

10-1-2013

## A Plausible Future: Some State Courts Embrace Heightened Pleading after Twombly and Iqbal

Joseph W. Owen

Follow this and additional works at: <https://archives.law.nccu.edu/ncclr>

 Part of the [Courts Commons](#), and the [Law Enforcement and Corrections Commons](#)

---

### Recommended Citation

Owen, Joseph W. (2013) "A Plausible Future: Some State Courts Embrace Heightened Pleading after Twombly and Iqbal," *North Carolina Central Law Review*: Vol. 36 : No. 1 , Article 6.  
Available at: <https://archives.law.nccu.edu/ncclr/vol36/iss1/6>

This Note is brought to you for free and open access by History and Scholarship Digital Archives. It has been accepted for inclusion in North Carolina Central Law Review by an authorized editor of History and Scholarship Digital Archives. For more information, please contact [jbeeker@nccu.edu](mailto:jbeeker@nccu.edu).

## A 'PLAUSIBLE' FUTURE: SOME STATE COURTS EMBRACE HEIGHTENED PLEADING AFTER *TWOMBLY* AND *IQBAL*

JOSEPH W. OWEN\*

In the 2007 decision of *Bell Atlantic v. Twombly*, the United States Supreme Court retired the well-settled 'notice pleading' standard that had become fundamental to the scheme of civil procedure in the United States for nearly 50 years. The Court crafted a new 'plausibility' standard that directed trial judges to dismiss complaints that failed to state a claim that was "plausible on its face." However, since *Twombly* involved a complex set of antitrust claims, it was initially unclear whether the new standard applied to all civil pleadings or only to abstract allegations of conspiracy. In 2009, any confusion as to the applicability of the heightened pleading requirement was settled by the decision of *Ashcroft v. Iqbal*. In *Iqbal*, the Court revisited the question of what civil litigants must plead under Rule 8(a)(2) of the Federal Rules of Civil Procedure to survive a 12(b)(6) motion to dismiss, declaring that the new 'plausibility' standard applies to all civil pleadings in federal court.

While many scholars have focused their inquiry on federal pleading practice following *Twombly* and *Iqbal*, very little has been discussed regarding the potential impact on state pleading practice following the "retirement" of notice pleading. Notwithstanding the fact that neither *Twombly* nor *Iqbal* is binding on the States, several state courts have chosen to embrace the heightened standard and effectively change the pleading regime in their respective jurisdiction without action of the legislature. This Comment analyzes various state court decisions that both embrace and reject the new 'plausibility' standard, emphasizing the potential consequences that may flow from the decision to blindly follow the Court, a practice that has proven to hinder the administration of justice for aggrieved plaintiffs.

### I. INTRODUCTION

As many are now well aware, the federal pleading standard changed when the Supreme Court articulated a new 'plausibility standard' in

---

\* North Carolina Central University School of Law, J.D. expected 2014; I am grateful for the insight and advice provided by Professor Susan E. Hauser and Professor David A. Green of North Carolina Central University School of Law.

*Bell Atlantic Corp. v. Twombly*<sup>1</sup> and further embraced this standard in *Ashcroft v. Iqbal*.<sup>2</sup> Notwithstanding the seemingly clear language of Rule 8(a)(2) of the *Federal Rules of Civil Procedure*, which requires a pleading to “contain a short and plain statement of the claim showing that the pleader is entitled to relief,”<sup>3</sup> the Supreme Court’s recent interpretation of this requirement has been anything but short and plain.

Heightened pleading in state court may be a ‘plausible’ future for litigants as more states join the trend in adopting *Twombly* and *Iqbal* within their own pleading regime. This comment will analyze state court decisions that have both accepted and rejected the new plausibility standard set out in *Twombly* and *Iqbal* with an emphasis on the states that have chosen to adopt the new standard in their respective jurisdictions. While the standard set forth in *Twombly* and *Iqbal* is not directly binding on the states,<sup>4</sup> many have modeled their respective rules of civil procedure after the Federal Rules and find Supreme Court interpretations of those rules “persuasive.”<sup>5</sup> Notably, some state courts have expressly embraced<sup>6</sup> the plausibility standard while others have either been silent on the issue or expressly rejected the standard set forth in *Twombly* and *Iqbal*.<sup>7</sup>

The intentionally ambiguous language<sup>8</sup> of Rule 8 was a part of a well-settled practice of “notice pleading” where the plaintiff set forth

---

1. *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570 (2007) (the new federal standard requires the plaintiff to plead “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”).

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

3. See FED. R. CIV. P. 8(a)(2).

4. See Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109,110 (2010) (noting that the *Twombly* and *Iqbal* are not directly binding on the states but are persuasive. Moreover, currently 26 states model their pleading rules after the Federal Rules of Civil Procedure).

5. See e.g., J. Thomas Richie & Anna Manasco Dionne, *Twombly and Iqbal: The Effect of the “Plausibility” Pleading Standard on Alabama Litigators*, 71 ALA. LAW. 75, 77 (2010) (“[T]he Alabama rules are modeled on the federal rules, and there is a longstanding tradition that “[f]ederal cases construing the Federal Rules of Civil Procedure are persuasive authority in construing the Alabama Rules of Civil Procedure since they were patterned after the Federal Rules.”).

6. See e.g., *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (2008) (when confronted with the new standard Mass. Supreme Court held, “[w]e take the opportunity to adopt the refinement of that standard that was recently articulated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*”). See also, Ryan Mize, *From Plausibility to Clarity: An Analysis of the Implications of Ashcroft v. Iqbal and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1259 (2010) (noting that courts remain split on whether to adopt new plausibility standard).

7. See, e.g., *Holleman v. Aiken*, 668 S.E.2d 579, 584 (2008) (noting, “[t]o date, North Carolina has not adopted the ‘plausibility standard’ set forth in *Twombly* for 12(b)(6) motions to dismiss.” The court of appeals further noted that it lacked authority to adopt a new standard of review for motions to dismiss).

8. See Mark Hermann et. al., *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141 (2009) (explaining the primary draftsman of the

a short and plain statement of their claim to put the defendant on notice.<sup>9</sup> In 1957, the Supreme Court first articulated its interpretation of Rule 8 in *Conley v. Gibson*, which famously stated that, “[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.”<sup>10</sup> For nearly 50 years following *Conley*, once the pleading requirement was met plaintiffs were given the opportunity to further develop the merits of their claims through liberal discovery rules.<sup>11</sup>

In 2007, the Supreme Court crafted a new pleading standard for plaintiffs seeking relief in federal court in *Bell Atlantic Corp. v. Twombly*.<sup>12</sup> The Court set aside the *Conley* “no set of facts” standard, stating a plaintiff can survive a motion to dismiss “only if the complaint contains sufficient factual matter to state a claim to relief that is *plausible* on its face.”<sup>13</sup> The Court further held a complaint must include enough factual matter to “[nudge] their claims across the line from conceivable to plausible.”<sup>14</sup> Since this decision changed the way in which trial judges are to assess 12(b)(6)<sup>15</sup> motions to dismiss, *Twombly* quickly became one of the most cited Supreme Court cases in history.<sup>16</sup>

While it was initially unclear whether the new standard would apply to all cases or be limited to *Twombly*,<sup>17</sup> *Ashcroft v. Iqbal* settled that

---

1938 Rules, Charles Clark, said “we made a generalized statement in the rules and to one judge a short and plain statement may require much more than it does to others”). See also, AM. BAR ASS’N RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES AT CLEVELAND, OHIO 240 (William W. Dawson ed., 1938).

9. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003).

10. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (emphasis added).

11. See David A. Green, *Friend or Foe: The Supreme Court’s “Plausible Claim” Standard Provides Another Barrier for Plaintiffs in Employment Discrimination Cases*, 39 S.U. L. REV. 1, 2 (2011).

12. Jane E. Willis & F. Turner Buford, *Articulating Twombly: The Iqbal Framework for the Lower Courts*, The Committee on Pretrial Practice & Discovery (A.B.A. Pretrial Practice), Fall 2009.

13. *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570 (2007) (emphasis added).

14. *Id.* at 547.

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

16. See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1357 (calling *Twombly* one of the most frequently cited Supreme Court decisions of all time; noting *Twombly* had been cited 14,645 times as of June 30, 2009); See also, Anthony Martinez, *Plausibility Among the Circuits: An Empirical Survey of Bell Atlantic Corp. v. Twombly*, 61 ARK. L. REV. 763, 772 (2009) (noting that *Twombly* had been cited over 10,000 times since November 2008, and a significant number are applying plausibility standard outside of the antitrust setting).

17. Since *Bell Atl. Corp. v. Twombly* was an antitrust case based on the Sherman Act, 15 U.S.C. §§ 1-7, it was initially unclear whether the standard was limited to antitrust litigation.

question in 2009.<sup>18</sup> In *Iqbal*, the Supreme Court revisited the plausibility language in *Twombly* and confirmed that the new standard applied to all civil pleadings in federal court.<sup>19</sup> This comment demonstrates how the plausibility standard has managed to find its way into various state courts, and it will assess the potential impact that *Twombly* and *Iqbal* could have on civil procedure in states across the nation unless Congress steps in and reverses the current interpretation of *Federal Rule of Civil Procedure* 8(a)(2).

## II. BACKGROUND

### A. *Conley*:

In the landmark decision of *Conley v. Gibson*,<sup>20</sup> a group of African-American railroad employees filed a class action lawsuit against their local union alleging the union violated its duty of fair representation by refusing to represent all employees in an equal manner.<sup>21</sup> The union filed a motion to dismiss for failure to state a claim which was granted by the district court and later affirmed by the Fifth Circuit.<sup>22</sup> Since this case involved an important question of employee rights the Supreme Court granted certiorari.<sup>23</sup> The Court took this opportunity to clarify that Rule 8(a) of the *Federal Rules of Civil Procedure* does not require specific factual allegations, stating:

[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. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. Such simplified “notice pleading” is made possible by the liberal opportunity for discovery and other pretrial procedures rules.<sup>24</sup>

The Court clarified Rule 12(b)(6),<sup>25</sup> by declaring a complaint should not be dismissed for failure to state a claim unless “[i]t appears beyond a doubt that the plaintiff can prove *no set of facts* to support his

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

19. *Id.* at 678.

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

21. *Id.* at 42. (employees sought relief from invidious discrimination pursuant to the Railway Labor Act, 45 U.S.C. 151 *et seq.*, which obligated union agents to represent all employees fairly and without discrimination based on an employee’s race).

22. *Id.* at 43-44. (the District Court and Court of Appeals for the Fifth Circuit apparently relied on the same grounds in granting the defendants motion to dismiss, holding that Congress had given exclusive jurisdiction of such controversies to the ‘Adjustment Board’).

23. *Id.* at 44.

24. *Id.* at 47 (emphasis added) (respondents argued that the complaint failed to set forth specific factual allegations to support its general allegations of discrimination and that it was thus proper to grant a motion to dismiss for failure to state a claim).

25. See FED. R. CIV. P. 12(b)(6).

claim.”<sup>26</sup> At the time the Court was willing to risk the possibility that some plaintiffs would file meritless claims in an effort to ensure all plaintiffs had proper access to courts.<sup>27</sup> Further, the Court rejected the notion that pleading was simply a “[g]ame of skill in which one misstep of counsel may be decisive to the outcome [of the case]” and embraced the idea that the pleading standard should be construed to simply provide fair notice to defendants of the plaintiffs’ claims.<sup>28</sup>

Following *Conley*’s notice pleading standard, judges were to accept all factual allegations contained in the complaint as true and draw all inferences in favor of the pleader, understanding Rule 8 as a device designed to keep cases in court as opposed to excluding them.<sup>29</sup> It is important to note that the reach of the liberal notice pleading standard set forth in *Conley* was not limited to federal courts since many states that modeled their rules of civil procedure after the Federal Rules soon followed the lead of the Supreme Court by applying a similar “no set of facts” standard when assessing a 12(b)(6) motion to dismiss.<sup>30</sup>

### B. *Twombly*

In its 2007 decision of *Bell Atlantic Corp. v. Twombly*, Justice Souter writing for the majority declared that *Conley*’s “no set of facts” language had been “questioned, criticized, and explained long enough.”<sup>31</sup> The Court went on to declare that *Conley* had earned its retirement:

[a]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard.<sup>32</sup>

*Twombly* involved a putative class action suit alleging conspiracy and “parallel conduct”<sup>33</sup> under the Sherman Antitrust Act<sup>34</sup> against

26. *Conley*, 355 U.S. at 45-46 (emphasis added).

27. Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1818 (2008). See also, GREEN, *supra* note 11, at 22.

28. *Conley*, 355 U.S. at 48.

29. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 18 (2010).

30. See Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 115 (2010) (noting that *Conley* decision had impact on many states who patterned rules of civil procedure after the Federal Rules of Civil Procedure); See e.g., *Halvorson v. Dahl*, 574 P.2d 1190, 1191 (Wash. 1978) (“[O]n a 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff’s allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim.” (citing *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293 (1975))).

31. See *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 562 (2007).

32. *Id.* at 563.

33. Parallel conduct is often used as circumstantial evidence in antitrust cases. See e.g., George G. Gordon, *Issues in the Law on Parallel Conduct and Proof of Conspiracy*, 1 SEDONA

several local telephone and internet carriers who allegedly conspired not to compete with each other in their respective markets.<sup>35</sup> In finding the allegations of conspiracy alone insufficient to state a claim under the Sherman Act, the District Court dismissed the plaintiff's complaint under Rule 12(b)(6).<sup>36</sup> On appeal, the Second Circuit reversed, holding that the District Court "tested the complaint by the wrong standard."<sup>37</sup> In order to resolve the dispute over the proper pleading standard for pleading an antitrust conspiracy the Supreme Court granted certiorari.

The Supreme Court started by criticizing the court of appeals literal reading<sup>38</sup> of *Conley* and then reiterated its "retirement" of *Conley*'s "no set of facts" standard. Then the Court proceeded to articulate a new standard stating that a plaintiff "must plead enough facts to state a claim to relief that is plausible on its face."<sup>39</sup> The Court demanded more than mere conclusory allegations of parallel business conduct asserting:

[W]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.<sup>40</sup>

Applying these principles to the complaint at issue, the Court held that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice"<sup>41</sup> and reversed and remanded the case. While the Court denied that it created a 'heightened' pleading standard,<sup>42</sup> it is clear that a heavier burden is now placed on plaintiffs under Federal

---

CONF. J. 147, 150 (2000) (noting, "[I]n its most general sense, the term [parallel conduct] refers to a pattern of uniform business practices engaged in by alleged conspirators. . .").

34. The Sherman Antitrust Act is codified as 15 U.S.C. §§ 1-7 (§ 1 of the Act states that "[E]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint on trade or commerce among the several States or with foreign nations, is declared to be illegal.>").

35. *Twombly*, 550 U.S. at 551 (the plaintiffs represented a putative class consisting of all "subscribers of local telephone and/or high speed internet services from February 8, 1996 to present." One of the plaintiff's allegations was "parallel conduct" which involves conspiracies or agreements among competitors in violation of § 1 of the Sherman Act).

36. *Id.* at 552 ("[t]he District Court understood that allegations of parallel business conduct, taken alone, do not state a claim under § 1 [of the Act]).

37. *Id.* at 553.

38. *See Id.* at 561 ("[O]n such a focused and literal reading of *Conley*'s 'not set of facts,' a wholly conclusory statement of [a] claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery").

39. *Id.* at 570.

40. *Id.* at 555.

41. *Id.* at 556.

42. *See Id.* at 570

Rule 8(a)(2).<sup>43</sup> The Court in *Twombly* based its interpretation of Federal Rule 8 primarily on the notion that conclusory conspiracy allegations lead to enormous amounts of costly discovery, stating: “[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that antitrust discovery can be expensive.”<sup>44</sup>

In his dissent, Justice Stevens characterized the Court’s analysis as a “dramatic departure from settled procedural law”<sup>45</sup> stating that *Conley* had long been cited by the Supreme Court as adequate authority and not until this case was *Conley*’s interpretation of Federal Rule 8 “questioned,” “criticized,” or “explained away” by the Court.<sup>46</sup> Moreover, Justice Stevens found this case to be a poor vehicle to achieve such a dramatic departure from *Conley*, suggesting:

[I] would not rewrite the Nation’s civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so.<sup>47</sup>

Rather than the haphazard analysis posed by the majority, Justice Stevens suggested that revisions to rules of procedure should be done in accordance with well-established procedures set forth by Congress.<sup>48</sup>

In the months following *Twombly*, there was significant confusion among the lower federal courts and litigants as to whether the “plausibility” standard was limited to federal antitrust cases or whether it applied to all civil pleadings.<sup>49</sup> The decision marked a significant change in civil procedure since *Conley* had become a staple in both federal and state courts for nearly 50 years.<sup>50</sup> It was soon apparent that *Twombly* would become one of the most cited Supreme Court opinions of recent history. For instance, by November 2007, 168 circuit

43. See GREEN, *supra* note 11, at 20-21; See also *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (noting the “pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring the plaintiff to plead more than the possibility of relief to survive a motion to dismiss”)

44. *Twombly*, 550 U.S. at 546.

45. *Id.* at 573.

46. *Id.* at 578 (Justice Stevens noted that *Conley* had been authority in dozens of opinions of the Supreme Court and not one of the 16 opinions questioned its adequacy).

47. *Id.* at 579 (noting that the petitioners nor the six *amici* who filed briefs in support of the petitioners did not requested the *Conley* formation to be retired).

48. *Id.*; See generally Rules Enabling Act, 28 U.S.C. §§ 2072-2074 (2011).

49. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 858 (2008) (“*Twombly* had effectively overruled *Conley* and imposed a new, more-stringent pleading standard for (1) all cases not already subject to “heightened” pleading under Rule 9(b) and the Private Securities Litigation Reform Act; (2) all conspiracy cases; or (3) antitrust conspiracy cases only”).

50. See Alana C. Jochum, *Pleading in Ohio After Bell Atlantic v. Twombly and Ashcroft v. Iqbal: Why Ohio Shouldn’t “Notice” A Change*, 58 CLEV. ST. L. REV. 495, 508 (2010) (noting that many states followed *Conley*’s well established notice pleading standard).



court decisions and over 2,000 district court decisions had cited the *Twombly* opinion.<sup>51</sup>

### C. *Iqbal*

Any confusion as to whether *Twombly* was limited to antitrust litigation was settled by the Supreme Court in its 2009 decision of *Ashcroft v. Iqbal*.<sup>52</sup> Following the September 11, 2001 terrorist attacks on the United States, respondent Iqbal, a Pakistani Muslim, was arrested by federal law enforcement and placed in a New York detention center.<sup>53</sup> Once in custody, Iqbal was deemed a person of “high interest” and was placed under maximum-security conditions where he remained until entering a plea of guilty on charges of conspiracy to defraud the United States.<sup>54</sup> Subsequent to his release, Iqbal filed a *Bivens*<sup>55</sup> action against 34 current and former federal officials<sup>56</sup> and 19 unnamed correctional officers, in which he alleged, *inter alia*, mistreatment based on his race, religion and national origin.

The petitioners moved to dismiss the complaint under Rule 12(b)(6)<sup>57</sup> arguing the respondent failed to state sufficient allegations to show their involvement in the unconstitutional conduct.<sup>58</sup> In denying the motion to dismiss, the District Court found, “[i]t cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief” relying principally on *Conley*’s “no set of facts” language.<sup>59</sup> While the petitioners’ appeal to the Second Circuit was pending, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, which presented new criteria for judges to utilize when considering whether a complaint is sufficient survive a 12(b)(6) motion to dismiss.<sup>60</sup> Considering the case before it, the Second Circuit acknowledged *Twombly*’s retirement of *Conley*’s “no set of facts” standard and concluded that *Twombly* required a ‘flexible plausibility standard’ that requires some factual allegations “in those contexts where such

51. See McMAHON, *supra* note 49, at 852 (“[A]s of November 21, 2007, a Westlaw search indicated that *Twombly* had been cited in 168 decisions by circuit courts and 2,159 decisions by district courts”).

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

53. *Id.* at 666.

54. *Id.* at 668 (respondent also plead guilty to charges relating to identification documents).

55. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (a “*Bivens* action” is commonly brought by persons who allege constitutional violations against federal law enforcement agents).

56. Among the federal officials named in the *Bivens* action were John Ashcroft, the 79th Attorney General of the United States and former director of the Federal Bureau of Investigation (“FBI”), Robert S. Mueller. See *Iqbal*, 556 U.S. at 666.

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

58. *Iqbal*, 556 U.S. at 669.

59. *Id.*

60. *Id.*

amplification is needed to render the claim plausible.”<sup>61</sup> The court of appeals affirmed the holding of the district court, stating the case was not one of those “contexts” requiring “amplification,” and thus the respondent’s complaint was sufficient to state a claim for relief.<sup>62</sup> To address the uncertainty surrounding the new pleading standard after *Twombly*, the Supreme Court granted certiorari.<sup>63</sup>

The Supreme Court, with Justice Kennedy writing for the majority,<sup>64</sup> expressly rejected the notion that *Twombly* should be limited to “pleadings made in the context of an antitrust dispute,” declaring that such an argument is not supported by *Twombly* and is “incompatible with the Federal Rules of Civil Procedure.”<sup>65</sup> The Court went on to note that “*Twombly* expounded the pleading standard for ‘all civil actions’ and it applies to antitrust and discrimination suits alike.”<sup>66</sup> The Court summarized the new ‘plausibility standard’ by stating:

To 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*.’ A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’*<sup>67</sup>

The Court went on to explain the two “working principles” underlying the Court’s decision in *Twombly* insofar that legal conclusions in the complaint will not be ‘accepted as true’ and that only a complaint that states a ‘plausible claim for relief’ will survive a 12(b)(6) motion to dismiss.<sup>68</sup>

#### D. *Iqbal*’s Two-Pronged Approach:

Although it was far from clear, the Court articulated a “two-pronged” approach for assessing a complaint under the new plausibility

61. *Id.* at 670; (quoting *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007)).

62. *Id.* (Judge Cabranes concurred, agreeing with the majority’s discussion of pleading requirements but expressed concern since the suit subjected high-ranking government officials to the burdens of discovery on “a complaint as nonspecific as respondent’s”).

63. *Id.*

64. *Id.* at 666. Justice Kennedy was joined by Chief Justice Roberts along with Justice Alito, Justice Scalia, and Justice Thomas.

65. *Id.* at 684.

66. *Id.* (emphasis added).

67. *Id.* at 678 (emphasis added) (citations omitted). (internal citations omitted, emphasis added).

68. *Id.* at 678-79 (further noting that “recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice”).

standard. First, a reviewing court is to identify those allegations in the complaint that are merely legal conclusions.<sup>69</sup> Conclusory allegations “are not entitled to the assumption of truth.”<sup>70</sup> The second prong requires reviewing judges to “draw on its judicial experience and common sense”<sup>71</sup> in making the determination as to whether a plausible claim for relief has been shown.<sup>72</sup>

Applying the foregoing principles to the case before it, the Court concluded that Iqbal’s complaint did not “[nudge] [his] claims of invidious discrimination across the line from conceivable to plausible.”<sup>73</sup> The Court reached such a conclusion by first identifying those allegations in the complaint that were not entitled to the assumption of truth.<sup>74</sup> Iqbal pled, *inter alia*, that the petitioners “[k]new 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 for no legitimate penological reason.”<sup>75</sup> In response, the Court held that such “bare assertions” like those in *Twombly* amount to “nothing more than a ‘formulaic recitation’ of the elements of a constitutional discrimination claim” and thus are not entitled to the assumption of truth since they are merely conclusory.<sup>76</sup>

After disregarding the conclusory allegations, the Court considered the factual allegations in the respondent’s complaint to determine whether “they plausibly suggested an entitlement to relief.”<sup>77</sup> Iqbal’s complaint alleged, *inter alia*, “the FBI. . . arrested and detained thousands of Arab Muslim men as part of its investigation of the events of September 11” and that the “policy of holding post-September 11th detainees in highly restrictive conditions until they were ‘cleared’ by the FBI was approved by Defendants Ashcroft and Mueller.”<sup>78</sup> Although the allegation was taken as true, the Court held that such allegations did not give rise to a “plausible inference that respon-

---

69. *Id.* at 679.

70. *Id.*

71. *Id.*

72. *Id.* (noting, “[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief”).

73. *Id.* at 680 (quoting *Twombly*, 550 U.S. at 570).

74. *Id.* Recall from the “two-pronged test” that these portions of the complaint not entitled to the assumption of truth are “conclusory” statements.

75. *Id.* (internal quotations removed)(the quoted allegation is referencing paragraph 96 of the relevant complaint along with App. to Pet. for Cert. at 173a-174a. *Id.* One of the principle allegations in the complaint was that Attorney General John Ashcroft was the “principal architect” of the invidious policy and that Robert Mueller was “instrumental” in adopting and executing it).

76. *Id.* at 681.

77. *Id.*

78. *Id.*

dent's arrest was a result of unconstitutional discrimination"<sup>79</sup> and that such an allegation failed to "[nudge] his claim of purposeful discrimination 'across the line from conceivable to plausible.'"<sup>80</sup>

### E. *A Misapplication of Twombly?*

Ironically, Justice Souter, the very person who crafted and embraced the 'plausibility' language in *Twombly*, rejected the majority's reasoning in *Iqbal*, stating that the majority "misapplie[d] the pleading standard under *Twombly*."<sup>81</sup> Specifically, Justice Souter found deficiencies in the majority's analysis of the plausibility language of *Twombly* insofar that:

*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be.<sup>82</sup>

Justice Souter distinguished the circumstances in *Twombly* from the instant case, pointing out that in *Twombly* "[t]he conduct alleged was 'consistent with conspiracy, but just as much in line with a wide swath of rational business strategy'"<sup>83</sup> while, in contrast, the conduct in the instant case was "neither confined to 'naked legal conclusions nor consistent with legal conduct.'"<sup>84</sup> Thus, according to Justice Souter, by alleging willful and deliberate discrimination solely on the basis of race, religion and national origin, *Iqbal*'s complaint clearly contain[ed] "enough factual matter to state a claim that is plausible on its face."<sup>85</sup>

Further, Justice Souter suggested that the majority misapplied *Twombly* by viewing the allegations against Ashcroft and Mueller in "isolation" as opposed to viewing the entire complaint as a whole.<sup>86</sup> By quickly categorizing the allegations as "bare assertions" and "conclusory" the majority failed to take the complaint as a whole,<sup>87</sup> giving

79. *Id.* at 682.

80. *Id.* at 683 (quoting *Bell Atlantic Corp. et al. v. Twombly*, 550 U.S. 554, 570 (2007)).

81. *Id.* at 688 (Souter, J., dissenting). Justice Souter was joined by Justice Stevens, Justice Ginsburg, and Justice Breyer.

82. *Id.* at 696 (quoting *Twombly* 550 U.S. at 555). (Justice Souter also noted approvingly that "[a] court must proceed 'on the assumption that all the allegations of the complaint are true (even if doubtful in fact)'" ), *Twombly* at 556 (pare, and that "Rule 12(b)(6) does not countenance. . . dismissals based on a judge's disbelief of a complaint's factual allegations[.]" *Neitzke v. Williams* 490 U.S. 319, 327 (1989).)

83. *Id.*(quoting *Twombly* at 554).

84. *Id.* at 696-97.

85. *Id.* at 697 (quoting *Twombly* at 570).

86. *Id.* at 698 ("[T]he fallacy of the majority's position, however, lies in looking at the relevant assertions in isolation").

87. *Id.* (*Iqbal*'s complaint alleged that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject him to a particular, discrete discriminatory policy" which was set forth in detail. Justice Souter pointed out that *Iqbal*'s allegations were not merely a bare assertion that Ashcroft was the "architect of some amorphous discrimination, or that Mueller

“Ashcroft and Mueller ‘fair notice of what the claim. . . is and the grounds upon which it rests.’”<sup>88</sup> Justice Breyer, who joined Justice Souter in his dissent, argued that the majority’s extension of *Twombly* was unwarranted since “[t]he law. . . provides trial courts with other legal weapons designed to prevent unwarranted interference” and approved of structur[ing] discovery in ways [to] diminish the risk of imposing unwarranted burdens upon public officials as a good example.”<sup>89</sup>

Since *Twombly* and *Iqbal*, the defense bar has utilized the new “plausibility” standard and routinely moves to dismiss cases for purportedly failing to state a claim for relief as failing “to show the plausibility of a claim.”<sup>90</sup> Notably, since *Twombly* and *Iqbal*, the perception amongst those in the legal community is that there has been an increase in granting motions to dismiss in cases alleging civil rights violations, employment discrimination, class action suits and pro se proceedings.<sup>91</sup>

### III. LIFE AFTER *IQBAL*: IMPACT ON PLAINTIFFS IN FEDERAL COURT

#### A. Federal Judicial Center Report

##### 1. 12(b)(6) Motions to Dismiss Following *Iqbal*

In March 2011, at the request of the Judicial Conference Advisory Committee on Civil Rules, the Federal Judicial Center released a report titled “Motions to Dismiss for Failure to State a Claim After *Iqbal*.”<sup>92</sup> The empirical study examined all motion activity in 23 federal districts courts in 2006 and 2010, while excluding all prisoner cases and pro se parties.<sup>93</sup> First, the study found there was a general increase from 2006 to 2010 in the rate of filing 12(b)(6) motions to dismiss for failure to state a claim.<sup>94</sup>

---

was instrumental in an ill-defined constitutional violation” but rather that “they helped to create the discriminatory policy. . .described.”)

88. *Id.* at 698-99 (quoting *Twombly*, at 555).

89. *Id.* at 700 (Breyer, J., dissenting).

90. See Miller, *supra* note 29, at 20 (noting that 12(b)(6) motions to dismiss based on *Twombly* and *Iqbal* have become routine, and “the perception among many practicing attorneys and commentators is that the grant rate [of motions to dismiss] has increased[.] . .”).

91. *Id.*; See also GREEN, *supra* note 11, at 26 (noting employment discrimination and civil rights cases have been adversely affected by application of the new plausibility standard set out by the Supreme Court in *Twombly* and *Iqbal*).

92. JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011).

93. *Id.* at 5-6. (The study included motion activity in the years 2006 and 2010 in order to assess the data that “[n]either anticipates the decisions of *Bell Atlantic Corp. v. Twombly* nor responds to the decision in *Ashcroft v. Iqbal* in the absence of appellate court guidance.”).

94. *Id.* at 8.

Specifically, the Federal Judicial Center study reported that “motions to dismiss for failure to state a claim were filed in 6.2% of all cases in 2009-2010, an increase of 2.2% since 2005-2006.”<sup>95</sup> Moreover, there was an increase in cases with motion to dismiss for failure to state a claim in 2009-2010 compared to 2005-2006.<sup>96</sup> Additionally, the study found motions to dismiss were likely to be filed in cases removed from state court to federal court, but indicated that there was no general increase in removal rates from 2005 through 2009 in states with notice pleading standards.<sup>97</sup>

## 2. Outcome of 12(b)(6) Motions Following *Iqbal*

The Federal Judicial Center study found that courts were more likely to grant 12(b)(6) motions to dismiss for failure to state a claim following *Iqbal*, however, the increase extended only to motions granted with leave to amend.<sup>98</sup> However, the study found that motions to dismiss were more likely to be granted without leave to amend when they were directed at an amended complaint.<sup>99</sup>

The study placed significant weight on the fact that during the evaluation period there was a significant increase in lawsuits involving financial instruments.<sup>100</sup> Specifically, these types of cases were more likely to be removed to federal court and were more likely to face motions to dismiss, rising from 9.1% in 2005-2006 to 27.7% in 2009-2010.<sup>101</sup> In 2010, orders responding to 12(b)(6) motions to dismiss in cases challenging financial instruments were more likely to be granted with respect to all claims by at least one plaintiff.<sup>102</sup>

---

95. *Id.*

96. *Id.* at 10.

97. *Id.* at 11; *see also id.* at 13 (“It first appears that motions to dismiss for failure to state a claim were more likely to grant all or some of the relief requested in 2010 than in 2006 (75% granted in 2010 and 66% in 2006), a closer inspection reveals that the increase extends only to motions granted with leave to amend.”).

98. *Id.* at 13; *see also id.* at 22 (noting that this was true both before and after Supreme Court decisions and noting that courts take earlier amendments to the complaint into account when deciding motions to dismiss).

99. *Id.* at 22; *see also id.* at 12 (“Cases challenging financial instruments increased by 214%, from 1,524 cases in 2006 to 4,790 in 2010, apparently due to the economic downturn in the housing market. . . . These cases include federal claims under statutes such as the Truth in Lending Act, the Real Estate Settlement Procedures Act, and the Fair Debt Collection Practices Act.”).

100. *See id.* at 12.

101. *Id.*; *see also id.* at 100 (finding the great majority of cases involving “financial instruments” involved cases by individuals suing lenders and/or loan servicing companies over the terms of their mortgage); *see also id.* at 21 (recognizing that there was no general increase in the likelihood that 12(b)(6) motions were granted in other types of cases not involving “financial instruments”).

102. *Id.* at 19.

### B. *Skepticism Surrounding the Federal Judicial Center's Report*

A quick glance at the findings of the Federal Judicial Center's 2011 report would lead many to believe that *Twombly* and *Iqbal* have had little effect on plaintiffs in federal court. However, several empirical studies suggest the impact on civil litigation is far greater than the Federal Judicial Center report would lead one to conclude.<sup>103</sup>

For example, an empirical study conducted by Professor Patricia Moore,<sup>104</sup> measuring motion activity after *Iqbal*, found a significantly higher rate of dismissal than suggested by the Federal Judicial Center (FJC).<sup>105</sup> Specifically, Professor Moore's study suggested, "[W]hile the FJC found that in the first six months of 2010 46% of the orders granted all relief sought by the 12(b)(6) motion, I found 53% of the orders granted all relief sought under the motion under *Iqbal* while still excluding pro se plaintiffs."<sup>106</sup> Further, if pro se plaintiffs were added back in, 46% of the 12(b)(6) motions were granted in full under *Conley* while 61% of the motions were granted in full following *Iqbal*.<sup>107</sup> Professor Moore's study included 1500 federal district court cases involving 12(b)(6) motions to dismiss: 500 cases which evaluated motions to dismiss under the retired *Conley* standard, 500 cases evaluated under *Twombly*, and 500 cases evaluating motions under the two-pronged test set forth in *Iqbal*.<sup>108</sup>

While Professor Moore does not suggest the FJC study was erroneously preformed, she does point out that the FJC's findings were "completed at the direction of federal judges" and thus may not be completely impartial.<sup>109</sup> Above all, Professor Moore is doubtful that

103. See generally Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012); see also Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012) (noting that there has been a 'significant' increase in 12(b)(6) motions to dismiss following *Twombly* and *Iqbal* notwithstanding the Federal Judicial Center study).

104. See Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603 (2012) (Patricia Hatamyar Moore is an Associate Professor of Law at St. Thomas University School of Law and she has conducted two detailed empirical studies on the effect of *Ashcroft v. Iqbal* on civil pleadings); see also Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 598 (2010) (Professor Moore's previous empirical study).

105. Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 608 (2012)

106. *Id.* at 608-09.

107. *Id.* at 609; see also *id.* at 610-611 (Professor Moore excluded some of the 1500 cases for various reasons e.g., cases not involving a 12(b)(6) motion to dismiss were not considered along with cases that were decided under a heightened pleading standard such as under Federal Rule of Civil Procedure 9(b) or under the Private Securities Litigation Reform Act).

108. *Id.* at 610.

109. *Id.* at 653; see also *id.* at 652 (noting, "[I] fear that *Iqbal* is another brick in the wall blocking access to civil justice and jury trial. . . the wall is taking shape with increased use of summary judgment, restrictive class action interpretations, the approval of mandatory arbitration clauses, and a parsimonious attitude towards plaintiff's attorney's fees.").

the increase in granting motions to dismiss was due primarily to “frivolous” claims being presented to the court, rather Professor Moore suggest that the change is due in large part to “tort reform” measures along with a general distaste for plaintiff’s attorneys in the federal judiciary.<sup>110</sup>

Other scholars have also suggested that the FJC report may not be the best indication of the true impact of *Twombly* and *Iqbal* on civil litigation. Among them is Jonah Gelbach, an economics expert and law student at Yale Law School, who recently conducted an empirical study examining motion activity following *Iqbal*.<sup>111</sup> Gelbach’s study measured the effects of *Twombly* and *Iqbal* by not only comparing the 12(b)(6) motions to dismiss data under *Conley* and *Iqbal* but by also focusing on four distinct factors: (i) judicial behavior effects; (ii) defendant selection effects (iii) plaintiff selection effects; and (iv) settlement selection effects.<sup>112</sup>

By focusing on changes in party behavior such as a plaintiff’s willingness to even file a complaint in response to heightened pleading, Gelbach suggests that the measure of *Twombly* and *Iqbal*’s impact is far greater than previously thought.<sup>113</sup> Specifically, Gelbach’s study found:

[a]mong cases not involving financial instruments, civil rights or employment discrimination, *Twombly* and *Iqbal* have negatively affected at least 21.5% of cases that faced a 12(b)(6) motion to dismiss during the post-*Iqbal* period, thus between one-fourth and two-fifth of cases failed to reach discovery on at least some claims in the post-*Iqbal* data window.<sup>114</sup>

Gelbach argues that *Twombly* and *Iqbal* have had a much larger effect on plaintiff’s access to discovery than the FJC report would sug-

110. *Id.* at 652-654.

111. See generally Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012) (Jonah B. Gelbach is a third year law student at Yale Law School and holds a Ph.D. in Economics from Massachusetts Institute of Technology (MIT); Gelbach’s study of *Twombly* and *Iqbal* suggest that the decisions of the Supreme Court have negatively impacted plaintiffs in various ways).

112. *Id.* at 2275-2276 (according to Gelbach, “judicial behavior effects” assesses the likelihood that more motions to dismiss might be granted in cases that would have motions to dismiss under either pleading regime; “defendant selection effects” considers that some defendants might file motions to dismiss in cases that they would otherwise answered under the previous *Conley* standard, and the fact that some of the new motions to dismiss will be granted; “plaintiff selection effects” considers the fact that plaintiffs might choose not to file some cases they think would be either more expensive to litigate or less likely to get to discovery. Essentially, the idea is that some plaintiffs may chose not to file a lawsuit as a result of increased pleading standard when faced with motions to dismiss; “settlement selection efforts” considers how the parties perception of the gains and cost of litigation might be either more expensive to litigate or less likely to get to discovery).

113. *Id.* at 2277.

114. *Id.* at 2278.



gest, noting that even a slight increase in 12(b)(6) motions to dismiss after *Iqbal* constitutes “strong evidence” that the plausibility standard has had a substantial impact.<sup>115</sup> Gelbach further noted, “[I]f defendants file motions to dismiss against a stronger set of complaints but win just as often, then judges must be dismissing complaints that they would not have dismissed before.”<sup>116</sup>

### C. The Real Consequences of ‘Plausibility’ Pleading

As the foregoing studies suggest, one thing is consistently found—an increase in 12(b)(6) motions to dismiss for failure to state a claim following *Twombly* and *Iqbal*. While it is difficult to truly quantify the actual impact of the new ‘plausibility’ standard, it is my contention that access to courts has been diminished for aggrieved plaintiffs across the nation. Tony Mauro of the National Law Journal cited a wide range of cases demonstrating the impact on plaintiffs shortly after the ruling in *Iqbal*, for example: “[A] major lawsuit against the makers of an anti-psychotic drug was dismissed on *Iqbal* grounds,<sup>117</sup> along with a case challenging the government’s no-fly list brought by a Muslim woman who claims she was a victim of racial profiling.”<sup>118</sup>

In *Ibrahim v. Dep’t of Homeland Security*, a Muslim Ph.D. student at Stanford alleged that she was mistakenly placed on a “no-fly” list, was prevented from flying and detained in a holding cell in San Francisco based on her religious beliefs and national origin.<sup>119</sup> The defendants moved to dismiss Ibrahim’s complaint, citing *Iqbal*, arguing the allegations were “insufficient” to state a claim for discriminatory purpose.<sup>120</sup> District Court Judge Alsup granted the defendant’s 12(b)(6)

115. See Jonah Gelbach, *Measuring Twombly and Iqbal’s Impact on Access to the Courts: An Economic Model*, AMERICAN CONSTITUTION SOCIETY BLOG (December 21, 2011), <http://www.acslaw.org/acsblog/measuring-twombly-and-iqbal%E2%80%99s-impact-on-access-to-the-courts-an-economic-model>.

116. *Id.*

117. Tony Mauro, *Plaintiffs groups Mount Effort to Undo ‘Iqbal’*, THE NATIONAL LAW JOURNAL (September 21, 2009), [http://www.law.com/jsp/article.jsp?id=1202433931370&Plaintiffs\\_Groups\\_Mount\\_Effort\\_to\\_Undo\\_Supreme\\_Courts\\_Iqbal\\_Ruling](http://www.law.com/jsp/article.jsp?id=1202433931370&Plaintiffs_Groups_Mount_Effort_to_Undo_Supreme_Courts_Iqbal_Ruling); see also *In Re Seroquel Products Liab. Litig.*, 244 F.R.D. 650 (M.D. Fla. 2007).

118. Tony Mauro, *Plaintiffs groups Mount Effort to Undo ‘Iqbal’*, THE NATIONAL LAW JOURNAL (September 21, 2009), [http://www.law.com/jsp/article.jsp?id=1202433931370&Plaintiffs\\_Groups\\_Mount\\_Effort\\_to\\_Undo\\_Supreme\\_Courts\\_Iqbal\\_Ruling](http://www.law.com/jsp/article.jsp?id=1202433931370&Plaintiffs_Groups_Mount_Effort_to_Undo_Supreme_Courts_Iqbal_Ruling); see also *Ibrahim v. Dep’t of Homeland Sec.*, No. 06-00545, 2009 WL 2246194, at \*10 (N.D. Cal. July 27, 2009).

119. *Id.* at \*3 (plaintiff Rahinah Ibrahim is a Muslim woman and citizen of Malaysia, in 2005, she was a doctoral student at Stanford University. She had no criminal history nor any links to terrorist activity, plaintiff was detained at the San Francisco International Airport where she was subjected to a search and questioning by law enforcement).

120. *Id.* at \*8 (“[T]he defendants invoke *Iqbal* to argue that [plaintiffs] factual allegations are insufficient to demonstrate discriminatory purpose and to plead claims for violations of her rights to freedom of religion, freedom of association, and equal protection. .they argue that like in *Iqbal*, [plaintiffs] detention was non-discriminatory and the fact that she is an identifiable Muslim is only incidental.”)

motion to dismiss upon the finding that Ibrahim's allegations of discrimination were "conclusory under *Iqbal*" and merely a "recital of the elements of a cause of action."<sup>121</sup> However, Judge Alsup did not necessarily agree with the heightened pleading standard, noting:

[A] good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court.<sup>122</sup>

*Ibrahim* is just one of many cases that were dismissed shortly after *Iqbal* for pleading "conclusory" allegations that were not sufficient to "nudge claims across the line from conceivable to plausible."<sup>123</sup> Unfortunately, these types of dismissals have become commonplace in federal courts. What is not as clear is how the plausibility standard has affected state courts.

#### IV. STATE COURTS THAT EMBRACE PLAUSIBILITY STANDARD

Since *Twombly* and *Iqbal* involved only the Supreme Court's interpretation the *Federal Rules of Civil Procedure*, the decisions were not directly binding on the states.<sup>124</sup> However, many states have patterned their own rules of civil procedure after the Federal Rules in an effort to promote "procedural uniformity."<sup>125</sup> Not surprisingly, some state courts have expressly embraced the heightened pleading standard after *Twombly* and *Iqbal*. Below I analyze the decisions of state courts that have chosen to adopt the Supreme Court's interpretation of Federal Rule 8(a)(2)<sup>126</sup> to apply to their own pleading regime.

##### A. Massachusetts:

Even before the Supreme Court's decision in *Iqbal*, the Supreme Court of Massachusetts took the time to expressly adopt the plausibility language in *Twombly*.<sup>127</sup> In *Iannacchino v. Ford Motor Co.*, owners of certain vehicle models filed a class action suit against Ford Motor Company alleging, *inter alia*, deceptive trade practices and breach of implied warranty.<sup>128</sup> Specifically, the plaintiff's complaint alleged that

121. *Id.* at \*9.

122. *Id.* at \*10.

123. *Id.* at \*11.

124. See MICHALSKI *supra* note 4 at 109.

125. See Z.W. Julius Chen, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1439 (2008) (noting, "[S]tates that model their procedural systems after the Federal Rules typically look to federal courts and particularly the U.S. Supreme Court's interpretation of the Rules as a default. . . and procedural uniformity is desirable.").

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

127. See *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 888 N.E.2d 879 (2008).

128. *Id.* at 624, 888 N.E.2d, at 882

the outside door handle systems in their vehicles were “noncompliant with applicable federal safety standards, defective and unsafe” and that Ford “knowingly manufactured, offered for sale, and refused to recall vehicles that [did] not comply with federal safety standards.”<sup>129</sup>

The Supreme Court of Massachusetts found the term “defect” to be conclusory and subjective, stating, “[a] bare assertion that a defendant has knowingly manufactured and sold a product that is defective or suffers from safety-related defects does not suffice to state a viable claim.”<sup>130</sup> The Supreme Court of Massachusetts followed the lead of the U.S. Supreme Court stating, “[W]e take the opportunity to adopt the standard that was recently articulated by the United States Supreme Court in *Bell Atlantic v. Twombly*. . . what is required at the pleading stage are factual allegations plausibly suggesting an entitlement to relief.”<sup>131</sup>

Further, the Supreme Court of Massachusetts noted, “[W]e agree with the Supreme Court’s analysis of the *Conley* language and we follow the lead in retiring its use.”<sup>132</sup> The court recognized that allegations in this case would not be sufficient under the current pleading requirements in Massachusetts but nonetheless adopted *Twombly*’s retirement of the “notice pleading” language.<sup>133</sup> Therefore, in the State of Massachusetts, plaintiffs must now state a claim that is ‘plausible’ on its face to survive a motion to dismiss.

## B. Ohio

In *Williams v. Ohio Edison*, the Court of Appeals of Ohio considered whether a lower court properly dismissed a collusion claim for failure to state a claim under Rule 12(b)(6) of the Ohio Rules of Civil Procedure.<sup>134</sup> Williams, a pro se plaintiff, brought suit against Ohio Edison, a public utility, for allegedly violating the Seventh Amendment of the United States Constitution and for allegedly violating Ohio’s statutory scheme for the garnishment of personal earnings.<sup>135</sup>

129. *Id.*

130. *Id.* at 632-33, 888 N.E.2d at 888.

131. *Id.* at 635-36, 888 N.E.2d at 890.

132. *Id.*

133. See Victor E. Schwartz & Christopher E. Appel, Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of *Twombly* and *Iqbal*, 33 HARV. J.L. & PUB. POL’Y 1107, 1147 (2010).

134. See *Williams v. Edison*, 2009 WL 3490945 at \*1 (Ohio App. 8 Dist. October 29, 2009).

135. *Id.* (Ohio Edison alleged that Williams was delinquent in payments for services provided. . . William’s balance was \$5,969.21, together with interest at 10% per annum. On March 28, 2008 Williams amended her complaint to include allegations that Ohio Edison, and others had colluded and committed abuse of process in order to avoid judgment being granted against them in the lower court).

After evaluating the requisite pleading standards in Ohio, the Court of Appeals quoted the recent decision in *Twombly*, noting, “[t]he claims set forth in the complaint must be plausible, rather than conceivable. . . William’s obligation to provide grounds for her entitlement to relief requires more than labels and conclusions, and a formalistic recitation of the elements will not suffice.”<sup>136</sup> Thus, while the Court of Appeals of Ohio did not expressly adopt *Twombly*, it effectively changed the interpretation of Ohio’s state pleading requirements to require a complaint to state a claim that is ‘plausible’ as opposed to merely conceivable.<sup>137</sup>

### C. Minnesota

In the 2010 decision of *Bahr v. Capella University*, the Supreme Court of Minnesota confirmed the court of appeals adoption of *Twombly*’s plausibility standard.<sup>138</sup> *Bahr* involved a suit brought by a former employee of the online educator Capella University, alleging, *inter alia*, that Capella terminated the plaintiff in retaliation of her opposition to certain discriminatory practices and that such retaliatory termination violated Minnesota’s Human Rights Act. The Court of Appeals of Minnesota had previously recognized, “[W]e are mindful that the United States Supreme Court has recently corrected [the *Conley*] standard insofar that. . . the statement of entitlement to relief must go beyond ‘labels and conclusions’ or the ‘speculative’ presentation of a claim.”<sup>139</sup>

On review, the Supreme Court of Minnesota affirmed the court of appeals articulation of the current pleading requirement in Minnesota, noting, “[a] legal conclusion in the complaint is not binding on us. . . a plaintiff must provide more than labels and conclusions.”<sup>140</sup>

### D. South Dakota

In the 2008 decision of *Sisney v. State*, the Supreme Court of South Dakota joined the growing number of states adopting *Twombly*’s heightened pleading requirement within its own jurisdiction.<sup>141</sup> In *Sisney*, a pro se prisoner filed a complaint against the State of South Dakota, the director of state prison operations, and the food service

136. *Id.* at \*3 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

137. *Id.*

138. See *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (Capella University sought review of the court of appeals decision that reversed the granting of the university’s motion to dismiss for failure to state a claim upon which relief can be granted).

139. See *Bahr v. Capella Univ.*, 765 N.W.2d 428, 436-37 (Minn. Ct. App. 2009) *rev’d.*, 788 N.W.2d 76 (Minn. 2010).

140. *Bahr*, 788 N.W.2d. at 80 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 544).

141. See *Sisney v. State*, 754 N.W.2d 639 (S.D. 2008).

provider alleging breach of contract to provide food services by “[f]ailing to adequately provide kosher food” in accordance to his Jewish faith and that his civil rights were violated.<sup>142</sup> The defendants moved to dismiss for failure to state a claim upon which relief could be granted, arguing that Sisney’s complaint alleging discrimination and conspiracy did “not contain sufficient factual allegations.”<sup>143</sup> The circuit court granted the defendants motion with prejudice and Sisney appealed.

On appeal, the Supreme Court of South Dakota adopted the *Twombly* standard and affirmed the dismissal of the complaint.<sup>144</sup> The court quoted *Twombly*, stating, “[a] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formalistic recitation of the elements of a cause of action will not do.”<sup>145</sup> The court further noted that in order to survive a motion to dismiss, the complaint “must allege facts, which, taken as true raise more than a speculative right to relief.”<sup>146</sup>

Other state courts have also taken the opportunity to adopt or otherwise endorse the heightened pleading requirement following *Twombly* and *Iqbal* including: Delaware,<sup>147</sup> Maine,<sup>148</sup> Louisiana,<sup>149</sup> and Nebraska.<sup>150</sup> Moreover, Oklahoma has taken *Twombly* and *Iqbal* even further by passing a specific class action reform bill based on the new

142. *Id.* at 641-42.

143. *Id.* at 642 (specifically, the defendants argued that the complaint did not contain sufficient factual allegations to support Sisney’s federal constitutional claim of discrimination and conspiracy under 42 U.S.C. § 1981 and § 1985).

144. *See Id.* at 643.

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

146. *Id.*

147. *See Desimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007) (stating, “[O]ur nation’s high court has now embraced the pleading principle that Delaware courts have long applied, which is that a complaint must plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to relief she seeks. If a complaint fails to do that and instead asserts mere conclusions, a 12(b)(6) motion must be granted.”).

148. *See Bean v. Cummings*, 2008 ME 18, 939 A.2d 676, 680 (the Supreme Judicial Court of Maine noted, “[W]here the Maine Rules of Civil Procedure is identical to the comparable federal rule, we value constructions and comments on the federal rules as aids in construing our parallel provision.” Further, the court quoted *Twombly*, requiring heightened pleading in the context of civil perjury claims).

149. *See Tuban Petroleum, LLC v. SIARC, Inc. Et Al.*, 11 So.3d 519 (La. App. 4 Cir. 2009) (applying *Twombly* in limited context of claim under Louisiana antitrust law. The court noted, “[T]he Louisiana Supreme Court has looked to the federal jurisprudence for guidance because the federal and state antitrust statutes are virtually identical the United States Supreme Court stated that, a formalistic recitation of the elements of a cause of action will not suffice.”).

150. *See Doe v. Bd. of Regents of Univ. of Nebraska*, 280 Neb. 492, 506, 788 N.W.2d 264, 278 (2010) (medical student brought action against state medical school alleging, *inter alia*, fraudulent concealment and violations of constitutional rights. In reviewing the district courts order granting a motion to dismiss, the Supreme Court of Nebraska embraced *Twombly* and *Iqbal*, “[W]e hold that to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.”).

“plausibility standard.”<sup>151</sup> Oklahoma State Bill 704 was enacted in 2011 and adopts the language from *Twombly* and *Iqbal*. Specifically, class action litigants in Oklahoma now must present a petition that contains “factual allegations sufficient to demonstrate a plausible claim for relief.”<sup>152</sup> Thus, while some state courts have expressly adopted the heightened pleading requirement articulated by the Supreme Court, some state legislatures have also joined the growing trend. While the foregoing list is not exhaustive, it represents the majority if not all states that have embraced at least some portion of the plausibility pleading standard.

## V. STATE COURTS THAT REJECT PLAUSIBILITY STANDARD

Not all state courts are prepared to “retire” *Conley*. Some state courts have addressed *Twombly* or *Iqbal* and have chosen to expressly reject the heightened pleading requirement.

### A. North Carolina

In *Holleman v. Aiken*, the North Carolina Court of Appeals declined to adopt the heightened pleading requirement set forth in *Twombly*.<sup>153</sup> *Holleman* involved various claims, including libel per se and infliction of emotional distress brought by an author who wrote a book about a celebrity singer.<sup>154</sup> The plaintiff’s claims were based primarily on the singer’s failure to endorse the publication and defamatory statements made in connection with the publication. The plaintiff appealed the trial court’s order dismissing her complaint under rule 12(b)(6) of the North Carolina Rules of Civil Procedure.<sup>155</sup>

On review, ironically, the plaintiff argued that the court should adopt the “plausibility standard” as set forth in *Twombly*.<sup>156</sup> The court of appeals rejected this argument noting, the “[P]laintiff has correctly noted that to date, North Carolina has not adopted the ‘plausibility standard’ set forth in *Bell Atlantic v. Twombly* for 12(b)(6) motions to dismiss, this court does not have the authority to adopt a new standard of review of motions to dismiss.”<sup>157</sup> The court of appeals reiterated

151. See OKLA. STAT. ANN. TIT. 12, § 2023 (West) (“[A]n action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied, if the petition in the class action contains factual allegations sufficient to demonstrate a plausible claim for relief.”).

152. See *Id.* § 2023.

153. See *Holleman v. Aiken*, 193 N.C. App. 484, 668 S.E.2d 579 (2008).

154. *Id.* at 487; 668 S.E.2d at 582 (the plaintiff was an author of a book written about singer Clay Aiken, among the legal claims set forth by the plaintiff were libel per se, libel per quod, intentional infliction of emotional distress, negligent infliction of emotional distress, and tortious interference with a business relationship).

155. *Id.* at 490; 668 S.E.2d at 584.

156. *Id.*

157. *Id.* at 491; 668 S.E.2d at 584.

the traditional pleading requirements, stating that “[T]he complaint must be liberally construed. . . and the court should not dismiss a complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim.”<sup>158</sup>

Interestingly, even as recent as April 2013, defendants have urged North Carolina courts to adopt the ‘plausibility’ language. For example, in *Bookman v. Britthaven, Inc.*, defendants appealed from the denial of a 12(b)(6) motion to dismiss solely for the purpose of preserving the issue of whether *Iqbal* should be adopted in North Carolina for future review under a writ of certiorari by the Supreme Court of North Carolina.<sup>159</sup>

### B. Alabama

Similarly, the Alabama Court of Appeals has declined to embrace the plausibility standard in its respective jurisdiction. In *Crum v. Johns Manville*, various construction plaintiffs brought an action against a roofing management company for negligence, wantonness, fraud, misrepresentation, breach of contract and breach of warranty.<sup>160</sup> After the trial court granted the defendant’s 12(b)(6) motion to dismiss, the plaintiffs appealed. On appeal, the defendant argued, “[T]he Supreme Court in *Bell Atlantic v. Twombly* abrogated the rule set forth in *Conley v. Gibson*.”<sup>161</sup>

The court of appeals disagreed, noting, “[T]he United States Supreme Court’s interpretation of the Federal Rules of Civil Procedure is not binding on this court’s interpretation or application of the Alabama Rules of Civil Procedure.”<sup>162</sup> Since the Alabama Supreme Court has not yet adopted the plausibility standard, the court of appeals also declined to do so.

158. *Id.* (quoting *Craven v. Cope*, 188 N.C. App. 814, 656 S.E.2d 729).

159. See *Bookman v. Britthaven, Inc.*, No. COA12-663, 2013 WL 1314965 at \*2 (N.C. Ct. App. Apr. 2, 2013). (“[A]s for the denial of its motion to dismiss, Britthaven acknowledges that such an order is not usually appealable prior to the entry of final judgment. Britthaven, however, argues that this order involves an important issue of law that this Court should review under a writ of certiorari issued pursuant to Appellate Rules 2 and 21(a)(2) in order to preserve the issue for review by the North Carolina Supreme Court. The legal issue raised by Britthaven is whether we should adopt the United States Supreme Court’s standard for motions to dismiss for failure to state a claim for relief set out in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); the court of appeals also noted that since an order denying a motion to dismiss may not be the subject of an interlocutory appeal the court dismissed that portion of the defendant’s appeal).

160. See *Crum v. Johns Manville*, 19 So. 3d 208 (Ala. Civ. App. 2009).

161. See *Id.* at 212 n.2.

162. *Id.*

C. *Tennessee*:

Before to the Supreme Court of Tennessee expressly rejected the plausibility standard, the Tennessee Court of Appeals had cited *Twombly* and/or *Iqbal* in eight opinions.<sup>163</sup> In fact, one decision purportedly recognized *Twombly*'s applicability in Tennessee state courts, while other decisions rejected the notion.<sup>164</sup> Any confusion as to the proper pleading standard in Tennessee was settled in the 2011 decision of *Webb v. Nashville Area Habitat for Humanity, Inc.*, when the Supreme Court of Tennessee went to great lengths to explain the reasons for rejecting the plausibility standard.<sup>165</sup>

In *Webb*, an employee's complaint alleging retaliatory discharge was dismissed for failure to state a claim upon which relief can be granted.<sup>166</sup> The court of appeals vacated the dismissal and remanded for further proceedings and the employer sought review by the Tennessee Supreme Court.<sup>167</sup> The Tennessee Supreme Court took the opportunity to reject the plausibility pleading standard set forth in *Twombly* and *Iqbal*, stating:

[T]he *Twombly* and *Iqbal* decisions reflect a significant and substantial departure from the United States Supreme Court's prior interpretations of Fed.R.Civ.P. 8 and the seventy-year history of a liberal notice pleading standard as envisioned by the Federal Rules of Civil Procedure and recognized in *Conley*.<sup>168</sup>

The court went on to reject the plausibility standard insofar that it "[i]ncorporates a determination of the likelihood of success on the merits—a judicial weighing of the facts," which at such an early stage in the proceeding is at odds with traditional notice pleading.<sup>169</sup>

Other states have also rejected the *Twombly* and/or *Iqbal* plausibility standard, including: Washington,<sup>170</sup> Arizona,<sup>171</sup> and Vermont.<sup>172</sup>

163. See *Deja Vu of Nashville, Inc. v. Metro. Gov't*, 311 S.W.3d 913, 918-19 (Tenn. Ct. App. 2009); *State ex rel. Watson v. Waters*, No. E2009-01753-COA-R3-CV, 2010 WL 3294109, at \*4 (Tenn. Ct. App. Aug. 20, 2010).

164. See *Hermosa Holdings, Inc. v. Mid-Tenn. Bone & Joint Clinic, P.C.*, No. M2008-00597-COA-R3-CV, 2009 WL 711125, at \*3 (Tenn. Ct. App. Mar. 16, 2009).

165. See *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011).

166. *Id.* at 424.

167. *Id.* (The plaintiff was employed by the Nashville Area Habitat for Humanity. Subsequent to her termination, she filed a complaint alleging retaliatory discharge under Tennessee Public Protection Act ("TPPA") and the common law of Tennessee.).

168. See *Id.* at 430.

169. *Id.* at 431.

170. See *McCurry v. Chevy Chase Bank, FSB*, 169 Wash. 2d 96, 233 P.3d 861 (2010) (rejecting pleading standard in *Twombly*, calling the standard a 'drastic change' in court procedure).

171. See *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 189 P.3d 344 (2008) (retaining notice pleading standard; noting that any modification of a pleading rule could only be effected by the Arizona Supreme Court interpretation).



States such as West Virginia<sup>173</sup> and Michigan<sup>174</sup> have reserved judgment as to whether the standard should apply in their respective jurisdictions. Thus, while some states have embraced the plausibility standard, others are hesitant to follow the lead of the Supreme Court in changing their own rules of civil procedure.

## VI. A CALL TO “REPEAL” *TWOMBLY* AND *IQBAL*

### A. *The Notice Pleading Restoration Act of 2009*

Members of Congress have not been silent on the issue of plausibility pleading. In 2009, Senator Arlen Specter introduced Senate Bill 1504<sup>175</sup> which provided:

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).<sup>176</sup>

Senator Specter, along with others, argued that federal courts had “consistently and faithfully”<sup>177</sup> applied the traditional notice pleading standard articulated in *Conley*, contenting that the new plausibility standard granted too much discretion to trial judges at such an early stage in the proceedings.<sup>178</sup> Moreover, several senators criticized *Twombly* and *Iqbal* insofar that it circumvents the process for amend-

172. See *Colby v. Umbrella, Inc.*, 184 Vt. 1, 955 A.2d 1082, 1087 n. 1 (2008) (noting, “[w]e have relied on the *Conley* standard for over twenty years and in no way are bound by federal jurisprudence in interpreting our state pleading rules.”).

173. See *In Re Flood Coal River Watershed*, 222 W.Va. 574, 668 S.E.2d 203, 216 n. 10 (2008) (“[A]lthough this court has not considered whether [the plausibility] standard should be adopted, the plaintiffs complaint clearly meets that standard.”).

174. See *Duncan v. State*, 284 Mich. App. 246, 774 N.W.2d 89, 136.

175. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009) (Senator Specter D-PA was joined by Senator Russell Feingold D-WI and Senator Harry Reid D-NV).

176. *Id.* at § 2.

177. See 155 CONG. REG. S7890 (daily ed. July 22, 2009) (statement made by Sen. Specter).

178. See Michael R. Huston, *Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal*, 109 MICH. L. REV. 415, 425 (2010).

ing the Federal Rules under the Rules Enabling Act.<sup>179</sup> However, after being referred to committee the bill died.<sup>180</sup>

### B. *Open Access to Courts Act of 2009*

On November 19, 2009 Representative Jerrold Nadler introduced H.R. 4115,<sup>181</sup> which varied slightly from its Senate counterpart, providing:

[A] court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.<sup>182</sup>

H.R. 4115 gained support from representatives who opposed *Twombly* and *Iqbal*, many of whom argued the Supreme Court's decision was a "bypass" of the Rules Enabling Act.<sup>183</sup> However, after being referred to committee, H.R. 4115 died.<sup>184</sup> While congressional efforts have been unsuccessful so far, some scholars support such restorative legislation, finding the 'plausibility' standard inconsistent with the views of the drafters of the Federal Rules.<sup>185</sup> While it is unclear how corrective legislation would impact states who have already chosen to adopt the new standard, the movement by Congress indicates the importance of this issue to federal pleading practice and the future of civil litigation in this country.

---

179. *Id.* at 426 (the Rules Enabling Act, 28 U.S.C. § 2071 provides: (a) "[T]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title. (b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order. (c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit. (2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.").

180. GovTrack.us. S.1504—111th Congress (2010) *Notice Pleading Restoration Act of 2009*, <http://www.govtrack.us/congress/bills/111/s4054>.

181. Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009) (Representative Nadler was joined by 36 co-sponsors).

182. *Id.* at § 2078(a).

183. See HUSTON, *supra*, note 178 at 427.

184. GovTrack.us. H.R. 4115—111th Congress (2009) *Open Access to Courts Act of 2009*, <http://www.govtrack.us/congress/bills/111/hr4115>.

185. See HERMANN, *supra*, note 8.

## VII. CONCLUSION

Unfortunately, it appears the plausibility standard is here to stay. While many state courts remain indecisive or silent on whether to adopt *Twombly* and/or *Iqbal*, a ‘plausible’ assumption is that litigants will be faced with heightened pleading requirements in the not so distant future. The defense bar is very aware of the implications of plausibility pleading and is slowly urging state courts to adopt the requirement. While studies differ as to the impact of *Twombly* and *Iqbal*, the standard has undoubtedly affected aggrieved plaintiffs in a wide range of cases including civil rights and employment discrimination.<sup>186</sup>

The most disturbing aspect of my research is the blind reliance by some state courts on the Supreme Court’s interpretation of Federal Rule 8(a)(2)<sup>187</sup> following *Twombly* and *Iqbal*. While procedural uniformity is certainly an important objective among states that model their respective rules after the federal rules, the Supreme Court’s interpretation of such procedural rules is in no way binding on the states.<sup>188</sup> Justice Souter, the very creator of the facial plausibility requirement argued that the new two-pronged plausibility framework is a patent “misapplication of *Twombly*.”<sup>189</sup> Because of *Iqbal*, litigants will have to live with the unintended consequences of *Twombly*’s framework in not only federal jurisdictions but some state jurisdictions as well. As state courts continue to be urged by defendants to adopt the heightened pleading standard, it is certain that many more jurisdictions will choose to embrace it as a “new normal” in pleading practice.

---

186. See GREEN, *supra*, note 11.

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

188. See MICHALSKI, *supra*, note 4.

189. See *Ashcroft v. Iqbal*, 556 U.S. 662, 689 (Souter, J., dissenting) (Justice Souter classified the majority’s opinion in *Iqbal* as a misapplication of *Twombly*).