing party to prepare his responsive pleadings and defenses.’ Such specifications include time and place, but not evidence or ‘detailed evidentiary matters.’”<sup>206</sup>

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201. *See id.*

202. *See id.* at 45-46.

203. *See Kirby v. Jean’s Plumbing Heat & Air*, 2009 OK 65, ¶ 5, 222 P.3d 21, 24.

204. *Id.* (second emphasis added).

205. *See id.*

206. *McFeely v. Tredway*, 1990 OK CIV APP 71, ¶ 13, 816 P.2d 575, 578 (citations

In the model petition, the date and place of the incident (facts), combined with negligence (legal theory of relief), are sufficient to put the defendant on notice for *why* he is being sued. In practice, the Oklahoma Supreme Court has held that when a plaintiff “asserted the existence of a contract, the breach thereof, and facts from which it might be determined that the breach was in bad faith” she had sufficiently met requirements of notice pleading.<sup>207</sup> The plaintiff had sufficient factual allegations and a supporting legal theory for relief (bad faith).<sup>208</sup>

If a plaintiff merely alleged “defendant was driving negligently and caused plaintiff injury” or “defendant breached a contract in bad faith” then the plaintiff would have *only* pleaded legal conclusions (recitation of the elements), without *any* factual allegations, and the petition would not be sufficient to give the defendant notice as to why he is being sued. Additionally, if the plaintiff had not pleaded his legal theory supporting relief, he would need to show additional facts from which a legal theory for relief could be identified, such as the fact that the defendant ran a red light, allowing the court to draw a reasonable inference of negligence.

By examining what a “claim” consists of and determining that one important element of a claim in Oklahoma is factual support sufficient to put the defendant on notice, the use of *Conley*’s “no set of facts” language can be adequately reconciled with the *Twombly* holding that deems a “formulaic recitation of the elements” as insufficient for notice pleading. Because the *Conley* standard would still require some level of factual detail in order to put the defendant on notice, it should continue to be used in Oklahoma when evaluating a motion to dismiss.

*B. Give a Plaintiff the Benefit of the Doubt, and Do Not Apply a “Plausibility” Standard*

Both federal courts and Oklahoma courts require a court reviewing a motion to dismiss for failure to state a claim to take all of a plaintiff’s factual allegations as true for the purpose of hearing that motion.<sup>209</sup> A court is *required* to accept all allegations in the plaintiff’s petition as true, not merely those that are “probably true.”<sup>210</sup> As the dissent in *Iqbal* points out,

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omitted).

207. See *Gens v. Casady Sch.*, 2008 OK 5, ¶ 12, 177 P.3d 565, 570.

208. See *id.*

209. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (explaining that “[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)” (internal citations omitted)); *Kirby*, ¶ 5, 222 P.3d at 24.

210. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1959 (2009) (Souter, J., dissenting).

this should mean that unless a plaintiff is making allegations “sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel” then the court does not have discretion of whether or not to believe the plaintiff.<sup>211</sup> Additionally, in Oklahoma, the court must draw all inferences in favor of the plaintiff as true.<sup>212</sup> This is a logical standard, because a plaintiff is not required to *prove* his case at a motion to dismiss, and an ultimate fact may be inferred from a set of “evidentiary facts.” A plaintiff is given the benefit of the doubt, and if *any set of facts* could later be shown which would entitle him to his claim for relief, then his petition should survive a motion to dismiss. Thus, in a petition in which the alleged conduct could be lawful or unlawful, the inference of illegal conduct should be drawn in favor of the plaintiff, as the plaintiff could prove a set of facts later in support of illegal conduct.

However, this standard is directly at odds with *Twombly*’s imposition that the plaintiff’s claim be plausible. Under *Twombly*, if allegations in the complaint are consistent with evidence of both legal and illegal behavior, then the plaintiff’s claim will not survive a motion to dismiss.<sup>213</sup> *Twombly* specifically requires that a complaint “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged” creating a requirement that “asks for more than a sheer possibility that a defendant has acted unlawfully.”<sup>214</sup> But even *Twombly* confounds this standard by then clarifying that “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and ‘that a recovery is very remote and unlikely.’”<sup>215</sup> *Iqbal* then suggests that a court refuse to consider any legal conclusions, and then, evaluating what remains in the petition, determine whether the claim is plausible.<sup>216</sup>

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211. *Id.*

212. See Kirby, ¶ 5, 222 P.3d at 24.

213. A claim consistent with legal and illegal behavior was at issue in both *Twombly* and *Iqbal*. In *Twombly*, an allegation of parallel behavior could have been proved illegal, but could also have been the product of legal happenstance. See Bell Atl. Corp v. Twombly, 550 U.S. 544, 556-57 (2007). In *Iqbal*, while the plaintiff made specific allegations of heinous treatment based on his race, the Court identified that the treatment could have also been (and was more likely) a product of a legitimate government policy enacted after the September 11, 2001 attacks. See *Iqbal*, 129 S. Ct. at 1951.

214. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 554, 556).

215. *Twombly*, 550 U.S. at 556.

216. See *Iqbal*, 129 S. Ct. at 1949-50.

But notice pleading, as evidenced by federal and Oklahoma forms which were created specifically to guide practitioners in pleading their petitions, does not require rejection of legal conclusions.<sup>217</sup> After pleading the statement of jurisdiction (in federal court only), the plaintiff is only advised to plead one sentence about the defendant's specific conduct: that "[o]n date, at place, the defendant negligently drove a motor vehicle against the plaintiff."<sup>218</sup> This means the petition's reference to the defendant's conduct would contain one factual statement: that on a certain date and time the defendant was driving.<sup>219</sup> The second statement shows the plaintiff's right to relief, or a *legal conclusion*: that the defendant was driving negligently.<sup>220</sup> Under *Conley*, the plaintiff has sufficiently put the defendant on notice, but must later prove his allegations through a set of facts to show: that the defendant was driving at that time and place, that he was driving negligently, and the plaintiff sustained injury.

Yet under *Twombly* and *Iqbal* a court could consider the legal conclusion (negligent driving) as not entitled to an inference of misconduct because it is a general allegation, unsupported by any meaningful facts.<sup>221</sup> The plaintiff has not alleged that by "running a red light the defendant was driving negligently" or that "by crossing the median defendant was driving negligently." Rather, the plaintiff has made a limited set of factual statements together with a legal conclusion that *could be proved* later by a set of facts to be uncovered in discovery, such as the production of the police report or the depositions of witnesses to the accident. Because the *Iqbal* court would not entertain the truth of a general allegation of negligence, the plaintiff would have failed to state a claim while using the federal forms. The plaintiff's remaining factual allegation, then put to a "plausibility" test, would not show that the defendant acted unlawfully. The federal form is clearly more aligned with a proper interpretation of *Conley* than the plausibility standard and rejection of legal conclusions in *Iqbal*. If Oklahoma adopts *Twombly*'s approach to legal conclusions, it should first examine the Oklahoma forms, as the same situation would also likely occur in Oklahoma courts.

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217. See FED. R. CIV. P. app. Form 11; 12 OKLA. STAT. § 2027 Form 8 (2001).

218. See FED. R. CIV. P. app. Form 11.

219. See *id.*

220. See *id.*

221. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986), to support the proposition that courts are not under an obligation to accept a legal conclusion as true); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (stating "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

Using similar analysis, the Supreme Court of Vermont recently held that when using the Vermont forms<sup>222</sup> “the term ‘negligently’ [was] a legal conclusion” under notice pleading, and “the complaint include[d] no further factual allegations regarding the specific actions by the defendant that the plaintiff allege[d] amounted to negligence.”<sup>223</sup> The Supreme Court of Vermont affirmed this standard, refusing to adopt *Twombly* noting that the current standard “strike[s] a fair balance, at the early stages of litigation, between encouraging valid, but as yet underdeveloped, causes of action and discouraging baseless or legally insufficient ones.”<sup>224</sup> The purpose of a petition in Vermont, as in Oklahoma, is to “initiate the cause of action, not prove the merits of the plaintiff’s case.”<sup>225</sup> If the plaintiff’s factual allegations are *not impossible*, he should be entitled to proceed past a motion to dismiss.

The application of a plausibility standard and the rejection of legal conclusions is in direct contrast to a policy of taking the plaintiff’s factual allegations as true. Because the federal and Oklahoma forms only require a minimum amount of factual detail in a complaint, a set of facts alone will rarely show a plausible claim without an accompanying legal conclusion. If the plausibility standard was aligned with the notion of giving the plaintiff the benefit of the doubt, then *Iqbal*’s complaint that he was identified, arrested, and detained because of his race/national origin would have been a sufficient, believable inference drawn from his factual allegations of treatment, rather than an inference that was deemed *not as likely* as other possibilities.

Maintaining Oklahoma’s standard of “tak[ing] as true all of the challenged pleading’s allegations together with all reasonable inferences that may be drawn from them”<sup>226</sup> continues to be the most consistent standard with federal and state forms on how to plead. If the limited amount of factual detail in the petition, such as time and place of the incident, is sufficient to put the defendant on notice of the reason he is being sued, and this is supported by a legal theory which could *possibly*

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222. See Vt. Rules of Civ. Pro. app. Form 9 (2000). This Vermont form is nearly identical to the corresponding Oklahoma and federal form. See FED. R. CIV. P. app. Form 11; 12 OKLA. STAT. § 2027 Form 8 (2001); Vt. Rules of Civ. Pro. app. Form 9. The form consists of: (1) On *date* and *place* defendant negligently drove a motor vehicle against plaintiff; (2) a statement of plaintiff’s resulting injuries; and (3) and demand of judgment. See Vt. Rules of Civ. Pro. app. Form 9.

223. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 12, 184 Vt. 1, 955 A.2d 1082.

224. *Id.* ¶ 13.

225. *Id.* (emphasis added).

226. *Kirby v. Jean’s Plumbing Heat & Air*, 2009 OK 65, ¶ 5, 222 P.3d 21, 24.

entitle the plaintiff to relief, then the claim should survive a motion to dismiss. Keeping this standard will ensure that while a plaintiff must plead factual allegations, he need not offer any level of proof of plausibility for these allegations at a motion to dismiss and will be provided an opportunity to engage in discovery to bolster his claim. Granting the motion to dismiss on a plausibility basis means that a plaintiff has received a judgment on his case before the defendant is even required to deny the allegations in an answer.<sup>227</sup>

In light of a proper interpretation of *Conley*, what should happen to the plaintiff, wrongfully convicted of rape, who has been thrown out of the Tenth Circuit for making general allegations? It seems that under either a strict or a liberal pleading standard the Tenth Circuit properly dismissed the wrongfully convicted plaintiff's claims against the police chief in *Bryson v. Gonzales*.<sup>228</sup> The court searched the claim for any factual allegations that would indicate the police chief's involvement.<sup>229</sup> First, the plaintiff's petition recognized that the police chief was not in office during the alleged time evidence was withheld from the plaintiff; and after the police chief was in office, there is no allegation that he was asked for evidence and unconstitutionally refused it to the plaintiff.<sup>230</sup> Second, the plaintiff did not allege any personal participation the police chief had with a police chemist, a second defendant in the case.<sup>231</sup> Finally, as to the remaining defendant, the district attorney, the court acknowledged that the police chief had no supervisory control or power over the district attorney, and so any wrongful actions could not be attributed to the police chief.<sup>232</sup> While the court noted that the plaintiff "may have many valid claims against many people," without any wrongful facts attributable to the police chief a claim against him could not stand.<sup>233</sup>

In sum, in order to "state his claim" a plaintiff must at a minimum include some facts that apprise a defendant of the nature of the suit against him. This must be more than recitation of a legal theory. If a plaintiff does not include a legal theory in his complaint, more than the minimal facts suggested by pleading forms may be needed in order for the court to

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227. Typically, a plaintiff is granted leave to amend his petition. If granted leave to amend, then this judgment would not be "final;" however, the plaintiff would still be punished despite following federal or state forms when pleading his case.

228. See 534 F.3d 1282, 1290 (10th Cir. 2008).

229. *Id.* at 1288-90.

230. *Id.* at 1288.

231. *Id.* at 1289.

232. *Id.*

233. *Id.* at 1290.

determine if a legal theory exists entitling the plaintiff to relief.<sup>234</sup> Once the plaintiff has met this standard, he has succeeded in giving the defendant notice, even if his claim could just as possibly be evidence of legal conduct, so long as the plaintiff could also show evidence of illegal conduct. A plaintiff's claim *should not* be judged by the court to determine plausibility of his claim.

It is important to remember that the defendant may quickly raise a motion for summary judgment if he believes that there is no genuine issue of material fact before the court, meaning that even after discovery (or limited discovery) the plaintiff does not have *any set of facts* available to him to prove his claim. While the defendant in a negligence claim may have been driving in a reasonable manner, on a motion to dismiss the court should still "assume the truth of plaintiffs' allegation[] and draw all inferences in [his] favor"<sup>235</sup> and save "the inquiry into what actions defendants took and the reasonableness of those actions"<sup>236</sup> for a motion for summary judgment. A possible claim is a claim worthy of discovery. Whether the allegations are believable, plausible, or probable are all determinations to be made by the court at a later date.

#### V. Conclusion

In order to "secure the just, speedy, and inexpensive determination of every action"<sup>237</sup> before a court, each court must balance both a plaintiff's and a defendant's right to relief, for what is "just" remains in the eye of the beholder. Defendants would prefer the dismissal of every petition before the court (an arguably inexpensive and speedy determination), and plaintiffs would prefer the most bare allegations to suffice. A middle ground exists which requires a plaintiff to put forward enough facts to put a defendant on notice of why he is being sued. If there are insufficient facts for a court to infer a cause of action, the plaintiff must also claim the basis for his right to relief. But this claim should not then be put to an additional "plausibility" test. This middle ground creates an avenue to eliminate meritless claims early in the litigation process while still allowing plaintiffs

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234. For example, in the pleading form for injury from negligent driving, if the plaintiff had not identified the negligence of the defendant as his basis for relief, he would have needed additional facts allowing the court to infer negligence on the part of the other driver.

235. *Elmaghraby v. Ashcroft*, No. 04-CV-01809-JG-SMG, 2005 WL 235202 at \*16 (E.D. N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part sub nom.* *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

236. *Id.* at \*19.

237. FED. R. CIV. P. 1.

an *opportunity* to prove a claim that, based on the pleading, is legally and factually *possible*. Oklahoma's current standard, employing the "no set of facts" language, may fulfill such a role if properly applied. While the process is arguably less speedy than application of the *Iqbal* plausibility standard, and both the plaintiff and the defendant may incur some expense, refraining from a determination of plausibility when considering a motion to dismiss will, in the long run, be most just.

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