NOTE

MAY WE PLEAD THE COURT? TWOMBLY, I qb al, AND THE “NEW” PRACTICE OF PLEADING

I. INTRODUCTION

As of June 30, 2009, the Supreme Court decision Bell Atlantic Corp. v. Twombly has been cited by federal courts and tribunals nearly 24,000 times, making it the seventh most-cited case of all time. Twombly replaced fifty-year-old precedent, shifted the focus of the Federal Rules of Civil Procedure (“FRCP”), and became the case to cite to when litigating the sufficiency of one’s complaint. The backlash following the Twombly decision was pervasive, with some commentators arguing that the Supreme Court has effectively heightened the formerly liberal pleading standards of the FRCP and others claiming

3. See Twombly, 550 U.S. at 579 (Stevens, J., dissenting) (accusing the Twombly majority of rewriting the country’s civil procedure textbooks with their decision).
4. See Kendall W. Hannon, Note, Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions, 83 NOTRE DAME L. REV. 1811, 1811-12 (2008) (“Thus, when the Supreme Court recently spoke on this issue in the case of Bell Atlantic Corp. v. Twombly, the American bar rightfully took notice.” (footnote omitted)); see also 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 . . . .”); Edward A. Hartnett, Taming Twombly, Even After Iqbal, 158 U. PA. L. REV 473, 474 (2010) (“Scholarly reaction to Twombly has been largely critical . . . .”); Douglas G. Smith, The Twombly Revolution?, 36 PEPP. L. REV. 1063, 1063 (2009) (“No decision in recent memory has generated as much interest and is of such potentially sweeping scope as the Supreme Court’s decision in Bell Atlantic Corp. v. Twombly.”).
5. See FED. R. CIV. P. 8(a)(2) (requiring a “short and plain statement of the claim showing that the pleader is entitled to relief”); see also Bone, supra note 4, at 875 (“[M]any 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 . . . .”); Hartnett, supra note 4, at 474 (“Scholars have criticized the Court for abandoning decades of precedent and rejecting ideas central to the Federal Rules of Civil Procedure.”); Jason Bartlett, Comment, Into the Wild: The Uneven and Self-Defeating Effects of Bell Atlantic v. Twombly, 24 ST. JOHN’S J. LEGAL COMMENT. 73, 75, 83-85 (2009) (examining how Twombly “redefined the meaning of Rule 8(a)(2)’s . . . short and plain statement”).

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that the *Twombly* decision does not drastically alter these rules. 6 Those who speculated that the *Twombly* decision might be limited in scope to antitrust litigation 7 were corrected by the Supreme Court’s decision in *Ashcroft v. Iqbal*, 8 which laid to rest any such speculation by decreeing that *Twombly* set the standard for “all civil actions.” 9 Although the Supreme Court disclaimed in *Twombly* that “[i]n reaching this conclusion, we do not apply any ‘heightened’ pleading standard[,]” 10 the practical effect of its decision on the lower courts has been resounding. 11 The revised (if not heightened) pleading standard, known as “plausibility pleading,” 12 was controversial enough to provoke lawmakers to introduce legislation seeking to undo the effects of both *Twombly* and *Iqbal.* 13 The Supreme Court’s decision in *Twombly* was founded on

6. Bone, supra note 4, at 877 (“*Twombly* does not alter pleading rules in as drastic a way as many of its critics, and even some of its few defenders, suppose.”); see also Smith, supra note 4, at 1064 (“The majority in *Twombly* undertook a careful analysis based on the text and purpose of the Federal Rules, articulating a standard that is relatively clear.”).

7. See Anthony Martinez, Case Note, *Plausibility Among the Circuits: An Empirical Survey of Bell Atlantic Corp. v. Twombly, 61 ARK. L. REV. 763, 782-83 (2009)* (discussing how the Ninth Circuit limited *Twombly* to antitrust litigation); see also Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 318 n.407 (2008) (“To read *Twombly* as stating a general principle of federal procedural law, under which plaintiffs in all kinds of cases must provide greater factual detail to get past the pleadings phase, could interfere with substantive rights.”).


9. Id. at 1953 (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions’ . . . and it applies to antitrust and discrimination suits alike.” (quoting FED. R. CIV. P. 1)).


11. See, e.g., Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 434 n.2 (6th Cir. 2008) (“This Court has cited the heightened pleading standard of *Twombly* in a wide variety of cases, not simply limiting its applicability to antitrust actions.” (emphasis added)); see also Taylor Consultants, Inc. v. United States, 90 Fed. Cl. 531, 537 (2009) (“In *Iqbal*, the Court discussed, in detail, the ‘two working principles’ of *Twombly’s* heightened pleading requirements.” (emphasis added) quoting *Iqbal*, 129 S. Ct. at 1949)); Angell v. Burrell (*In re Careamerica, Inc.*), 409 B.R. 759, 767 (Bankr. E.D.N.C. 2009) (“Rather, § 548(a)(1)(B) claims must satisfy Rule 8(a) and the heightened pleading standard introduced in *Twombly and Iqbal*.” (emphasis added)).


policy concerns, most notably the rising trend of plaintiffs with factually weak claims seeking to open the doors to enormously expensive discovery and the modest success of judges supervising abusive discovery. The *Twombly* decision can be seen as the Supreme Court’s response to these policy issues, and the *Iqbal* decision further built on *Twombly*’s foundation. Giving district court judges the ability to screen more cases at the pleading stage rather than waiting until the summary judgment stage enhances judicial economy and should be seen as a welcome departure from the basic notice pleading system of the recent past. In doing so, however, some potential plaintiffs will find themselves disenfranchised and unable to obtain the proper information they need to adequately state their legal claims in the face of dismissal. Therefore, this Note argues for a balance to be struck that will arm these potentially disenfranchised plaintiffs with some recourse and, ultimately, their day in court.

Part II of this Note will recap the history of pleading regimes from common law times until 2002. The discussion will start with pleading practice as it evolved from the common law to the advent of the FRCP. Each section will briefly explain the context in which the different pleading regimes were developed and highlight the features that were further implemented or cast aside for future regimes. Part II will further discuss the concept that the FRCP and its proponents sought to promote access to the courts rather than restrict it. Part II will end with a discussion of two Supreme Court cases that established the liberal ethos of pre-*Twombly* pleading practice.

Part III will outline the current pleading debate by discussing the trilogy of cases that the Supreme Court has recently ruled on: *Twombly*, *Erickson v. Pardus*, and *Iqbal*. This discussion will start with the wrench that *Twombly* threw into the gears of pleading doctrine. After that, Part III will discuss *Erickson* and the Supreme Court’s attempt to revert back to the liberal ethos of the FRCP. Then, *Iqbal* will be
discussed, thus completely setting the stage for the present pleading problem.\footnote{25}{See discussion infra Part III.C.} Finally, Part III will conclude with a discussion of how the \textit{Twombly} and \textit{Iqbal} decisions have reinforced a new narrative of pleading practice, how the lower courts are adopting this new narrative, and the unintended consequences thereof.\footnote{26}{See discussion infra Part III.D.}

Part IV will argue for a system to be implemented that allows brief, targeted discovery before a complaint has been filed when a plaintiff finds himself unable to plausibly state his claim for relief because he does not have access to necessary information.\footnote{27}{See infra Part IV.} This section will begin by discussing the current state of the FRCP and using that basis to carve out the “\textit{Iqbal Motion}” proposed herein—where plaintiffs lacking necessary information to plausibly plead their case have an opportunity to gather that information.\footnote{28}{See infra Part IV.A.1–2. The “\textit{Iqbal Motion},” crafted and proposed by the author, would serve as a pre-filing, pre-suit request by a potential plaintiff who wishes to obtain critical information necessary to plead a sufficient complaint and cannot obtain that information any other legal way.} The discussion will continue by addressing the obvious concerns that would arise as a response to creating a system of pre-filing discovery.\footnote{29}{See infra Part IV.B.} These concerns consist of the \textit{Iqbal Motion}’s potentially negative effect on judicial economy\footnote{30}{See discussion infra Part IV.B.1.} and fairness to defendants, an important concern in both \textit{Twombly} and \textit{Iqbal}.\footnote{31}{See discussion infra Part IV.B.2.} Part IV will conclude by discussing how the \textit{Iqbal Motion} will address these concerns and strike a balance between efficiency and justice.\footnote{32}{See discussion infra Part IV.C.1–2.}

\section{From the Archaic Code to the Liberal Notice: A Brief History of Pleading Standards}

\subsection{Pleading Standards Before the Adoption of FRCP}

To put the current controversy regarding pleading and the \textit{Twombly} and \textit{Iqbal} decisions into perspective, it makes sense to recount how the practice of pleading has evolved over time, starting with the common law pleading system, which gave way to the code pleading system, which in turn gave way to the notice pleading system.\footnote{33}{Common-Law Pleading, L. LIBR.—A M. L. & LEGAL INFO., http://law.jrank.org/pages/5452/Common-Law-Pleading.html (last visited Oct. 7, 2010).}
1. Common Law Pleading

Common law pleading, or issue pleading, was developed in England in the thirteenth century.34 When a citizen sought relief, he needed to obtain the proper writ—a right of action that was recognized by the King.35 Upon purchasing and receiving the appropriate writ, the plaintiff then needed to frame or formulate the issues of his claim so that they were identifiable.36 At common law, the functions of pleading were to reduce the controversy to a single, clear-cut, well-defined issue of fact or law; to eliminate immaterial matter to aid in admitting or rejecting evidence; to give notice to the parties of the respective claims and defenses of the adversaries; to guide the court in apportioning the burden of proof between parties; to serve as a basis for the judgment; and to preserve a record to prevent relitigation of the same issue between the same parties in the future.37 Though no longer followed, the common law pleading system “has served each succeeding generation as an effective instrument in the Administration of Justice, and today is still very much alive, both as an Operating System and as a guiding force in the recurring Waves of Reform designed to correct its abuses.”38 These words resound amongst the present controversy regarding federal pleading practice. Although lampooned for its rigidity, the common law pleading system, along with its system of specialized pleadings, did also include a simple and direct system of allegation which served as the formulaic basis for certain actions at law.39 Interestingly enough, the use of highly-formalized demands or answers in place of counsel’s simple oral responses to the complaint was a byproduct of the development of England’s jury system.40 The movement for pleading reform then was understandably led by laymen and the delay of the reform movement was a result of the bar’s opposition.41

36. Id.
38. Id. at 3.
39. See Charles E. Clark, Simplified Pleading, in 2 F.R.D. 456, 458 (1943) (“Indeed, it is interesting to see how the true common-law pleading had at one and the same time a simple system of direct allegation which is even now the basis of the federal forms of complaints in negligence and
The common law pleading system had obvious shortcomings. Most notable was its infamous rigidity, which led to those with worthy claims unable to obtain redress because of some unfortunate misstatement in the pleadings. As time moved on, more people were seeking recovery and redress for their substantive rights and were unable to do so because of the common law pleading system’s inability to adapt to the growth of those substantive rights. Common law pleading inherently subordinated substance to form. The common law pleading system was truly arcane, preoccupying itself with unnecessarily specialized allegations and was unworkably inefficient and costly. Despite numerous attempts to reform this archaic system, it was not until 1848 that the movement to reform pleading reached a significant “milestone.”

2. Code Pleading

New York became the first state to adopt the David Dudley Field Code (“Field Code”) and by the time the FRCP was enacted, more than half of the states had adopted their own version of the Field Code. Code pleading distanced itself from the common law’s issue pleading and moved toward a system where pleadings were used more for contract...
developing the facts rather than forming the issues. 51 Most importantly, the Field Code sought to merge the courts of equity and law to promote efficiency and to allow petitioners to seek, and courts to grant, both legal and equitable relief.52 A mere statement of the facts became sufficient to tell the court one’s case.53 This statement of the facts required such simplicity that, purportedly, even a child at the time could sufficiently draft one.54 However, despite this newfound emphasis on simplicity, courts still found themselves reverting back to requiring more detailed pleadings55—a trend that has repeated itself continuously to this very day.56 The judges of the era applied the code rules very strictly, emphasizing the “hopeless distinctions among allegations of ultimate fact, legal conclusions, and evidentiary facts”57—distinctions that were much easier to talk about than to apply.58 This led to more waste, inefficiency, and ultimately, an obstruction to justice rather than a path to justice.59 Thus, pleading standards needed further reformation, but with strict adherence to succinctness and simplicity.60

B. The FRCP, Rule 8(a), and Its Pleading Progeny

The advent of the FRCP broke down the ivory towers upon which common law pleading and code pleading stood.61 The drafters realized it

51. Id.
52. See id. at 100-01.
53. See Clark, supra note 39, at 459.
54. Id. (noting that the common law emphasis on issue pleading shifted to requiring “a statement of the facts, so simple, it was said at the time, that even a child could write a letter to the court telling of its case”).
55. Id.
56. See Bone, supra note 4, at 897 (discussing how federal courts in the 1980s tightened pleading requirements as a response to increasing litigation costs and filing of frivolous suits).
57. Id. at 891.
59. See Clark, supra note 39, at 460 (“Therefore, it may be concluded that this tendency to seek admissions by detailed pleadings is at best wasteful, inefficient, and time-consuming, and at most productive of confusion as to the real merits of the cause and even of actual denial of justice.”).
60. See id. (“[T]he failures of past pleading reform demonstrates, in the writer’s judgment, the necessity of procedural rules which enforce the mandate of simplicity and directness . . . .”).
61. See Bone, supra note 12, at 864 (“[T]he drafters of the Federal Rules of Civil Procedure eliminated the code distinction between facts and legal conclusions.”); see also Brooks, supra note 35, at 102 (“[T]he Federal Rules of Civil Procedure (FRCP) provide the most modern and liberal set of procedural rules available in American courts.”); Jack B. Weinstein & Daniel H. Distler, Comments on Procedural Reform: Drafting Pleading Rules, 57 Colum. L. Rev. 518, 522 (1957) (discussing how the drafters of the FRCP adopted a new terminology and abandoned terms used in
was not necessary to distinguish between facts and legal conclusions. The FRCP established what is now commonly known as the “notice pleading” system. However, it is imperative to the present-day issue to note that nowhere in the FRCP is there an explicit mention of “notice pleading.” This realization has led at least one commentator to postulate that this notion of notice pleading was simply a myth that grew over time against the backdrop of the seemingly draconian pleading practices of the past. However, until the recent decisions in Twombly and Iqbal, it was a widely-accepted idea that the FRCP propounded a very liberal approach to pleading, which provided the keys to “the gate through which all disputes must pass.”

1. Rule 8(a)(2) and the FRCP

Rule 8(a)(2) of the FRCP provides that: “[A] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” The prevailing theory behind Rule 8(a)(2) from the drafters’ perspective was to simplify the system, and to “give[] fair notice of what the dispute is about.” Charles E. Clark, architect of the FRCP and reporter of the 1938 Advisory Committee, realized, however, that his very liberal ideals might not be shared by all the other members of the Advisory Committee.

62. See Bone, supra note 12, at 865; see also Weinstein & Distler, supra note 61, at 522 (recalling how the FRCP retired the terms “ultimate facts,” “material facts,” and “cause of action”).
63. Brooks, supra note 35, at 103; see also Steinman, supra note 2, at 1295 (“Before [the Twombly and Iqbal] decisions, federal courts followed an approach known as notice pleading . . . .”)
64. See Bone, supra note 4, at 892.
65. See Fairman, supra note 48, at 988 (noting that every federal circuit has imposed “non-Rule-based heightened pleading in direct contravention of notice pleading doctrine”).
66. Steinman, supra note 2, at 1297.
67. Hannon, supra note 4, at 1811.
68. Fed. R. Civ. P. 8(a)(2). The full text of FCRP 8(a) is as follows:
A pleading that states a claim for relief must contain:
(1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.
Id. 8(a).
69. Bone, supra note 12, at 865.
70. Bone, supra note 4, at 892-93.
Moreover, if it were up to Clark, the practice of pleading motions would have been eliminated altogether.\textsuperscript{71} In fact, for two decades after the FRCP was enacted, courts continued to disagree over what the proper pleading standard should be.\textsuperscript{72} Some jurists insisted that specificity in pleading was integral in properly framing a lawsuit and making it manageable,\textsuperscript{73} whereas others, such as Clark (who was later appointed as a judge to the Second Circuit), actively tried to establish Rule 8(a)(2) simply to require notice, denouncing efforts to construe it otherwise.\textsuperscript{74} Although the extremities of Clark’s views were not adopted, the prevailing thought was that the FRCP, especially Rule 12(b)(6),\textsuperscript{75} was to be construed to contain a presumption against throwing out pleadings for failing to state a claim for which relief can be granted.\textsuperscript{76}

The drafters sought to create a straightforward and uncomplicated litigation roadmap that started with simple notice to the opposition, easy access to discovery, and, ultimately, a trial where the case should be adjudicated based on “what actually happened rather than on legal technicalities.”\textsuperscript{77} Simplicity is rarely found in the law, however, and despite how feasible it seemed at the time, the nature of modern litigation prevents us from following such a roadmap as it was conceived.

The liberal overtones of the new notice pleading system must be viewed in light of the times in which it was created. In the early-twentieth century, the complex mega-trials of today were virtually unknown.\textsuperscript{78} The drafters did not and could not anticipate, for example, a nation-wide class action suit consisting of hundreds of thousands of plaintiffs.\textsuperscript{79} Were the Advisory Committee of 1938 to take place today, it is almost a certainty that the arena of modern litigation would have heavily influenced their ultimately liberal ideals regarding pleading practice.\textsuperscript{80} Sadly, they were not availed this foresight.

\begin{itemize}
\item \textsuperscript{71} Fairman, \textit{supra} note 48, at 992.
\item \textsuperscript{72} Bone, \textit{supra} note 4, at 892-93.
\item \textsuperscript{73} \textit{Id.} at 892.
\item \textsuperscript{74} \textit{Id.} at 892-93.
\item \textsuperscript{75} “Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .” \textit{FED. R. CIV. P.} 12(b)(6).
\item \textsuperscript{76} Fairman, \textit{supra} note 48, at 992.
\item \textsuperscript{77} Bone, \textit{supra} note 4, at 895.
\item \textsuperscript{78} \textit{Id.} at 895-96.
\item \textsuperscript{79} Such was the case in \textit{Twombly}. \textit{See id.} at 896 (“Many cases were rather small affairs; the huge, complex case of today was relatively unknown.”).
\item \textsuperscript{80} \textit{Id.} at 897 (“Indeed, Charles Clark emphasized . . . the importance of revising those Rules to keep pace with changing litigation conditions.”).
\end{itemize}
2. *Conley v. Gibson*\(^{81}\) and Its “No Set of Facts” Standard

Nearly twenty years after the creation of the FRCP, the Supreme Court in *Conley* created the paradigm for pleading standards and solidified Rule 8(a) as a notice-pleading requirement.\(^{82}\) In doing so, the Court effectively ended the controversy as to how to apply the rule, albeit until *Twombly* and *Iqbal* were decided.

a. The *Conley* Decision

*Conley* involved a group of black railroad workers who sought relief from their union for failing to protect them when their jobs were taken away and their positions replaced with white workers.\(^{83}\) The complaint alleged that the union failed to represent Negro employees equally and in good faith, in contravention of the union agreement.\(^{84}\) The union moved to dismiss the complaint on several grounds, including failure to state a claim upon which relief could be given.\(^{85}\) The Supreme Court granted certiorari to address an important issue concerning employee rights.\(^{86}\)

Justice Black wrote the decision for the Supreme Court, and held that the lower courts were incorrect in deciding that they lacked jurisdiction.\(^{87}\) He then turned to the motion to dismiss and, relying on earlier cases, held that petitioners’ complaint did indeed set forth a claim upon which relief could be granted.\(^{88}\) To test the complaint’s sufficiency, Justice Black followed “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”\(^{89}\) Petitioners’ complaint alleged a wrongful discharge by the union who protected the jobs of white employees over the black employees, and that the union refused to address petitioners’ grievances because they were black.\(^{90}\) If these allegations were proven true, Justice Black reasoned, then there would be a breach on the part of

\(^{81}\) 355 U.S. 41 (1957).

\(^{82}\) See id. at 45-46.

\(^{83}\) Id. at 42-43.

\(^{84}\) Id. at 43.

\(^{85}\) Id.

\(^{86}\) Id. at 44.

\(^{87}\) Id. at 42, 44.

\(^{88}\) Id. at 45.

\(^{89}\) Id. at 45-46 (emphasis added).

\(^{90}\) Id. at 46.
the union of its lawful and statutorily imposed duty to represent its members fairly and equally without discrimination.91

To the argument that the complaint was bereft of specific facts and therefore required dismissal, Justice Black simply relied on the FRCP.92 He noted that the FRCP makes no requirement that the claims in the complaint be substantiated with detailed facts upon which the claims are based.93 For support, Justice Black took note of the forms in the appendix of the FRCP.94 The Supreme Court ultimately held that the petitioners’ complaint adequately set forth a claim for relief for which they were entitled and that it gave the respondents fair notice of its basis.95 As parting words, Justice Black expressed that the FRCP rejects the notion that "pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept[s] the principle that the purpose of pleading is to facilitate a proper decision on the merits."96

b. The Conley Decision in Hindsight

Although it could hardly be claimed that Conley would not pass muster under present-day pleading standards, the complicated landscape of modern-day litigation renders as moot at least some of Justice Black’s reasoning.97

91. Id.
92. Id. at 47.
93. Id.
94. Id. This seemingly innocent point has been recycled and reused by jurists and commentators alike unable to reconcile the standard propounded in Twombly and the original intent behind the FRCP. See, e.g., Bell Atl. Corp. v. Twombly, 550 U.S. 544, 575-76 (2007) (Stevens, J., dissenting) (“The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, a complaint for negligence.”); Scott Dodson, Pleading Standards After Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 141 (2007), http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf (“[I]f the ‘plausibility’ standard extends beyond the antitrust context, then these examples are in tension with Form 9 . . . .”); Allan Ides, Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice, in 243 F.R.D. 604, 633 (2007) (noting that it is almost impossible to distinguish between the “supposedly sufficient . . . Form 9, where no specific facts of negligence are alleged and the supposedly inadequate, ‘fact-deficient’ allegation of an antitrust conspiracy (or any other type of conspiracy”)).
95. Conley, 355 U.S. at 48.
96. Id.
97. For a discussion of how the FRCP was created in a time where the litigation landscape was less complex, see supra notes 80-82 and accompanying text.
Justice Black noted that simplified notice pleading, as established by the FRCP, was feasible because of the FRCP’s “liberal opportunity for discovery and the other pretrial procedures... to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.” 98 This opportunity to gain easy discovery was a compelling reason why, fifty years later, the Supreme Court in Twombly retired Conley’s “no set of facts” language.99


In 2002, the Supreme Court once again denounced the application of a heightened pleading standard as applied to an employment discrimination lawsuit, thus reaffirming the FRCP’s notice pleading system.101 In so holding, the Court sought to send a message to lower courts who, despite decisions admonishing them against it,102 continued to embrace and impose heightened pleading standards.103

In Swierkiewicz, fifty-three-year-old Akos Swierkiewicz, a native of Hungary, sued his former company for allegedly firing him because of his national origin and because of his age.104 Petitioner claimed that, after he was demoted, his position was filled by a thirty-two-year-old who had only one year of underwriting experience compared to petitioner’s twenty-six years of experience.105 The U.S. District Court for the Southern District of New York dismissed petitioner’s complaint on the grounds that it did not allege a prima facie case for discrimination, a precedential requirement, and the Second Circuit affirmed the dismissal.106

Citing Conley, the Supreme Court reversed the Second Circuit, holding that “under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case”107 and the imposition of a heightened pleading standard conflicts directly with Rule 8(a)(2), which requires simply that the complaint give the

99. See infra Part III.A.2.a.
100. 534 U.S. 506 (2002).
101. See id. at 508 (holding that a complaint for an employment discrimination suit need not “contain specific facts establishing a prima facie case”).
104. Swierkiewicz, 534 U.S. at 508-09.
105. Id. at 508.
106. Id. at 509.
107. Id. at 511, 515.
defendant fair notice of what the claim is and the grounds on which that claim rests.\textsuperscript{108} Again, the Court relied on the FRCP’s allowance of liberal discovery and summary judgment to narrow the issues and dispose of those claims that lacked merit.\textsuperscript{109} To further drive home the point, the Court reiterated that “Rule 8(a)’s simplified pleading standard applies to all civil actions,” except those provided in Rule 9(b).\textsuperscript{110} After applying the proper standard, the Supreme Court found that the petitioner’s complaint satisfied the requirements of Rule 8(a) because it gave the respondent sufficient notice of the basis of petitioner’s claims.\textsuperscript{111}

Swierkiewicz was the last Supreme Court decision to address pleading standards pre-Twombly and seemed to lay to rest any speculation about these standards. Swierkiewicz, as well as other decisions that rejected any system of heightened pleading,\textsuperscript{112} stood boldly for certain pre-Twombly pleading norms. These norms champion the ideals of simple notice pleading: informing the defendant of the claim against him and the basis thereof; factual detail was unnecessary at the pleading stage; dismissal of a complaint was proper only if there were no set of facts that the plaintiff could adduce that could prove liability; and reliance on discovery and pretrial procedures to elicit those facts that were necessary to further frame the issues and weed out claims that lacked merit.\textsuperscript{113} Swierkiewicz seemed to finally have reaffirmed these ideals beyond speculation, but the Twombly decision five years later effected an unprecedented reversal of course.\textsuperscript{114}

III. ONE OF THESE THINGS IS NOT LIKE THE OTHER—THE SUPREME COURT REVISITS PLEADING STANDARDS THRICE IN TWO YEARS

Three Supreme Court decisions serve as the basis for the current controversy regarding pleading standards. The Twombly decision ignited

\textsuperscript{108} Id. at 512.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 513.
\textsuperscript{111} Id. at 514. The respondent’s main argument was that the petitioner’s complaint was too conclusory. Id. However, the petitioner’s complaint alleged, in detail, the events that led up to his discharge, the relevant dates, and even the nationalities and ages of some of the key persons involved. Id. The Court held that this information was sufficient to inform the respondent of petitioner’s claim and the basis thereof. Id.; see also Smith, supra note 4, at 1087 (“[N]othing in \textit{Swierkiewicz} is at odds with the majority’s analysis in \textit{Twombly}.”).
\textsuperscript{112} See supra note 102 and accompanying text.
\textsuperscript{113} Spencer, supra note 103, at 438-39.
\textsuperscript{114} Id. at 439.
the debate,115 the Erickson decision subtly attempted to water it down,116 and the Iqbal decision erupted a conflagration.117 Despite this confusion concerning pleading standards, the Supreme Court rightfully called into question some of those basic tenets of the notice pleading system in light of modern-day federal civil litigation practices.118

A. Twombly: From Conceivable to Plausible

Since being handed down in 2007, Twombly necessitates that all federal civil court proceedings faced with a Rule 12(b)(6) motion to dismiss cite to Twombly instead of Conley.119 Justice Souter, writing for the seven-justice majority, “retire[d]” Conley’s “no set of facts” language after it “puzzl[ed] the profession for 50 years.”120 In doing so, the Court inadvertently created a wave of confusion in lower courts as to how to apply the Supreme Court’s new interpretation of Rule 8(a) and what the pleadings require to withstand a motion to dismiss.121 Despite the confusion, however, even a cursory reading of the Twombly decision reveals that the Supreme Court “clearly intended to effect some change”122 and based its decision on policy concerns that have evolved greatly since the framers created the FRCP.123

1. The Facts

In Twombly, a class of consumers who were subscribers of local telephone and Internet services brought an action in the Southern District of New York against Incumbent Local Exchange Carriers (“ILECs”) alleging that these ILECs were conspiring to keep local telephone companies, known as “competitive local exchange carriers” (“CLECs”) from competing in the market.124 The plaintiffs sued under § 1 of the Sherman Antitrust Act, which forbids “[e]very contract, combination in

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115. See supra notes 3-4 and accompanying text.
116. Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (overturning the Tenth Circuit’s dismissal of a complaint because the allegations in question were “too conclusory”).
117. See infra Part III.A–C.
118. See Hannon, supra note 4, at 1820 (“The Supreme Court replaced the oft-cited Conley language in Twombly.”).
120. See supra notes 4-6 and accompanying text.
122. See supra notes 59-60 and accompanying text.
123. Twombly, 550 U.S. at 549-50.
the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.\footnote{125}

The plaintiffs’ complaint alleged that the ILECs conspired to restrain trade that led to inflated charges for local telephone and Internet services.\footnote{126} The plaintiffs claimed that the ILECs engaged in parallel conduct in their service areas to restrict the growth of the upstart CLECs\footnote{127} and that the ILECs further agreed not to compete with one another.\footnote{128} According to the plaintiffs, this agreement could be inferred from the ILECs’ collective failure to pursue some business opportunities where they possessed substantial competitive advantages\footnote{129} and a statement from one of the ILEC’s chief executives.\footnote{130}

Defendant phone companies moved to dismiss for failure to state a claim and were granted this dismissal by the Southern District of New York.\footnote{131} On the allegations that the ILECs discouraged competition with the CLECs by conspiring to act in “conscious parallelism,” Judge Lynch held that these allegations were inadequate because the ILECs’ behavior could be explained by their interests in their individual territories.\footnote{133} Furthermore, Judge Lynch held that the plaintiffs have failed to raise the inference that the ILECs’ actions were born out of a conspiracy.\footnote{134}

The Second Circuit reversed the district court’s decision, holding that the district court applied the wrong pleading standard against the complaint.\footnote{135} The Second Circuit ruled that the pleading of “plus factors” was not necessary for parallel conduct antitrust claims to survive a motion to dismiss.\footnote{136} In reversing the district court, the Second

\begin{footnotes}
\item[125] Id. at 550 (alteration in original) (quoting 15 U.S.C. § 1 (2006)).
\item[126] Id.
\item[127] Id. According to the complaint, this parallel conduct consisted of “making unfair agreements with the CLECs for access to the ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs’ relations with their own customers.” Id.
\item[128] Id. at 551.
\item[129] Id.
\item[130] Id. Richard Notebaert, CEO of ILEC Qwest, stated: “[C]ompeting in the territory of another ILEC might be a good way to turn a quick dollar but that doesn’t make it right.” Id. (internal quotation marks omitted).
\item[131] Id. at 552.
\item[133] Id.
\item[134] Id.
\item[135] Id. at 553.
\item[136] Id. (quoting Twombly v. Bell Atl. Corp., 425 F.3d 99, 114 (2d Cir. 2005), rev’d, 550 U.S. 544 (2007)).
\end{footnotes}
Circuit invoked Conley’s “no set of facts” language. The Supreme Court granted certiorari “to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.”

2. The Majority Opinion

In a decision penned by Justice Souter and joined by six other Justices, the Supreme Court reversed the Second Circuit. The Court reasoned that to plead that the defendant companies engaged in parallel conduct, without more, is just as nebulous as the defendants’ alleged conspiratorial activity. The Court then set out to decide what a plaintiff must plead to sufficiently state a claim under § 1 of the Sherman Antitrust Act.

As all pleading queries begin, the Supreme Court analyzed the requirements laid out under Rule 8(a)(2). Justice Souter relied less on the Rule 8’s fair notice requirement and more on the part of the rule that requires a plaintiff to state the grounds for his entitlement to relief—a statement requiring enough factual allegations “to raise a right to relief above the speculative level” and more than just a “formulaic recitation of the elements of a cause of action.” Justice Souter then held that the complaint must contain enough factual basis suggesting that an agreement was in fact made. This is where the notion of “plausibility” was conceived. Justice Souter then aligned this concept of plausibility with Rule 8(a)(2), explaining that this is, as a threshold matter, what the rule requires. The plaintiffs did not contest this notion of plausibility.

137. The Second Circuit held that “to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.” Id. (quoting Twombly, 425 F.3d at 114).
138. Id.
139. Id. at 547, 553.
140. See id. at 554 (“The inadequacy of showing parallel conduct or interdependence, without more . . . [is] consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”).
141. Id. at 554-55.
142. Id. at 555.
143. Id.
144. Id. at 556.
145. See id. (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”).
146. See id. at 557 (“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.” (alteration in original) (emphasis added) (quoting FED. R. CIV. P. 8(a)(2))).
in itself but argued that imposing a plausibility requirement at the pleading stage conflicts with precedent, namely, the Supreme Court’s decision in Conley.147 Ultimately, the majority held that plaintiffs’ claims of conspiracy were inadequately pled for lack of plausibility.148 In doing so, it warned that they were not applying any heightened pleading standard or the need for specific pleadings but that the plaintiffs have failed to “nudge[] their claims across the line from conceivable to plausible, [and] their complaint must be dismissed.”149

a. Say Goodbye to “Conleywood”

Justice Souter realized that Conley’s “no set of facts language” can and has been read in isolation and taken hyper-literally to mean that a statement of a claim is sufficient unless it seems impossible based on the four-corners of a complaint.150 Furthermore, the majority opinion summoned instances in which both jurists and commentators balked at applying Conley so literally.151 As a result of fifty years of criticism, questioning, and explanations, the majority decided that Conley’s language had “earned its retirement.”152

b. A Matter of Policy

Importantly, the majority paid more than mere lip service to the economics implicated by pleading doctrine.153 In doing so, the Court explained how requiring a pleading to be plausible on its face has a fundamental basis in sound economic policy.154 Justice Souter noted that pleadings need to include sufficiently plausible facts or else plaintiffs with groundless claims could occupy the time of defendants, as well as

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147. Id. at 560-61.
148. Id. at 564.
149. Id. at 570.
150. Id. at 561.
151. Id. at 562.
152. Id. at 563. Justice Souter then eulogized Conley’s famous phrase, burying it “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.” Id.
153. See id. at 557-58 (discussing the “practical significance of the Rule 8 entitlement requirement”).
154. See id. (citing to cases discussing the need for plausible pleadings in the face of inevitably expensive discovery).
the courts, for the purpose of scaring the other side into increasing the potential settlement value.\textsuperscript{155} This concept displays the converse of the concerns expressed by the framers of the FRCP.\textsuperscript{156} However, if complaints do not require facial plausibility, plaintiffs would have unfettered access to costly discovery and could use this access to seek settlements “based on their \textit{in terrorem} value rather than the actual merits of the case.”\textsuperscript{157}

c. The Dissent: The Majority Went to Extremes

Two Justices dissented from the majority opinion, accusing the majority of rewriting the FRCP.\textsuperscript{158} Justice Stevens took exception to the majority’s retirement of \textit{Conley}, noting that the majority’s decision was the first time any member of the Supreme Court had expressed any doubt over its adequacy.\textsuperscript{159} He undertook a brief historical analysis of pleading rules to show how Rule 8(a)(2)’s language was artfully chosen and assembled by its drafters as a response to the failures of past pleading regimes.\textsuperscript{160} Justice Stevens explained his view that the purpose of the FRCP’s liberal pleading was to keep litigants in court, not out of it.\textsuperscript{161} He reiterated that, under the FRCP, “separating the wheat from the chaff is a task assigned to the pretrial and trial process[,]” and that these policy choices were embedded in the spirit and text of the rules, and thus federal courts are bound by them.\textsuperscript{162} Bolstering his dissenting opinion with prior decisions “rebuff[ing]” the efforts of lower courts attempting to impose a heightened pleading requirement, Justice Stevens argued that precedent reaffirmed the notion that “motions to dismiss were not the place to combat discovery abuse.”\textsuperscript{163}

Despite rivaling the length of the majority opinion with his very spirited dissent, Justice Stevens paid mere lip service to the concept that Rule 8(a)(2) requires a “showing” of one’s entitlement to relief—a point that seemed to headline the majority’s opinion.\textsuperscript{164} As to the majority’s

\textsuperscript{155} Id. at 558 (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).
\textsuperscript{156} See supra Part II.B.1.
\textsuperscript{157} Smith, supra note 4, at 1073.
\textsuperscript{158} See Twombly, 550 U.S. at 570, 579 (Stevens, J., dissenting) (“I would not rewrite the Nation’s civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so.”).
\textsuperscript{159} Id. at 578.
\textsuperscript{160} Id. at 573-74.
\textsuperscript{161} Id. at 575.
\textsuperscript{162} Id. at 583.
\textsuperscript{163} Id. at 584.
\textsuperscript{164} See id. at 580 n.6. Relegating this part of his argument to a footnote, Justice Stevens
other headlining concern, Justice Stevens admonished against giving into “the urge to engage in armchair economics at the pleading stage.”\textsuperscript{165} Ultimately, Justice Stevens claimed that the “‘plausibility’ standard is irreconcilable with Rule 8 and our governing precedents.”\textsuperscript{166} He accused the majority of making the distinctions between legal conclusions and factual allegations, which was the “stuff of a bygone era.”\textsuperscript{167}

History seemed to be repeating itself yet again,\textsuperscript{168} and the natives were getting restless, perhaps fearing a return to this “bygone era.”\textsuperscript{169} The Supreme Court presumptively took notice and responded by deciding yet another case involving pleading standards.

\textbf{B. Erickson: An Attempt to Quell the Uproar?}

The Supreme Court revisited the pleading question in \textit{Erickson}, only two weeks after deciding \textit{Twombly}.\textsuperscript{170} A seemingly exciting time for Civil Procedure buffs everywhere, some hoped that the Court would undo any heightened pleading requirement it seemed to impose in \textit{Twombly}, or at least limit \textit{Twombly} to the antitrust context.\textsuperscript{171} In \textit{Erickson}, the Supreme Court reversed the Tenth Circuit decision to uphold the dismissal of petitioner’s complaint, and reaffirmed Rule 8’s liberal pleading standards.\textsuperscript{172}

\textbf{1. The Facts}

Petitioner William Erickson, an inmate at Limon Correctional Facility in Colorado, filed suit in the District Court of Colorado against the prison’s officials alleging violations of his Eighth Amendment right against cruel and unusual punishment.\textsuperscript{173} Petitioner was diagnosed with hepatitis C, for which he was receiving treatment.\textsuperscript{174} This treatment
required a year’s worth of weekly injections that Erickson was to
administer himself.\textsuperscript{175} Some time after the treatment began, prison
officials were unable to account for one of Erickson’s syringes, but soon
found it in a communal garbage can, altered in a way that suggested it
had been used to inject illegal drugs.\textsuperscript{176} Prison officials did not believe
Erickson’s claims that he was not the reason the syringe was modified.
The officials found that his conduct violated the Colorado Code of Penal
Discipline, and decided to stop Erickson’s hepatitis C treatment.\textsuperscript{177}
Petitioner developed a life-threatening liver condition as a result of the
cessation of treatment.\textsuperscript{178}

Petitioner’s complaint alleged that he had hepatitis C, he met the
standards for treatment thereof, and that the refusal of treatment was
causing irreversible harm to his liver that could ultimately result in his
death.\textsuperscript{179} He attached grievance forms to his complaint, and also alleged
that other inmates died as a result of the same disease.\textsuperscript{180} The
respondents filed a motion to dismiss that was granted by the district
court citing failure to adequately plead that the prison health officials’
actions caused petitioner substantial harm.\textsuperscript{181} The Tenth Circuit
affirmed, holding that petitioner’s allegations of substantial harm were
“only conclusory.”\textsuperscript{182}

2. The Holding

The Supreme Court, in a rather terse six-page per curiam opinion
granted review because the “holding departs in so stark a manner from
the pleading standard mandated by the Federal Rules of Civil
Procedure . . . .”\textsuperscript{183} The Supreme Court reaffirmed the “liberal pleading
standards set forth by Rule 8(a)(2).”\textsuperscript{184} In reviewing the sufficiency of
petitioner’s complaint, the Supreme Court noted that it would be enough
if petitioner simply alleged his medication was withheld after

\textsuperscript{175} Id.
\textsuperscript{176} Id. at 91.
\textsuperscript{177} Id. The prison officials who removed the petitioner from treatment defended this removal
by saying that the hepatitis C treatment could only succeed if the patient was drug and alcohol free.
Id. Erickson would have to wait a year and go through six months of classes to regain his treatment
eligibility. Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 92.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id. (quoting Erickson v. Pardus, 198 F. App’x 694, 698 (10th Cir. 2006)).
\textsuperscript{183} Id. at 90; see also Bone, supra note 4, at 883 (“The Court went out of its way to chasitse
the lower courts for a ‘stark’ departure . . . .”).
\textsuperscript{184} Erickson, 551 U.S. at 94.
commencing treatment, the treatment was necessary, and the officials were refusing to provide it.\textsuperscript{185} The Court further chastised the Tenth Circuit for its dismissal of petitioner’s complaint because he was proceeding pro se and any filings as such should be construed liberally.\textsuperscript{186}

It was not plausibility, but reaffirmations of the liberal nature of Rule 8(a)(2), that led the Court to hold that Erickson’s case cannot be dismissed because the allegations in his complaint regarding harm were too conclusory.\textsuperscript{187} The \textit{Erickson} decision may have been a relief to those fearing the possible implications of \textit{Twombly} on the plaintiffs’ bar. The \textit{Iqbal} decision, however, quickly dissipated this temporary relief.

C. \textit{Iqbal}: Plausibility for All

The pleading controversy was reignited when the Supreme Court decided \textit{Iqbal} in May 2009. In a five-to-four decision, Justice Kennedy, writing for the majority, reversed the Second Circuit holding that respondent’s pleading was sufficiently pled to state a claim for which relief may be granted.\textsuperscript{188} It is interesting to note that the District Court for the Eastern District of New York denied petitioners’ motion to dismiss, relying on \textit{Conley}’s “no set of facts” language, after which the petitioners’ filed for an interlocutory appeal to the Second Circuit, which was not heard until after the Supreme Court handed down its decision in \textit{Twombly}.\textsuperscript{189}

1. The Facts

Respondent Javaid Iqbal was a Pakistani Muslim who was arrested in November 2001 by the FBI on counts of conspiracy to defraud the United States and fraud regarding identification documents.\textsuperscript{190} Iqbal pled guilty to the charges, served his prison sentence, and was deported to Pakistan.\textsuperscript{191} He then filed a \textit{Bivens} action\textsuperscript{192} in the Eastern District of

\begin{itemize}
\item \textsuperscript{185} Id.
\item \textsuperscript{186} Id.
\item \textsuperscript{187} Id. at 93-94.
\item \textsuperscript{188} Ashcroft v. Iqbal, 129 S. Ct. 1937, 1941-43 (2009).
\item \textsuperscript{189} Id. at 1944.
\item \textsuperscript{190} Id. at 1942-43.
\item \textsuperscript{191} Id. at 1943.
\item \textsuperscript{192} Id. A \textit{Bivens} action recognizes the right of a private action against federal officers who have allegedly violated a citizen’s constitutional rights. Id. at 1947. Furthermore, vicarious liability does not apply in either \textit{Bivens} actions or § 1983 actions. Id. at 1948.
\end{itemize}
New York against thirty-four current and former federal officials and nineteen “John Doe” federal corrections officers alleging a violation of his civil rights for the treatment he received while in the maximum-security detention unit. These violations consisted of physical and mental abuse inflicted by the prison officials without justification.

The relevant allegations of Iqbal’s complaint involve the petitioners, former Attorney General John Ashcroft and Director of the FBI Robert Mueller. The complaint alleged that Iqbal was arrested and detained under the direction of the petitioners and was to be so detained until cleared by the petitioners. Furthermore, the complaint stated that petitioners not only knew of and condoned this harsh treatment, but also “willfully and maliciously” agreed to subject him to it because of his ethnicity and not for any justifiable purpose. Iqbal’s complaint named Ashcroft the “principal architect” of the policy and Mueller as “instrumental in [its] adoption, promulgation, and implementation.” The petitioners moved to dismiss the complaint for failing to sufficiently state allegations showing their involvement in the conduct.

Relying on Conley, the district court denied petitioners’ motion to dismiss. Petitioners appealed to the Second Circuit, who wrestled with the Supreme Court’s latest decision on “assessing the adequacy of pleadings.” After concluding that the Twombly decision created a “flexible plausibility standard” requiring pleaders to include greater factual detail in those cases and contexts “where such amplification is needed to render the claim plausible,” the Second Circuit nonetheless held that the respondent’s pleading was sufficient to allege the petitioners’ personal involvement in the decisions behind the detainment policy. Judge Cabranes, realizing the edgy compromise that must be made between petitioners’ qualified immunity privilege and Rule 8(a)’s

193. Id. at 1943-44.
194. Id. at 1944. Iqbal alleged that the jailors “kicked him in the stomach, punched him in the face, and dragged him across his cell without justification.” Id. (internal quotation marks omitted).
195. Id.
196. Id.
197. Id.
198. Id. (alteration in original) (internal quotation marks omitted).
199. Id.
200. Id.
201. Id. (quoting Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007), rev’d, Iqbal, 129 S. Ct. at 1954 (internal quotation marks omitted)).
202. Id. (quoting Iqbal, 490 F.3d at 157-58 (internal quotation marks omitted)).
203. Id. (quoting Iqbal, 490 F.3d at 158 (internal quotation marks omitted)).
204. Id. (citing Iqbal, 490 F.3d at 174).
pleading requirements, urged the Supreme Court to grant certiorari, which it did.205

2. The Majority Decision

The Supreme Court reversed the holding of the Second Circuit.206 In discussing the sufficiency of respondent’s complaint, the Supreme Court invoked *Twombly* and reaffirmed that a complaint will be dismissed if it is devoid of some factual enhancement to back up bare assertions.207 Relying again on policy concerns, the Court held that a complaint containing no more than legal conclusions cannot unlock the doors of discovery, and hence only complaints with plausible claims for relief will survive a motion to dismiss.208 What counts as plausible will be a context-based inquiry requiring the “reviewing court to draw on its judicial experience and common sense.”209

The Court then developed a two-pronged test for lower courts to utilize when considering a motion to dismiss. Courts are to separate the legal conclusions of a complaint since they are not entitled to a presumption of truth.210 These legal conclusions must be bolstered with factual allegations, taken as true.211 If they are bolstered, the judge then decides if they plausibly give rise to an entitlement of relief.212 In conducting its analysis, the Supreme Court held that the allegations that petitioners willfully and maliciously agreed to subject respondent to discriminatory treatment were conclusory and not entitled to be taken as true.213 More was needed to plausibly suggest petitioners’ discriminatory state of mind, and hence the pleadings did not meet Rule 8’s standards.214

*Iqbal* then attempted to limit *Twombly*’s holding to the antitrust context.215 The Court responded by holding that its decision in *Twombly* applies to all civil actions.216 *Iqbal* also argued that pleading standards should be relaxed because discovery would be minimally intrusive, relying on the Second Circuit’s instruction to the district court to set up a

205. *Id.* (citing *Iqbal*, 490 F.3d at 178 (Cabranes, J., concurring)).
206. *Id.* at 1945.
207. *Id.* at 1949.
208. *Id.* at 1950.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 1951.
214. *Id.* at 1952.
215. *Id.* at 1953.
216. *Id.*
system of “cabin[ed] discovery” to preserve petitioners’ defense of qualified immunity. To this the majority responded that gauging the sufficiency of a complaint does not turn on controlling the discovery process. The majority held that respondent’s pleading was insufficient under Rule 8, and thus was “not entitled to discovery, cabined or otherwise.”

3. The Dissent

Justice Souter, the author of the Twombly decision, wrote the dissent in Iqbal in which three other Justices joined. Justice Souter believed the majority misapplied Twombly’s pleading standards and incorrectly held that the respondent’s complaint was insufficient. The dissent took issue with the majority’s application of Twombly. According to Justice Souter, Twombly does not require judges to consider the veracity of factual allegations at the motion to dismiss stage, but requires accepting them as true no matter how fanciful they may be. Justice Souter explained that Iqbal’s allegations of petitioners’ discriminatory intent were neither bare legal conclusions nor were they, such as in Twombly, consistent with legal behavior. The complaint detailed the discriminatory policy and alleged that petitioners’ were the architects and were instrumental in implementing this policy. This, opined the dissent, gave the petitioners’ “fair notice of what the . . . claim is and the grounds upon which it rests” and was sufficient under Rule 8 to withstand dismissal.

D. The Confusion

Despite creating an analytical framework and a two-pronged approach to help lower courts decipher the sufficiency of a complaint, the Supreme Court in Iqbal realized that plausibility is to be decided

218. Iqbal, 129 S. Ct. at 1953.
219. Id. at 1954.
220. Id. at 1954-55 (Souter, J., dissenting).
221. Id. at 1959.
222. Id. The only exception to this premise, explains Justice Souter, are “claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.” Id.
223. Id. at 1960.
224. Id. at 1961 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks omitted)).
based on “judicial experience and common sense.”

The confusion and backlash resulting first from Twombly, and now from Iqbal, on how to apply this plausibility standard has resulted in a variety of interpretations across the circuit courts. By relying on their own “judicial experience and common sense,” it follows that different judges will conceive plausibility differently.

The purpose of this Note, however, is not to try and set forth a definition of plausibility to be universally followed by the courts. As admonished by the Supreme Court, that is a context-specific undertaking. Rather, this Note intends to show that throughout history, there has been a struggle between granting and restricting access to the courts. This struggle is continuing to this very day, as is evidenced by these recent Supreme Court decisions. Until Twombly was decided, cases such as Conley and Swierkiewicz reinforced the notion that the purpose of pleading was to simply give notice to the other side. Since Twombly, the Supreme Court has shifted the focus of Rule 8(a)(2) from a notice requirement to a showing requirement, that is, showing enough factual content to state a plausible claim for relief. Erickson may have led some to believe that the Court meant to limit Twombly.

225. Id. at 1950.
226. See supra note 4 and accompanying text; see also Colleen McMahon, The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 853 (2008) (“We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim.”).
227. See Nicholas Tymoczko, Note, Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 518 (2009) (“[T]he actual meaning of the plausibility standard . . . remains as important and as unclear as ever.”); see also Khan & Magee, supra note 34 (displaying the different versions of the plausibility standard created by different federal circuits).
228. See A. Benjamin Spencer, Understanding Pleading Doctrine, 108 MICH. L. REV. 1, 11 (2009) (noting how certain courts now require heightened pleading whereas some adhere to the liberal notice requirement of pre-Twombly times).
229. See Hartnett, supra note 4, at 499 (“Different judges with different life experiences can be expected to view plausibility differently because they have a different understanding of what is ordinary, commonplace, natural, a matter of common sense.”).
230. See supra Part III.C.2.
231. See supra Part II.B.2–3.
232. See Spencer, supra note 228, at 11 (“Twombly has turned our gaze toward the obligation under the rule to make a ‘showing’ that the pleader is . . . entitled to relief.”).
233. See Gottesman, supra note 94, at 1002-03 (“The strong language in support of the liberal pleading policy seems to indicate that the Court was reaching beyond the facts of Erickson. It seems as though the Court was trying to take something back from Twombly and tacitly suggested that they did not mean to implement a higher pleading standard.”); see also Hannon, supra note 4, at 1826 (noting that some commentators believed that “Erickson may serve as an affirmation of traditional pleading standards more broadly”).
decision in *Iqbal*, however, showed no such limitation, and the Supreme Court reinforced its new focus on policy concerns and the effect of these concerns on pleading practice.\(^\text{234}\) Whether one agrees or disagrees with the *Twombly* and *Iqbal* decisions, the Supreme Court has spoken. This Note applauds the Supreme Court’s shifted focus as a needed adaptation to the modern litigation landscape, and seeks to strike a balance amongst all countervailing interests.

The message the Supreme Court is sending is quite clear—fortify pleadings with a sufficiently factual foundation or face dismissal under Rule 12(b)(6).\(^\text{235}\) As discussed above and throughout both the *Twombly* and *Iqbal* decisions, this new vision of the purpose of pleading is well founded in policy concerns, namely expensive and intrusive discovery, and is necessary for the fairest administration of justice.\(^\text{236}\) The plaintiff’s bar must conform accordingly; however, this has not been an easy transition, especially in certain substantive areas of the law.\(^\text{237}\) Plaintiffs should bolster their pleadings with factual detail, including specific names, places, and the circumstances surrounding the alleged illegal behavior. However, this new emphasis on fact-based pleading has looming consequences in the instances where a plaintiff simply is not privy to such information prior to formal discovery.

IV. THE PUSH FOR POLICY: A POSSIBLE SOLUTION TO THE CURRENT PLEADING PROBLEM

The Supreme Court, through its decisions in both *Twombly* and *Iqbal*, has affirmed the notion that defendants should not have to be inconvenienced with litigation by those with factually weak claims, nor should the doors of discovery be open to those plaintiffs.\(^\text{238}\) In essence, the Court is sending a message to potential litigants that more will be required early on to get to the discovery stages of litigation—where

\[\text{\textsuperscript{234}}\text{ See supra Part III.C.}\]
\[\text{\textsuperscript{235}}\text{ See supra Part III.C.2.}\]
\[\text{\textsuperscript{236}}\text{ See Bone, supra note 4, at 901 ("At least at first glance, there seems to be something unfair about a plaintiff forcing a defendant to shoulder the burden of litigation without giving the defendant any reason why he should do so.").}\]
\[\text{\textsuperscript{237}}\text{ See, e.g., Hannon, supra note 4, at 1838 (explaining the statistically significant results of an empirical analysis of motions to dismiss in post-*Twombly* civil rights cases).}\]
\[\text{\textsuperscript{238}}\text{ Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558-59 (2007). The Court in *Twombly* was concerned with the enormous costs of discovery even though the defendants were communication-industry giants. Id. The Court in *Iqbal* was concerned with discovery that could reveal confidential information regarding our national security and bogging down top public officials with the "concerns of litigation." Ashcroft v. *Iqbal*, 129 S. Ct. 1937, 1953 (2009).}\]
settlement value can be greatly, if not unfairly, appreciated.\textsuperscript{239} Coupled with this message, by granting district court judges more discretion at the pleadings stage, these policy-backed decisions should foster striking a balance between halting meritless lawsuits before they can start and giving the plaintiff his day in court.\textsuperscript{240}

\section*{A. Sleeping in the Bed That Was Made: How District Courts Should Deal with the Backlash}

The \textit{Twombly} and \textit{Iqbal} decisions have caused and will continue to cause an increase to the number of 12(b)(6) motions filed and, ultimately, the number of these motions that are granted.\textsuperscript{241} It follows that the 12(b)(6) motion to dismiss will become an integral and even greater part of the litigation process than it previously has been.\textsuperscript{242} Because the motion to dismiss has taken on a larger role and threatens to deny some access to the courts, it makes sense to create a pre-suit "\textit{Iqbal Motion}," where those who lack information to plausibly state their claim can explain to the judge precisely what discovery or information is needed to plausibly state a claim for relief without fear of having it dismissed. By proposing a legislative remedy, the types of suits that would be most greatly affected by the \textit{Twombly} and \textit{Iqbal} decisions will have a better opportunity to plausibly plead their case. This would, at the very least, grant the plaintiff his day in court and an opportunity to be able to cross "the line between possibility and plausibility of 'entitlement to relief.'"\textsuperscript{243} The judge would then undertake the "context-specific task that requires the . . . court to draw on its judicial experience and common sense."\textsuperscript{244} As will be discussed later, certain trade-offs must be made to achieve these ends.\textsuperscript{245}

\subsection*{1. Working with What We Have: FRCP 27}

\begin{itemize}
\item \textsuperscript{239} See \textit{Twombly}, 550 U.S. at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.").
\item \textsuperscript{242} See Spencer, \textit{supra} note 228, at 11 ("[D]efendants will be emboldened to challenge the sufficiency of claims.").
\item \textsuperscript{243} \textit{Iqbal}, 129 S. Ct. at 1949 (quoting \textit{Twombly}, 550 U.S. at 557).
\item \textsuperscript{244} \textit{Id.} at 1950.
\item \textsuperscript{245} See infra Part IV.C.1.
\end{itemize}
As discussed earlier, history has shown that when a particular pleading system falls out of favor or becomes unfairly strict, it results in a wholesale overhaul of pleading doctrine. This is not necessary, as a simple amendment to the FRCP will suffice to balance the scale of justice and protect those plaintiffs with claims that are inevitably affected by the Twombly and Iqbal decisions—cases involving “information asymmetry.” An amendment to the FRCP’s only rule regarding pre-suit discovery, Rule 27, will serve as the foundation for the Iqbal Motion.

As it now stands, FRCP 27 is the only federal rule that speaks to any sort of pre-filing discovery mechanism. FRCP 27(a)(1) allows for a potential party to seek a deposition prior to filing a lawsuit for purposes of perpetuating testimony. Despite seeming broad on its face, Rule 27 has generally only been utilized to perpetuate testimony that may be lost before a trial begins, such as the impending death of a potential witness. However, there exists some judicial recognition for alternative uses, such as when the defendant has exclusive control over the information the plaintiff needs to sufficiently frame his complaint.

The case Reints v. Sheppard, shows at least one court’s willingness to allow discovery before the filing of an amended complaint. There, a plaintiff alleging a civil rights violation invoked Rule 27 to support his claim that critical information needed to plead specific facts was in the defendants’ exclusive control. Although the plaintiff ultimately did not prevail in obtaining the court order, the district court agreed with the principles the plaintiff set forth and in dicta

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246. See supra Part II.A–B.
248. See Penn Mut. Life Ins. Co. v. United States, 68 F.3d 1371, 1373 (D.C. Cir. 1995) (“Unlike other discovery rules, Rule 27(a) allows a party to take depositions prior to litigation if it demonstrates an expectation of future litigation, explains the substance of the testimony it expects to elicit and the reasons the testimony is important, and establishes a risk that testimony will be lost if not preserved.”).
250. See Bone, supra note 4, at 933 n.249 (discussing the application of Rule 27 and other cases where targeted discovery was utilized in cases subject to heightened pleading standards and the information was within the exclusive control of the defendant).
251. See id. (noting instances where Rule 27 was applied to cases where there were no concerns of impending death or disappearing evidence).
253. Id. at 347.
254. Id. at 347-48.
admitted that it would be willing to grant plaintiff’s deposition requests if he “truly did not have knowledge of sufficient facts to plead his case.”

In light of the *Twombly* and *Iqbal* decisions, it now seems necessary to broaden Rule 27’s scope to account for the situations where a plaintiff may have a meritorious claim but truly does not have access to the sufficient facts to plead his case. An amended Rule 27, allowing for the possibility to seek specifically targeted discovery through limited depositions before the plaintiff files a complaint, provides a weapon for those plaintiffs facing information asymmetry and the inevitable motion to dismiss. Thus, through an amended Rule 27, the *Iqbal* Motion will take flight.

2. The *Iqbal* Motion

To serve as a caveat, it first must be understood that the *Iqbal* Motion’s practical application will naturally be limited to those cases where evidence of the defendant’s wrongdoing is likely to be solely in the defendant’s possession. It would be cheap and abusive for a plaintiff to seek an *Iqbal* Motion for a garden-variety tort claim, unnecessarily wasting the court’s and the defendant’s time, and the presiding judge would be remiss if he granted the motion in these circumstances. Furthermore, the pre-filing discovery allowed by a granted *Iqbal* Motion should take the form of depositions or interrogatories—not requests for documents that would be requested under normal discovery. These restrictions will help adhere to the concerns expressed by the Supreme Court in both *Twombly* and *Iqbal*. Those being deposed will have to bring with them certain documents for reference, but the plaintiff should not be able to request that these documents be furnished for them before the filing of the complaint.

That brings us to the next issue: who rules on such a motion and conducts the hearing if necessary? It seems to make sense to have a magistrate judge conduct the *Iqbal* Motion hearing. Magistrates play a large role in the federal judiciary system and are seen as integral members in the administration of justice. Since magistrates preside

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255. *Id.* It should be noted that in *Reints*, the plaintiff was himself an attorney, a factor that the court did consider when denying his Rule 27 request. *Id.* at 347.

256. *See* Bone, *supra* note 12, at 873 (“Two notable examples are the types of factual allegations at issue in *Iqbal* and *Twombly*: descriptions of the defendant’s state of mind (e.g., *Iqbal’s* allegations of knowledge, condoning, and willfulness and malice relevant to discriminatory intent), and references to actions taken in private (e.g., *Twombly’s* allegation of an agreement).”).

257. *See* Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989) (“Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in
over pretrial discovery and hearings, they seem an obvious choice to decide the \textit{Iqbal} Motion and conduct a hearing if necessary.\footnote{See \textit{Kiobel v. Millson}, 592 F.3d 78, 88 (2d Cir. 2010) (“Conducting pretrial and discovery proceedings has been a core component of a magistrate judge’s role in civil cases since Congress created the position of magistrate judge.”).}

The \textit{Iqbal} Motion was conceived out of both the \textit{Twombly} and \textit{Iqbal} decisions and the presiding magistrate must hold true to and respect the policies underlying those decisions—to promote the adjudication of meritorious claims and to stop the meritless ones before they can inflict any damage.\footnote{See supra Parts III.A.2.b, III.C.2.} In seeking a court order for this narrow pre-filing discovery, the prospective plaintiff will have to prove to the magistrate that he exhausted all possible opportunities to seek the information he claims that he needs.

Before the filing of the claim, a potential plaintiff will petition the court for an \textit{Iqbal} Motion and serve the defendant with the same. This request for pre-filing discovery should briefly explain the grounds for why the plaintiff believes he has a meritorious claim, what information he believes is missing that is preventing him from simply filing a complaint, who he wishes to depose and why, and why he cannot obtain this information without judicial intervention. He must set out in detail, attaching affidavits, every attempt made in trying to obtain this information on his own, and convince the judge that this information is imperative to the vitality of the plaintiff’s claim. Specificity is key and any ambiguity or lack of clarity should be construed against the party requesting the \textit{Iqbal} Motion.\footnote{This would almost mirror the process required by \textit{Fed. R. Civ. P. 27}. \textit{See supra Part IV.A.1.}}

The filing of this claim should instantly toll the statute of limitations, so as to not prejudice the plaintiff or bar him from eventually bringing his claim when he feels ready. If the \textit{Iqbal} Motion is granted by the court, but upon completion bears no fruit, the plaintiff should still have the time to further investigate or develop his claim on his own if he chooses, despite the outcome of whatever pre-filing discovery the court allowed.

The potential defendant, upon receipt of the plaintiff’s \textit{Iqbal} Motion, should have twenty days to file an answer responding to the allegations.\footnote{See \textit{Fed. R. Civ. P. 12(a)(1)(A)(i)} (specifying that a party has twenty-one days to answer a complaint).} The defendant should try to convince the court why pre-filing discovery is unwarranted in this instance, why he has not acted
unlawfully, and explain how the plaintiff has failed to exhaust whatever investigatory means available to him.

After receipt of the defendant’s answer, the judge will make a decision either granting or denying the Iqbal Motion. The burden of persuasion should be if, in balancing the equities, it is likely that discoverable information exists that will push the plaintiff’s claim past Twombly’s plausibility threshold. Furthermore, the plaintiff must have no way of obtaining this information without judicial intervention. If denied, the plaintiff is in no worse a position than before and is free to file a complaint, investigate further, or not pursue the claim. No interlocutory appeal should be granted at this point because this denial is by no means a final judgment.262 If granted, the judge should have tremendous discretion in tailoring the plaintiff’s initial discovery requests so that they are as minimally intrusive as necessary to help the plaintiff state a plausible claim for which relief may be granted. As an example, if a plaintiff is trying to sue for alleged employment discrimination and is granted an Iqbal Motion, the judge should allow no more than two depositions—the plaintiff’s boss and the human resources manager—to be controlled by normal discovery procedures.263

Although the Iqbal Motion seeks to strike a balance between all countervailing interests, it is by no means foolproof and can fall victim to the same inefficiencies and injustices that it seeks to rectify.

B. Adding Fuel to the Fire? Potential Shortcomings of the Iqbal Motion

As discussed earlier, the Twombly and Iqbal decisions have serious implications, arousing displeasure among legal scholars264 and legislators265 alike. Superficially, the displeasure is based on the thought that the Supreme Court has overturned fifty years of precedent.266 The backlash runs deeper, attacking the plausibility standard created in Twombly as “too subjective to yield predictable and consistent results across cases.”267 The most severe implications, however, come from the

262. See Hardy v. Knapp, 27 F. App’x 24, 26 (2d. Cir. 2001) (“Generally, discovery orders are ‘interlocutory orders that must await final judgment’ for appellate review.” (quoting New York State Nat’l Org. for Women v. Terry, 886 F.2d 1339, 1350 (2d Cir. 1989))).
263. See FED. R. CIV. P. 30(d)(1) (limiting depositions to one day of seven hours unless additional time is needed to “fairly examine the deponent”).
264. See supra note 4 and accompanying text.
265. See supra notes 12-13 and accompanying text.
266. See Bone, supra note 4, at 875.
267. Spencer, supra note 228, at 11.
argument that *Twombly* and *Iqbal* effectively deny plaintiffs who seek redress on claims where the defendant has critical private information, and this especially affects those claiming civil rights and discrimination violations. Furthermore, some argue that the *Twombly* and *Iqbal* decisions defeat their own purposes by raising other costs, especially filing and litigation fees, for Rule 12(b)(6) motions. As a result, any solutions posited to enhance judicial efficiency in the *Twombly/Iqbal* context would almost inevitably work an injustice to those potential plaintiffs affected most by these decisions. On the same note, a solution aimed at restoring access to those plaintiffs will run contrary to the policy concerns that served as the basis for both *Twombly* and *Iqbal*. The *Iqbal* Motion can fall prey to both these issues.

1. Judicial Economy

The underlying ideal behind the *Iqbal* Motion is to expend more effort and resources earlier on, before the summary judgment stage, so that only truly meritorious claims proceed and those lacking merit are halted to prevent wasting the resources of the court and the parties further down the line. However, it seems misguided to believe that by creating something else to be litigated, one could possibly seek to drive down costs and the use of resources rather than escalating them.

The federal docket is notoriously overburdened. Although not expressly stated as a concern in the *Twombly* and *Iqbal* decisions, one can reasonably surmise that in requiring factually based pleadings and opening the door to an increase in motions to dismiss, the Supreme Court is seeking to rid the federal docket of meritless or undesirable claims. By allowing a potential plaintiff to seek limited discovery before filing a complaint simply because he does not have enough

268. Bone, supra note 12, at 878-79.
269. See id. at 879.
270. See Bartlett, supra note 5, at 108 (noting that due to the increasing number of motions to dismiss that will be filed as a result of *Twombly*, it will serve to increase costs, not reduce them).
272. See McMahon, supra note 226, at 868 (opining that the Supreme Court thought it was “providing relief to the federal docket by making it easier to dismiss complaints”).
factual information to ensure the merit of his claim, it seems that the *Iqbal* Motion will run up costs to litigants and usurp more time and resources from an already overworked court.

2. Free Discovery?

At first sight, the notion of the *Iqbal* Motion seems to run contrary to the policy concerns addressed in both *Twombly* and *Iqbal*—plaintiff fishing expeditions, costly discovery, and the slim hope of effective judicial supervision during discovery.\(^{273}\) It seems unfair to the defendants, who the Supreme Court was trying to protect, to add another procedural option to those plaintiffs who do not have enough information to plausibly state a claim for relief. If a plaintiff can convince the judge that the information needed is solely in the defendant’s possession and that he has exhausted all possible means of obtaining that information, a defendant can literally be forced into a deposition where he must answer, under oath, the questions of a party who he knows lacks the information to even bring forth a claim. In essence, this is free discovery. At least in regular discovery, the plaintiff has already proved to the court that his claim is sufficient to warrant discovery and the full development of the issues.\(^{274}\) The *Iqbal* Motion allows a plaintiff who has not satisfied the low federal pleading threshold\(^{275}\) to occupy a potential defendant’s time. However, an explanation of the possible restrictions imposed in an *Iqbal* Motion and the ensuing pre-filing discovery may help alleviate these valid and troublesome concerns.

C. Using the *Iqbal* Motion to Address These Concerns

The success of the *Iqbal* Motion will be achieved by a system of self-regulation. Restrictions and limitations imposed on *Iqbal* Motions will help fortify the policy concerns of the Supreme Court while at the same time preventing an unfair barrier to the courts.

As discussed above, the new outlook on the purpose of pleadings in the federal civil system and the standard those pleadings must meet has different implications for different types of claims.\(^{276}\) Requiring a pleading to be "plausible on its face"\(^{277}\) inevitably creates an added

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274. See supra Part III.C.2. (discussing how if a complaint is insufficiently pled, the complainant is not entitled to any discovery).
275. See supra Part II.B.1.
276. See supra Part IV.B.
challenge for those plaintiffs who simply do not have access to the information they need to “nudge[] their claims across the line from conceivable to plausible.” Thus, by creating a new federal rule that allows a plaintiff to admit that they cannot comply with the Twombly and Iqbal pleading requirements because the defendant has all the pertinent information, but still allows that plaintiff an opportunity to be heard by the court, would strike a balance between judicial efficiency and justice. The Iqbal Motion is the key to obtaining this balance.

1. Reciprocal Depositions

An important feature of the Iqbal Motion is the “reciprocal deposition.” Simply put, if a party seeks an Iqbal Motion and it is granted, the practical effect of this is that that party will be able to question a potential defendant or witness under oath, even though the deposing party self-admittedly does not have enough facts to plead a plausible complaint. However, the Iqbal Motion will have an automatic reciprocal deposition attached to it—allowing the potential defendant to then depose the potential plaintiff. This is where the Iqbal Motion’s self-regulation bares its teeth. Before the party even decides to request an Iqbal Motion, that party faces the reality and inevitability that the deposed party will return the favor and depose the party that made the Iqbal Motion in the first place.

a. Creating Fairness

In allowing a reciprocal deposition, the Iqbal Motion seeks to even the count between the party who was granted the Iqbal Motion and the discontented party who is being subjected to a pre-filing deposition. The potential defendant will get an opportunity to depose the potential plaintiff, drawing out the plaintiff’s theory of the case and forcing him to show his cards. The potential plaintiff will have to take this feature of the Iqbal Motion into account when deciding whether to request it in the first place. The reciprocal deposition thus addresses the concern that the Iqbal Motion allows a potential plaintiff to seek free discovery—he must open himself up if he wants the potential defendant to do the same. This feature should deter some plaintiffs who do not want to show the defense all of their cards.

278. Twombly, 550 U.S. at 570.
279. Since this is not regular discovery, the potential defendant would not be able to depose the movant. The Iqbal Motion would allow this deposition as a matter of right.
280. See supra Part IV.B.2.
b. Creating Efficiency

Mentioned above is the concern over the rising costs of early litigation, especially pretrial motion practice. The advantage of the \textit{Iqbal} Motion is that it alleviates the fears of filing an insufficiently pled complaint and facing an inevitable Rule 12(b)(6) hearing. By hammering out these issues before a complaint is even filed, a prospective plaintiff will have the foresight into the likelihood of success that his complaint will be not be dismissed for failure to state a claim. Furthermore, the \textit{Iqbal} Motion’s reciprocal deposition mechanism will give both parties a taste of what is to come. After the potential defendant deposes the potential plaintiff, he will learn the facts of the case, the plaintiff’s theory of the case, and what arguments are likely to be made. This should lead to more efficient litigation if and when the suit is actually filed. Also, the reciprocal deposition will prevent the potential plaintiff from being hasty in filing his suit—hopefully resulting in a plausible claim for relief that will stand in the face of a motion to dismiss, should one be filed.

2. The Result

The \textit{Iqbal} Motion, if utilized incorrectly, can create more waste and inefficiency. However, crafted with the right limitations, it can create a much sought after balance between efficiency and justice by promoting a give-and-take between the potential litigants. If the prospective plaintiff is denied his request for court ordered pre-filing discovery, this does not mean that his complaint will be insufficient. If he is granted this court order, he can depose a potential defendant or witness to try to obtain the information that he was previously lacking. Again, this does not mean that the plaintiff will then have sufficient facts to plead his complaint. What he will have, however, is the opportunity to further develop his claim. If, after a brief, concentrated deposition, the prospective plaintiff did not receive the information he was looking for because it does not exist or it is not favorable, he will have a better idea of his complaint’s likely success. He may ultimately decide not to bring the suit, saving the time and resources of the defendant (a \textit{Twombly}...
concern), the court (an \textit{Iqbal} concern), and the plaintiff himself (an overlooked, but equally critical concern).

V. CONCLUSION

Whether it intended to or not, the Supreme Court, by its decisions in both \textit{Twombly} and \textit{Iqbal}, has flummoxed the legal world and has made pleading practice the hot-button issue amongst civil procedure circles. The Supreme Court, by requiring a complaint to be facially plausible, reinforced policy concerns that inherently restrict access to the courts for certain types of plaintiffs. Although \textit{Iqbal} reinforced the concept that plausibility pleading extends to all civil actions, it is inevitable that those who will be affected most are the plaintiffs who simply do not have access to the information needed to make their claims plausible on their face. Despite seeming like an affirmation of efficiency over justice, requiring a pleading to be plausible on its face simply forces a plaintiff to establish the merit of his claim in the initial complaint. This ensures that the defendant will have full notice of the claim against him and the grounds upon which that claim rests. If accomplished, the plausible claim will fully open the doors of discovery. However, there are certain types of plaintiffs that are detrimentally affected by the \textit{Twombly} and \textit{Iqbal} decisions—plaintiffs who simply do not have access to the information they need to plausibly state a claim for relief.

If these potential plaintiffs who find themselves suddenly disenfranchised had some form of legislative alternative, they would be ensured their day in court and would be granted an opportunity to convince the judge that information exists, solely in the defendant’s possession, that would allow the plaintiff to cross the plausibility threshold. The \textit{Iqbal} Motion can level the playing field while addressing the concerns of both potential defendants and plaintiffs.

If used correctly, with an eye towards both efficiency and justice, the \textit{Iqbal} Motion can achieve a balance between these two often-antithetical ideals. The \textit{Iqbal} Motion is more than a “plausible” solution to the current pleading crisis.

\begin{itemize}
\item 284. \textit{See supra} Part III.A.2.b.
\item 285. \textit{See supra} Part III.C.2.
\item 286. \textit{See supra} Part IV.C.2.
\item 287. \textit{See Bone, supra} note 4, at 875 (commenting that \textit{Twombly} and \textit{Iqbal} have made “[p]leading rules . . . once again a hot topic in civil procedure circles”).
\item 288. \textit{See supra} notes 8-9 and accompanying text.
\item 289. \textit{See supra} notes 266-69 and accompanying text.
\end{itemize}
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