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**The Rise and Fall of Plausibility Pleading?**

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69 VANDERBILT LAW REVIEW 333 (2016)



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# The Rise and Fall of Plausibility Pleading?

Adam N. Steinman\*

*The Supreme Court's 2007 decision in Bell Atlantic Corp. v. Twombly and its 2009 decision in Ashcroft v. Iqbal unleashed a torrent of scholarly reaction. Commentators charged these decisions with adopting a new pleading regime, "plausibility pleading," that upended the notice-pleading approach that had long prevailed in federal court. Whether a complaint could survive a motion to dismiss—it was argued—now depends on whether the court found the complaint plausible, allowing courts to second-guess a complaint's allegations without any opportunity for discovery or consideration of actual evidence. Lower courts began to cite Twombly and Iqbal at a remarkably high rate, and empirical work revealed their effect on both dismissal rates and litigant behavior.*

*Although Twombly and Iqbal were troubling on many levels, the rise of a newly restrictive form of plausibility pleading was not inevitable. There was—and still is—a path forward that would retain the notice-pleading approach set forth in the text of the Federal Rules themselves and confirmed by pre-Twombly case law. This Article describes this reading of Twombly and Iqbal, and explains how more recent Supreme Court pleading decisions are consistent with this understanding. It is crucial, however, that these post-Iqbal decisions and the approach to pleading they reflect receive the same attention that accompanied Twombly, Iqbal, and the rise of plausibility pleading. Otherwise the narrative that Twombly and Iqbal compel a more restrictive pleading standard may become further entrenched, compounding the adverse effects of those problematic decisions.*

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## INTRODUCTION

With all apologies to T.S. Eliot, sometimes the world does end with a bang.<sup>1</sup> At least, that’s how it seemed after the Supreme Court

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1. T.S. ELIOT, *THE HOLLOW MEN* (1925) (“This is the way the world ends. Not with a bang but a whimper.”).

decided *Bell Atlantic Corp. v. Twombly*<sup>2</sup> and *Ashcroft v. Iqbal*.<sup>3</sup> According to the conventional wisdom, these decisions imposed a new regime of plausibility pleading, discarding the notice-pleading approach that—for more than half a century—allowed disputes to be resolved on their merits after a meaningful opportunity for parties to uncover relevant evidence.<sup>4</sup> *Twombly* and *Iqbal* unleashed a torrent of scholarly reaction—largely critical—with many arguing that plausibility pleading had fundamentally recalibrated federal litigation, undermining access to justice and the private enforcement of substantive law.<sup>5</sup>

In more recent decisions on pleading standards, however, the Supreme Court has applied *Twombly* and *Iqbal* in ways that confirm and reinvalidate the simplified notice-pleading approach that the Federal Rules’ original drafters put into place.<sup>6</sup> This may come as a

2. 550 U.S. 544 (2007).

3. 556 U.S. 662 (2009).

4. See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 825 (2010); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 19 (2010) [hereinafter Miller, *Double Play*]; Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 331 (2013) [hereinafter Miller, *Deformation of Federal Procedure*]; Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1207–08 (2014); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527 (2010); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–32 (2008); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1848 (2014); Sheldon Whitehouse, *Restoring the Civil Jury’s Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1260 (2014); see also *infra* Part I.D (discussing other critiques).

5. See *supra* note 4; see also David Freeman Engstrom, *The Twiqlbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1204 (2013) (“Few developments in civil procedure have caused anything like the furor that has greeted the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* . . .”); Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1181 (2013) (noting that *Twombly* and *Iqbal* “generated intense reactions”). Not all of the academic commentary was critical of plausibility pleading, however. See Andrew Blair-Stanek, *Twombly Is the Logical Extension of the Mathews v. Eldridge Test to Discovery*, 62 FLA. L. REV. 1, 4 (2010) (“*Twombly* is not the radical departure alleged by Justice Stevens’ dissent and by a number of commentators, but rather is a logical progression in the Court’s ever-expanding application of the *Mathews* balancing test.”); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POLY 61, 64 (2007) (agreeing with the judgment in *Twombly*, but based on reasoning not expressed in the majority opinion); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1064–65 (2009) (asserting that a plausibility standard is “an appropriate and necessary standard”).

6. For some early recognition that the Court’s post-*Iqbal* pleading decisions reflect a more lenient approach than the critiques of *Twombly* and *Iqbal* would suggest, see Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 465 (2013), which states that *Skinner v. Switzer*, 562 U.S. 521 (2011), and *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011), “may indicate that the sky is not falling”; and Adam N. Steinman,

surprise—presumably a welcome one—to the many critics of plausibility pleading.<sup>7</sup> But if one takes the reasoning of *Twombly* and *Iqbal* seriously, there was indeed a path forward that would retain the notice-pleading approach set forth in the text of the Federal Rules and confirmed by pre-*Twombly* case law.<sup>8</sup> That path was always the best way to make sense of *Twombly* and *Iqbal*, and it appears to be the path the Court itself has taken in more recent decisions.<sup>9</sup>

This is not to defend *Twombly* and *Iqbal*. They were problematic, result-driven decisions whose reasoning was—in many important respects—incomplete, confusing, internally contradictory, or all of the above.<sup>10</sup> Critics of *Twombly* and *Iqbal* expressed legitimate concerns about where the logic of those decisions might lead. Indeed, empirical studies suggest that *Twombly* and *Iqbal* have had a significant effect on lower-court decisions and litigant behavior.<sup>11</sup> But it does not follow that lower courts have been correct to read and apply *Twombly* and *Iqbal* the way that they have.

This Article uses the Court's more recent decisions, as well as the logic of the *Twombly* and *Iqbal* decisions themselves, to challenge the doctrinal misperceptions about *Twombly* and *Iqbal* that have proven to be so influential among courts and commentators. Part I begins by summarizing federal pleading standards from the adoption of the Federal Rules in 1938 through seven decades of Supreme Court case law enshrining the well-known notice-pleading approach. It then describes *Twombly* and *Iqbal* and the initial reaction to those controversial decisions.

Part II examines the majority opinions in *Twombly* and *Iqbal* and argues that they did not impose a newly restrictive regime of plausibility pleading. Taking those opinions at face value, their approach to pleading did not make the viability of a complaint depend

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*To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1763–65 (2013), which argues that *Skinner* and *Matrixx* are in tension with the view that *Twombly* and *Iqbal* command a stricter approach to pleading. *Skinner*, *Matrixx*, and more recent Supreme Court decisions are discussed *infra* Part III.

7. Admittedly, the Supreme Court's recent track record does not inspire confidence when it comes to procedural issues that affect individuals' ability to hold more powerful interests accountable in federal court. See, e.g., Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1470–72 (2013); Miller, *Deformation of Federal Procedure*, *supra* note 4, at 310; Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 81–84, 91–104, 161–68 (2011); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 358–66 (2010); Subrin & Main, *supra* note 4, at 1869.

8. See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1324–41 (2010).

9. See *infra* Part III.

10. See *infra* notes 174–176 and accompanying text.

11. See *infra* notes 96–101 and accompanying text (describing empirical studies).

on whether the court finds the claim “plausible,” and it did not give courts carte-blanche to second-guess a complaint’s allegations at the pleading phase. Although *Twombly* and *Iqbal* recognized that a court need not accept as true mere “legal conclusions,”<sup>12</sup> the ability to disregard conclusory allegations should not allow courts to treat complaints any more skeptically than they could under a notice-pleading approach. The Federal Rules’ text and structure remain unchanged, and the Court has repeatedly indicated that to impose stricter pleading standards would require an amendment to the Federal Rules themselves. Indeed, *Twombly* quoted, cited, and endorsed several of the Supreme Court’s landmark notice-pleading cases, and it explicitly embraced the “fair notice” standard that has been at the core of Supreme Court’s approach since *Conley v. Gibson*<sup>13</sup> in 1957.<sup>14</sup> Accordingly, not only is it possible to apply *Twombly* and *Iqbal* in a way that preserves notice pleading, it is the best way to make sense of what those decisions actually say.

Part III analyzes the Supreme Court’s post-*Iqbal* pleading decisions. Several cases during the last five years confirm the understanding of *Twombly* and *Iqbal* described in Part II. Last Term, for example, in *Johnson v. City of Shelby*,<sup>15</sup> the Court made clear that a complaint passed muster as long as it “stated simply, concisely, and directly events that, they alleged, entitled them to damages.”<sup>16</sup> When the Court’s recent decisions have referred to plausibility, they have done so in a way that—properly understood—reflects a legitimate inquiry into the legal sufficiency of the plaintiff’s claim.<sup>17</sup> These decisions, therefore, refute two presumptions about how plausibility pleading operates to heighten pleading standards in federal court. An assessment of the complaint’s factual “plausibility” is not the crucial inquiry in deciding whether it survives a motion to dismiss. And courts do not possess newfound power to second-guess a complaint’s

12. See *infra* Sections I.B–C.

13. 355 U.S. 41 (1957).

14. As explained *infra*, notes 63–65 and accompanying text, *Twombly* did “retire” one phrase from *Conley*: the statement 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.” *Conley*, 355 U.S. at 45–46. However, *Twombly* disclaimed only an extremely literal reading of that language and left its true meaning intact. See *infra* notes 63–65, 126–141 and accompanying text.

15. 135 S. Ct. 346 (2014).

16. *Id.* at 347; see also *id.* (“Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim.”). The *Johnson* decision is discussed in more detail *infra* Section III.E.

17. *Johnson*, for example, referred to whether a claim had “substantive plausibility.” *Id.* Other post-*Iqbal* Supreme Court decisions can also be understood in this way. See *infra* Part III.

allegations before any opportunity to conduct discovery or to consider actual evidence. To borrow a phrase from *Twombly* itself, the notion that plausibility is the animating force behind the Court's recent pleading jurisprudence has "earned its retirement."<sup>18</sup>

Finally, Part IV confronts some important questions that courts are likely to face going forward. Noting some continued uncertainty in the lower federal courts, it proposes additional clarifications to ensure that *Twombly* and *Iqbal* are properly aligned with a well-functioning notice-pleading framework. It also addresses the role that potential discovery burdens should—or more precisely should not—play when considering motions to dismiss for failure to state a claim.

### I. *TWOMBLY*, *IQBAL*, AND THE RISE OF "PLAUSIBILITY PLEADING"

This Part describes federal pleading standards beginning with the adoption of the Federal Rules of Civil Procedure in 1938. It outlines Supreme Court case law setting forth the well-known notice-pleading approach, and then details the Court's decisions in *Twombly* and *Iqbal*. It concludes by summarizing the initial reaction to *Twombly* and *Iqbal* and the early impact of those decisions in the lower federal courts.

#### A. *Pleading Standards During the Federal Rules' First Seven Decades*

Rule 8 of the Federal Rules of Civil Procedure provides that, in order to state a claim, a complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>19</sup> This pleading standard was a core feature of the Federal Rules when they were initially adopted in 1938.<sup>20</sup> It was meant to provide a simpler approach than had traditionally been required under either common-law pleading or code pleading, in order to facilitate determinations of cases on their merits.<sup>21</sup>

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18. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007).

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

20. Charles E. Clark, *Simplified Pleading*, in 2 FED. RULES DECISIONS 456, 462 (1941) ("Simplified pleading is basic to any program of civil procedural reform . . . . That is the course of the new Federal Rules of Civil Procedure . . . .").

21. See Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1584 (2014) ("In rejecting common law pleading, . . . the drafters of the 1938 Federal Rules embraced the insights of legal realism. Pleadings are an inferior method to find out what actually happened . . . ."); Miller, *Deformation of Federal Procedure*, *supra* note 4, at 288–89:

[T]he distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation . . . . Because the rulemakers were deeply steeped in the history of the debilitating technicalities and rigidity that characterized the prior English and

The Federal Rules illustrated this simpler approach with several hypothetical complaints that were included in the Rules' appendix. One of them provided that a negligence complaint would satisfy Rule 8 by alleging: "On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff."<sup>22</sup> A hypothetical patent infringement complaint, using the example of electric motors, provided that it would be sufficient to allege: "The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention."<sup>23</sup>

Judge Charles Clark, the chief drafter of the original Federal Rules, believed that these sample complaints were "the most important part of the rules" as far as illustrating Rule 8's pleading standard.<sup>24</sup> As of December 1, 2015, the forms that had long appeared in the Federal Rules' Appendix have been removed, and Rule 84—which had provided the forms "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate"<sup>25</sup>—has been abrogated.<sup>26</sup> The Advisory Committee Note to this 2015 amendment states explicitly, however, that the elimination of the forms "does not alter existing

American procedural systems—that is, the common law forms of action and then the codes—the Rules established an easily satisfied pleading regime for stating a grievance that abjured factual triviality, verbosity, and technicality.

Charles E. Clark—who was the chief drafter of the original rules as well as dean of the Yale Law School and, later, a federal judge on the U.S. Court of Appeals for the Second Circuit—put it this way: "[I]n the case of a real dispute, there is no substitute anywhere for a trial. To attempt to make the pleadings serve as such substitute is in very truth to make technical forms the mistress and not the handmaid of justice." Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 319 (1938). For more on Clark's view of the proper role of pleading standards, see Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 179–89, 191–93, 196–97 (1958) [hereinafter Clark, *Pleading Under the Federal Rules*]; Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990–94 (2003); and Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 917–19, 923–32 (1976).

22. FED. R. CIV. P. Form 11, ¶ 2 (2014), reprinted *infra* Appendix B. Until 2007, this form appeared as Form 9 and was drafted slightly differently. See *Twombly*, 550 U.S. at 575–76 (Stevens, J., dissenting) (quoting former Form 9: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 n.4 (2002) (same). The 2007 change occurred as part of a general restyling of the Federal Rules, which was intended "to be stylistic only" and "to make no changes in substantive meaning." FED. R. CIV. P. 1 advisory committee's notes to 2007 amendment.

23. See FED. R. CIV. P. Form 18, ¶3 (2014), reprinted *infra* Appendix B. This language derived from Form 16 of the original rules, but became Form 18 in 2007.

24. Clark, *Pleading Under the Federal Rules*, *supra* note 21, at 181:

What we require [in Rule 8] is a general statement of the case . . . . We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms.

25. FED. R. CIV. P. 84 (2014) (abrogated 2015).

26. FED. R. CIV. P. 84 advisory committee's notes to 2015 amendment.



pleading standards or otherwise change the requirements of Civil Rule 8.”<sup>27</sup>

For the Federal Rules’ first seven decades, Supreme Court case law elaborated on the simplified approach to pleading commanded by the text of Rule 8 and these illustrative forms. In 1957, *Conley v. Gibson* made clear that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”<sup>28</sup> Rather, a complaint is sufficient as long as it “give[s] the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>29</sup> During the half-century that followed *Conley*, the Court repeatedly quoted and applied the “fair notice” standard<sup>30</sup>—so much so that the federal approach enshrined in Rule 8 came to be known as “notice pleading.”<sup>31</sup>

This approach, the Court would later emphasize, was compelled by the text of Rule 8 itself: “In *Conley v. Gibson*, . . . we said in effect that the Rule meant what it said.”<sup>32</sup> When presented with arguments

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27. *Id.* As discussed in more detail *infra* note 163, long-standing forms such as the complaints in Form 11 and Form 18 should continue to inform federal courts’ approach to pleading even though the Appendix of Forms has been deleted. Given their continued relevance—and because such abrogated content may be harder to find as electronic sources of information are updated to reflect the current Rules—several of the forms relevant to pleading standards are reproduced in Appendix B of this Article.

28. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

29. *Id.*

30. *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley*, 355 U.S. at 47); *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (same).

31. *E.g.*, *Swierkiewicz*, 534 U.S. at 511 (describing the federal approach as “a notice pleading system”); *Leatherman*, 507 U.S. at 168 (noting “the liberal system of ‘notice pleading’ set up by the Federal Rules”); *Thomas v. Independence Twp.*, 463 F.3d 285, 295 (3d Cir. 2006) (“[T]he notice pleading standard of Rule 8(a) applies in all civil actions, unless otherwise specified in the Federal Rules or statutory law.”); *see also* *Mayle v. Felix*, 545 U.S. 644, 669 (2005) (contrasting the Court’s approach to habeas corpus petitions with “the generous notice-pleading standard for the benefit of ordinary civil plaintiffs under Federal Rule of Civil Procedure 8(a)”). It is worth noting that Charles Clark himself had some reservations about framing the pleading standard in terms of notice; he wrote:

The usual modern expression, at least of text writers, is to refer to the notice function of pleadings . . . . This is a sound approach so far as it goes; but *content must still be given to the word “notice.”* It cannot be defined so literally as to mean all the details of the parties’ claims, or else the rule is no advance.

Clark, *supra* note 20, at 460 (emphasis added). For convenience, however, this Article will use the phrase “notice pleading” to refer to the pleading standard that prevailed before *Twombly*, if only because the Supreme Court itself has embraced that phrase. By contrast, the Court has still never used the phrase “plausibility pleading”; a Westlaw search for that phrase in the Supreme Court database returned zero cases.

32. *Leatherman*, 507 U.S. at 168:

Rule 8(a)(2) requires that a complaint include only “a short and plain statement of the claim showing that the pleader is entitled to relief.” In *Conley v. Gibson*, . . . we said in effect that the Rule meant what it said: “The Federal Rules of Civil Procedure do not

that heightened pleading standards would be desirable for certain kinds of issues in certain kinds of cases, the Court invariably responded that such concerns—however justified as a practical matter—could not be squared with the Federal Rules as they were written, and therefore could only be implemented “by the process of amending the Federal Rules, and not by judicial interpretation.”<sup>33</sup>

Indeed, the Court made one of its most robust reaffirmations of notice pleading just five years before *Twombly* came down. *Swierkiewicz v. Sorema N.A.*<sup>34</sup> was an employment-discrimination case decided in 2002. In a unanimous opinion authored by Justice Thomas, the Court concluded that it was sufficient for a plaintiff to allege that his “age and national origin were motivating factors in [the defendant’s] decision to terminate his employment.”<sup>35</sup> Emphasizing *Conley*’s “fair notice” standard,<sup>36</sup> Justice Thomas made clear that the pleading threshold did not require the plaintiff to show that he will ultimately prevail on his claim,<sup>37</sup> or that he has or will likely uncover evidence to support his allegations.<sup>38</sup> Justice Thomas explicitly recognized that the

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require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests” (citations omitted).

33. *E.g.*, *Swierkiewicz*, 534 U.S. at 515 (“A requirement of greater specificity for particular claims is a result that ‘must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.’” (quoting *Leatherman*, 507 U.S. at 168)); *see also* Subrin & Main, *supra* note 4, at 1847 (“In 1993, and then again in 2002, the Supreme Court . . . found that only Congress or other rulemakers—not the courts—could deviate from the ‘notice pleading’ standard required by Federal Rule 8(a).”).

34. 534 U.S. 506.

35. Amended Complaint at ¶ 37, *Swierkiewicz v. Sorema N.A.*, No. 99 Civ. 12272 (S.D.N.Y. Apr. 19, 2000), *reprinted in* Joint Appendix, 2001 WL 34093952, at 27a; *see also Swierkiewicz*, 534 U.S. at 514 (“Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA.”).

36. *Swierkiewicz*, 534 U.S. at 512:

[I]mposing the Court of Appeals’ heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Such a statement must simply “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests” (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

37. *See id.* at 515 (“[The federal] pleading standard [is] without regard to whether a claim will succeed on the merits.”); *accord Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974):

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

38. *See Swierkiewicz*, 534 U.S. at 511–12 (rejecting as “incongruous” with notice pleading a requirement to allege facts raising an inference of discrimination, because “direct evidence of discrimination” might be unearthed during discovery even though the plaintiff was concededly “without direct evidence of discrimination at the time of his complaint”).

federal approach to pleading would “allow[] lawsuits based on conclusory allegations of discrimination to go forward.”<sup>39</sup> But “[w]hatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits.”<sup>40</sup>

Notice pleading was not a free pass, however. Even at the pleading stage, a defendant could challenge a claim’s legal sufficiency.<sup>41</sup> If the substantive law does not provide a remedy for the conduct alleged, the complaint’s statement of the claim does not “show[] that the pleader is entitled to relief” as required by Rule 8(a)(2).<sup>42</sup> And such a complaint “fail[s] to state a claim upon which relief can be granted,” which justifies dismissal under Rule 12(b)(6).<sup>43</sup> Indeed, a pleading-stage motion to dismiss was—and remains—a suitable vehicle for resolving novel questions of substantive law.<sup>44</sup> Notice pleading was also understood to permit dismissal at the pleading stage when the plaintiff’s own allegations reveal a fatal defect that defeats the claim on the merits. In other words, a plaintiff may “plead[] itself out of court”<sup>45</sup> by making

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39. *Id.* at 514.

40. *Id.* at 514–15.

41. *See, e.g.,* *Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 902 (6th Cir. 2004) (reviewing a dismissal “based purely on the legal sufficiency of a plaintiff’s case”); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (“A Rule 12(b)(6) motion tests the legal sufficiency of a complaint . . .”); *Int’l Mktg., Ltd. v. Archer-Daniels-Midland Co.*, 192 F.3d 724, 732 (7th Cir. 1999):

[G]iven that the written agreements were, as a matter of law, the only valid agreements between IML and the defendants, and given that IML by its own admissions apparently failed to meet the payment terms that would have triggered the defendants’ duty to perform, neither ADM nor Swift acted wrongfully . . . ;

*see also* Clyde Spillenger, *Teaching Twombly and Iqbal: Elements Analysis and the Ghost of Charles Clark*, 60 UCLA L. REV. 1740, 1745 (2013):

“[N]otice pleading” did not alter the requirement that the complaint’s allegations satisfy the elements of a recognized cause of action. The conceptual basis for assessing the legal sufficiency of a complaint that had prevailed prior to the [Federal Rules’] adoption remained in place: The complaint’s allegations must be assessed in light of governing substantive law to ensure that they address the elements of some recognized claim.

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

43. FED. R. CIV. P. 12(b)(6).

44. *See generally, e.g.,* *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (on appeal from the district court’s denial of a Rule 12(b)(6) motion, deciding whether the federal Religious Land Use and Institutionalized Persons Act violated the Establishment Clause); *Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 845 (D.S.D. 2014) (deciding in the context of defendants’ motion to dismiss that South Dakota’s ban on same-sex marriage was unconstitutional); *Wyeth, Inc. v. Weeks*, 159 So. 3d 649 (Ala. 2014) (on certification from a federal district court in connection with a Rule 12(b)(6) motion to dismiss, considering whether a name-brand drug manufacturer could be liable for failing to warn a purchaser of the generic version); *see also* *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990) (on appeal from a grant of a Rule 12(b)(6) motion, deciding “whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support”).

45. *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004).

allegations that conclusively undermine its claim for relief. If so, a Rule 12(b)(6) dismissal is proper.<sup>46</sup>

### B. *Twombly*

The genesis of what has come to be known as plausibility pleading was the Supreme Court’s 2007 decision in *Bell Atlantic Corp. v. Twombly*.<sup>47</sup> *Twombly* was an antitrust class action alleging that America’s largest telecommunications firms—the “Baby Bells” or “ILECs”—had violated § 1 of the Sherman Antitrust Act by engaging in anticompetitive “parallel conduct.”<sup>48</sup> The complaint alleged that they had refused to compete against one another in their respective regional markets, and had restrained other potential competitors (the non-Baby Bells or “CLECs”) who wished to access those markets.<sup>49</sup>

For a plaintiff to obtain relief under § 1, the defendants’ anticompetitive behavior must have been pursuant to a “contract, combination, or conspiracy.”<sup>50</sup> As to this requirement, the crucial allegation in the *Twombly* complaint was paragraph 51, which stated:

In the absence of any meaningful competition between the [ILECs] in one another’s markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.<sup>51</sup>

By a vote of seven to two, the Supreme Court concluded that the *Twombly* complaint must be dismissed for failure to state a claim.

46. See, e.g., *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005) (“[L]itigants may plead themselves out of court by alleging facts that defeat recovery.”); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (“We have held that a plaintiff can—as Sprewell has done here—plead himself out of a claim by including unnecessary details contrary to his claims.”); *Sparrow v. United Air Lines, Inc.* 216 F.3d 1111, 1116 (D.C. Cir. 2000) (“In some cases, it is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible.”); 5 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, *FEDERAL PRACTICE & PROCEDURE* § 1215 (3d ed. 2015) (“If a plaintiff does plead particulars, and they show he has no claim, then the plaintiff has pleaded himself out of court.”).

47. 550 U.S. 544 (2007).

48. *Id.* at 548–49; see also *id.* at 549 (defining “ILECs” as “Incumbent Local Exchange Carriers”).

49. See *id.* at 550–51; see also *id.* at 549 (defining “CLECs” as “competitive local exchange carriers”).

50. *Id.* at 548.

51. *Id.* at 551 (quoting Amended Complaint & Demand for Jury Trial, at ¶ 51, *Twombly v. Bell Atlantic Corp.*, No. 02 CIV. 10220 (GEL) (S.D.N.Y. Apr. 11, 2003), reprinted in Joint Appendix, 2006 WL 2472651, at 27) [hereinafter *Twombly* Complaint].

Justice Souter's majority opinion recognized the allegation in paragraph 51 that there had, in fact, been a "contract, combination, or conspiracy,"<sup>52</sup> but he found that "on fair reading these are merely legal conclusions resting on the prior allegations" of parallel conduct.<sup>53</sup> Accordingly, more was required to comply with federal pleading standards. Justice Souter wrote that the complaint must contain "allegations plausibly suggesting (not merely consistent with) agreement,"<sup>54</sup> or—as he put it elsewhere in the opinion— "facts that are suggestive enough to render a § 1 conspiracy plausible."<sup>55</sup>

In applying this inquiry to the *Twombly* complaint, Justice Souter concluded that the plaintiffs had "not nudged their claims across the line from conceivable to plausible."<sup>56</sup> He noted the plaintiffs' allegations that the defendants had engaged in a "parallel course of conduct" to restrain competition, such as by "making unfair agreements" with CLECs wishing to access their networks; by "providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers"; and by their "common failure meaningfully to pursue attractive business opportunities in contiguous markets where they possessed substantial competitive advantages."<sup>57</sup> Antitrust law, however, does not forbid such parallel conduct if it is the product of each actor's "independent decision" rather than "an agreement, tacit or express," between competitors.<sup>58</sup> Justice Souter also observed that such parallel conduct was consistent with "a wide swath of rational and *competitive* business strategy unilaterally prompted by common perceptions of the market."<sup>59</sup>

What did the *Twombly* opinion say about prior Supreme Court pleading decisions? Most significantly, it reaffirmed the basic notice-pleading standard, explicitly endorsing *Conley's* command that Rule 8(a)(2) requires only that the complaint provide the defendant "fair notice of what the . . . claim is and the grounds upon which it rests."<sup>60</sup> *Twombly* also relied on *Swierkiewicz*, an exemplar of notice pleading

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52. *Id.* at 564 & n.9.

53. *Id.* at 564.

54. *Id.* at 557.

55. *Id.* at 556.

56. *Id.* at 570.

57. *Id.* at 550–51 (internal quotation marks omitted).

58. *Id.* at 553 (citations and internal quotation marks omitted).

59. *Id.* at 553–54 (emphasis added).

60. *Id.* at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

from just five years earlier.<sup>61</sup> Quoting *Scheuer v. Rhodes*—a 1970s pleading case—*Twombly* made clear that “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’”<sup>62</sup>

*Twombly* did, however, take issue with one aspect of the half-century of Supreme Court pleading case law that preceded it. In *Conley*, Justice Black had stated 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.”<sup>63</sup> In *Twombly*, Justice Souter wrote that this phrase had “earned its retirement,”<sup>64</sup> insofar as it could be understood to preclude dismissal “whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.”<sup>65</sup>

### C. Iqbal

*Ashcroft v. Iqbal* was a case brought by a Pakistani man whom federal officials had detained in New York City following the September 11th attacks.<sup>66</sup> Mr. Iqbal had been designated a “person ‘of high interest’” in the September 11th investigation, and he alleged that he had been held under harsh and highly restrictive conditions of confinement at the Administrative Maximum Special Housing Unit (“ADMAX SHU”) in Brooklyn.<sup>67</sup> Mr. Iqbal sought damages under *Bivens*<sup>68</sup> for a variety of constitutional violations against several individual officials.<sup>69</sup> The only claims before the Supreme Court, however, were Mr. Iqbal’s claims against Attorney General John Ashcroft and FBI Director Robert Mueller,<sup>70</sup> which were based on a theory that Ashcroft and Mueller had “adopted an unconstitutional

61. See *supra* notes 34–40 and accompanying text (describing *Swierkiewicz*); see also *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (“The Supreme Court’s explicit decision to reaffirm the validity of *Swierkiewicz*, which was cited with approval in *Twombly*.”) (citations omitted).

62. *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

63. 355 U.S. 41, 45–46 (1957).

64. *Twombly*, 550 U.S. at 563.

65. *Id.* at 561 (brackets and internal quotation marks omitted). As discussed in more detail in Section II.B, *Twombly*’s treatment of *Conley*’s “no set of facts” language did not constitute a meaningful departure from notice pleading. Again, *Twombly* explicitly embraced *Conley*’s “fair notice” standard. See *supra* note 60 and accompanying text.

66. 556 U.S. 662, 666–67 (2009).

67. *Id.* at 667–68.

68. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

69. *Iqbal*, 556 U.S. at 667–68.

70. *Id.* at 668–69.

policy that subjected [Iqbal] to harsh conditions of confinement on account of his race, religion, or national origin.”<sup>71</sup>

The Court split five-to-four over whether Mr. Iqbal’s complaint adequately stated this claim. Writing for the majority, Justice Kennedy made clear that the Court’s approach in *Twombly* had not been an aberration. Rather, *Twombly* “was based on our interpretation and application of Rule 8,”<sup>72</sup> and therefore “expounded the pleading standard for ‘all civil actions.’”<sup>73</sup>

With respect to Mr. Iqbal’s substantive claims, Justice Kennedy explained that—for purposes of a *Bivens* action—officials like Ashcroft and Mueller “may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.”<sup>74</sup> Thus, “a plaintiff must plead that each Government-official defendant, *through the official’s own individual actions*, has violated the Constitution.”<sup>75</sup> For a constitutional claim based on invidious discrimination, “the plaintiff must plead and prove that the defendant acted with discriminatory purpose.”<sup>76</sup> The defendant must act “because of, not merely in spite of, [the action’s] adverse effects upon an identifiable group.”<sup>77</sup>

The *Iqbal* majority then looked to the *Twombly* decision to evaluate whether Mr. Iqbal’s complaint was sufficient. Justice Kennedy reasoned that “[t]wo working principles underlie our decision in *Twombly*.”<sup>78</sup> The first principle was this: “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”<sup>79</sup> In other words, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>80</sup> The second principle was that “only a complaint that states a plausible claim for relief survives a motion to dismiss.”<sup>81</sup> This second inquiry depended intimately on the

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71. *Id.* at 666.

72. *Id.* at 684.

73. *Id.* (quoting FED. R. CIV. P. 1).

74. *Id.* at 676.

75. *Id.* (emphasis added).

76. *Id.*

77. *Id.* at 677 (internal quotation marks omitted) (quoting *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

78. *Id.* at 678.

79. *Id.*

80. *Id.*

81. *Id.* at 679.

first. In assessing plausibility, the court must accept all *nonconclusory* allegations as true.<sup>82</sup>

Accordingly, the only way the Supreme Court could reject Mr. Iqbal's claim was to dispose of any allegations in Mr. Iqbal's complaint describing discriminatory conduct by Ashcroft and Mueller as individuals. Paragraph 96 of Iqbal's complaint alleged that Ashcroft and Mueller each "knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to [harsh] conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin and for no legitimate penological interest."<sup>83</sup> And indeed, Justice Kennedy found that this allegation was "conclusory and not entitled to be assumed true."<sup>84</sup>

Justice Kennedy then inquired whether other allegations in the complaint—the remaining *nonconclusory* or "factual" allegations—plausibly suggested discriminatory conduct by Ashcroft or Mueller. The two allegations he considered were (1) that "[i]n the months after September 11, 2001, the Federal Bureau of Investigation ('FBI'), under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11"<sup>85</sup>; and (2) that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001."<sup>86</sup>

Just as the allegations of parallel conduct in *Twombly* were deemed insufficient to plausibly suggest a prior agreement,<sup>87</sup> these allegations were deemed insufficient to plausibly suggest discriminatory conduct by Ashcroft and Mueller. As for the large numbers of Arab Muslim men detailed in the wake of 9/11, Justice Kennedy reasoned that the attacks themselves "were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group [that] was headed by another Arab Muslim—Osama bin Laden—and composed in

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82. *Id.* ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." (emphasis added)).

83. *Id.* at 680 (quoting Complaint at 17–18, *Elmaghraby v. Ashcroft*, 2005 WL 2375202 (S.D.N.Y. 2005) (No. 04CV1809) [hereinafter *Iqbal* Complaint]).

84. *Id.* at 681.

85. *Id.* (quoting *Iqbal* Complaint, *supra* note 83, at ¶ 47).

86. *Id.* (quoting *Iqbal* Complaint, *supra* note 83, at ¶ 69).

87. *See supra* notes 56–59 and accompanying text.



large part of his Arab Muslim disciples.”<sup>88</sup> Therefore, “[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims.”<sup>89</sup> As for the role Ashcroft and Mueller played in adopting the policy of holding post-September-11 detainees under restrictive conditions until the FBI cleared them, Justice Kennedy responded that the complaint “does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin.”<sup>90</sup>

#### D. Reaction to *Twombly* and *Iqbal*

The reaction to *Twombly*—and then *Iqbal*—came swiftly. Numerous commentators argued that the decisions had overturned notice pleading in favor of a new, restrictive “plausibility pleading” approach.<sup>91</sup> It was often asserted that core notice-pleading precedents—such as *Swierkiewicz*—had been implicitly overruled and were no longer good law.<sup>92</sup> As a practical matter, *Twombly* and *Iqbal* threatened

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88. *Iqbal*, 556 U.S. at 682.

89. *Id.*

90. *Id.* at 683.

91. See *supra* note 4; see also, e.g., Miller, *Deformation of Federal Procedure*, *supra* note 4, at 331 (“By demanding that the plaintiff plead facts demonstrating that the claim has substantive plausibility, rather than a statement that is legally sufficient and gives notice of the plaintiff’s claim, [*Twombly* and *Iqbal*] represent a procedural ‘sea change’ in plaintiffs’ ability to survive the pleading stage.”). But see Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010) (noting the pre-*Twombly* understanding that “all that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity,” that “a basic objective of the rules is to avoid civil cases turning on technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleader’s claim and a general indication of the type of litigation that is involved,” and arguing that *Twombly* and *Iqbal* do not “undermine[] these broad principles”). For examples of scholarly attempts to understand *Twombly* and *Iqbal* in ways that are less disruptive to pre-*Twombly* precedent, see Edward A. Hartnett, *Taming Twombly*, *Even After Iqbal*, 158 U. PA. L. REV. 473 (2010); David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117 (2010); Steinman, *supra* note 8.

92. See, e.g., Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 226 (2011) (“*Swierkiewicz* is effectively dead after *Iqbal* and *Twombly*.”); Sheldon Whitehouse, *Opening Address*, 162 U. PA. L. REV. 1517, 1521 (2014) (“*Iqbal* and *Twombly* . . . implicitly overruled precedents, such as *Swierkiewicz*.”); see also Brown v. Castleton State College, 663 F. Supp. 2d 392, 403 n.8 (D. Vt. 2009) (“*Swierkiewicz* itself has a questionable status after *Twombly* . . . and especially after *Iqbal*.”). In *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009), the court suggested that *Swierkiewicz* had been “repudiated,” but it then used classic notice-pleading reasoning to conclude that a disability-discrimination claim was adequately pled. See Steinman, *supra* note 8, at 1322 n.167, 1343 n.290, 1343, 1345 nn.300–04 (discussing *Fowler*). Just recently, a panel of the Fourth Circuit divided sharply over the continued vitality of *Swierkiewicz*. Compare McCleary-Evans v. Maryland Dept. of Trans., 780 F.3d 582, 587 (2015) (noting that *Swierkiewicz* had “applied a pleading standard more relaxed than the plausible-claim

access to justice and the private enforcement of substantive law by authorizing courts to dismiss complaints they find implausible before the plaintiff has had any opportunity to invoke the discovery process.<sup>93</sup> *Iqbal*'s clarification that a federal court could refuse to accept as true "conclusory" allegations added another dimension to this critique; how could a plaintiff who had no access to information in the defendant's possession provide the sort of nonconclusory allegations *Iqbal* would require? *Twombly* and *Iqbal*, it was argued, created a "Catch-22"<sup>94</sup>—plaintiffs would need court-supervised discovery in order to obtain the information needed to get past the pleading phase, but they could not invoke the discovery process unless they survived the pleading phase.<sup>95</sup>

*Twombly* and *Iqbal* also prompted scholars to examine the empirical impact of those decisions.<sup>96</sup> There is some disagreement

standard required by *Iqbal* and *Twombly*"), with *id.* at 589–90 (Wynn, J., dissenting) (arguing that the majority improperly "ignore[d] the factual underpinnings of the *Swierkiewicz* holding, looking solely to the Supreme Court's 2009 decision in *Iqbal* to guide its decision," and noting that lower federal courts "have no authority to overrule a Supreme Court decision no matter how out of touch with the Supreme Court's current thinking the decision seems").

93. See *supra* note 4.

94. See Dodson, *supra* note 4, at 68 ("[T]he plaintiff is trapped in a Catch-22: she may have a meritorious claim, but, because critical facts are not obtainable through informal means, she cannot plead her claims with sufficient factual detail to survive a motion to dismiss under the New Pleading standard of *Twombly* and *Iqbal*."); Miller, *Double Play*, *supra* note 4, at 42–43 (arguing that "something of a Catch-22" could arise in "actions in which factual sufficiency is most difficult to achieve at the pleading stage" because such cases "have been particularly vulnerable to the demands of *Twombly* and *Iqbal*" even though "these are the very cases that should be given greater pleading latitude"); see also Steinman, *supra* note 8, at 1352 (noting that heightened pleading standards can place plaintiffs "in the Catch-22 of needing court-supervised discovery to uncover the factual and evidentiary details that would be required to get past the pleadings phase to discovery").

95. See *supra* note 94; see also Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009) ("Perhaps the most troublesome possible consequence of *Twombly* and *Iqbal* is that it will deny access to court to plaintiffs and prospective plaintiffs with meritorious claims who cannot satisfy their requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries.").

96. See, e.g., Christina Boyd, David Hoffman, Zoran Obradovic & Kosta Ristovski, *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J. EMPIRICAL LEGAL STUD. 253 (2013); Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2338 (2012) [hereinafter, Gelbach, *Locking the Doors*]; Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1 (2011); William H. J. Hubbard, *Testing For Change In Procedural Standards, With Application To Bell Atlantic v. Twombly*, 42 J. LEGAL STUD. 35 (2013); Patricia W. Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015) [hereinafter Reinert, *Measuring the Impact*]; Joe S. Cecil, *Of Waves and Water: A Response to Comments on the FJC Study Motions to Dismiss for Failure to State a Claim after Iqbal* (Mar. 19, 2012), <http://ssrn.com/abstract=2026103> [<http://perma.cc/VRS7-YRJU>]; Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J.

among the various studies,<sup>97</sup> but many found that *Twombly* and *Iqbal* increased the likelihood that motions to dismiss would be granted (at least for particular kinds of cases).<sup>98</sup> There were also significant selection effects;<sup>99</sup> parties were opting not to file in federal court at all, concerned that the lawsuit would founder on the rocks of *Twombly* and *Iqbal*.<sup>100</sup> As for the lawsuits that were filed, federal courts invoked *Twombly* and *Iqbal* at an astounding rate—the two decisions quickly joined the ranks of the most frequently cited Supreme Court opinions in history.<sup>101</sup>

The critiques of *Twombly* and *Iqbal* raise valid concerns, and the practical effects of these decisions are troubling. As a normative matter, any pleading standard that imposes unnecessary obstacles to potentially meritorious claims deserves criticism, especially when the federal rules governing the discovery process explicitly allow litigants both to protect themselves from unduly burdensome discovery requests and to obtain information from their opponents beyond what is alleged in the pleadings.<sup>102</sup> One question that went largely unexplored, however, was whether *Twombly* and *Iqbal*—as a doctrinal matter—should have been read to mandate a newly restrictive approach to pleading.

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Bataillon, Fed. Judicial Ctr., *Motions to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conf. Advisory Comm. on Civil Rules* (2011); Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Bataillon & Jacqueline G. Campbell, Fed. Judicial Ctr., *Update on Resolution of Rule 12(b)(6) Motions Granted with Leave to Amend: Report to the Judicial Conference Advisory Committee on Civil Rules* (2011). See generally Engstrom, *supra* note 5 (discussing some of the empirical studies on the effect of *Twombly* and *Iqbal*); Jonah B. Gelbach, *Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?*, 2 STAN. J. COMPLEX LITIG. 223 (2014) [hereinafter Gelbach, *Dark Arts*] (same).

97. Compare, e.g., Hubbard, *supra* note 96, at 57:

I find fairly precise zeros for the effects of *Twombly* on both the grant rate of MTDs and the overall rate of dismissals among filed cases. These results support the view that *Twombly* effected no (significant) change in the willingness of courts to dismiss cases, even after accounting for selection effects.,

with Gelbach, *Dark Arts*, *supra* note 96, at 233 n.51, 234 (arguing that Hubbard's study fails to account for party selection effects).

98. See, e.g., Hoffman, *supra* note 96, at 12; Moore, *supra* note 96, at 603; Reinert, *Measuring the Impact*, *supra* note 96, at 2145.

99. See Gelbach, *Locking the Doors*, *supra* note 96, at 2306–07; Boyd et al., *supra* note 96, at 254.

100. See Gelbach, *Locking the Doors*, *supra* note 96, at 2306–07.

101. A list of the 100 most frequently cited Supreme Court decisions appears *infra* in Appendix A. According to the Shepard's citation service, *Twombly* and *Iqbal* already rank third and fourth in terms of citations by federal court opinions.

102. See *infra* notes 298–306 and accompanying text; see also Steinman, *supra* note 8, at 1353 (noting that the Federal Rules already “allow judges to restrict discovery where its costs are likely to exceed its benefits” and arguing that “[t]his more nuanced approach avoids the sledgehammer of dismissal at the pleadings phase, which denies all access to discovery, in favor of allowing courts to mitigate discovery's costs while preserving its potential benefits”).

II. RECONCILING *TWOMBLY* AND *IQBAL* WITH NOTICE PLEADING

This Part examines the Court's reasoning in *Twombly* and *Iqbal* and the pleading framework they employ. Although the decisions are problematic in many respects, their approach to pleading can and should be reconciled with the notice-pleading approach that characterized federal practice for nearly seven decades. Section A proposes a basic understanding of the *Twombly/Iqbal* two-step analysis, and shows how that approach can be applied consistently with notice pleading. Section B examines *Twombly's* "retirement" of the Supreme Court's statement in *Conley* 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,"<sup>103</sup> and explains why *Twombly's* critique of *Conley* does not constitute a meaningful departure from notice pleading. Section C elaborates on what should constitute a "conclusory" allegation whose truth need not be accepted at the pleading phase.

A. *Iqbal's Two Steps*

To reconcile the logic of *Twombly* and *Iqbal* with notice pleading, one must consider carefully the two-step analysis Justice Kennedy described in *Iqbal*. That analysis proceeds as follows: First, the court must identify allegations that are mere "legal conclusions" and disregard them for purposes of determining whether the complaint states a claim for relief.<sup>104</sup> Second, the court must assess whether the remaining allegations, accepted as true, plausibly suggest an entitlement to relief.<sup>105</sup> Under this framework, the real potential for mischief lies in the ability to disregard conclusory allegations. Only the first-step examination of "legal conclusions" can excise allegations from a complaint. The second-step "plausibility" inquiry allows a complaint to pass muster *even if* a substantive requirement of the plaintiff's claim is stated only in conclusory terms.<sup>106</sup>

Accordingly, calling the *Twombly* and *Iqbal* framework "plausibility pleading" is a significant over-simplification. Under the

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103. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

104. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also supra* notes 78–80 and accompanying text (describing this part of the *Iqbal* opinion).

105. *Iqbal*, 556 U.S. at 678; *see also supra* notes 81–82 and accompanying text (describing this part of the *Iqbal* opinion).

106. *See* Steinman, *supra* note 8, at 1319 ("Conclusoriness is destructive; it justifies disregarding an allegation. Plausibility is generative; it justifies creating an allegation that is not validly made in the complaint itself (perhaps because it was alleged only in a conclusory manner).").

logic of *Twombly* and *Iqbal*, there is no need to assess plausibility if the nonconclusory allegations establish all of the requirements of a meritorious claim. *Twombly* recognized this, noting that an “independent” allegation of an agreement between the Baby Bell defendants would have sufficed.<sup>107</sup> And *Iqbal* recognized this, noting that it was paragraph 96’s “conclusory nature”—not the fact that it was “chimerical” or “fanciful”—that allowed the Court to refuse to accept its truth.<sup>108</sup> As long as a complaint’s nonconclusory allegations, accepted as true, establish a claim for relief, the complaint necessarily passes muster. To allow courts to second-guess such allegations under the guise of “plausibility” would contravene the requirement that nonconclusory allegations must be accepted as true at the pleading phase.<sup>109</sup>

What about *Iqbal*’s recognition that courts may refuse to accept the truth of conclusory allegations? One might argue that even to recognize that possibility is to impose a more restrictive pleading standard than had existed prior to *Twombly* and *Iqbal*. Well before *Twombly* and *Iqbal*, however, federal appellate courts had embraced the idea that a court was not required to accept mere legal conclusions.<sup>110</sup> Indeed, the power to disregard legal conclusions flows quite naturally from the core fair-notice requirement. If a complaint provides—in the language of *Iqbal*—merely an “unadorned, the-defendant-unlawfully-harmed-me accusation,”<sup>111</sup> or “a formulaic recitation of the elements of a cause of action,”<sup>112</sup> it has not provided “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>113</sup>

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107. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564 (2007).

108. *Iqbal*, 556 U.S. at 681. Justice Kennedy also made clear that “[w]ere we required to accept [paragraph 96] as true, respondent’s complaint would survive petitioners’ motion to dismiss.” *Id.* at 686.

109. Put another way, “when a complaint contains nonconclusory allegations on every element of a claim for relief, the plausibility issue vanishes completely,” because “the court must assume the veracity of such nonconclusory allegations.” Steinman, *supra* note 8, at 1316 (citation omitted). “If such allegations address each element that would be needed to ultimately prove the plaintiff’s claim, then they do more than make an entitlement to relief plausible—they confirm an entitlement to relief, at least for purposes of the pleadings phase.” *Id.* at 1316–17 (citation omitted).

110. *See, e.g.,* *Achtman v. Kerby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006) (“[C]onclusory allegations or legal conclusions . . . will not suffice to defeat a motion to dismiss.” (citation omitted)); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (“[T]he court is not required to accept legal conclusions . . . .” (citation omitted)).

111. *Iqbal*, 556 U.S. at 678 (“[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” (quoting *Twombly*, 550 U.S. at 555)).

112. *Id.* (quoting *Twombly*, 550 U.S. at 555).

113. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Indeed, one might perfectly align *Twombly* and *Iqbal* with notice pleading simply by defining the term “conclusory” to mean “failing to provide fair

The biggest challenge going forward from *Twombly* and *Iqbal* is to determine what *qualifies* as a conclusory allegation whose truth may be disregarded at the pleading phase. This inquiry is what makes *Twombly* and *Iqbal* so potentially disruptive to notice pleading, but it is also the key to saving notice pleading. One way to reconcile the *Twombly/Iqbal* framework with notice pleading would be with the following approach: an allegation qualifies as “conclusory”—and hence fails to provide “fair notice”—when it states a mere legal conclusion rather than identifying a real-world act or event.<sup>114</sup>

This approach should not cause alarm for proponents of notice pleading. Suppose, for example, that a complaint alleges merely: “the defendant violated the plaintiff’s legal rights in a way that entitles the plaintiff to relief”; or “the defendant violated the plaintiff’s rights under Title VII of the 1964 Civil Rights Act”; or “the defendant breached a duty owed to the plaintiff under state law and this breach proximately caused damages to the plaintiff.” These allegations would all state a claim for relief, in the sense that the plaintiff would prevail if these allegations were ultimately proven true. Yet even notice pleading would require something more. Why? Because they do not identify what actually occurred in the real world: What did the defendant do? What happened to the plaintiff? These hypothetical allegations epitomize the “unadorned, the-defendant-unlawfully-harmed-me accusation,”<sup>115</sup> or the “formulaic recitation of the elements of a cause of action,”<sup>116</sup> that can be disregarded as conclusory. One might call this a transactional approach to pleading—it is the failure to provide an adequate transactional narrative that permits the court to refuse to accept such allegations as true.

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notice of what the plaintiff’s claim is and the grounds upon which it rests.” Under the two-step framework set forth in *Iqbal*, the only basis for refusing to accept an allegation as true is that it is conclusory. See *supra* notes 78–82, 106–109 and accompanying text (summarizing *Iqbal* and emphasizing that the nonconclusory allegations must be accepted as true). If “conclusory” means nothing more than “failing to provide fair notice,” the conflict with notice pleading disappears. See Steinman, *supra* note 8, at 1324–25 (“*Iqbal*’s recognition that conclusory allegations need not be accepted as true does not necessarily mean the end of notice pleading. It merely cloaks the notice inquiry in different doctrinal garb.”); *id.* at 1325 (“To say that an allegation is ‘conclusory’ because it lacks X is no different than saying that ‘fair notice’ requires the defendant to be informed of X.”).

114. See Steinman, *supra* note 8, at 1334:

One way to reconcile *Twombly* and *Iqbal* with authoritative pre-*Twombly* texts and precedents is to define ‘conclusory’ in transactional terms. A plaintiff’s complaint must provide an adequate transactional narrative, that is, an identification of the real-world acts or events underlying the plaintiff’s claim. When an allegation fails to concretely identify *what* is alleged to have happened, that allegation is conclusory and need not be accepted as true at the pleadings phase.

115. *Iqbal*, 556 U.S. at 678.

116. *Id.* (quoting *Twombly*, 550 U.S. at 555).

I will elaborate in more detail below on how this transactional approach fits with the Supreme Court's reasoning in *Twombly* and *Iqbal*.<sup>117</sup> For now, it is important to note that this approach does not require a court to inquire how a plaintiff will ultimately *prove* her version of what happened, or to assess the likelihood that the plaintiff will ultimately succeed. The plaintiff need only provide *allegations* regarding the events underlying her claim. It thus avoids the informational "Catch-22" associated with a restrictive understanding of plausibility pleading. As long as the plaintiff can articulate a transactional narrative that, if true, would entitle her to relief, she can use the discovery process to uncover evidence to support that transactional narrative.

What about plausibility—the second step in the *Twombly/Iqbal* framework? The plausibility inquiry might perform a number of functions that do not invite the troubling consequences that would flow from a more restrictive reading of those decisions. First, as *Twombly* and *Iqbal* both indicate, plausibility could allow courts to infer things that were not themselves alleged in the complaint—or that were alleged purely in a conclusory manner. Many have criticized the Supreme Court's reasoning regarding how a court should decide whether certain allegations *do* "plausibly suggest" some missing requirement of a viable cause of action.<sup>118</sup> These critiques are well taken, but it is crucial to recognize that a plaintiff need not rely on "plausibl[e] suggest[ions]" if the complaint's nonconclusory allegations, accepted as true, establish a

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117. See *infra* Section II.C (elaborating on how "conceptualiz[ing] what counts as 'conclusory' in transactional terms . . . reconcile[s] the Court's conclusions in *Twombly* and *Iqbal* with pre-*Twombly* notice-pleading precedents"); see also Steinman, *supra* note 8, at 1298–99, 1328–39 (describing the transactional approach).

118. See, e.g., Miller, *Deformation of Federal Procedure*, *supra* note 4, at 334:

[*Twombly*] requires facts—not conclusions—"showing" (a word in the Rule never previously judicially focused on or accorded any significance) a "plausible" claim, with little guidance as to what that means. And what does it mean? Justice Souter's *Twombly* opinion only tells us plausibility is something more than purely speculative or possible, but it can be less than probable. Of course, that's not very helpful.

(footnotes omitted); Burbank, *supra* note 95, at 118 (criticizing "[t]he *Iqbal* Court's reliance on 'judicial experience and common sense' " as "an invitation to 'cognitive illiberalism' " (citing Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 838 (2009)). Additional confusion regarding plausibility stems from seemingly contradictory language on the relationship between plausibility and the likelihood of uncovering supporting evidence during discovery. On one hand, *Twombly* stated that "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations." *Twombly*, 550 U.S. at 563 n.8. On the other hand, it stated that the plausibility inquiry "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. This tension is discussed *infra* note 297.

meritorious claim.<sup>119</sup> As a logical matter, the potential for the plausibility inquiry to salvage complaints where the requirements of a meritorious claim are addressed only by conclusory allegations makes the pleading framework *more* forgiving, not less.<sup>120</sup> Again, it is only the ability to disregard conclusory allegations that allows courts to second-guess the truth of a complaint's allegations.

Second, plausibility can encompass the sort of legal-sufficiency inquiries that have long been an accepted aspect of notice pleading.<sup>121</sup> Even if a complaint describes with unquestionable clarity the events that are the basis for the plaintiff's cause of action, it should not survive the pleading phase if those events would fail, as a matter of law, to justify any relief for the plaintiff. It would correctly be said that the complaint does not "state[] a plausible claim for relief."<sup>122</sup> One subset of this scenario is where the plaintiff has "pled itself out of court" by including allegations that conclusively undermine a viable claim.<sup>123</sup> In this situation, the plaintiff's own allegations would confirm that the complaint does not "state[] a plausible claim for relief."<sup>124</sup>

Under this view of the plausibility inquiry,<sup>125</sup> plausibility plays no role when a complaint's nonconclusory allegations, accepted as true, establish a claim for relief. Because those nonconclusory allegations must be accepted as true, such a complaint necessarily would survive the plausibility inquiry. The complaint must be examined as if all of those nonconclusory allegations have been proven. If those nonconclusory allegations make out a meritorious claim, there is no role for a free-floating assessment of those allegations' "plausibility."

### *B. Whither Conley?*

One of the principal arguments that *Twombly* and *Iqbal* should be read to abrogate notice pleading is captured by the vastly oversimplified sound bite that *Twombly* overruled *Conley*. As discussed above, *Twombly* did "retire[]" *Conley*'s statement 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

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119. See *supra* notes 104–109 and accompanying text.

120. See Steinman, *supra* note 8, at 1319.

121. See *supra* notes 41–46 and accompanying text.

122. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.").

123. See *supra* notes 45–46 and accompanying text.

124. *Iqbal*, 556 U.S. at 679.

125. See *supra* notes 106–109 and accompanying text.



his claim which would entitle him to relief.”<sup>126</sup> This is the only aspect of notice-pleading case law that either decision challenged explicitly. Yet for the reasons that follow, *Twombly*’s treatment of this single sentence in *Conley* does not constitute a meaningful departure from notice-pleading precedent.

As an initial matter, *Twombly* did not undermine *Conley*’s fair-notice standard—*Twombly* explicitly embraced it.<sup>127</sup> And even with respect to *Conley*’s “beyond doubt . . . no set of facts” language, *Twombly* “retir[ed]” only a nonsensically literal understanding of that phrase—one that would preclude dismissal “whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.”<sup>128</sup> This was not what *Conley* meant, of course. If one were to adopt such a straw man interpretation of this language, then a complaint could survive if it alleged nothing more than “the planet Earth is round.”<sup>129</sup> From that allegation alone, it would not “appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Any number of actionable facts are consistent with the Earth being round. A round planet might play host to contractual breaches, interference with property rights, negligently-caused automobile collisions, infringement of patents for electric motors, constitutional violations—the list goes on. The “Earth is round” allegation would certainly “le[ave] open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.”<sup>130</sup>

Consider also a complaint alleging only that “I was an employee of the defendant and the defendant terminated my employment.” Even if that allegation is accepted as true, it does not state a meritorious claim for relief. Yet that allegation also does not make it “appear[] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” The termination might have breached a contract, violated the employee’s First Amendment rights, or run afoul of federal prohibitions on discrimination based on race, gender, age, religion, or national origin. Again, such an allegation would “le[ave] open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.”<sup>131</sup>

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126. See *supra* notes 63–65 and accompanying text.

127. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

128. *Id.* at 561, 563 (brackets and internal quotation marks omitted).

129. Steinman, *supra* note 8, at 1321.

130. *Twombly*, 550 U.S. at 561 (brackets and internal quotation marks omitted).

131. *Id.*

Therefore, it is not at all inconsistent with notice pleading for *Twombly* to have rejected this one sentence from *Conley* insofar as that sentence would preclude dismissal “whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.”<sup>132</sup> What, then, was *Conley*’s now-retired “no set of facts” phrase meant to achieve? Properly understood, that language merely confirmed that speculation about the provability of a claim typically is not an appropriate inquiry at the pleading phase; provability is relevant only when it “appears ‘beyond doubt’ that the plaintiff cannot prove her claim.”<sup>133</sup>

*Twombly* did not undermine this notion. *Twombly*, in fact, said much the same thing: “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.”<sup>134</sup> As for what makes a complaint “well-pleaded,” *Conley* and *Twombly* provide identical answers: “[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.”<sup>135</sup>

It should also be recognized that some of the most frequently quoted passages from *Conley* did not paint the full picture of how notice pleading operated in practice. As discussed above, *Conley*’s “no set of facts” language would lead to ridiculous results if taken literally<sup>136</sup>—although that phrase was subject to a much more sensible interpretation than *Twombly* acknowledged.<sup>137</sup> Even *Conley*’s “fair notice” language is partially incomplete, insofar as it overlooks the possibility that a complaint could fail on legal-sufficiency grounds. That is, it is not necessarily true that “all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>138</sup> If

132. *Id.*

133. *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *see also* Steinman, *supra* note 8, at 1321. (“[T]his now-discredited phrase was subject to a far more sensible reading.”).

134. *Twombly*, 550 U.S. at 556 (citation and internal quotation marks omitted).

135. *Conley*, 355 U.S. at 47; *accord Twombly*, 550 U.S. at 555 (“Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” (quoting *Conley*, 355 U.S. at 47)).

136. *See supra* notes 128–131 and accompanying text (demonstrating the problems with an overly literal interpretation of this language from *Conley*).

137. *See supra* notes 133–135 and accompanying text.

138. *Conley*, 355 U.S. at 47; *accord Twombly*, 550 U.S. at 555 (“Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” (quoting *Conley*, 355 U.S. at 47)).

that “statement of the claim” reveals that the claim would fail as a matter of law, it can and should be subject to dismissal at the pleading phase. Properly understood, *Twombly* and *Iqbal*’s plausibility inquiry operationalizes the legal-sufficiency inquiry—as discussed above.<sup>139</sup>

Accordingly, *Twombly*’s one point of departure with *Conley* does not reject any meaningful aspect of the pre-*Twombly* pleading regime—especially when so much of that regime is reaffirmed and cited approvingly by the *Twombly* opinion itself.<sup>140</sup> *Iqbal* also did not question any aspect of the Court’s notice-pleading precedent. Justice Kennedy framed the Court’s approach to pleading in *Iqbal* as nothing more, and nothing less, than the *Twombly* approach.<sup>141</sup> If *Twombly* and *Iqbal* discarded notice pleading, they did not do so explicitly.<sup>142</sup>

### C. *Twombly*, *Iqbal*, and the Power to Disregard Conclusory Allegations

For all of the reasons explained earlier, *Twombly* and *Iqbal*’s most significant potential impact lies in courts’ ability to disregard allegations in a complaint on the grounds that they state only “legal conclusions.”<sup>143</sup> Because *Iqbal* itself recognizes that nonconclusory allegations must be accepted as true, a court may second-guess a complaint’s allegation only if it finds that the allegation is conclusory. I argue here that as long as the complaint’s allegations identify the basic events that establish the plaintiff’s entitlement to relief, those allegations are nonconclusory—the plaintiff should not be required to include allegations indicating how it will prove those allegations.

Admittedly, the *Twombly* and *Iqbal* decisions themselves fail to provide concrete guidance on what makes an allegation impermissibly “conclusory.” One reason for this difficulty is that the Court does not reconcile its refusal to accept some allegations in those cases with its willingness to accept others.<sup>144</sup> In *Iqbal*, for example, the Court deemed it sufficiently nonconclusory to allege that “[i]n the months after September 11, 2001, the Federal Bureau of Investigation (‘FBI’), under

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139. See *supra* notes 41–46 and accompanying text.

140. See *supra* notes 60–62 and accompanying text (discussing *Twombly*’s endorsement of *Conley* and other notice-pleading precedents).

141. As discussed above, the *Iqbal* opinion viewed *Twombly* as “expound[ing]” Rule 8’s pleading standard for all civil actions. See *supra* notes 72–73 and accompanying text.

142. This is significant because, as discussed *infra* notes 153–155 and accompanying text, the Supreme Court has repeatedly instructed that lower courts should not infer that earlier Supreme Court decisions have been implicitly overruled.

143. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

144. See Steinman, *supra* note 6, at 1758 (noting “the [*Iqbal*] majority’s conclusion (also without explanation) that other allegations in the *Iqbal* complaint were ‘factual’ and hence entitled to an assumption of truth”).

the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11,”<sup>145</sup> and that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.”<sup>146</sup> If there is a principle that explains why these allegations must be accepted as true but the allegation in paragraph 96 does not, the Court does not explain what it is.<sup>147</sup>

In deciding how best to navigate this terrain, it is significant that neither *Twombly* nor *Iqbal* overrule *Swierkiewicz* or any other aspect of pre-*Twombly* pleading except for *Conley*’s “beyond doubt . . . no set of facts” language.<sup>148</sup> As discussed above, *Twombly* took issue only with an extremely literal reading of that phrase.<sup>149</sup> The pre-*Twombly* notice-pleading framework did not depend on the contorted reading of *Conley* that *Twombly* correctly retired.<sup>150</sup> That *Twombly* took pains to challenge that one particular reading of one particular phrase in *Conley* buttresses the view that other tenets of the long-standing notice-pleading framework should remain intact. Again, *Twombly* embraced *Conley*’s “fair notice” standard.<sup>151</sup> It would be perverse to read *Iqbal* as implicitly rejecting that standard when its analysis was based on the *Twombly* decision that had explicitly reaffirmed “fair notice.”<sup>152</sup>

Moreover, the Supreme Court has repeatedly instructed that its decisions should not be read to overrule earlier decisions implicitly. Only the Supreme Court has the “prerogative of overruling its own decisions.”<sup>153</sup> Until the Court itself has done so, lower courts continue to be bound by those prior decisions.<sup>154</sup> Caution seems especially

145. *Iqbal* Complaint, *supra* note 83, at ¶ 47; *see also Iqbal*, 556 U.S. at 681 (quoting the complaint).

146. *See Iqbal* Complaint, *supra* note 83, at ¶ 69; *see also Iqbal*, 556 U.S. at 681 (quoting the complaint).

147. *See* Steinman, *supra* note 8, at 1329 (comparing the allegations that the Court disregarded in *Iqbal* with the ones that the Court accepted as true).

148. *See supra* notes 60–135 and accompanying text.

149. *Supra* notes 126–133 and accompanying text; *see also* Steinman, *supra* note 6, at 1757 (“*Twombly* jettisoned only a very problematic, borderline-nonsensical understanding of this phrase . . .”).

150. *See* Steinman, *supra* note 6, at 1757 (“No serious jurist had ever read *Conley* as imposing such a meaningless standard . . .”).

151. *See supra* note 60 and accompanying text.

152. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

153. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted).

154. *See id.* at 238 (emphasizing that lower courts are bound to follow Supreme Court holdings “unless and until [the Supreme] Court reinterpreted the binding precedent”); *see also* Scheiber v.

warranted where, as here, the later decisions cite and reaffirm the earlier decisions that they have supposedly overruled.<sup>155</sup>

The approach proposed earlier—which would conceptualize what counts as “conclusory” in *transactional* terms<sup>156</sup>—is able to reconcile the Court’s conclusions in *Twombly* and *Iqbal* with pre-*Twombly* notice-pleading precedents.<sup>157</sup> First, consider paragraph 51 of the *Twombly* complaint:

In the absence of any meaningful competition between the [defendants] in one another’s markets, and *in light of the parallel course of conduct* that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.<sup>158</sup>

As a logical matter, an agreement to engage in parallel conduct must come before the parallel conduct itself. Yet paragraph 51 suggests that the conspiracy derives from the parallel conduct, rather than the other way around. The *Twombly* majority emphasized precisely this fact in finding that while “a few stray statements [in the complaint] speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations.”<sup>159</sup> Accordingly, Justice

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Dolby Labs., Inc., 293 F.3d 1014, 1018 (7th Cir. 2002) (Posner, J.) (“[W]e have no authority to overrule a Supreme Court decision no matter . . . how out of touch with the Supreme Court’s current thinking the decision seems.”).

155. See *supra* notes 60–62 and accompanying text.

156. See *supra* notes 113–117 and accompanying text.

157. It may be worth interrogating the presumption that the Supreme Court’s ultimate conclusion on a particular issue—such as whether paragraph 51 of the *Twombly* complaint or paragraph 96 of the *Iqbal* complaint should be accepted as true at the pleading phase—generates obligations on future courts as a matter of stare decisis. See Steinman, *supra* note 6, at 1742 (examining whether stare decisis should “requir[e] future courts to infer obligations from the mere results of cases”). As explained above, neither *Twombly* nor *Iqbal* provided any clarifying principle that would require courts to disregard allegations that would have passed muster for purposes of notice pleading. If stare decisis requires courts to read *Twombly* and *Iqbal* as creating broader authority to disregard allegations at the pleading phase, then courts are—by necessity—being forced to infer from those bare results new principles that the precedent-setting decisions never themselves articulated. See *id.* at 1783–90. Although result-based stare decisis may foster consistency in a very loose sense, it carries with it the risk that courts will be required to read decisions far more sweepingly than is justified. See *id.* at 1742. For these reasons, I have argued elsewhere that—as a matter of institutional design—a better approach to stare decisis would not require courts to justify, reconcile, or explain the bare results reached by superior courts. *Id.* at 1783–86.

158. *Twombly* Complaint, *supra* note 51, at ¶ 51.

159. *Twombly*, 550 U.S. at 564–66 (explaining that “the complaint *first* takes account of the alleged absence of any meaningful competition between the ILECs in one another’s markets, the parallel course of conduct that each ILEC engaged in to prevent competition from CLECs, and the other facts and market circumstances alleged earlier” and that “*in light of these*, the complaint

Souter concluded that the *Twombly* plaintiffs had merely “rest[ed] their § 1 claim on descriptions of parallel conduct and not on any *independent* allegation of *actual* agreement among the ILECs.”<sup>160</sup>

Now consider the key paragraph of the *Iqbal* complaint. Paragraph 96 alleged that Ashcroft, Muller, and nine other defendants “each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to [harsh] conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin.”<sup>161</sup> The problem with this paragraph is not necessarily the allegation that Ashcroft and Mueller acted “solely on account of [Iqbal’s] religion, race, and or national origin.” If it were, *Iqbal* would indeed be hard to square with *Swierkiewicz* (where the complaint contained a similarly cursory allegation regarding the defendant’s intent),<sup>162</sup> as well as former Form 11 (which states without elaboration that the defendant was driving “negligently”).<sup>163</sup>

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concludes that the ILECs have entered into a contract, combination or conspiracy to prevent competitive entry into their markets and have agreed not to compete with one another.” (emphasis added)) (quoting *Twombly* Complaint, *supra* note 51, at ¶ 51) (other quotation marks and alterations omitted)).

160. *Id.* at 564 (emphasis added). One can certainly take issue with the Court’s reading of paragraph 51. The placement and phrasing of that paragraph could have been an attempt to indicate, consistent with Rule 11, “that the conspiracy allegation was one that did not *currently* have evidentiary support but ‘will *likely* have evidentiary support after a reasonable opportunity for further investigation or discovery.’” Steinman, *supra* note 8, at 1338–39 (quoting FED. R. CIV. P. 11(b)(3)). For the *Twombly* plaintiffs, it is unfortunate that the Court failed to consider this possibility. But the fact remains that the *Twombly* majority’s concern with paragraph 51 was that it did not constitute an “*independent* allegation of *actual* agreement” but rather a mere “legal conclusion[ ] *resting* on the prior allegations.” *Twombly*, 550 U.S. at 564 (emphasis added). Had the complaint provided such an “independent allegation of actual agreement,” it would have—in the language of *Iqbal*—qualified as a nonconclusory allegation that must be accepted as true.

161. *Iqbal* Complaint, *supra* note 83, at ¶ 96.

162. See *supra* notes 34–40 and accompanying text (describing *Swierkiewicz*).

163. See *supra* note 22 and accompanying text (describing Form 11). The 2015 amendments to the Federal Rules of Civil Procedure eliminated nearly all of the Forms that had appeared in the Federal Rules’ Appendix, including all of the sample complaints. See *supra* notes 22–27 and accompanying text (describing the sample complaint for negligence and the sample complaint for patent infringement). The Advisory Committee Note makes clear, however, that the elimination of the forms “does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.” FED. R. CIV. P. 84, advisory committee note. Indeed, the impetus for eliminating the forms confirms that no substantive change to the Federal Rules is intended; rather, the committee note explains that the Forms “are no longer necessary” because “[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled.” *Id.* As an interpretive matter, it would be nonsensical to use the fact that the Forms’ “purpose” has been “fulfilled” as justification for an approach to pleading (or any other topic governed by the Federal Rules) that flies in the face of those same Forms. Given the explicit instruction in the proposed committee note, and the fact that no amendments were made to the rules that govern pleading and pleading motions (such as Rule 8 and Rule 12), pleading forms that have occupied the Federal Rules for its first eight decades remain the best indicator of the pleading framework contemplated by the drafters, and they should continue to be followed unless and until the Court commands a

But there is another way to understand what made paragraph 96 conclusory. It failed to state what Ashcroft and Mueller actually did *vis-à-vis* Iqbal. Given the Court's understanding of what was required for *Bivens* liability—that “each Government-official defendant, through the official's own individual actions, has violated the Constitution”<sup>164</sup>—Ashcroft's and Mueller's individual conduct was crucial as a matter of substantive law. Yet up until this key allegation in the *Iqbal* complaint, Ashcroft's and Mueller's role in Iqbal's confinement seemed to be solely their approval of the hold-until-cleared policy. This policy was never alleged to have been adopted for invidious reasons—a point that Justice Kennedy made explicitly in his opinion.<sup>165</sup> Insofar as paragraph 96 did not allege that discriminatory animus drove Ashcroft and Mueller to take any particular, concrete, real-world action, one might legitimately conclude that—at least as to Ashcroft and Mueller—the allegation in paragraph 96 is “nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”<sup>166</sup>

A proper application of *Iqbal* could yield a different outcome, therefore, if a hypothetical complaint alleged:

Ashcroft and Mueller ordered that all post-September-11th detainees who are Arab or Pakistani Muslim men be subjected to harsh conditions of confinement, and they issued this order because of its adverse effect on this particular group. Iqbal was subjected to harsh conditions of confinement pursuant to this policy.

Or perhaps:

Ashcroft and Mueller knew Iqbal personally and they ordered that he be subjected to harsh conditions of confinement because he was a Pakistani Muslim man.

In both instances, the allegation of the defendants' state of mind is no less cursory than in *Iqbal* itself.<sup>167</sup> But these hypothetical allegations state more than mere legal conclusions because they describe—admittedly in “short and plain” fashion<sup>168</sup>—what actions Ashcroft and

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different approach. Several of the forms relevant to pleading standards are reproduced in Appendix B of this Article.

164. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

165. *Id.* at 683.

166. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

167. See Steinman, *supra* note 8, at 1341 (arguing that under a proper understanding of *Iqbal*, “an allegation may contain some language that, in isolation, might be characterized as conclusory without the allegation being deemed ‘conclusory’ for purposes of *Iqbal* step one”).

168. FED. R. CIV. P. 8(a)(2) (requiring “a *short and plain* statement of the claim showing that the pleader is entitled to relief” (emphasis added)).

Mueller took.<sup>169</sup> Therefore, they should be accepted as true without any assessment of their “plausibility.”<sup>170</sup>

This approach also makes sense of *Swierkiewicz* and the sample negligence complaint (former Form 11)<sup>171</sup> that occupied the Rules’ Appendix for nearly eight decades. Although *Swierkiewicz*—like *Iqbal*—involved a defendant’s discriminatory intent, the *Swierkiewicz* complaint provided a straightforward transactional narrative: the plaintiff was employed by the defendant, and the plaintiff was fired because of his age (fifty-three) and national origin (Hungarian). Former Form 11 also concretely identified the liability-generating conduct and event: the defendant negligently driving his car against the plaintiff.<sup>172</sup> This is more than the sort of “unadorned, the-defendant-unlawfully-harmed-me accusation” that *Iqbal* declared should be disregarded as a mere legal conclusion, even though it does not elaborate on precisely how the defendant was negligent.<sup>173</sup>

#### D. Saving *Twombly* and *Iqbal* from Themselves?

The argument that *Twombly* and *Iqbal* can be reconciled with notice pleading is not an attempt to defend those decisions. The Court gave little meaningful guidance as to crucial aspects of pleading doctrine and how that doctrine commanded the results in *Twombly* and *Iqbal*.<sup>174</sup> Although the newly-constituted “plausibility” inquiry can be contextualized in a way that does not disrupt the federal court’s long-

169. This approach, therefore, makes sense of Rule 9(b)’s command that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” FED. R. CIV. P. 9(b). Yet it also explains why the mere ability to allege intent or state of mind “generally” does not mean that every such allegation passes muster. See *Iqbal*, 556 U.S. at 686–87 (“Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8.”). The allegation must still be sufficiently tethered to an adequately identified transaction in order to be accepted as true at the pleading phase. See *id.* at 687 (“Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label ‘general allegation,’ and expect his complaint to survive a motion to dismiss.”).

170. As discussed above, plausibility could nonetheless play a role if the complaint contained other allegations that were fatal to the plaintiff’s claims, or if the substantive law were such that not even discriminatory animus would entitle a plaintiff to *Bivens* damages. See *supra* notes 121–124 and accompanying text. But those kinds of legal-sufficiency arguments have always been proper at the pleading phase. See *supra* notes 41–46 and accompanying text.

171. See *supra* note 22 and accompanying text (describing Form 11).

172. Form 11 remains instructive regarding pleading standards notwithstanding the recent elimination of the Federal Rules’ Appendix. See *supra* note 163.

173. *Iqbal*, 556 U.S. at 678 (“As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

174. See *supra* notes 144–147, 160 and accompanying text.



standing notice-pleading approach,<sup>175</sup> it was ill-advised to create from thin air a concept that lends itself to such confusion and consternation.<sup>176</sup>

To avoid any misunderstanding, it is worth clarifying where the arguments in this Article do—and do not—depart from the standard critique of *Twombly* and *Iqbal*. It is admittedly a bit of a misnomer to say there is a “standard” critique given the vast literature on these decisions. But at the risk of oversimplifying, one tends to find the following features:

- Point #1: *Twombly* and *Iqbal* impose a more restrictive pleading standard.
- Point #2: Lower courts have taken a more restrictive approach to pleading following *Twombly* and *Iqbal*.
- Point #3: A more restrictive pleading standard is normatively undesirable.

If one accepts all of these points, it follows that lower courts are *correct* to take a more restrictive approach to pleading (Point #2); they are, after all, simply following the binding precedent from the Supreme Court (Point #1). Adherents to the standard critique, therefore, would necessarily accept that this restrictive approach to pleading can be corrected only by the Supreme Court explicitly overruling *Twombly* and *Iqbal* or by an amendment of the Federal Rules themselves, either through the Rules Enabling Act process or by direct congressional legislation. None of these seem particularly likely to occur. Accordingly, the standard critique operates to entrench a restrictive approach to pleading that is normatively undesirable (Point #3).<sup>177</sup>

My arguments part ways with the standard critique only with respect to Point #1. I argue that *Twombly* and *Iqbal* should *not* be read to impose a more restrictive pleading standard. Of course people may legitimately disagree over the correct interpretation of *Twombly* and *Iqbal*, just as people may disagree over the correct interpretation of statutes or constitutional provisions.<sup>178</sup> But this is an interpretive question with normative dimensions: how *should* these decisions be

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175. See *supra* Section II.A.

176. See Steinman, *supra* note 8, at 1299 (“[I]t was irresponsible for the Court to invite the controversial ‘plausibility’ concept into pleading doctrine in a way that has led to such widespread confusion.”).

177. See *id.* at 1296–97 (“The current discourse . . . threatens to make *Iqbal*’s (and *Twombly*’s) effect on pleading standards a self-fulfilling prophecy.”).

178. See Steinman, *supra* note 6, at 1738, 1767–75 (comparing interpretation of case law with interpretation of statutes).

interpreted? Point #1 of the standard critique, therefore, cannot be established simply by Point #2, unless we are to accept that lower courts' interpretations of Supreme Court precedent are always correct.

When one combines the interpretive argument presented here with the other aspects of the standard critique, the points are as follows:

- Point #1: *Twombly* and *Iqbal* do not impose a more restrictive pleading standard.
- Point #2: Lower courts have taken a more restrictive approach to pleading following *Twombly* and *Iqbal*.
- Point #3: A more restrictive pleading standard is normatively undesirable.

If one accepts Point #1—that *Twombly* and *Iqbal* do not impose a more restrictive approach to pleading and that the core aspects of the pre-*Twombly*, notice-pleading approach remain good law—then lower federal courts are *wrong* to take a more restrictive approach to pleading (Point #2). And there are, therefore, more options for avoiding the normatively undesirable consequences of a more restrictive pleading standard (Point #3). Litigants can make the interpretive argument set out in this Article without waiting for a textual revision of the Federal Rules or a grand declaration from the Supreme Court overruling *Twombly* and *Iqbal*. While many critiques of *Twombly* and *Iqbal* reduce the options for avoiding a more restrictive approach to pleading going forward, the arguments set out in this Article increase those options.

Indeed, a fair reading of *Twombly* and *Iqbal*—despite their many faults—suggests caution before presuming an intent to overhaul federal pleading standards.<sup>179</sup> If there were five votes to abandon notice pleading, or to overrule *Swierkiewicz* or other core precedents from the pre-*Twombly* era, nothing would have stopped the Court from doing so.<sup>180</sup> For those who question the normative desirability of a more

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179. What may have united the majorities in *Twombly* and *Iqbal* was not a desire to make pleading standards more restrictive, but rather an outcome-driven hostility to the particular claims being asserted in those cases. See Steinman, *supra* note 8, at 1299 (“At best, *Twombly* and *Iqbal* appear to be result-oriented decisions designed to terminate at the earliest possible stage lawsuits that struck the majorities as undesirable.”); *id.* at 1326 (arguing that “the precise facts of *Twombly* and *Iqbal*” may have motivated the majorities in those cases, rather than a “broader doctrinal agenda” regarding pleading standards).

180. See *id.* at 1326 (“[The Court] was perfectly willing to retire *Conley v. Gibson*’s ‘no set of facts’ language . . . . That the Court did not similarly retire either *Swierkiewicz* or *Conley*’s ‘fair notice’ principle speaks volumes.”). The conventional reaction to *Twombly* and *Iqbal* may, in fact, have enabled those Justices who do favor a broader dismantling of federal pleading standards to have their cake and eat it too. They did not have to *say* they were overruling core aspects of the federal approach to pleading—they likely lacked the votes to do so. But the presumption that there was no other way to apply *Twombly* and *Iqbal* going forward allowed them to accomplish that

restrictive pleading standard, the worst possible outcome would be for courts to read *Twombly* and *Iqbal* as wreaking havoc on the simple, merits-driven approach to pleading conceived of by the original drafters of the Federal Rules.<sup>181</sup> That alternative is troubling not only because of its impact on access to justice and the enforcement of substantive rights and obligations, but also because—as discussed above—it is contrary to so many other aspects of the *Twombly* and *Iqbal* decisions themselves. The “fair notice” test is still good law.<sup>182</sup> *Swierkiewicz* is still good law.<sup>183</sup> And it is still the case that “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.”<sup>184</sup>

To be sure, there were aspects of the *Twombly* and *Iqbal* majority opinions that courts could point to as justifying greater hurdles at the pleading phase, if they were so inclined. Empirical studies suggest that many lower courts have been doing just that.<sup>185</sup> It does not follow, however, that those courts are reading *Twombly* and *Iqbal* correctly. For all the reasons set out above, a careful reading of

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result all the same. *See id.* at 1296–97 (“The current discourse . . . threatens to make *Iqbal*’s (and *Twombly*’s) effect on pleading standards a self-fulfilling prophecy.”).

181. To accept the approach to pleading urged here, one need not necessarily agree with the Supreme Court’s findings that the core allegations in the *Twombly* and *Iqbal* complaints should indeed have been disregarded as conclusory. *See* Steinman, *supra* note 8, at 1344–45 (“One could reasonably disagree with the Court’s holdings that the crucial allegations in *Twombly* and *Iqbal* were conclusory.”). Although there are some ways in which those allegations are less-than-ideal from a transactional standpoint, *see supra* notes 158–160, 164–170 and accompanying text, one could sensibly conclude otherwise. But if the Court’s findings that those allegations were conclusory place constraints on future courts in terms of how the post-*Iqbal* pleading framework is to be applied, *but cf. supra* note 157 (questioning whether a court’s ultimate findings, as opposed to the legal principles than generate such findings, should create binding obligations on future courts as a matter of *stare decisis*), a transactional approach can make sense of those decisions without implicitly overhauling core features of notice pleading.

182. *See supra* notes 60, 127, 135 and accompanying text; *see also* Hamilton v. Palm, 621 F.3d 816, 817 (8th Cir. 2010) (“*Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2).”); Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009) (noting that *Twombly* had not “repudiated the general notice-pleading regime of Rule 8” and that “[t]his continues to be the case after *Iqbal*.”); Carter v. Ford Motor Co., 561 F.3d 562, 565–66 (6th Cir. 2009) (“The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” (citations and internal quotation marks omitted)); Anderson v. U.S. Dep’t of Hous. & Urban Dev., 554 F.3d 525, 528 (5th Cir. 2008) (citing *Twombly* for the proposition that “the complaint must give the defendant fair notice of what the claim is and the grounds upon which it rests.” (ellipses and internal quotation marks omitted)).

183. *See supra* notes 61–62, 153–155 and accompanying text; *see also* Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010) (noting “[t]he Supreme Court’s explicit decision to reaffirm the validity of *Swierkiewicz*, which was cited with approval in *Twombly*) (citations omitted)).

184. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236).

185. *See supra* notes 96–101 and accompanying text.

*Twombly* and *Iqbal* not only permits, but compels them to be applied in a manner that preserves the preexisting notice-pleading framework. As the next Part will show, the Supreme Court's post-*Iqbal* pleading decisions are consistent with this understanding.

### III. THE SUPREME COURT'S POST-*IQBAL* PLEADING DECISIONS

For the reasons described in Part II, the best reading of *Twombly* and *Iqbal* does not impose on the federal judiciary a new plausibility-pleading regime. The framework developed in *Twombly* and *Iqbal* does not, in fact, make an assessment of the complaint's "plausibility" the crucial inquiry in deciding whether it survives a motion to dismiss. Nor do *Twombly* and *Iqbal* compel a more restrictive pleading standard than the notice-pleading framework that existed in pre-*Twombly* years. We now have the benefit of additional input from the Supreme Court, which has addressed federal pleading standards on numerous occasions during the last five years. This Part will describe the six most significant post-*Iqbal* Supreme Court decisions that address pleading standards.

#### A. *Skinner v. Switzer*

It took almost two years for the Court to revisit pleading standards following *Iqbal*. Then, in the spring of 2011, the Court decided *Skinner v. Switzer*,<sup>186</sup> which involved a prisoner's § 1983 action seeking to obtain DNA testing as a matter of procedural due process.<sup>187</sup> Writing for a six-Justice majority—and citing two core pre-*Twombly* precedents on pleading standards—Justice Ginsburg explained:

Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was not whether Skinner will ultimately prevail on his procedural due process claim, see *Scheuer v. Rhodes*, but whether his complaint was sufficient to cross the federal court's threshold, see *Swierkiewicz v. Sorema N.A.*<sup>188</sup>

The Court recognized that "Skinner's complaint is not a model of the careful drafter's art, but under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiff's claim."<sup>189</sup> Skinner's complaint included allegations that he

186. 131 S. Ct. 1289 (2011).

187. *Id.* at 1293.

188. *Id.* at 1296 (internal quotation marks and brackets omitted) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); and *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002)).

189. *Id.*

had twice requested and failed to obtain DNA testing under the only state-law procedure then available to him,<sup>190</sup> that he had persistently sought the State's voluntary testing of the materials he identified,<sup>191</sup> and that the State had refused "to release the biological evidence for testing," thereby depriving him "of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence."<sup>192</sup>

Ultimately, the Court did not take up the legal "vitality" of Skinner's claim, because the only issues before it were (1) whether federal subject-matter jurisdiction was foreclosed by the *Rooker-Feldman* doctrine, and (2) whether § 1983 was an appropriate vehicle for Skinner's claim.<sup>193</sup> What is significant in terms of pleading standards, however, is that the Court accepted as true Skinner's allegations regarding both his and the State's behavior without regard to whether those particular allegations were "plausible," and without insisting on additional allegations suggesting the truth of those allegations. The Court even cited *Swierkiewicz* as authoritative on "whether his complaint was sufficient to cross the federal court's threshold."<sup>194</sup> According to the Supreme Court itself, then, reports of *Swierkiewicz's* death were greatly exaggerated.<sup>195</sup>

### B. Matrixx Initiatives, Inc. v. Siracusano

*Matrixx Initiatives, Inc. v. Siracusano*<sup>196</sup> was a securities fraud case in which the Court unanimously held that the plaintiffs had

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190. *Id.* (citing Complaint at 14–20; and *Skinner v. Switzer* 131 S. Ct. 1289 (2011) (No.2:09-cv-00281-J-BB) 2010 WL 2937563 at \*5).

191. *Id.* (citing Complaint at 22–31; and *Skinner* 131 S. Ct. 1289 (No.2:09-cv-00281-J-BB) 2010 WL 2937563 at \*5).

192. *Id.* (citing Complaint at 33; and *Skinner* 131 S. Ct. 1289 (No.2:09-cv-00281-J-BB) 2010 WL 2937563 at \*5).

193. *See id.* at 1297:

The merits of Skinner's federal-court complaint assailing the Texas statute as authoritatively construed, and particularly the vitality of his claim in light of [*District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009)], are not ripe for review. We take up here only the questions whether there is federal-court subject-matter jurisdiction over Skinner's complaint, and whether the claim he presses is cognizable under § 1983. . . . Respondent Switzer asserts that Skinner's challenge is jurisdictionally barred by what has come to be known as the *Rooker-Feldman* doctrine.

194. *Id.* at 1296; *see supra* note 188 and accompanying text.

195. This phrase is often attributed to Mark Twain, responding to a prematurely published obituary. *See Rucker v. United States*, 382 F. Supp. 2d 1288, 1296 (D. Utah 2005) (Cassell, J.) ("Mark Twain observed in 1897 that 'the reports of my death are greatly exaggerated' . . ."). Other sources describe a slightly different quotation. *See OXFORD DICTIONARY OF QUOTATIONS* 512 (2014) (describing Twain's June 2, 1897 statement to the *New York Journal* that "[t]he report of my death was an exaggeration").

196. 131 S. Ct. 1309 (2011).

adequately pled that the defendant's misrepresentations were material for purposes of federal securities law.<sup>197</sup> According to the plaintiffs, Matrixx had made material misrepresentations by withholding information suggesting a connection between its product, the cold remedy Zicam, and a risk of anosmia (the loss of smell).<sup>198</sup> The defendant first argued that it had not made any material misrepresentations because the various studies and other information it knew of at the time did not establish a statistically significant risk of anosmia. Justice Sotomayor's opinion for the Court rejected that view, emphasizing that the legal test for materiality was whether the withheld information "would have been viewed by the reasonable investor as having significantly altered the total mix of information made available."<sup>199</sup>

Having clarified the proper standard, the opinion turned to whether allegations in the complaint relating to materiality passed muster. First, the Court recognized that—under *Iqbal*—"facts" alleged in a complaint must be "assumed to be true."<sup>200</sup> At several points, Justice Sotomayor's opinion used the word "plausible" (or variants thereof),<sup>201</sup> and acknowledged that a complaint must "allege 'enough facts to state a claim to relief that is plausible on its face.'"<sup>202</sup> But her analysis of the plaintiff's complaint makes clear that plausibility is not grounds for a court to second-guess allegations at the pleading phase. To the contrary, Justice Sotomayor accepted as true all of the

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197. *Matrixx*, 131 S. Ct. at 1318. The *Matrixx* plaintiffs had also alleged a failure to adequately plead scienter, an issue which is explicitly governed by the heightened pleading standard imposed by the Private Securities Litigation Reform Act (PSLRA). See *id.* at 1323–24 (noting that the PSLRA requires the complaint to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind" (quoting 15 U.S.C. § 78u–4(b)(2)(A) (2012))). The Court found that the complaint was sufficient on this issue as well. *Id.* at 1324–25.

198. *Id.* at 1314.

199. *Id.* at 1318 (citations and internal quotation marks omitted).

200. *Id.* at 1314 ("Respondents' consolidated amended complaint alleges the following facts, which the courts below properly assumed to be true." (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009))).

201. See *id.* ("[R]espondents have alleged facts plausibly suggesting that reasonable investors would have viewed these particular reports as material."); *id.* at 1322 ("Assuming the complaint's allegations to be true, as we must, Matrixx received information that plausibly indicated a reliable causal link between Zicam and anosmia."); *id.* at 1322 n.12 ("[R]espondents' allegations plausibly suggest that Dr. Jafek and Linschoten's conclusions were based on reliable evidence of a causal link between Zicam and anosmia."); *id.* at 1322 n.13 ("[T]he existence of the studies suggests a plausible biological link between zinc and anosmia, which, in combination with the other allegations, is sufficient to survive a motion to dismiss."); *id.* at 1323 ("The information provided to Matrixx by medical experts revealed a plausible causal relationship between Zicam Cold Remedy and anosmia.")

202. *Id.* at 1322 n.12 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

complaint's allegations regarding what information was communicated to Matrixx, and what the relevant studies actually showed.

For example, she accepted without any further inquiry the allegation that the studies "confirmed the toxicity of zinc,"<sup>203</sup> which was sufficient for materiality purposes even though the studies involved zinc sulfate, rather than zinc gluconate, which was Zicam's active ingredient.<sup>204</sup> In response to Matrixx's argument that the relevant studies were unreliable "because they did not sufficiently rule out the common cold as a cause for their patients' anosmia,"<sup>205</sup> Justice Sotomayor accepted without further inquiry the allegation that "in one instance, a consumer who did not have a cold lost his sense of smell after using Zicam."<sup>206</sup> At no point did she indicate that additional allegations were required to plausibly suggest that the content of those reports and studies was, in fact, as the plaintiffs alleged.

The *Matrixx* opinion, therefore, used plausibility in the classic legal-sufficiency sense: accepting that everything happened as the plaintiff described it, would it be legally permissible to conclude that the withheld information would satisfy the materiality standard? Matrixx first argued for a per se rule that adverse reports could be material for securities fraud purposes only if they showed a statistically significant relationship.<sup>207</sup> When the Court rejected that argument, Matrixx made the more nuanced argument that the information Matrixx allegedly knew (and failed to disclose) could not, as a matter of law, have "significantly altered the total mix of information made available."<sup>208</sup> This is a legitimate argument to pursue—even at the pleading phase. But the Court's rejection of that argument confirms that the plausibility inquiry does not allow a court to refuse to accept a complaint's allegations based on the judge's own perception of their plausibility, or because the complaint fails to allege how the plaintiff would ultimately prove those allegations as an evidentiary matter.<sup>209</sup>

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203. *Id.* at 1322 n.13.

204. *Id.*

205. *Id.* at 1322 n.12.

206. *Id.*

207. *Id.* at 1318; see also *supra* text accompanying note 199.

208. *Matrixx*, 131 S. Ct. at 1318 (citations and internal quotation marks omitted).

209. Indeed, the Supreme Court and countless lower courts have cautioned that whether a misrepresentation qualifies as "material" is typically a question for the ultimate fact-finder, and should not be determined as a matter of law. See, e.g., *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976):

The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts. In considering whether summary judgment on the issue is appropriate, we must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The

## C. Wood v. Moss

The next Supreme Court case on pleading standards came nearly three years later. In March 2014, the Court decided *Wood v. Moss*<sup>210</sup>—a *Bivens* case brought by plaintiffs who had been protesting against President George W. Bush during his 2004 visit to a restaurant in Oregon.<sup>211</sup> They sought monetary damages against several Secret Service agents, alleging that the agents had engaged in unconstitutional viewpoint discrimination (in violation of the First Amendment) by moving them farther away from the President than a similar group that was expressing support for the President.<sup>212</sup> The defendants invoked qualified immunity, and the Court agreed that the plaintiffs' complaint should be dismissed on qualified immunity grounds.<sup>213</sup>

Writing for the Court, Justice Ginsburg quoted *Iqbal*'s instruction that “courts ‘must take all of the factual allegations in the complaint as true,’ but ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’ ”<sup>214</sup> She quoted *Iqbal* again for the proposition that “the ‘complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.’ ”<sup>215</sup> Integral to her examination of the *Wood* complaint, however, was the Court's substantive holding regarding qualified immunity. Justice Ginsburg reasoned that given the state of the law at the time the agents acted, the plaintiffs would have to show—at the very least—that “the agents had no objectively reasonable security rationale” and had acted “solely to inhibit the expression of disfavored views.”<sup>216</sup> As long as an objectively reasonable security rationale existed, the agents would be entitled to qualified immunity even if it could be shown that viewpoint discrimination also played a role.

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determination requires delicate assessments of the inferences a “reasonable shareholder” would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.;

United States v. Fields, 592 F.2d 638, 649 (2d Cir. 1978) (considering but rejecting the argument that the alleged misrepresentations were immaterial as a matter of law); S.E.C. v. Reys, 712 F. Supp. 2d 1170, 1175 (W.D. Wash. 2010) (same); In re Aetna Inc. Sec. Litig., 34 F. Supp. 2d 935, 945 (E.D. Pa. 1999) (same).

210. 134 S. Ct. 2056 (2014).

211. *Id.* at 2061.

212. *Id.* at 2065.

213. *Id.* at 2065, 2070.

214. *Id.* at 2065 n.5 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

215. *Id.* at 2067 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

216. *Id.* at 2069 (emphasis added).



This was a crucial premise for the Court's decision in *Wood*, because the complaint itself included a map of the relevant area revealing that "when the President reached the patio to dine, the protesters, but not the supporters, were within weapons range of his location."<sup>217</sup> It was this fact—and this fact alone—that led Justice Ginsburg to conclude that "the protesters cannot *plausibly* urge that the agents had no valid security reason to request or order their eviction."<sup>218</sup>

*Wood* did not, therefore, find that the allegation regarding the agents' intent (impermissible viewpoint discrimination) was a "conclusory" allegation that could be disregarded at the pleading phase. Rather, the Court concluded that—because of the substantive law governing the defendants' qualified immunity defense—the presence of an objectively reasonable security rationale doomed the plaintiffs' claims even if it could be shown that viewpoint discrimination also motivated the agents' actions.<sup>219</sup> To be sure, one might disagree with the Court's view of what First Amendment obligations were "clearly established" at the time the agents acted.<sup>220</sup> But the Court's application of the pleading standard was premised on that understanding. Accordingly, the Court's reasoning in *Wood* simply reflected the long-standing pre-*Twombly* notion that plaintiffs can plead themselves out of court if the complaint contains allegations that are fatal as a matter of substantive law.<sup>221</sup> That was what led Justice Ginsburg to conclude that the plaintiffs "cannot plausibly urge that the agents had no valid security reason."<sup>222</sup>

#### D. Fifth Third Bancorp v. Dudenhoeffer

In June 2014, the Court decided *Fifth Third Bancorp v. Dudenhoeffer*.<sup>223</sup> The case focused primarily on the substantive law governing ERISA duty-of-prudence claims. The unanimous opinion by Justice Breyer began by rejecting the defendant's argument that certain kinds of ERISA fiduciaries (those of an employee stock

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217. *Id.* at 2070.

218. *Id.* (emphasis added).

219. *Id.* at 2069; *see also supra* text accompanying note 215.

220. *Wood*, 134 S. Ct. at 2068–69.

221. *See supra* notes 45–46 and accompanying text; *see also* Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899, 901 (7th Cir. 2004) (noting that a plaintiff "pleads itself out of court" when its complaint "admits all the ingredients of an impenetrable defense").

222. *Wood*, 134 S. Ct. at 2070.

223. 134 S. Ct. 2459 (2014).

ownership plan, or ESOP) should enjoy a “presumption of prudence.”<sup>224</sup> In remanding the case, however, Justice Breyer stated that a motion to dismiss a duty-of-prudence claim “requires careful judicial consideration of whether the complaint states a claim that the defendant has acted imprudently.”<sup>225</sup> Discussing some of the relevant considerations, the Court clarified several aspects of the substantive law governing ERISA duty-of-prudence claims depending on whether the alleged lack of prudence was based on publicly available information known to the fiduciary or inside information known to the fiduciary.

With respect to the first category, the Court explained that “allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances.”<sup>226</sup> But the Court refused to rule out the possibility that “a plaintiff could nonetheless plausibly allege imprudence on the basis of publicly available information by pointing to a special circumstance affecting the reliability of the market price as an unbiased assessment of the security’s value in light of all public information that would make reliance on the market’s valuation imprudent.”<sup>227</sup>

With respect to the second category (where the use of inside information might run afoul of securities laws), the Court wrote that “to state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.”<sup>228</sup>

[L]ower courts faced with such claims should also consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant’s position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer’s stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.<sup>229</sup>

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224. *Id.* at 2463; *see also id.* at 2470 (“The proposed presumption makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances. Such a rule does not readily divide the plausible sheep from the meritless goats.”).

225. *Id.* at 2471.

226. *Id.*

227. *Id.* at 2472.

228. *Id.*

229. *Id.* at 2473.

The Court's discussion of the potential role pleading motions might play in the context of ESOP duty-of-prudence claims does not suggest a fundamentally more restrictive approach to pleading. While the Court indicates that certain things must be "plausibly alleged," the only concrete "implausibility" examples the Court provides are theories that fail as a matter of law. As a matter of law, holding stock is not imprudent if selling that stock based on inside information would violate securities laws. As a matter of law, holding or buying a particular stock is not imprudent simply because the price of that stock was dropping, because, absent special circumstances, fiduciaries may prudently rely on the premise that the market price accurately reflects publicly available information. As a matter of law, failing to stop new purchases is not imprudent if doing so would have done more harm than good, such as by signaling to the market that the stock is a bad investment and leading to a drop in the stock price that would hurt existing holdings. Where a complaint does allege a legally sufficient theory, however, nothing in *Fifth Third* suggests that a court may second-guess the underlying allegations based on a perceived lack of plausibility.<sup>230</sup>

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230. As this Article was in its final editing stages, the Supreme Court issued a per curiam decision in *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016), a case that had previously been remanded to the Ninth Circuit for further consideration in light of *Fifth Third*. See *Amgen Inc. v. Harris*, 134 S. Ct. 2870 (2014). Prior to *Fifth Third*, the Ninth Circuit had found that the *Amgen* complaint had adequately stated an ESOP duty-of-prudence claim based on the defendants' "continuing to provide Amgen common stock as an investment alternative when they knew or should have known that the stock was being sold at an artificially inflated price." See *Harris v. Amgen, Inc.*, 770 F.3d 865 (9th Cir. 2014). After *Fifth Third*, on remand from the Supreme Court, the Ninth Circuit "reiterated its conclusion that the complaint states such a claim." *Amgen*, 136 S. Ct. at 758; see also *Harris v. Amgen, Inc.*, 788 F.3d 916, 919 (2014) ("The opinion filed on October 30, 2014, and published at 770 F.3d 865, is hereby amended and replaced by the amended opinion filed concurrently with this order."); *id.* at 929 ("On reconsideration in light of *Fifth Third*, we again reverse the district court's dismissal."). The Supreme Court then found that the Ninth Circuit's post-*Fifth Third* ruling had "failed to properly evaluate the complaint" because it "failed to assess whether the complaint in its current form has plausibly alleged that a prudent fiduciary in the same position could not have concluded that the alternative action would do more harm than good." 136 S. Ct. at 759 (internal quotation marks omitted). The Supreme Court then stated, without elaboration: "Having examined the complaint, the Court has not found sufficient facts and allegations to state a claim for breach of the duty of prudence." *Id.* It did, however, "leave[] to the District Court in the first instance whether the stockholders may amend it in order to adequately plead a claim for breach of the duty of prudence guided by the standards provided in *Fifth Third*." *Id.*

As with the *Fifth Third* decision itself, the Court did not specify in *Amgen* what would be required to adequately allege that a particular alternative action would not have "done more harm than good." Although the Court found the *Amgen* complaint to be insufficient, that complaint did not contain any allegations regarding whether removing Amgen common stock from the list of investment alternatives would have led to adverse consequences that might outweigh the benefits to the plan participants. See Amended Complaint at ¶¶ 288–292, *Harris v. Amgen*, No. No. 2:07-cv-05442-PSG-PLA (C.D. Cal. Mar. 23, 2010), available at 2010 WL 11401029. As described above,

## E. Johnson v. City of Shelby

Last Term, the Supreme Court issued a per curiam decision in *Johnson v. City of Shelby*.<sup>231</sup> The primary issue in *Johnson* was whether the district court had properly rejected the plaintiffs' due process claims for failing to invoke 42 U.S.C. § 1983 explicitly in their complaint. The Supreme Court held that a plaintiff's failure to cite § 1983 is not fatal: "Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted."<sup>232</sup>

The *Johnson* opinion then turned to *Twombly* and *Iqbal*. The Court noted that *Twombly* and *Iqbal* did not resolve whether the plaintiffs were required to cite § 1983 in their complaint, because *Twombly* and *Iqbal* "concern the *factual* allegations a complaint must contain to survive a motion to dismiss."<sup>233</sup> While *Twombly* and *Iqbal* require a plaintiff to "plead facts sufficient to show that her claim has substantive plausibility," the complaint in *Johnson* was "not deficient in that regard" because the plaintiffs "stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city."<sup>234</sup> It explained: "Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim. See Fed. Rules Civ. Proc. 8(a)(2) and (3), (d)(1), (e)."<sup>235</sup>

The Court's reasoning in *Johnson* confirms that the framework set out in *Twombly* and *Iqbal* is consistent with a notice-pleading approach. *Iqbal* itself recognized that nonconclusory allegations must

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nonconclusory allegations on this question would have to be accepted as true; a judge may not refuse to accept such allegations on plausibility grounds. *See supra* Sections II.A–C. Given the Court's instruction that ESOP duty-of-prudence claims require that "a prudent fiduciary in the same position could not have concluded that the alternative action would do more harm than good," *Amgen*, 136 S. Ct. at 759, it is not inconsistent with a regime that allows scrutiny of a complaint's legal sufficiency to insist on allegations that—accepted as true—establish that requirement.

231. 135 S. Ct. 346 (2014).

232. *Johnson*, 135 S. Ct. at 346.

233. *Id.* at 347.

234. *Id.*

235. *Id.* The Court's citation to these particular aspects of Rule 8 is further endorsement of the simplified, merits-based approach to pleading Charles Clark urged from the very beginning. *See supra* notes 20–21. Rule 8(a)(2) & (a)(3), of course, set forth the basic pleading obligations: the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" FED. R. CIV. P. 8(a)(2), and "a demand for the relief sought." FED. R. CIV. P. 8(a)(3). Rule 8(d) states: "Each allegation must be simple, concise, and direct. No technical form is required." FED. R. CIV. P. 8(d). And Rule 8(e) makes clear that "[p]leadings must be construed so as to do justice." FED. R. CIV. P. 8(e).

be accepted as true at the pleading phase, without any inquiry into whether the truth of those allegations is plausibly suggested by other allegations. It follows that plaintiffs comply with Rule 8(a)(2) as long as they—like the *Johnson* plaintiffs—“stat[e] simply, concisely, and directly events that, they allege[], entitle[] them to damages.”<sup>236</sup>

It is particularly noteworthy that the plaintiffs’ claims in *Johnson* were “that they were fired by the city’s board of aldermen, not for deficient performance, but because they brought to light criminal activities of one of the aldermen.”<sup>237</sup> Such claims—like the claims at issue in *Iqbal* and *Swierkiewicz*—hinge on the defendants’ intent. The Supreme Court’s reasoning in *Johnson*, therefore, also supports the view that *Iqbal* does not establish that an allegation is “conclusory” simply because it alleges that a defendant acted with a certain state of mind.<sup>238</sup> Rather, such an allegation should be accepted as true—including its description of the defendant’s intent—as long as it provides a basic identification of the liability-generating events or transactions.<sup>239</sup> Under the sort of “plausibility pleading” approach many associate with *Twombly* and *Iqbal*, one would expect the Court to refuse to accept such allegations unless further allegations plausibly suggest their truth.

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236. *Johnson*, 135 S. Ct. at 347. *Johnson* is similar in this regard to another per curiam decision, *Erickson v. Pardus*, 551 U.S. 89 (2007), that the Court decided shortly after *Twombly* but prior to *Iqbal*. *Erickson* reversed the lower court’s dismissal of a prisoner’s Eighth Amendment claim based on improper medical treatment. *Id.* at 94. The Court cited *Twombly*, yet made no mention of plausibility. 551 U.S. at 93–94. Instead, *Erickson* stated:

Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests. In addition, when ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.

*Id.* (citations, ellipses and internal quotation marks omitted). At the time, many held out hope that *Erickson* was a conscious effort to limit the scope of *Twombly*—to reassure courts and litigants that *Twombly* was an exceptional case but that the traditional notice-pleading approach to pleading would continue to prevail in the mine run of litigation. *Iqbal* was viewed as rejecting this theory, insofar as it made clear that *Twombly* reflects the pleading standard for all federal cases. *See supra* notes 72–73 and accompanying text. As described above, however, a proper reading of both *Twombly* and *Iqbal* would not undermine traditional notice pleading. *Erickson*—like *Johnson*—simply confirms what the *Twombly/Iqbal* approach to pleading mandates as a matter of logic: when nonconclusory allegations establish a meritorious cause of action, a complaint necessarily survives a motion to dismiss without any inquiry into the plausibility of those allegations. *See supra* notes 82, 131–133 and accompanying text.

237. *Johnson*, 135 S. Ct. at 346.

238. *See supra* notes 161–170 and accompanying text.

239. *See supra* notes 156–170 and accompanying text.

*F. Omnicare, Inc. v. Laborers District Council  
Construction Industry Pension Fund*

*Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*<sup>240</sup> involved a false registration claim under § 11 of the 1933 Securities Act. As in *Fifth Third*, the Court in *Omnicare* focused primarily on the governing substantive law, but it then indicated the role that pleading standards might play on remand. The plaintiffs in *Omnicare* asserted that the issuer’s statement of an opinion in a registration statement was actionable because the issuer had “omitted to state facts necessary to make its opinion . . . not misleading.”<sup>241</sup> Specifically, the *Omnicare* plaintiffs challenged the issuer’s belief that its arrangements with pharmaceutical manufacturers complied with federal and state law.<sup>242</sup>

Writing for the majority, Justice Kagan rejected the defendant’s argument that an issuer’s statement of opinion can never be grounds for a § 11 “omission” claim.<sup>243</sup> Instead, she recognized: “[A] reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about . . . the speaker’s basis for holding that view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience.”<sup>244</sup> Put another way: “if a registration statement omits material facts about the issuer’s inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11’s omissions clause creates liability.”<sup>245</sup>

Because a viable cause of action in this context exists “only when an issuer’s failure to include a material fact has rendered a published statement misleading,”<sup>246</sup> Justice Kagan emphasized (citing *Iqbal*) that

240. 135 S. Ct. 1318 (2015).

241. *Id.* at 1327; *see also* 15 U.S.C. § 77k(a) (2012) (creating a cause of action if a registration statement “omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading”). *Omnicare* also recognized that an opinion would violate § 11’s prohibition on making an “untrue statement of a material fact,” 15 U.S.C. § 77k(a), if the speaker did not hold the belief she professed, or if a supporting fact the speaker used to support her belief was false. 135 S. Ct. at 1327 (“[L]iability under § 11’s false-statement provision would follow . . . not only if the speaker did not hold the belief she professed but also if the supporting fact she supplied were untrue.”). The allegations in *Omnicare* did not support that theory. *Id.* (noting that the plaintiffs “cannot avail themselves of either of those ways of demonstrating liability” because the allegedly false sentences were “pure statements of opinion” and the plaintiffs “do not contest that *Omnicare*’s opinion was honestly held”).

242. *Omnicare*, 135 S. Ct. at 1323.

243. *Id.* at 1328–29.

244. *Id.* at 1328.

245. *Id.* at 1329.

246. *Id.* at 1332.

“an investor must allege that kind of omission—and not merely by means of conclusory assertions.”<sup>247</sup> That is, the complaint must “identify particular (and material) facts going to the basis for the issuer’s opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.”<sup>248</sup> Justice Kagan did not, however, indicate that a court may refuse to accept the truth of such an allegation at the pleading phase—the plaintiff’s obligation is merely to “identify” the omitted facts that form the basis for a claim that the issuer’s statement was misleading.<sup>249</sup> If the court is able to determine as a matter of law that the omitted fact does *not* “show that Omnicare lacked the basis for making those statements that a reasonable investor would expect,”<sup>250</sup> that is no different than the usual inquiry into legal sufficiency that was traditionally proper fodder for motions to dismiss.

In remanding the case, Justice Kagan recognized that the complaint in *Omnicare* had alleged “that an attorney had warned Omnicare that a particular contract ‘carried a heightened risk’ of legal exposure under anti-kickback laws.”<sup>251</sup> However, she observed that “[i]nsofar as the omitted fact at issue is the attorney’s warning, that inquiry entails consideration of such matters as the attorney’s status and expertise and other legal information available to Omnicare at the time.”<sup>252</sup> Whether Omnicare’s opinion was misleading may also depend on “whatever facts Omnicare did provide about legal compliance, as well as any other hedges, disclaimers, or qualifications it included in its registration statement.”<sup>253</sup>

These considerations are consistent with examining the legal sufficiency of a § 11 false registration claim at the pleading phase. Depending on the allegations, a court might properly conclude as a matter of law that the opinion was not misleading in light of *other* information contained in the registration statement—not just “hedges, disclaimers, or qualifications” but also, as in *Omnicare*, information in

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247. *Id.* Accordingly, Justice Kagan explained: “The Funds’ recitation of the statutory language—that Omnicare ‘omitted to state facts necessary to make the statements made not misleading’—is not sufficient; neither is the Funds’ conclusory allegation that Omnicare lacked ‘reasonable grounds for the belief’ it stated respecting legal compliance.” *Id.* at 1333.

248. *Id.* at 1332.

249. *Id.*; see also *id.* at 1333 (“[The plaintiff] cannot proceed without identifying one or more facts left out of Omnicare’s registration statement.”).

250. *Id.* at 1333.

251. *Id.*

252. *Id.*

253. *Id.*

the registration statement that there *was* a risk of legal exposure.<sup>254</sup> In listing these considerations, Justice Kagan did not indicate that courts should be undertaking a more rigorous inquiry than is ordinarily proper to determine whether a claim fails as a matter of law. Indeed, the Supreme Court has indicated that issues relating to such securities law claims often present mixed questions of law and fact that are properly left to the ultimate fact-finder.<sup>255</sup>

### *G. Other Post-Iqbal Supreme Court References to Pleading Standards*

There have been a few other post-*Iqbal* Supreme Court decisions that allude to pleading standards without providing guidance as to their content.<sup>256</sup> In *Lexmark International, Inc. v. Static Control Components, Inc.*,<sup>257</sup> for example, the Court cited *Iqbal* in holding that “proximate cause” is an “element of a cause of action” under the Lanham Act, and therefore “must be adequately alleged at the pleading stage in order for the case to proceed.”<sup>258</sup> The Court did not address, however, what was

254. *Id.* (noting that the registration statement itself indicated that “States had initiated enforcement actions against drug manufacturers for giving rebates to pharmacies, that the Federal Government had expressed concerns about the practice, and that the relevant laws could be interpreted in the future in a manner that would harm Omnicare’s business”).

255. *See supra* note 209 and accompanying text. There is potentially some ambiguity in Justice Kagan’s statement that the lower court should “determine whether the omitted fact would have been material to a reasonable investor—*i.e.*, whether ‘there is a substantial likelihood that a reasonable investor would consider it important.’” 135 S. Ct. at 1333 (brackets omitted) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). This does not, however, support the notion that the lower court must make a factual finding on the materiality question at the pleading phase—particularly when Justice Kagan quotes the very Supreme Court decision confirming that materiality is ordinarily a question for the ultimate fact-finder. *See id.* Properly understood, this sentence from *Omnicare* simply indicates that—as in *Matrixx*—a lack of materiality *can* be fatal at the pleading phase if the court can determine as a matter of law that a statement is not material. *See supra* notes 207–209 and accompanying text.

256. There have also been occasional references to *Twombly* and *Iqbal* in concurring or dissenting opinions by Supreme Court Justices. *See, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726, 2794–95 (2015) (Sotomayor, J., dissenting) (noting that requiring a plaintiff to plead an element of a claim “would not have meant imposing a heightened standard at all, but rather would have been entirely consistent with traditional pleading requirements”) (citations and internal quotation marks omitted) (citing *Iqbal*, 556 U.S. at 678); *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2247 (2013) (Roberts, C.J., dissenting) (citing *Twombly* to support the point that antitrust actions entail “famously burdensome discovery”); *Pitre v. Cain*, 131 S. Ct. 8, 9 (2010) (Sotomayor, J., dissenting from denial of certiorari) (faulting the court below for requiring the plaintiff “to produce ‘evidence’ in support of his allegations before a responsive pleading was filed,” and quoting *Twombly* for the proposition that “when a complaint adequately states a claim, it may not be dismissed based on a district court’s assessment that the plaintiff will fail to find evidentiary support for his allegations”).

257. 134 S. Ct. 1377 (2014).

258. *Id.* at 1391 n.6; *see also id.* (“If a plaintiff’s allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed; if they are sufficient, then the plaintiff is entitled to an opportunity to prove them.”).



required to “adequately allege[]” proximate cause, and it did not decide the case on that basis.

In *Dart Cherokee Basin Operating Co. v. Owens*,<sup>259</sup> Justice Ginsburg’s majority opinion did not mention *Twombly* or *Iqbal*, but she referred to the need to make “plausible” allegations in a notice of removal. She framed the question presented in *Dart Cherokee* as follows: “To assert the amount in controversy adequately in the removal notice, does it suffice to allege the requisite amount plausibly, or must the defendant incorporate into the notice of removal evidence supporting the allegation?”<sup>260</sup> She concluded that “a defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold,”<sup>261</sup> and “need not contain evidentiary submissions.”<sup>262</sup> The Court did not discuss what would qualify as a “plausible allegation” in this context, except to make clear that it does not require “evidentiary submissions.”<sup>263</sup>

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Accordingly, the Supreme Court’s pleading decisions since *Twombly* and *Iqbal* reflect an approach to pleading that is consistent with the notice-pleading regime that characterized pre-*Twombly* case law. As described above, this is also the best reading of the *Twombly* and *Iqbal* decisions given both the logic of the pleading framework they employ and what those decisions say—and do not say—about the continued vitality of the Court’s pre-*Twombly* precedents.<sup>264</sup> Whether lower courts will adopt this understanding as they continue to wrestle with federal pleading standards remains to be seen. But it is crucial to recognize the important ways that the Court’s post-*Iqbal* decisions bolster, rather than undermine, basic aspects of notice pleading. Otherwise the narrative that *Twombly* and *Iqbal* compel a more restrictive approach to pleading may become further entrenched, to the

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259. 135 S. Ct. 547, 549 (2014).

260. *Id.* at 551.

261. *Id.* at 554.

262. *Id.* at 551.

263. *Id.* The need for a “plausible” allegation regarding the amount in controversy might simply reflect the understanding described in Part II, in which the plausibility prong of the *Twombly* and *Iqbal* framework can operate as a mechanism for assessing legal sufficiency. *See supra* notes 121–125 and accompanying text. Jurisdictional theories relevant to removal—just like a claim’s substantive merit—can also be challenged on legal-sufficiency grounds. *See, e.g.*, *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288–89 (1938) (noting that an amount-in-controversy allegation need not be accepted for jurisdictional purposes if it “appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal”).

264. *See supra* Part II.

detriment of access to justice and meaningful enforcement of substantive law.

#### IV. BEYOND PLAUSIBILITY PLEADING

The preceding Parts of this Article show that (1) *Twombly* and *Iqbal* should not have been read to impose a plausibility-pleading regime that was more restrictive than the long-standing notice-pleading approach; and (2) recent Supreme Court decisions on pleading confirm the view that *Twombly* and *Iqbal* should be applied in a way that preserves notice pleading and pre-*Twombly* Supreme Court case law. Confusion continues in the lower federal courts, however, and it is worth addressing a few points that have arisen as courts have struggled to make sense of *Twombly* and *Iqbal*.

As described in Part II, it is possible to reconcile the idea that courts may disregard so-called “conclusory” allegations with the pre-*Twombly* notice-pleading approach. It is crucial, however, to understand what makes an allegation a mere “legal conclusion” whose truth need not be accepted at the pleading phase. A statement is not conclusory for pleading purposes simply because it contains some language that might be called conclusory in other contexts.<sup>265</sup> The key allegation in former Form 11, for example, must be accepted as true even though one might call it conclusory to allege that the defendant was driving “negligently.”<sup>266</sup> The allegation regarding the defendant’s discriminatory intent in *Swierkiewicz* must be accepted as true even though one might call it conclusory to allege that Mr. Swierkiewicz’s “age and national origin were motivating factors in [the defendant’s] decision to terminate his employment.”<sup>267</sup> These allegations are not conclusory in the transactional sense—and therefore are sufficient to give defendants fair notice—because they provide a basic identification of the liability-generating events or transactions and the defendant’s role in those events or transactions. In addition to making sense of *Twombly* and *Iqbal*,<sup>268</sup> this approach gives effect to Rule 9(b)’s instruction that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”<sup>269</sup>

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265. See *supra* notes 161–173 and accompanying text.

266. See *supra* note 22 and accompanying text (describing Form 11). As discussed *supra* note 163, Form 11 remains instructive regarding federal pleading standards even though it and other forms in the Federal Rules’ Appendix were eliminated in December 2015. Former Form 11 (and other forms relevant to pleading standards) are reproduced in Appendix B of this Article.

267. See *supra* note 35.

268. See *supra* notes 161–166 and accompanying text.

269. FED. R. CIV. P. 9(b); see *supra* note 169.

Post-*Iqbal* lower court decisions have been inconsistent when handling these sorts of allegations.<sup>270</sup> There have, however, been some encouraging examples of a more sensible approach—even before the Supreme Court’s more recent pleading decisions described in Part III. In *Swanson v. Citibank, N.A.*,<sup>271</sup> for example, the U.S. Court of Appeals for the Seventh Circuit found that a complaint for discrimination under the Fair Housing Act was sufficient because it “identifie[d] the type of discrimination that [the plaintiff] thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home-equity loan). This is all that she needed to put in the complaint.”<sup>272</sup> Under the approach proposed in this Article, that is the correct way to understand federal pleading standards after *Twombly* and *Iqbal*, and it is consistent with both pre-*Twombly* and post-*Iqbal* Supreme Court case law.

Another important question going forward is how much detail a complaint must provide in describing the relevant events or transactions in order to avoid being labeled conclusory. Notice pleading may not be dead, but even Charles Clark—the chief drafter of the original Federal Rules—recognized that some “content” must be given to the word “notice.”<sup>273</sup> As Clark also recognized, notice “cannot be defined so literally as to mean all the details of the parties’ claims, or else the rule is no advance.”<sup>274</sup> This spirit should continue to inform federal pleading standards. An allegation should not be treated as conclusory—or as failing to provide fair notice—simply because it does not provide “exact dates, times, locations, or which particular employees or officers of an institutional or corporate party were involved.”<sup>275</sup> As long as the complaint provides a “short and plain”<sup>276</sup> identification of what is alleged to have happened, there is no need for courts to insist at the pleading phase on detail for detail’s sake.

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270. See Alex Reinert, *Pleading As Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 12–13 & nn.83–86 (citing cases).

271. 614 F.3d 400, 405 (7th Cir. 2010).

272. *Id.* at 404; see also *Samovsky v. Nordstrom, Inc.*, 619 Fed. Appx. 547, 548 (Mem) (7th Cir. Oct. 28, 2015) (reversing Rule 12(b)(6) dismissal of an employment discrimination claim as “premature” because “‘I was turned down for a job because of my race’ is all a complaint has to say”).

273. See *supra* note 31 (citing Clark, *supra* note 20, at 460).

274. Clark, *supra* note 20, at 460.

275. Steinman, *supra* note 8, at 1343.

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

*Twombly* and *Iqbal*, in fact, both recognize that Rule 8 does not require “detailed factual allegations.”<sup>277</sup>

On this issue as well, courts since *Iqbal* have adopted conflicting stances. One example has arisen in the context of Fair Labor Standards Act (FLSA) claims for failure to pay overtime wages. In *Landers v. Quality Communications, Inc.*,<sup>278</sup> the U.S. Court of Appeals for the Ninth Circuit recently found that it was insufficient for an FLSA complaint to allege that the plaintiff had worked more than forty hours per week but had not received overtime pay for those hours; rather, it was necessary to identify the particular weeks overtime hours were not paid.<sup>279</sup> Other courts, however, have held that such detail is not required.<sup>280</sup>

In determining what constitutes a “conclusory” allegation that can be disregarded at the pleading phase, there is an unavoidable level-of-generality problem. Why, for example, is it sufficient for a plaintiff to allege that the defendant in former Form 11 “negligently drove” rather than to require the plaintiff to allege the particular aspect of the defendant’s driving that constituted negligence? On the other hand, if the pleading standard tolerates “negligently drove,” must it also tolerate “tortiously drove,” or “drove in a manner that makes the defendant liable to the plaintiff?” These are difficult questions that may elude perfectly coherent answers. It should be recognized, however, that notice pleading was not immune from these level-of-generality problems; again, some content must be given to the word “notice.”<sup>281</sup>

One possible guidepost for resolving these issues may be the substantive contours of the plaintiff’s claim. To say that the defendant drove “tortiously” may be impermissibly conclusory because the substantive law itself delineates between different kinds of tortious behavior. An intentional tort and a negligence tort are distinct legal claims. They are subject to distinct legal standards that, at trial, would

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277. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require ‘detailed factual allegations’ . . . .” (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007))); *Twombly*, 550 U.S. at 555 (“[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . .”).

278. 771 F.3d 638 (9th Cir. 2014).

279. *Id.* at 644–46.

280. *See, e.g., Pope v. Walgreen Co.*, No. 3:14–CV–439, 2015 WL 471006, at \*5 (W.D. Tenn. Feb. 4, 2015) (“To require the present plaintiffs to each specify in their complaint a particular week in which they worked more than 40 hours without overtime pay would, again, be rigidly harsh and inconsistent with *Iqbal* and *Twombly*.”)

281. *See supra* note 31 (citing *Clark, supra* note 20, at 460).

invite distinct instructions to the jury.<sup>282</sup> On this view, an adverb like “tortiously” is problematic because it glosses over these distinctions with a catch-all legal conclusion. Such an approach would not be insurmountable for plaintiffs, however. Even if the more general adverb “tortiously” is too conclusory to be accepted as true in and of itself, a plaintiff could still pursue relief under both a negligence theory and an intentional tort theory. The Federal Rules unequivocally authorize plaintiffs to plead claims in the alternative—even claims that are inconsistent with one another.<sup>283</sup>

Recognizing the substantive contours of particular claims can also explain what might seem to be a tension between former Form 11 and the Court’s post-*Iqbal* decisions in *Fifth Third* and *Omnicare*. If it is sufficient to allege that the defendant “negligently” drove, how can *Fifth Third* suggest that it is insufficient to allege simply that an ESOP fiduciary “imprudently” bought or failed to sell company stock? And how can *Omnicare* suggest that it is insufficient to allege simply that *Omnicare* “lacked ‘reasonable grounds’” for its belief?

One answer is that the *Fifth Third* and *Omnicare* decisions clarify the substantive law in ways that establish new substantive requirements for pursuing the claims at issue in those cases. After *Fifth Third*, there is no longer a generic ERISA “imprudence” claim against an ESOP fiduciary with respect to their decision to buy or hold their own company’s stock. Such claims depend on what information would have alerted the fiduciary that its behavior was imprudent. If it was public information, then the claim is legally insufficient unless—at the very least—special circumstances reveal that the market price was failing to account for that information.<sup>284</sup> If it was private information, then the claim is legally insufficient unless taking the purportedly prudent course of action would be consistent with securities laws against insider trading and would not have harmed the fund in other ways.<sup>285</sup> As in the car-accident example above,<sup>286</sup> a plaintiff might pursue multiple theories—either together or in the alternative. But a

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282. See, e.g., N.Y. PATTERN JURY INSTR.—CIVIL 2:10–2.12 (various instructions relating to negligence); N.Y. PATTERN JURY INSTR.—CIVIL 3:1–3.3 (various instructions relating to intentional torts).

283. See FED. R. CIV. P. 8(d)(2) (“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.”); FED. R. CIV. P. 8(d)(3) (“A party may state as many separate claims or defenses as it has, regardless of consistency.”).

284. See *supra* notes 226–227 and accompanying text.

285. See *supra* notes 228–229 and accompanying text; see also *supra* note 230 (describing the Court’s per curiam decision in *Amgen*, a follow-up to *Fifth Third*).

286. See *supra* note 283 and accompanying text.

blanket allegation that the defendant acted “imprudently” need not be accepted as true.

Similarly, *Omnicare* means that there is no longer a generic claim that the expression of an opinion in a registration statement was a “false statement.” Rather, there are distinct claims that (1) the speaker did not actually hold the opinion stated in the registration statement; (2) the speaker supported its opinion with a fact that was false; or (3) a reasonable investor would understand the opinion to convey facts about the speaker’s basis for that opinion, but the real facts are otherwise and are not provided in the statement.<sup>287</sup> Where—as in *Omnicare*—a plaintiff pursues the third theory, it must at least identify the facts whose omission make the statement of the opinion without those facts misleading.<sup>288</sup> And again, the plaintiff is free to pursue multiple theories of liability as alternative claims.<sup>289</sup>

To survive the sort of legal-sufficiency inquiry that has always been proper at the pleading phase, a complaint’s “statement of the claim” must have allegations that—accepted as true—cover each of the substantive requirements articulated in *Fifth Third* and *Omnicare*. Courts should be sensitive to how much detail is required when describing the events underlying the plaintiff’s claim,<sup>290</sup> but it is not inconsistent with notice pleading to require allegations that, assuming they are proven true, would make out a viable claim for relief. When the Court states that such allegations must “plausibly” satisfy the substantive requirements of a viable claim, this should be understood to allow screening for *legal* insufficiency, as described above.<sup>291</sup> The plausibility inquiry should not permit a court to insist that the complaint itemize subsidiary facts or evidence that the plaintiff plans to use to support those allegations.

Finally, it is important to address the relationship between pleading standards and discovery. There is, of course, an important

287. See *supra* note 241 and accompanying text.

288. See *supra* notes 246–247 and accompanying text.

289. See *supra* note 283 and accompanying text.

290. See *supra* notes 273–280 and accompanying text.

291. See *supra* notes 121–124 and accompanying text. This approach makes sense of the Court’s post-*Iqbal* statements that certain matters must be “plausibly” alleged. See, e.g., *supra* notes 201–208, 214–222, 226–230 & 259–263 and accompanying text (discussing *Matrixx*, *Wood*, *Fifth Third*, and *Dart Cherokee*). As the Court explained in *Johnson*, this inquiry focuses on a claim’s “substantive plausibility.” *Johnson*, 135 S. Ct. at 347. It is only if a complaint lacks a substantively necessary requirement of a meritorious claim (or addresses it merely with a “conclusory,” “unadorned, the-defendant-unlawfully-harmed-me accusation,” *Iqbal*, 556 U.S. at 678) that a court should inquire whether the remaining allegations in a complaint “plausibly suggest” its truth. See *supra* notes 118–120 and accompanying text; see also *supra* notes 83–87 and accompanying text (discussing Justice Kennedy’s reasoning in *Iqbal*).

practical relationship between the two. Because the pleading standard determines whether the case will proceed to the discovery phase, finding the proper balance between the costs and benefits of court-supervised discovery has been a central feature of the pleading debate.<sup>292</sup> Too lenient a pleading standard might impose unwarranted discovery costs on innocent defendants,<sup>293</sup> yet too strict a pleading standard could thwart meritorious claims by plaintiffs who cannot satisfy the pleading standard without obtaining the information needed to do so through the discovery process.<sup>294</sup>

The *Twombly* and *Iqbal* opinions do contain a number of comments regarding potential discovery burdens, although most are simplistic and empirically unsupported.<sup>295</sup> *Twombly* and *Iqbal* do not, however, employ a pleading standard that depends on a case-specific assessment of the likely burdens or benefits of discovery. The *Twombly* and *Iqbal* framework insists that nonconclusory allegations be accepted as true,<sup>296</sup> regardless of whether it appears likely that supporting evidence will be found during discovery: again, “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’”<sup>297</sup>

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292. See Steinman, *supra* note 8, at 1311 (“At the core of this consequentialist debate over pleading standards is a struggle to balance the costs and benefits of pre-trial discovery.”).

293. See *id.* (“If 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.”).

294. See *id.* at 1311–12. This, of course, is the “Catch-22” described *supra* notes 94–95 and accompanying text.

295. See *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (describing the need to avoid “disruptive discovery” that “exacts heavy costs in terms of efficiency and expenditure of valuable time and resources”); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (“Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.” (citations omitted)); *id.* at 559 (“[T]he threat of discovery expense will push cost-conscious defendants to settle.”). In fact, empirical studies confirm that disproportionately burdensome discovery is the rare exception in federal court. See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 773 (2010).

296. See *supra* Part II.

297. *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). This notion is not undermined by *Twombly*’s comment that the plausibility inquiry “calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Id.* As discussed *supra* notes 157–160 and accompanying text, *Twombly* undertook the plausibility inquiry only because the complaint had failed to make an “independent allegation of actual agreement.” *Id.* at 564 (emphasis added). Had the complaint provided such an “independent allegation of actual agreement,” it would have qualified as a nonconclusory allegation that must be accepted as true. See *id.* That would have rendered the plausibility inquiry—and any need for additional “fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement”—unnecessary. *Id.* at 556. This is confirmed not only by the logic of the *Twombly* opinion itself, but also by *Twombly*’s reliance on *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S.

Even on *Twombly* and *Iqbal*'s own terms, the pleading standard is not an invitation for courts to make off-the-cuff assessments about discovery burdens based solely on the allegations in the complaint. Discovery expense is a valid concern, but it is one that is already accounted for in the discovery rules themselves. The Federal Rules explicitly state that discovery will not be permitted unless it is “proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>298</sup> Procedurally, parties can request *ex ante* limits on the kind, quantity, and sequence of discovery, and they can also make a-la-carte objections to particular discovery requests at the time those requests are made.<sup>299</sup> The structure of the discovery rules ensures that parties are never forced to comply with an unduly burdensome discovery request without an opportunity for the court to consider whether the request is proper.

Indeed, there are functional reasons to insist that this inquiry occur as part of the discovery process rather than in the context of a Rule 12(b)(6) motion. A Rule 12(b)(6) motion allows a defendant to obtain dismissal of the complaint without even having to deny the truth of the plaintiff’s allegations.<sup>300</sup> A Rule 12(b)(6) motion merely targets

336 (2005), for the proposition that a complaint should not survive the pleading phase if there is no “reasonably founded hope that the [discovery] process will reveal relevant evidence.” *Id.* at 559–60 (quoting *Dura*, 544 U.S. at 347). For *Dura*, there *would* have been such “reasonably founded hope” as long as the complaint had provided “some indication of the loss and the causal connection that *the plaintiff has in mind.*” *Dura*, 544 U.S. at 347 (emphasis added). All *Dura* required, then, was a mere articulation of events connecting the defendant’s conduct to the loss suffered by the plaintiff—not some affirmative indication that supporting evidence would, in fact, be found. *See* Steinman, *supra* note 8, at 1334–35 (describing *Dura* as consistent with a transactional approach to pleading).

298. *See* FED. R. CIV. P. 26(b)(1). Prior to the 2015 amendments to Rule 26, proportionality considerations were addressed in Rule 26(b)(2)(C)(iii). The 2015 amendments “rearranged” the previously codified proportionality considerations “slightly” and added an explicit reference to “the parties’ relative access to relevant information.” FED. R. CIV. P. 26 advisory committee’s note to 2015 amendment (“The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.”).

299. *See* FED. R. CIV. P. 16(c)(2)(F) (authorizing the court to “take appropriate action on . . . controlling and scheduling discovery”); FED. R. CIV. P. 26(b)(2) (authorizing the court to order limitations on discovery); FED. R. CIV. P. 26(c)(1) (“A party or any person from whom discovery is sought may move for a protective order.”); FED. R. CIV. P. 37 (describing the process for resolving discovery disputes).

300. *See* FED. R. CIV. P. 12(a)–(b) (authorizing the defense of “failure to state a claim” to be asserted “by motion” prior to having to serve an answer); *see also Twombly*, 550 U.S. at 572 (Stevens, J., dissenting) (noting that the *Twombly* complaint was dismissed “without so much as requiring [the defendants] to file an answer denying that they entered into any agreement”).



whether the complaint adequately *states* a claim. Therefore, the defendant can file such a motion free from Rule 8's obligation to "admit or deny the allegations asserted against it by an opposing party,"<sup>301</sup> as well as Rule 11's obligation that a defendant may deny such allegations only when an "inquiry reasonable under the circumstances" reveals that "denials of factual contentions are warranted on the evidence" (or at least "are reasonably based on belief or lack of information").<sup>302</sup> What difference does this make? If information surfaces that confirms the plaintiff's allegations *after* a Rule 12(b)(6) dismissal, it is unlikely that there will be any potential recourse against the defendant. But if the defendant improperly denies an allegation in its answer or improperly withholds relevant information during the discovery process, and this ultimately leads to a judgment against the plaintiff (either at summary judgment or at trial), Rule 60(b) can be used to reopen the case.<sup>303</sup>

Even if a court is concerned about discovery burdens, it is hard to see why at least some basic discovery is not warranted in all cases where the complaint provides a simple transactional narrative that, if accepted as true, would establish a legally viable claim. Narrowly tailored discovery—some number of relevant interrogatories, requests for identifiable, relevant documents, and depositions of key witnesses—would admittedly impose some litigation costs on the defendant. But so does litigation over pleading sufficiency at the Rule 12(b)(6) phase,<sup>304</sup> which can invite amended complaints that are then followed by additional Rule 12(b)(6) motions challenging the sufficiency of those pleadings.<sup>305</sup> Defendants are often happy to incur those costs if the potential result is a pre-answer dismissal of the complaint. For the system as a whole, however, it seems better to have pre-trial activity focus on the discovery of relevant information—and a direct assessment of what type and quantity of discovery is warranted—than on pre-

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301. FED. R. CIV. P. 8(b)(1)(B).

302. FED. R. CIV. P. 11(b)(4).

303. See FED. R. CIV. P. 60(b)(3) ("[T]he court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party."); see, e.g., *Summers v. Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004) ("As several circuits have held, failure to disclose or produce materials requested in discovery can constitute misconduct within the purview of Rule 60(b)(3)." (citations and internal quotation marks omitted)).

304. See Steinman, *supra* note 8, at 1355:

[T]he argument that a stricter pleading standard is needed to control discovery costs overlooks the costs that heightened pleading standards can add to the pleadings phase itself. . . . [A] stricter pleading standard can encourage costly, time-consuming litigation over pleading sufficiency. The perception that *Twombly* and *Iqbal* raised the bar for federal pleading standards seems to have had precisely this effect.

305. See, e.g., *Santiago v. Warminster Twp.*, 629 F.3d 121, 133–34 (3d Cir. 2010) (considering whether the plaintiff's Third Amended Complaint passes muster under *Twombly* and *Iqbal*).

answer briefs and motions scrutinizing every jot and tittle of the plaintiff's complaint. As Charles Clark observed: "we cannot expect the proof of the case to be made through the pleadings" because "such proof is really not their function."<sup>306</sup>

## CONCLUSION

From the original drafters of the Federal Rules of Civil Procedure to the twenty-first century critics of *Twombly* and *Iqbal*, scholars have long recognized the importance of pleading standards to an effective, well-functioning system of civil justice. The initial pleading is the key to the courthouse door. A claim that cannot survive the pleading phase is effectively no claim at all.

This realization drove the federal courts' approach to pleading during the first seven decades of the Federal Rules. Although *Twombly* and *Iqbal* disrupted the traditional framework, they need not be interpreted in a way that imposes a newly restrictive pleading standard. The *Twombly* and *Iqbal* decisions had many flaws, but it was—and still is—possible to read them in a way that would retain the notice-pleading approach set forth in the text of the Federal Rules and confirmed by pre-*Twombly* case law. More recent Supreme Court decisions refute the conventional wisdom that *Twombly* and *Iqbal* installed a plausibility-pleading regime that gives courts greater power to second-guess a plaintiff's allegations at the pre-answer motion-to-dismiss stage. This is a positive development, but it may have little impact unless it receives the same attention that accompanied the *Twombly* and *Iqbal* decisions themselves.

## APPENDIX A: MOST FREQUENTLY CITED SUPREME COURT DECISIONS

The following chart lists the one hundred most-frequently cited Supreme Court decisions of all time, in terms of citations by federal courts and tribunals. The citation counts are based on the Shepard's citation service primary database as of September 9, 2015.<sup>307</sup>

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306. Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

307. Reprinted with the permission of LexisNexis. Sincere thanks to Frear Simons and Praveen Nuthakki for compiling this information.

Rank	Case	Federal Court Citing References
1	Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	195,159
2	Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	183,365
3	Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)	127,521
4	Ashcroft v. Iqbal, 556 U.S. 662 (2009)	104,712
5	Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	94,229
6	Strickland v. Washington, 466 U.S. 668 (1984)	70,312
7	Thomas v. Arn, 474 U.S. 140 (1985)	68,944
8	Conley v. Gibson, 355 U.S. 41 (1957)	60,389
9	Slack v. McDaniel, 529 U.S. 473 (2000)	51,901
10	Haines v. Kerner, 404 U.S. 519 (1972)	51,029
11	McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	44,833
12	Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)	44,577
13	Neitzke v. Williams, 490 U.S. 319 (1989)	42,084
14	Richardson v. Perales, 402 U.S. 389 (1971)	41,975
15	Estelle v. Gamble, 429 U.S. 97 (1976)	41,044
16	Williams v. Taylor, 529 U.S. 362 (2000)	40,156
17	Farmer v. Brennan, 511 U.S. 825 (1994)	37,406
18	Miller-El v. Cockrell, 537 U.S. 322 (2003)	35,293
19	Erickson v. Pardus, 551 U.S. 89 (2007)	28,298
20	Harlow v. Fitzgerald, 457 U.S. 800 (1982)	26,999
21	United States v. Booker, 543 U.S. 220 (2005)	26,818
22	Coleman v. Thompson, 501 U.S. 722 (1991)	25,669
23	Jackson v. Virginia, 443 U.S. 307 (1979)	24,940
24	Anders v. California, 386 U.S. 738 (1967)	24,858
25	Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	24,085
26	Scheuer v. Rhodes, 416 U.S. 232 (1974)	22,728
27	Heck v. Humphrey, 512 U.S. 477 (1994)	22,348
28	Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)	21,394

Rank	Case	Federal Court Citing References
29	Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)	21,286
30	Apprendi v. New Jersey, 530 U.S. 466, (2000)	20,414
31	West v. Atkins, 487 U.S. 42 (1988)	20,328
32	Estelle v. McGuire, 502 U.S. 62 (1991)	20,276
33	Denton v. Hernandez, 504 U.S. 25 (1992)	18,993
34	Foman v. Davis, 371 U.S. 178 (1962)	18,961
35	Brady v. Maryland, 373 U.S. 83 (1963)	18,525
36	Erie R.R. v. Tompkins, 304 U.S. 64 (1938)	17,552
37	Murray v. Carrier, 477 U.S. 478 (1986)	16,982
38	United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	16,906
39	Miranda v. Arizona, 384 U.S. 436 (1966)	16,775
40	Saucier v. Katz, 533 U.S. 194 (2001)	16,406
41	Wolff v. McDonnell, 418 U.S. 539 (1974)	16,286
42	Sandin v. Conner, 515 U.S. 472 (1995)	16,127
43	Hensley v. Eckerhart, 461 U.S. 424 (1983)	15,927
44	Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989)	15,753
45	Graham v. Connor, 490 U.S. 386 (1989)	15,328
46	Preiser v. Rodriguez, 411 U.S. 475 (1973)	15,197
47	Lindh v. Murphy, 521 U.S. 320 (1997)	15,112
48	Hishon v. King & Spalding, 467 U.S. 69 (1984)	14,957
49	Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000)	14,904
50	O'Sullivan v. Boerckel, 526 U.S. 838 (1999)	14,684
51	Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938)	14,643
52	Bowen v. Yuckert, 482 U.S. 137 (1987)	14,617
53	Rose v. Lundy, 455 U.S. 509 (1982)	14,478
54	Schlup v. Delo, 513 U.S. 298 (1995)	14,459
55	Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993)	14,026
56	International Shoe Co. v. Washington, 326 U.S. 310 (1945)	13,936
57	Hudson v. McMillian, 503 U.S. 1 (1992)	13,619

Rank	Case	Federal Court Citing References
58	Wilson v. Seiter, 501 U.S. 294 (1991)	13,607
59	Harrington v. Richter, 562 U.S. 86 (2011)	13,472
60	Anderson v. Creighton, 483 U.S. 635 (1987)	13,316
61	Picard v. Connor, 404 U.S. 270 (1971)	13,307
62	Kentucky v. Graham, 473 U.S. 159 (1985)	13,290
63	Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	13,123
64	Terry v. Ohio, 392 U.S. 1 (1968)	12,991
65	Link v. Wabash R. Co., 370 U.S. 626 (1962)	12,960
66	Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984)	12,829
67	Jones v. Bock, 549 U.S. 199 (2007)	12,741
68	Lockyer v. Andrade, 538 U.S. 63 (2003)	12,727
69	Brecht v. Abrahamson, 507 U.S. 619 (1993)	12,525
70	Mathews v. Weber, 423 U.S. 261 (1976)	12,503
71	St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)	12,397
72	United States v. Diebold, Inc., 369 U.S. 654 (1962)	12,322
73	Daniels v. Williams, 474 U.S. 327 (1986)	12,276
74	Bell v. Wolfish, 441 U.S. 520 (1979)	12,177
75	Gall v. United States, 552 U.S. 38 (2007)	12,031
76	Houston v. Lack, 487 U.S. 266 (1988)	11,984
77	Blakely v. Washington, 542 U.S. 296 (2004)	11,872
78	Hill v. Lockhart, 474 U.S. 52 (1985)	11,828
79	Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)	11,673
80	Parratt v. Taylor, 451 U.S. 527 (1981)	11,594
81	Younger v. Harris, 401 U.S. 37 (1971)	11,533
82	Porter v. Nussle, 534 U.S. 516 (2002)	11,531
83	Pace v. DiGuglielmo, 544 U.S. 408 (2005)	11,504
84	Pearson v. Callahan, 555 U.S. 223 (2009)	11,435
85	Coppedge v. United States, 369 U.S. 438 (1962)	11,363
86	Board of Regents v. Roth, 408 U.S. 564 (1972)	11,328
87	Lewis v. Casey, 518 U.S. 343 (1996)	11,264

Rank	Case	Federal Court Citing References
88	Woodford v. Ngo, 548 U.S. 81 (2006)	11,218
89	United States v. Frady, 456 U.S. 152 (1982)	11,114
90	City of Canton v. Harris, 489 U.S. 378 (1989)	10,925
91	Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)	10,664
92	Rhodes v. Chapman, 452 U.S. 337 (1981)	10,361
93	Ylst v. Nunnemaker, 501 U.S. 797 (1991)	10,347
94	Booth v. Churner, 532 U.S. 731 (2001)	10,215
95	Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984)	10,191
96	Hudson v. Palmer, 468 U.S. 517 (1984)	10,061
97	Wainwright v. Sykes, 433 U.S. 72 (1977)	9,920
98	Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941)	9,913
99	United States v. Olano, 507 U.S. 725 (1993)	9,741
100	Rizzo v. Goode, 423 U.S. 362 (1976)	9,700

APPENDIX B: SELECTED FORMS FROM THE FEDERAL RULES'  
APPENDIX (AS OF NOV. 30, 2015)

Until December 1, 2015, the Appendix to the Federal Rules of Civil Procedure contained a number of forms that—according to the now-abrogated Rule 84—“suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”<sup>308</sup> The Appendix has now been eliminated,<sup>309</sup> but for the reasons set forth earlier the forms relating to pleading standards should remain relevant.<sup>310</sup> Because the abrogated forms may be harder to find as electronic sources of information are updated to reflect the current Rules, several of the forms relevant to pleading standards are reproduced here.<sup>311</sup>

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308. See *supra* notes 24–25 and accompanying text.

309. See *supra* note 26 and accompanying text.

310. See *supra* note 163.

311. Note that all of the form complaints reproduced here begin with a Caption (a sample of which previously appeared in Form 1), and a Statement of Jurisdiction (a sample of which previously appeared in Form 7). They conclude with the date and a signature (a sample of which previously appeared in Form 2).

Form 10

## COMPLAINT TO RECOVER A SUM CERTAIN

1. (Statement of Jurisdiction—See Form 7.)

(Use one or more of the following as appropriate and include a demand for judgment.)

(a) *On a Promissory Note*

2. On *date*, the defendant executed and delivered a note promising to pay the plaintiff on *date* the sum of \$\_\_\_\_\_ with interest at the rate of \_\_\_ percent. A copy of the note [is attached as Exhibit A] [is summarized as follows: \_\_\_\_\_.]

3. The defendant has not paid the amount owed.

(b) *On an Account*

2. The defendant owes the plaintiff \$\_\_\_\_\_ according to the account set out in Exhibit A.

(c) *For Goods Sold and Delivered*

2. The defendant owes the plaintiff \$\_\_\_\_\_ for goods sold and delivered by the plaintiff to the defendant from *date* to *date*.

(d) *For Money Lent*

2. The defendant owes the plaintiff \$\_\_\_\_\_ for money lent by the plaintiff to the defendant on *date*.

(e) *For Money Paid by Mistake*

2. The defendant owes the plaintiff \$\_\_\_\_\_ for money paid by mistake to the defendant on *date* under these circumstances: *describe with particularity in accordance with Rule 9(b)*.

(f) *For Money Had and Received*

2. The defendant owes the plaintiff \$\_\_\_\_\_ for money that was received from name on *date* to be paid by the defendant to the plaintiff.

*Demand for Judgment*

Therefore, the plaintiff demands judgment against the defendant for \$\_\_\_\_\_, plus interest and costs.

Form 11

COMPLAINT FOR NEGLIGENCE

1. (Statement of Jurisdiction—See Form 7.)

2. On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$\_\_\_\_\_.

Therefore, the plaintiff demands judgment against the defendant for \$\_\_\_\_\_, plus costs.

Form 12

COMPLAINT FOR NEGLIGENCE WHEN THE PLAINTIFF DOES NOT KNOW WHO IS RESPONSIBLE

1. (Statement of Jurisdiction—See Form 7.)

2. On *date*, at *place*, defendant *name* or defendant *name* or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff.

3. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of \$\_\_\_\_\_.

Therefore, the plaintiff demands judgment against one or both defendants for \$\_\_\_\_\_, plus costs.

Form 13

COMPLAINT FOR NEGLIGENCE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

1. (Statement of Jurisdiction—See Form 7.)

2. At the times below, the defendant owned and operated in interstate commerce a railroad line that passed through a tunnel located at \_\_\_\_\_.

3. On *date*, the plaintiff was working to repair and enlarge the tunnel to make it convenient and safe for use in interstate commerce.

4. During this work, the defendant, as the employer, negligently put the plaintiff to work in a section of the tunnel that the defendant had left unprotected and unsupported.



5. The defendant's negligence caused the plaintiff to be injured by a rock that fell from an unsupported portion of the tunnel.

6. As a result, the plaintiff was physically injured, lost wages or income, suffered mental and physical pain, and incurred medical expenses of \$\_\_\_\_\_.

Therefore, the plaintiff demands judgment against the defendant for \$\_\_\_\_\_, and costs.

#### Form 14

### COMPLAINT FOR DAMAGES UNDER THE MERCHANT MARINE ACT

1. (Statement of Jurisdiction—See Form 7.)

2. At the times below, the defendant owned and operated the vessel name and used it to transport cargo for hire by water in interstate and foreign commerce.

3. On *date*, at *place*, the defendant hired the plaintiff under seamen's articles of customary form for a voyage from \_\_\_\_\_ to \_\_\_\_\_ and return at a wage of \$\_\_\_\_\_ a month and found, which is equal to a shore worker's wage of \$\_\_\_\_\_ a month.

4. On *date*, the vessel was at sea on the return voyage. (Describe the weather and the condition of the vessel.)

5. (Describe as in Form 11 the defendant's negligent conduct.)

6. As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured, has been incapable of any gainful activity, suffered mental and physical pain, and has incurred medical expenses of \$\_\_\_\_\_.

Therefore, the plaintiff demands judgment against the defendant for \$\_\_\_\_\_, plus costs.

#### Form 15

### COMPLAINT FOR THE CONVERSION OF PROPERTY

1. (Statement of Jurisdiction—See Form 7.)

2. On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of describe.

3. The property is worth \$\_\_\_\_\_.

Therefore, the plaintiff demands judgment against the defendant for \$\_\_\_\_\_, plus costs.

Form 17

COMPLAINT FOR SPECIFIC PERFORMANCE OF A CONTRACT  
TO CONVEY LAND

1. (Statement of Jurisdiction—See Form 7.)
2. On *date*, the parties agreed to the contract [attached as Exhibit A] [summarize the contract].
3. As agreed, the plaintiff tendered the purchase price and requested a conveyance of the land, but the defendant refused to accept the money or make a conveyance.
4. The plaintiff now offers to pay the purchase price.  
Therefore, the plaintiff demands that:
  - (a) the defendant be required to specifically perform the agreement and pay damages of \$\_\_\_\_\_, plus interest and costs, or
  - (b) if specific performance is not ordered, the defendant be required to pay damages of \$\_\_\_\_\_, plus interest and costs.

Form 18

COMPLAINT FOR PATENT INFRINGEMENT

1. (Statement of Jurisdiction—See Form 7.)
2. On *date*, United States Letters Patent No. \_\_\_\_\_ were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.
3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.
4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all *electric motors* it manufactures and sells and has given the defendant written notice of the infringement.  
Therefore, the plaintiff demands:
  - (a) a preliminary and final injunction against the continuing infringement;
  - (b) an accounting for damages; and
  - (c) interest and costs.

Form 19COMPLAINT FOR COPYRIGHT INFRINGEMENT AND  
UNFAIR COMPETITION

1. (Statement of Jurisdiction—See Form 7.)

2. Before *date*, the plaintiff, a United States citizen, wrote a book entitled \_\_\_\_\_.

3. The book is an original work that may be copyrighted under United States law. A copy of the book is attached as Exhibit A.

4. Between *date* and *date*, the plaintiff applied to the copyright office and received a certificate of registration dated \_\_\_\_\_ and identified as *date, class, number*.

5. Since *date*, the plaintiff has either published or licensed for publication all copies of the book in compliance with the copyright laws and has remained the sole owner of the copyright.

6. After the copyright was issued, the defendant infringed the copyright by publishing and selling a book entitled \_\_\_\_\_, which was copied largely from the plaintiff's book. A copy of the defendant's book is attached as Exhibit B.

7. The plaintiff has notified the defendant in writing of the infringement.

8. The defendant continues to infringe the copyright by continuing to publish and sell the infringing book in violation of the copyright, and further has engaged in unfair trade practices and unfair competition in connection with its publication and sale of the infringing book, thus causing irreparable damage.

Therefore, the plaintiff demands that:

(a) until this case is decided the defendant and the defendant's agents be enjoined from disposing of any copies of the defendant's book by sale or otherwise;

(b) the defendant account for and pay as damages to the plaintiff all profits and advantages gained from unfair trade practices and unfair competition in selling the defendant's book, and all profits and advantages gained from infringing the plaintiff's copyright (but no less than the statutory minimum);

(c) the defendant deliver for impoundment all copies of the book in the defendant's possession or control and deliver for destruction all infringing copies and all plates, molds, and other materials for making infringing copies;

(d) the defendant pay the plaintiff interest, costs, and reasonable attorney's fees; and

(e) the plaintiff be awarded any other just relief.

Form 21

COMPLAINT ON A CLAIM FOR A DEBT AND TO SET ASIDE A  
FRAUDULENT CONVEYANCE UNDER RULE 18(B)

1. (Statement of Jurisdiction—See Form 7.)

2. On date, defendant name signed a note promising to pay to the plaintiff on date the sum of \$\_\_\_\_\_ with interest at the rate of \_\_\_ percent. [The pleader may, but need not, attach a copy or plead the note verbatim.]

3. Defendant name owes the plaintiff the amount of the note and interest.

4. On date, defendant name conveyed all defendant's real and personal property if less than all, describe it fully to defendant name for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.

Therefore, the plaintiff demands that:

(a) judgment for \$\_\_\_\_\_, plus costs, be entered against defendant(s) name(s); and

(b) the conveyance to defendant name be declared void and any judgment granted be made a lien on the property.