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The Evolution of a New Pleading Standard: *Ashcroft v. Iqbal*

In the last few years, the Supreme Court has undertaken a radical change in its approach to pleading standards. The watershed event was the Court's decision in *Bell Atlantic Corp. v. Twombly*,[1] in which

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the Court articulated a new "plausibility" pleading standard under Rule 8(a) of the Federal Rules of Civil Procedure. Under the Court's plausibility standard, the allegations in a plaintiff's complaint must be both nonconclusory and "plausible"—i.e., the allegations must not only be "consistent with" the defendant's liability, but must go beyond mere consistency to supplant alternative explanations for challenged conduct that would result in nonliability. The Court's recent articulation of the plausibility standard has been the subject of significant academic commentary, as well as the focus of a series of judicial decisions grappling with the exact scope of the doctrine.[2] It is in this context that the Court decided, once again, to enter the fray and further articulate the standards that govern pleading in the federal courts.

In *Ashcroft v. Iqbal*,[3] the Court went even further than it had in *Twombly* in giving teeth to the notice pleading standard in Rule 8(a).[4] This time, the Court focused on the requirement under Rule 8(a) that allegations be "nonconclusory." In doing so, the Supreme Court articulated a theory that invites even greater judicial scrutiny at the pleading stage. In discussing this prong of the analysis, the majority made clear that conclusory allegations are not entitled to the normal assumption of truth accorded factual allegations in deciding a motion to dismiss and that, in order to avoid the conclusory label, a plaintiff must plead specific facts that support the plaintiff's more general allegations. Simply asserting ultimate conclusions that, if accepted as true, would support liability is not enough.

Iqbal thus represents a further raising of the bar plaintiffs must meet before they are allowed to proceed with discovery. As in

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1 550 U.S. 544 (2007).

2 *See, e.g.*, Gunasekera v. Irwin, 551 F.3d 461, 466 (6th Cir. 2009) ("Courts in and out of the Sixth Circuit have identified uncertainty regarding the scope of *Twombly* and have indicated that its holding is likely limited to expensive, complicated litigation like that considered in *Twombly*."); Wilkerson v. New Media Tech. Charter Sch., Inc., 522 F.3d 315, 321 (3d Cir. 2008) ("[T]he exact parameters of the *Twombly* decision are not yet known . . . ."); Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008); Anderson v. Sara Lee Corp., 508 F.3d 181, 188 n.7 (4th Cir. 2007) ("In the wake of *Twombly*, courts and commentators have been grappling with the decision's meaning and reach."); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–32 (2008) (maintaining that under *Twombly*, the notice pleading rules had been "decidedly tightened (if not discarded) in favor of a stricter standard"); Linda S. Mullenix, *Troubling "*Twombly,*"* NAT'L L.J., June 11, 2007, at 13 (arguing that *Twombly* is "a surprising departure from ingrained federal pleading rules").

3 129 S. Ct. 1937 (2009).

4 FED R. CIV. P. 8(a).

Twombly, the Court reiterated that its articulation of the pleading standard was dictated by the text of the Federal Rules of Civil Procedure. Nonetheless, the Court also noted that its ruling would have significant practical implications. As in *Twombly*, the Court cited the dangers of allowing plaintiffs with weak claims to proceed with discovery, given the burdens the process frequently places on defendants. Allowing such cases to proceed is not only inefficient and costly, but may result in settlements that are not warranted by the merits. *Iqbal* thus represents a logical progression in the march toward greater judicial scrutiny at the outset of litigation to avoid the inefficiencies and burdens that may be imposed on defendants later in the process. The ruling is likely to have a sweeping effect on the ability of plaintiffs to pursue their claims beyond the pleading stage, potentially revolutionizing federal civil practice.[5]

The Court's recent pleading decisions recognize that, as the costs of litigation increase and the scope of discovery expands, the need for more stringent pleading standards increases. It is neither efficient nor fair to allow claims of dubious merit to proceed when doing so may lead to settlements that are not based on the underlying merits, but rather the potential costs associated with defending a lawsuit in our modern civil justice system. *Iqbal* thus presents a further evolution in the pleading standard that is likely to increase the efficiency and fairness of modern civil practice. At the same time, it is a decision that is consistent with the text of Rule 8, giving effect to language that in the past had often lain dormant.

[5] *See* Moss v. U.S. Secret Serv., 572 F.3d 962, 972 (9th Cir. 2009) (noting that *Twombly*'s plausibility standard was "a significant change, with broad-reaching implications"); Phillips v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008) ("Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts."); Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 875 (2009) ("Many judges and academic commentators read the decision as overturning fifty years of generous notice pleading practice, and critics attack it as a sharp departure from the 'liberal ethos' of the Federal Rules, favoring decisions 'on the merits, by jury trial, after full disclosure through discovery.'"); Edward D. Cavanagh, Twombly, *the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 878–79 (2008) (arguing that *Twombly* changed the law dramatically, "put[ting] an end to notice pleading as it has been understood in the seventy years since the enactment of the Federal Rules of Civil Procedure"); Robert L. Rothman, Twombly *and* Iqbal*: A License to Dismiss*, 35 A.B.A. LITIG. 1, 2 (Spring 2009) ("*Iqbal* drastically changed the landscape for Rule 12(b)(6) motions."); *see also* Courie v. Alcoa Wheel & Forged Prods., 577 F.3d 625, 629 (6th Cir. 2009) (explaining that the Supreme Court's decision in *Iqbal* "raised the bar for pleading requirements beyond the old 'no-set-of-facts' standard of *Conley v. Gibson*, 355 U.S. 41 . . . (1957)").

Part I of this Article discusses the majority and dissenting opinions in *Iqbal*. Justice Kennedy's decision for the majority provides a strong statement of the requirement that pleadings not be "conclusory," going so far as to hold that such conclusory allegations are not entitled to the normal assumption of truthfulness. In articulating this requirement, the majority invites lower courts to look closely at the representations in the complaint to determine whether they are grounded in fact or they are mere assertions. The majority's decision thus provides a powerful basis for lower courts to dismiss complaints that are unsupported and has the potential to effect a sweeping change in the ability of plaintiffs to survive the pleading stage, without at least alleging some specific facts that would support their ultimate conclusions. The potentially sweeping nature of the majority's ruling was recognized in the dissent written by Justice Souter, who was the architect of the *Twombly* decision. As the dissent observed, *Iqbal* goes beyond the principles articulated in *Twombly*. The *Iqbal* decision thus promises to fulfill the evolution the Court began in *Twombly*.

Part II addresses the ways in which *Iqbal* supplements the Supreme Court's decision in *Twombly*. *Twombly* presents a significant reinterpretation of traditional notice pleading standards as articulated in Rule 8(a) of the Federal Rules of Civil Procedure. The Court articulated a standard that requires a more stringent scrutiny of the pleadings, which is "even more favorable to dismissal of a complaint."[6] Under *Twombly*, the factual allegations contained in a complaint must be "plausible."[7] The decision thus requires that the allegations go beyond mere consistency with liability and demonstrate that, if accepted as true, the defendant is in fact liable. As the Court made clear, the mere "possibility" that a plaintiff may be entitled to relief is not enough. In this way, the standard imposes what might be characterized as a logical coherence requirement.[8] The allegations in the complaint must be both necessary and sufficient to state a claim. While the Court mentioned that the allegations in the complaint also must be nonconclusory,[9] the decision did not address this requirement in detail under the Federal Rules.

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[6] Giarratano v. Johnson, 521 F.3d 298, 304 n.3 (4th Cir. 2008).

[7] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–57 (2007).

[8] *See generally* Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063 (2009).

[9] *Twombly*, 550 U.S. at 561.

This is where the Court's decision in *Iqbal* provides additional guidance, supplementing and strengthening the requirements under Rule 8(a). The guidance the Court provided as to this "nonconclusory" prong of the test is likely to bar an even greater number of claims at the threshold pleading stage. The Court made clear that ultimate conclusions must be supported by well-pled factual allegations. Taken together, *Iqbal* and *Twombly* establish two bright-line requirements that plaintiffs must meet: allegations must be both plausible and nonconclusory. These twin requirements are likely to increase the scrutiny given to federal pleadings as well as the dismissal rates in the federal courts. Moreover, they are likely to increase the detail in initial pleadings and the extent to which issues are defined at the outset of a case, which, in turn, will likely increase the efficiency of civil litigation in the federal courts.

Finally, Part III discusses certain additional questions that were raised in the wake of *Twombly* that have now been put to rest in *Iqbal*. In resolving these lingering issues, the *Iqbal* Court consistently rejected attempts to limit the reach of its prior decision. For example, the Court rejected the suggestion that *Twombly* was limited to the antitrust context or to complex cases. The Court made clear that *Twombly* was based on the plain language of Rule 8, which applies broadly to all civil claims and is not limited to particular categories of cases. Likewise, the Court rejected the notion that the ability to limit the scope of discovery had any role in the scrutiny that should be undertaken at the pleading stage. While it is clear that the Court had a concern that lax pleading standards might lead to the imposition of unwarranted costs during discovery, the majority indicated that such concerns were not critical to its decision. Accordingly, as it had in *Twombly*, the Court made clear that the pleadings must be subjected to heightened scrutiny whether or not discovery costs could be controlled through active judicial management of the discovery process in a particular case. In sum, the Court rejected any attempts to limit or constrain the scope of its new pleading doctrine.

The *Iqbal* decision is likely to have significant consequences. Accordingly, the debate regarding the merits and effects of the decision is important. This is particularly true given recent calls for legislative repeal of the ruling.[10] The decision presents an important

[10] Senator Specter recently proposed the following legislation to overrule *Iqbal* and *Twombly*, which provides:

> Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the

evolution of pleading standards that is likely to have beneficial effects in terms of the efficiency of civil litigation—one that is consistent with the text and structure of the Federal Rules.

I
THE *IQBAL* DECISION

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[11] The Supreme Court's decision in *Conley v. Gibson* had long governed the construction of the rule, with the Court famously stating that a complaint must merely "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[12] The Supreme Court in *Twombly* rejected this formulation as an inaccurate gloss on the rule, and in the wake of that decision, there was some uncertainty regarding the level of scrutiny that must be given to federal pleadings.[13] *Iqbal* definitively answered that question, making clear that the Court understood the Federal Rules to require a high level of judicial scrutiny at the pleading stage in order to screen out cases in which plaintiffs had simply failed to plead the necessary facts to establish a claim.

It was by no means clear that the Supreme Court would revisit this issue in *Iqbal*. Questions concerning the appropriate pleading standard under Rule 8 were bound up with claims regarding governmental immunity for official acts that, independently, could have been dispositive in the case. *Iqbal* involved a lawsuit brought by an individual detained after the September 11 terrorist attacks. Plaintiff sued former Attorney General John Ashcroft and the Director of the FBI, Robert Mueller, alleging that plaintiff was subject to abuse and harsh conditions during his confinement in violation of his civil rights.[14] His complaint asserted that these high-ranking officials should be held liable for these alleged violations because

> date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).

Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009) (emphasis added).

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

12 355 U.S. 41, 47 (1957).

13 *See* sources cited *supra* note 2.

14 *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942 (2009).

they were responsible for the policies that led to his detention. Specifically, Mr. Iqbal alleged that Attorney General Ashcroft and Director Mueller had overseen the arrest and detainment of "thousands of Arab Muslim men" 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.'"[15] In addition, the complaint asserted, without providing any supporting factual allegations, that the defendants "'each knew of, condoned, and willfully and maliciously agreed to subject'" Mr. Iqbal to allegedly abusive conditions of confinement "'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'"[16] Defendants moved for dismissal of these claims based both on their qualified immunity from suit and because the allegations in the complaint were insufficient to state a claim against them. The district court denied the motion to dismiss, and defendants sought interlocutory review before the U.S. Court of Appeals for the Second Circuit.[17]

In reviewing the district court's decision, the Second Circuit found itself faced with a somewhat unusual situation. While defendants' appeal was pending, the Supreme Court issued *Bell Atlantic Corp. v. Twombly*—a decision that had the potential to revolutionize federal pleading standards. The Second Circuit affirmed the district court's decision despite the new pleading standard, suggesting that *Twombly* was limited to its context. While the Second Circuit recognized that *Twombly* had overturned the prior formulation articulated by the Supreme Court in *Conley v. Gibson*,[18] adopting a standard that required that allegations contained in a plaintiff's complaint be "plausible," the court imposed limitations on the *Twombly* doctrine, arguing that it was dependent upon the "context" in which the claims

[15] *Id.* at 1944 (internal quotation marks omitted) (quoting First Amended Complaint ¶¶ 47, 69, Elmaghraby v. Ashcroft, No. 04 CV 1809 (E.D.N.Y. Sept. 27, 2005) [hereinafter Complaint]).

[16] *Id.* (alteration in source) (quoting Complaint, *supra* note 15, ¶ 96).

[17] Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007).

[18] *Id.* at 155 ("[T]he Court's explanation for its holding indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since *Conley v. Gibson*, 355 U.S. 41 . . . (1957) . . . .").

arose and that, in particular, *Twombly* was most applicable to complex cases in which discovery was likely to be extensive.[19]

However, by the court's own admission, its decision was premised on uncertainty regarding the test articulated in *Twombly*. According to the court, *Twombly* created "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings."[20] The court attempted to fill this void. At the outset, it rejected many of the limitations the plaintiff sought to impose on *Twombly*, noting that "it would be cavalier to believe that the Court's rejection of the 'no set of facts' language from *Conley* . . . applies only to section 1 antitrust claims."[21] However, at the same time, the court imposed a similar limitation—one couched in the rubric of "context"—to suggest that the *Twombly* rule was not a general one, but rather was dependent on context.

In support of this theory, the court claimed that the Supreme Court had sent "conflicting signals" by applying the "fair notice" formulation of the pleading rule in a *pro se* case, *Erickson v. Pardus*,[22] "just two weeks after issuing its opinion in *Bell Atlantic*."[23] In addition, the court cited the oft-referenced Form 9 of the Federal Rules of Civil Procedure, which, it asserted, supported the notion that a complaint with only "generalized allegation[s] of negligence" was adequate to survive a motion to dismiss "as long as the defendant is given notice of the date, time, and place where the legally vulnerable conduct occurred."[24] Finally, the court cited the concerns expressed by the *Twombly* majority regarding the cost of discovery as "provid[ing] some basis for believing that whatever adjustment in pleading standards results from *Bell Atlantic* is limited to cases where massive discovery is likely to create unacceptable settlement pressures."[25] Having circumscribed the holding of *Twombly*, the court ruled that it did not bar the plaintiff's claims.

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[19] *See id.* at 157–58 ("[*Twombly* articulated] a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.").

[20] *Id.* at 155.

[21] *Id.* at 157 n.7.

[22] 551 U.S. 89 (2007).

[23] Iqbal v. Hasty, 490 F.3d 143, 157 (2d Cir. 2007).

[24] *Id.* at 156.

[25] *Id.* at 157.

A. The Majority Opinion

The Supreme Court flatly rejected the Second Circuit's attempt to limit *Twombly*. While the majority acknowledged that "the pleading standard Rule 8 announces does not require detailed factual allegations," it made clear that "[the standard] demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[26] "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' . . . Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[27]

The majority reiterated *Twombly*'s plausibility standard, observing that the plausibility requirement "asks for more than a sheer possibility that a defendant has acted unlawfully."[28] "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'"[29]

The majority made clear that this plausibility standard was not limited to particular kinds of cases, as the Second Circuit's analysis had suggested, but rather applied more broadly. While the majority acknowledged that "[d]etermining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense,"[30] this did not mean that the plausibility standard was limited to certain kinds of cases.

However, the majority did not merely reaffirm the plausibility standard; it went much further, articulating its view of what it termed a second "working principle" under Rule 8—i.e., the requirement that allegations not be "conclusory." The majority observed that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[31] "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."[32]

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[26] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted).

[27] *Id.* (alteration in source) (citation omitted) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007)).

[28] *Id.*

[29] *Id.* (quoting *Twombly*, 550 U.S. at 557).

[30] *Id.* at 1950.

[31] *Id.*

[32] *Id.*

Accordingly, the majority outlined a two-step process for lower courts to follow in assessing the allegations in a complaint. First, the court must determine which allegations in the complaint are conclusory and, therefore, are not entitled to the assumption of truthfulness normally accorded to allegations in a complaint when ruling on a motion to dismiss under Rule 12. Second, the court must proceed to consider the remaining factual allegations, assuming them to be true, and determine whether they state a "plausible" claim for relief:

> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. 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.[33]

The majority found that the allegations in Mr. Iqbal's complaint were insufficient because they constituted "bare assertions" linking Attorney General Ashcroft and Director Mueller to the challenged conduct.[34] Such bare assertions, the majority noted, were "not entitled to the assumption of truth."[35] Rather, the majority concluded that they should not be considered in determining whether plaintiff had pleaded sufficient allegations under Rule 8.

Having excluded several of plaintiff's allegations as conclusory, the majority found that plaintiff's complaint did not meet the plausibility requirement. The majority observed that the allegations in plaintiff's complaint were "consistent with" a plan to purposefully detain individuals as a result of their race, religion, or national origin.[36] However, the majority concluded that there were "more likely explanations" for the policies cited in the complaint and thus plaintiff had not "plausibly establish[ed]" the discriminatory purpose necessary to state a claim for relief.[37]

Specifically, the majority concluded that the federal government's detention policies after the September 11 attacks were "likely lawful and justified by [officials'] nondiscriminatory intent to detain aliens

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[33] *Id.*

[34] *Id.* at 1951.

[35] *Id.* at 1950.

[36] *Id.* at 1951.

[37] *Id.*

who were illegally present in the United States and who had potential connections to those who committed terrorist acts":

> The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It 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, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests, . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.[38]

Moreover, the majority found that the complaint did not contain allegations plausibly demonstrating that defendants had "purposefully housed detainees" under harsh considerations "due to their race, religion, or national origin."[39] Rather, the majority concluded that "[a]ll [the complaint] plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."[40] Accordingly, the majority concluded that the complaint failed to satisfy both requirements under Rule 8.[41]

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[38] *Id.* at 1951–52 (citation omitted) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 554, 567 (2007)).

[39] *Id.* at 1952.

[40] *Id.*

[41] The majority rejected the plaintiff's contention that these allegations were adequate because the Federal Rules allowed plaintiff to "allege petitioners' discriminatory intent 'generally.'" *Id.* at 1954. While the majority acknowledged that Rule 9(b) contained such language, the opinion noted:

> 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. . . . And 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.

Id. (citation omitted).

B. The Dissent

The dissent in *Iqbal* is notable in several respects. First, the dissent authored by former Justice Souter, the author of the *Twombly* majority opinion, is significant because it makes clear that *Iqbal* went far beyond *Twombly*.[42] In arguing that the allegations contained in the complaint were sufficient under Rule 8, the dissent found dispositive the fact that the complaint alleged that Attorney General Ashcroft and Director Mueller "knew of and condoned" the detention policy, and indeed "affirmatively acted to create" the policy:

> The complaint . . . alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller [sic] affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it.[43]

The dissent believed that the majority misapplied *Twombly* by engaging in an assessment of the probability that these allegations were true, as compared to alternative explanations. According to the dissent, "*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be."[44]

The dissent focused on the majority's analysis with respect to the allegations in the complaint that the majority found conclusory, noting both that it did not "understand the majority to disagree with th[e] understanding of 'plausibility' under *Twombly*" and that it "agree[d] that the two allegations selected by the majority, standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination."[45] The dissent disagreed with the majority's conclusions that the remaining allegations in the complaint, which the dissent believed did set out a "plausible" basis for liability, were no more than "bare assertions":

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[42] *Id.* at 1955 (Souter, J., dissenting).

[43] *Id.* at 1959.

[44] *Id.* The dissent, however, noted: "The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel." *Id.*

[45] *Id.* at 1960.

> The fallacy of the majority's position . . . lies in looking at the relevant assertions in isolation. The complaint contains specific allegations that, in the aftermath of the September 11 attacks, the Chief of the FBI's International Terrorism Operations Section and the Assistant Special Agent in Charge for the FBI's New York Field Office implemented a policy that discriminated against Arab Muslim men, including Iqbal, solely on account of their race, religion, or national origin. . . . Viewed in light of these subsidiary allegations, the allegations singled out by the majority as "conclusory" are no such thing. Iqbal's claim is not that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" him to a discriminatory practice that is left undefined; his allegation is that "they knew of, condoned, and willfully and maliciously agreed to subject" him to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described.[46]

The dissent argued that such allegations were more than enough to give defendants "fair notice" of the claims against them and thus to satisfy the pleading standards of Rule 8. Accordingly, the dissent would have found that such allegations were not conclusory and, considering the complaint as a whole, would have found that it stated a plausible claim for relief.

Second—and somewhat paradoxically—the dissent is also notable for the common ground shared with the majority. Other than its disagreement with the majority's application of the plausibility standard and determinations regarding whether plaintiff's allegations were conclusory, the dissent was remarkably silent with respect to the general propositions laid out in the majority's opinion. The dissent did not disagree, for example, that conclusory allegations were not entitled to a presumption of truthfulness. It did not disagree that, under the plausibility standard, allegations contained in a complaint must state more than a mere possibility that the defendants are liable. And it did not disagree that allegations merely "consistent with"[47] defendants' liability were insufficient to state a claim for relief. Rather, the dissent was almost entirely an exercise in disputing the *application* of these general principles, which, taken by themselves, significantly increased the scrutiny afforded to plaintiff's allegations at the pleading stage.

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[46] *Id.* at 1960–61 (citation omitted).

[47] *Id.* at 1949 (majority opinion) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007)).

II
THE EVOLUTION OF PLEADING STANDARDS: FROM *TWOMBLY* TO *IQBAL*

On its face, *Iqbal* represents a leap from the Supreme Court's other recent blockbuster decision on pleading standards, *Bell Atlantic Corp. v. Twombly*. The *Twombly* Court addressed a complaint filed by consumers alleging that local telephone carriers were conspiring to increase prices by preventing competitors from entering the market in violation of Section 1 of the Sherman Act.[48] The decision, authored by former Justice Souter, represented a landmark in the interpretation of Rule 8(a). In a strong ruling joined by seven members of the Court, the majority held that Rule 8 requires that plaintiffs' allegations be "plausible," and that a mere possibility that the defendant was liable based on the allegations in the complaint was insufficient. The Court reasoned that "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[49] Applying this standard, the Court held that dismissal was required.[50] The allegations of parallel conduct among the telephone companies were not sufficient to state a claim because the Sherman Act required that there be an actual "agreement" for liability to attach.[51] Simply alleging that there was an agreement was

[48] *Twombly*, 550 U.S. at 550; *see* Sherman Act, 15 U.S.C. § 1 (2006).

[49] *Twombly*, 550 U.S. at 557 (alteration in original) (quoting FED. R. CIV. P. 8(a)(2)). The Court also concluded that its interpretation of Rule 8(a) was consistent with prior precedent. The Court pointed to *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), where it had ruled that "something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Id.* at 557–58 (quoting *Dura Pharm., Inc.*, 544 U.S. at 347).

[50] *Id.* at 564–65.

[51] *Id.* at 556–57 ("Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."); *id.* at 553 ("'[T]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" (second alteration in original) (quoting Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954))).

not enough because such allegations were "merely legal conclusions resting on . . . prior allegations."[52]

The *Iqbal* Court started with these basic principles and provided significant elaboration. In the process, it markedly tightened the pleading standards under Rule 8(a) as compared with *Twombly*, which itself interpreted Rule 8(a) in a manner that courts and commentators have construed as significantly increasing the level of judicial scrutiny at the pleadings stage.[53] Taken together, these twin decisions are likely to have a significant impact on federal pleading.[54]

A. The Plausibility Analysis

The plausibility analysis is laid out fully in the *Twombly* opinions. The sweeping nature of the *Twombly* decision was underscored by the dissent, which maintained that the decision "announced a significant new rule" that both constituted a "stark break from precedent" and "fundamental[ly] . . . change[d] . . . the character of pretrial practice."[55] In the dissent's view, *Twombly*'s majority decision amounted to "rewrit[ing] the Nation's civil procedure textbooks."[56] Nonetheless, the majority maintained that its new test was dictated by both the text and underlying policies of the Federal Rules.[57]

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[52] *Id.* at 564; *see also id.* at 566 (noting that such allegations were fully consistent with conduct constituting "the natural, unilateral reaction of each [defendant] intent on keeping its regional dominance").

[53] *See* Bone, *supra* note 5, at 877.

[54] *Id.* at 877 (arguing that "*Twombly* has already had a major impact," and noting that the case had been "cited a startling 4000 times during the first nine months after it was decided").

[55] *Twombly*, 550 U.S. at 596–97 (Stevens, J., dissenting) ("[T]he Court has announced a significant new rule that does not even purport to respond to any congressional command . . . ."); *see also* Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 n.5 (9th Cir. 2008) (stating that *Twombly* "abrogated" the traditional notice pleading standard). *But see* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (observing that, even before *Twombly*, the "rhetoric" of notice pleading did "not match the reality of federal pleading practice" and that "federal courts in every circuit impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine"); Spencer, *supra* note 2, at 432 (noting that "the Court's move in th[e] direction [of plausibility pleading] is consistent with long-held sentiment among the lower federal courts").

[56] *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting).

[57] *See id.* at 555 n.3 (majority opinion).

1. The Textual Foundation

The majority decision in *Twombly* focused heavily on the text of Rule 8(a). While the majority conceded that Rule 8(a) "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,'" it maintained that some language in the rule placed specific and significant requirements on plaintiffs seeking to pursue claims in the federal courts.[58] Specifically, the Court observed that Rule 8(a) requires that a plaintiff provide "'grounds'" for the plaintiff's alleged "'entitle[ment] to relief.'"[59]

Under the first element, plaintiffs must provide "not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests," which means that a plaintiff's complaint must contain factual allegations that actually support and explain the plaintiff's theory of liability.[60] Under the second element, the plaintiff must make factual allegations that, if accepted as true, are sufficient to actually establish the defendant's liability: "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[61] These two interconnected requirements, the majority found, meant that a complaint must contain "[f]actual allegations [that are] enough to raise a right to relief above the speculative level."[62]

The Court's plausibility standard flowed directly from these twin requirements. Under that standard, plaintiffs were required to make factual allegations that, if accepted as true, would dictate that there was more than a mere "possibility" that defendant was liable. Allegations that were merely consistent with the defendant's liability were insufficient. Rather, plaintiffs must provide allegations that nudged the complaint from mere consistency with liability to establishing a "plausible" case that defendants were actually liable. In other words, the complaint must not merely reflect an equanimity between liability and nonliability, but rather must contain allegations

[58] *Id.* at 555 (omission in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

[59] *Id.* (alteration in original) (quoting FED. R. CIV. P. 8(a)).

[60] *Id.* at 555 n.3.

[61] *Id.* at 557 (alteration in original) (quoting FED. R. CIV. P. 8(a)).

[62] *Id.* at 555.

that were sufficient, if taken as true, to establish liability over plausible alternatives.[63]

While the Court articulated a strong view of the role of judges in scrutinizing the initial pleadings, the Court did not state that the scrutiny applied at the initial pleading stage was without limits. For example, the majority expressly disclaimed that it was imposing a "heightened" pleading standard such as that for pleading fraud under Rule 9 of the Federal Rules of Civil Procedure.[64] As the majority observed, such a requirement could "only be accomplished 'by the process of amending the Federal Rules.'"[65]

Nonetheless, in articulating the plausibility test, the Court broke from long-established precedent, "retiring" the "famous observation" in *Conley v. Gibson* 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."[66] The majority reasoned that this no set of facts formulation "is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[67]

Why was it necessary to abandon this formulation? According to the majority, under the *Conley* formulation, "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery."[68] Such a result

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63 *See id.* at 557–58.

64 *Id.* at 569 n.14 ("Here, our concern is not that the allegations in the complaint were insufficiently 'particular[ized],' . . . rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible." (alteration in original) (citation omitted)).

65 *Id.* (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002)).

66 *Id.* at 561 (internal quotation marks omitted) (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).

67 *Id.* at 563.

68 *Id.* at 561 (alteration in original) (quoting *Conley*, 355 U.S. at 45–46). In contrast, the dissent argued that the *Conley* formulation should not be so lightly rejected given its long-standing pedigree. It maintained that, "[c]onsistent with the design of the Federal Rules, *Conley*'s 'no set of facts' formulation permits outright dismissal only when proceeding to discovery or beyond would be futile." *Id.* at 577 (Stevens, J., dissenting). The dissent argued that "*Conley*'s language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts. We have consistently reaffirmed that basic understanding of the Federal Rules in the half century since *Conley*." *Id.* at 583; *see*

would be inconsistent with the text of Rule 8(a), which plainly required that a complaint contain more than merely conclusory allegations. Because of this potential problem with the literal reading of *Conley*, the majority observed that several courts had already rejected "taking the literal terms of the *Conley* passage as a pleading standard."[69]

2. The Policy Implications

While the Court did not base the plausibility standard on policy concerns, it nonetheless noted that the new standard would have significant practical ramifications for civil litigation in the federal courts.[70] As the Court observed, increasing judicial scrutiny at the pleading stage would eliminate costs that otherwise might be needlessly incurred if weak cases proceeded to discovery. "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'"[71] Not only would more stringent scrutiny at the pleading stage eliminate such unwarranted costs, but it also would reduce the potential that unwarranted settlements may be extracted

also id. at 577 (arguing that the *Conley* language "has been cited as authority in a dozen opinions of this Court").

[69] *Id.* at 562 (majority opinion) (citing Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989); McGregor v. Indus. Excess Landfill, Inc., 856 F.2d 39, 42–43 (6th Cir. 1988); Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984); O'Brien v. DiGrazia, 544 F.2d 543, 546 n.3 (1st Cir. 1976)).

[70] The dissent likewise noted that the *Twombly* decision would accomplish a significant change. According to the dissent, "[u]nder the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial." *Id.* at 575 (Stevens, J., dissenting). The "case management" procedures the dissent cited included: Rule 12(e)'s mechanism for requiring a plaintiff to provide a more definite statement of claims; Rule 7(a)'s authorization for courts to require a plaintiff to reply to a defendant's answer; Rule 23's requirements for "rigorous analysis" of class allegations; Rule 26's directive to control the scope and sequence of discovery to prevent "annoyance, embarrassment, oppression, or undue burden or expense"; and Rule 16's authorization of significant judicial involvement in pretrial proceedings through pretrial conferences and scheduling orders that address "the necessity or desirability of amendments to the pleadings," "the control and scheduling of discovery," and "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." *Id.* at 593 n.13 (Stevens, J., dissenting).

[71] *Id.* at 558 (majority opinion) (omission in original) (internal quotation marks omitted) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 233–34 (3d ed. 2004)).

due to the *in terrorem* effects of litigation. Thus, the Court recognized that the plausibility standard would play an important role in increasing the efficiency of civil litigation.

At the same time, the Supreme Court rejected the policy arguments in favor of lax scrutiny at the pleading stage.[72] For example, the majority expressly rejected the notion that active management of discovery could remedy any alleged problems that might occur if weaker cases were allowed to proceed beyond the pleading stage.[73] As the Court observed, such remedies were an imperfect substitute for increased judicial scrutiny of the pleadings at the outset of a case. Among other problems, trial judges may not be in a position at that stage in the proceedings to ascertain which discovery would be appropriate and which discovery would be inefficient. Moreover, judges are inherently disadvantaged in trying to make such determinations because "[t]he judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find."[74] Accordingly, the majority concluded that active case management to "trim back excessive [discovery] demands" was "doomed to be[] hollow": "We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define 'abusive' discovery except in theory, because in practice we lack essential information."[75]

The majority likewise concluded that engaging in "phased" discovery would not provide an adequate remedy. Such a procedure

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[72] For example, while the dissent conceded that antitrust litigation could be "enormously expensive" and that "there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions," its solution was "careful case management," which would include limitations on discovery, scrutiny of the evidence at the summary judgment stage, and "lucid instructions to juries." *Id.* at 573 (Stevens, J., dissenting).

[73] *Id.* at 559 (majority opinion) (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)).

[74] *Id.* at 560 n.6 (quoting Easterbrook, *supra* note 73, at 638) (observing that "'[a] magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown.'").

[75] Easterbrook, *supra* note 73, at 638–39. In contrast, the dissent believed that such measures would be effective. It acknowledged that plaintiffs should not be "permitted . . . to engage in massive discovery based solely on the allegations in this complaint." *Twombly*, 550 U.S. at 593 (Stevens, J., dissenting). The dissent argued that case management provided the solution and that "[t]he potential for 'sprawling, costly, and hugely time-consuming' discovery . . . is no reason to throw the baby out with the bathwater." *Id.* at 593 n.13 (citation omitted).

suffers from the same problem: lack of judicial knowledge and competence to make efficient determinations. In addition, phased discovery does not reduce the costs associated with the initial "phase" of discovery, which may, in a complex case, prove "hugely time-consuming" and costly.[76]

Finally, the majority noted that summary judgment could not provide an effective remedy. Almost by definition, the costs of discovery must be incurred before the defendant can utilize this procedure. Moreover, the plaintiff can attempt to require the imposition of such costs by postponing a ruling until discovery is completed on the ground that discovery is needed in order to oppose the motion.[77] Accordingly, the majority concluded that the summary judgment procedure could not prevent potential discovery costs from "push[ing] cost-conscious defendants to settle even anemic cases."[78] The Court found that there simply was no viable alternative to judicial scrutiny at the pleading stage.

3. The Meaning of "Plausibility"

What was the Court attempting to accomplish with the plausibility standard? At bottom, it appears that the Court sought to embody basic principles of logical coherence in pleading decisions.[79] Under the new test, a complaint must contain factual allegations that, if taken as true, would be both necessary and sufficient to establish liability. The principle the Court sought to establish by emphasizing that plaintiffs must move beyond mere equanimity between liability and nonliability closely matches the requirement of logical necessity and sufficiency.

Viewed in this light, the majority's decision is not particularly surprising. The Federal Rules could not be interpreted in a way that would allow a plaintiff to assert logically defective claims. Imposing such basic requirements is thus in large part simply consistent with common sense. Moreover, such a requirement flows directly from the text of Rule 8, which requires that plaintiffs make a "showing" that they are entitled to relief. In order to make the "showing" required under Rule 8, plaintiffs must demonstrate that liability is a necessary consequence of the allegations in their complaint.

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[76] *Twombly*, 550 U.S. at 560 n.6.

[77] *See* FED. R. CIV. P. 26(f).

[78] *Twombly*, 550 U.S. at 559.

[79] *See* Smith, *supra* note 8, at 1088–89.

The plausibility test is also consistent with the idea of notice pleading.[80] Absent logically coherent allegations, it is difficult to see how a defendant can be put on "notice" regarding the substance of a plaintiff's claims. Thus, while the dissent in *Twombly* maintained that the plausibility standard was somehow inconsistent with notice pleading, in reality, it is merely a logical extension of the notice requirement.

4. Iqbal*'s Gloss on Plausibility*

What contribution did *Iqbal* make to this formulation? Undoubtedly, the Court in *Iqbal* strengthened the plausibility standard.[81] As the dissent in *Iqbal* observed, the majority provided additional guidance that went beyond the formulation in *Twombly*.[82] Specifically, it provided a more fulsome explanation of *Twombly*'s directive that complaints must proceed beyond equanimity between liability and nonliability to actually establish the liability of the defendant, if all of the allegations are taken as true. In articulating this principle, the majority in *Iqbal* explained that a plaintiff must make allegations that are more "probable" than alternative explanations that would not result in the defendant's liability.[83]

Thus, for example, in *Twombly* the Court distinguished between parallel conduct among competitors that was perfectly legal and appropriate, and coordinated conduct among competitors that constituted a conspiracy to restrain trade in violation of Section 1 of the Sherman Act. The *Twombly* majority found that plaintiffs' allegations were inadequate because the allegations were fully

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[80] *See* Robbins v. Oklahoma, 519 F.3d 1242, 1248 (10th Cir. 2008) (noting that the plausibility requirement "inform[s] the defendants of the actual grounds of the claim against them"); Phillips v. County of Allegheny, 515 F.3d 224, 232 (3d Cir. 2008) ("[W]ithout some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair notice,' but also the 'grounds' on which the claim rests.").

[81] Some courts had specifically called for additional clarification of the plausibility standard. *See, e.g.*, *Robbins*, 519 F.3d at 1247 ("The most difficult question in interpreting *Twombly* is what the Court means by 'plausibility.'"); *Phillips*, 515 F.3d at 230 ("What makes *Twombly's* impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new 'plausibility' paradigm for evaluating the sufficiency of complaints."); *see also* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 547 ("The courts of appeals have struggled to determine *Twombly*'s precise meaning and scope of application, and their efforts have resulted in different approaches.").

[82] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1959 (2009) (Souter, J., dissenting).

[83] *See id.* at 1951–52 (majority opinion).

consistent with the alternative explanation of independent, parallel conduct. In other words, the plaintiffs' allegations, if taken as true, did not make it more probable that the conduct constituted a coordinated anticompetitive conspiracy. They showed only a state of affairs that was consistent with the defendants' violation of the Sherman Act. Plaintiffs therefore failed to "nudge" their allegations from mere equanimity between liability and nonliability to establish defendants' liability.

The same was true in *Iqbal* where the majority concluded that the plaintiff had failed to make allegations that, if accepted as true, established defendants' liability. As the majority observed, there was more than one possible explanation for the detainment policies cited in plaintiff's complaint. The first possibility, which plaintiff alleged, was that the policies were the result of intentional discrimination. The second possibility, however, was that the policies were designed to detain individuals who were both breaking the law by being in the country illegally and might have ties to terrorists responsible for the September 11 attacks. The majority found that the allegations in the complaint did not sufficiently nudge the complaint away from this perfectly permissible alternative explanation. In other words, the allegations were merely consistent with liability. Thus, while the analysis provided in *Iqbal* surely finds its roots in *Twombly*, as the dissent observed, *Iqbal* strengthened and elaborated upon this requirement in a manner that certainly went beyond *Twombly*.[84]

B. "Conclusory" Allegations

The Court in *Twombly* did not discuss at length the requirement under Rule 8(a) that allegations not be "conclusory." While the plaintiffs in *Twombly* had asserted that there was an antitrust conspiracy among defendants, and thus the Court necessarily had to dispense with this allegation,[85] the Court did so without elaborating

[84] *See* Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009) (observing that "*Iqbal* . . . provides the final nail-in-the-coffin for the 'no set of facts' standard that applied to federal complaints before *Twombly*").

[85] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); *see also Iqbal*, 129 S. Ct. at 1950 (observing that "[h]ad the [*Twombly*] Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce").

on the general requirements necessary to avoid the "conclusory" label. This is where the Court in *Iqbal* made its major contribution.[86]

1. Origins in Twombly

In *Twombly*, the majority noted generally that a pleading that offers only "labels and conclusions" or the "formulaic recitation of the elements of a cause of action" is insufficient.[87] Moreover, in a footnote, the majority expressly distinguished between allegations that were "conclusory" and those that were "factual" in nature.[88] In doing so, the majority suggested that "conclusory" allegations were deficient because they could not be credited as "factual."[89] Accordingly, such allegations had to be excluded from any plausibility analysis, which was a separate and distinct analysis that focused on the distinction between "factually neutral" allegations and "factually suggestive" allegations.[90]

As the Court in *Twombly* observed, each of these dividing lines "must be crossed to enter the realm of plausible."[91] The first line divided claims that were essentially legal assertions from those that were factual allegations. The factual allegation category then was subdivided into two subsets: "factually neutral" allegations and "factually suggestive" allegations. Only the latter were sufficient to satisfy the pleading requirements under Rule 8(a). Accordingly, the Court explained that under the plausibility test, plaintiffs must nudge "their claims across the line from conceivable to plausible" in order to avoid dismissal of their complaints.[92]

2. Iqbal*'s Completion*

The Court in *Iqbal* elaborated on the first requirement—i.e., that allegations be nonconclusory. In the process, it provided further guidance regarding when allegations were so conclusory that they

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[86] *See Fowler*, 578 F.3d at 210 ("The Supreme Court's opinion in *Iqbal* extends the reach of *Twombly*, instructing that all civil complaints must contain 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'").

[87] *Twombly*, 550 U.S. at 555.

[88] *Id.* at 557 n.5.

[89] *Id.* at 557.

[90] *Id.* at 557 n.5.

[91] *Id.*

[92] *Id.* at 570.

were "not entitled to the assumption of truth,"[93] which was the "beginning" of the Court's Rule 8 analysis:

> We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, and that Mueller was "instrumental" in adopting and executing it. These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, namely, that petitioners adopted a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." As such, the allegations are conclusory and not entitled to be assumed true.[94]

Under this prong of the analysis, the Court distinguished between allegations that were "extravagantly fanciful in nature" and those that were conclusory, making clear that it was not "reject[ing] these bald allegations on the ground that they are unrealistic or nonsensical."[95] Rather, the problem with the allegations was that they were mere conclusions that were not "supported by factual allegations."[96]

While the dissent seemed to criticize the majority's application of this principle, it did not dispute it. Indeed, the principle appears to flow directly from *Twombly*'s footnote distinguishing "conclusory" allegations from those that are "factual."[97] Moreover, it is clear that under Rule 8, there must be a prohibition against conclusory allegations—indeed, such a prohibition is consistent with a long line of judicial interpretation.[98] At bottom, a contrary interpretation would simply make no sense. If plaintiffs could simply rely upon assertions regarding elements of their claims, then every case could proceed beyond the pleading stage.

The drafters of Rule 8 plainly contemplated no such result, as is evidenced by the Rule's requirement that plaintiffs make a "showing"

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93 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009).

94 *Id.* (quoting Personnel Administrator of Mass. v. Feeny, 442 U.S. 256, 279 (1979)).

95 *Id.*

96 *Id.* at 1950.

97 *Twombly*, 550 U.S. at 557 n.5.

98 *See, e.g.*, Martin v. Davies, 917 F.2d 336, 340 (7th Cir. 1990); Munz v. Parr, 758 F.2d 1254, 1259 (8th Cir. 1985); Hurney v. Carver, 602 F.2d 993, 995 (1st Cir. 1979).

that they are entitled to relief.[99] Conclusory allegations cannot constitute such a "showing." Nor could such allegations put a defendant on "notice" of a plaintiff's claims. Thus, conclusory allegations must be disregarded under the plain language of Rule 8.

III

IQBAL'S STRONG REPUDIATION OF EFFORTS TO LIMIT *TWOMBLY*

The *Iqbal* decision is significant not only because it went beyond *Twombly* in articulating the requirements plaintiffs must meet at the pleading stage, but also because it rejected across-the-board attempts to impose limits on the *Twombly* decision. Shortly after *Twombly* was decided, several commentators and some judges suggested potential limitations on the decision.[100] Indeed, the Second Circuit's "context-based" analysis adopted one of these supposed limitations. The majority in *Iqbal* rejected such limitations in favor of a broad reading of *Twombly* that made clear that the plausibility rule it articulated was one of general application.

A. The Alleged Antitrust Limitation

Almost immediately after the *Twombly* decision, some commentators and certain judges focused on the fact that the decision addressed antitrust claims under Section 1 of the Sherman Act.[101] They observed that the majority in *Twombly* had specifically cited the costs associated with discovery in the antitrust context as a reason that a heightened pleading standard was warranted, and accordingly argued that *Twombly* should not be applied outside that context.[102]

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[99] *See* FED. R. CIV. P. 8(a)(2); *see also* Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) ("[A] complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts.").

[100] *See* Bone, *supra* note 5, at 880 ("*Twombly* triggered a sharp response from the academic community almost immediately, most of it criticizing the Court for tightening up on pleading requirements.").

[101] *See* Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. COLLOQUY 117, 117 (2007) (explaining that *Twombly* was limited to antitrust and "did not rework pleading rules across the board," but recognizing that courts had not adopted this interpretation); Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 438 n.38 (2007) (maintaining that it is "not clear" whether *Twombly* "is really just about pleading in antitrust cases"); *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 310 n.51 (2007) [hereinafter *Leading Cases*] ("Some scholars view *Twombly* as primarily an antitrust case.").

[102] *See* Bradley, *supra* note 101, at 117 (arguing that "plausibility" is "antitrust jargon").

The majority in *Iqbal* rejected this assertion. Pointing to language in the *Twombly* decision, the majority noted that the Court's "decision in *Twombly* expounded the pleading standard for 'all civil actions,' . . . and it applies to antitrust and discrimination suits alike."[103] As the majority observed, the *Twombly* decision "was based on [the Court's] interpretation and application of Rule 8."[104] Because that rule applies to all cases filed in federal courts, regardless of subject matter, the *Twombly* standard likewise is one of general applicability.

Moreover, the neutrality reflected in this interpretation is an important characteristic of the Federal Rules of Civil Procedure.[105] Applying different rules for different types of cases could lead to inefficiencies and make pleading unduly complex. It could also lead to unfairness and results-based judicial decision making. The Federal Rules are intended to be substantively neutral for precisely this reason. Moreover, as Professor Redish has observed, a system of federal rules that lacks such neutrality raises significant constitutional concerns, as it would in effect raise the prospect of replacing substantive law created by representative bodies with the procedural decisions of unelected members of the rules committee or the judiciary.[106]

Even if such limitations could be imposed, however, it is not clear that they make sense. Many of the same concerns justifying stringent scrutiny of the pleadings in the context of antitrust cases arise in other cases as well.[107] Thus, for example, the *Twombly* majority specifically noted the potential for *in terrorem* litigation in the securities context.[108] More generally, the costs associated with discovery can be significant in a broad range of cases and, indeed, are

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[103] Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (citation omitted); *see also* Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009) (*Iqbal* "clarified that *Twombly's* plausibility requirement applies across the board, not just to antitrust cases"); Moss v. U.S. Secret Serv., 572 F.3d 962, 969 n.7 (9th Cir. 2009) ("[T]he *Iqbal* Court made clear that *Twombly's* 'plausibility standard' applies to pleadings in civil actions generally, rejecting the plaintiff's suggestion that the holding be limited to the antitrust context.").

[104] *Iqbal*, 129 S. Ct. at 1953.

[105] Smith, *supra* note 8, at 1082.

[106] *See* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 69 (2009) ("[T]he language of the Rules Enabling Act codified the reformers' belief that as long as the judiciary limited its scope to 'procedural' matters and not 'substantive' ones, it would not encroach on legislative functions").

[107] *See* Smith, *supra* note 8, at 1082.

[108] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–58 (2007).

only increasing with the onset of increased electronic discovery.[109] For these reasons, even the Second Circuit had recognized that *Twombly* could not be limited to the antitrust context.[110] Nor did the dissent in *Iqbal* assert otherwise. To the contrary, the dissent expressly stated that *Twombly* applied generally but argued that the majority had "misapplie[d] the pleading standard" the Court had previously articulated.[111] Thus, there was uniform rejection of this proposed limitation on *Twombly*.

B. The Alleged Complex Case Limitation

The Second Circuit, however, did seem to adopt a second and related limitation of *Twombly*—that it was limited to "complex" cases or cases in which the costs of discovery were likely to be significant.[112] Again, this interpretation of *Twombly* focused on the Court's discussion of discovery costs rather than its discussion of the plain language of Rule 8.[113] As such, it represents a misguided attempt to limit the scope of the Court's decision.

The majority in *Iqbal* rejected this proposed limitation, disputing the notion that the "construction of Rule 8 should be tempered where, as here, the Court of Appeals has 'instructed the district court to cabin discovery in such a way as to preserve' petitioners' defense of qualified immunity 'as much as possible in anticipation of a summary judgment motion.'"[114] As the *Iqbal* Court observed, in *Twombly* it had specifically held "that the question presented by a motion to

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109 *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 590 (2001). *But see* Cavanagh, *supra* note 5, at 887 (arguing that "the 2006 Amendments to the Federal Rules on e-discovery . . . provide federal judges ample authority to rein in potentially expensive e-discovery").

110 Iqbal v. Hasty, 490 F.3d 143, 157 (2d Cir. 2007).

111 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1955 (2009) (Souter, J., dissenting).

112 *See Iqbal*, 490 F.3d at 157–58; *see also* Robbins v. Oklahoma, 519 F.3d 1242, 1249 (10th Cir. 2008) (suggesting that "[t]he *Twombly* standard may have greater bite" in cases involving "complex claims against multiple defendants").

113 *Iqbal*, 490 F.3d at 157; *see also* Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1237–38 (2008) ("[S]ome have suggested that perhaps one way to read the decision in *Twombly* is to regard it as an effort by the Court to impose heightened judicial scrutiny over pleadings but, simultaneously, to try to corral the extent of the decision's reach by pegging the need for heightened judicial scrutiny to the risk of exorbitant discovery costs.").

114 *Iqbal*, 129 S. Ct. at 1953; *see also* Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009) ("The Supreme Court's opinion [in *Iqbal*] makes clear that the *Twombly* 'facial plausibility' pleading requirement applies to all civil suits in the federal courts.").

dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process."[115] This conclusion flowed directly from the analytical basis for the Court's ruling, which was the text of Rule 8—a rule of general application that applies to all cases filed in federal courts.

Again, it is significant that this analysis went largely unchallenged by the dissent, which did not even purport to argue that limitations on discovery rendered *Twombly* inapplicable. Rather, the dissent dutifully applied the Court's prior decision, suggesting only that it dictated a result contrary to that reached by the majority. Only Justice Breyer, in a separate dissenting opinion joined by no other members of the Court, raised the issue of discovery at all, suggesting not that *Twombly* was limited to particular cases, but rather that trial courts had "other legal weapons designed to prevent unwarranted interference" with the performance of official government functions:

> As the Second Circuit explained, where a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case and "mindful of the need to vindicate the purpose of the qualified immunity defense," can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials. . . . A district court, for example, can begin discovery with lower level government defendants before determining whether a case can be made to allow discovery related to higher level government officials. . . . Neither the briefs nor the Court's opinion provides convincing grounds for finding these alternative case-management tools inadequate, either in general or in the case before us.[116]

Thus, once again, both the majority and dissent declined to limit the general rule articulated in *Twombly*.

C. Resolution of Questions Regarding the Court's Commitment to Twombly

The *Iqbal* Court also implicitly put to rest arguments based on subsequent decisions. For example, the Second Circuit and some commentators had latched onto the fact that almost immediately after issuing *Twombly* the Supreme Court had restated the general notice

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[115] *Iqbal*, 129 S. Ct. at 1953 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007)); *see also id.* at 1954 ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.").

[116] *Id.* at 1961–62 (Breyer, J., dissenting) (quoting *Iqbal*, 490 F.3d at 158).

requirement in *Erickson v. Pardus*.[117] However, in *Erickson*, the Court simply asserted that

> 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." 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.'"[118]

There is nothing inconsistent with this statement and the decision in *Twombly*, which expressly stated that its interpretation of Rule 8 was not inconsistent with the concept of "notice" pleading.[119]

While the Court in *Iqbal* did not expressly address this argument, its decision implicitly resolved the question by strongly reaffirming *Twombly* and making clear that it applied to all cases filed in the federal courts.[120] Likewise, the dissent's failure to make any mention of this supposed limitation raised by the Second Circuit underscores that even the dissenters did not believe that *Erickson* signaled a limitation on the *Twombly* ruling in any way.

In sum, the fact that the Court in *Iqbal* rejected all of these proposed limitations on *Twombly* is significant. The Court sent a strong signal that pleadings filed in federal court should be given significant scrutiny at the outset of litigation, a result that is compelled by the text of the Federal Rules of Civil Procedure, as well as sound notions of policy. The *Iqbal* and *Twombly* decisions are thus

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117 *See Iqbal*, 490 F.3d at 157 (citing Erickson v. Pardus, 551 U.S. 89 (2007)); *see also, e.g.*, Bradley, *supra* note 101, at 122 (arguing that in *Erickson*, "the Court allowed a complaint based only on scant allegations"); Cavanagh, *supra* note 5, at 890 (arguing that *Twombly* and *Erickson* are "inconsistent"); Chemerinsky, *supra* note 101, at 438 n.38 (noting that in *Erickson*, the Court "reaffirmed traditional rules of notice pleading"); *Leading Cases*, *supra* note 101, at 310 n.51 ("Several commentators have argued that *Erickson* shows that *Twombly* should be read less expansively than some have suggested."). Even after *Iqbal*, some courts have cited *Erickson*. *See, e.g.*, Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009).

118 *Erickson*, 551 U.S. at 93 (omission in original) (quoting *Twombly*, 550 U.S. at 544).

119 *Twombly*, 550 U.S. at 556 n.3, 557, 569 n.14.

120 Even before *Iqbal*, courts and commentators rejected this argument. *See, e.g.*, Giarratano v. Johnson, 521 F.3d 298, 304 n.5 (4th Cir. 2008) ("We do not read *Erickson* to undermine *Twombly*'s requirement that a pleading contain 'more than labels and conclusions.' . . ."); *see also* Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 140 (2007) ("*Erickson* reaffirmed *Bell Atlantic*'s requirement that the complaint provide notice *plus* grounds. . . . The two cases are looking at the same standard . . . ."); Spencer, *supra* note 2, at 456 (maintaining that while *Erickson* may "soften the edges of *Twombly*, seeming to assure readers that not all of *Conley*'s legacy has been discarded," its "homage to notice pleading and the liberal ethos ring hollow").

likely to have a significant effect on both the rate at which cases are dismissed in the federal courts and also the level of factual detail contained in the initial pleadings. The outcome of these effects is likely to be increased efficiency.[121] Dispensing with legally invalid claims obviously will conserve scarce judicial resources. However, even where cases proceed, to the extent claims are defined at the outset of the litigation, courts can better determine which claims can proceed and which do not merit further attention. The time and effort of both the courts and the parties are therefore less likely to be wasted.

CONCLUSION

What will the future bring under *Twombly* and *Iqbal*? This is a question that the federal courts must address. However, it is already clear that the level of judicial scrutiny given at the pleading stage is likely to increase. The Supreme Court has sent a strong signal with these twin decisions that plaintiffs must plead sufficient factual details such that a logically coherent theory emerges that is more than merely "consistent with" the defendant's liability.

Not only the text of Rule 8, but also the Federal Rules as a whole and the policies they embody, support the Supreme Court's interpretation. Modern civil litigation has taken on a life of its own and threatens to spiral out of control without some judicial involvement early in the proceedings to weed out weak or frivolous claims. These concerns have only escalated in recent years with the increases in costs associated with discovery. Electronic discovery alone has imposed significant burdens on defendants that should not be borne in cases in which plaintiffs are unable to come up with a coherent theory as to defendants' liability.[122]

The Supreme Court has not turned a deaf ear to these concerns. While *Twombly* and *Iqbal* are firmly rooted in the text of the Federal Rules, the Court's extensive discussion of the policy implications of its decisions, as well as the interplay among the various rules, underscores that it is not oblivious to such considerations. Indeed,

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[121] *See* Bone, *supra* note 5, at 890–91 (arguing that *Twombly* is consistent with the "procedural vision of the Federal Rule drafters" who had "a pragmatic commitment to making procedure an efficient means to enforce the substantive law accurately").

[122] *See* Redish, *supra* note 109, at 581 ("[T]he costs and burdens that result from [the] difficulties [associated with electronic discovery] can be of such a magnitude as to have a profound and unpredictable impact on basic societal choices not directly involving the lawsuit.").

Twombly and *Iqbal* may be viewed as the culmination of a string of decisions in which the Court has recognized that the judiciary plays a valuable role in acting as a gatekeeper to the federal courts.[123] While the judiciary should not block the door to the trial of meritorious claims, it can serve a useful screening function at the outset of the litigation. Moreover, this role cannot be supplanted by other means of case management.[124]

The Court's decisions, which strengthen and define the standards under Rule 8(a), effectively target those claims with little or no merit while not disadvantaging those with merit. In this regard, the Court's decisions are likely to have a salient effect. Weak and unsupported claims will be discouraged. Plaintiffs will have an incentive to include factual allegations to support their legal claims in the body of the complaint. And this early definition of plaintiffs' contentions is likely to further streamline those cases that survive judicial scrutiny at the pleading stage. In sum, the more defined the claims are at the outset of the litigation, the more efficient that litigation is likely to be.

[123] For example, before *Twombly*, the Court had previously "alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc. v. Broudo*," a securities case in which the court strengthened the requirements for pleading loss causation. *Twombly*, 550 U.S. at 557–58 (citing Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005)). There, the Court "explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Id.* (quoting *Dura Pharm., Inc.*, 544 U.S. at 347). Likewise, in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), the Court had tightened the standard for pleading a "strong inference of scienter" under Section 21D(b)(2) of the Private Securities Litigation Reform Act of 1995 (PSLRA). *See* 15 U.S.C. § 78u-4(b)(2) (2006). Justice Ginsburg, writing for the majority, held that "[i]t does not suffice that a reasonable factfinder plausibly could infer from the complaint's allegations the requisite state of mind." *Tellabs*, 551 U.S. at 314. Instead, "a court . . . must consider, not only inferences urged by the plaintiff, . . . but also competing inferences rationally drawn from the facts alleged." *Id.* In so ruling, the majority observed that "[p]rivate securities fraud actions, . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Id.* at 313 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 81 (2006)).

[124] *Twombly*, 550 U.S. at 558–60, 560 n.6 (citing Easterbrook, *supra* note 73, at 638–39).