LIBERTY UNIVERSITY

Liberty University Law Review

Volume 6 | Issue 1 Article 9

August 2011

# Restoring the Gatekeeper: How Illustrative Notice Pleading Can Save the American Judicial System

John Robert Toy II

# COMMENT

# RESTORING THE GATEKEEPER: HOW ILLUSTRATIVE NOTICE PLEADING CAN SAVE THE AMERICAN JUDICIAL SYSTEM

*John Robert Toy II*[†]

## I. INTRODUCTION

When the United States Supreme Court decided to review its interpretation of the procedural rules concerning pleadings, its decisions in *Bell Atlantic v. Twombly*[1] and *Ashcroft v. Iqbal*[2] became the center of a legal and academic controversy.[3] *Twombly*, though decided in 2002, is one of the twenty cases cited most often in federal court opinions,[4] and *Iqbal* is currently cited by federal courts nearly three hundred times every month.[5] There is general recognition that the combined force of *Twombly* and *Iqbal* changed the interpretation of the pleading standard for a plaintiff's complaint, but the legal community differs on whether this change is a negative or a positive development for civil litigation.

This Comment takes the position that while the intended change in the pleading interpretation was a positive development, the ensuing divisiveness created more problems than solutions. The answer to this is the adoption of illustrative notice pleading. This position may appear to be centrally one of semantics, but it is not. Perception is reality, and there are growing and divergent perceptions that plausibility either completely eviscerated notice pleading[6] or that plausibility merely tweaked notice

---

† Law Review Senior Staff; J.D. Candidate, Liberty University School of Law, May 2012; B.A., Middle Tennessee State University, 2001. I dedicate this Comment to my wife, Addie, and my daughter, Maisie, who both sacrificed much for me to pursue my dream of studying to become an attorney.

1. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2002).

2. Aschcroft v. Iqbal, 129 S. Ct. 1937 (2009).

3. Alexander A. Reinert, *The Costs of Heightened Pleading*, 89 IND. L.J. 119, 120 (2011).

4. Robert D. Owen & Travis Mock, *The Plausibility of Pleadings After* Twombly *and* Iqbal, 11 SEDONA CONF. J. 181, 181 (2010).

5. *Id.*

6. "A procedural system requiring that the pleader give only a short and plain statement of the claim showing the pleader is entitled to relief, and not a complete detailing of all the facts." BLACK'S LAW DICTIONARY 1271 (9th ed. 2010).

pleading. Both fundamentally fail to understand the rationale underpinning plausibility, which was to reassert the proper role of the judge as the gatekeeper of the court. The reexamination of the judge's role as the gatekeeper of the court was a needed and long overdue step for the Supreme Court, but the shrouded mystery of plausibility failed to bolster confidence in pleading procedure. A judge's role as gatekeeper gives him the responsibility to justly and efficiently manage the limited resources of the judicial system. Too narrow an emphasis on either justice or efficiency results in neither being achieved. The judge has the duty to ensure that meritorious claims receive every opportunity for resolution while preventing frivolous claims from draining judicial resources.

Modern pleading standards fall into one of two categories: code pleading, which is more commonly known as fact pleading,[7] required in several state courts, or notice pleading, followed by the federal courts and those states that have adopted the federal standard.[8] This is true despite the new interpretation of the pleading standard. Fact pleading requires the complaint to allege sufficient factual information to establish a cause of action conclusively.[9] Before the establishment of fact pleading, the standard was common-law issue pleading,[10] which required a plaintiff to focus his litigation on a single issue for judicial resolution.[11]

While both fact pleading and issue pleading produced contests over the form of the pleadings rather than the substance of the case,[12] notice pleading moves the focus of contestation to the substance of the case and

---

7. "A procedural system requiring that the pleader allege merely the facts of the case giving rise to the claim or defense, not the legal conclusions necessary to sustain the claim or establish the defense." BLACK'S LAW DICTIONARY 1271 (9th ed. 2010). Fact pleading proved to be hyper-technical and difficult to navigate for plaintiffs, which resulted in the denial of too many legitimate cases.

8. Jay S. Judge, *Federal Notice Pleading vs. State Fact Pleading,* THE LAW OFFICES OF JUDGE, JAMES, & KUJAWA, LLC (last visited Nov. 19, 2010), http://www.judgeltd.com/pdf/federalcourts080806.pdf. This article is a PDF reprint from a publication entitled LAWYERS' FORUM.

9. KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 38-39 (2005).

10. "The common law method of pleading, the main purpose of which was to frame an issue. Cf. *code pleading*." BLACK'S LAW DICTIONARY 1271 (9th ed. 2010) (defining "issue pleading"). Issue pleading required plaintiffs to pursue only one claim at a time, which proved to be an inefficient use of judicial resources. Issue pleading predates the idea that courts could resolve all of the legal or equitable issues arising from an event.

11. CLERMONT, *supra* note 9, at 39.

12. *Id.*

allows greater access to discovery.[13] Notice pleading, as interpreted prior to *Twombly*, overcorrected for the deficiencies in fact and issue pleading, which resulted in both a near abandonment of the judge's role as gatekeeper and a dramatic increase in cost and time for each case by allowing speculative claims admittance to the discovery system.[14] This increased role of discovery—sorting out the validity of claims—created an environment that nourished the filing of meritless lawsuits. These counter-productive results necessitated that the Supreme Court consider whether changing the interpretation of the pleading standard could be a viable solution for courts and litigants. The change in interpretation occurred in *Bell Atlantic v. Twombly*, where the Court established that to survive a motion to dismiss for failure to state a claim,[15] the claims presented in the pleadings must include enough factual allegations for the claim to be plausible.[16] The divisions over the new requirement of plausibility became a vast chasm of opinion and vigorous debate in an area of law generally thought to be routine.

The process of filing a complaint is a ubiquitous part of the American judicial system. Regardless of the position a person takes as to the impact of *Twombly* and *Iqbal*, no legal professional practicing in civil courts can escape the impact of these rulings. This Comment considers the current state of pleadings in the United States by examining the ongoing debate of the effect of *Twombly* and *Iqbal* and by offering a solution to the confusion wrought by plausibility. Understanding the foundation of our pleadings jurisprudence is essential to understanding the nuance of the current debate about pleading standards. Therefore, Part II examines the history of pleading, focusing particularly on the judicial application of procedural pleading rules.[17] Part III discusses the problem of unnecessary confusion caused by the plausibility standard, which created divergent positions put forth by the opposing sides in the debate over pleading standards. This Part examines both those who regard the ramifications of *Twombly* and *Iqbal* negatively and those who view the changes positively.[18] Part IV offers the solution of illustrative notice pleading, which preserves the spirit of *Twombly* by reestablishing the proper judge's role as the court's gatekeeper

13. *Id.*

14. Judge Paul M. Spinden, Lecture at Liberty University School of Law (Oct. 26, 2009).

15. Fed. R. Civ. P. 12(b)(6).

16. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2002).

17. *See infra* Part II.

18. *See infra* Part III.

by requiring plaintiffs to offer actual examples rather than mere conclusions of the elements required for a claim, while not demanding that these factual examples be of such weight as to rise to the strict standard of fact pleading.[19]

## II. BACKGROUND

### *A. Early Pleading Requirements*

American jurisprudence once required federal judges to apply one distinct set of procedural standards to cases in equity and a separate, dissimilar set of procedural rules for cases at law, which were governed by the procedural standards of the state in which that federal court resided.[20] If an attorney specialized either in equity or in legal litigation, that attorney reaped the benefit of uniformity between state and federal courts in his jurisdiction since he needed to master only one set of procedural rules.[21] Attorneys who primarily practiced in the federal court system, however, faced the daunting task of learning and complying with procedural standards that were markedly different in each of the fifty states.[22] This reality, coupled with the growing recognition that legislation was not the most efficient means of crafting procedural rules, prompted Congress to pass the Rules Enabling Act in 1934.[23] This legislation created a standard procedural scheme for all of the nation's federal courts.[24] While this shift resulted in different state and federal procedural rules within each

---

19. *See infra* Part IV.

20. CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 31-34 (2d ed. 1947).

21. Michael C. Dorf, *Meet the New Rules of Civil Procedure: Same as the Old Rules?*, FINDLAW (Wed., July 18, 2007), http://writ.lp.findlaw.com/dorf/20070718.html.

22. *Id.*

23. *History & Society: Rules Enabling Act*, ENCYCLOPÆDIA BRITANNICA (retrieved Oct. 05, 2010), http://www.britannica.com/EBchecked/topic/1305059/Rules-Enabling-Act.

The Rules Enabling Act, 28 U.S.C. § 2072 (1934), states the following:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

24. Dorf, *supra* note 21.

jurisdiction, many states avoided the problems of differing rules by modifying existing state procedural rules to conform to the new federal model.[25]

### *B. The Establishment of a Liberal Federal Pleading Standard*

In 1957, the Supreme Court's holding in *Conley v. Gibson*[26] established the interpretation of the pleading standard that federal courts would follow for nearly half a century.[27] The Court held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[28] This "no set of facts" standard encapsulated the legal community's desire to move far from the exacting requirements of fact pleading.

In *Conley*, employees of a labor union sued their union claiming that union representatives intentionally failed to represent the employees' interests properly due to racial discrimination.[29] The uncontested facts of the case included the employment of the petitioners at the Texas and New Orleans Railroad in Houston; that the union, Local 28 of the Brotherhood, was to represent the employees under the Railway Labor Act; and that the union was empowered to protect employees from discharge and loss of seniority.[30] The allegations centered on the claim that the Railroad discharged or demoted forty-five Negro[31] workers and filled those positions with white workers.[32] The claim that the union failed to protect the interests of the Negro workers in the loss of jobs and loss of seniority for those who

---

25. *Id.*

26. Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 560-61 (2002).

27. *Id.* at 45-46.

28. *Id.*

29. *Id.* at 42-43.

30. *Id.* at 43.

31. It is the author's opinion that the original language from precedential case law should be preserved in academic writing against the modern evolution of language, even when changes to the language are done as a development of cultural sensitivity. The author believes that too much is lost in the true understanding of the rationale and opinions of the courts when the snapshot of that time in history is distorted by modern revisions to the language.

32. *Conley*, 355 U.S. at 43.

were rehired magnified this injury.[33] The complaint concluded by noting the lack of good faith representation by the union, which was a violation under the Railway Labor Act, and asserting that the petitioners were entitled to declaratory judgment, injunctive relief, and damages.[34] Upon review of the pleadings, the Court issued its interpretation of the notice-pleading requirement of Fed. R. Civ. P. 8,[35] which resulted in deference to plaintiffs that effectively abrogated the judge's role as the gatekeeper of the court.

Over time, pleadings became an inconvenient formality—given the low threshold under *Conley*, a pre-printed form for docket entry would likely have sufficed—due to notice pleading's requirement that a claim would proceed to discovery unless it was manifestly impossible to credit any fact in support of the complaint.[36] This eliminated any need for a claimant to weigh the merits of his claim before filing a lawsuit since a court would allow the opportunity to uncover support for the claim during discovery.[37]

---

33. *Id.*

34. *Id.*

35. Fed. R. Civ. P. 8.

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

. . . .

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

36. *Fact Based Pleading: A Solution Hidden in Plain Sight*, UNIVERSITY OF DENVER: INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (last visited Oct. 6, 2010), http://www.du.edu/legalinstitute/pubs/Fact-BasedPleading.pdf.

37. *Id.*

The judge's role as a gatekeeper effectively transformed into one focused on moderating discovery.

In *Conley*, the stated purpose behind a pleading standard that required only fair notice was to allow "liberal opportunity for discovery and the other pretrial procedures."[38] The Court based its rationale on its reading of Fed. R. Civ. P. 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[39] Reasoning that it must give full effect to Fed. R. Civ. P. 8(f)'s call for pleadings not to be construed in a way that renders injustice, the Court believed that pleadings must be a very low hurdle to overcome.[40]

By choosing to frame the standard of pleading so liberally, the Court rejected the idea that "pleading is a game of skill in which one misstep by counsel may be decisive to the outcome."[41] Instead, the Court declared that pleadings should safeguard the principle that court decisions should rely solely on the merits of a case.[42] The actual result of *Conley*, though, was that the meritorious cases the Court sought to protect often ended before trial due to the crushing burden of time and resources expended during discovery.[43] The original purpose of both discovery and summary judgment was to determine if legitimate claims could carry the burden of proof required by law, but this idea has been perverted into a complex and expensive process of ferreting out frivolous claims that should never have seen the inside of a courtroom.[44] From the decision in *Conley* in 1957 until *Twombly* and *Iqbal*, lawsuits survived a motion to dismiss for failing to state a claim despite providing nothing of any substance beyond putting the other party on notice.[45]

---

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

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

40. *Conley*, 355 U.S. at 48. The current rule states "Construing Pleadings. Pleadings must be construed so as to do justice." FED. R. CIV. P. 8(e).

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

42. *Id.*

43. *Fact Based Pleading: A Solution Hidden in Plain Sight,* UNIVERSITY OF DENVER: INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (last visited Oct. 6, 2010), http://www.du.edu/legalinstitute/pubs/Fact-BasedPleading.pdf.

44. *Id.*

45. Alexander A. Reinert, *The Costs of Heightened Pleading*, 89 IND. L.J. 119, 119 (2011).

### *C. The Rebellious Lower Courts and Heightened Pleading Standards*

Before *Twombly*, the Supreme Court consistently rejected attempts to implement a heightened pleading standard.[46] The *Twombly* decision itself references two examples:[47] *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*[48] and *Swierkiewicz v. Sorema*.[49] Both cases proposed the idea that cases involving federal civil rights should be subject to a higher bar for pleadings, akin to that required under Fed. R. Civ. P. 9.[50]

---

46. Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 544, 566 (2010).

47. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 584 (2002).

48. Leatherman v. Tarrant Cnty. Narcotics Intel. & Coord. Unit, 507 U.S. 163 (1993).

49. Swierkiewicz v. Sorema, 534 U.S. 506 (2002).

50. Fed. R. Civ. P. 9.

(a) Capacity or Authority to Sue; Legal Existence.

(1) *In General.* Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) *Raising Those Issues.* To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(c) Conditions Precedent. In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.

(d) Official Document or Act. In pleading an official document or official act, it suffices to allege that the document was legally issued or the act legally done.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.

(f) Time and Place. An allegation of time or place is material when testing the sufficiency of a pleading.

(g) Special Damages. If an item of special damage is claimed, it must be specifically stated.

(h) Admiralty or Maritime Claim.

(1) *How Designated.* If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or

In *Leatherman,* the complaint alleged that law enforcement officers violated the defendants' civil rights during searches for illegal narcotics.[51] The district court dismissed the complaint because it did not meet the heightened pleading standard for civil rights cases against the government.[52] The district court based the heightened pleading standard it applied on Fifth Circuit decisions, which subsequently affirmed the lower court decision.[53] The Supreme Court invalidated the Fifth Circuit's heightened pleading standard.[54] The Fifth Circuit based its heightened pleading requirement on Fed. R. Civ. P. 9, which includes a requirement for particularized pleading,[55] but the Supreme Court rejected this basis, noting that civil rights litigation against municipalities under 42 U.S.C. § 1983[56]

---

> maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.
> (2) *Designation for Appeal.* A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).

51. *Leatherman*, 507 U.S. at 164-65.

52. *Id.* at 165.

53. *Id.* (referencing the lower court decision Leatherman v. Tarrant Cnty. Narcotics Intel. & Coord. Unit, 755 F. Supp. 726 (N.D. Tex. 1991), *rev'd*, 507 U.S. 163 (1993)).

54. *Id.* at 168.

55. Fed. R. Civ. P. 9(b).

56. 42 U.S.C. § 1983 (2006).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Id.*

Section 1983, as this statute is commonly referred to, provides a remedy against the government for violating citizens' constitutional civil rights. It is an exception to the sovereign immunity normally enjoyed by the government and government officials. As evidenced by *Swierkiewicz*, courts routinely attempted to raise the pleading standard as a means of protecting the government from legal actions.

was subject to pleading requirements under Fed. R. Civ. P. 8, not Fed. R. Civ. P. 9.[57]

In *Swierkiewicz,* the complaint alleged that the defendant's employer violated Title VII by undertaking discriminatory practices.[58] The district court dismissed the complaint because it failed to present a prima facie case.[59] The district court based the need for a prima facie showing in the complaint on settled precedent noted by the Second Circuit, which subsequently affirmed the district court's ruling.[60] The Supreme Court granted certiorari and held that the Second Circuit misinterpreted the precedent cited in *McDonnell Douglas Corp. v. Green*,[61] which the Court clarified to be an evidentiary standard requirement of a prima facie case rather than a pleading requirement.[62]

Following *Leatherman* and *Swierkiewicz*, lower courts continued to defy the Supreme Court's holdings against heightened pleading standards.[63] Litigation involving 42 U.S.C. § 1983 particularly drew continued boundary pushing in search of a heightened pleading standard.[64] The issue of requiring a prima facie case in employment cases based on discriminatory conduct also continued to surface despite the holding of *Swierkiewicz*.[65] Despite this resistance from the lower courts, the Supreme Court never waivered in its position that Fed. R. Civ. P. 8 does not require any form of heightened pleading and made specific reference to this fact in its decision in *Twombly*.[66]

---

57. *Leatherman*, 507 U.S. at 168.

58. Swierkiewicz v. Sorema, 534 U.S. 506, 508 (2002).

59. *Id.* at 509.

60. *Id.*

61. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

62. *Swierkiewicz*, 534 U.S. at 510.

63. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003).

64. *See, e.g.*, Gonzalez v. Reno, 325 F.3d 1228, 1235 (11th Cir. 2003); Oliver v. Scott, 276 F.3d 736, 741 (5th Cir. 2002); Ramirez v. Dep't of Corr., 222 F.3d 1238, 1241 (10th Cir. 2000).

65. *See, e.g.*, Totten v. Norton, 421 F. Supp. 2d 115, 120 (D.D.C. 2006).

66. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2002). "In reaching this conclusion, we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9 . . . ." *Id.*

*D. Plausibility*

Despite the growing evidence of a broken system, there was relative quiet on the issue of the pleading standard following *Conley* until the Supreme Court broke the silence in its 2002 decision in *Bell Atlantic v. Twombly*.[67] In *Twombly*, the Supreme Court faced a complaint that adhered strictly to the interpretation of the pleading standard commanded by *Conley* and a split decision on the application of that pleading standard by the district court and the court of appeals.[68] This split provided the necessary opportunity for a renewed look at the interpretation of the pleading standard. Though *Twombly* was a good case for reviewing the pleading standard, the facts of *Twombly* contributed significantly to the post-*Twombly* conclusion that the holding applied only to complex litigation.[69]

*Twombly* featured a complaint that alleged violations of the Sherman Anti-Trust Act.[70] In 1984, AT&T's local phone business was broken apart, resulting in the establishment of Incumbent Local Exchange Carriers (ILECs).[71] In exchange for a regional monopoly on local telephone service, the law prohibited the ILECs from providing long distance telephone service.[72] The Telecommunications Act of 1996 ended this arrangement by putting an end to the ILECs' monopolies and facilitating competition.[73] As a trade-off for the loss of the business monopoly and the introduction into the market of Competitive Local Exchange Carriers (CLECs), the ILECs could now offer customers long distance telephone service in addition to local service.[74]

The issues presented in the litigation centered on accusations that the ILECs engaged in parallel conduct and agreed to forego competing against each other.[75] The Telecommunications Act of 1996 required ILECs to share their networks with the CLECs.[76] The ILECs resisted this sharing

67. *Twombly*, 550 U.S. 544.

68. *Id.* at 546, 552-53.

69. *Judge Posner Questions Reach of High Court Decisions on Civil Lawsuits*, AM. CONSTITUTIONAL SOC'Y BLOG (Aug. 7, 2009, 1:33 PM), http://www.acslaw.org/acsblog/judge-posner-questions-reach-of-high-court-decisions-on-civil-lawsuits.

70. *Twombly*, 550 U.S. at 548.

71. *Id.* at 549.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 550-51.

76. *Id.* at 549.

component of the law, resulting in the Federal Communications Commission revising its interpretation of the Telecommunications Act of 1996 three different times.[77] The complaint suggested that the ILECs restrained trade by parallel conduct, which included inflating consumer charges for services, providing lower quality network connections to CLECs, and billing CLECs in a manner intended to impair the CLECs customer relations.[78] The argument followed that had the ILECs not engaged in such conduct, the CLECs would have been more successful.[79] The complaint additionally alleged that the ILECs agreed to respect one another's territory by not competing against each other.[80] The support for this second claim was that the ILECs were not competing against one another, so they must have agreed not to do so.[81] The essence of the complaint was that there must be something going on or else circumstances would be different.

While the district court recognized that the complaint presented circumstantial evidence meant to be persuasive, it refused to allow that evidence to be a substitute for genuine support of a conspiracy.[82] Recognizing that a circumstantial complaint alone does not actually state a claim, the court granted the defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(6).[83] [84] The complaint presented the trappings of a conspiracy in a magnificent fashion but lacked grounds to support a genuine inference of the conspiracy.[85]

The Second Circuit reversed the district court's decision and held that a complaint did not need a "plus factor" to proceed to discovery.[86] While the Second Circuit recognized that a complainant must plead in a manner sufficient to demonstrate the possibility of a claim, the court strictly

77. *Id.* at 549-50.

78. *Id.* at 550.

79. *Id.* at 551.

80. *Id.*

81. *Id.*

82. *Id.* at 552.

83. *Id.*

84. Fed. R. Civ. P. 12(b)(6).

(b) How to Present Defenses. "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted . . . ." *Id.*

85. *Twombly*, 550 U.S. at 552.

86. *Id.* at 553.

interpreted *Conley* and held that a dismissal could be granted only when no facts could support the leap from possible to demonstrable.[87] According to the Second Circuit's strict reading of the *Conley* standard, if a judge could imagine the existence of supporting facts, then a judge could allow a case to proceed to discovery, even if the parties themselves failed to allege any facts in support of a required element.

Faced with this split reading of the *Conley* interpretation, the Supreme Court granted certiorari and resurrected the question of the proper interpretation of the standard of pleading for Fed. R. Civ. P. 8(a)(2).[88] The underlying task before the Court was to determine what was required under the pleading standard.[89] Considering the absence of any facts and the abundance of accusations, the Court decided the complaint in *Twombly* was not sufficient to overcome the motion to dismiss under Fed. R. Civ. P. 12(b)(6).[90]

To support this decision, the Court methodically examined the general rules of notice pleading based on Fed. R. Civ. P. 8(a)(2).[91] The Court cited *Conley* to reiterate the standard that Fed. R. Civ. P. 8(a)(2) is satisfied by a complaint that is a short plain statement showing an entitlement to relief and putting the defendant on fair notice.[92] The Court cited *Sanjuan v. American Board of Psychiatry and Neurology, Inc.* to dispel the notion that a complaint under siege from a motion to dismiss for failure to state a claim does not require exacting, factual recitations.[93] The Court cited to *Papasan v. Allain* for the rule that courts are not compelled to take simple conclusory labeling and mere narrations of legal causes of action as true, noting that a plaintiff's complaint is required to rise above this manner of pleading.[94] The Court cited to *Neitzke v. Williams* to dispel the idea that a judge's disbelief

87. *Id.*

88. *Id.*

89. *Id.* at 554-55.

90. *Id.* at 570.

91. *Id.* at 555-56 (interpreting FED. R. CIV. P. 8(a)(2)).

92. *Id.* at 555 ("[A]ll 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." (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

93. *Id.* ("complaints need not contain elaborate factual recitations" (paraphrasing Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)).

94. *Id.* ("Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).

in a factual allegation should have any bearing in the decision of dismissal.[95] Finally, the Court cited *Scheuer v. Rhodes* to address the concern that a defendant's odds of recovery are not a factor to be considered in deciding a Fed. R. Civ. P. 12(b)(6) motion.[96]

According to Justice Souter, writing the majority opinion, for a complaint to survive a motion to dismiss, Fed. R. Civ. P. 8(a)(2) required sufficient facts pled to establish plausibility.[97] He noted that "[a]sking for plausible grounds . . . does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the allegation made in the complaint]."[98] Justice Souter reasoned that the introduction of plausibility as the pleadings standard indicated nothing more than the recognition of a line between conclusory statements and genuine facts; a pleading needed only to cross this line to meet the Fed. R. Civ. P. 8(a)(2) requirements.[99]

Recognizing that the Second Circuit's reading of *Conley* is what led to the conclusion that a "claim will suffice unless its factual impossibility may be shown from the face of the pleadings[,]"[100] the Court decided that under such a standard a claimant would never need to plead anything more substantive than conclusory assertions.[101] This was not a standard the Court was willing to adhere to any longer. The *Conley* interpretation eliminated the need for a showing that the complainant actually alleged a claim under which relief could be granted.[102] Nevertheless, the Court's introduction of plausibility as the standard for pleadings created confusion as to the reach of this new standard; did the requirement of plausibility affect all pleadings or merely complex litigation similar to that at issue in *Twombly*, and exactly what was "plausibility"?

---

95. *Id.* at 556 ("What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support." (quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989)).

96. *Id.* ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

97. *Id.*

98. *Id.* (alteration in original).

99. *Id.* at 557 n.5.

100. *Id.* at 561.

101. *Id.*

102. *Id.* at 562.

### *E. The Reach of Twombly Questioned*

#### 1. Confusion Reigns

The confusion engendered by the concurrence of complicated facts and a less-than-clear Supreme Court opinion in *Twombly* spawned commentary as to the scope of *Twombly's* effect on the pleading standard. Although there is not a clear consensus, commentaries center on the idea that *Twombly*, while not limited to its facts, is limited to complex litigation. The belief is that the Court, despite its clear notation to the contrary, enacted a heightened pleading standard.

One early criticism of the Court was that no clear standard emerged for litigators and judges to follow.[103] The sense was that the Court had placed pleadings into unfamiliar territory.[104] The focus of the disquiet was on the term "plausibility," given by the Court as the new threshold for a sufficient complaint.[105] Plaintiffs viewed this shift as a mystery that, if nothing else, certainly foretold of more robust challenges to complaints.[106]

An additional source of confusion surrounding *Twombly* was the Court's decision in *Erickson v. Pardus*,[107] which vacated and remanded the dismissal of a pro se litigant's complaint.[108] The Court cited *Twombly*, but the deficiency of facts in the complaint left many observers with a now-grounded assumption that *Twombly* was applicable to only complex litigation.[109]

#### 2. A Prudent Change

Another reflection of *Twombly* is that plausibility was an overdue change to the pleading standard that focused more on judicial economy.[110] This rationale is that the Federal Rules of Civil Procedure were written at a time when class actions and complex, expensive discovery were unknown.[111] The

---

103. Jason G. Gottesman, *Speculating as to the Plausible: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 17 WIDENER L.J. 973, 1003 (2008).

104. *Id.*

105. *Id.*

106. *Id.*

107. Erickson v. Pardus, 551 U.S. 89 (2007).

108. *Id.* at 94-95.

109. Gottesman, *supra* note 103, at 1003-04.

110. A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 36 (2009).

111. *Id.*

enormous costs associated with modern discovery simply cannot be justified for litigation that presented non-plausible facts.[112] Embracing this idea of judicial economy requires recognition that certain types of cases will necessarily face more difficulties in constructing sufficient complaints.[113] Proponents of this reasoning also suggest that the *Twombly* standard should be relaxed for certain types of cases or that there should be discovery reform to permit limited, early stage discovery to bolster the crafting of the complaint.[114] This compromise suggests a means of maintaining the efficiency wrought by *Twombly* without sacrificing access to justice.[115] Absent any compromise, advocates of a judicial-economy reading of *Twombly* hope that courts will consider the challenges some plaintiffs will face in presenting facts acceptable after *Twombly*.[116]

3. The Parroting Lower Courts

There is also a sense that the lower courts exacerbated the confusion as to *Twombly*.[117] The argument is that the plausibility standard needed refinement by the lower courts.[118] As the circuits applied *Twombly* in practice, the majority of the Court opinions offered no elucidation on the standard since the courts merely quoted the language from *Twombly*—parroting the rule without offering additional guidance.[119] The parroting of the rule by the lower courts, without any additional gloss, deprived the legal community of a bright-line rule regarding the standard of plausibility.[120] Without such a clear rule, there can be nothing but a case-by-case application of plausibility, which accordingly offers no guidance to watching attorneys and potential plaintiffs.[121] Commentators critical of the lower court's refusal to refine the *Twombly* standard believed that it was the

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Anthony Martinez, *Plausibility Among the Circuits: An Empirical Survey of* Bell Atlantic Corp. v. Twombly, 61 ARK. L. REV. 763, 785 (2009).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

duty of the circuits to perform this function until the Supreme Court decided to expound further on its new pleading standard.[122]

4. *Iqbal* Foretold

While the majority of commentary focused on the belief that *Twombly* was limited to complex litigation, the minority recognized that the plausibility standard was meant to be all-encompassing.[123] This minority recognized that steadfast observance of *Twombly* must have far-reaching effects.[124] The minority's reflection on the *Twombly* decision noted how careful the Court was in requiring a close scrutiny of complaints that were conclusory and scant on factual assertions.[125] The plain language of Fed. R. Civ. P. 8(a) requires this close scrutiny.[126] The minority observers noted that any argument as to *Twombly*'s reach being limited inherently adopted the fallacy that the Federal Rules of Civil Procedure apply differently to different cases.[127] While acknowledging that the costs associated with complex litigation may warrant closer scrutiny, the *Twombly* Court's holding was grounded in the language of Fed. R. Civ. P. 8(a), which applies uniformly to all civil cases.[128] It was the language of the rules and not a policy consideration that wrought *Twombly*. Therefore, the holding simply could not be limited to particular cases.[129]

While textual interpretation of the Federal Rules of Civil Procedure produced *Twombly*, the ramifications the decision had on the role of the courts and the effect on discovery cannot be discounted.[130] The expense of civil litigation and the imperatives associated with discovery justified the introduction of a new pleading standard regardless of the Court's reliance on a textual interpretation of the Rules.[131] The genuine risks that too many cases reach settlement based on factors other than the meritorious nature of the claims alone required some prompting for a greater judicial role in

122. *Id.*
123. Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1099 (2009).
124. *Id.* at 1100.
125. *Id.* at 1099.
126. *Id.* at 1099-1100.
127. *Id.* at 1100.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

scrutinizing complaints.[132] *Twombly* embodies this vital, systematic progression toward improving civil litigation.[133]

*F. The Affirmation of Twombly's Reach*

In 2009, *Ashcroft v. Iqbal* imparted the answer that all pleadings needed a plausible claim.[134] In *Iqbal*, the plaintiff claimed deprivation of his constitutional rights by the terrorism policies promulgated by officials in the Bush Administration.[135] The complaint, though, failed to "'nudge[] [ his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"[136]

In addressing the sufficiency of the complaint, the majority opinion, written by Justice Kennedy, quoted from *Twombly* rather than *Conley*; this evidenced that the concept of plausibility was applicable across the federal court system.[137] The Court stressed that Fed. R. Civ. P. 8(a)(2) demanded "more than an unadorned, the defendant-unlawfully-harmed-me accusation."[138] Specifically, it found complaints that offer nothing more than labels, conclusions, listings of elements, or naked assertions to be unacceptable.[139] Justice Kennedy noted "a claim has facial plausibility when the plaintiff pleads factual content that allows [a] court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[140]

The rationale supporting *Twombly* relied on two principles.[141] First, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."[142] The Court, while recognizing the requirement to accept factual allegations, stated that no

---

132. *Id.*

133. *Id.*

134. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

135. *Id.* at 1942. Specifically the plaintiff claimed he was "subjected . . . to harsh conditions of confinement on account of his race, religion, or national origin." *Id.*

136. *Id.* at 1950-51 (alteration in original).

137. *Id.* at 1949. The simple act of Justice Kennedy choosing to quote from *Twombly* rather than *Conley* settled the debate regarding whether *Twombly* was intended to be limited in scope.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

binding authority required a court to accept "as true a legal conclusion couched as a factual allegation."[143] Additionally, Justice Kennedy drew attention to the fact that the Federal Rules of Civil Procedure and the "hyper-technical" form of pleadings that existed prior to the Federal Rules bear no resemblance to one another.[144]

Second, the Court held that the trial judge had discretion to determine when "a complaint that states a plausible claim for relief survives a motion to dismiss,"[145] acknowledging that this determination of plausibility was dependent upon the context of each case.[146] The Justices expected judges to rely on both experience and common sense in determining whether a complaint crossed the threshold of plausibility.[147] Nevertheless, the Court held that an outer limit of this judicial discretion might be found in the understanding that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'"[148]

The transition from the no-set-of-facts standard of *Conley* to the plausibility standard of *Twombly* unleashed a firestorm of controversy centered on whether *Twombly* negatively changed notice pleading or whether the shift was merely a more precise description of the discretion judges historically held.[149] The following section examines the debate over the change in the interpretation of the pleading standard.

## III. THE PLEADINGS CIVIL WAR

### *A. Something Wicked This Way Comes*

While complaints now need to recite a plausible claim, the opinions discussed in this section believe a sea change occurred in civil litigation under *Twombly* and *Iqbal*. It is true that plausibility requires a plaintiff to give more than bare notice, but the arguments proffered here tend to portray this change as a very negative development. This subpart begins

143. *Id.* at 1949-50.

144. *Id.* at 1950.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* (quoting FED. R. CIV. P. 8(a)(2)).

149. *See infra* Part III.

with the dissenting Justices of the Supreme Court[150] and concludes with a discussion of the legislative reaction to *Twombly* and *Iqbal*.[151]

1. The High Court Dissenters

The natural beginning for the discussion of the viewpoint most hostile to plausibility is with the dissenting Justices from *Twombly* and *Iqbal*. The initial criticism leveled was that the new standard dispensed with claims without requiring, at a minimum, that the defendant file an answer.[152] Simply taking the defense attorney's word that there is no substance to the plaintiff's allegations is something the Court should not encourage.[153] At a minimum, the dissenting members of the Court thought that precedent and reason require "some sort of response from petitioners before dismissing a case."[154]

The dissent acknowledged that lawsuits are expensive and that complicated lawsuits can cause confusion for a jury.[155] Justice Stevens, writing for the dissent, proffered that the answer to these concerns is more care and oversight of the case.[156] In building their case, the dissenting Justices considered that history validated the idea that plausibility has no place in modern civil procedure. Justice Stevens examined the word choice of the drafters of Fed. R. Civ. P. 8(a)(2); he argued that the phrase "a short plain statement of the claim showing that the pleader is entitled to relief" was not accidental or caused by inattention.[157] The language was chosen specifically to clarify the Field Code of 1848, which itself was a response to the cumbersome pleading standard of the common law.[158]

When a motion under Fed. R. Civ. P. 12(b)(6) results in a case dismissal, the court dismisses the case with prejudice, thereby disposing of a plaintiff's claim and denying him his day in court.[159] According to Justice Stevens, that result is diametrically opposed to the purpose of notice pleading, which is to

150. *See infra* Part III.A.1.

151. *See infra* Part III.A.2.

152. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 572 (2002) (Stevens, J., dissenting).

153. *Id.*

154. *Id.* at 573.

155. *Id.*

156. *Id.*

157. *Id.* at 573-74.

158. *Id.*

159. BLACK'S LAW DICTIONARY 537 (9th ed. 2010) (defining "dismissed with prejudice").

keep litigants in court so that the dispute can be adjudicated.[160] Additionally, the dissent asserted that notice pleading was better served under the *Conley* standard.[161] In support of this assertion, the dissenting Justices pointed to the twenty-seven jurisdictions that adhere to the notice pleading standard under some iteration of the *Conley* interpretation.[162] The dissent viewed plausibility as nothing more than an ill-informed and hasty departure from a trusted standard.[163]

This trusted standard removed from the judge the burden of discerning the merits of a case, shifting that burden to the adversarial processes of discovery, summary judgment, and trial.[164] In the dissenting Justices' opinion, without properly considering the context of pleadings, the majority applied reasoning more suited for a summary judgment decision.[165] The absence of even basic evidence in the form of affidavits or at minimum, a response from the defendant, rendered plausibility incompatible with precedent.[166]

---

160. *Twombly*, 550 U.S. at 575 (Stevens, J., dissenting).

161. *Id.* at 577.

162. *Id.* at 578 n.5. *See, e.g.*, EB Invs., LLC v. Atlantis Dev., Inc., 930 So. 2d 502, 507 (Ala. 2005); Dep't of Health & Soc. Servs. v. Native Vill. of Curyung, 151 P.3d 388, 396 (Alaska 2006); Newman v. Maricopa Cnty., 808 P.2d 1253, 1255 (Ariz. Ct. App. 1991); Public Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377, 385-86 (Colo. 2001) (en banc); Clawson v. St. Louis Post-Dispatch, LLC, 906 A.2d 308, 312 (D.C. 2006); Hillman Constr. Corp. v. Wainer, 636 So. 2d 576, 578 (Fla. Dist. Ct. App. 1994); Kaplan v. Kaplan, 469 S.E.2d 198, 199 (Ga. 1996); Wright v. Home Depot U.S.A., 142 P.3d 265, 270 (Haw. 2006); Taylor v. Maile, 127 P.3d 156, 160 (Idaho 2005); Fink v. Bryant, 801 So. 2d 346, 349 (La. 2001); Gagne v. Cianbro Corp., 431 A.2d 1313, 1318-19 (Me. 1981); Gasior v. Mass. Gen. Hosp., 846 N.E.2d 1133, 1135 (Mass. 2006); Ralph Walker, Inc. v. Gallagher, 926 So. 2d 890, 893 (Miss. 2006); Jones v. Mont. Univ. Sys., 155 P.3d 1247, 1252 (Mont. 2007); Johnston v. Neb. Dept. of Corr. Servs., 709 N.W.2d 321, 324 (Neb. 2006); Blackjack Bonding v. Las Vegas Mun. Ct., 14 P.3d 1275, 1278 (Nev. 2000); Shepard v. Ocwen Fed. Bank, 638 S.E.2d 197, 199 (N.C. 2006); Rose v. United Equitable Ins. Co., 632 N.W.2d 429, 434 (N.D. 2001); State *ex rel.* Turner v. Houk, 862 N.E.2d 104, 105 (Ohio 2007) (per curiam); Moneypenney v. Dawson, 141 P.3d 549, 551 (Okla. 2006); Gagnon v. State, 570 A.2d 656, 659 (R.I. 1990); Osloond v. Farrier, 659 N.W.2d 20, 22 (S.D. 2003) (per curiam); Smith v. Lincoln Brass Works, Inc., 712 S.W.2d 470, 471 (Tenn. 1986); Ass'n of Haystack Prop. Owners v. Sprague, 494 A.2d 122, 124 (Vt. 1985); *In re* Coday, 130 P.3d 809, 814-15 (Wash. 2006) (en banc); Haines v. Hampshire Cnty. Comm'n, 607 S.E.2d 828, 831 (W. Va. 2004); Warren v. Hart, 747 P.2d 511, 512 (Wyo. 1987).

163. *Twombly*, 550 U.S. at 579.

164. *Id.* at 584-85.

165. *Id.* at 586.

166. *Id.*

Additionally, the plausibility standard was a resurrection of the legal distinctions of factual allegations and legal conclusions.[167] As Justice Stevens considered, that distinction was a relic of fact pleading and had no place in the federal courts.[168] In true paternalistic fashion, he warned that the majority would learn of its folly in due course.[169]

The dissenting Justices in *Iqbal* expressed frustration at the Court's implementation of the *Twombly* interpretation of the pleading standard. Justice Souter claimed the majority misapplied the standard crafted in *Twombly* to the complaint in *Iqbal*.[170] Souter's dissent posited that the Court fundamentally misunderstood what was required under *Twombly*.[171] He noted that *Twombly* did not require a court to test the probability of the truth of an allegation; rather, a court must set aside skepticism and accept the veracity of a complaint at the pre-trial stage of litigation.[172] Justice Souter mockingly asserted that only tales of aliens and time travel should warrant dismissal at such an early stage of court proceedings.[173] The dissent stated that the court must accept the allegations as true and simply inquire whether there is a plausible ground for relief.[174]

2. The Legislative Response

The dissenting Justices were not the only ones second-guessing the majority on the matter of the new pleading standard interpretation. Congress, which has certain authority over the federal courts,[175] took an active interest in the new interpretation of the pleading standard.[176] Former Senator Arlen Specter of Pennsylvania introduced the Notice Pleading

---

167. *Id.* at 589-90.

168. *Id.* (Stevens, J., dissenting).

169. *Id.* at 587. "I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial . . . experience has found no quick and easy short cut for trials . . . ." *Id.*

170. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1955 (2007) (Souter, J., dissenting).

171. *Id.* at 1959.

172. *Id.*

173. *Id.*

174. *Id.*

175. U.S. CONST. art. III.

176. Brian Wolfman, *Senator Specter Introduces Bill to Overrule* Twombly *&* Iqbal, CONSUMER LAW & POLICY BLOG (July 23, 2009), http://pubcit.typepad.com/clpblog/2009/07/senator-specter-introduces-bill-to-overrule-twombly-iqbal.html.

Restoration Act of 2009 in the United States Senate,[177] and Congressman Jerrold Nadler of New York introduced the Open Access to Courts Act of 2009 in the United States House of Representatives.[178] Combined, the two pieces of legislation have thirty-six co-sponsors, all of whom are Democratic representatives.[179] Former Senator Specter firmly believed the Court altered the standard for pleadings negatively.[180] His legislation suggests that the Court gave too much discretion to trial judges—implying that those judges will abuse this discretion to punish disfavored litigants.[181] Forcing a return to the *Conley* standard is the aim of both pieces of legislation.[182] The bills, however, are still in committee; with a new Republican majority in the House and Senator Spector having left the Senate, it is unlikely either bill will become law.[183]

The arguments that the Supreme Court's new interpretation of the pleading standard is a negative development in civil litigation are persuasive. The reality is that plaintiffs' attorneys in federal court now face a situation where the judge will closely scrutinize complaints that contain conclusory statements. The judge is to ensure that the claim, once the conclusory statements are removed, is at least plausible based on the facts presented. Nevertheless, the arguments that the new interpretation of the pleading standard is a positive development present a more compelling case that is examined in the following section.

### *B. Restoring the Gatekeeper*

Before analyzing the standard itself, the Supreme Court majority in *Twombly* chastised the dissent for suggesting that notice pleading did not require the presentation of any facts.[184] The majority contended that the dissent failed to recognize that even under *Conley*-based notice pleading, a claim must make a showing of the right to relief, not merely bandy an

---

177. *Senator Introduces Bill to Address High Court Decision on Civil Lawsuits*, AM. CONSTITUTIONAL SOC'Y BLOG (July 24, 2009, 10:41 AM), http://www.acslaw.org/node/13821.

178. Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

179. *Id.*

180. *Senator Introduces Bill to Address High Court Decision on Civil Lawsuits*, AM. CONSTITUTIONAL SOC'Y BLOG (Jul. 24, 2009, 10:41 AM), http://www.acslaw.org/node/13821.

181. *Id.*

182. *Id.*

183. H.R. 4115.

184. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 n.3 (2002).

accusation.[185] This can be reduced to the understanding that before and after *Twombly* a plaintiff must put a defendant on notice, not simply that he is being sued, but why he is being sued. This subpart begins with the reactions of the Third and Seventh Federal Circuit Courts[186] and concludes with an additional discussion of the rationales supporting *Twombly* and *Iqbal*.[187]

1. The Circuits React

The concern that *Twombly* and *Iqbal* created an opportunity for claims to be dismissed too early must be tempered by the reality that judges must still apply the standard of plausibility to actual cases.[188] The application of the standard is subject to the variables of context, jurisdiction, and judge.[189] This mixture was present before *Twombly* and is an equally determinative force now. An example can be seen in the application of the plausibility standard in two cases by the Third Circuit: *Phillips v. County of Allegheny*[190] and *Fowler v. UPMC Shadyside*.[191] The plausibility standard required one level of specificity for claims relating to negligence but required more particularity for a claim relating to antitrust.[192]

In *Phillips*, the Third Circuit first applied the new plausibility requirement under *Twombly*.[193] In its discussion of how to apply the new standard, the court stressed that the context of the case was the most important factor in determining whether a complaint should be dismissed.[194] The *Phillips* court understood that the Supreme Court in *Twombly* was not enacting a new standard.[195] Rather, the court viewed *Twombly* as a carefully-based restatement of pre-existing principles that a

185. *Id.*

186. *See infra* Part III.B.1.

187. *See infra* Part III.B.2.

188. C. James Zeszutek & Randal M. Whitlatch, *Best Pleading Practices in Federal Court Following* Twombly *and* Iqbal, DINSMORE & SHOHL LLP (Aug. 9, 2010), http://www.dinslaw.com/best_pleading_practices_in_federal_court.

189. *Id.*

190. Phillips v. Cnty. of Allegheny, 515 F.3d 224 (3d Cir. 2008).

191. Fowler v. UPMC Shadyside, 578 F.3d 203 (3d Cir. 2009).

192. Zeszutek, *supra* note 188.

193. *Phillips*, 515 F.3d at 230.

194. *Id.* at 232.

195. *Id.* at 233.

claim had to show the moving party was entitled to relief, not merely make the recitation that the party was entitled to relief.[196]

In *Fowler,* the Third Circuit divided its analysis into two parts for deciding if a complaint should survive a motion to dismiss.[197] The first step was to untangle the factual and legal elements of the complaint leaving only the facts, which must be taken as true, for review at the pre-trial stage.[198] The second step was to determine, based solely on the facts actually alleged, whether the plaintiff showed a plausible claim for relief.[199] Analysis of this test indicates that nothing is genuinely different under *Twombly* and *Iqbal* except that courts are now explicitly required to consider the context of a claim when deciding a motion to dismiss.[200] That it took a new interpretation of the pleading standard to motivate judges to actually examine a case within its context at the pre-trial stage shows just how broken the *Conley* standard was. While it was necessary for *Twombly* and *Iqbal* to retire the *Conley* interpretation of the pleading standard,[201] the cases did not radically alter civil litigation.[202]

The Seventh Circuit, like the Third Circuit, also addressed the application of plausibility in two recent cases.[203] Judge Easterbrook wrote the first case, *U.S. ex rel. Lusby v. Rolls-Royce Corporation*.[204] In the opinion, he defined the necessary detail that a complaint must include "the who, what, when, where, and how: the first paragraph of any newspaper story."[205] Additionally, he wrote that inferred facts were satisfactory since the entire principle of circumstantial evidence is built on treating inferences as factual.[206] Judge Easterbrook concluded that "[i]t is enough to show, in detail, the nature of the charge, so that vague and unsubstantiated accusations . . . do not lead to costly discovery and public obloquy."[207]

---

196. *Id.*

197. Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009).

198. *Id.* at 210.

199. *Id.* at 211.

200. Zeszutek, *supra* note 188.

201. *Id.*

202. *Id.*

203. U.S. *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849 (7th. Cir. 2009); Smith v. Duffey, 576 F.3d 336 (7th Cir. 2009).

204. *Rolls-Royce Corp.*, 570 F.3d at 850.

205. *Id.* at 853 (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)).

206. *Id.* at 854.

207. *Id.* at 854-55.

The second case from the Seventh Circuit was *Smith v. Duffey*.[208] The majority opinion, penned by Judge Posner, noted the court's reluctance to apply *Twombly* to the case before it because *Twombly* dealt with complex litigation and *Duffey* did not.[209] The Supreme Court, however, decided *Iqbal* one week after the Seventh Circuit heard oral arguments in *Duffey*.[210] The Seventh Circuit wrestled with whether *Iqbal* was necessary; in Judge Posner's opinion, the interpretation of the pleading standard was less important than the merits of the case itself.[211] In *Duffey*, he went so far as to comment that the complaint was so deficient that it needed dismissal under any interpretation.[212] Both Judge Easterbrook and Judge Posner believed that the debate over the new interpretation of the pleading standard was overwrought.[213]

2. A Better Understanding

The implementation of *Twombly* and *Iqbal* demonstrates that the introduction of plausibility was an attempt at a better formulation of the discretion judges had under the *Conley* standard but too often failed to exercise. While a review of case law is informative, a closer review of the rationale of *Twombly* and *Iqbal* is also important.

The Supreme Court has the sole authority to overrule its precedents. But the Court did not seek to overturn any precedent from the *Conley* era in either *Twombly* or *Iqbal*.[214] This includes unanimous decisions that flatly rejected the need for greater detail in support of an allegation.[215] The problem with the view that *Twombly* and *Iqbal* were radical departures from notice pleading is due to a misinterpretation of the plausibility

208. *Duffey*, 576 F.3d at 336.

209. *Id.* at 339-40.

210. *Id.* at 340.

211. *Id.*

212. *Id.*

213. Maxwell S. Kennerly, *Posner and Easterbrook Put Brakes on* Ashcroft v. Iqbal, LITIGATION & TRIAL: THE TALES AND TRIBULATIONS OF A PHILADELPHIA LAWYER (Aug. 10, 2009), http://www.litigationandtrial.com/2009/08/articles/the-law/for-lawyers/posner-and-easterbrook-put-the-brakes-on-ashcroft-v-iqbal.

214. Jaya Ramji-Nogales, *Re-reading* Iqbal *(a new take on the 12(b)(6) wars)*, CONCURRING OPINIONS (Aug. 4, 2009, 8:28 AM), http://www.concurringopinions.com/archives/2009/08/re-reading-iqbal-a-new-take-on-the-12b6-wars.html.

215. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Leatherman v. Tarrant Ctny. Narcotics Intel. & Coord. Unit, 507 U.S. 163 (1993).

standard.[216] The requirement that a complaint present a plausible claim is necessary only if the complaint itself is full of conclusory statements that need to be disregarded under a proper motion-to-dismiss analysis.[217] If the complaint is free from conclusory statements, then there is no need for the plausibility test.[218] The real issue is to understand what qualifies as a conclusory statement. A conclusory statement should be understood to mean a claim that fails to relate to any real world person, place, or event.[219] Consider Form 11 of the Federal Rules, "which provides that a complaint would be sufficient simply by alleging 'On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff.'"[220] The view that notice pleading was overruled or that civil litigation suffered a severe undermining via *Twombly* and *Iqbal* is simply wrong. The retirement of the *Conley* interpretation and the introduction of the *Twombly* interpretation were intended to reinstate the proper function of the judge as the gatekeeper of the court. Nevertheless, the concept of plausibility has prevented this goal from being fully realized.

## IV. ILLUSTRATIVE NOTICE PLEADING

The best understanding of the requirement of *Twombly* that a complaint include sufficient facts to present a plausible claim is this: it is a more refined articulation of the standard judges should have followed before *Twombly*. The problem is that the persons who necessarily implement pleading interpretation theory into practice are deeply divided over this understanding because of the uncertainty created by the plausibility standard. [221] The solution is for courts to adopt illustrative notice pleading.

Illustrative notice pleading is the spirit of *Twombly* encapsulated in a standard that eschews the amorphous concept of plausibility in favor of the idea that conclusory statements need to be replaced with factual examples that illustrate that each particular element of a cause of action has substance beyond the mere recitation of the prime facie elements. The requirement of plausibility was, in retrospect, a poor choice of wording by the Supreme Court and needs to be discarded.

---

216. Ramji-Nogales, *supra* note 214.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *See supra* Part III.

The true underlying intent of *Twombly* was to force plaintiffs to provide judges sufficient information in a complaint to recognize that the claim was not frivolous. Rather than focus on the revival of the appropriate role of judges, the concept of plausibility became the focus of the *Twombly* holding, which is why the debate over something as important but mundane as pleadings will not end until the Court recognizes that its goal of more efficient justice is being subsumed in a petty legal squabble that is "sound and fury, signifying nothing."[222]

*Matrixx Initiatives, Inc. v. Siracusano*[223] is emblematic of this problem. Carrying on in apparent ignorant bliss, a unanimous Supreme Court correctly rejected a motion for dismissal under Fed. R. Civ. P. 12(b)(6) that argued that the complaint failed to meet the standard of *Twombly*. The problem is not in the Court's ability to understand its own rule, but rather in the fact that plausibility has so blinded the legal community. Just a portion of a single paragraph[224] in the *Matrixx* opinion prompted an article in Lawyers USA suggesting that this decision was somehow another reinvention of the pleading standard.[225]

The article asserts that *Matrixx* "takes a step back to the fundamental philosophy of notice pleading."[226] This assertion that the *Matrixx* opinion relaxed the pleading standard set by *Twombly* is founded on the belief that *Twombly* rejected notice pleading.[227] This is a perfect example of a legal professional equating plausibility with a heightened standard of pleading.[228] The problem with plausibility is that despite the Court's effort to be clear that notice pleading was still the standard for federal complaints and that plausibility was entirely consistent with the requirements of notice pleading,[229] serious commentary still misunderstands the rationale of the *Twombly* holding. Since plausibility continues to confound the legal

---

222. WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5.

223. Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309 (2011).

224. "We believe that these allegations suffice to 'raise a reasonable expectation that discovery will reveal evidence' satisfying the materiality requirement, *Bell Atlantic Corp. v. Twombly* (citation omitted) and to 'allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,' [*Ashcroft v.*] *Iqbal* (citation omitted)." *Id.* at 1323.

225. Kimberly Atkins, *U.S. Supreme Court Tweaking 'Twiqbal'?*, LAWYERS USA, May 2001, at 1.

226. *Id.* at 27.

227. *Id.* at 1, 27.

228. *Id.*

229. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2002)

community, it is time for the Court not to abandon its rationale of *Twombly*, but to abandon the concept of plausibility. Only by removing the spotlight from plausibility will the Court allow the legal community to understand that *Twombly* was meant to restore the judge's role as gatekeeper.

To further understand how illustrative notice pleading is the solution to the problem of plausibility, it is helpful to understand how illustrative notice pleading works. Illustrative notice pleading is analogous to creating a resume. Whether recently laid-off or a freshly-minted graduate, any successful resume writer must focus his resume on the intended reader; the same is true of a complaint.[230] In addition, resumes need to *show* the reader the characteristics possessed by the applicant rather than *tell* the reader.[231] For example, a resume should not state that the applicant is "an excellent writer," but it should explain that the job-seeker wrote and published three law review articles during his first year of law school. Similarly, no job seeker would ever consider asserting on his resume that he was simply well educated. Rather, an applicant offers in detail the educational credentials he has earned through years of hard work.

Similarly, no woman would believe that she is loved by a man who is distant and cold toward her merely because he tells her he loves her. Rather, he needs to show her he loves her. We instinctively know in every facet of our lives that *showing* something bears the mark of truth that *telling* can never replicate. Yet, in our legal system, we have for far too long tolerated the insincerity of *telling*. It is this narrative *showing* of the plaintiff's story that makes illustrative notice pleading the answer to the confusion caused by the plausibility standard.

The Supreme Court never intended a return to fact pleading or sought to destroy civil procedure as we knew it. Rather, the Supreme Court simply wants a plaintiff who wishes to utilize the judicial system to *show* why he is entitled to relief instead of merely state that he is. Plausibility failed to achieve this goal, and courts should now turn to illustrative notice pleading to bring about the stability that our courts so desperately need.

---

230. *See How to Write a Masterpiece of a Resume*, ROCKPORT INSTITUTE, http://www.rockportinstitute.com/resumes.htm l (last visited Sept. 14, 2011).

231. *See Resume Tips*, MIT CAREER DEVELOPMENT CENTER, http://www.mit.edu/~career/guide/resumes.html (last updated Tues. Aug. 23, 2011, 9:39:44 AM).

## V. CONCLUSION

The proper role of a judge is to serve as a gatekeeper of the judicial system. With limited resources and time, it is simply not practical, and may in fact be impossible, for a court system to resolve every dispute that comes before it. A judge is the only one positioned to ensure that judicial resources are used wisely and efficiently. Under the *Conley* interpretation of the pleading standard, judges were permitted to abandon this duty. The "no set of facts" standard became an excuse for judges to avoid becoming involved in a case until trial, the constant hope being that the case would be settled.

Adherence to the *Conley* interpretation of the pleading standard essentially abrogated the judge's responsibility to manage the judicial resources under his charge. The process of pleading devolved into a near-meaningless exercise of paperwork. Plaintiffs had no incentive to weigh the merits of cases before filing a lawsuit because the liberal nature of discovery allowed for speculative litigation. The result too often was that defendants chose to settle meritless claims as opposed to enduring the costs and burdens of discovery.

The remedy for the abuse of discovery by plaintiffs and abdication by judges of the role as gatekeeper arrived in *Twombly*. Under the *Twombly* standard of plausibility, the Court intended to force judges to consider pleadings from a different perspective. The Court tried to reinforce this idea in *Iqbal* by suggesting that a court is "to draw on its judicial experience and common sense" in determining plausibility.[232] This was an attempt at clarifying the role of the judge revived under *Twombly* rather than a heightening of the pleading standard. The Court did not intend the stringency of the pleading standard to be substantively greater than under *Conley*. Despite this, the Court's decision to introduce plausibility resulted in unnecessary confusion and frustration.

Courts should recognize that the plausibility standard became a great harm to the goal of efficient jurisprudence and that redacting it from precedent will pave the way for the ascendancy of illustrative notice pleading. A revitalization of the authority that judges need to wield to bring sanity back to America's judicial system is a noble goal. The common sense and prudence supporting illustrative notice pleading will ultimately save the American judicial system.

---

232. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).