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**Pound Civil Justice Institute
2010 Forum for State Appellate Court Judges**

Back to the Future: Pleading Again in the Age of Dickens?

**PLEADING IN STATE COURTS
AFTER *TWOMBLY* AND *IQBAL***

A. Benjamin Spencer*

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Executive Summary

In parts I and II of his paper, Professor Spencer introduces the concept of “notice pleading” and contrasts it with the fact-pleading regime that existed before the adoption of the Federal Rules of Civil Procedure. The 1938 rules included the well-known provision that a pleader need provide only “a short and plain statement of the claim showing that the pleader is entitled to relief.” In a line of decisions extending to 2002, the United States Supreme Court underscored the liberality of the federal courts’ ordinary pleading standard, stating notably in Conley v. Gibson in 1957 that a complaint should not be dismissed unless “no set of facts” could establish the pleader’s entitlement to relief.

In part III, Professor Spencer analyzes the Supreme Court’s more recent decisions in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, in which it abrogated the Conley “no set of facts” standard, added a requirement of “plausibility,” and called for courts to employ a “two-pronged approach” to their review of pleadings, in which allegations that are merely conclusory are set aside and the remaining allegations are examined for sufficient plausibility. The effect of these two decisions, Professor Spencer observes, appears to be to set aside the federal courts’ 70-year-old notice pleading regime in favor of requiring parties to plead specific facts if they hope to avoid dismissal.

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Part IV discusses the reactions to Twombly and Iqbal of the lower federal courts. Although a few decisions appear to resist the new regime, the Courts of Appeals generally have accepted that the Supreme Court now requires factual details in complaints. Civil rights, antitrust, RICO, and securities fraud cases are among the substantive areas hit hardest by the new approach. Professor Spencer asks whether federal district courts may take Twombly and Iqbal as justification to require a higher level of pleading even if parties can't reach a higher level of specificity prior to discovery—and may even be tempted simply to dismiss complaints that they believe are weak or lack merit.

In part V, Professor Spencer examines the impact of Twombly and Iqbal within state jurisdictions, which fall roughly into two groups—the majority of states whose civil procedure systems “replicate” the federal rules, and those that vary from the Federal Rules in some significant way. In the three years since Twombly was decided, courts in 14 of the “replica” states have had occasion to reexamine their pleading standards. Seven replica state courts have declined to follow the federal move in the direction of plausibility pleading, but only two so indicated through their states' highest courts. The courts in the other seven replica states that have addressed these cases appear to have embraced the fact-pleading requirement, including the highest courts in five of those states. In the non-replica states, there has been little response from the few that use notice pleading, and there can be little expectation that the remaining states whose courts already use fact pleading will be significantly impacted by the new federal regime. The resulting box score is 24 states for tighter pleading and 27 apparently maintaining notice pleading.

The normative question of how states should respond to Twombly and Iqbal remains, and Professor Spencer outlines a number of considerations that he suggests state policymakers should address, including matters of policy, practicality, and doctrine.

I. Introduction

The Supreme Court recently issued two opinions that modified—some might say dramatically—the general pleading standard in federal civil cases. Working what appears to be a shift away from notice pleading to a more fact-based pleading regime, the Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* have sent shockwaves through the legal community, leaving members of the bench and the bar struggling to determine the precise contours of federal pleading standards in the wake of these cases and to sort through all of the implications of what appears to be a more stringent approach to pleading at the federal level.

At the state level, where many (but not all) states had opted for notice pleading in keeping with the federal approach, the question has become whether pleading doctrine in the state courts should similarly turn to fact pleading of the kind suggested by *Twombly* and *Iqbal*. This paper provides insight into the meaning and import of these two decisions, followed by a discussion of the factors state court jurists should consider in determining the advisability of incorporating the

Twombly and *Iqbal* approach to pleading into their respective states' jurisprudence.

II. Background on “Notice Pleading”

It is well known that civil pleading standards under the 1938 Federal Rules of Civil Procedure were designed to work a departure from the fact-pleading regime prevailing under the procedural codes that preceded the Federal Rules and applied in the federal courts—in actions at law—under the Conformity Act of 1872.¹ Under the 1938 Rules, all that was needed was “*a short and plain statement of the claim showing that the pleader is entitled to relief.*”² As Charles Clark—the Reporter to the first Advisory Committee on Civil Rules appointed after the adoption of the Rules Enabling Act³—remarked when speaking of pleading under the new rules, “There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail.”⁴

Although many courts were reluctant to embrace liberalized pleading standards initially, the Supreme Court’s 1957 decision in *Conley v. Gibson* put all doubt regarding the import of the new rules to rest: the new pleading regime was one focused on notice, not the articulation of detailed facts, and no complaint should be dismissed for failure to state a claim unless there were “no set of facts” that could show that the plaintiff was entitled to relief.⁵

In the ensuing years, “notice pleading” was widely acknowledged to be the pleading standard in the ordinary case. Thus, although some lower courts over time moved toward the imposition of heightened fact-pleading requirements for certain types of claims,⁶ the Supreme Court repeatedly rejected these efforts as inappropriate and inconsistent with the Federal Rules. Specifically, a unanimous Court in both the *Leatherman* and *Swierkiewicz* cases held that Rule 8(a)(2) required only notice pleading, not the pleading of detailed facts,⁷ and that if a more

¹ Act of June 1, 1872, ch. 255, §§ 5-6, 17 Stat. 196, 197.

² FED. R. CIV. P. 8(a).

³ Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064, codified at 28 U.S.C. § 2072.

⁴ Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

⁵ 355 U.S. 41, 47 (1957) (“[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”).

⁶ See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011–59 (2003) (discussing the heightened pleading standards imposed among the circuits for various types of claims, including antitrust, civil rights, RICO, conspiracy, and defamation claims); see also A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 111–18 (2008) (reviewing the history of heightened pleading in the civil rights context).

⁷ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (“Given the Federal Rules’ simplified standard for pleading, [a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984))); see also *id.* (“If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding.”).

stringent pleading standard were desired, that result would have to be achieved through the formal rules amendment process.⁸

The Supreme Court substantially revised its views on these points in *Bell Atlantic Corp. v. Twombly* in 2007, holding—in short—that a complaint must indeed contain factual allegations and those allegations must show plausible entitlement to relief.⁹ In the process, the Court “retired” *Conley v. Gibson*’s “no set of facts” standard, in effect overruling *Conley* to some extent.¹⁰ In 2009, the Court followed-up its *Twombly* decision with *Ashcroft v. Iqbal*, in which it explained that allegations deemed to be mere legal conclusions are to be disregarded and the plausibility of claims set forth by the remaining “well-pleaded” factual allegations are to be evaluated with reference to “judicial experience and common sense.”¹¹

What, precisely, are the contours of the revised approach to pleading given to us in *Twombly* and *Iqbal*? And what has this revision meant for litigants bringing cases in the federal courts since those decisions were issued? Needless to say, any set of cases that abrogates a long-standing precedent and reworks something as fundamental to the civil justice system as pleading standards will send shockwaves through the legal community. *Twombly* and *Iqbal* have done precisely that, yielding countless scholarly works analyzing, explaining, and critiquing the cases, and many CLE and conference programs on the topic. Our task here is to form a relatively clear picture of the nature of pleading doctrine in the wake of *Twombly* and *Iqbal* before turning to a consideration of what these decisions mean for state courts, particularly those in jurisdictions that have heretofore tracked the Federal Rules of Civil Procedure in their own systems.

III. The *Twombly* & *Iqbal* Decisions

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

Twombly involved a claim under the Sherman Act alleging that the defendants—regional telephone service providers in business at the time of the breakup of AT&T (known in the industry as “incumbent local exchange carriers” (ILECs))—were conspiring to restrain trade by frustrating the efforts of prospective market entrants to offer competitive service and by agreeing not to compete with one another in their respective regions. Although the plaintiff’s complaint alleged agreements to this effect on the part of the defendants, the only additional allegations offered in support of those assertions were statements regarding the defendants’ parallel conduct in thwarting entry by competitors, their collective failure to compete against one another, and the

⁸ *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (stating that different pleading standards “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation”).

⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–62 (2007). In 2007 the Court also decided *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), in which it interpreted the pleading standard of the Private Securities Litigation Reform Act (PSLRA) as follows: “A plaintiff alleging fraud in a § 10(b) action, we hold today, must plead facts rendering an inference of scienter *at least as likely* as any plausible opposing inference.” *Id.* at 328.

¹⁰ *Twombly*, 550 U.S. at 562.

¹¹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

statement of one of their presidents that competing in the territory of another ILEC “might be a good way to turn a quick dollar but that doesn’t make it right.”¹²

The Supreme Court, per Justice Souter in a 7-2 decision, found the plaintiff’s complaint to be insufficient to state a claim under Rule 8(a). To reach this conclusion, the Court abrogated the “no set of facts” language in *Conley* and developed a new interpretation of Rule 8’s pleading standard that seemed to undo much of what was previously understood about pleading doctrine. Instead of disclaiming the need to plead detailed facts, the *Twombly* Court indicated that stating a claim “requires a complaint with enough factual matter (taken as true) to suggest” that the allegations of wrongdoing are true and that “[f]actual allegations must be enough to raise a right to relief above the speculative level.”¹³ Further, the Court for the first time inserted the concept of plausibility into the standard, writing of “[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with)” liability, pushing the claim past “the line between possibility and plausibility,”¹⁴ but not requiring the allegations to show a “probability” of entitlement to relief.¹⁵

B. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)¹⁶

Ashcroft v. Iqbal, which followed two years later, involved an action by a Pakistani national and member of the Muslim faith who was arrested in the wake of the attacks of September 11, 2001, and subsequently detained and designated as a “person of high interest” to the federal government’s investigation of the attacks. Iqbal alleged that this designation and the subsequent harsh treatment he received while in detention were unconstitutionally discriminatory and that then-Attorney General John Ashcroft and FBI Director Robert Mueller were personally and overtly complicit in developing and imposing the policy underlying his treatment. Ashcroft and Mueller, who—as high-level government officials—were entitled to raise the defense of qualified immunity, moved to dismiss these claims on the ground that Iqbal had failed to offer

¹² *Twombly*, 550 U.S. at 551.

¹³ *Id.* at 555.

¹⁴ *Id.* at 557. I have previously described the *Twombly* Court’s pleading schema as consisting of three “zones” of pleading:

[I]n the Court’s pleading schema, there are three different zones into which one’s pleading may fall, with the third alone being sufficient. The first zone consists of largely conclusory pleading. The second zone consists of factually neutral pleading. The third zone consists of factually suggestive pleading. Only those complaints that plead facts suggestive of liability satisfy the Rule 8(a) obligation to state a claim that shows entitlement to relief.

A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 448 (2008).

¹⁵ *Id.* at 556 (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage.”). I have heard Professor Arthur Miller refer to this schema as the “Three Ps: possibility, plausibility, and probability.” Arthur Miller, Remarks, Duke Civil Litigation Conference, May 11, 2010.

¹⁶ The description of the *Iqbal* opinion here draws heavily from my previous writings on the topic in which I have described and critiqued the *Twombly* and *Iqbal* decisions. See A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010).

sufficient allegations establishing their personal involvement in clearly unconstitutional conduct.¹⁷

The Supreme Court agreed with the defendants and held that Iqbal had failed to satisfy the pleading burden described in *Twombly*. The Court embraced the core components of *Twombly* that established plausibility pleading and then explained that under *Twombly*, a “two-pronged approach” was necessary. First, only “well-pleaded factual allegations” are entitled to the assumption of truth traditionally accorded to the plaintiff’s complaint. Such allegations, said the court, are to be contrasted with “legal conclusions” or “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” which a court is free to disregard.¹⁸ Thus, the initial step in the *Twombly* analysis is for the court to identify those allegations that are “conclusory” and set them aside. Second, the court then determines whether the well-pleaded factual allegations plausibly give rise to an entitlement to relief. This latter determination is made, in the Court’s words, as follows:

Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.”¹⁹

Applying the first prong of this test to Iqbal’s complaint, the Court determined that the following allegations were not “well-pleaded”: that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject [him]” to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest” and that “Ashcroft was the ‘principal architect’ of this invidious policy and that Mueller was ‘instrumental’ in adopting and executing it.”²⁰ In the Court’s view, these were “bare assertions” that “amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”²¹ Thus, the Court concluded that “the allegations [were] conclusory and not entitled to be assumed true.”²²

Having disposed of Iqbal’s core allegations personally connecting Ashcroft and Mueller with the alleged unlawful policy, the Court turned to the matter of whether Iqbal’s remaining allegations plausibly showed entitlement to relief. Those remaining allegations that the Court accepted as “well-pleaded” were as follows:

[T]he [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of

¹⁷ *Iqbal*, 129 S. Ct. at 1943–44.

¹⁸ *Id.* at 1949.

¹⁹ *Id.*

²⁰ *Id.* at 1951 (internal citations omitted).

²¹ *Id.*

²² *Id.*

September 11. . . . [and] [t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.²³

The Court found these allegations to be merely consistent with—rather than suggestive of—wrongdoing by Ashcroft and Mueller, since, in its view, there were “more likely explanations” for the disparate impact of the law enforcement actions Iqbal challenged in his complaint.²⁴ Thus, the Court concluded that Iqbal “has not ‘nudged [his] claims’ of invidious discrimination ‘across the line from conceivable to plausible.’”²⁵

C. Understanding *Twombly* & *Iqbal*

Together, the doctrinal impact of the Court’s statements in *Twombly* and *Iqbal* is substantial.²⁶ Prior to *Twombly*, the rhetoric surrounding the Federal Rules was that they contemplated a system of “notice” pleading, meaning they embraced a general pleading standard whose principal purpose was to ensure that the statement of the claim provided adequate notice to the adversary of the nature of the claim so that he or she might be able to prepare a response. But with *Twombly*, the notice justification for pleading was diminished if not effectively discarded,²⁷ as was any notion that specific facts were unnecessary at the pleading stage. The question is, in light of *Twombly* and *Iqbal*, how much factual specificity is required to survive a motion to dismiss?

The answer, as I have written elsewhere, is that the level of facts necessary to state a plausible claim depends on “the legal and factual context in which a claim is situated.”²⁸ More specifically, “legal claims that apply liability to factual scenarios that otherwise do not bespeak wrongdoing will be those that tend to require greater factual substantiation” to show plausibility.²⁹ Thus, in *Twombly*, pleading parallel conduct and non-competition among the defendants by itself was not suggestive of wrongdoing when such evidence is wholly consistent with lawful, rational economic behavior.

Similarly, in *Iqbal*, alleging discriminatory intent based on arrests that disproportionately impact Arab Muslims was insufficient to suggest wrongdoing because, as the Court stated, the demographic profile of the 9/11 attackers meant that there was likely a legitimate, non-

²³ *Id.* (citations omitted).

²⁴ *Id.*

²⁵ *Id.* (citations omitted). Justice Souter, the author of *Twombly*, wrote a strong dissent in *Iqbal* and was highly critical of the majority’s willingness to discount Iqbal’s allegations that directly linked Ashcroft and Mueller to wrongdoing as mere legal conclusions rather than factual allegations.

²⁶ For a full analysis of the doctrinal impact of these two opinions, see A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009).

²⁷ I say “effectively” discarded because the Court itself would likely deny it had formally discarded the notice rationale. See *Erikson v. Pardus*, 551 U.S. 89, 93 (2007) (“[T]he statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”) (citing *Twombly*).

²⁸ Spencer, *supra* note 26, at 14.

²⁹ *Id.*

discriminatory reason for targeting people with similar profiles for arrests in the aftermath of the attacks.³⁰ However, were one to face a complaint of the kind reflected in Form 11 in the Appendix to the Federal Rules—a simple negligence case that alleges an automobile collision and resulting harm all due to the defendant’s having acted “negligently”—the plausibility of the claim is apparent since such collisions are not normal and when they do occur they are likely to be the product of some type of impropriety.

In other words, the *Twombly* and *Iqbal* decisions give us a context-dependent standard for judging the sufficiency of claims, with the relevant context being the offering of facts that, based on “judicial experience and common sense,” suggest wrongdoing of some legally cognizable kind as the explanation for the events narrated in the complaint. A narrative for which a lawful explanation is as likely or more likely to be an explanation for the events will fail to show plausible entitlement to relief unless additional facts are offered that suggest wrongdoing as the reasonable explanation to infer.

What does all of this mean in practical terms? Is heightened pleading now required under Rule 8, and is notice pleading in the federal system a thing of the past? Although it seems clear that “notice pleading” can no longer fully describe the general pleading standard under Rule 8, less clear is whether *Twombly* and *Iqbal* should be read as imposing “heightened” pleading standards in ordinary cases. For one, the Supreme Court in both cases disclaimed that it was imposing a heightened pleading standard³¹ and, at least in *Twombly*, the Court stood by its decision in *Swierkiewicz v. Sorema* in which it upheld an employment discrimination complaint as sufficient, even though direct factual allegations supporting the assertion of a discriminatory motive were lacking. Scholars³² and judges,³³ too, have sought to soften the blow from these cases, by offering interpretations of them that result in a much less radical change to pleading doctrine. Thus, there is some ground for regarding the cases as not having worked drastic

³⁰ I have criticized these presumptions in favor of rational, lawful explanations in another writing, finding them to be the product of the Court’s insider bias:

Increasingly, members of the Court in cases like *Iqbal* and *Twombly* appear to see allegations not through the lens of detached, impartial observers, but rather through the eyes of conforming social elites. Thus, corporations are presumed to operate in legitimate ways motivated only by the quest for lawful profit; law enforcement and other government officials are presumed to operate by-the-book in a focused mission to protect innocents from the multitude of deviants; and employers are presumed to make hiring, firing, and promotion or transfer decisions based wholly on merit rather than on prejudice against members of various protected classes.

Spencer, *supra* note 16, at 199.

³¹ *Iqbal*, 129 S. Ct. at 1954 (distinguishing its interpretation of the ordinary pleading standard under Rule 8 from the “particularity requirement applicable to fraud and mistake”); *Twombly*, 550 U.S. at 569 n.14 (“In reaching this conclusion, we do not apply any ‘heightened’ pleading standard.”).

³² See, e.g. Edward A. Hartnett, *Taming Twombly—Even After Iqbal*, 158 U. PA. L. REV. 473, 484–85 (2010) (arguing that “plausibility” is simply the equivalent of the traditional insistence that all factual inferences be reasonable).

³³ At the recently held Civil Litigation Conference at Duke Law School put on by the Advisory Committee on Civil Rules, two sitting federal appeals court judges expressed the view that *Twombly* and *Iqbal* were not radical or unwarranted alterations of pleading doctrine and that lower courts have demonstrated enormous restraint in not applying the cases in ways that unduly constrain claimants’ access to the courts.

revisions to the general pleading standard but as simply clarifying that factual allegations rather than mere legal conclusions are required to get beyond the pleading stage.³⁴

Reassurances of the Supreme Court and some scholars notwithstanding, it cannot be denied that something has changed. First, *Twombly* abrogated *Conley*'s “no set of facts” standard, a standard that had theretofore been used to prevent the dismissal of claims if the court could envision some set of facts consistent with the complaint that would entitle the pleader to relief. Second, although the Court in *Conley* indicated that detailed facts were not required at the pleading stage,³⁵ the Court in *Twombly* and *Iqbal* insisted that factual allegations were indeed necessary and that such facts had to “suggest” wrongdoing and present a “plausible”—not merely possible—picture of liability. These are innovations that depart from notice pleading to be sure.

Thus, although some jurists may seize on the palliative statements of the Court indicating that any revision to pleading doctrine is only slight, courts that are so inclined have every basis for seeing *Twombly* and *Iqbal* as giving them a green light to require factual specificity from plaintiffs in support of each of the elements of their claims. A review of some lower court decisions interpreting and applying *Twombly* and *Iqbal* will help make our understanding of the import of these cases more concrete.

IV. *Twombly* & *Iqbal* in the Lower Federal Courts

The circuit courts have generally interpreted *Twombly* and *Iqbal* as requiring pleaders to offer factual details in support of their claims. The Fourth Circuit's view is illustrative:

“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” to plead a claim. And “[w]e are not bound to accept as true a legal conclusion couched as a factual allegation.” Appellants’ allegations “do not permit [us] to infer more than the mere possibility of misconduct.” This mere possibility is inadequate to subject the County to appellants’ suit for monetary damages.³⁶

From this excerpt one can see that showing the “possibility” of entitlement to relief—which arguably was sufficient under *Conley*'s “no set of facts” standard—simply does not suffice under *Twombly* and *Iqbal*. One also can take from this excerpt an admonition that factual allegations, not conclusory legal statements, must be offered in the complaint. What must these factual

³⁴ The Second Circuit has stated that it does not see *Twombly* and *Iqbal* as having imposed heightened pleading standards. *See* *Arista Records, LLC v. Doe 3*, ___ F.3d ___, 2010 WL 1729107, at *8 (2d Cir. Apr. 29, 2010) (“[T]he notion that *Twombly* imposed a heightened standard that requires a complaint to include specific evidence, factual allegations in addition to those required by Rule 8, and declarations from the persons who collected the evidence is belied by the *Twombly* opinion itself.”); *id.* (“Nor did *Iqbal* heighten the pleading requirements.”); *see also*, *e.g.*, *Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010) (“Antitrust cases are not subject to a heightened pleading standard.”) (citing *Twombly*).

³⁵ 355 U.S. 41, 47 (1957) (“[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”).

³⁶ *Walker v. Prince George's County*, 575 F.3d 426 (4th Cir. 2009) (quoting *Iqbal*, 129 S.Ct. at 1949–50).

allegations show, if the mere possibility of entitlement to relief is insufficient? In short, a pleader's factual allegations must go beyond showing the speculative possibility of relief to showing that the claim to relief is *plausible*; the Fourth Circuit has stated that "plaintiffs may proceed into the litigation process only when their complaints are justified by both law and fact," meaning they "'show' . . . 'plausibility' of 'entitlement to relief.'"³⁷

Twombly and *Iqbal* have not been differently received in most of the other circuits.³⁸ Indeed, most circuits have not bristled against the revisions imposed by the Court but seem to have embraced them with zeal. The First Circuit, for example, has not only followed the *Iqbal* Court's instruction to engage in a two-part inquiry of setting aside conclusory allegations and then assessing the remainder for plausibility, it has embraced the Court's broad view of what constitutes a "conclusory" allegation by declining to accept direct allegations of official wrongdoing as "factual" allegations:

Turning to plaintiff's complaint, we find that it does little more than assert a legal conclusion about the involvement of the administrative correctional defendants in the underlying constitutional violation. Parroting our standard for supervisory liability in the context of Section 1983, the complaint alleges that the administrative defendants were "responsible for ensuring that the correctional officers under their command followed practices and procedures [that] would respect the rights and ensure the bodily integrity of Plaintiff" and that "they failed to do [so] with deliberate indifference and/or reckless disregard of Plaintiff's federally protected rights." This is precisely the type of "the-defendant-unlawfully-harmed-me" allegation that the Supreme Court has determined should not be given credence when standing alone.³⁹

As this case illustrates, civil rights claims seem to be facing particular difficulty under the new pleading standard,⁴⁰ but antitrust,⁴¹ RICO,⁴² and securities fraud claims are finding the

³⁷ *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009).

³⁸ *See, e.g., Remexcel Managerial Consultants, Inc. v. Arlequin*, 583 F.3d 45 (1st Cir. 2009) (explaining that its prior precedent was consistent with *Twombly* and its explanation of the proper pleading standard); *Tully v. Barada*, 599 F.3d 591, 593 (7th Cir. 2010) ("Tully states a claim only if he alleges enough facts to render the claim not just conceivable, but facially plausible."); *Cole v. Homier Distrib. Co., Inc.*, 599 F.3d 856, 861 (8th Cir. 2010) ("Where we can infer from those factual allegations no more than a 'mere possibility of misconduct,' the complaint must be dismissed.") (quoting *Iqbal*, 129 S.Ct. at 1950). The Eighth Circuit, which applies an acknowledged "heightened pleading standard" to § 1983 actions, has equated the *Twombly/Iqbal* plausibility pleading standard with their pre-existing heightened standard for § 1983 claims. *Keating v. City of Miami*, 598 F.3d 753, 762–63 (11th Cir. 2010) ("[T]his circuit, along with others, has tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out nonmeritorious claims. . . . In other words, '[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" (quoting *Twombly* and *Iqbal*)).

³⁹ *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009).

⁴⁰ *See, e.g., Hayden v. Paterson*, 594 F.3d 150, 165–66 (2d Cir. 2010) ("We hold that, under these circumstances, plaintiffs fail to state a plausible claim of intentional discrimination as to the enactment of [a felon disenfranchisement provision]."); *Zutz v. Nelson*, ___ F.3d ___, 2010 WL 1489350, at *4 (8th Cir. Apr. 15, 2010) (indicating that to state a § 1983 claim, a plaintiff must allege facts showing the deprivation of a constitutional right and holding that the plaintiff in the case had failed to do so); *see also Spencer, Pleading Civil Rights Claims*, *supra* note 6.

⁴¹ *See, e.g., Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010);

Twombly/Iqbal hurdle a difficult one to surmount as well. For example, *SEC v. Cohmad Securities Corp.*, 2010 WL 36384 (S.D.N.Y. Feb. 2, 2010), is a case in which *Iqbal* was invoked and applied in the securities fraud context. This case was an action by the Securities and Exchange Commission against defendants who marketed and funneled funds to Bernie Madoff's fraudulent ponzi scheme. After articulating the *Iqbal* standard as requiring a complaint to have "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," the district judge dismissed the SEC's complaint as "speculative" and insufficient. Specifically, the court found that "nowhere does the complaint allege any fact that would have put defendants on notice of Madoff's fraud. Rather, the complaint supports the reasonable inference that Madoff fooled the defendants as he did individual investors, financial institutions, and regulators" and concluded, "[T]he SEC has failed to allege facts giving rise to a plausible inference of the Cohns' or Jaffe's fraudulent intent, and the securities fraud claims against them are dismissed." What is interesting about this case is that although the heightened pleading requirements of the Private Securities Litigation Reform Act (PSLRA) do not apply to actions by the SEC⁴³—meaning the SEC does not have to plead facts that show a "strong inference" of scienter—the court's application of the *Iqbal* standard arguably achieved the same result: the SEC's allegations were insufficient to support "plausible" inference of fraudulent intent.

Unlike the other circuits, the Ninth Circuit has issued a ruling that could be read as flouting *Iqbal*. In *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009), *reh'g en banc denied* 598 F.3d 1129 (9th Cir. 2010), the court held that a suit against former Attorney General John Ashcroft by another plaintiff could go forward because the allegations of direct wrongdoing by Ashcroft showed plausible entitlement to relief, even though the Supreme Court had found similar allegations against Ashcroft insufficient in *Iqbal*. The court found that the plaintiff should have the ability to go forward with discovery and only be put to proof at the summary judgment stage;⁴⁴ at the pleading stage, however, "*Twombly* and *Iqbal* do not require that the complaint include all facts necessary to carry the plaintiff's burden."⁴⁵

The amended complaint states only in a conclusory manner that all of the defendants—Dentsply and all the Dealers included—conspired and knew about the alleged plan to maintain Dentsply's market position. The amended complaint alleges, for instance, that "Dentsply made clear to each . . . dealer that every other Dentsply dealer was . . . required to agree to the same exclusive dealing arrangement, and that every other Dentsply dealer had so agreed." Iterations of this allegation are sprinkled throughout the amended complaint. But to survive dismissal it does not suffice to simply say that the defendants had knowledge; there must be factual allegations to plausibly suggest as much.

⁴² See, e.g., *Edwards v. Prime, Inc.*, ___ F.3d ___, 2010 WL 1404280 (11th Cir. 2010):

[T]he plaintiffs have never alleged that any of the defendants knew the aliens who were hired had been illegally brought into the United States. The closest the plaintiffs come is their allegation that "Prime hired and allowed employees to remain employees despite the fact that . . . they were known by Prime's management as unauthorized or ineligible to work or even be in this Country." Perhaps that allegation "gets the . . . complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." An employer may know that it hired illegal aliens without knowing how they made their way into the United States.

⁴³ See, e.g., *SEC v. Lucent Techs., Inc.*, 363 F. Supp. 2d 708, 717 (D.N.J. 2005) ("[T]he heightened requirements for pleading scienter under the PSLRA do not apply to actions brought by the SEC.").

⁴⁴ *Id.* at 978 ("Were this case before us on summary judgment, and were the facts pled in the complaint the only ones in the record, our decision might well be different. In the district court, moving forward, *al-Kidd* will bear a

The Second Circuit, too, has offered some statements that are arguably in tension with how *Twombly* and *Iqbal* have been understood by other lower courts. In a very recent decision, *Arista Records, LLC v. Doe 3*, a panel of the Second Circuit disputed that *Twombly* or *Iqbal* imposed a heightened pleading standard.⁴⁶ Rather, in its view, a complaint need only contain enough facts beyond mere legal conclusions to render the claim plausible to survive a motion to dismiss. Although some would argue that such a requirement itself is a heightening of the standard from what it was under *Conley*, the *Arista Records* panel went on to make a more remarkable statement when it indicated that allegations based on “information and belief” are still permissible under the *Twombly* standard.⁴⁷ Indeed, the Second Circuit, in a previous decision, had reversed the dismissal of a civil rights complaint based largely on “information and belief” allegations, albeit in a *pro se* context.⁴⁸

Although the Second Circuit’s allowance is a hopeful one for those interested in resisting the notion that heightened fact pleading is now the order of the day, the fact remains that the *Twombly* and *Iqbal* standard can be and has been applied in a manner that faults plaintiffs for failing to allege facts they cannot know. Such an obligation—to plead facts that support each element of a claim at the pleading stage—can be challenging for plaintiffs who lack access to all relevant information prior to discovery. This was the difficulty facing the plaintiffs in *Twombly* and *Iqbal*. In *Twombly*, the plaintiff lacked inside information that would confirm the existence of an unlawful conspiracy; as an outsider, the plaintiff was left to infer a conspiracy from the parallel anticompetitive conduct that could be observed. Only discovery would have enabled the *Twombly* plaintiff to learn of facts that would support his claim. However, it was that very discovery that the Supreme Court declared *Twombly* could not have access to, given, in the view of the Court, *Twombly*’s ability to inflict enormous discovery expense on his adversaries and thereby extort an unfair settlement.⁴⁹ In *Iqbal*, too, the plaintiff required discovery to determine whether Ashcroft and Mueller personally designed or condoned a practice of arresting and mistreating persons based on their national origin or Muslim faith. Rule 11 of the Federal Rules of Civil Procedure seems to endorse the concept of permitting plaintiffs to make allegations that either have factual support or “will likely have evidentiary support after a reasonable opportunity

significant burden to show that the Attorney General himself was personally involved in a policy or practice of alleged violations of § 3144.”).

⁴⁵ *Id.*

⁴⁶ ___ F.3d ___, 2010 WL 1729107, at *8 (2d Cir. Apr. 29, 2010) (“[T]he notion that *Twombly* imposed a heightened standard that requires a complaint to include specific evidence, factual allegations in addition to those required by Rule 8, and declarations from the persons who collected the evidence is belied by the *Twombly* opinion itself.”); *id.* (“Nor did *Iqbal* heighten the pleading requirements.”).

⁴⁷ *Id.* (“The *Twombly* plausibility standard, which applies to all civil actions, does not prevent a plaintiff from pleading facts alleged ‘upon information and belief’ where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible.”) (citing *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008)).

⁴⁸ *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008) (“[A]s *Boykin* correctly observes, the names and records, if any, of persons who were not members of the protected classes and were more favorably treated in the loan application process is information particularly within KeyBank’s knowledge and control. Pleading on the basis of information and belief is generally appropriate under such circumstances.”).

⁴⁹ *Twombly*, 127 S. Ct. at 1967 (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”).

for further investigation or discovery.”⁵⁰ Nevertheless, the Supreme Court has determined otherwise; allegations in the complaint must be grounded in fact at the pleading stage.

So far, at least one district court has taken this message to heart, dismissing a complaint in a slip-and-fall case for insufficient factual detail. In *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at *1 (W.D. Va. Aug. 24, 2009), the plaintiff alleged the following:

- She was severely and permanently injured when she fell at a Dollar General store owned and operated by the defendant and its employees and agents;
- She fell due to the negligence of the defendants, who negligently failed to remove the liquid from the floor and had negligently failed to place warning signs to alert the plaintiff of the wet floor, thereby breaching their duty to warn the plaintiff of the wet floor;
- As a result of the defendant’s negligence, she was severely and permanently injured and thus sought \$300,000 from the defendants.⁵¹

The district court in *Branham* found these allegations insufficient to state a claim of negligence. The court reasoned as follows:

In this case, the Plaintiff has failed to allege any facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff’s accident occurred. Without such allegations, the Plaintiff cannot show that she has a “right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. While consistent with the possibility of the Defendant’s liability, the Plaintiff’s conclusory allegations that the Defendant was negligent because there was liquid on the floor, but that the Defendant failed to remove the liquid or warn her of its presence are insufficient to state a plausible claim for relief. *See id.* at 570.⁵²

This is a remarkable conclusion, and one that surely would have been different under the *Conley v. Gibson* regime. But even under *Twombly/Iqbal* this result seems inappropriate. If everything the plaintiff alleged in her complaint is true, it seems that she has much more than a speculative case; her case is certainly plausible, if not probable. Further, requiring the pleader to allege facts “that show how the liquid came to be on the floor” may be asking the plaintiff for more information than she can reasonably be expected to have prior to any discovery.

Branham illustrates the real potential impact of *Twombly* and *Iqbal*: district courts can use the decisions as a license to require heightened fact pleading, even when the necessary facts lie beyond the reach of pleaders pre-discovery. But *Twombly* and *Iqbal* also may serve to embolden

⁵⁰ FED. R. CIV. P. 11(b)(3).

⁵¹ Complaint, *Branham v. Dolgencorp*, 2009 WL 2604447 (W.D. Va. 2009) (on file with the author).

⁵² *Branham*, 2009 WL 2604447, at *2.

district courts that are so inclined to turn away complaints whose merits they doubt, even though traditionally plaintiffs were to be given the benefit of the doubt at the motion to dismiss stage. Additionally, defendants may be encouraged to file more motions to dismiss under Rule 12(b)(6) than they formerly did in an effort to knock out claims that previously might have survived under *Conley*.

V. *Twombly* & *Iqbal* in State Courts

As can be seen from the preceding discussion, *Twombly* and *Iqbal* have certainly made waves at the federal level, although the precise scope and nature of their impact is still being worked out. What impact, if any, have these cases had at the state level?

A. Response to *Twombly* and *Iqbal* in FRCP “Replica” States

Over half of the states and the District of Columbia have procedural rules that replicate or are based largely on the Federal Rules of Civil Procedure, whether enacted by rule or by statute.⁵³ Among these states—which in many cases treat federal court interpretation of the Federal Rules as relevant to their own interpretation of their respective state procedural rules—the question of whether to follow the Supreme Court’s revision of the general pleading standard is most directly presented. As it turns out, the courts in such states have not universally embraced *Twombly* and *Iqbal* but rather have split on that issue.

Table 1 reports those states that have held that their pre-*Twombly* approach to pleading remains unchanged:

Table 1: Replica States Not Following *Twombly* or *Iqbal*

State	Case	Holding
Alabama	<i>Crum v. Johns Manville, Inc.</i> , 19 So. 3d 208 (Ala. Civ. App. 2009)	Our supreme court has adopted the standard set forth in <i>Conley v. Gibson</i> for the dismissal of claims under Rule 12(b)(6), Ala. R. Civ. P. Until such time as our supreme court decides to alter or abrogate this standard, we are bound to apply it, the United States Supreme Court's decision in <i>Twombly</i> notwithstanding.

⁵³ See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377 (1986). Although the term “replica” is a misnomer—there are many variations in procedure among these states from the FRCP, see John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2003), I will use the term since the states are similar to the Federal Rules with respect to the matter of interest here: pleading standards.

State	Case	Holding
Arizona	<i>Cullen v. Auto-Owners Ins. Co.</i> , 218 Ariz. 417, 189 P.3d 344 (July 25, 2008)	We granted review to dispel any confusion as to whether Arizona has abandoned the notice pleading standard under Rule 8 in favor of the recently articulated standard in <i>Bell Atlantic Corp. v. Twombly</i> . We hold that Rule 8, as previously interpreted by this Court, governs the sufficiency of claims for relief.
Colorado	<i>Western Innovations, Inc. v. Sonitrol Corp.</i> , 187 P.3d 1155 (Colo. App. 2008)	A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove facts in support of a claim that would entitle it to relief.
N. Carolina	<i>Holleman v. Aiken</i> , 193 N.C.App. 484, 668 S.E.2d 579 (N.C. App. 2008)	Plaintiff argues that this court should apply the “plausibility standard” as set forth in <i>Bell Atlantic Corp. v. Twombly</i> This Court does not have the authority to adopt a new standard of review for motions to dismiss.
Tennessee	<i>Morris v. Grusin</i> , 2009 WL 4931324 (Tenn. Ct. App. 2009)	[T]he United States Supreme Court’s standard for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) does not bind the courts of this state regarding dismissals under Tennessee Rule of Civil Procedure 12.02(6). . . . Accordingly, we are not at liberty to adopt the more liberal standard for dismissing complaints for failure to state a claim urged by Defendants.
Vermont	<i>Colby v. Umbrella, Inc.</i> , 184 Vt. 1, 955 A.2d 1082 (2008)	[W]e have relied on the <i>Conley</i> standard for over twenty years, and are in no way bound by federal jurisprudence in interpreting our state pleading rules. We recently reaffirmed our minimal notice pleading standard . . . and are unpersuaded by the dissent’s argument that we should now abandon it for a heightened standard.
Washington	<i>Save Columbia CU Committee v. Columbia Community Credit Union</i> , 150 Wash. Ct. App. 176, 206 P.3d 1272 (2009)	We . . . reject <i>Twombly</i> until the state Supreme Court specifically holds otherwise.

It should be noted that only in Alabama and Vermont have the highest state courts expressly rejected *Twombly* and decided to stick with notice pleading. The remaining states in Table 1 involve courts that lacked the authority to embrace *Twombly* until their respective highest courts had done so. Thus, in these jurisdictions there is still the possibility that *Twombly*’s approach to pleading will be adopted.

Table 2 shows those replica jurisdictions that have followed the Supreme Court’s lead and applied the *Twombly* understanding of the general pleading standard to the interpretation of their respective pleading rules:

Table 2: Replica States Embracing *Twombly* or *Iqbal*

State	Case	Holding
D.C.	<i>Grayson v. AT & T Corp.</i> , 980 A.2d 1137 (D.C. 2009)	Under the Court's decision in <i>Ashcroft</i> , “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
Maine	<i>Bean v. Cummings</i> , 939 A.2d 676 (Me. 2008)	More recently, however, in <i>Bell Atlantic Corporation v. Twombly</i> , the Supreme Court stated: “... On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires.” [The Court affirmed application of a heightened pleading standard in a civil perjury case.]
Massachusetts	<i>Iannacchino v. Ford Motor Co.</i> , 451 Mass. 623, 888 N.E.2d 879 (2008)	[W]e take the opportunity to adopt the refinement of [the pleading] standard that was recently articulated by the United States Supreme Court in <i>Bell Atl. Corp. v. Twombly</i> . We agree with the Supreme Court's analysis of the <i>Conley</i> language . . . and we follow the Court's lead in retiring its use.
Minnesota	<i>Bahr v. Capella University</i> , 765 N.W.2d 428 (Minn. Ct. App. 2009)	[W]e are mindful that the United States Supreme Court has recently corrected this standard insofar as it suggests that the future introduction of evidence can substitute for an adequate statement of facts in the complaint; the statement of entitlement to relief must go beyond “labels and conclusions” or the “speculative” presentation of a claim.
Montana	<i>McKinnon v. Western Sugar Co-Op. Corp.</i> , 2010 WL 411552 (Mont. 2010)	This Court, like other courts, has steadfastly rejected the use of conclusory statements in a pleading in the absence of factual basis. <i>Ashcroft v. Iqbal</i> (Courts “are not bound to accept as true a legal conclusion couched as a factual allegation.”); <i>Bell Atlantic Corp. v. Twombly</i> (“[A] pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.”).
Ohio	<i>Parsons v. Greater Cleveland Regional Transit Auth.</i> , 2010 WL 323420 (Ohio Ct. App. 2010)	However, the claims set forth in the complaint must be plausible, rather than conceivable. . . . Factual allegations must be enough to raise a right to relief above the speculative level.
South Dakota	<i>Sisney v. Best Inc.</i> , 754 N.W.2d 804 (S.D. 2008)	Because SDCL 15-6-8(a) also requires a “showing” that the pleader is “entitled” to relief, we adopt the Supreme Court's new standards [from <i>Twombly</i>].

Note that five of these seven statements embracing *Twombly* or *Iqbal* emanate from the highest courts in those states.

Although Indiana, a replica state, has not adopted or rejected *Twombly* yet, it has taken note of the case and will likely decide whether to embrace *Twombly* when the issue is squarely presented to one of its courts for resolution.⁵⁴ West Virginia has expressly reserved judgment on this question as well.⁵⁵ Georgia has cited *Twombly* once for the proposition that a complaint “must contain more than a formulaic recitation of the elements of a legal cause of action,” but has not otherwise determined whether to adopt *Twombly* as a whole.⁵⁶ The remaining replica states—Alaska, Hawaii, Idaho, Kansas, Kentucky, Mississippi, Nevada, New Mexico, North Dakota, Oklahoma, Rhode Island, Utah, and Wyoming—have not addressed whether to adopt the *Twombly/Iqbal* approach to pleading at all.

B. Response to *Twombly* and *Iqbal* in Non-Replica States

Among the states that do not track the Federal Rules of Civil Procedure in their own rules, there are two categories into which such states must be placed: those that have notice pleading and those that require fact pleading. Iowa, Michigan, New Hampshire, and Wisconsin fall into the former category. Of these, Iowa, New Hampshire, and Wisconsin have not mentioned *Twombly* or *Iqbal* in any of their decisions; Michigan has mentioned *Twombly* but did not expressly decide whether to adopt its approach.⁵⁷

The remaining states are those that required fact pleading before *Twombly* was decided and continue to do so. It cannot be expected that *Twombly* would have much of an impact on pleading standards in these states, given that *Twombly* simply brings the federal approach more in line with that already taken in fact-pleading states. Only five of the seventeen fact-pleading states have mentioned the pleading decisions of *Twombly* or *Iqbal*: Connecticut⁵⁸ and Louisiana⁵⁹ cited *Twombly* in antitrust cases that were before them; New York cited *Iqbal* as support for its understanding that implausible allegations may be discarded;⁶⁰ Delaware cited *Twombly* as

⁵⁴ *State v. Am. Family Voices, Inc.*, 898 N.E.2d 293 (Ind. 2008):

Though this case requires us to apply T.R. 12(B)(6), the parties do not contend that the issue decided in a recent watershed opinion under Fed.R.Civ.P. 12(b)(6) is at stake [*Twombly*]. . . . The new federal rule is that, to survive a motion to dismiss, a complaint must contain factual allegations “enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true.” Even though not joined here, we mention this issue because of the avalanche of cases addressing it

⁵⁵ *See, e.g., Hoover v. Moran*, 222 W. Va. 112, 116 n.3, 662 S.E.2d 711, 715 n.3 (2008) (“For the purposes of the decision in this case, we need not decide whether this Court will adopt the *Twombly* standard.”).

⁵⁶ *Charles H. Wesley Educ. Found., Inc. v. State Election Bd.*, 282 Ga. 707, 654 S.E.2d 127 (2007).

⁵⁷ *Duncan v. State*, 284 Mich. Ct. App. 246, 326 n.24, 774 N.W.2d 89, 136 n.24 (2009) (“To the extent that *Ashcroft*, a case interpreting the Federal Rules of Civil Procedure and cases construing those rules, even has application to the case at bar, which is controlled by the Michigan Court Rules, it does not support summary dismissal of plaintiffs’ complaint.”).

⁵⁸ *State v. Liberty Mut. Holding Co., Inc.*, 2009 WL 943094 (Conn. Super. Ct. 2009).

⁵⁹ *Tuban Petroleum, L.L.C. v. SIARC, Inc.*, 11 So. 3d 519 (La. Ct. App. 2009).

⁶⁰ *Creative Interiors, Inc. v. Epelbaum, Slip Copy*, 2009 WL 2382986 (Table) (N.Y. 2009).

reflecting the pre-existing fact-pleading standard already followed in that state;⁶¹ and Nebraska simply mentioned *Twombly* in the course of articulating the requirements for pleading a claim under Section 1983.⁶² The remaining fact-pleading states have not mentioned *Twombly* or *Iqbal*'s pleading decisions at all up to this point.⁶³

C. The Normative Question: How *Should* States Respond to *Twombly* and *Iqbal*?

With at least seven notice pleading states embracing *Twombly* and *Iqbal*'s interpretation of Rule 8's pleading standard as their own, that brings the total to 25 states that either explicitly require fact-pleading or the more stringent approach to pleading reflected in those two cases. Thus, post-*Twombly* and *Iqbal* the balance between "notice" pleading states and fact/plausibility-pleading states has shifted toward parity where notice pleading appeared to hold sway before.⁶⁴

At this critical juncture, it is important for states that have yet to decide whether to adopt the *Twombly/Iqbal* approach and for states in the midst of doing so to consider the wisdom of such a course. I can only offer a few reflections in service of state judiciaries' respective efforts to confront this question.

1. Policy Considerations

First, any effort to shape or revise pleading rules must be grounded in a clear view of the purpose of pleadings in a civil justice system; one cannot know how stringent pleading standards should be without knowing what goals are being served thereby. Specifically, what ends are complaints supposed to serve? There is the oft-mentioned notice-giving function, but certainly a complaint's purpose goes beyond that. I suggest there are three principal functions of pleading:

- *The Instigation Function*—the complaint initiates the case with the court and gives the defendant something to which to respond. The traditional aim of providing "notice" may be subsumed within this function.
- *The Framing Function*—the complaint should identify the nature and contours of the dispute for purposes of discovery, judicial case management, determination of the jury right, and *res judicata*.

⁶¹ See, e.g., *BASF Corp. v. POSM II Properties P'ship, L.P.*, 2009 WL 522721, at *6 n.43 (Del. Ch. 2009) (remark- ing, after stating that Delaware required pleaders to "plead facts," that "the U.S. Supreme Court has adopted a simi- lar standard") (citing *Twombly*).

⁶² *Holmstedt v. York County Jail Supervisor (Name Unknown)*, 15 Neb. Ct. App. 893, 739 N.W.2d 449 (2007).

⁶³ The remaining fact-pleading states are Arkansas, California, Florida, Illinois, Louisiana, Maryland, Missouri, South Carolina, Oregon, Pennsylvania, Texas, and Virginia.

⁶⁴ Although it should be acknowledged that notice pleading states may, like many of the circuit courts prior to *Twombly*, have proclaimed an adherence to a notice pleading standard while in truth requiring more factual details than that label would seem to imply. Thus, the pre-*Twombly* picture regarding the balance between fact-pleading and notice-pleading states is inevitably imprecise.

- *The Filtering Function*—the complaint should permit the defendant and the court to identify facially invalid claims that should be dismissed.⁶⁵

It is the last of these functions that generally animates our calibration of pleading standards. But pleadings are a poor vehicle for engaging in anything more than the screening of clearly baseless claims as Rules architect Charles Clark remarked long ago.⁶⁶ The *Twombly/Iqbal* plausibility standard goes beyond identifying clearly meritless claims; it screens for *doubtful* claims. In other words, complaints that fail to satisfy the *Twombly/Iqbal* standard admittedly contain allegations that support the possibility of liability but lack additional facts that make the claims plausible. In this way the plausibility pleading standard is overinclusive, weeding out (and deterring) potentially meritorious claims on the ground that the plaintiff has yet to substantiate them.⁶⁷

Whether it is advisable to screen for meritless and doubtful claims at the pleading stage is a policy determination that must be addressed as state courts decide whether to follow *Twombly* and *Iqbal* in their states. Certainly, as alluded to above, there are instances when plaintiffs lack access to information critical to their claims because it pertains to states of mind, concealed wrongful acts, or otherwise to information within the exclusive control of the defendant. To the extent the *Twombly/Iqbal* standard closes the courthouse door to such litigants, serious access to justice questions are raised and should be resolved before any state determines to embrace the plausibility standard.⁶⁸

2. Practical Considerations

The *Twombly* decision was motivated by specific practical concerns on the part of the Supreme Court regarding discovery abuse, the high costs of litigation, and heavy judicial caseloads and a lack of faith in the ability of judges to manage these issues using other tools.⁶⁹ For states, then, the question is whether these same challenges are present in their respective civil justice systems: Are too many frivolous cases being filed? Are your civil dockets overburdened

⁶⁵ Spencer, *Plausibility Pleading*, *supra* note 14, at 490.

⁶⁶ Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) (“Experience has shown, therefore, that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function.”).

⁶⁷ See Spencer, *Understanding Pleading Doctrine*, *supra* note 26, at 24–25.

⁶⁸ Some states have constitutional provisions protecting access to courts (so-called “open courts” provisions) that should be consulted in this regard. See, e.g., Colo. Const. art. 2, section 6 (“Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.”). However, because *Twombly* and *Iqbal* do not purport to create a pleading standard that arbitrarily singles out certain types of cases but rather articulates a general standard requiring some specificity, open courts provisions are likely not implicated.

⁶⁹ *Twombly*, 127 S. Ct. at 1967 (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management,’ given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by ‘careful scrutiny of evidence at the summary judgment stage,’ much less ‘lucid instructions to juries’”).

with cases? Are discovery costs out of control? Is discovery abuse a problem in your system?⁷⁰ Although I would question the wisdom and necessity of resorting to pleadings decisions as a means of addressing these concerns,⁷¹ to the extent one concurs with the Supreme Court's judgment that tighter pleading scrutiny is the answer—and to the extent that these are problems plaguing a state's civil justice system—it may make sense to give plausibility pleading some consideration.

3. Doctrinal Considerations

There is not consensus on the true meaning and import of *Twombly* and *Iqbal*. Although the case can be made that these decisions effectively endorse a heightened fact-pleading approach on the federal level, others have persuasively argued that these decisions should not be read in that way. Thus, state jurists who see *Twombly* and *Iqbal* not as revolutionary cases that have done away with notice pleading but rather as decisions that give greater clarity and precision to what notice pleading has always been understood to require should not find much reason to reject the cases. In other words, to the extent *Twombly* and *Iqbal* reflect a state's prior understanding of what was demanded of pleadings under a notice pleading regime, those cases equip judges in those states with a language that will better communicate what is expected and how, precisely, any given statement of a claim falls short.

In short, in those states that may have nominally had a notice pleading system but in effect already required the pleading of some factual details within that context, *Twombly* and *Iqbal* may be embraced as buttressing those prior understandings of the general pleading standard and as lighting the way for state courts that continue to have an interest in seeing such information before permitting a case to proceed.

However, if judges in notice pleading states view *Twombly* and *Iqbal* as decisions that do indeed mark a move in the direction of fact-pleading, then the decision whether to mimic that move is squarely presented. I submit that if a notice-pleading jurisdiction has previously expressed its commitment to simplified pleading for various policy reasons such as promoting access to justice, it should not treat *Twombly* and *Iqbal* as undermining such policies in any way. Rather, those decisions reflect the Supreme Court's embrace of different policy concerns that states should feel free to discount when addressing pleading in their own systems.

⁷⁰ Note that these are questions that are difficult to answer with much certainty. One often has a sense of the answers to these questions but such answers are typically based on anecdotal evidence and personal experience more so than hard empirical evidence. Any effort to address these issues thus should be accompanied by some attempt to define terms like “frivolous” and “discovery abuse” with precision and to explore these questions through methods that go beyond the impressionistic.

⁷¹ Careful case management, as suggested by Justice Stevens in his *Twombly* dissent, would be an example of an approach that could reconcile notice pleading with the need to screen frivolous claims and protect against discovery abuse. *Twombly*, 127 S. Ct. at 1975 (Stevens, J., dissenting) (“Those concerns merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking.”).

VI. Conclusion

Twombly and *Iqbal* clearly are watershed decisions that mark a shift in the burden pleaders will face to adequately state their claims to avoid dismissal. Even if “heightened pleading” misdescribes the plausibility pleading standard that arises from these cases, it is clear that fact pleading, more so than notice pleading, is the label that is more apt. Factual allegations in support of one’s claims are necessary, and defendants who identify factual gaps in the allegations underlying a claim can feel a bit more confident that efforts to dismiss such claims prior to filing an answer will gain some traction. Practitioners would be advised to keep abreast of developments in their respective jurisdictions as decisions on *Twombly* motions continue to issue and give shape to our understanding of a litigant’s pleading obligations in the ordinary civil case.