

THE SUPREME COURT’S NEW NOTICE PLEADING REQUIREMENTS: REVOLUTIONARY OR EVOLUTIONARY

RICHARD A. MICHAEL*

The Roberts Court’s decisions about the requirements of federal pleading have engendered significant controversy in the literature. These cases, Bell Atlantic Corp. v. Twombly¹ and Ashcroft v. Iqbal,² have been said by some to have destroyed the federal notice-pleading system and “radically tipped the balance in favor of defendants.”³ It is the position of this article that these cases do not “radically” change federal pleading but merely modify it in a reasonable manner to correct past errors in the interpretation of its rules and address problems that have troubled courts and legal scholars since the adoption of the federal rules. It is further believed that recent decisions from modern fact-pleading jurisdictions provide a roadmap for the proper interpretation of the “facial plausibility” now required in federal pleadings.

TABLE OF CONTENTS

I. THE EARLY DEVELOPMENT OF NOTICE PLEADING	268
II. THE INTERRELATIONSHIP OF DISCOVERY AND PLEADING	272
III. <i>TWOMBLY</i> AND <i>IQBAL</i>	277

*Professor Emeritus, Loyola University of Chicago School of Law. J.D. 1958, Loyola of Chicago; LL.M. 1960 University of Illinois. Member, American Law Institute. Special thanks are expressed to Professor Locke for reviewing a draft of this article and to Brendan Kottenstette and Chantel Bector for their able research assistance. The views expressed herein are solely those of the author.

1. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
2. Ashcroft v. Iqbal, 556 U.S. 662 (2009).
3. See, e.g., Edward A. Purcell, Jr. & Brandt Goldstein, *The Umpire Changes the Rules*, HUFFINGTON POST: THE BLOG (Oct. 7, 2013, 2:16 PM), http://www.huffingtonpost.com/brandt-goldstein/the-umpire-changes-the-ru_b_4041479.html?utm_hp_ref=politics&ir=Politics; see also Luke Meier, *Why Twombly is Good Law (But Poorly Drafted) and Iqbal will be Overturned*, 87 IND. L.J. 709 (2012); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710 (2013).

IV. THE APPLICATION OF THE FACIAL-PLAUSIBILITY STANDARD: THE LESSONS FROM FACT PLEADING	283
V. CONCLUSION	288

I. THE EARLY DEVELOPMENT OF NOTICE PLEADING

When the states began to replace common-law procedure with procedural codes starting with the New York Field Code in 1848, and fact pleading replaced the issue pleading of the common law, distinguishing “facts” from evidence or conclusions caused serious problems. For that reason, when the Federal Rules of Civil Procedure were drafted, their draftsmen, in order to avoid these problems, deliberately avoided the use of the term “facts” in the rules. Accordingly, Rule 8(a)(2) required “a short and plain statement showing that the pleader is entitled to relief.”⁴ Thus federal notice pleading was born, though its precise interpretation remained to be determined. It is relevant to an analysis of *Twombly* and *Iqbal* that notice pleading was born because of the difficulty of determining what allegations constituted “facts” for pleading purposes.

The early decision in *Dioguardi v. Durning*,⁵ written by Judge Clark, one of the draftsmen of the Federal Rules of Civil Procedure, reversed a dismissal of the case on the pleadings.⁶ The opinion stated that under the federal rules there is “no pleading requirement of stating ‘facts sufficient to constitute a cause of action,’ but only a requirement that there be ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’”⁷ that the motion for dismissal was for failure to state a claim upon which relief can be granted,⁸ and that the district court had failed to state why it concluded that the complaint did not state a claim upon which relief could be based.⁹ This rationale was based on the fact that the case had been dismissed because of the defective pleading, and hence the criteria of Rule 12(b)(6), the test for whether a case should be

4. See STEPHEN C. YEAZELL, CIVIL PROCEDURE 338–39 (7th ed. 2008). The words “notice pleading” never appear as part of the Federal Rules of Civil Procedure. They constitute a short-hand reference to the pleading requirements imposed by Rule 8. Accordingly, they provide no guidance for how Rule 8 is to be interpreted and applied.

5. *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944).

6. *Id.* at 776.

7. *Id.* at 775 (quoting FED. R. CIV. P. 8(a)).

8. *Id.*

9. *Id.*

dismissed on the pleadings, rather than the criteria of Rule 8(a), the test for when a pleading is not defective, applied as if it were a motion to strike a pleading. This rationale was, however, interpreted by some as the test for the adequacy of a pleading under Rule 8(a), and, therefore, for a complaint to be stricken, it must show that the plaintiff cannot prevail.¹⁰ As thus interpreted, this statement seems clearly incorrect because a complaint stating the plaintiff's claim to be that "the defendant acted so as to make himself liable to me" does not give any notice of the plaintiff's claim and does not evidence any reason why the plaintiff could not prove himself entitled to damages. Yet it does not show any reason why "the pleader is entitled to relief" and surely should not be allowed to stand. A consideration of the forms attached to the rules exemplifies that notice of the nature of the plaintiff's claim must always be given along with the reason the plaintiff is entitled to relief.

These two apparently conflicting statements, those in Rule 8(a)(2) that a valid complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief and those in Rule 12(b)(6) stating that a case should not be dismissed unless it fails to state a claim upon which relief can be granted, can be easily reconciled by the following interpretation: a complaint is defective if it fails to meet the requirement of Rule 8(a)(2), but the case should not be dismissed and leave to amend should be granted under Rule 15 if it is clearly shown that the plaintiff cannot prevail.¹¹ Under this interpretation, leave to amend must be allowed after the complaint is stricken unless the allegations contained in the complaint show that the plaintiff cannot prevail or the plaintiff fails to file a satisfactory complaint after a number of attempts. This interpretation requires that a court treat an attack on the conclusory nature of a pleading as an attack on the form of the complaint rather than a motion to dismiss

10. See, e.g., *G & G Cards & Gifts, Inc. v. Berman* (*In re Berman*), 100 B.R. 640, 643 (Bankr. E.D.N.Y. 1989).

11. Rule 15 requires that that a court should freely grant leave to amend when justice so requires. See *Foman v. Davis*, 371 U.S. 178, 182 (1962) (reversing a lower court decision that denied a party's leave to amend a complaint on the basis that Rule 15 allows courts to allow leave to amend when justice requires). Modern courts, including those using the federal rules, have abolished special demurrers as the means of attacking uncertain and ambiguous complaints and have substituted motions to make more definite and certain for them, but these motions are generally disfavored and "courts are more likely to dismiss with leave to amend rather than to grant the motion. JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 317, (Thomson-West 4th ed. 2007).

the case and grant leave to amend “when justice so requires.”¹²

Commenting on the interpretation of *Dioguardi v. Durning* that the test of Rule 12(b)(6) rather than Rule 8(a)(2) should be used to test the adequacy of a complaint, one author has implied that cases like *Dioguardi v. Durning* encourage unfounded litigation, speculative litigation, and litigation for nuisance value and the hope of settlement.¹³ However, in 1952 the Rules Committee considered a resolution adopted by the Judicial Conference of Judges of the Ninth Circuit proposing that Rule 8(a)(2) be amended to include, after the requirement that a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief, a clause adding “the facts constituting the cause of action.”¹⁴ In rejecting this proposal, the Advisory Committee on the Rules for Civil Procedure wrote that the complaint in *Dioguardi v. Durning*

stated a plethora of facts and the court so construed them as to sustain the validity of the pleading.

....

... [A]s it stands the rule adequately sets forth the characteristics of good pleading . . . and requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.¹⁵

Thus any statement that the case stands for the proposition that a complaint should not be stricken unless it affirmatively shows that the plaintiff cannot recover on the claim asserted, at best, relies on dictum, and, most probably, constitutes an incorrect interpretation of the case.

A few years later in *Conley v. Gibson*¹⁶ the Supreme Court

12. FED. R. CIV. P. 15(a)(2).

13. See O.L. McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123, 126 (1952). Professor McCaskill reports that the *Dioguardi* case went to trial and the plaintiff failed to prove a right to recovery and judgment for the defendant was affirmed on appeal.

14. Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure, 13 FED. RULES DECISIONS 253, 253 (1952).

15. ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 19 (1955)

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

issued an opinion that was interpreted to have approved the *Dioguardi v. Durning* approach of allowing the wording of Rule 12(b)(6) to control motions directed to the pleadings rather than the requirements of Rule 8(a). In *Conley*, the Court said that it will “follow, of course, the accepted rule that a case 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.”¹⁷ A few paragraphs later, the Court continued:

[A]ll the rules require is a “short and plain statement of the ‘claim’” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified “notice pleading” is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.¹⁸

The first sentence of this quotation properly states the rule that a case should never be *dismissed* unless the plaintiff can prove no set of facts that would entitle him to relief. The later part properly states that the rules require a statement of the claim that gives the defendant fair notice of the plaintiff’s claim and the ground on which it rests. Cases in the federal courts, however, have generally cited *Conley* for the first sentence and interpreted it to say that a complaint should not be *stricken* unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief,¹⁹ and the remainder of the quote has not generally been cited. Furthermore, the facts of *Conley* establish that the second part of the rationale was satisfied in that case. In *Conley*, the complaint alleged that the plaintiffs’ employer had wrongfully discharged the plaintiffs and that the plaintiffs’ union, acting in accord with a prior plan, failed to protect the plaintiffs’ rights in the same way it protected the rights of the white employees because the plaintiffs were African-

17. *Id.* at 46.

18. *Id.* at 47–48.

19. *See, e.g.,* McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 246 (1980); Estelle v. Gamble, 429 U.S. 97, 112 (1976); Hondo, Inc. v. Sterling, 21 F.3d 775, 777. (7th Cir. 1994).

American.²⁰ This complaint appeared to give the defendants fair notice of what the plaintiffs' claim was and the grounds upon which it rested. The Court never said that a complaint should not be stricken unless it affirmatively shows that the plaintiff cannot recover on the claim, but if it did, it would have been dictum.²¹ Accordingly, the federal rules have always required a pleader to disclose the basis of the claim, the essential basis for the *Twombly* and *Iqbal* decisions.

Thus, by 1960 it was well established that pleadings in federal court must show "that the pleader is entitled to relief"; it is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery."²² While there have been dicta indicating that a case should not be dismissed on the pleadings unless they affirmatively show that the plaintiff cannot recover on the claim asserted,²³ this has never been an accurate statement of the law.

II. THE INTERRELATIONSHIP OF DISCOVERY AND PLEADING

There is a symbiotic relationship between pleading and discovery in civil cases that goes beyond the "seamless web" of civil procedure.²⁴ So, changes in one area can have significant implications

20. *Conley*, 355 U.S. at 42.

21. Senator Arlen Specter introduced Senate Bill 4054 in 2010, which read:

Except as expressly provided by an Act of Congress . . . or by an amendment to the Federal Rules of Civil Procedure . . . the law governing a dismissal, striking, or judgment . . . shall be in accordance with the Federal Rules of Civil Procedure as interpreted by the Supreme Court of the United States in decisions issued before May 20, 2007.

Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. (2010). Had that bill been enacted, the precise standards would have been difficult to ascertain.

22. *Hoshman v. Esso Standard Oil Co.*, 263 F.2d 499, 501 (5th Cir. 1959) (quoting JAMES WILLIAM MOORE ET AL., *MOORE'S FEDERAL PRACTICE* 1653 (2d ed. 1948)).

23. *See Conley*, 355 U.S. at 45–46 ("In appraising the sufficiency of the complaint we follow, of course, 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.").

24. Judge Clark, the reporter to the Advisory Committee that drafted the Federal Rules of Civil Procedure for their 1938 adoption, expressed this relationship as follows: "Although full discussion of discovery is outside the scope of this book, the discovery mechanisms are discussed herein since they are a necessary supplement to the system of simplified pleading supported herein." CHARLES EDWARD CLARK ET AL., *HANDBOOK OF THE LAW OF CODE PLEADING* 567 (2d ed. 1947). Professor Sunderland, also a member of the Advisory

in others.²⁵ That the *Conley* Court cited the introduction of modern discovery as the reason that notice pleading is possible demonstrates this.²⁶

Professor Subrin's extensive analysis of the legislative history of the discovery provisions of the original Federal Rules of Civil Procedure's legislative history states that "[t]here are several examples of possible restraints on discovery that did not survive the many drafts. One way to put limits on the entire lawsuit, including the discovery stage, is to have more rigorous pleading rules and then to tie the scope of discovery to pleading allegations."²⁷ In addition to exemplifying the symbiotic relationship between pleading and discovery, this passage provides a key insight into the *Twombly* and *Iqbal* decisions.

Discovery used to be viewed primarily as a means by which each side would disclose the facts underlying its own case, thus preventing surprise at trial and facilitating settlement.²⁸ This view of discovery is clearly stated in *Hickman v. Taylor*, where the Court said: "No longer can the time honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."²⁹ Professor Subrin's article contains an exhaustive study of the legislative history of the federal discovery rules.³⁰ This article clearly shows that the original focus of those rules was on permitting a party to discover the case of the other side to prevent surprise and facilitate settlement,³¹ with little, if any, mention of permitting the discovery of

Committee, wrote that expanded discovery would "diminish the importance of pleading." Edson R. Sunderland, *Improving the Administration of Civil Justice*, ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI., May 1933, at 74-75.

25. See Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 816 (1981).

26. See *Conley v. Gibson*, 355 U.S. 41 (1957).

27. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 722 (1998).

28. See *Conley*, 355 U.S. 41.

29. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

30. See Subrin, *supra* note 27.

31. See *id.* at 697, 716, 725, 727, 758. Although there were many who disapproved of the "fishing expedition" approach to discovery, this disapproval was mostly directed to "expeditions" related to the other side's case. The article also refers to an early draft of a discovery rule requiring a party on request to provide a "descriptive list of documents, books, accounts, letters or other papers, photographs or tangible things that are known to him and relevant to the pending cause," *id.* at 718-19, and which provides as a sanction for violations only the inadmissibility of the omitted documents by the interrogated party. This sanction would be useful only if the omitted evidence was favorable to the party from whom discovery was sought, not if it was favorable to the party seeking discovery.

data needed by the discovering party to prove the essential allegation of his own prima facie case or defense.³²

Even though the early focus was on discovery of the adverse party's case, the rules permitted discovery related to any issue in the case. Discovery was increasingly used to obtain not only knowledge of an opponents' case and the facts needed to refute it but also the evidence needed to prove one's own case.³³ Subrin's article contains little in the way of the legislative history pertaining to the discovery rules to indicate that this type of discovery was intended. Rather, this use of discovery appears to have developed from the broad language of the rules combined with the approach derived from the *Conley* case that no case may be dismissed on the pleadings unless those pleadings affirmatively show that the plaintiff cannot recover. It is widely recognized that surviving a motion for dismissal on the pleading is the gateway to modern discovery, and preventing dismissal, because the plaintiff cannot plead factual support for the elements of a prima facie case, opened the way for the use of discovery to determine the necessary elements of a party's own case.

The 1960s marked a pronounced change in the nature of civil litigation in the federal courts. There was a great increase in complex litigation, including products-liability litigation and malpractice cases. Further, scientific advances like modern copying inventions similar to xerography and the birth of the microcomputer greatly changed the character of discovery.

Xerography and other advances in copying technology have made the discovery of millions of documents in complex cases possible. Electronically stored information has had an even greater impact on the cost and complexity of discovery with requests for data from back-up tapes and for metadata and forensic examinations of disks. While these costs are not applicable in a large number of cases,³⁴ they can be overbearing in the cases where they are

32. See *id.* at 727–31 (the only references to the use of discovery to learn of information essential to the discoverer's case were negative concerns about the abuse of this possibility).

33. See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 288 (5th ed. 2001) (stating that discovery makes possible the prosecution and defense of actions that would not be possible without it, because with it “an action or defense can be maintained that is dependent on witnesses or documents known only to the opponent—for example a medical malpractice claim that must be proved through the testimony and records of the treating medical staff or an antitrust action based chiefly on the records of the alleged offender.”); see also Subrin, *supra* note 27.

34. In Spencer, *supra* note 3, it is noted that the study cited by the Court in *Twombly* states that in almost forty percent of federal cases discovery is not used at all, and that in an

applicable.³⁵ Both *Twombly* and *Iqbal* are cases where substantial discovery costs would have been involved if the cases had not been dismissed.³⁶

Judge Easterbrook, recognizing that discovery is used as both a tool for uncovering facts essential to accurate adjudication and as a weapon capable of imposing large and unjustifiable costs on one's adversary,³⁷ stated that the enormous unnecessary costs discovery creates is "hard to conquer in a system of notice pleading, and even harder to limit when an officer lacking the power to decide the case supervises discovery."³⁸ This judge also believes discovery of evidence to be used to prove one's own case is a large contributor to this problem. "Lawyers cannot limit their search for information in discovery, because they do not know what they are looking for," and "[t]hey do not know when to stop because they never know when they have enough."³⁹ Judge Easterbrook concludes that the impositional expenses of discovery are impossible to control in a system where "the parties are in charge of a system characterized by notice pleading. . . . [I]n other words, when discovery precedes the identification of the dispositive legal issues."⁴⁰

It is often noted how our international trading partners are strongly opposed to the American system of discovery.⁴¹ It is submitted that this is attributable to the system's use to discover the evidence needed to prove the requestor's own case rather than to learn of the other side's case because that type of information is essentially

additional substantial percentage of the cases only about three hours of discovery occur.

35. See, e.g., JAMES N. DERTOUZOS ET AL., RAND INST. FOR CIVIL JUSTICE, THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY 1-2 (2008); see also Emily Madavo et al., *Recent Key Developments in Shifting E-Discovery Costs*, E-DISCOVERY & DIGITAL EVIDENCE COMMITTEE J., Spring 2013, at 2 (citing a recent study indicating that discovery costs of Fortune 200 companies average between \$621,000 and \$2,993,567 per case and electronic-discovery costs average about \$3.5 million for a typical mid-size law suit, and that the opportunity to recover these costs at the end of trial have narrowed).

36. *Twombly* was an antitrust case where discovery costs were extremely high, and *Iqbal* would have required extensive discovery, most likely electronic discovery involving computer records in an attempt to ascertain if the instructions alleged in the suit came from the named individual defendants.

37. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636 (1989).

38. *Id.* at 639 (discussing the practice of assigning the management of discovery to magistrate judges in the federal courts).

39. *Id.* at 641.

40. *Id.* at 644.

41. See STEPHEN C. YEAZELL, CIVIL PROCEDURE 458 (8th ed. 2012) ("Outside the United States, neither the common law nor the civil law systems permit the searching scrutiny of material in the possession of the opposing party.").

as equally obtainable in litigation overseas as it is in the United States.⁴²

It soon became recognized that these developments could make civil discovery extremely expensive and time consuming; expense became the dark side of discovery.⁴³ The Supreme Court soon attempted to protect appropriate defendants from the growing burden of discovery. In some cases, this involved modification of the substantive law.⁴⁴ In other cases, it has been reflected in a tightening of the discovery rules.⁴⁵ Since the early 1970s, most of the amendments to the discovery rules have been directed to the prevention of discovery abuse. Thus limits have been imposed on depositions and interrogatories, court supervision over the discovery process has increased and there are increasingly severe sanctions that may be imposed for a violation of the rules. As one authority reports: "Most of the modern law of discovery is an accommodation between affording full and open discovery and safeguarding against unrestrained rummaging through an opponent's files, imposition of oppressive expenses or invasion the opponent's preparation for adversarial trial."⁴⁶

This movement to protect parties from unwarranted costs and burdens of discovery was also manifested in amendments to the Federal Rules with regard to pleadings sanctions. Federal Rule 11 was

42. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

43. See JAMES, *supra* note 33, at 288.

44. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court stated that under the prior law, the good faith required for a qualified privilege had both an objective and subjective element (good faith and reasonable cause), and that the subjective element was incompatible with preventing insubstantial suits from progressing to trial because "good faith" is a fact issue that can rarely be decided on summary judgment. "Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." *Harlow*, 427 U.S. at 817. The Court concluded: "[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or the burdens of broad-reaching discovery" and that the subjective element of the qualified privilege should be abolished. *Id.* at 817-18. This decision was followed by *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which held that the denial of a summary judgment based on a qualified privilege may be reviewed by an interlocutory appeal, which, if successful, would avoid discovery and trial.

45. In 1980, Justices Powell, Rehnquist, and Stewart dissented from the adoption of rules intended to limit broad discovery on grounds that they were not strong enough. See Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 997 (1980) (Powell, J., Rehnquist, J., & Stewart, J., dissenting).

46. JAMES, *supra* note 33, at 289.

significantly rewritten and expanded in 1983.⁴⁷ The principal change was the replacement of a subjective test of good faith by the objective test of a reasonable inquiry. A pleader was now required to make a reasonable inquiry to ensure that the factual contentions of the complaint “have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery” and are warranted by existing law.⁴⁸ Thus the 1983 amendments significantly strengthened Rule 11 to help prevent the abuses notice pleading had permitted,⁴⁹ the abuses identified by Professor McCaskill.⁵⁰

While these amendments to Rule 11 did not directly modify the requirements of notice pleading, a tension between the minimal requirements of notice pleading and the requirements of Rule 11 as then interpreted is obvious. If a plaintiff is required to make a reasonable investigation to ensure that his complaint had evidentiary support, why should that pleader not be required to support his complaint with those relevant facts the investigation had revealed and that the Court was aware of the burdens, expense, and possible abuses made applicable by extremely broad notice pleading and was taking steps to help alleviate these abuses? In both *Twombly* and *Iqbal*, the Court rationalized these decisions by citing the danger of permitting parties with weak claims to proceed to discovery, given the burden discovery frequently places on defendants.

III. TWOMBLY AND IQBAL

The facts in *Twombly*⁵¹ can be briefly stated for purposes of this article. The plaintiffs, subscribers to local telephone and internet services, alleged that the local telephone companies violated the antitrust laws by agreeing not to compete with each other and by agreeing to exclude other potential competitors from the market. The result was that each company had monopoly power in its own

47. FED. R. CIV. P. 11, Advisory Committee’s note to 1983 Amendment.

48. The Advisory Committee’s note on the 1983 Amendment states: “The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule.”

49. Although a further amendment of Rule 11 in 1993 made the imposition of sanctions for the violation of this rule discretionary rather than mandatory, a violation of the reasonable-investigation rule remained constant.

50. See McCaskill, *supra* note 13.

51. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

market.⁵² The trial court dismissed the complaint, but the court of appeals reversed, citing *Conley v. Gibson*.⁵³ The Supreme Court granted certiorari to address the proper standard for pleading an antitrust conspiracy and reversed the court of appeals.⁵⁴

The Court first rejected *Conley v. Gibson*'s "no set of facts" interpretation of the pleading rules stating that the court of appeals appeared to have "read [*Conley*] in isolation" when forming its understanding of a proper pleading standard in that it specifically found that the "prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement."⁵⁵ The Court concluded that the "no set of facts" language should be understood in light of the complaint's allegations in the *Conley* case that the *Conley* Court reasonably understood as amply stating a claim for relief.⁵⁶ The Court concluded: "The phrase is best forgotten."⁵⁷

With respect to the adequacy of the pleading in the *Twombly* case itself, the problem arose because the complaint alleged parallel conduct that is not, in itself, a violation of the antitrust laws but requires facts evidencing an illegal agreement to constitute a violation and only the bare statement of an "agreement" with no factual support was pled.⁵⁸ The Court held that this was inadequate under Rule 8(a)(2)'s requirement that a complaint must give the defendant fair notice of what the claim is and the grounds upon which it rests.⁵⁹ In a footnote the Court added: "Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing 'fair notice' of the nature of the complaint, but also of the 'grounds' on which the claim rests."⁶⁰ These factual allegations, the opinion states, must be enough to raise a right to relief above the speculative level.⁶¹ Accordingly, the Court concluded in this case that there must be factual allegations to suggest that an

52. *Id.* at 550–51.

53. *Id.* at 552.

54. *Id.* at 553.

55. *Id.* at 561.

56. *Id.* at 562–63.

57. *Id.* at 563.

58. *Id.* at 556–57.

59. *Id.* at 560–61.

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

61. *Id.* at 555.

agreement was made.⁶² Only Justices Stevens and Ginsberg dissented from this opinion.⁶³

Twombly thus held that in this litigation the pleader was required by Rule 8(a) to plead some facts evidencing an illegal agreement to give fair notice of the claim and of the grounds on which it rests. It would seem that the focus of this requirement is that without factual allegations constituting evidence of an agreement, the complaint did not give fair notice of the grounds on which the pleader's claim rested. It would appear that the pleading did give fair notice of the claim, an illegal agreement in restraint of trade under the antitrust laws, but not of the grounds upon which it rested.

The opinion of the Court, written by Justice Souter, emphasized that discovery in antitrust litigation can be expensive and that a lower court "must insist upon some specificity in pleading before allowing a potentially massive controversy to proceed."⁶⁴ This statement raised the issue of whether the requirement of some factual specificity applied only to large or complex cases. It is perhaps attributable to the increase in the burdens of discovery that the Court based the need for greater specificity in the pleading on the burdens of forthcoming discovery if the case proceeds beyond the motions directed to the pleadings. Compare this with *Conley v. Gibson* where the Court had attributed the propriety of the use of notice pleading to the liberal opportunity for discovery in that forthcoming phase of the case.⁶⁵ Thus after attributing the opportunity for notice pleadings to discovery at an earlier time, the Court now believed that modern discovery required more specificity in the pleadings reinforcing the symbiotic relationship between those two phases of a civil trial.⁶⁶

After the decision in *Twombly*, there was some confusion among the bench and the bar as to the appropriate interpretation and application of the case.⁶⁷ One source reports that in six months after

62. *Id.* at 556.

63. *Id.* at 570.

64. *Id.* at 558 (citing *Associated Gen. Contractors v. Carpenter*, 459 U.S. 519, 528 n.17 (1983)).

65. See *Conley v. Gibson*, 355 U.S. 41, 45–47 (1957).

66. Remediating one of the causes for discovery abuse as contended by Judge Easterbrook in *Discovery as Abuse*, *supra* note 37.

67. See *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.").

the decision it had been cited in 2,400 judicial decisions.⁶⁸ The basic ground for confusion was whether it was an interpretation of Rule 8(a)(2) or whether it only applied in large complex cases. This confusion was compounded when the Court decided *Erickson v. Pardus*,⁶⁹ a prisoner's civil-rights case in which the Court reversed a dismissal granted on the basis that the complaint was conclusory. The Court cited the quote from *Conley v. Gibson* that specific facts are not necessary and that the complaint must only give the defendant "fair notice of what the . . . claim is and the grounds on which it rests."⁷⁰

The Court resolved much of this uncertainty in its decision in *Ashcroft v. Iqbal*.⁷¹ In that case the plaintiff, a citizen of Pakistan and a Muslim, was arrested after the September 11, 2001 attack on the World Trade Center. His complaint asserted a *Bivins* claim⁷² and alleged, *inter alia*, that John Ashcroft (the former United States Attorney General) and Robert Mueller (the Director of the FBI) had adopted a policy following the September 11th attacks that had subjected plaintiff unconstitutionally to harsh conditions of confinement because of his race, religion, or national origin.⁷³ The district court denied defendants' motion to dismiss the case in which they contended that the complaint was not sufficient to state a claim against them.⁷⁴ The Court of Appeals for the Second Circuit affirmed, but the Supreme Court reversed.⁷⁵ The Court acknowledged that the complaint had properly alleged that the plaintiff's constitutional rights had been violated but held that the plaintiff did not adequately allege that the two defendants in question were legally responsible for that violation.⁷⁶ Vicarious liability is not available under *Bivins*, and the plaintiff's case was required to establish that these defendants had adopted the unconstitutional policy that had subjected the plaintiff to the harsh conditions of confinement because of his race, religion, or

68. See YEAZELL, *supra* note 4, at 364.

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

70. *Id.* at 93 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555) (quoting *Conley*, 355 U.S. at 47).

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

72. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that a violation of the Federal Constitution's Fourth Amendment rights of the plaintiff will render a federal agent liable to the plaintiff in damages in the same way that 42 U.S.C. § 1983 holds a state officer liable for such a violation).

73. *Iqbal*, 556 U.S. at 668–69.

74. *Id.* at 669.

75. *Id.* at 670.

76. *Id.* at 681.

national origin.⁷⁷

The Court held that to survive a motion attacking a complaint under Rule 8, a complaint must contain sufficient factual data to state a claim for relief that is plausible on its face.⁷⁸ A complaint has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.⁷⁹ It requires more than a mere possibility that the defendant is liable for the misconduct alleged.⁸⁰ Furthermore the rule that all allegations must be taken as true does not apply to conclusions.⁸¹ To state a cause of action there must be factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.⁸² This is not a probability requirement, but it requires more than a mere possibility.⁸³ The Court concluded that that the claim should be dismissed because “plaintiff has not nudged his claims across the line from conceivable to plausible.”⁸⁴

The Court also emphasized the validity of the language of the court of appeals that to determine whether a complaint states a plausible claim for relief is a content-specific task that requires a

77. *Id.* at 676.

78. *Id.* at 677.

79. *Id.* at 678.

80. *Id.* at 679.

81. *Id.* at 678.

82. *Id.*

83. *Id.*

84. *Id.* at 680. The Court said:

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.

Id. at 682 (citation omitted). This explanation tracks the explanation in *Twombly* that indicated that in light of the alternative explanation that parallel pricing reflected strong competition, it was not plausible to assume that there was an illegal agreement to compete. Thus in light of the possible interpretations, in *Twombly* the fact of parallel conduct made the intent to price-fix possible but not one single additional fact was alleged that would make it plausible. And in *Iqbal*, the fact that the plaintiff was the victim of unconstitutional conduct made the fact the conduct was authorized by the heads of the agencies involved possible, but not one single additional fact was alleged to make it plausible.

reviewing court to draw on its judicial experience and common sense,⁸⁵ but it reiterated that the well-pleaded facts must permit the court to infer more than the mere possibility of misconduct.⁸⁶ In ruling on a motion directed to the pleadings, a court should begin by first identifying and then disregarding the allegations that, because they are no more than conclusions, are not entitled to the presumption of truth.⁸⁷ Conclusions must be supported by factual allegations.⁸⁸ To show that factual allegation support in this case, the Court reasoned, the complaint must contain facts plausibly showing that the two relevant defendants had purposefully adopted a policy of classifying post-September 11th detainees as “high interest” because of their race, religion, or national origin, and it did not.⁸⁹

Finally, the Court rejected three arguments that would have rendered the heightened pleading standard inapplicable to this case. First, the Court rejected the argument that the heightened pleading standard should be limited to antitrust litigation, holding that the standard was an interpretation and application of Rule 8 which is applicable to all federal pleadings.⁹⁰ Next it rejected the contention that by limiting discovery, the heightened standard may be avoided. The Court ruled that the question presented by a motion to attack a complaint for insufficient pleading does not turn on controls placed on the discovery process.⁹¹ Finally, it rejected the application of Rule 9(c) and its statement that “malice, intent, knowledge and other conditions of the mind may be pled generally.”⁹² Here the Court concluded that Rule 9 required allegations of fraud and mistake to be pled with greater specificity than required by Rule 8 and that the quoted language was intended to indicate that Rule 8 was to be applied to allegations of that nature.⁹³

Thus in *Twombly* and *Iqbal*, the Court first corrected the misinterpretation of *Conley v. Gibson* that had permitted federal

85. *Id.* at 664–65 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). The Court, however, disagreed with the application of this approach to the facts of the given case. The Second Circuit had used it to distinguish *Iqbal* from *Twombly*, while the Court reasoned that the cases were not distinguishable on that basis.

86. *Id.* at 678.

87. *Id.* at 679.

88. *Id.*

89. *Id.* at 682.

90. *Id.* at 684.

91. *Id.* at 684–85.

92. *Id.* at 686–87.

93. *Id.*

complaints to stand that failed to meet Rule 8(a)(2), and held, for the first time, that to show that the pleader is entitled to relief, a pleading must manifest facial plausibility. This, in turn, requires that a court in ruling on the validity of a complaint first disregard all conclusory allegations unsupported by facts, and then ask whether the remaining (factual) allegations allow the court to reasonably draw a plausible, not necessarily probable, but more than possible, inference that the defendant is liable for the misconduct alleged.

This interpretation of Rule 8(a) will have an adverse impact primarily on cases where a plaintiff is seeking to use discovery to learn of evidence to establish the plaintiff's own prima facie case because the absence of nothing else can destroy the ability of an amendment to cure the defect.

IV. THE APPLICATION OF THE FACIAL-PLAUSIBILITY STANDARD: THE LESSONS FROM FACT PLEADING

The rejection of *Conley v. Gibson*'s "no set of facts" dictum should have little impact going forward. While its rejection is often mentioned prominently in the articles discussing these two cases, it had been cited by the Supreme Court only in reference to the requirements of Rule 12(b)(6), not as an interpretation of Rule 8(a)(2), and only in dicta in cases that otherwise met the requirements of Rule 8(a). Thus the dicta do not properly have a role in determining if a claim in a pleading is defective because of its failure to meet the requirements of Rule 8(a) but only on the issue of whether its failure to state a claim upon which relief can be based should warrant a dismissal of the plaintiff's claim. Significantly, it should still be valid in its proper role, determining whether, after a pleading fails to pass a motion because of its failure to comply with the requirements of Rule 8(a), leave to amend that claim should be allowed.⁹⁴

Twombly and *Iqbal* do, however, importantly modify the interpretation of the requirements of Rule 8(a)(2) by holding that it requires facial plausibility, which appears to dictate greater specificity in some cases than was previously necessary. Accordingly, while the Court emphasized that it was being true to the language of Rule 8, which requires a short and plain statement of the "claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests, it appears that by adding for the first time

94. See *Conley v. Gibson*, 355 U.S. 41 (1957).

a requirement of facial plausibility they were interpreting it more strictly than it had been interpreted previously.⁹⁵ It is submitted that the most significant aspect of these cases is the requirement that in determining whether a pleading meets the requirements of Rule 8(a), a federal court must first disregard all the conclusory allegations in the complaint that are not supported by factual allegations before determining whether the allegations remaining possess facial plausibility, that is, deciding if these allegations warrant drawing a rational inference that the claim asserted in the complaint is a valid one.

This formulation, however, neglects to consider the reality that led to notice pleading in the first place, the reality that it is often difficult (if not close to impossible) to differentiate between an ultimate fact and a conclusion. Judge Charles Edward Clark spoke of the distinction between facts, law, and evidence as “illusory,” and said that the attempted distinction between them “viewed as anything other than a convenient distinction of degree, seems philosophically and logically unsound.”⁹⁶ This problem is highlighted by the fact that the four-Justice dissent in *Iqbal*, written by Justice Souter,⁹⁷ the author of the Court’s majority opinion in *Twombly*, is based on the belief that the allegations in *Iqbal* that the majority dismissed as conclusions were truly factual in nature.

The Illinois Supreme Court has written on the issue of differentiating facts from conclusions:

The same allegation may in one context be deemed to be one of ultimate fact while in another “ . . . where from a pragmatic viewpoint some of these words do not give sufficient information to an opponent of the character of evidence to be introduced or of the issues to be tried, they are held to be legal conclusions. What is law, what are facts, and what is evidence, for pleading purposes, can be determined only by a careful consideration of the particular

95. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007). Thus, while the Court emphasized they could not adopt a “heightened pleading standard” without amending the rules, the same result was apparently achieved by requiring a more rigorous interpretation of them.

96. CLARK, *supra* note 24, at 567.

97. *Iqbal*, 556 U.S. at 699. The other dissenters were Justices Stevens, Ginsburg, and Breyer.

task of administering a particular litigation.”⁹⁸

This language appears to echo the same concept that the U.S. Supreme Court’s opinion in *Iqbal* approvingly quoted from the court of appeals’ decision in that case, stating that determining whether a complaint states a plausible claim for relief is a content-specific task that requires a reviewing court to draw on its judicial experience and common sense.⁹⁹ The only precedential guide given is the statement by the Court in both *Twombly* and *Iqbal* that a pleading that offers labels and conclusions or a formalistic recitation of the elements of a cause of action will not succeed.¹⁰⁰

The forms attached at the end of the Federal Rules of Civil Procedure exemplify the legitimacy of evaluating the adequacy of a complaint as a content-specific task, requiring a reviewing court to draw on its judicial experience and common sense. Rule 84 states that these forms “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”¹⁰¹ Accordingly, these forms both remain valid today as a model for the type of pleading that is acceptable.

An example of the simplicity required for sufficiency of these forms under *Iqbal* and *Twombly* is Form 11, titled a “Complaint for Negligence.”¹⁰² Form 11 specifies the body of such a complaint as follows: “On *date*, at *place*, the defendant negligently drove a motor

98. *Van Dekerkhov v. City of Herrin*, 282 N.E.2d 723, 725 (Ill. 1972) (quoting O.L. MCCASKILL, ILLINOIS CIVIL PRACTICE ACT ANNOTATED 70 (1933)).

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

100. *Id.* at 680–81. Justice Kennedy describing the pleading inadequacies of the complaint:

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 “formulistic 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.

Id. (citations omitted) (first quoting *Petition for Certiorari* at 157, 173a–174a, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009); then quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); and then quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

101. Fed. R. Civ. P. 84.

102. Fed. R. Civ. P. Form 11.

vehicle against the plaintiff.”¹⁰³ This sentence is then to be followed by an articulation of plaintiff’s damages.¹⁰⁴ Following the *Twombly–Iqbal* approach, the term “negligently” must be disregarded, and it must be asked if the remaining allegations, those alleging that the defendant drove a motor vehicle against the plaintiff, constitute a facially plausible claim for relief against the defendant, because of his fault. The alternative appears to be that the accident was the plaintiff’s fault or the fault of no one. The fact that it was the defendant that was at fault need not be probable but only plausible. Negligence drafted in this way is an allegation of negligence by reference to its result, and not its cause; it contains no facts indicating what the actual negligence of the driver consisted of, only that it happened. Was the driver speaking or texting on a cell phone and not observing where he was going or was he speeding? In the context of this hypothetical case, the court would find the complaint states a factually plausible allegation.¹⁰⁵ In the context of a factually different case, such a pleading of negligence may not be adequate. Conversely, in an older fact-pleading case, the complaint alleged that while plaintiff was riding on defendant’s railroad, she was “through the negligence, carelessness, and misdirection of the defendant and its agents . . . thrown from and under the coaches or railcars of the said defendant.”¹⁰⁶ Here the negligence of the defendant was pled by its effect rather than its cause, and it was held to be insufficient. The court and the adverse party had no indication of what the railroad employees had done or how the plaintiff was thrown from the car to under its wheels. The court stated that in simple negligence cases it is common to aver that the injury was inflicted by the want of care of the defendant.¹⁰⁷

In a study of fact pleading in Illinois,¹⁰⁸ it was determined that a general pleading of the liability of the defendant, similar to notice pleading, was usually acceptable, except in two situations. The first

103. *Id.*

104. *Id.*

105. *See also* *Erickson v. Pardus*, 551 U.S. 89 (2007) (holding a complaint was not conclusory and it was only necessary that the complaint give the defendant “fair notice of what the . . . false claim is and the grounds on which it rests.” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 444 (2007))).

106. *Cent. R.R. Co. of N.J. v. Van Horn*, 38 N.J.L. 133, 138 (N.J. 1875).

107. *Id.* at 138.

108. *See* 3 RICHARD A. MICHAEL, *CIVIL PROCEDURE BEFORE TRIAL*, § 23:3 (2d ed. West).

situation occurs when the allegations of the complaint do not adequately inform the court and the adverse party of why the plaintiff believes he is entitled to recover from the particular defendant.¹⁰⁹ The second situation arises in cases where, absent special circumstances, the plaintiff would not be entitled to recover. In those situations, the plaintiff is typically required to plead, in some greater detail, the exceptional facts that warrant recovery.¹¹⁰ It is significant that both *Twombly*¹¹¹ and *Iqbal*¹¹² fall into the second category of cases. It appears that the pleading requirements in fact-pleading jurisdictions are similar to the federal pleading requirements, with the exception of these two categories, which seem to require more specificity. This higher standard makes meeting the facial-plausibility requirement more taxing to achieve.

What is deemed a fact as opposed to a conclusion will vary with the particular case. In the Illinois fact-pleading case *Teter v. Clemens*,¹¹³ the general pleading of negligence was held inadequate.

109. See also *Barham v. Knickrehm*, 661 N.E.2d 1166 (Ill. App. Ct. 1996) (upholding the dismissal of plaintiff's negligence complaint for failure to state a cause of action, as it failed to allege facts to support the allegation that the defendants owed a duty to the minor); *Walker v. Shell Chem., Inc.*, 428 N.E.2d 943 (Ill. App. Ct. 1981) (upholding the dismissal of a complaint for failure to state a claim of strict liability in tort, as the complaint did not allege facts stating the circumstances of how the accident occurred); *Gillispie v. Goodyear Serv. Stores*, 128 S.E.2d 762 (N.C. 1963) (holding the plaintiff's complaint failed to state a claim upon which relief could be granted because the complaint only alleged certain acts but did not connect the facts with the plaintiff's legal theory of tort).

110. See *Karas v. Strevell*, 884 N.E.2d 122, 130, 135 (Ill. 2008) (“[I]n a contact sport the duty owed by a participant to a fellow participant is the ‘duty to refrain from willful and wanton or intentional misconduct. . . . [I]t is plaintiff’s responsibility to plead facts that show conduct totally outside the range of ordinary activity involved in the sport.” (quoting *Pfister v. Shusta*, 657 N.E.2d 1013, 1015 (Ill. 1995))); *Teter v. Clemens*, 492 N.E.2d 1340 (Ill. 1986) (affirming the dismissal of a complaint where the plaintiff had been struck in the eye by a pellet fired from the defendant’s five-year-old son, the court held there was no allegation of what the defendants had done which allowed the child to obtain the gun or in what way the conduct was negligent; alleging negligence in terms of the result rather than the cause was insufficient); *York v. Modine Mfg. Co.*, 442 N.E.2d 282 (Ill. App. Ct. 1982) (affirming the dismissal of the complaint where plaintiff was seeking to recover, from her employer and its security service, for a criminal attack on her at her place of employment, for a failure to allege facts to support her allegation that the service had been hired for the protection of employees).

111. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (finding the plaintiff’s pleading of parallel conduct, which alone was not a violation of the antitrust law, was insufficient to show a violation was plausible, without facts evidencing an illegal agreement).

112. See *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (holding that because vicarious liability is not available under *Bivens*, the complaint had to allege that the two defendants involved in the appeal had themselves adopted the unconstitutional policy, requiring some specific facts to show that this was plausible.).

113. See *Teter*, 492 N.E.2d at 1343.

The Illinois Supreme Court held that the complaint lacked facial plausibility because the conclusion that the grandparents were negligent was not plausible on the facts alleged, as grandparents are not normally liable for the actions of an infant grandchild.¹¹⁴ *Clemens* is similar to the *Twombly* decision when the court stated that the conclusion that the parties had agreed to price fixing was not plausible from the mere allegation of parallel pricing and therefore was not factually specific enough to “show that the pleader is entitled to relief.”¹¹⁵ In *Iqbal*, following the standard established in *Bivens* that a supervisor is not responsible for the constitutional wrongs of his agents absent his involvement in the wrongful conduct, the Court concluded that there was such complicity was not facially plausible without more sufficient facts.¹¹⁶ The well-pled-complaint analysis is fact dependent, leading to the possibility that the exact same cause of actions may have different results, depending on the facts alleged.¹¹⁷ Thus the *Twombly–Iqbal* approach is a longstanding method used in fact-pleading jurisdictions, which gives guidance as to what allegations may be deemed adequate to show that the pleader is entitled to relief.

V. CONCLUSION

From a legal standpoint, the important aspect of *Twombly* and *Iqbal* is their correction of the erroneous interpretation of *Conley v. Gibson* (and *Dioguardi v. Durning*), that the validity of a complaint and whether or not dismissal is appropriate, is to be determined by the Rule 12(b)(6) test, rather than the Rule 8(a)(2) test for complaint adequacy. *Twombly* and *Iqbal* also remedy *Conley*'s misinterpretation that Rule 8(a)(2)'s requirement that a complaint give a defendant fair notice of the grounds upon which the claim rests requires sufficient factual allegations to exhibit facial plausibility, as defined by the Court.

Twombly and *Iqbal* represent a class of potentially meritorious cases where an amended complaint could not cure the pleading defect, leading a court to require dismissal. Accordingly, it is submitted that the Court is attempting to raise the bar somewhat higher before complainants are allowed to seek discovery from third

114. *Id.* at 1342–43.

115. *See Twombly*, 550 U.S. at 555.

116. *Iqbal*, 556 U.S. at 687.

117. *See Meier, supra* note 3, at 717.

parties and defendants to satisfy the elements of their case. *Twombly* and *Iqbal*'s interpretation of the pleading requirements forces the plaintiff's Rule 11 pretrial investigation to meet the facial-plausibility test before subjecting the defendant to the burdens of discovery. *Twombly* and *Iqbal* will have the greatest impact on cases where litigants are attempting to use discovery to learn of an essential element of their own case and not where they are attempting to discover elements of their opponents' case.

These cases also represent another attempt to resolve a related difficulty created by notice pleading. Notice pleading enables claimants to evade dismissal even when their claims lack merit, forcing the defendant to agree to a settlement or expend the time and expense of discovery to defend against the claim. The new facial-plausibility standard for pleading is an appropriate response to the prior attempts to resolve this struggle. It is submitted that if a pleading is determined to lack facial plausibility, the case should not be dismissed. Instead, it is argued that the pleading should be stricken with leave to amend, except in unusual circumstances, such as repeated failed attempts to amend, or other circumstances indicating the defect cannot be cured.

In *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, Professor Spencer states that the apologists for *Twombly* and *Iqbal* fall into three categories: those who suggest that the standard has not really changed, those who believe that it has changed but that the change will not have a substantial impact, and those who believe the changes are real and substantial, but that they will be beneficial to the litigation system.¹¹⁸ In this article I argue that these cases set out a stricter standard to define when a pleading will adequately show that the pleader is entitled to relief and that this will have a substantial impact in cases where the pleader is attempting to use discovery to establish the elements of the pleader's prima facie case. I submit that these cases will be beneficial to the administration of justice by ameliorating long-standing problems with notice pleading, such as allowing pleaders to go on fishing expeditions for elements of their claims and subjecting defendants to high discovery costs.¹¹⁹

118. See Spencer, *supra* note 3, at 1713.

119. *Id.* at 1736 (explaining that there is little distinction in pleading requirements post *Iqbal*, as the application will vary dependent on the judge who applies it). Professor Spencer concludes that, "If the abandoned code pleading system can be described as 'nineteenth-

Professor Subrin ends his 1998 study of the historical background and legislative history of the discovery rules with the conclusion that our procedural world is more complicated than it appeared to the original draftsmen of discovery rules and accordingly:

There is a real problem: how to permit discovery “fishing” sufficient to reach just results without expeditions in which the costs of time, money and privacy outweigh the gains. Our procedural ancestors discussed discovery problems, but rejected most of the solutions. This may now be a luxury we cannot afford.¹²⁰

It is submitted that in *Twombly* and *Iqbal* the Supreme Court, by limiting discovery through tightening the pleading rules, reached the conclusion that it was no longer sustainable to ignore the cost of discovery in the “fishing expeditions” that often occurred. *Twombly* and *Iqbal* reflect the adjustment that the Supreme Court deemed necessary. Thus, these cases reflect a movement that is more evolutionary than revolutionary.¹²¹

century judges [who] applied the code rules in a hyper-technical fashion, insisting on “strict and logical accuracy” and drawing hopeless distinctions among allegations of ultimate fact, legal conclusions, and evidentiary facts,’ how is pleading post-*Iqbal* much different?” *Id.*

120. See Subrin, *supra* note 27 at 745.

121. See Douglas G. Smith, *The Evolution of a New Pleading Standard*, 88 Or. L. Rev. 1055, 1055 (2009) (“*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 long lain dormant.”).