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July 13, 2010

Via Federal Express

The Honorable Mark R. Kravitz
Chair, Civil Advisory Committee
United States District Judge
United States District Court
Richard C. Lee United States Courthouse
141 Church Street
New Haven, CT 06510

Re: Report of the New York State Bar Association's Special Committee on Pleading Standards in Federal Litigation ("Report")

Dear Judge Kravitz:

I write as the chair of the referenced committee to transmit our Report to you as the chair of the Civil Advisory Committee ("Committee") with the hope that our report will be of use to the Committee as it deliberates on appropriate rule revisions to address the various issues discussed at its recent conference at the Duke Law School on May 10th and 11th. Our Report addresses the general issue of the appropriate pleading standards in litigation in federal court and more specifically the impact of the U.S. Supreme Court's decisions in *Twombly* and *Iqbal*.

The special committee was comprised of representatives of both the defense and plaintiffs' bars, and our committee's goal was to present a balanced report, which I think we have done. The Report recommends amending FRCP Rule 8(a)(2) to replace the current language with:

> " ... (2) a short and plain non-conclusory statement of grounds sufficient to provide notice of (a) the claim and (b) the relief sought; and ...."

The Report was approved by the House of Delegates of the Bar Association of the State of New York at its June 19th meeting, after having previously been approved by the Association's Executive Committee. The House is the policy making body of the Association, which represents approximately 76,000 attorneys registered in the State of New York.

If it is appropriate, I or other members of our committee are prepared to participate in the Committee's deliberations in anyway that you see fit. Please feel free to contact me at your convenience if you wish us to have further involvement.

Sincerely yours,

Samuel F. Abernethy

SFA:rhm

Enclosure

cc: Honorable Lee H. Rosenthal
Peter G. McCabe
Stephen P. Younger, Esq.
Ronald F. Kennedy

REPORT

OF THE

NEW YORK STATE BAR ASSOCIATION'S

SPECIAL COMMITTEE ON PLEADING STANDARDS IN FEDERAL LITIGATION

June 2, 2010

Approved by the House of Delegates
On
June 19, 2010

New York State Bar Association
SPECIAL COMMITTEE ON PLEADING STANDARDS IN FEDERAL LITIGATION

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* The Committee was ably assisted by Kevin Blackwell, Joshua Walters, and Michael R. Huttenlocher, an associate in the New York office of McDermott Will & Emery LLP.

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REPORT

OF THE

NEW YORK STATE BAR ASSOCIATION'S

SPECIAL COMMITTEE ON STANDARDS FOR PLEADING IN FEDERAL LITIGATION

June 2, 2010

SUMMARY

The Special Committee on Standards for Pleading in Federal Litigation was established to examine and report on issues relating to standards for pleading a claim in federal litigation under the Federal Rules of Civil Procedure (sometimes hereinafter "FRCP"). The impetus for this examination was the decisions by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*,[1] and *Ashcroft v. Iqbal*.[2] The Committee has examined those cases, their progeny, Congressional proposals, the history behind the adoption of FRCP Rule 8(a)(2) in 1938, New York's and other states' pleading requirements, and the procedure for amending the FRCP.

The Committee has concluded that the current language of Rule 8(a)(2) requiring a pleading that states a claim for relief to contain "a short and plain statement of the claim showing that the pleader is entitled to relief," should be changed to read "a short and plain non-conclusory statement of grounds sufficient to provide notice of (a) the claim and (b) the relief sought." The Committee further recommends that the promulgation of such a standard should be accomplished through the process of review and consideration under the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

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[1] 550 U.S. 544, 127 S. Ct. 1955 (2007).

[2] ___ U.S. ___, 129 S. Ct. 1937 (2009).

Proposed legislation before the Senate and House of Representatives addresses an interim standard for pleadings while the process of review of the existing standard occurs. The Committee takes no position as to what the appropriate interim standard should be, but endorses a procedure to present a standard to Congress.

INTRODUCTION

From time to time, the United States Supreme Court hands down blockbuster decisions that alter the way we function as a society or how we as professionals conduct our practices. Some of these decisions impact a limited number of people, and some have widespread effect, not only on lawyers, but also on society at large. The two recent decisions, *Twombly* and *Iqbal,* working in tandem have created a firestorm that has not only caught the attention of litigators, business lawyers, and civil rights lawyers, but also editorial board members and our elected representatives in Congress. The issue addressed is pleading standards in federal court actions and proceedings – a subject that at first blush might not appear to be of great or widespread significance. But the attention these two decisions have received in newspapers and law reviews reveals the substantial controversy these decisions have spawned in the profession.

The first case was *Twombly*, a consumer class action against local telephone companies alleging a Sherman Act § 1[3] antitrust conspiracy. The case reached the Supreme Court after the United States District Court for the Southern District of New York had dismissed the complaint for failure to state a claim upon which relief could be granted, and the dismissal had been reversed by the United States Court of Appeals for the Second Circuit.[4]

The 1984 breakup of the American Telephone & Telegraph Company resulted in a system of local regional telephone service monopolies ("ILECs") and a separate competitive market for long-distance telephone service from which ILECs were excluded.[5] In 1996,

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[3] 15 U.S.C. § 1 (2004).
[4] 313 F. Supp. 2d 174 (S.D.N.Y. 2003) and 425 F.3d 99 (2d Cir. 2005).
[5] *Twombly*, 550 U.S. at 549, 127 S. Ct. at 1961.

Congress changed the rules to permit ILECs to enter the long-distance market under certain conditions and required ILECs to share their regional networks with competitors ("CLECs").[6] In his complaint, Twombly alleged the ILECs conspired to restrain trade by allegedly, among other things, making unfair agreements with CLECs for access to the ILECs' networks, providing inferior connections to the ILECs' networks, and billing in ways to sabotage the CLECs' relations with the CLECs' customers.[7] Twombly also implied that the ILECs agreed to refrain from competing against one another based on their common failure to pursue attractive business opportunities in contiguous markets.[8]

In reversing the Second Circuit, the Supreme Court, in a 7 to 2 decision, found these allegations insufficient as mere "descriptions of parallel conduct and not . . . any independent allegation of actual agreement among the ILECs."[9] The Court held that, to state a claim under §1 of the Sherman Act, the complaint must contain "enough factual matter (taken as true) to suggest that an agreement was made"[10] and articulated a standard that, in order to withstand a motion to dismiss under FRCP Rule 12(b)(6), the alleged facts must be sufficient "to state a claim to relief that is plausible on its face,"[11] as opposed to merely pleading "labels and conclusions" or "a formulaic recitation of the elements of a cause of action."[12]

The decision was applauded by the antitrust defense bar, which recognized that the cost of defending meritless claims could still be substantial for defendants. Many practitioners assumed that this "plausibility standard" would be applied only to antitrust cases, or perhaps other cases where discovery costs could easily reach into the hundreds of thousands, if not

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[6] *Id.*
[7] *Id.*, 550 U.S. at 550, 127 S. Ct. at 1962.
[8] *Id.*, 550 U.S. at 551, 127 S. Ct. at 1962.
[9] *Id.*, 550 U.S. at 564, 127 S. Ct. at 1970.
[10] *Id.*, 550 U.S. at 556, 127 S. Ct. at 1965.
[11] *Id.*, 550 U.S. at 570, 127 S. Ct. at 1974.
[12] *Id.*, 550 U.S. at 555, 127 S. Ct. at 1965.

millions of, dollars. Other practitioners wondered if the "no set of facts" standard articulated by the Supreme Court in *Conley v. Gibson*[13] was still good law.[14]

Courts have issued decisions with a myriad of formulations of the standard under *Twombly*. Shortly after *Twombly* was decided, in *Goodman v. Praxair, Inc.*,[15] Judge Paul V. Niemeyer, formerly head of the Advisory Committee on Civil Rules, emphasized that "'once a claim has been stated adequately, it may be supported by showing *any set of facts* consistent with the allegations in the complaint.' *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1969 (2007) (emphasis added)." The Third Circuit in *Phillips v. County of Allegheny*,[16] found two new concepts in *Twombly*. "First, . . . the Supreme Court used certain language that it does not appear to have used before. The Court explained that '[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's [Rule 8] obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.' *Twombly*, 127 S. Ct. at 1964-65 (alteration in original) (internal citations omitted)."[17] "Second, the Supreme Court disavowed certain language that it had used many times before – the 'no set of facts' language from *Conley*. *See id.* at 1968."[18] The Second Circuit in *Iqbal* held that "the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[19]

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[13] 355 U.S. 41, 47, 78 S. Ct. 99 (1957).

[14] The Rule 8(a)(2) requirement that a pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" was interpreted almost 20 years later by the Supreme Court in *Conley v. Gibson* to require that, for a pleading to withstand a motion to dismiss for failure to state a claim, it must "appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).

[15] 494 F.3d 458, 466 (4th Cir. 2007).

[16] 515 F.3d 224 (3d Cir. 2008).

[17] *Id.* at 231.

[18] *Id.* at 232.

[19] *Iqbal v. Hasty*, 490 F.3d 143, 157-158 (2d Cir. 2007) (original emphasis).

Some of the uncertainties created by these conflicting decisions were soon addressed. In May of 2009, the Supreme Court issued its decision in *Iqbal*. Iqbal was a Pakistani Muslim who was arrested on criminal charges after the September 11, 2001 terrorist attacks, incarcerated, and held under harsh conditions. Iqbal sued former Attorney General John Ashcroft, FBI director Robert Mueller, and other government officials, claiming violations of his First and Fifth Amendment rights arising from actions taken against him because of his race, religion, or national origin. Iqbal alleged that Ashcroft was the "principal architect" of the plan to arrest suspected terrorists and that Mueller was "instrumental" in adopting and executing the plan. The United States District Court for the Eastern District of New York denied the defendants' motion to dismiss on qualified immunity grounds.[20] On interlocutory appeal, the United States Court of Appeals for the Second Circuit affirmed.[21]

In *Iqbal*, the Supreme Court rejected arguments that *Twombly* should apply only to antitrust cases, explaining that the *Twombly* decision was an interpretation of Rule 8(a)(2), which "in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'"[22] The Court articulated "[t]wo working principles."[23] First, a court evaluating the sufficiency of a complaint need not accept as true legal conclusions couched as factual allegations, including recitals of the elements of a cause of action supported by conclusory statements.[24] Thus, the Court rejected as conclusory the allegations that Ashcroft was the "principal architect" of the policy, that Mueller was "instrumental" in adopting and executing it, and that "each knew of, understood, and willfully and maliciously agreed to subject" Iqbal to

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[20] No. 04 CV 1809 JG SMG, 2005 WL 2375202, at *35 (E.D.N.Y. Sept. 27, 2005).
[21] 490 F.3d 143 (2d Cir. 2007).
[22] *Iqbal*, 129 S.Ct. at 1953.
[23] *Id.* at 1949.
[24] *Id.*

harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race and/or national origin."[25]

The second principle was that determining whether a complaint states a plausible claim for relief ("[w]here the well-pleaded facts . . . permit the Court to infer more than the mere possibility of misconduct") is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[26]

In the Committee's view, these two principles go too far.[27] They import a subjective view (judicial experience and common sense) of whether "well-pleaded facts" lead to an inference of misconduct and allow courts to reject as legal conclusions factual allegations (such as "principal architect" of a policy), including allegations of a party's intent. This approaches the discredited distinctions between ultimate facts and evidentiary facts and conclusions which characterized pleading before the FRCP.

A BRIEF HISTORY OF FEDERAL PLEADING STANDARDS

The History of FRCP Rule 8(a)(2)

With the creation of the federal court system, the Judiciary Act of 1789 and the Process Act of the same year together established that the law of the state in which the federal court sat, both procedural and substantive, was to be applied unless federal law provided otherwise.[28]

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[25] *Id.* at 1944, 1951, 1954.

[26] *Id.* at 1950.

[27] Several Circuit Courts have recognized that the Supreme Court has altered the standard See, e.g., *Turkmen v. Ashcroft,* 589 F. 3d 542, 546 (2nd Cir. 2009) ("Now, following the district court's decision, *Twombly* and *Iqbal* require a 'heightened pleading standard in those contexts where factual amplification is needed to render a claim plausible.'"); *Fowler v. UPMC Shadyside,* 578 F.3d 203, 210 (3rd Cir. 2009) ("pleading standards have seemingly shifted ... to a more heightened form of pleading ..."); *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629 (6th Cir. 2009) ("[t]he Supreme Court . . . raised the bar for pleading requirements . . . that had prevailed for the last few decades."); *Barrett v. Orman,* 2010 WL1499586 *2 (10th Cir. Apr. 15, 2010)("under the more stringent *Twombly/Iqbal* pleading standard ...").

[28] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (Process Act) ("[unless federal law requires otherwise], the forms of writs and executions . . . shall be the same in each state respectively as are now used . . . in the supreme courts of the

Under the Conformity Act,[29] this principle continued through the 19th century and up until the adoption of the Federal Rules of Civil Procedure in 1938.[30]

Pleading in federal court in the first half of the nineteenth century was governed by common law pleading standards and in the second half by the Field Code and by common law pleading standards, which recalcitrant judges and practitioners accustomed to the common law forms of action continued to apply. Common law pleading had evolved from the English writ system, which required strict compliance with formal pleading requirements. Each writ was limited to a single cause of action with the factual issue to be identified after multiple responsive pleadings.[31] Originally issued by the English Lord Chancellor's office, writs ordered a court to hear a case and directed the sheriff to compel the defendant's attendance.[32] Without a writ, which over the centuries evolved into a standardized claim form, a party was not entitled to proceed to court.[33] The evolution of the writ system, which blended substantive law and procedure, required pleading of facts sufficient to meet the requirements of the form of action for the writ and led to strict and technical pleading requirements that, despite the presence of a meritorious claim, could lead to dismissal for failure to comply with technical requirements of the writ. Pleaders were supposed to allege facts, "'dry, naked, actual facts,' avoiding the pitfalls

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same;" Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (codified as amended at 28 U.S.C. § 1652 (1982) (Rules of Decision Act) ("the laws of the several states [unless they conflict with the federal law] shall be regarded as the rules of decision in trials at common law").

[29] Act of June 1, 1872, ch. 255, 17 Stat. 197 (1872).

[30] *See* Charles E. Clark and James Wm. Moore, *A New Federal Civil Procedure, II, Pleadings and Parties,* 44 YALE L.J. 1291, 1299 (1935) (hereinafter "Clark II"); CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 152 (1928); HENRY HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17-18, 581-86 (1963) (discussing the repeated pattern of state law governing unless superseded by federal law in the Process and Conformity Acts of the 1700's and 1800's).

[31] Subrin, Stephen, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV 909, 916 n. 35 (1987) (citing in I.J. CHITTY, TREATISE OF PLEADING 261-63 (1879) and other sources).

[32] S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 22 (1969).

[33] *Id.* at 25.

of stating conclusions on the one hand and pleading evidence on the other."[34] While these strict pleading requirements applied to actions at law, equity proceedings employed a more lenient pleading practice and gave the judges more discretion in the management of the cases.

The Field Code, adopted in New York in 1848,[35] was created to address some of the restrictive aspects of the common law pleading system and to incorporate features of equity proceedings in a unified code of civil procedure.[36] David Dudley Field and his fellow commissioners sought to unify law and equity and facilitate the use of pleadings to educe all relevant facts, to reveal a side's position, and to narrow the controversy. The Field Code not only liberalized pleading, but it also facilitated joinder of additional parties and discovery. Blending features of common law actions and equity, the Field Code imposed a single procedure for all types of cases without regard to the substantive claim or claims, the number of parties, and the number of claims. In doing so, it discarded the formulaic common law approach to find a single issue to be resolved,[37] but it did not discard the need to plead facts that supported causes of action.[38]

While the Field Code merged actions at law and equity, and in so doing eliminated forms of action, it did not fully embrace the equity model's vesting of unfettered powers and discretion with the courts. As Professor Subrin observed in his comprehensive law review article,

> "[A] closer look at the merger under the 1848 Field Code shows more concern for the confining aspects of common law procedure than is generally recognized."[39]

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[34] 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1202 n.10 (3d ed. 2004).

[35] The Field Code was adopted by the New York State Legislature and signed into law in 1848 and by about half the states in the years following 1848. Subrin, *supra*, 135 U. PA. L. REV. at 939.

[36] *Id.* at 932 n. 127 (citing F. JAMES, JR., CIVIL PROCEDURE § 2.5 at 65-66, § 2.11 at 85.86 (1st ed. 1965), Charles E. Clark & James W. Moore, *A New Federal Civil Procedure, I. Background* (hereinafter "Clark I"), 44 YALE L.J. 387, 393 (1935), and others).

[37] Subrin, *supra*, 135 U. PA. L. REV. at 933-934.

[38] *Id.* at 963.

[39] *Id.* at 932.

Judge Charles E. Clark, widely recognized as the principal author of the Federal Rules of Civil Procedure, himself believed that the Field Code was rigid and inflexible.[40]

Field and the commissioners attempted to eliminate superfluous technical requirements with a goal of simplifying and making more efficient the process of pleading and the adjudication of disputes between, if appropriate, multiple parties, but they still required pleading facts to support a cause of action. As observed by Professor Subrin, "The Field Code contained strong verification requirements to encourage truthful pleading, prevent 'to a considerable extent groundless suits and groundless defenses,' and compel the admission of the 'undisputed' facts."[41]

Nonetheless, the legal profession, schooled in the common law, continued to utilize common law pleading modes, and some federal courts ignored the merger of law and equity and evaluated the sufficiency of pleadings with the common law technical yardstick.[42] Moreover, practitioners struggled with proper fact pleading.

The Field Code pleading reformulation apparently did not provide sufficient guidance so as to distinguish between pleading allegations of (a) ultimate fact, which was proper, (b) evidence, which was improper, or (c) conclusions, which also was improper.[43] The distinctions between these three were not always easy to divine, for a factual proposition can be evidentiary (*i.e.*, having no legal consequence immediately attached to it) in one context and ultimate (*i.e.*, one to which legal consequences attach) in another, even in the same dispute.[44] Improper fact pleading continued to lead to dismissals, and as a result pleading continued to be hazardous.

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[40] *Id.* at 939.

[41] *Id.* at 936, quoting from Speeches, Arguments, and Miscellaneous Papers of David Dudley Field, 226, 235-37 (A Sprague ed. 1884).

[42] Subin, *supra*, 135 U. PA. L. REV. at 940.

[43] Richard Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986).

[44] Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1327 (1942).

Part of the problem in the federal courts was the application of the local state's laws and procedures with resultant disparate treatment in different federal courts, depending on the state in which they sat. Since the Field Code was not adopted in all the states and since there were small variations among the codes in the states where it was adopted, lawyers with national practices faced obvious hazards. In 1906, then Nebraska College of Law Dean Roscoe Pound addressed the annual American Bar Association ("ABA") convention to highlight the "real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today."[45] Pound identified problems of procedure as "the most efficient causes of dissatisfaction with the present administration of justice in America."[46]

Several years later, after much discourse in the profession, the ABA sought to have the Supreme Court "make rules of procedure for federal civil actions at law and to unite the federal law and equity procedure."[47] This reform movement focused on solving the chaos that existed in federal civil procedure. It lasted for over twenty years and culminated in the Rules Enabling Act of 1934, which granted the Supreme Court authority to prepare and present to Congress procedural rules governing actions in federal court.[48] The Supreme Court in 1935 announced its intention to "draft rules for a united system in the federal district courts."[49] The United States Supreme Court Advisory Committee ("Committee") was appointed by the Supreme Court to draft the rules,[50] and Charles E. Clark, Dean of the Yale Law School, was appointed as the Reporter of the Committee. In this position, Clark had an outsized impact on the drafting of what became the Federal Rules of Civil Procedure. Clark looked at how different courts at the

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[45] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration Justice*, 29 A.B.A. REP. 395 (1906), reprinted in 35 F.R.D. 241 (1964).
[46] *Id.*, 29 A.B.A. at 408, 35 F.R.D. at 284.
[47] Clark I at 387.
[48] *See id.* at 392.
[49] Clark II at 1291.
[50] Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1058 (1955).

time dealt with pleading standards and found that the courts were "demanding what is under the circumstances an adequate statement of the fact transaction to identify it with reasonable certainty, not to set forth all its details."[51] Drawing on these observations, Clark noted that applying the established principles from the Federal Equity Rules to the new Federal Rules would make the most sense.[52]

Accordingly, the Committee relied heavily on the Federal Equity Rules in drafting the FRCP.[53] Under then proposed Rule 8(a)(2) of the FRCP, "a pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief." This language drew heavily on Equity Rule 25, which provided for "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."[54] By drafting Rule 8 with this similar language, the Committee intended for it to "no longer [be] necessary for a complaint to comply with all the technical requirements of a statement of a cause of action."[55] Instead, the Committee felt that it would be enough if the plaintiff's complaint "put the defendant on notice as to what was the subject matter of the suit." *Id.* In other words, "[Clark] would have preferred that the parties merely tell their stories in the pleadings."[56]

Notably absent from the language of Rule 8(a)(2) is any mention of "facts" or "cause of action," requirements that were prevalent under the code pleading system. This was in line with the Committee's expansive and flexible views on the draft rules.[57] The Committee members did

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[51] Clark II at 1302.
[52] *See id.* at 1302–03.
[53] Holtzoff, *supra*, 30 N.Y.U.L. REV. at 1058.
[54] *See* Note to Subdivision (a), Advisory Committee Notes, Fed. R. Civ. P. 8; *see also* Clark II, 44 YALE L.J. at 1301–03.
[55] Holtzoff, *supra*, 30 N.Y.U.L. REV. at 1066.
[56] Subrin, *supra*, 135 U. PA. L. REV. at 963.
[57] *Id.* at 975–77.

have their doubts about how flexible they were making the federal rules, however.[58] An earlier draft of Rule 8(a)(2) focused on the underlying events in a litigation and "required a 'statement of the acts and occurrences upon which the plaintiff bases his claim or claims for relief.'" In the end, however, the Committee was faithful to its expansive and flexible views. After drafting was complete, the FRCP became law by Congressional inaction in 1938.[59]

Rule 8(a)(2) was intended to eliminate the complexities and confusion of fact pleading under the codes, which failed to provide adequate guidance or clarification of the distinctions between proper ultimate facts and improper evidentiary facts and conclusions. But some courts and practitioners resisted the new pleading rules in the years following 1938.[60]

Judicial Implementation of Rule 8(a)(2) Before *Twombly*

Following his appointment to the Second Circuit, Charles Clark continued his campaign to eliminate the remnants of code and common law pleading. In *Dioguardi v. Durning*,[61] Judge Clark reversed a dismissal of an "obviously home-drawn" complaint, pointing out that "[u]nder the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action.'"[62] Then, in 1955, Judge Clark was still Reporter for the Advisory Committee on Rules for Civil Procedure, when it rejected a proposed amendment to Rule 8(a)(2) by the Ninth Circuit Judicial Conference, triggered by concern about the high costs of complex antitrust litigation, to add the phrase, "facts constituting a cause of action."[63]

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[58] *Id.* at 975.
[59] *Id.* at 973.
[60] Marcus, *supra*, 86 COLUM. L. REV. at 433.
[61] 139 F.2d 774 (2d Cir. 1944).
[62] *Id.* at 774, 775.
[63] *See* Advisory Committee on Rules of Civil Procedure, *Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts* 18-19 (1955), available at http://www.uscourts.gov/rules/Reports/CV10-1955.pdf, and *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253 (1952).

Notice pleading was firmly established as the standard under Rule 8(a)(2) by the Supreme Court in 1957 in *Conley v. Gibson*,[64] when the Court 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."[65] For 50 years prior to *Twombly*, this was the guiding principle in evaluating a Rule 12(b)(6) motion to dismiss or a Rule 12(c) motion for judgment on the pleadings,[66] and, in the years immediately preceding *Twombly*, this formulation had been restated by every circuit court of appeals.[67] In fact, one law professor observed that, in the twelve months prior to the decision in *Twombly*, this passage from *Conley* was quoted 1,631 times in the lower federal courts.[68]

Other standards for evaluating motions to dismiss had also been adopted uniformly. One is that a court "must accept as true all of the factual allegations contained in the complaint."[69] All circuit courts have utilized this rule when considering

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[64] 355 U.S. 41, 78 S. Ct. 99 (1957).

[65] 355 U.S. at 45-46, 78 S. Ct. at 102.

[66] *See Hayden v. Paterson*, 594 F.3d 150, 157 n.4 (2d Cir. 2010) ("[i]n deciding a Rule 12(c) motion, we apply the same standard as that applicable to a motion under Rule 12(b)(6)" (quoting *Burnette v. Carothers*, 192 F.3d 52, 56 (2d Cir. 1999))); *Guidry v. Am. Public Life Ins. Co.*, 512 F.3d 177, 180 (5th Cir. 2007) (same); *Hentosh v. Herman M. Finch Univ. Health Sci./Chi. Med. Sch.*, 167 F.3d 1170, 1173 n.2 (7th Cir. 1999) (same).

[67] *See McLaughlin v. Boston Harbor Cruise Lines, Inc.*, 419 F.3d 47, 50 (1st Cir. 2005); *Twombly v. Bell Atl. Corp.*, 425 F.3d 99 (2d Cir. 2005), *rev'd, Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007); *California Pub. Employees' Retirement Sys. v. Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004); *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 (4th Cir. 2004); *Cornish v. Correctional Svcs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005); *Ricco v. Potter*, 377 F.3d 599, 602 (6th Cir. 2004); *Cole v. U.S. Capital*, 389 F.3d 719, 724 (7th Cir. 2004); *Quinn v. Ocwen Federal Bank FSB*, 470 F.3d 1240, 1244 (8th Cir. 2006), *Doe v. U.S.*, 419 F.3d 1058; 1062 (9th Cir. 2005); *Society of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1240 (10th Cir. 2005), *Thaeter r v. Palm Beach County Sheriff's Office*, 449 F.3d 1342, 1353 (11th Cir. 2006); *Barr v. Clinton*, 370 F.3d 1196; 1202 (D.C. Cir. 2004).

[68] *Open Access to the Courts Act of 2009: Hearing on H.R. 4115 Before the Subcomm. On Courts and Competition Policy of the H. Comm. on the Judiciary*, 111TH CONG. 4 (2009)(statement of Prof. Eric Schnapper, University of Washington Law School).

[69] *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, n.1 (2002).

motions to dismiss.[70] A second is that "a court, when reading a complaint, shall draw all reasonable inferences in favor of plaintiff."[71] Every circuit court has followed this rule as well.[72]

However, even before *Twombly*, there were well-established exceptions to these liberal pleading rules. One was that, on a motion to dismiss, a court is not required "to accept as true a legal conclusion couched as a factual allegation."[73] Another was that a court is not required to accept as true a factual allegation that is "clearly baseless."[74] Yet another is for claims sounding in fraud or alleging mistake.[75] In addition, all circuit courts prior to *Twombly* employed a heightened pleading standard for securities fraud cases governed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 77z-1 and 78 u-4.[76]

Post-*Twombly* and *Iqbal* Case Law and Commentary

As discussed above, on May 18, 2009, the Supreme Court decided *Iqbal*, reaffirming the "plausibility" standard announced in *Twombly* and answering in the affirmative the question of whether the "plausibility" standard applies to all federal complaints, rather than just cases brought under the federal antitrust laws. In the post-*Twombly/Iqbal* world, the circuit courts, the

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[70] Dawinder S. Sidhu, *First Korematsu and now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 BUFF. L. REV. (forthcoming Spring 2010), *available at* http://ssrn.com/abstract=1478787 (collecting cases).

[71] *Id.*, citing to Elliott J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L REV. 675, 691 (1996).

[72] *Id.* (collecting cases).

[73] *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

[74] *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989).

[75] FRCP Rule 9(b).

[76] *In re Credit Suisse First Boston Corp.*, 431 F.3d 36, 47-48 (1st Cir. 2005); *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 32 (2d Cir. 2005), *vacated on other grounds*, 545 U.S. 71 (2005); *California Pub.*, 394 F.3d at 145; *In re PEC Solutions Sec. Litig.*, 418 F.3d 379, 388 (4th Cir. 2005); *Financial Acquisitions Partners LP v. Blackwell*, 440 F.3d 278, 289 (5th Cir. 2006); *Robert N. Clemens Trust v. Morgan Stanley DW, Inc.*, 485 F.3d 840, 846-47 (6th Cir. 2007); *Makor Issues & Rights, Ltd., v. Tellabs, Inc.*, 437 F.3d 588, 602 (7th Cir. 2006), *vacated and remanded on other grounds*, 551 U.S. 308 (2007); *Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820, 824 (8th Cir. 2003); *In re Daou Sys., Inc.*, 411 F.3d 1006, 1016 (9th Cir. 2005); *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1105 (10th Cir. 2003); *Belizan v. Hershon*, 434 F.3d 579, 584 (D.C. Cir. 2006).

district courts, the bar, and legal commentators are all struggling with how to apply the Court's new formulation replacing the now overruled decades-old standard enunciated in *Conley v. Gibson*.

Not surprisingly, the reactions to *Iqbal* in the legal community vary widely.[77] Some, like Gregory Katsas, a partner in Jones Day and former Assistant Attorney General, Civil Division, Department of Justice, involved in defending the government in *Iqbal*, support the Supreme Court's decisions and have argued that *Twombly* and *Iqbal* "faithfully interpret and apply the pleading requirements of the Federal Rules of Civil Procedure, are consistent with the vast bulk of prior precedent, and strike an appropriate balance between the legitimate interests of plaintiffs and defendants."[78] Others, like John Vail, Vice-President and Senior Litigation Counsel Center for Constitutional Litigation, P.C., have taken the polar opposite position, arguing that "[o]ne of the reasons that we adopted the Federal Rules was to rid ourselves of endless and irresolvable debates about whether statements were properly classified as facts, ultimate facts, mixed assertions of law and fact, or legal conclusion. *Iqbal* returns us to the kind of legal practice Dickens condemned in *Bleak House* and we had good sense to put to rest."[79] Still others, like Debo P. Adegbile, Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc., focus their concern regarding *Twombly*'s and *Iqbal*'s effect on certain areas of the law,

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[77] *Compare* Statement of Gregory Katsas Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties House Judiciary Committee, presented October 27, 2009 *with* Statement of John Vail Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties House Judiciary Committee, presented October 27, 2009, and Statement of Debo P. Adegbile Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties House Judiciary Committee, presented October 27, 2009, can be found at http://judiciary.house.gov/-hearings/hear_091027.html.

[78] Statement of Gregory Katsas Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties House Judiciary Committee, presented October 27, 2009, at 1.

[79] Statement of John Vail Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties House Judiciary Committee, presented October 27, 2009, at 11.

arguing that "the Supreme Court has taken unwarranted and unwelcome steps toward limiting civil rights litigation by restricting ordinary individuals' access to courts."[80]

Indeed, a debate about the effect of *Twombly* and *Iqbal* rages in legal literature.[81] A sampling of these articles reveals that the legal community is divided over whether *Twombly* and *Iqbal* were correctly decided.[82]

Although disparate points of view are being staked out by commentators, the circuit and district courts still have the task of faithfully applying the Supreme Court's precedent. Before analyzing particular cases, and the anecdotal perspective that comes with such an approach, it might be helpful to examine initial statistical analyses of the effect of *Twombly/Iqbal*. In February 2010, the Statistics Division of the Administrative Office of the United States Courts released information detailing the number of motions to dismiss filed in the federal courts from

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[80] Statement of Debo P. Adegbile, Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties House Judiciary Committee, presented October 27, 2009, at 1.

[81] *Iqbal* is cited in forty-six different law review articles according to the Shepard's report of *Iqbal* in the LexisNexis database. Not all of these articles, however, focus solely upon the pleading standards announced in *Twombly* and *Iqbal*.

[82] *Compare* Andrew Blair-Stanek, *Twombly is the Logical Extension of the Mathews v. Eldridge Test to Discovery*, 62 FLA. L. REV. 1, 4 (2010) ("Twombly is not the radical departure alleged by Justice Stevens' dissent and by a number of commentators, but rather is a logical progression in the Court's ever-expanding application of the Mathews balancing test."); and Nicholas Tymoczko, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 507 (2009) (arguing "that the plausibility standard is best understood as a minimal standard, representing at most a small break from past pleading practice, which requires only that a complaint support a reasonable inference that the plaintiff has a viable claim, which a court is then required to draw."); *with* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 36 (2009) ("Recalibrating the doctrine to permit more generalized allegations of certain components of a claim, coupled perhaps with discovery reform that permits greater access to prefiling or staged discovery could go a long way toward restoring a proper balance between efficiency and access. In the meantime, I would urge courts to be conscious of the challenge that certain claims - particularly those of larger public-policy significance - face under contemporary pleading doctrine, and to find creative ways to use their managerial authority to give potentially valid claims their due before closing the courthouse door."); and The Honorable John P. Sullivan, *Twombly and Iqbal: The Latest Retreat from Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 56 (2009) ("it makes little sense to return to judicial decision-making based on technical analyses of pleadings rather than merit-based decisions arrived at by summary judgment or trial, or in the small percentage of cases where the allegations clearly reflect no reasonable possibility that the plaintiff has a cognizable claim."); *see also* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010); *Debate: Plausible Denial: Should Congress Overrule Twombly and Iqbal*, 158 U. PA. L. REV. PENNumbra 141 (2009).

January 2007 through December 2009, as well as their dispositions.[83] The report, entitled Statistical Information on Motions to Dismiss re: *Twombly/Iqbal*, provided specific information regarding certain types of federal cases, including personal injury, prisoner petitions, civil rights employment, civil rights other, civil rights ADA (i.e., the Americans with Disabilities Act), antitrust, patent, labor law, contracts, and all others.[84] It included four months of data prior to the *Twombly* decision and seven months of data after the *Iqbal* decision. The chart below shows the types of federal actions identified in the report and the percentages of motions to dismiss that were granted or denied pre-*Twombly* and post-*Iqbal*:

[83] The data provided by the Statistics Division, Administrative Office of the United States Courts, has some flaws. First, the data includes all motions to dismiss filed under Rules 12(b)(1)–(7) in cases filed from January 2007 through December 2009. Rule 12(b)(6) motions cannot be broken out in this data. Second, the data does not include information on whether motions to dismiss were granted with or without leave to amend. Third, the data does not include MDL cases in either the total number of cases filed or the motions to dismiss filed. Further, the data was extracted directly from the text of 94 district court docket entries, rather than from the official statistics system, and they did not pass through all the quality controls of the statistics system.

[84] The report of the Statistics Division of the Administrative Office of the United States Courts upon which these statistics were originally based has since been updated with data from January 2010 through April 2010. This updated report, however, was not available when this report was submitted to the House of Delegates for approval. The updated report, including all of the data upon which this report is based, can be retrieved at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions_to_Dismiss_060110.pdf.

Type of Action	Pre-*Twombly* Granted %	Post-*Iqbal* Granted %	Pre-*Twombly* Denied %	Post-*Iqbal* Denied %
Personal Injury	48%	40%	13%	10%
Prisoner Petitions	34%	35%	12%	14%
Civil Rights Employment	40%	35%	16%	15%
Civil Rights Other	38%	36%	15%	12%
Civil Rights ADA	41%	38%	14%	13%
Antitrust[85]	56%	47%	25%	26%
Patent	61%	68%	27%	19%
Labor Law	34%	32%	17%	16%
Contracts	37%	38%	16%	16%
All Others	38%	38%	15%	13%

From this chart, it appears that, but for patent cases, *Iqbal* has not had an appreciable effect on the percentage of motions to dismiss that have been granted and denied in the federal courts. In some types of cases, such as antitrust and civil rights employment matters, the percentage of motions to dismiss that have been granted have actually declined in a post-*Iqbal* world.

These statistics, however, do not tell the whole story. First, these statistics do not account for any number of cases that were never brought in the first place, because of a potential chilling-effect that *Iqbal* may have on potential plaintiffs. Second, these numbers compare only four

[85] The percentages for antitrust and patent cases reflect the percentage of adjudicated motions to dismiss which were granted or denied. For some reason, the Statistics Division combined the total number of motions to dismiss filed in antitrust and patent cases. Therefore, in calculating the above percentages, the denominator used in the antitrust and patent cases is the total number of motions to dismiss that were granted, denied, moot, or were granted in part and denied in part. Moreover, since many antitrust cases are MDL cases, they would not be included in these statistics. For all the other figures in the above chart, the denominator is all motions to dismiss filed in the federal courts related to that particular area of law for the above-described time period.

months of pre-*Twombly* motions to only seven months of post-*Iqbal* motions.[86] Third, these statistics do not account for any number of cases that may have been settled prior to the adjudication of a motion to dismiss because a plaintiff may have been worried about the complaint's susceptibility to dismissal post-*Iqbal*. Fourth, these statistics do not indicate whether the courts that granted the motions to dismiss also granted plaintiff leave to amend the complaint. However, taking into account the limitations of the data, they do suggest that post-*Iqbal* decisions are idiosyncratic to individual judges applying their experience and predispositions, as opposed to a comprehensive application of a uniform pleading standard.

Another study was published in the February 2010 American University Law Review regarding the statistical effect of *Twombly* and *Iqbal*.[87] This study was based upon a random sampling of 500 federal district court opinions for the two years prior to the *Twombly* decision, 500 federal district court opinions for the two years after *Twombly*, and 200 federal district court opinions decided in the three months following *Iqbal*.[88] For all cases in which a motion to dismiss was filed, Professor Hatamyar concluded that "there was a slight decline in the proportion of motions granted without leave to amend from the Database under *Conley* (40%) to *Twombly* (39%) to *Iqbal* (37%). However, the percentage of 12(b)(6) motions in the database that were granted with leave to amend increased from 6% under *Conley* to 9% under *Twombly* to

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[86] There is also a spike in the data due to reporting requirements to the Administrative Conference for Federal Judicial Caseload Statistics as of each March 31. In March of each year, there are the greatest number of dismissals by a substantial margin. March is included in the four months before *Twombly*, but not in the seven months after *Iqbal*. Therefore, the percentage of dismissals was elevated for the four months before *Twombly* without a corresponding spike in the seven months after *Iqbal*. If March 2007 dismissals were eliminated from the data, then there would be a clear increase in the percentage of dismissals overall in the months after *Iqbal* compared to the months before *Twombly*. It is difficult, however, to predict the magnitude of this spike. Federal courts also have reporting requirements as of each September 30th, and the data does not show a marked spike of dismissals in these months. So while the lack of March data post-*Iqbal* does have an effect on the percentage of dismissals after *Iqbal*, it is impossible to quantify that effect with any certainty.

[87] Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U.L. REV. 553 (2010.).

[88] For particular screening reasons, the study used 444 pre-*Twombly* cases, 422 post-*Twombly* cases, and 173 post-*Iqbal* cases. *See Id.* at 585.

19% under *Iqbal*."[89] Further, the "proportion of motions denied – *i.e.*, plaintiff wins – fell from 26% under *Conley* to 23% under *Twombly* to only 18% under *Iqbal*."[90] The data, however, did indicate that "much of the increase in 'grant[ed motions to dismiss]' under *Twombly* and *Iqbal* is comprised of grants with leave to amend."[91] The data in this study is, admittedly, limited with regard to post-*Iqbal* cases as it only covered a random sampling from the first three months of cases decided after *Iqbal*.[92]

A review of the circuit and district court case law decided post-*Iqbal* does not indicate that any clear or discernable trends have developed regarding how any individual circuit has interpreted *Iqbal* as opposed to the other circuits.[93] In one review of the case law, the author Andrea Kuperman[94] remarked that "the case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency."[95] She concludes that, "[w]hile it seems likely that *Twombly* and *Iqbal* have resulted in screening out some claims that might have survived before those cases, it is difficult to determine from the case law whether meritorious claims are being screened under the *Iqbal* framework or whether the new framework is effectively working to sift out only those claims that lack merit earlier in the proceedings."[96]

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[89] *Id.* at 599.
[90] *Id.*
[91] *Id.*
[92] *See id.*
[93] For an extensive review of the case law applying *Twombly* and *Iqbal* for the period after *Iqbal* was decided until December 30, 2009, see the memorandum from Andrea Kuperman, the Rules Law Clerk to Judge Lee H. Rosenthal, Chair of the Judicial Conference Committee on Rules of Practice and Procedure, to the Civil Rules Committee and the Standing Rules Committee. It may be found at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_051710.pdf. A search of the Westlaw database revealed that, as of December 29, 2009, *Iqbal* had been cited more than 4,200 times. In an effort to bring such information up to date, from January 1, 2010 through March 9, 2010, according to the LexisNexis database, *Iqbal* has been cited an additional 1,586 times.
[94] Ms. Kuperman is the Rules Law Clerk to Judge Lee H. Rosenthal, Chair of the Judicial Conference Committee on Rules of Practice and Procedure.
[95] *Id.* at 2.
[96] *Id.* at 3. *See, e.g., Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (complaint in a § 1983 case was insufficient and the allegations "would not have been [enough] even before *Bell Atlantic* and *Iqbal*."); *Lehman Bros.*

It is apparent, however, that the circuit and district courts are often grappling with the holdings of *Twombly* and *Iqbal* in particular areas of the law.[97] For instance, the courts appear to be struggling with the application of *Twombly* and *Iqbal* in areas of the law in which some element of the claims is dependent upon information that is uniquely within the hands of the defendant, such as pleading a conspiracy in an antitrust matter, pleading a supervisor's knowledge of civil rights violations under 42 U.S.C. § 1983, or pleading intent in a securities fraud case.[98] A few examples of cases in which complaints have been dismissed or reinstated under the new pleading regime are examined, by topic, below.

Antitrust

In antitrust cases brought under the Sherman Act, courts continue to grapple with the quantum and quality of facts needed to be asserted to sufficiently plead a conspiracy claim.[99] As conspiracies are rarely public knowledge, plaintiffs will always have a difficult time pleading exactly when and how an illegal price-fixing or other anticompetitive conspiracy is struck

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Holdings, Inc. v. Cornerstone Mortgage Co., No. H-09-0672, 2009 WL 2900740, at *5 (S.D. Tex. Aug. 31, 2009) (the complaint "fails to plead sufficiently under the standards that applied even before *Twombly* and *Iqbal*.") *Argeropoulos v. Exide Techs.*, No. 08-CV-3760 (JS), 2009 WL 2132443, at *6 (E.D.N.Y. Jul. 8, 2009) ("even before *Iqbal*, the federal rules required a plaintiff to do more than just plead 'labels and conclusions, and a formulaic recitation of the elements of a cause of action.").

[97] To be sure, the areas of the law discussed in this section are not the only ones in which complaints have explicitly turned upon the plausibility of the allegations in the complaint. *See, e.g., Dubinsky v. Mermart, LLC*, 595 F.3d 812 (8th Cir. 2010) (contract); *Hayden v. Paterson*, 594 F.3d 150, 161-69 (2d Cir. 2010) (federal constitutional challenge to New York constitution and statute on felon voting rights); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255-60 (4th Cir. 2009) (immunity under Communications Decency Act of 1996 § 230); *Rao v. BP Prods. N. Am., Inc.*, 589 F.3d 389, 398-401 (7th Cir. 2009) (RICO); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) (Alien Tort Statute and Torture Victims Protection Act); *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629-31 (6th Cir. 2009) (hybrid claim under Labor Management Relations Act § 301).

[98] Notably, the Eighth Circuit has cautioned, in the context of an appeal of an ERISA claim, that courts should take account of this imbalance of knowledge between plaintiff and defendant at the outset of an action when assessing the plausibility of the factual allegations of a complaint. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597-598 (8th Cir. 2009) ("[W]e must also take account [plaintiffs'] limited access to crucial information. If plaintiffs cannot state a claim without pleading facts which tend systemically to be in the sole possession of defendants, the remedial scheme of the statute will fail, and the crucial rights secured by ERISA will suffer. These considerations counsel careful and holistic evaluation of an ERISA complaint's factual allegations before concluding that they do not support a plausible inference that the plaintiff is entitled to relief.").

[99] Given that the penultimate allegations of conspiracy in *Twombly* appear to have been made upon "information and belief," *Twombly* may even call into question the efficacy of this traditional pleading device. *See Twombly*, 550 U.S. at 551.

between competitors. The standard of *Twombly* and *Iqbal* does appear to have made it more difficult to plead violations of the antitrust laws, at least in the Sixth and Ninth Circuits. But how much more difficult is still open to question in light of the Second Circuit's later decision in *Starr v. Sony BMG Music Entm't.*[100]

The Sixth Circuit in *In re Travel Agent Com'n Antitrust Litig.*[101] affirmed the district court's dismissal of a complaint alleging a section 1 conspiracy under the Sherman Act.[102] The plaintiff alleged that one of the industry leader airlines would lower the commissions it paid to travel agents and that the competitor airlines would follow suit, and that this pattern happened several times until eventually the commissions were reduced to zero.[103] The complaint alleged that the defendants had the opportunity to conspire at trade meetings and did so.[104] The Sixth Circuit, however, did not permit this case to proceed to discovery to enable the plaintiff to attempt to find additional direct or circumstantial evidence of an antitrust conspiracy, holding that "plaintiffs have failed to allege sufficient facts plausibly suggesting (not merely consistent with) an agreement in violation of § 1 of the Sherman Act because defendants' conduct 'was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior.' . . . [And,] we note that the plausibility of plaintiffs' conspiracy claim is inversely correlated to the magnitude of defendants' economic self-interest in making the cuts."[105]

Judge Merritt, in dissent, expressed dismay with the majority's opinion stating, among other things, that the majority was using "the pleading rules to keep the market unregulated" and

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[100] 592 F.3d 314 (2d Cir. 2010).
[101] 583 F.3d 896 (6th Cir. 2009).
[102] *Id.* at 898–99.
[103] *See id.* at 899–900.
[104] *Id.* at 911.
[105] *Id.* at 908–99.

that, if these types of decisions continue, "[o]ver time, the antitrust laws [will] fall further into desuetude as the legal system and the market place are manipulated to benefit economic power, cartels, and oligopolies capable of setting prices."[106]

In *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*,[107] the Ninth Circuit affirmed the district court's dismissal of an antitrust claim based upon Sherman Act § 1. The court held that the plaintiff failed to demonstrate that certain bilateral agreements among purveyors of gasoline had any anti-competitive effect.[108] Because of a prior decision, the plaintiff was precluded from pleading that the defendants engaged in a conspiracy to control the market, but could raise other antitrust claims.[109] One of the remarkable findings in this case is that, in *dicta*, the Ninth Circuit appears to have dismissed the case in part because "this is the type of '*in terrorem* increment of the settlement value' that the Supreme Court mentioned in *Twombly*."[110] *Twombly* seems to have countenanced this justification for dismissing a complaint, despite the fact that it does not directly deal with the sufficiency of the allegations.

In the *Starr* case, plaintiffs challenged the activities of two joint ventures that sold music to consumers and retailers over the internet: MusicNet, created by defendants Bertelsmann, Inc., Warner Music Group, and EMI; and Pressplay, launched by defendants Sony Corporation and Universal Music Group.[111] The district court dismissed the claim for failure to allege sufficient facts under *Twombly* and denied the plaintiffs' motion to amend the complaint as futile.[112] The court reasoned that, in a digital music landscape filled with unauthorized downloading, the

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[106] *Id.* at 914-16.
[107] 588 F.3d 659 (9th Cir. 2009) (per curiam).
[108] *Id.* at 665.
[109] *Id.* at 661.
[110] *Id.* at 668.
[111] *Starr,s upra*, 592 F.3d at 318.
[112] *Id.* at 321.

actions taken by the defendants were not indicative of illegal collusive conduct, but merely rational business decisions taken to combat piracy.[113]

The Second Circuit disagreed with the district court, reinstating the section 1 claim and granting the motion to amend.[114] The court held that the amended complaint contained enough factual matter for an agreement to be plausible.[115] It concluded that the complaint contained allegations of parallel conduct as well as additional facts required under *Twombly*, thus making an inference of agreement plausible.[116] Specifically, the court cited the following conduct as evidence of an agreement to fix non-competitive prices and terms: the joint ventures charged unreasonably high prices and required consumers to agree to unpopular digital-rights-management terms, the defendants raised the price for internet music when the costs of providing the music dramatically decreased, the members of the joint ventures used most-favored-nation clauses to ensure that no member received terms less favorable than another member, and all defendants refused to do business with eMusic, the second most popular internet music retailer.[117]

The Second Circuit distinguished the failed pleading in *Twombly*, noting:

> Under *Twombly*, allegations of parallel conduct that could just as well be independent action are not sufficient to state a claim. However, in this case plaintiffs have alleged behavior that would plausibly contravene each defendant's self-interest in the absence of similar behavior by rivals.[118]

Section 1983 Supervisory Liability for Civil Rights Violations

In section 1983 cases alleging civil rights violations by supervisors and policymakers, plaintiffs encounter difficulties in pleading supervisory liability, as the acts of administrators

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[113] *Id.* at 320..
[114] *Id.* at 327.
[115] *Id.*
[116] *Id.* at 323–25.
[117] *Id.*
[118] *Id.* at 327 (internal citations and quotations omitted).

tend to happen behind closed doors and, at the time of pleading, plaintiffs do not have access to certain information usually unlocked by discovery.[119] The cases discussed below demonstrate the tension in the case law as plaintiffs attempt to push their claims into the realm of "plausibility." It is worth noting that the courts, as shown below, apply the standard separately to each defendant and not just to the claim in general.

In *Sanchez v. Pereira-Castillo*,[120] the plaintiff alleged that, "while a prisoner at a Puerto Rico correctional institution, correctional officers subjected him to an escalating series of searches of his abdominal cavity that culminated in a forced exploratory abdominal surgery."[121] The plaintiff sued correctional officers for the Commonwealth of Puerto Rico Administration of Corrections ("AOC") and doctors from the Rio Piedras Medical Center under 42 U.S.C. § 1983.[122] The district court dismissed the complaint for failure to state a claim. The First Circuit reversed the dismissal of the Fourth Amendment claims against two of the correctional officers and the doctor who performed the surgery.

Although the First Circuit reinstated the plaintiff's complaint in this action finding that the plaintiff had "alleged facts which, if proved, would amount to a violation of his Fourth Amendment rights," the court examined the plausibility of the allegations as against each named defendant.[123] The court determined that the plaintiff's claims against the defendants who allegedly directly caused the plaintiff's injury should be reinstated. However, the claims against the administrative defendants were dismissed because the court determined that the complaint

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[119] *See Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2009 WL 2246194, at *10 (N.D. Cal. Jul. 27, 2009) ("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.").
[120] 590 F.3d 31 (1st Cir. 2009).
[121] *Id.* at 36.
[122] *Id.*
[123] *Id.* at 48.

"[p]arrot[ed] our standard for supervisory liability in the context of section 1983."[124] Further, although the complaint alleged that the plaintiff's injuries were caused, in part, because the defendants followed regulations promulgated by Puerto Rico's Secretary of Corrections and Rehabilitation, the plaintiff's complaint did not establish a claim for supervisory liability/failure to train, because it "cannot plausibly be inferred from the mere existence of a poorly-implemented strip search or x-ray policy and a bald assertion that the surgery somehow resulted from those policies."[125]

The plaintiffs in *Maldonado v. Fontanes*[126] faced a similar problem in pleading supervisory liability under section 1983 against the mayor of Barceloneta, Puerto Rico, in alleging that their rights had been violated by the seizures and cruel killings of their pet cats and dogs.[127] Although the complaint alleged that the mayor had promulgated the policy that residents of the public housing complex had to relinquish their pets or be evicted and the mayor was present at the first raid and observed it, the complaint's allegation that the mayor "planned, personally participated in, and executed the raids in concert with others" was insufficient to sustain a claim for supervisory liability.[128]

In addition, in one of the most candid opinions regarding *Iqbal*, in *Ocasio-Hernandez v. Fortuno-Burset*,[129] Judge Gelpi determined that the plaintiff's complaint alleging civil rights violations under section 1983 failed to state a claim for relief, although it "clearly met the pre-*Iqbal* pleading standard under Rule 8."[130] The court went on to say that, "as evidenced by this opinion, even highly experienced counsel will henceforth find it extremely difficult, if not

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[124] *Id.* at 49.
[125] *Id.* at 50.
[126] 568 F.3d 263 (1st Cir. 2009).
[127] *Id.* at 266.
[128] *Id.* at 274.
[129] 639 F. Supp. 2d 217 (D.P.R. Aug. 4, 2009).
[130] *Id.* at 226.

impossible, to plead a section 1983 political discrimination suit without 'smoking gun' evidence."[131] Judge Gelpi also stated that the pleading requirements of *Iqbal* will force plaintiffs to file their claims in state (or commonwealth) court where they may able to obtain discovery.[132] "Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983."[133]

These cases demonstrate the problems facing a plaintiff seeking to plead supervisory liability under the new pleading regime. A recent case in the Eleventh Circuit, however, appears to demonstrate that all hope is not lost for plaintiffs pleading supervisory liability or deliberate indifference of officials. *Keating v. City of Miami*[134] reversed and remanded in part a number of supervisory liability claims arising out of an alleged violation of the plaintiffs' First Amendment rights during a demonstration held in November 2003 outside a Free-Trade-Area-of-the-Americas meeting in Miami.[135] The court of appeals reversed the district court's finding that the plaintiff had not alleged a plausible claim for relief and reinstated the plaintiffs' claims because they met the Eleventh Circuit's "heightened pleading requirement" under § 1983.[136]

Securities

The effect of *Twombly* and *Iqbal* is even felt in areas of the law which already have heightened pleading standards, such as pleading a violation of the securities laws under the PSLRA.

In *South Cherry Street, LLC v. Hennessee Group LLC*,[137] the Second Circuit affirmed the district court's dismissal for failing to adequately plead *scienter* as required under the PSLRA of

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[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] No. 09-10939, 2010 WL 703000 (11th Cir. Mar. 2, 2010).
[135] *Id.* at *1.
[136] *Id.* at *6, *10. *See also Fritz v. Charter Township of Comstock*, 592 F.3d 718 (6th Cir. 2010) (reversing district court decision dismissing complaint because "[p]laintiff's factual allegations are sufficient to raise more than a mere possibility of unlawful First Amendment retaliation on the part of Defendants").
[137] 573 F.3d 98 (2d Cir. 2009).

the plaintiffs' allegations that the defendant violated section 10(b) of the Securities and Exchange Act of 1934[138] and Rule 10b-5[139] by failing to learn and disclose that a hedge fund in which the plaintiff had invested on the defendant's recommendation was part of a Ponzi scheme.[140]

Although the court was analyzing the PSLRA, it focused on the plausibility standard and discussed the need to plead more than speculation to meet the requirements of FRCP Rule 8. Of particular note, the court stated that "[the plaintiff] argues that because such facts would be *peculiarly within the knowledge of the defendants*, it had no obligation to include [an allegation that the defendant acted illegally] in the Complaint, intimating that it might hope to develop some such evidence in discovery. . . . But 'before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct,' *Twombly*, at 564 n.8, and a plaintiff whose 'complaint is deficient under Rule 8 . . . is not entitled to discovery,' *Iqbal*, 129 S. Ct. at 1954. South Cherry's confessed inability to offer more than speculation . . . underscores, rather than cures, the deficiency in the Complaint."[141]

By contrast, the Ninth Circuit in *Siracusano v. Matrixx Initiatives, Inc.*[142] reversed and remanded a district court's dismissal under the PSLRA of a class action complaint that sought relief against Matrixx and three of its executives. The complaint alleged that "Matrixx's Form 10-Q filed on November 12, 2003, was false and misleading and violated SEC rules and the Generally Accepted Accounting Principles ('GAAP') promulgated by the Financial Accounting Standards Board ('FASB')."[143] The district court dismissed the complaint because it failed to

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[138] 15 U.S.C. § 78j(b).
[139] 17 C.F.R. § 240.10b-5.
[140] *South Cherry, supra*, 573 F.3d at 99–100.
[141] *Id.* at 113–14 (emphasis added).
[142] 585 F.3d 1167 (9th Cir. 2009).
[143] *Id.* at 1175.

sufficiently allege *scienter*. The Ninth Circuit reversed after conducting a "holistic review" of the complaint. Ultimately, the court concluded that "the inference that [the defendants] withheld the information intentionally or with deliberate recklessness is at least as compelling as the inference that [the defendants] withheld the information innocently."[144]

* * *

The above cases illustrate some of the uncertainty *Twombly* and *Iqbal* have thrust upon the circuit and district courts. There are opinions that declare that *Twombly* and *Iqbal* have closed the courts' doors to potential litigants, [145] and there are opinions that state that these cases have not dramatically affected pleading in the federal courts.[146] It is remarkable that two cases can engender such disparate views of its impact and effect on the existing case law. This counsels in favor of thoughtful consideration of a wide variety of views of what an appropriate pleading standard should be.

A LOOK AT STATE PLEADING STANDARDS

In considering what an appropriate pleading standard might be, the experience of the states should not be ignored. We next turn in some detail to the New York pleading requirements and then quickly summarize other states' requirements.

New York Pleading Requirements

New York Civil Practice Law and Rules ("CPLR") 3013 sets forth the requirements for

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[144] *Id.* at 1183

[145] A number of cases state that a complaint must be dismissed under *Twombly* and *Iqbal* but would have survived pre-*Twombly*. *See Ocasio-Hernandez*, 639 F. Supp. 2d at 226 n.4; *Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner I, LLC*, 637 F. Supp. 2d 185, 200 (S.D.N.Y. 2009); *Ansley v. Florida, Dep't of Revenue*, No. 4:09cv161-RH/WCS, 2009 WL 1973548 (N.D. Fla. Jul. 8, 2009).

[146] *See Vorassi v. US Steel*, No. 09 Civ. 0769, 2009 WL 2870635, at *2 (W.D. Pa. Sept. 3, 2009) (*Twombly* "does not impose a heightened burden on the claimant above that already required by Rule 8, but instead calls for fair notice of the factual basis of a claim while 'rais[ing] a reasonable expectation that discovery will reveal evidence of the necessary element.'"); *Chao v. Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) ("[n]otice pleading, however, remains the rule in federal courts, requiring only 'a short plain statement of the claim.' . . .[and] [y]et in keeping with Rule 8(a), a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible").

the substance of pleadings, providing two discrete requirements.[147] The mandate of CPLR 3013 is applicable to all pleadings, affirmative or responsive, even if another CPLR provision specifically governs that type of pleading.[148] CPLR 3013 states:

> Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

The first requirement is that the pleading provide notice to the court and parties of the event or events out of which the claim or defense arises.[149] "As long as the pleading may be said to give 'such' notice, in whatever terminology it chooses, this aspect of the CPLR 3013 requirement is satisfied."[150] This requirement represented a deliberate break from Section 241 of the Civil Practice Act that had required the pleading of "material facts."[151] As Professor David D. Siegel has commented:

> The Advisory Committee abandoned the word "facts" altogether in the pleading requirement. See 1st Rep.Leg.Doc. (1957) No. 6(b), p. 63. They did so not because a pleading does not allege facts, but because "facts" was the word around which was built most of the rigidities of old-law pleadings. The idea is that if the word "facts" falls, then falling with it will be all of the technical case law that depended on it. The idea appears to have worked.[152]

The second requirement is that the pleading provide the essential elements of the claim or defense being asserted. "Material elements" should be understood to mean all the elements of

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[147] The provisions immediately following CPLR 3013 provide additional requirements relating to the form, particularity regarding specific facts that must be plead, particularity of statements in certain types of actions, and so forth. *See* CPLR 3014 (form of statements); CPLR 3015 (particularity with regard to certain facts, including conditions precedent, corporate status, and judgments); CPLR 3016 (particularity in certain types of actions); CPLR 3017 (demand for relief); CPLR 3018 (denials and affirmative defenses); CPLR 3019 (counterclaims and crossclaims); David D. Siegel, McKinney's Practice Commentaries (hereinafter "Siegel, Prac. Commentaries"), CPLR 3013, C3013:1, C3013:2.

[148] *See Foley v. D'Agostino*, 21 A.D.2d 60, 62–63 (1st Dep't 1964). For example, affirmative defenses must satisfy CPLR 3013, even though CPLR 3018(b) specifically addresses them. Siegel, Prac. Commentaries, CPLR 3013, C3013:2.

[149] DAVID D. SIEGEL, NEW YORK PRACTICE (hereinafter "SIEGEL, N.Y. PRAC.") § 208 (4th ed. 2005).

[150] Siegel, Prac. Commentaries, CPLR 3013, C3013:2.

[151] Siegel, Prac. Commentaries, CPLR 3013, C3013:4.

[152] *Id.*

the claim or defense asserted.[153] The absence of one element of the claim can result in dismissal of the pleading.[154] The material elements of a cause of action are found in the substantive law, not in the CPLR.[155] Notably, CPLR 3013 merely requires that a party provide the material elements of the claim or defense; it is not necessary for the party to name the claim or defense.[156] As such, the mislabeling of a cause of action is not necessarily fatal to a pleading.[157]

A pleading may satisfy the first requirement of CPLR 3013, but still be defective, because the opposing party cannot determine what claim or defense is being asserted from the statements in the pleading.[158] Conversely, the pleading could provide the essential elements of the claim, but fail to provide notice of the transactions or occurrences forming the basis for the claim. If the pleading gives notice of the events forming the basis for the claim and the essential elements of the claim, then CPLR 3013 is satisfied.

The procedural vehicle that tests whether a pleading meets these two requirements is a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action.[159] This ground for dismissal may be asserted in a motion for summary judgment,[160] but it is more commonly asserted in a pre-answer motion to dismiss. If both CPLR 3013 requirements are satisfied, then the pleading will defeat the CPLR 3211(a)(7) motion. Under the CPLR, all pleadings are to be

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[153] Siegel, Prac. Commentaries, CPLR 3013, C3013:3.

[154] *See Feeney v. City of New York*, 255 A.D.2d 484 (2d Dep't 2008) (dismissing a third party complaint alleging breach of contract where no consideration was alleged); *Brickner v. Linden City Realty, Inc.*, 23 A.D.2d 560, 560 (2d Dep't 1965) (dismissing a complaint because it contained no allegation of reliance by the plaintiffs in an action to recover damages for fraudulent misrepresentation).

[155] "Article 30 of the CPLR creates no cause of action for anyone; it merely supplies the rules for pleading it." Siegel, Prac. Commentaries, CPLR 3013, C3013:3.

[156] *See* SIEGEL, N.Y. PRAC. § 208.

[157] *See Barrick v. Barrick*, 24 A.D.2d 895 (2d Dep't 1965) (finding a separate cause of action even though the complaint failed to support the cause of action specifically named).

[158] *See Shapolsky v. Shapolsky*, 22 A.D.2d 91 (1st Dep't 1964).

[159] "The federal 'claim' is for all practical purposes the same as the New York 'cause of action' . . . ." A 3211(a)(7) motion is the New York Practice equivalent of a 12(b)(6) motion for failure to state a claim upon which relief can be granted under the Federal Rules of Civil Procedure. SIEGEL, N.Y. PRAC. § 211.

[160] *See* SIEGEL, N.Y. PRAC. § 283 (citing *Houston v. Trans Union Credit Info. Co.*, 154 A.D.2d 312 (1st Dep't 1989)).

liberally construed and "[d]efects shall be ignored if a substantial right of a party is not prejudiced."[161] Thus, for a defect to warrant dismissal, the burden is on the party attacking the pleading to show that they have been prejudiced by the defect.[162] If a cause of action can be found within the four corners of the pleading, then a cause of action is stated and the CPLR 3211(a)(7) motion will fail.[163] The quality of the draftsmanship is not significant; so long as both requirements are met, then the pleading is acceptable under CPLR 3013.[164]

The liberalization of pleading was one of the major achievements of the CPLR.[165] The CPLR's Advisory Committee sought to do away with much of the former technicalities of pleading, but their ambitions would have been frustrated without the support of the courts. Fortunately, the courts were swift to embrace the liberalized pleadings envisioned by the Advisory Committee.[166]

The earliest case embracing the Advisory Committee's vision of liberalized pleadings was *Foley v. D'Agostino*.[167] In *Foley*, the court reviewed both "fact pleading" and the "Theory of the Pleadings,"[168] as well as prior dismissals of valid claims.[169] The court explained in detail that much of prior case law was no longer valid and that the CPLR had shifted the emphasis to "where it should be, on the primary function of pleadings, namely, that of adequately advising

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[161] CPLR 3026.
[162] *Foley*, *supra*, 21 A.D.2d at 65 (1st Dep't 1964).
[163] *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274–75 (1977).
[164] SIEGEL, N.Y. PRAC. § 208.
[165] SIEGEL, N.Y. PRAC. § 207.
[166] Siegel, Prac. Commentaries, CPLR 3013, C3013:1.
[167] 21 A.D.2d 60 (1st Dep't 1964).
[168] Fact pleading required attorneys to present material facts in their pleadings, but not evidentiary matters or legal conclusions, which were forbidden. WEINSTEIN, KORN & MILLER, N.Y. CIV.P RAC.¶ 3013.01. There is nothing in the CPLR to preclude evidentiary facts and stating legal conclusions is permissible under CPLR 3013 as long as the pleading contains statements that provide the requisite notice. Siegel, Prac. Commentaries, CPLR 3013, C3013:13. The Theory of the Pleadings Rule required the plaintiffs to prove and recover on the theory of the case pleaded. If a plaintiff proved a theory other than the one pled, then it was denied judgment. SIEGEL, N.Y. PRAC. § 209.
[169] *See* WEINSTEIN, KORN & MILLER, N.Y. CIV. PRAC. ¶ 3013.02.

the adverse party of the pleader's claim or defense."[170] Two of the three claims were sustained, because when "viewed with reason and liberality, [the claims were] 'sufficiently particular'" to provide defendants with the notice required by CPLR 3013 and state the elements of the causes of action. Further, the court noted that none of the alleged deficiencies would prejudice the defendants, even though the complaint did not show with specificity the extent and manner of the alleged wrongs and stated certain allegations in conclusory form.[171] *Foley* was subsequently cited with approval by the Court of Appeals in *Guggenheimer v. Ginzburg*.[172] Many of the significant developments in the case law surrounding the pleading standards occurred shortly after *Foley*, with subsequent cases merely affirming the initial developments.

Lane v. Mercury Record Corp.[173] confirmed that the Theory of the Pleadings Rule was put to rest by the CPLR.[174] Formerly, the Theory of the Pleadings Rule required plaintiffs to conform their pleadings to the theory of relief sought. If, for example, a plaintiff claimed equitable relief in their pleadings and the facts alleged merely entitled a plaintiff to legal relief, a motion to dismiss would be granted.[175] In *Lane*, the defendants claimed the plaintiffs had done precisely that. The court refused to dismiss the complaint, because CPLR 3013 was complied with and the Theory of Pleadings Rule was no longer valid. The court explained that the reasoning behind the prior rule was to ensure that the right to a jury trial was preserved. The court noted that any element of prejudice was eliminated by CPLR 4103, which provides that a court will give an adverse party the opportunity to demand a trial by jury during the course of trial when the relief required entitles the adverse party to a trial by jury on certain issues of

[170] *Foley*, *supra*, 21 A.D.2d at 62–63.
[171] *Id.* at 68–70.
[172] 43 N.Y.2d 268 (1977).
[173] 21 A.D.2d 602 (1st Dep't 1964), *aff'd* 18 N.Y.2d 889 (1966).
[174] The Court of Appeals had apparently abandoned the rule prior to the enactment of the CPLR in *Diemer v. Diemer*, 8 N.Y.2d 206 (1960) (sustaining a separate cause of action on abandonment, even though the case was pled and tried on the ground of cruelty only).
[175] *Lane*, *supra*, 21 A.D.2d at 603.

fact.[176]

Other States' Pleading Requirements

The majority of states, having adopted the FRCP or modeled their rules on the FRCP, are either expressly or practically guided by federal law. Accordingly several courts in those states have adopted a pleading standard akin to that set forth in *Twombly* and now *Iqbal*.[177] Other states, whether they have adopted the federal rules or not, have embraced notice pleading and therefore have rejected the departure from the standard set forth in *Conley*.[178] For "code" states that have different variations of fact pleading,[179] the recent decisional law is of minimal import.

PROPOSED LEGISLATION

About two months after the decision in *Iqbal*, Senator Arlen Spector introduced S. 1504 in the Senate. It 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).

On November 16, 2009, Representative Jerrold Nadler introduced H.R. 4115 into the House of Representatives. It stated:

> (a) 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

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[176] *Id.* at 604–05.

[177] Maine: *Bean v. Cummings*, 939 A.2d 676 (Me. 2008); Massachusetts: *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879 (Mass 2008); South Dakota: *Sisney v. State*,754 N.W.2d 639, (S.D. 2008); Minnesota: *Bahr v. Capella University*, 765 N. W. 2d 428 (Minn. App. 2009); Nebraska: *Holmstedt v. York County Jail Supervisor*, 739 N.W.2d 449 (Neb. App. 2007); Ohio: *Gallo v. Westfield Nat'l Ins. Co.*, No. 91893, 2009 WL 625522 (Ohio App. March 12, 2009).

[178] Arizona: *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344 (Ariz. 2008); Vermont: *Colby v. Umbrella, Inc.*, 955 A.2d 1082 (Vt. 2008); West Virginia: *Highmark West Virginia, Inc. v. Jamie*, 655 S.E.2d 509 (W. Va. 2007).

[179] California, Connecticut, Louisiana, Maryland, Michigan, Nebraska and South Carolina.

> 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.
>
> (b) The provisions of subsection (a) govern according to their terms except as otherwise expressly provided by an Act of Congress enacted after the date of the enactment of this section or by amendments made after such date to the Federal Rules of Civil Procedure pursuant to the procedures prescribed by the Judicial Conference under this chapter.

Both bills seek to roll back the law to that under *Conley v. Gibson,* the Senate by explicit reference to the case and the House by adopting its no-set-of-facts language. Both bills allow for a change in the law pursuant to the rule-making process under the Judicial Conference of the United States, which will be described below.

Hearings have been held on October 27, 2009, by the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the Committee on the Judiciary of the House of Representatives; on December 2, 2009, by United States Senate Committee on the Judiciary; and on December 16, 2009, by the Subcommittee on Courts and Competition Policy of the Committee on the Judiciary of the House of Representatives.

The Committee takes no position with respect to the advisability or desirability of adopting any interim measure, but rather has addressed the ultimate pleading standard it believes should be presented to Congress.

THE PROCESS FOR CHANGING THE FRCP

The current process for adoption or modification of the federal rules has been in place since 1958, when Congress transferred the major responsibility for the rule-making function from the Supreme Court to the Judicial Conference of the United States. Pub. L. No. 85-513, 72 Stat. 356, codified at 28 U.S.C. §§ 331.[180] Following the passage of that legislation, the Judicial Conference established a Standing Committee on Rules of Practice and Procedure and five advisory committees to amend or create civil, criminal, bankruptcy, appellate and admiralty rules through a process that was codified in 1988 in Title IV of the Judicial Improvements and Access to Government Act, Pub. L. No. 100-702, 102 Stat. 4642, 28 U.S.C. §§ 2071(b)-(f), 2072-75.[181] The committees are composed of federal circuit, district or other judges, state court chief justices, private attorneys, Department of Justice attorneys, and law professors.[182] A law professor acts as the reporter for each advisory committee with responsibility for coordinating the committee's agenda and drafting appropriate amendments and explanatory committee notes.[183]

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[180] 28 U.S.C. § 331, in relevant part, reads:

> The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

Thus, "[t]he Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference." Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U.L. REV. 1655, 1658 (June 1995), reprinted at http://www.uscourts.gov/rules/-mccabearticle.pdf.

[181] The admiralty rules were merged into the civil procedure rules in 1966, and an advisory committee on evidence rules was established in 1993. *See* McCabe, 44 AM. U.L. REV. at 1659, 1664 n.67.

[182] *See* 28 U.S.C. § 2073(a)(2); McCabe, 44 AM. U.L. REV. at 1664-65.

[183] *See* Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure ("Procedures") at I.3.b., found at http://www.uscourts.gov/rules/procedurejc.htm; McCabe, 44 AM. U.L. REV. at 1664-65.

Proposed changes may be generated from outside or within an advisory committee. For example, at the first meeting of the Civil Rules Advisory Committee after *Twombly* was decided, on November 8-9, 2007, there was a panel discussion on whether, and perhaps when, it would be appropriate for the Advisory Committee "to begin crafting formal rules amendments to channel, redirect, modify or even retract whatever changes in notice pleading flow from the *Twombly* decision."[184] A potential project regarding pleading standards has been discussed at every semiannual Civil Rules Advisory Committee since.[185] Recently, a conference was held on May 10-11, 2010 to "consider the basic structure of the notice-pleading/discovery/summary judgment system created in 1938," for which empirical data is being gathered through a discovery survey and a study of e-discovery.[186] "Discovery, e-discovery, judicial management, settlement, summary judgment and pleading perspectives from state procedure systems and from the users of federal courts, bar association proposals and the observations of veterans of the rulemaking process were explored."[187]

After appropriate study and drafting, an advisory committee votes on whether to pursue a rule change.[188] If the advisory committee votes to pursue a rule change, it then seeks approval from the Standing Committee or its chair to publish the proposal with the required proposed rule, explanatory note and written report explaining the proposed action.[189] If publication is approved,

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[184] *See* Report of the Civil Rules Advisory Committee, dated December 17, 2007 at 1, 12.
[185] *See* Report of the Civil Rules Advisory Committee, dated May 9, 2008 at 110; Report of the Civil Rules Advisory Committee, dated December 9, 2008, at 6-7; Report of the Civil Rules Advisory Committee, dated May 8, 2009, draft minutes at 10; and Report of the Civil Rules Advisory Committee, dated December 8, 2009, at 1-2.
[186] *See* Report of the Civil Rules Advisory Committee, dated May 8, 2009, draft minutes at 10.
[187] Report of the Civil Rules Advisory Committee, dated December 8, 2009, at 1.
[188] *See* Procedures at I.3.c.; McCabe, 44 AM. U.L. REV. at 1672.
[189] *See id.*; 28 U.S.C. § 2073(d).

the public is normally provided at least six months to comment, and usually one or more public hearings are scheduled.[190]

After the public comment period, the advisory committee reviews the proposed changes in light of the comments and testimony.[191] If it decides to make a substantial change in its proposal, it will republish it for further public comment.[192] If the advisory committee decides to proceed with a proposed rule or amendment, it submits to the Standing Committee the final proposal, with an explanatory note, a written report including a summary of comments received and an explanation of any changes made, and any minority or separate views.[193]

The Standing Committee may accept, reject or modify any advisory committee proposal.[194] If a modification by the Standing Committee effects a substantial change, the proposal will be returned to the advisory committee with appropriate instructions.[195] If the Standing Committee approves the proposed change, it will transmit its recommendations to the Judicial Conference accompanied by the advisory committee report and its own report explaining any changes the Standing Committee has made.[196]

The Judicial Conference normally considers proposed amendments to the rules at its September session.[197] If the Judicial Conference approves an amendment, it is transmitted to the Supreme Court for the Supreme Court's consideration and adoption, modification or rejection.[198]

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[190] *See* Procedures at I.4.b. and c.; McCabe, 44 AM. U.L. REV. at 1672. The Standing Committee or its chairman, after determining that the administration of justice requires that a proposed rule change be expedited, may shorten the public comment period, eliminate public hearings or both. *See* Procedures at I.4.d; McCabe, 44 AM.U.L. REV. at 1674.

[191] *See* Procedures at I.5.a.; McCabe, 44 AM. U.L. REV. at 1672.

[192] *See* Procedures at I.5.a.; McCabe, 44 AM. U.L. REV. at 1673.

[193] *See* Procedures at I.5.b.; McCabe, 44 AM. U.L. REV. at 1672-73; 28 U.S.C. § 2073(d).

[194] *See* 28 U.S.C. § 2073(b); Procedures at II.8.c.; McCabe, 44 AM. U.L. REV. at 1673.

[195] *See* Procedures at II.8.c.; McCabe, 44 AM. U.L. REV. at 1673.

[196] *See* Procedures at II.8.d.; McCabe, 44 AM. U.L. REV. at 1673; 28 U.S.C. § 2073(d).

[197] McCabe, 44 AM. U.L. REV. at 1673.

[198] 28 U.S.C. § 331; McCabe, 44 AM. U.L. REV. at 1673. For example, on April 28, 2010, the Supreme Court transmitted to Congress proposed changes in Rules 12.3, 21 and 32.1 of the Federal Rules of Criminal Procedure but recommitted proposed changes in Rule 15 to the Advisory Committee on Criminal Rules.

The Supreme Court has until the following May 1 to transmit a proposed rule or amendment to Congress, fixing the extent to which such a change shall apply to pending proceedings.[199]

Congress has until December 1 to enact legislation rejecting, modifying or deferring any rule or amendment transmitted by the Supreme Court.[200] Otherwise, the change becomes effective.[201]

RECOMMENDATIONS

Iqbal has moved too far toward the code and common law pleading regime rejected in 1938.[202] *Conley*, if interpreted literally, provides no standard at all,[203] contrary to the apparent intent of the main draftsman of the Federal Rules of Civil Procedure, Charles E. Clark.[204] We recommend that the pleading standard be restated to require notice of the claim or defense asserted, including the grounds on which the claim rests. The elimination of the phrase "showing that the pleader is entitled to relief" will enable the courts to put aside the case law that is developing under *Iqbal*, while the addition of the phrase "non-conclusory statement of grounds sufficient to provide notice of (a) the claim and (b) the relief sought" moves away from the

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[199] 28 U.S.C. § 2074(a).
[200] 28 U.S.C. § 2074(a); McCabe at 1673.
[201] *Id.*
[202] "I can show you thousands of cases that have gone wrong on dialectical, psychological, and technical argument as to whether a pleading contained a 'cause of action;' and of whether certain allegations were allegations of 'fact' or were 'conclusions of law' or were merely 'evidentiary' as distinguished from 'ultimate' facts." *Rules of Civil Procedure for the District Courts of the United States: Hearings before the H. Comm. on the Judiciary*, 75th Cong. 94 (1938) (statement of Edgar B. Tolman, Secretary of the Advisory Committee on Rules for Civil Procedure Appointed by the Supreme Court),.
[203] *See* Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX.L . REV. 1749, 1769 (1998) ("if courts hewed rigidly to the line laid down in *Conley v. Gibson*, pleading practice would probably have vanished").
[204] "[A]n allegation which says simply that the defendant did injure the plaintiff through his negligence is too general and would not stand, for really that tells you no differentiating features about the case whatsoever. . . . [T]he allegation in . . . Form 9 . . . instead . . . say[s] that defendant negligently drove his automobile against the plaintiff, who was then crossing the street[.] . . . [Y]ou have then the case isolated from every other type of case of the same character, really from every other case, as a pedestrian or collision case. At the pleading stage, in advance of the evidence, before the parties know how the case is going to shape up, that is all, in all fairness, you can require." Charles E. Clark, *Federal Rules of Civil Procedure*: A.B.A. PROC. INST. AT WASH., D.C. AND SYMPOSIUM at N.Y.C. 241 (1938).

formulation of what has been referred to as a "nonexistent" standard under *Conley*.[205] Consistent with the Rules Enabling Act requirement of "general rules," 28 U.S.C. § 331, this should be a trans-substantive standard applicable to all cases brought in the federal courts.[206]

The promulgation of such a new standard should be accomplished through the Judicial Conference's process under the Standing Committee on Rules of Practice and Procedure, so as to obtain the greatest relevant input and the most thoughtful consideration of the appropriate standard in an orderly manner that has already begun.

We take no position on the advisability of Congress's attempt to restore the *Conley* no-set-of-facts standard through H.R. 4115 and S. 1504.

We are not oblivious to the societal and technological changes that have occurred since 1938 which have impacted litigation. The advent of photocopying machines and then the computer have increased exponentially the available amounts of information relevant to a particular litigation and significantly augmented the consequent costs associated with a lawsuit.

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[205] *Twombly*'s plausibility standard was grounded upon the Rule 8(a)(2) requirement that the pleader make a showing of entitlement to relief. The Third Circuit in *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008), made this clear. First, Judge Nygaard explicitly tied the concept of "plausibility" to the word "showing" in Rule 8(a)(2), when he stated that "'plausibility' is related to the requirement of a Rule 8 'showing.'" *Id.* at 234. Second, he wrote that "the Supreme Court's emphasis on Rule 8's requirement of a 'showing' is new." *Id.* at 232. Third, Judge Nygaard summarized the effect of *Twombly* when he stated, "Put another way, in light of *Twombly*, Rule 8(a)(2) requires a 'showing,' rather than a blanket assertion of an entitlement to relief." *Id.*

Further, the Supreme Court's decision in *Iqbal* also indicates that "showing" and "entitlement" are the source of the Court's "plausibility" standard. The Supreme Court stated that "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.' Fed. Rule Civ. Proc. 8(a)(2)." *Iqbal, supra*, 129 S. Ct. at 1950. "In keeping with these principles, a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth . . . and then determine whether [the remaining well-pleaded factual allegations] plausibly give rise to an entitlement to relief." *Id.* Here, the Supreme Court is explicitly stating that the difference between an insufficiently pled complaint and a sufficiently pled complaint is based upon whether the pleader has shown entitlement to relief.

Thus, to leave no doubt that the new standard we propose is a break with *Twombly* and *Iqbal*, we have eliminated from Rule 8(a)(2) the requirement of showing an entitlement to relief.

[206] According to University of Pennsylvania Law School Professor Stephen B. Burbank, "[t]he original Advisory Committee interpreted the Enabling Act's reference to 'general rules' as requiring not just rules that would be applicable in all district courts but also rules that would be applicable in every type of civil action (trans-substantive)." Prepared Statement of Stephen B. Burbank at Hearing on Whether the Supreme Court Has Limited Americans' Access to Court, Before the Committee on the Judiciary, United States Senate, December 2, 2009, at 3, http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf.

However, limitations on discovery through the 1970, 1993, and 2000 amendments to the Federal Rules of Civil Procedure, control of electronic discovery through the 2006 amendments, increased case management through the 1993 amendments, and strengthening of the standards for granting summary judgment through the Supreme Court's 1986 decisions, *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*,[207] *Anderson v. Liberty Lobby, Inc.*,[208] and *Celotex Corp. v. Catrett*[209] have mitigated and accommodated the impact of these changes.

Moreover, the empirical findings of the Federal Judicial Center published in October 2009[210] do not support the assumption underlying *Twombly*[211] that there are enormous discovery expenses and a problem of discovery abuse which require the corrective of fact-based screening of pleadings through motions to dismiss at the outset of a case prior to discovery. The Survey found that expenditures for discovery, including attorneys' fees, at the median was 1.6 percent of the reported stakes for plaintiff attorneys and 3.3 percent of the reported stakes for defendant attorneys.[212] The Survey further found that, at the median, discovery was 20% of plaintiffs' litigation costs, including attorneys' fees, totaling $15,000 (ranging from $1,600 at the 10th percentile to $280,000 at the 95th percentile) and 27% of defendants' litigation costs, including

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[207] 475 U.S. 574 (1986).
[208] 477 U.S. 242 (1986).
[209] 477 U.S. 317 (1986).
[210] Emery G. Lee III and Thomas E. Willging, "*Federal Judicial Center National, Case-Based Civil Rules Survey, Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*," FEDERAL JUDICIAL CENTER (Oct. 2009) (the "Survey").
[211] 550 U.S. at 559, 127 S. Ct. at 1967.
[212] Survey at 2, 42-43. The median estimate of the stakes in the litigation for plaintiffs was $160,000, ranging from less than $15,000 at the 10th percentile to almost $4 million at the 95th percentile, and for defendants was $200,000, ranging from $15,000 at the 10th percentile to $5 million at the 95th percentile. Survey at 2, 41-42. Later multivariate analysis confirmed that the higher the stakes, the higher the reported costs. Emery G. Lee III and Thomas E. Willging, "*Litigation Costs in Civil Cases: Multivariate Analysis, Report to the Judicial Conference Advisory Committee on Civil Rules*," FEDERAL JUDICIAL CENTER (Mar. 2010) at 5, 7. This relationship might account for the complaints that discovery costs are excessive in the rare high-stakes, complex litigation.

attorneys' fees, totaling $20,000 (ranging from $5,000 at the 10th percentile to $300,000 at the 95th percentile).[213]

In sum, the insight that underlay the paradigm imposed by the Federal Rules of Civil Procedure in 1938 – to narrow disputes not through pleadings but through factual discovery aiming at resolution at trial or on summary judgment – is still valid today. The Survey found that, in the typical federal court case, the disputed issues central to the case were adequately narrowed and framed for resolution (1) after fact discovery according to 30.1% of plaintiff attorneys and 35% of defendant attorneys, (2) after summary judgment according to 14.6% of plaintiff attorneys and 20.3% of defendant attorneys, but (3) after the initial complaint according to only 10.1% of plaintiff attorneys and 3.9% of defendant attorneys.[214]

"[T]he primary function of pleadings . . . [is] adequately advising the adverse party of the pleader's claim or defense,"[215] that is, regarding a complaint, "to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[216] The pleading standard in Rule 8(a)(2) therefore should be restated to assure this objective is achieved, without requiring more under *Iqbal* or less under the literal language of *Conley*. Thus, Rule 8(a)(2) should be changed to read:

> . . . (2) a short and plain non-conclusory statement of grounds sufficient to provide notice of (a) the claim and (b) the relief sought; and . . . .

This formulation emphasizes that the primary purpose of pleadings is to provide notice, not to prematurely evaluate the merits of claims by eliminating "conclusory facts"[217] and

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[213] Survey at 2, 35-39.
[214] Survey at 2, 46.
[215] *Foley, supra*, 21 A.D.2d 62-63.
[216] *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964 (quoting *Conley*, 355 U.S. at 47, 78 S. Ct. at 102).
[217] Black's Law Dictionary, 329 (9th ed. 2009) defines conclusory as "[e]xpressing a factual inference without stating the underlying facts on which the inference is based." Bryan A. Garner, Garner's Modern American Usage 174(2003) describes conclusory as "expressing a factual inference without stating facts or reasoning on which the inference is based."

subjectively evaluating the remainder. Nonetheless, this formulation includes requirements that the "grounds" be sufficient to provide notice, indicating that some level of factual pleading must be undertaken, and that a "claim" must be described, meaning that the elements of the claim must appear from the pleading and the pleader must give notice of the relief it seeks. To avoid the literal reading of *Conley*'s no-set-of-facts standard, we have also added a requirement that the statement must be non-conclusory. A mere recitation of the elements of a claim will be insufficient.

Our recommended standard is also consistent with current FRCP Rule 8(a)(2) insofar as it requires the pleader to place the defendant on notice of the relief it seeks. There may be instances in which the relief sought by the plaintiff is not necessarily captured under the grounds of the plaintiff's "claim." For instance, a plaintiff should be required to give the defendant notice of the grounds upon which it seeks an injunction, if that is the relief it seeks. Further, requiring the plaintiff to give notice of the relief it seeks is consistent with Rule 8(a)(3)'s requirement that the plaintiff also make a "demand for the relief sought."

We believe that this formulation of the pleading standard provides sufficient protection to defendants so that they may understand of what they have been accused, while not raising the bar so high for plaintiffs that, in those cases where there is a disparity of information in favor of defendants, plaintiffs will be unable to plead sufficient facts. We urge its adoption through the process already being undertaken by the Judicial Conference's Standing Committee on Rules of Practice and Procedure.