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The New Federal Pleading Standard Ashcroft v. Iqbal

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CASE COMMENTS

THE NEW FEDERAL PLEADING STANDARD

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

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In the wake of the September 11, 2001 terrorist attacks, Javaid Iqbal, a Muslim citizen of Pakistan, was arrested and detained in a maximum security prison in the United States as a person of "high interest."[1] As a detainee, Iqbal alleged he was subjected to severe physical and verbal abuse, unnecessary and abusive strip and body-cavity searches, extended detention in solitary confinement, and interference with his ability to communicate with his counsel and to pray.[2] Iqbal further claimed that he, like thousands of other Arab Muslims, was subjected to these harsh conditions solely because of his race, religion, or national origin and that his continued detention stemmed from a discriminatory policy created by high-level federal officials.[3] As a result, Iqbal filed a claim[4] in federal district court against numerous federal officials including John Ashcroft, former United States Attorney General, and Robert Mueller, Director of the Federal Bureau of Investigation, alleging he was deprived of various constitutional protections.[5]

In response, Mueller and Ashcroft moved to dismiss the complaint for failure to show their involvement in the unconstitutional conduct.[6] The

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1. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942–43 (2009).

2. *Id.* at 1944; *see* Elmaghraby v. Ashcroft, 2005 WL 2375202, at *1, *3 (E.D.N.Y. Sept. 27, 2005), *aff'd*, 490 F.3d 143 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1937 (2009).

3. *Iqbal*, 129 S. Ct. at 1943–44; *Elmaghraby*, 2005 WL 2375202, at *1.

4. Iqbal sought damages pursuant to the principles set forth in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Iqbal*, 129 S. Ct. at 1947–48 (quoting Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001)). In order to state a valid *Bivens* claim, a plaintiff must plead sufficient facts to show that the official adopted and implemented policies for the purpose of discriminating on account of race, religion, or national origin. *Id.* at 1948–49.

5. *Elmaghraby*, 2005 WL 2375202, at *1.

6. Ashcroft and Mueller sought dismissal on qualified immunity grounds, claiming that "[g]overnment officials performing discretionary functions enjoy qualified immunity and are

district court denied the motion to dismiss reasoning the complaint alleged facts on which Iqbal could be entitled to relief.[7] The Second Circuit Court of Appeals affirmed the district court reasoning that Iqbal's pleading was plausible and thus did not require factual allegations to amplify the claim.[8] On review, the Supreme Court rejected the appellate court and HELD, in a 5-4 decision, that Iqbal's complaint was insufficient to state a claim for purposeful and unlawful discrimination.[9]

In order to survive a motion to dismiss, Federal Rule of Civil Procedure 8(a)(2) requires a pleader to set forth a "short and plain statement of the claim showing that the pleader is entitled to relief."[10] The Supreme Court's landmark decision in *Conley v. Gibson*[11] emphasized that Rule 8 imposed only a simplified notice pleading standard.[12] In *Conley*, African American railroad workers sued their union, alleging they were wrongfully discharged when they were fired and replaced by white workers.[13] The union moved to dismiss the complaint for failure to state a claim under Rule 8.[14] The Court held the complaint adequately set forth a claim upon which relief could be granted under the Rule.[15] In appraising the sufficiency of the complaint, the Court applied the accepted rule 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."[16] The Court reasoned that since plaintiffs' allegations, if proven to be true, would entitle the plaintiffs to relief, the complaint was sufficient.[17] In its reasoning, the Court noted "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."[18] To the contrary, the Rules require only "'a short and plain statement of the claim' that will give

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'shielded from liability for civil damages'" so long as their conduct does not violate clearly established constitutional rights. *Id.* at *10.

7. *Id.* at *35.

8. *Iqbal*, 129 S. Ct. at 1942, 1944; *see* Iqbal v. Hasty , 490 F.3d 143 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1937 (2009).

9. *Iqbal*, 129 S. Ct. at 1954.

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

11. 355 U.S. 41 (1957), *overruled in part by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

12. *Id*. at 47–48; *see* A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 402 (Thomson West 2007).

13. *Conley*, 355 U.S. at 42–43.

14. *Id.* at 43.

15. *Id.* at 45.

16. *Id*. at 45–46; *see* Dabney D. Ware & Bradley R. Johnson, *Oncale v. Sundowner Offshore Services, Inc.: Perverted Behavior Leads to a Perverse Ruling*, 51 FLA. L. REV. 489, 499 (1999) (noting that pursuant to *Conley*, "a court granting a motion to dismiss must find that there are no facts which could be proven to support a finding of liability").

17. *Conley*, 355 U.S. at 45–46.

18. *Id.* at 47.

the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[19]

The Supreme Court in *Bell Atlantic Corp. v. Twombly*,[20] reassessed the standard for evaluating the adequacy of pleadings under Rule 8, and appeared to endorse a new paradigm that imposed a higher burden on plaintiffs at the pleadings phase.[21] The Court in *Twombly* concluded the pleading standard under Rule 8 demands more than the notice-pleading standard established in *Conley*.[22] In *Twombly*, subscribers of various cable and Internet services brought a class action against telephone and Internet service providers alleging they engaged in a conspiracy in violation of § 1 of the Sherman Act.[23] Specifically, the subscribers claimed the service providers "engaged in parallel conduct" and "refrain[ed] from competing against one another" in order to inhibit competition among each other.[24] Justice Souter, writing for the Court, held the plaintiffs' action must be dismissed under Rule 8 because the allegations did not give rise to a plausible inference of conspiracy.[25]

According to *Twombly*, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."[26] While the Court conceded that a complaint does not require detailed factual allegations, a plaintiff must include the grounds of his entitlement to relief which "requires more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action."[27] In other words, plaintiffs need to show they are entitled to relief by pleading allegations which plausibly suggest and are not merely consistent with their claim.[28] According to the Court, the plaintiffs' allegation in *Twombly* did not plausibly suggest the defendants engaged in a conspiracy[29] because the allegations amounted to parallel conduct that, although consistent with an unlawful agreement, was more likely explained by free-market behavior than by unlawful conspiracy.[30] The Court required plaintiffs to provide "further factual enhancement" in their pleadings in order to cross "the line between possibility and plausibility of entitlement to relief."[31]

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19. *Id.* (citing FED. R. CIV. P. 8(a)(2)).
20. 550 U.S. 544 (2007).
21. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming May 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442786##.
22. *Iqbal*, 490 F.3d 143, 155–56 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1937 (2009).
23. *Twombly*, 550 U.S. at 550–51.
24. *Id.*
25. *Id.* at 553–54, 570.
26. *Id.* at 570.
27. *Id.* at 555.
28. *Id.* at 557.
29. *Id.* at 564–66.
30. *Id.* at 553–54; *Iqbal*, 129 S. Ct. 1937, 1950 (2009) (citing *Twombly*, 550 U.S. at 567, 570).
31. *Twombly*, 550 U.S. at 557.

In the aftermath of *Twombly*, however, questions remained regarding the applicability, implementation, and scope of the opinion.[32] Specifically, it was unclear whether the Court intended to confine the heightened pleading standard to complex litigation, such as the antitrust claim in *Twombly*, or whether the heightened pleading standard applied more generally to all civil actions.[33]

The instant case clarified the uncertainty surrounding *Twombly*'s scope and application.[34] In its analysis, the Court in *Iqbal* applied the "[t]wo working principles" that underlie its decision in *Twombly* and set forth a new two-pronged approach to assess the sufficiency of a complaint.[35] Furthermore, the Court unequivocally concluded that the *Twombly* pleading standard applies in all federal civil actions.[36]

In the Court's analysis, it first examined the "[t]wo working principles" of *Twombly*: (1) a complaint must do more than make legal conclusions; and (2) a complaint must state a plausible claim for relief.[37] First, while courts must accept the truth of all factual allegations contained in a complaint, the same tenant does not apply to legal conclusions.[38] Accordingly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[39] While legal conclusions may serve as a framework for a complaint, they must be supported by factual allegations in order to be entitled to the assumption of truth.[40] Second, the complaint must show, not merely allege, the

32. Robert L. Rothman, Twombly *and* Iqbal*: A License to Dismiss*, LITIG., Spring 2009, at 1; Andrée Sophia Blumstein, Twombly *Gets* Iqbal*-ed*, TENN. B.J., July 2009, at 23, 23.

33. Posting of Ashby Jones to Wall Street Journal Law Blog, http://blogs.wsj.com/law/2009/05/19/why-defense-lawyers-are-lovin-the-iqbal-decision/ (May 19, 2009, 13:07 EST). *Twombly* expressed concern about the "high cost of antitrust discovery to defendants, in dismissing an antitrust complaint for failing to sufficiently plead allegations of concerted action." Larry Dougherty, Note, *Does a Cartel Aim Expressly? Trusting* Calder *Personal Jurisdiction When Antitrust Goes Global*, 60 FLA. L. REV. 915, 932 n.119 (2008). As a result, numerous lower courts determined the heightened pleading standard established in *Twombly* only applied to "'expensive, complicated litigation' like the antitrust conspiracy litigation claims in *Twombly*." Posting of Yuri Mikulka to LawUpdates.com, http://www.lawupdates.com/tips/entry/iashcroft_v._iqbal_i_raising_the_federal_pleading_standard_for_plaintiffs_a/ (Aug. 18, 2009) (citing Gunasekera v. Irwin, 551 F.3d 461, 466 (6th Cir. 2009); Filipek v. Krass, 576 F. Supp. 2d 918 (N.D. Ill. 2008); *In re* Papst Licensing GMBH & Co. KG Litig., 602 F. Supp. 2d 17 (D.D.C. 2009)). Even when *Iqbal* came to the Second Circuit on appeal, the court noted that *Twombly* created "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings." *Iqbal*, 490 F.3d 143, 155 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1937 (2009).

34. *See* Mikulka, *supra* note 33.

35. *Iqbal*, 129 S. Ct. at 1949–50.

36. *Id.* at 1953.

37. *Id.* at 1949–50.

38. *Id.* at 1949.

39. *Id.* at 1949–50 (noting Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions").

40. *Id.* at 1950.

plausibility of the claim.[41] In other words, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'"[42]

Combining *Twombly*'s two working principles, the Court set forth a new two-pronged approach for federal courts to apply in assessing the sufficiency of a complaint.[43] First, a court should identify pleadings that are merely legal conclusions (therefore not entitled to the assumption of truth) and those that are factual allegations.[44] Next, after identifying the complaint's factual allegations, a court should assume their truth and then determine whether they are plausible.[45] According to the Court, determining the plausibility of a complaint is a fact-specific task that requires a court to use its "judicial experience" and "common sense."[46]

In *Iqbal*, the Court applied the two-part test to evaluate the sufficiency of the complaint.[47] Justice Kennedy, writing for the Court, found that the complaint failed to state a cause of action and should be dismissed.[48] The Court began its analysis by identifying the allegations in the complaint that were not entitled to the truth presumption.[49] Iqbal's allegations that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed" to the discrimination, that Ashcroft was the "principal architect" of the policy, and that Mueller was "instrumental in adopting" the policy were deemed conclusory.[50] The Court compared these allegations to the "bare assertions" plead in *Twombly*, reasoning they amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[51] Accordingly, the Court determined the conclusory statements could not be assumed true.[52]

The Court then considered the factual allegations in Iqbal's complaint to determine their plausibility.[53] In its analysis, the Court assumed true that Mueller and Ashcroft "arrested and detained thousands of Arab Muslim men" and approved the policy "of holding post-September 11th detainees

41. *Id.*
42. *Id*. (citing FED. R. CIV. P. 8(a)(2)).
43. *Id*.; *see* Mintz Levin, *Appellate Advisory: U.S. Supreme Court Addresses Pleading Standard for Federal Civil Lawsuits in* Ashcroft v. Iqbal, May 22, 2009, *available at* http://www.jdsupra.com/post/documentViewer.aspx?fid=bdd79147-4847-4bfe-86e5-ae49025c72c5.
44. *Iqbal*, 129 S. Ct. at 1950.
45. *Id*.; *see* Mintz Levin, *supra* note 43.
46. *Iqbal*, 129 S. Ct. at 1950.
47. *Id*. at 1951–52.
48. *Id*. at 1950–51.
49. *Id*. at 1951.
50. *Id.*
51. *Id*. (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 550 (2007)).
52. *Id.*
53. *Id*.

in highly restrictive conditions of confinement."[54] The Court, however, found these explanations did not plausibly establish Iqbal's claim that he was detained because of his race, religion, or national origin.[55] Instead, the Court focused on the "obvious alternative explanation" for Iqbal's arrest and confinement.[56] The Court emphasized that the perpetrators of the September 11th attacks were Arab Muslim hijackers who were members of al Qaeda, and that al Qaeda is comprised of Arab Muslims and headed by another Arab Muslim.[57] Taking these factors into consideration, the Court found it was a more plausible conclusion that the government focused on Arab Muslims in the aftermath of September 11th because of their "potential connections to those who committed [the] terrorist acts" rather than because of outright discrimination.[58] Accordingly, the Court reasoned that as between the nondiscriminatory intent to detain aliens who potentially had connections to terrorist attacks and the "invidious discrimination" Iqbal claimed, "discrimination is not a plausible conclusion."[59]

The Court noted that even if the facts did amount to a plausible inference that Iqbal's arrest was the result of discrimination, Iqbal would still not be entitled to relief.[60] To prevail in his action, Iqbal would need to allege facts plausibly showing that Ashcroft and Mueller purposefully adopted a policy that discriminated against him solely because of his race, religion, or national origin.[61] The Court reasoned the complaint did not contain any factual allegation to plausibly suggest Ashcroft's and Muller's discriminatory states of mind.[62] In fact, according to the Court, all the complaint "plausibly suggests is 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." Similar to its conclusion in *Twombly*, the Court found Iqbal would need to do more "by way of factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'"[63]

The decision in *Iqbal* has already been touted as one of the most significant decisions impacting civil pleadings,[64] creating broad and far-

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1951–52.
60. *Id.* at 1952.
61. *Id.*
62. *Id.*
63. *Id.* (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
64. *See* Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10, *available at* http://www.nytimes.com/2009/07/21/us/21bar.html (noting "*Iqbal* is the most significant Supreme Court decision in a decade for day-to-day litigation in the federal

reaching implications for both practitioners and parties to a federal civil lawsuit.[65] First, in attempting to clarify the *Twombly* standard and setting forth a new two-pronged approach for evaluating pleadings,[66] the Court may have actually created more uncertainty on how courts should evaluate the sufficiency of pleadings. Second, and most importantly, the present case clarified that *Twombly* applies to all federal civil cases,[67] thereby expanding the heightened *Twombly* standard beyond complex or technical cases.[68]

The clear tension between Justice Kennedy's majority opinion and Justice Souter's dissent illustrates that applying the two-prong test may be more difficult for courts to undertake than it initially appears.[69] As noted above, the first prong of the test requires a court to identify pleadings that are legal conclusions. At the outset, it is not entirely clear how a court should distinguish between a complaint's legal conclusions, which are not entitled to the assumption of truth, and its legitimate factual allegations, which are entitled to the assumption of truth.[70] For example, in the instant case, the majority and the dissent employed different standards to distinguish between legal conclusions and factual allegations. While the majority easily found that many of Iqbal's allegations against Ashcroft and Mueller were too conclusory to be entitled to the assumption of truth,[71] the dissent disagreed and found the same allegations were factual and indeed entitled to the truth presumption.[72] What the majority classified as "bare assertions" and a "formulaic recitation of the elements," the dissent characterized as factual allegations sufficient to state a claim for relief.[73] Even focusing on the majority opinion alone, it is difficult to reconcile the majority's selection of certain allegations as conclusory with its treatment of other allegations as nonconclusory.[74] For example, the majority deemed it nonconclusory, and took as true, that Mueller and Ashcroft "arrested and detained thousands of Arab Muslim men" and approved the policy "of holding post-September 11th detainees in highly restrictive conditions of confinement."[75] Yet, the majority deemed it conclusory that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed" to that discrimination, that Ashcroft was the "principal architect" of the policy and

courts"). In fact, federal judges cited *Iqbal* more than 500 times in just two months following the Court's ruling. *Id.*

65. *See* Mintz Levin, *supra* note 43.
66. *Id.*; *see* Liptak, *supra* note 64.
67. Mintz Levin, *supra* note 43.
68. *Id.*; Rothman, *supra* note 32, at 1.
69. Mintz Levin, *supra* note 43.
70. *Id.*
71. *Iqbal*, 129 S. Ct. 1937, 1951 (2009); *id.* at 1959–60 (Souter, J., dissenting).
72. *Id.* at 1959–61 (Souter, J., dissenting).
73. *Id.* at 1960.
74. *Id.* at 1961.
75. *Id.* at 1951 (majority opinion); *id.* at 1961 (Souter, J., dissenting).

that Mueller was "instrumental in adopting" the policy.[76] Unfortunately, the majority failed to provide reasoning of how to differentiate between the two sets of allegations, only declaring that the latter set of allegations are not entitled to the assumption of truth because of their "conclusory nature."[77] As the dissent illustrates, "there is no principled basis for the majority's disregard of the allegations linking Ashcroft and Mueller to . . . [the] discrimination," yet the majority's acceptance of other allegations that similarly link Ashcroft and Mueller to the discrimination.[78]

Another difficulty presented in applying the two-prong test is determining whether a complaint's factual allegations are plausible. As noted above, once a court determines a pleading's factual allegations, it must determine whether the allegations are plausible. In the present case, the majority failed to establish parameters on how to apply the plausibility standard,[79] instead leaving the plausibility determination to the "judicial experience" and "common sense" of district courts.[80] Justice Souter, who authored the *Twombly* opinion, along with three other Justices, flatly rejected the *Iqbal* majority's approach to evaluating *Twombly*'s plausibility standard.[81] While the majority took into account the "more likely explanations" and the "obvious alternative explanation" to determine the plausibility of the claims,[82] the dissent argued it is not a court's place at the motion-to-dismiss stage to consider whether the allegations are probably true.[83] According to the dissent, a court must take all the allegations as true, no matter how skeptical it may be, unless the allegations are "sufficiently fantastic to defy reality as we know it."[84] As an illustration of claims that a court could properly deem improbable, the dissent pointed to "claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel."[85] Despite the majority finding otherwise, the dissent argued that Iqbal's allegation that Muller and Ashcroft discriminated against him on account of his race, religion, or national origin is not unrealistic or nonsensical and, by itself, is sufficient to make a plausible claim.[86]

The present case certainly leaves questions regarding the proper interpretation and application of *Twombly*'s plausibility standard when

76. *Id*. at 1951 (majority opinion).
77. *Id*.
78. *Id*. at 1961 (Souter, J., dissenting).
79. Mikulka, *supra* note 33.
80. *Iqbal*, 129 S. Ct. at 1950 (majority opinion); *see* Caroline N. Mitchell, David S. Rutkowski, & David L. Wallach, *United States:* Ascroft v. Iqbal*: The New Federal Pledging Standard*, MONDAQ BUS. BRIEF, June 17, 2009, http://www.mondaq.com/unitedstates/article.asp?articleid=81392.
81. *Iqbal*, 129 S. Ct. at 1955 (Souter, J., dissenting) (citation omitted).
82. *Id*. at 1951 (majority opinion).
83. *Id*. at 1959 (Souter, J., dissenting).
84. *Id*.
85. *Id*.
86. *Id*. at 1960.

evaluating the sufficiency of a complaint. Not only is there a clear conflict between the Court's majority opinion and the four dissenting Justices over what constitutes a plausible claim, but the Court creates greater uncertainty by leaving the plausibility determination to the "judicial experience" and "common sense" of district courts and permitting courts to look beyond the complaint to the surrounding factual context to establish whether a claim establishes plausibility.[87] Many commentators have expressed concern that this may result in highly subjective judgments and inconsistent results among trial courts.[88] Some have claimed the instant case enables district judges to "dismiss cases based on their own subjective notions of what is probably true," which will inevitably create disparate and irreconcilable results.[89] At least one legal commentator claims, however, that the judicial discretion the Court imposed on lower courts may not be as significant as many commentators believe.[90]

Undoubtedly, the biggest impact the present case will have on practitioners and parties to federal civil lawsuits is its expansion of the *Twombly* pleading standard to all federal civil cases. Prior to *Iqbal*, some courts were reluctant to expand *Twombly* to all civil suits. *Iqbal*, however, unequivocally "expounded the pleading standard for 'all civil actions,'"[91] suppressing any doubt that the *Twombly* standard should be limited to technical, complex cases.[92] As a result, the instant case will inevitably increase the number of motions to dismiss defendants will file, as well as increase the number of such motions that are granted.[93] Defendants in all civil federal cases can now use *Twombly*'s plausibility standard as a powerful tool to obtain an early dismissal of a claim.[94] By strengthening the "factual particularity that a plaintiff must allege in [all civil]

87. *Id.* at 1950–51 (majority opinion); *see* Mitchell et al., *supra* note 80.

88. *Iqbal*, 129 S. Ct. at 1950–51; *see* Liptak, *supra* note 64; Mitchell et al., *supra* note 80; Rothman, *supra* note 32, at 1; Posting of Jaya Ramji-Nogales to Concurring Opinions, http://www.concurringopinions.com/archives/2009/08/re-reading-iqbal-a-new-take-on-the-12b6-wars.html (Aug. 4, 2009 08:28 EST); *see also* Jason Barlett, Comment, *Into the Wild: The Uneven and Self-Defeating Effects of* Bell Atlantic v. Twombly, 24 ST. JOHN'S J. LEGAL COMMENT 73, 94–97 (2009).

89. Rothman, *supra* note 32, at 1–2.

90. *See* Steinman, *supra* note 21. According to Steinman, although *Iqbal* recognizes a judge's power to disregard "conclusory" allegations at the pleadings phase, this does not necessarily constitute a drastic shift from notice pleading. Before *Iqbal*, the notice-pleading regime gave judges some power to disregard allegations in a complaint. The critical question for judges was whether the pleading constituted "fair notice." Post-*Iqbal*, judges must still determine whether certain allegations in a pleading should be disregarded if they determine the allegations are "conclusory." Therefore, even after *Iqbal*, judges still must answer the crucial question of what a complaint must contain in order for an allegation to be accepted as true.

91. *Iqbal*, 129 S. Ct. at 1953 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555–56 (2007)).

92. Rothman, *supra* note 32, at 1; Mintz Levin, *supra* note 43; Mitchell et al., *supra* note 80.

93. *See* Mikulka, *supra* note 33; Mitchell et al., *supra* note 80.

94. Mikulka, *supra* note 33.

complaint[s],"[95] and in effect creating a universal heightened pleading standard under Rule 8, the Court makes it easier for defendants to dispose of a suit early in the litigation process.[96] Indeed, the ruling makes it more difficult for plaintiffs to coerce settlements from defendants who wish to avoid the expensive costs of discovery.[97]

By the same token, the decision may make it harder for plaintiffs to get past the pleading stage;[98] thereby potentially quashing meritorious claims and "threaten[ing] the entire federal system of notice pleading."[99] The present case may even completely prevent legitimate claims from proceeding to discovery because plaintiffs may not have enough information at the pleading stage to plead sufficient plausible facts.[100] Whereas prior to *Iqbal*, plaintiffs could plead a general description of their claim and rely on the pre-trial process to uncover supporting evidence, post *Iqbal*, this option is no longer available.[101] Instead, many plaintiffs will find themselves in a pleading dilemma.[102] That is, plaintiffs will be required to include certain facts in their pleadings that can only be obtained through discovery.[103] As a result, "potentially meritorious cases [may be] deterred or dismissed with the plaintiff never having had a chance to fully explore the evidence in support of the claim."[104] Particularly in cases such as the present case, which involve high-level governmental officials who "are likely to keep the details of their policies hidden from the public," it may be difficult to obtain the evidence necessary to plead enough plausible facts.[105] For instance, in *Iqbal*, it is not clear how Iqbal could obtain

95. Mintz Levin, *supra* note 43.

96. Jones, *supra* note 33.

97. Mintz Levin, *supra* note 43; David G. Savage, *Narrowing the Courthouse Door*, A.B.A. J., July 2009, at 22; *see* Steinman, *supra* note 21 (noting "[i]f pleading standards are too lenient, plaintiffs without meritorious claims could force innocent defendants to endure the costs of discovery and, perhaps, extract a nuisance settlement from a defendant who would rather pay the plaintiff to make the case go away").

98. Liptak, *supra* note 64.

99. Tom Kurland & Janelle Menendez, *Supreme Court Previews:* Ashcroft, Former Att'y Gen. v. Iqbal *(07-1015) Appealed from the U.S Court of Appeals for the Second Circuit (June 14, 2007) Oral Argument: Dec. 10, 2008*, Fed. Law. Feb. 2009, at 52, 52–53. Ashcroft v. Iqbal, 56 FED. L. 52, 52 (2009).

100. Rothman, *supra* note 32, at 1; Ramji-Nogales, *supra* note 88.

101. Kurland & Menendez, *supra* note 99, at 52; Mitchell et al., *supra* note 80.

102. Savage, *supra* note 97, at 22.

103. *Id.*

104. Posting of Howard Wasserman to PrawfsBlawgl, http://prawfsblawg.blogs.com/prawfsblawg/2009/06/discovery-defaults-and-iqbal.html (June 2, 2009, 06:38 EST); *see* Steinman, *supra* note 21 06:38 EST); *see* Steinman, *supra* note 21 (noting "by increasing the federal pleading standards, meritorious cases could be dismissed at the pleadings phase without plaintiffs having the opportunity to engage in pretrial discovery that, if permitted, would confirm the case's merit").

105. Kurland & Menendez, *supra* note 99, at 52.

evidence that showed Ashcroft and Mueller discriminated against him without being able to question the officials and inspect documents.[106]

Without a doubt, the present case drastically changes the landscape for federal pleading standards and signifies a new era for pleading standards in every civil case in federal court.[107] By extending the heightened pleading standard to all civil actions, the case has broad, far-reaching implications for both practitioners and parties to a civil lawsuit in federal court.[108] Unfortunately, however, the Court in *Iqbal* fails to provide district courts with an adequate framework for evaluating the sufficiency of pleadings.[109] Consequently, district courts are left to wrestle with how to properly interpret and apply the new pleading standard, which will likely result in inconsistent outcomes based on the subjective notions of what trial judges believe is plausible.[110]

In order to help limit the inconsistent results among district courts resulting from differing judicial interpretations of *Iqbal*'s new pleading standard, federal courts should interpret *Iqbal* as being consistent with Rule 8's liberal notice pleading regime.[111] Accordingly, in interpreting and applying the first-prong of the *Iqbal* pleading standard, courts should only dismiss claims which "merely parrot the statutory language of the claims that they are pleading."[112] On the other hand, courts should accept those pleadings which contain specific facts to support the plaintiff's legal claims.[113] Anything other than "abstract recitations of the elements of a cause of action or conclusory legal statements" should be entitled to the assumption of truth.[114] In interpreting and applying the second prong of the *Iqbal* pleading standard, courts should only deny those factual allegations which are "so sketchy or implausible that they fail to provide sufficient notice to defendants of the plaintiff's claim."[115] While employing such a framework will not completely eliminate the judicial subjectivity *Iqbal* created, such an approach will allow courts to focus more on the merits of the claim "rather than on the technicalities that might keep plaintiffs out of court."[116]

106. Savage, *supra* note 97, at 22.
107. Rothman, *supra* note 32, at 2; Steinman, *supra* note 21.
108. Rothman, *supra* note 32, at 2.
109. Steinman, *supra* note 21.
110. *See* Rothman, *supra* note 32, at 2; Mitchell et al., *supra* note 80.
111. *See* Brooks v. Ross, 578 F.3d 574, 580–82 (2d Cir. 2009).
112. *Id.* at 581.
113. *Id.*
114. *See id.*
115. *Id.*
116. *Id.* at 580 (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002)).