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The Post-Iqbal State of Pleading: An Argument Opposing a Uniform National Pleading Regime

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THE POST-IQBAL STATE OF PLEADING: AN ARGUMENT OPPOSING A UNIFORM NATIONAL PLEADING REGIME

MARK W. PAYNE*

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I. INTRODUCTION

The U.S. Supreme Court’s 2009 decision in *Ashcroft v. Iqbal*¹ placed a squeeze on the once touted liberal Federal Rules of Civil Procedure by requiring judges to consider the veracity of potential plaintiffs’ federal claims in light of *Iqbal*’s new heightened pleading standard. This article examines post-*Iqbal* pleading standards across United States jurisdictions and argues that states should exert caution before choosing to adopt *Iqbal*’s new “plausibility” standard, and if they elect to modify their pleading standards in light of the *Iqbal* decision, they should also carefully contemplate their method of adoption.

The Supreme Court’s overhaul of federal pleading doctrine has caused confusion among lower courts due to the *Iqbal* decision’s

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¹ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

ambiguity and lack of precedent. As such, states should exercise restraint before adopting *Iqbal's* model as their own. Part II of this article identifies the Supreme Court's swift departure from the backbone of the Federal Rules, by abandoning the traditional "notice" pleading requirement and replacing it with a vague "plausibility" standard. Part III examines the relationship between federal and state civil procedural systems and demonstrates that states are under no obligation to follow the Federal Rules, but have adopted them into state procedural systems primarily out of comity. Part IV then explores the lack of uniformity of pleading standards across state jurisdictions since the *Iqbal* decision. Finally, Part V argues states should retain their unique pleading standards and be weary of adopting *Iqbal's* plausibility pleading standard because the new standard will encounter substantial problems in determining the sufficiency of a complaint.

II. "IF IT AIN'T BROKE DON'T FIX IT"

Every civil action in federal court commences upon the plaintiff filing a complaint. Prior to the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*,² there was minimal consideration of the requirements for this initial step. And why should there have been? The Federal Rules of Civil Procedure provide for a relatively simple process requiring that a plaintiff's complaint contain only "a short and plain statement of the claim showing that the pleader is entitled to relief."³ According to the appendix to the Rules, the language "short and plain" literally means what it says.⁴ In *Conley v. Gibson*,⁵ the Supreme Court promulgated the standard for pleading vis-à-vis a motion to dismiss.⁶ *Conley's* simple formula became quickly ingrained as a liberal mechanism within federal pleading

² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007) (rejecting the low pleading standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and adopting heightened pleading standards).

³ FED. R. CIV. P. 8(a)(2).

⁴ See FED. R. CIV. P. Form 11. The Federal Rules of Civil Procedure contain an example of what a "short and plain" statement should entail: "On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff." *Id.*; see also Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 861 (2010) (opposing the notion of plausibility pleading by using Form 11 as determinative of a sufficient complaint).

⁵ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("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.").

⁶ For a general overview of the motion to dismiss and its operation in response to a plaintiff's complaint see Charles Alan Wright ET AL., *Motions to Dismiss — Practice Under Rule 12(b)(6)*, 5B FEDERAL PRACTICE & PROCEDURE § 1357 (3d ed. 2011).

doctrine,⁷ allowing plaintiffs to easily gain access to the discovery phase of litigation without the need for an extensive preliminary investigation to provide evidentiary support for their pleadings.⁸

Prior to the *Twombly* decision, *Conley* was the “fourth-most cited decision by the federal courts.”⁹ Under *Conley*, Rule 8(a)(2) required only that a plaintiff provide “notice” to the defending party of the claims that were being asserted against it.¹⁰ Litigants across the board understood that even the most unembellished complaint would typically survive a motion to dismiss and as such, the motion to dismiss was used sparingly (and perhaps more legitimately) by defendants under the oft-cited *Conley* standard.¹¹ The Supreme Court’s decision in *Twombly* threw fifty years of settled law into pandemonium by declaring that pure notice was

⁷ The Rules Enabling Act, codified at 28 U.S.C. §§ 2071 – 2077, allowed for the promulgation of the Federal Rules of Civil Procedure, the purpose of which was to abolish the strict forms of common law pleading.

⁸ Although the purpose of this article is to examine the relationship between FED. R. CIV. P. 8(a)(2) and 12(b)(6), the Federal Rules of Civil Procedure impose other requirements on a plaintiff’s pleadings before access to discovery is granted. Rule 8(a)(1) requires a plaintiff to establish federal subject matter jurisdiction and Rule 8(a)(3) requires the plaintiff to state the relief sought. Pleadings are also subject to other requirements such as process and service under Rule 4. Arguably, Rule 11 is another threshold that a plaintiff bears in filing a complaint. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 849 (2010) (“[O]ne could have less disruptively attained an equivalent of the *Twombly* and *Iqbal* regime by aggressively rereading Rule 11 rather than Rule 8.”); see also Benjamin P. Cooper, *Iqbal’s Retro Revolution*, 46 WAKE FOREST L. REV. 937 (Winter 2011) (comparing the rationale behind the *Iqbal* decision to the 1983 amendment to Rule 11).

⁹ Joseph A. Seiner, *The Trouble With Twombly: A Proposed Pleading Standard For Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1017 (2009).

¹⁰ See Bone, *supra* note 4, at 853 (arguing that under notice pleading the sole function of a complaint was to give fair notice to the defendant of what the dispute was generally about).

¹¹ Dismissal is granted pursuant to a defendant’s motion to dismiss under FED. R. CIV. P. 12(b)(6). Where a motion to dismiss was likely denied by a District Court following *Conley*, a component of a defending party’s litigation strategy would be to move for a “more definite statement of a pleading.” FED.R.CIV.P. 12(e). Since the motion to dismiss was difficult to obtain under *Conley*, a more definite statement served to provide the defendant with the “notice” necessary to proceed with pleading the answer. The ability of a defendant to require a plaintiff to provide more information regarding a particular claim is consistent with the concept of notice pleading under *Conley*. One major theme that is echoed throughout scholarship following *Twombly* and *Iqbal* are the potential conflicts within the Federal Rules due to the Supreme Court’s rewriting of the relationship between FED. R. CIV. P. 8(a)(2) and 12(b)(6). The Rules were written to be interdependent and function uniformly. By radically changing one section of the Rules without conforming the others to the change, makes the functionality of procedure in the federal courts questionable. See, e.g., Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010) (demonstrating the merging of Rules 12(b)(6) and 56).

insufficient for initiating civil claims in federal courts.¹² The holding in *Twombly* dismissed the plaintiff's claims because they were not "plausible,"¹³ leaving later district courts and parties alike to determine what the new standard of "plausibility" actually required.¹⁴

Whatever uncertainty existed with regard to the breadth of *Twombly*'s holding¹⁵ was put to rest in *Ashcroft v. Iqbal*.¹⁶ The issue in *Iqbal* contemplated whether conclusory statements could sustain a *Bivens* action,¹⁷ but the Court's decision went well beyond those unique facts. It not only magnified the burden on plaintiffs,¹⁸ but clarified that the "plausibility" standard is applicable to all civil actions.¹⁹

Iqbal's holding articulates that two important principals must be utilized by a district judge when ruling on a motion to dismiss: (1) legal conclusions contained in the complaint are not entitled to the presumption of truth; and (2) factual allegations contained therein must be nudged "across the line from conceivable to plausible."²⁰ To successfully rebut a motion to dismiss, *Iqbal* requires that plaintiffs state factual matter that a court would not read as a legal conclusion. A plaintiff's bare legal conclusions will not be given any weight when faced

¹² For fifty years *Conley*'s "no set of facts" formula was the standard for a motion to dismiss. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The upheaval caused by *Twombly* was indeed sudden, considering that Supreme Court jurisprudence had been unflinching in upholding the *Conley* standard into the early 2000s. See *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 511 (2002) (holding civil rights complaint need not contain greater particularity, merely a short plain statement).

¹³ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The court determined that "stating a claim requires a complaint with enough factual matter. . ." and requiring "plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" of the claim asserted. *Id.*

¹⁴ See *Seiner*, *supra* note 9, at 1014.

¹⁵ See *Twombly*, 550 U.S. at 563 (2007). *Twombly* was a complicated antitrust case and the thrust of legal debate following the decision focused on whether the decision would be applied broadly or would be limited to the antitrust context. See, e.g., *Seiner*, *supra* note 9, at 1021-22 ("*Twombly* arose at the complete opposite end of the spectrum . . . complex antitrust litigation.").

¹⁶ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (finding dismissal proper when complaint does not plead plausible facts on its face).

¹⁷ See *Petition for Writ of Certiorari, Ashcroft*, 554 U.S. 902 (No. 07-1015); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396-97 (1971) (holding that damages may be obtained for violation of civil rights by a federal official).

¹⁸ See *Bone*, *supra* note 4, at 858 ("It is highly significant that Justices Souter and Breyer dissented in *Iqbal*. Both were with the majority in *Twombly*. Moreover, Justice Souter, who wrote the principal dissenting opinion in *Iqbal*, actually authored the majority opinion in *Twombly*. These are strong signs that *Iqbal* is not just a straightforward application of *Twombly*.").

¹⁹ *Iqbal*, 550 U.S. at 684.

²⁰ See *id.* at 683 (quoting *Twombly*, 550 U.S. at 570).

with a motion to dismiss. At the same time, the plaintiff must also state its complaint with adequate conciseness and profusion in order to convince the court of its claim's plausibility. Although heightened pleading existed prior to *Twombly*,²¹ notably when alleging fraud,²² the Court's abrogation of *Conley* was severe because previously, federal courts uniformly applied *Conley* notice pleading to the vast majority of civil actions.²³

The departure from notice pleading has been met with confusion and discontent,²⁴ prompting congressional legislation demanding the return of *Conley* standards.²⁵ This article does not recommend an alternative to plausibility pleading,²⁶ it merely identifies the deficiencies of the new rule and the flawed process by which it came about in order to serve as a warning to states so as to prevent their rules of civil procedure from falling into the plausibility conundrum. The *Iqbal* decision bestowed a new "gatekeeping"²⁷ power upon district judges, requiring that they determine the probability of success of a case at the outset of litigation. Upon a timely motion to dismiss, a district judge must determine whether the

²¹ Although the thrust of scholarly work pertains to the radical approach taken by the court in *Twombly*, some commentators assert that pre-*Twombly* notice pleading was not as straightforward as suggested in *Conley*. See, e.g., Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 989 (2003) (arguing that heightened pleading requirements exist in several substantive areas of law).

²² See FED. R. CIV. P. 9(b) ("[A] party must state with particularity the circumstances constituting fraud or mistake.").

²³ Seiner, *supra* note 9.

²⁴ See JOSHUA CIVIN & DEBO P. ADEGBILE, RESTORING ACCESS TO JUSTICE: THE IMPACT OF IQBAL AND TWOMBLY ON FEDERAL CIVIL RIGHTS LITIGATION 1 (American Constitution Society for Law and Policy Sept. 2010), available at <http://www.acslaw.org/files/Civin%20and%20Adegbile%20issue%20brief%20final%20%289-14-10%29.pdf> ("Suddenly and without clear necessity . . . we now risk a world in which meritorious claims face 'dismissal first, trial never.'"); see also Bone, *supra* note 4, at 879 (discussing the screening of civil rights as "troubling from a social point of view.").

²⁵ See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009). But see Michael R. Huston, *Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal*, 109 MICH. L. REV. 415, 443 (2010) (arguing Congress should not overrule *Iqbal* until its long-term effects are clear).

²⁶ This subject has been addressed in much detail by recent scholarly work. See, e.g., Robert D. Owen & Travis Mock, *The Plausibility of Pleadings After Twombly and Iqbal*, 11 SEDONA CONF. J. 181, 181 (2010) ("[*Twombly*] and [*Iqbal*] have ignited a firestorm of judicial and academic analysis.").

²⁷ "Gatekeeping" has been the most common phrase adopted for the new duties of district judges within the plausibility model. See, e.g., Michael Eaton, *The Key to the Courthouse Door: The Effect of Ashcroft v. Iqbal and the Heightened Pleading Standard*, 51 SANTA CLARA L. REV. 299, 314 (2011) (quoting Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10) (describing the new role for trial judges as a "skeptical judicial gatekeeper").

facts contained in a complaint are sufficient to state a plausible claim.²⁸ At this stage in the pleadings, plaintiffs are not yet permitted to take advantage of the discovery devices contained in the Federal Rules and often lack the information that *Iqbal* demands in order to withstand a motion to dismiss.²⁹ As a result, *Iqbal* mandates that a judge grant dismissal, essentially making a determination of the success of a claim on the merits, before plaintiffs have an opportunity to investigate and properly allege the facts supporting their claim.

The Supreme Court crafted plausibility pleading without utilizing the Rule-making process, which allows for study and debate before a change to a Rule is put into effect.³⁰ Consequently, the Supreme Court's unilateral approach placed a heavy and often disparate burden on plaintiffs in the early phases of litigation. The doctrinal framework established in *Twombly* broadened a district judge's ability to screen meritless suits, which is beyond the pure notice required by the *Conley* model.³¹ However, *Iqbal* goes even further and permits the screening of not only meritless suits, but also those that in the opinion of the district judge, appear weak.³² These developments demonstrate the Supreme Court's movement toward a defendant-friendly procedural system because judges are now able to dismiss those lawsuits deemed "weak" prior to any factual discovery by the parties. States should be hesitant to adopt the Supreme Court's version of plausibility pleading. At the very least, states should

²⁸ See *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) ("[A] complaint must contain sufficient factual matter."). But cf. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("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."). Under *Conley*, a court could hypothesize about any conceivable facts that would entitle a plaintiff to relief and the plaintiff was not required to produce those facts to the court. Conversely, *Iqbal* requires the plaintiff to produce particular facts which would create a plausible basis that the wrongdoing alleged actually occurred. See *Iqbal*, 556 U.S. at 663.

²⁹ Compare Thomas, *supra* note 11, at 15 (calling into question the propriety of merging the motion to dismiss with summary judgment), with Richard A. Epstein, Bell Atlantic v. *Twombly*: *How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 62 (2007) (defending disguised summary judgments as a balance between stopping litigation too soon and proceeding too far).

³⁰ The Federal Rules of Civil Procedure are made pursuant to 28 U.S.C. §§ 2071 - 2077. Title 28 U.S.C. § 2073(2), authorizes the Judicial Conference to appoint committees that recommend and review changes to the existing Rules.

³¹ Bone, *supra* note 4, at 853 ("The *Twombly* complaint clearly satisfied [the "notice" standard]; the defendants knew what the plaintiffs were complaining about and could easily admit or deny the allegations. The Court held, however, that pleading standards should do more than give notice; they should also screen for meritless suits.").

³² See *id.*

leave procedural reform to a rule-making body that will expose changes to thorough examination and debate prior to disseminating a potentially devastating rule which has dire consequences for a party's ability to obtain relief.

III: A STATE'S ABILITY TO ADOPT A PROCEDURAL SYSTEM INDEPENDENT FROM THE FEDERAL RULES

A. Procedure Far From Universal

To what extent must states adhere to the federal model of civil procedure? One primary purpose of the Rules Enabling Act was to create a system of uniformity in both state and federal jurisdictions throughout the United States.³³ However, as one might expect from America's rich history of federalism, states have not been entirely receptive to the Act's uniformity objective. In fact, the Rules fell far short from universal adherence.³⁴ There is also some evidence that the Supreme Court has not been entirely concerned with uniformity, as reflected by its passive role in policing the district courts' use of local rules.³⁵ However, despite procedural incongruities, at the time *Twombly* was decided, about half³⁶ of the states had adopted the *Conley* model of procedure in their respective jurisdictions.

The Supreme Court's unequivocal elimination of *Conley* notice pleading has caused confusion in the states that follow the federal model since they often "give great weight to the federal interpretations of the rules."³⁷ The states that have not adopted the Federal Rules have pleading

³³ Z.W. Julius Chen, *Following the Leader: Twombly, Pleading Standards and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1435-36 (2008). According to Professor Sunderland, a drafter of the Rules, "[t]he primary purpose . . . was the attainment of local uniformity in trial court practice between the state and federal courts." *Id.*

³⁴ In their 1986 landmark study, Professors Oakley and Coon were actually surprised by the low results when they sought to determine the extent of uniformity. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1427 (1986) ("fewer than half the states").

³⁵ See Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 417 (2010). "[S]ince the introduction of the Federal Rules of Civil Procedure in 1938 . . . the Supreme Court has addressed local rules and local rulemaking authority" only four times. *Id.*

³⁶ See *Bell Ad. Corp. v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting) ("Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears beyond doubt that no set of facts in support of the claim would entitle the plaintiff to relief." (internal quotation marks omitted)).

³⁷ Chen, *supra* note 33, at 1439 (quoting *Edwards v. Young*, 486 P.2d 181, 182 (Ariz. 1971)).

systems that vary on a spectrum from pure notice pleading to those requiring a fact specific complaint. However, out of the states that have not adopted the Federal Rules verbatim, many have followed federal jurisprudence in a number of unique ways. The radical approach taken by *Iqbal* is causing state courts to reevaluate their pleading standards.

Although the Rules Enabling Act's push for procedural uniformity fell short of its goal, a uniform system of rules can provide some benefits to courts. Federal courts are tasked with hearing substantive state law claims in cases involving diversity jurisdiction, and conversely, state courts have the ability to hear federal claims in cases involving concurrent jurisdiction. A uniform system of civil procedure would facilitate the administration of diverse substantive claims litigated in courts of various jurisdictions as well as present simplified and reliable outcomes for parties to the litigation. Nevertheless, when a case requires the opposing state and federal systems to operate together it has been a complicated area of law to reconcile.³⁸

There is, however some guidance to interpreting the opposing state and federal choice of law methods, at least in the federal courts. State claims brought in a federal court sitting in diversity are dictated by *Erie Railroad Co. v. Tompkins* and its progeny.³⁹ Conversely, when federal substantive claims are litigated in state court, there is less of a dedicated line of cases offering precedential guidance. What has emerged, however, is the reverse-*Erie* doctrine, which dictates when federal law applies in state court.⁴⁰ Although the reverse-*Erie* doctrine is an ambiguous concept, it is nevertheless pertinent to the debate regarding the states' adoption of

³⁸ See, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001) (holding claim preclusive effect of federal diversity court's ruling was governed by federal rule that in turn incorporated forum state's law of claim preclusion).

³⁹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding federal courts sitting in diversity must apply the law of the state). The *Erie* doctrine dictates that the general rule in a diversity case is that "federal courts are to apply state substantive law and federal procedural law." *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). However, a federal court may be inclined to apply a state mode of procedure if, absent countervailing federal concerns, the failure to apply the state standard would be "outcome determinative" to the litigation. See *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 537 (1958). The applicability of the *Erie* doctrine when rules of procedure are involved is complicated, and hinges on the impact of a procedural rule on substantive law. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010) ("A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others-or valid in some cases and invalid in others-depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes).").

⁴⁰ Kevin M. Clermont, *Federal Courts, Practice & Procedure: Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 2 (2006) [hereinafter Clermont, *Reverse-Erie*]. Reverse-*Erie* is not a widely known concept and its applicability is nowhere as concrete as traditional *Erie* doctrine. In fact, it "goes strangely ignored by most scholars." *Id.*

the Supreme Court's interpretation of the Federal Rules of Civil Procedure. The importance of a state's ability to dictate the outcome of federal substantive law by applying state methods of procedure should not be taken lightly, considering that "federal law covers a wide array of litigation-producing activities that end up in state court."⁴¹

B. The Reverse-Erie Doctrine

When federal claims are litigated in state court, the state court bears the responsibility of adjudicating claims of concurrent jurisdiction consistent with the federal law upon which a party's cause of action is based.⁴² A difficulty inherent in the federalism concept arises when substantive federal claims are implemented through state procedural standards. State procedural standards are often so different from federal procedural standards that they alter a plaintiff's ability to successfully bring a claim under federal law in a state court jurisdiction.

It has been suggested that "[s]tate and federal courts should ultimately apply an identical [procedural] standard to federal civil claims generally"⁴³ by using what has been labeled a "reverse-Erie" analysis.⁴⁴ This was the proposition supplied by *Brown v. Western Railway of Alabama*,⁴⁵ in which a plaintiff attempted to litigate a federal claim in a state jurisdiction with a pleading standard that diverged from the federal model.⁴⁶ The Court rationalized that "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."⁴⁷ Although state procedure was not required to be a replica of the federal model, state practices could not defeat federal claims, at least where those claims would have had merit in federal court.

⁴¹ *Id.* at 4.

⁴² U.S. CONST. art. VI, cl. 2; see also Clermont, *Reverse-Erie*, *supra* note 40, at 25 ("[T]he Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'").

⁴³ Chen, *supra* note 33, at 1451.

⁴⁴ See, e.g., Clermont, *Reverse-Erie*, *supra* note 40.

⁴⁵ *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949) (finding state practice of determining viability of complaint cannot be used to defeat an otherwise sufficient federal claim).

⁴⁶ The civil procedure of the state of Georgia required a court to view contentions contained in the complaint "most strongly against the [plaintiff]." Chen, *supra* note 33, at 1445-46 (citing *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 295 (1949)).

⁴⁷ *Brown*, 338 U.S. at 299.

Aside from *Brown v. Western Railway*, the Supreme Court has not been very active in reverse-Erie doctrine.⁴⁸ In *Johnson v. Fankell*,⁴⁹ the Supreme Court determined that “[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.”⁵⁰ The Court went on to clarify that “[t]his proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules.”⁵¹ Accordingly, the state courts largely have a discretionary role in determining whether to apply federal standards in state court proceedings. Generally, “the state courts come out the same way on reverse-Erie that federal courts do in the Erie setting.”⁵² Therefore, “in adjudicating federal-law claims, state courts apply federal law on clearly substantive questions, and generally state courts apply state law on clearly procedural questions.”⁵³ In using state procedure to adjudicate federal claims, the Supreme Court is unlikely to find a state court in error, absent the existence of a state law that purposefully denies a federal right.⁵⁴

The *Conley* model was considered liberal, and able to accommodate most claims, at least to the extent that discovery was made available to a plaintiff who could bear the simplicity of its “no set of facts” threshold.⁵⁵ Under the reverse-Erie concept, it follows that when *Conley* was still good law, a state pleading system was required to accommodate federal claims in a manner in which those claims would hypothetically be treated in

⁴⁸ The Supreme Court rarely alludes to the topic of reverse-Erie. See, e.g., *Felder v. Casey*, 487 U.S. 131, (1988); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952); see also *Clermont, Reverse-Erie*, *supra* note 40, at 23.

⁴⁹ *Johnson v. Fankell*, 520 U.S. 911 (1997).

⁵⁰ *Id.* at 916. But see *Haywood v. Drown*, 556 U.S. 729, 738 (2009) (distinguishing *Fankell* on the grounds that there the state rule did not discriminate against actions brought to vindicate civil rights). Reading the two cases together, it follows that the Supreme Court will not disrupt a state’s substantive or procedural law as applied to federal claims unless the state law disrupts the “equality of treatment” required under Supremacy clause analysis. See *Haywood*, 556 U.S. at 739.

⁵¹ *Fankell*, 520 U.S. at 916.

⁵² *Clermont, Reverse-Erie*, *supra* note 40, at 29-30.

⁵³ *Id.*

⁵⁴ In *Haywood*, the state had purposefully denied plaintiffs the opportunity to litigate federal civil rights claims in state court. See *Haywood*, 556 U.S. at 740. Only in circumstances as extreme as in *Haywood* is it likely that a state court would be denied the opportunity to use state procedure when hearing federal substantive claims. Consequently, in ordinary state court adjudications of federal claims, federal procedure will not infiltrate state court systems. See *Fankell*, 520 U.S. at 916.

⁵⁵ See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Under *Conley*, once a complaint survived a motion to dismiss, a plaintiff was entitled to proceed to discovery, and only after an adequate opportunity in discovery would an unmeritorious claim be weeded out through summary judgment. See FED. R. CIV. P. 56. In this manner, the Rules provided ample opportunity for a plaintiff to put forth a meritorious claim.

federal court under the standards set forth in *Conley*.⁵⁶ States did not necessarily apply reverse-Erie methodology, but due to the widespread use of *Conley* pleading adopted by the states,⁵⁷ problems did not generally arise between the federal and state criteria for the sufficiency of a complaint when faced with a motion to dismiss. The Supreme Court's passive role in this area indicates as much. Indeed, the way that the reverse-Erie doctrine "flows down to govern in state court . . . [it] does so by uncertain means and to an uncertain extent."⁵⁸ Therefore, despite federalism concerns, *Conley* jurisprudence flowed naturally to the states' pleading rules, which allowed them to accommodate federal claims without much need for federal pleading rules to force their way into state courts.

The *Twombly/Iqbal* decisions destroyed the harmony that *Conley* established throughout state jurisdictions with otherwise diverse procedural standards. Assume a case similar to *Brown v. Western Railway*, litigated today, and assume state procedure followed the *Conley* model. The tables would be turned since the claim would potentially be defeated in a federal court applying *Iqbal's* stricter plausibility standard where it would be sufficient in jurisdiction that continued to follow *Conley* and hence only required pure notice. *Brown v. Western Railway* dictated that "states may not apply more stringent pleading standards than would be applied to the case had it been brought in federal court."⁵⁹ The heightened pleading required by *Iqbal* in federal courts exemplifies the reverse of the situation in *Brown*, because a state court following *Conley* is now more likely to vindicate a federal right than a federal court under the obligation to adhere to *Iqbal's* plausibility pleading requirement. Applying a strict reverse-Erie analysis would require the state court to place a higher burden on the plaintiff seeking relief under federal law, which is not the purpose of the reverse-Erie doctrine as explained in *Brown v. Western Railway*.

Despite the reverse-Erie doctrine and *Brown v. Western Railway* propositions urging states to follow federal procedure when litigating

⁵⁶ It is unlikely that state courts actively recognized the reverse-Erie concept. See Clermont, *Reverse-Erie*, *supra* note 40, at 38-39 (acknowledging federal interests are not overbearing enough to push aside conflicting state law). It seems more likely that *Conley* was so ingrained in court jurisprudence, that for the most part, when faced with a motion to dismiss, federal claims arrived at the same result in state court as they would under the Federal Rules.

⁵⁷ Chen, *supra* note 33, at 1438-40.

⁵⁸ Clermont, *Reverse-Erie*, *supra* note 40, at 5.

⁵⁹ Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 121 (2010).

federal claims, the U.S. Constitution does not require states to adopt the plausibility model.⁶⁰ Moreover, in practice, state courts do not tend to make reverse-Erie decisions; federal procedure generally does not invade the state courts, unless by state court comity or state legislative action.⁶¹ Just as the U.S. Supreme Court adopted a new pleading standard to be applied in federal courts, state supreme courts can and should similarly adopt pleading standards to be applied in their respective state courts, notwithstanding the U.S. Supreme Court's activity in this area of procedure.⁶²

C. A Note on Removal Jurisdiction and Forum Shopping

The new disparity between the heightened pleading now required in federal courts and the liberal *Conley* style of pleading that some states will likely retain, plaintiffs may attempt to take advantage of the most lenient standard by filing federal claims of concurrent jurisdiction in state court.⁶³ Defendants' solution to this situation lies in removal jurisdiction.⁶⁴ Removal is a contentious procedural device because it allows for a defendant to thwart a plaintiff's ability to dictate the forum in which his case will be heard and is easily "abuse[d]... as a forum-selection device."⁶⁵

⁶⁰ See Clermont & Yeazell, *supra* note 8, at 831 n.41 ("[*Twombly* and *Iqbal*] have only persuasive force outside the federal system.").

⁶¹ See Michalski, *supra* note 59, at 110-11 (acknowledging that state courts are not bound by federal procedure).

⁶² See *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); see also *Crum v. Johns Manville, Inc.*, 19 So. 3d 208, 212 n.2 (Ala. Civ. App. 2009) ("Our supreme court has adopted the standard set forth in *Conley v. Gibson*. . . . Until such time as our supreme court decides to alter or abrogate this standard, we are bound to apply it, the United States Supreme Court's decision in *Twombly* notwithstanding." (citations omitted)).

⁶³ See Michalski, *supra* note 59, at 121. "Plaintiffs are thus likely to shift litigation to state courts when not constrained by the exclusive subject-matter jurisdiction of the federal courts. Similarly, some plaintiffs might reconfigure their complaints to avoid the diversity jurisdiction of the federal courts. Widening procedural diversity, in short, will constrain more plaintiffs in more jurisdictions in how they can structure complaints that will survive the pleading phase." *Id.* It is important to note that some federal statutes deprive plaintiffs of the opportunity to file in state court when pleading particular claims. Federal preemption of certain claims has made federal court jurisdiction a prerequisite thereby usurping all of the plaintiff's power to litigate in a state jurisdiction. For example, provisions of the Securities Litigation Uniform Standards Act of 1998 (SLUSA) require class actions alleging securities fraud to be brought exclusively in federal courts and provides for extensive removal provisions. See 15 U.S.C. § 78bb(f) (2006).

⁶⁴ See 28 U.S.C. § 1441 (2006).

⁶⁵ Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 122 (2002). It can be argued however, that a plaintiff also has the opportunity to forum shop at the outset of the litigation because claims involving concurrent jurisdiction can typically be brought in either federal or state court.

Heightened pleading in the federal courts amplifies the potential for abuse, reaffirming the notion that “plaintiffs’ win rate[s] in removed cases is very low.”⁶⁶ Now, defendants may easily capitalize on the burden that plausibility pleading places on plaintiffs in order to successfully move for dismissal in actions that would proceed to discovery in state court.

The primary pre-requisite for obtaining removal is that a defendant must establish federal jurisdiction before being able to take advantage of a federal forum. As far as federal questions⁶⁷ are concerned, a plaintiff has the power to determine the defendant’s eligibility to remove. Forum shopping by defendants is curtailed by the “well-pleaded complaint” rule which grants the plaintiff the ability to bar removal by choosing a cause of action that does not arise under federal law.⁶⁸ The well-pleaded complaint rule creates a narrow window in pleadings by which a defendant can take advantage of removal because it is the plaintiff’s complaint, and not the defendant’s answer, which dictates whether removal is possible.⁶⁹ If the plaintiff does not plead a federal claim then there is no reverse-Erie concern because federal law would not be disrupted by state procedure since federal law would not be determined in the action. Moreover, if the plaintiff does bring a federal claim, either the plaintiff can initiate the action in federal court and comply with the plausibility standard, or the defendant can remove to federal court, forcing the plaintiff to abide by the higher threshold.

The purpose of the reverse-Erie doctrine was to prevent state procedure from defeating viable federal claims. If states retain the *Conley* standard, a federal claim can either proceed in state court or be removed to be adjudicated under the *Iqbal* standard. Prior to *Twombly/Iqbal*, the success achieved by defendants when removing cases was frequently attributed to “plaintiff attorneys who . . . demonstrated their incompetence by already exposing their clients to removal” by filing federal claims in state court,⁷⁰ and thus having their litigation plan frustrated by removal. However, post-*Iqbal*, a plaintiff’s strategy may take

⁶⁶ *Id.* at 122-23 (stating that removal as a procedural device is itself is disruptive to a plaintiff’s ability to successfully adjudicate a claim).

⁶⁷ A federal question is a civil action “arising under” federal law. See 28 U.S.C. § 1331 (2006).

⁶⁸ See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (holding federal subject matter jurisdiction proper only when plaintiff alleges a cause of action arising under the laws of the United States).

⁶⁹ See *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (holding that a counterclaim cannot serve as a basis for federal jurisdiction).

⁷⁰ *Clermont & Eisenberg, supra* note 65, at 123.

refuge in the leniency of state court by pleading claims without a federal component.

This unique dance between the plaintiff's ability to choose whether to plead a federal claim and the defendant's opportunity to remove protects the viability of federal claims in the federalism model. However, plaintiffs should exert caution when playing this forum-shopping game because pleading with the goal of keeping the case in state court would require foregoing causes of action under federal law. Although many state and federal claims overlap, a plaintiff may be deprived of otherwise valid federal claims if they are not brought due to a concern of removal by a defendant. A plaintiff is typically required to bring all causes of action in a single suit under the principles of claim preclusion.⁷¹ Additionally, a plaintiff cannot test the sufficiency of his complaint in federal court and then upon dismissal, opt for a more lenient standard in state court, because a dismissal under these circumstances typically operates as a judgment on the merits thus barring a new complaint.⁷²

A defendant's ability to remove federal claims offers substantial protection to federal substantive law from being thwarted by a state procedural system. Furthermore, a plaintiff would be unwise to file a federal claim in state court if the tainted procedure of the state jurisdiction would stifle a plaintiff's ability to obtain relief. Since the federal pleading standard is now a higher threshold than under many state rules of procedure, state standards for determining the viability of a claim would not thwart the viability of a federal claim.⁷³ Rather it is the parties' opportunistic use of forum-shopping that dictates whether the heightened pleading standard of the federal courts will apply. Realistically, since "the volume of business in state courts dwarfs that in federal courts,"⁷⁴ every-day civil actions in state court will continue to decide federal claims

⁷¹ See, e.g., *Frier v. City of Vandalia*, 770 F.2d 699, 702 (7th Cir. 1985) ("[T]he first suit operates as an absolute bar to a subsequent action . . . not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." (internal quotation marks omitted)); see also RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

⁷² See *Federated Dep't. Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits." (internal quotations omitted)).

⁷³ The result is that the holding in *Brown v. Western Railway*, 338 U.S. 294, 296 (1949), is no longer applicable due to *Iqbal*'s heightened pleading requirements.

⁷⁴ Clermont, *Reverse-Erie*, *supra* note 40, at 3.

without interference from the Supreme Court and its interpretation of the Federal Rules.⁷⁵

IV: HAVE THE STATES BEEN PERSUADED TO ADOPT IQBAL?

Whether any particular state will continue to follow *Conley* or adopt *Iqbal* is entirely up to the wisdom of the state's legislatures and courts. States that have traditionally followed the Federal Rules⁷⁶ will likely either slowly begin to follow *Iqbal*'s model or will be unresponsive, retaining the *Conley* notice pleading standard. Conversely, states that never followed *Conley* and instead followed a heightened pleading standard similar to that mandated in *Iqbal* may now be more similar to the new federal model. The jurisdictional discrepancies among the several states have always spanned a unique spectrum, but post-*Iqbal*, the degree of requirements facing a plaintiff at the pleadings stage will undoubtedly become even more diverse than they were before *Twombly*.⁷⁷

A. States where *Iqbal* has had little impact

Colorado provides an example of a state that has traditionally followed the Federal Rules, but has not adopted the *Iqbal* interpretation of plausibility into its state law equivalent of Federal Rule 8(a)(2). Colorado's pleading rules track the exact language of the Federal "short and plain statement" and the motion to dismiss.⁷⁸ In light of the Federal Rules, Colorado state courts adopted language similar to *Conley*, holding that "a complaint is not to be dismissed unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief."⁷⁹ After the *Twombly* decision, Colorado state courts took notice that in order to survive the motion to dismiss under the Federal Rules, "the complaint [must] set forth factual allegations sufficient to raise a right to relief above the speculative level."⁸⁰ Still,

⁷⁵ See sources cited *supra* note 62.

⁷⁶ See generally Oakley & Coon, *supra* note 34 (surveying the extent to which the Federal Rules of Civil Procedure have been adopted by the states).

⁷⁷ See Michalski, *supra* note 59, at 111 (identifying the "splintering of pleading standards").

⁷⁸ See COLO. R. CIV. P. 8(a)(2) ("a short and plain statement of the claim showing that the pleader is entitled to relief."); COLO. R. CIV. P. 12(b)(5) ("failure to state a claim upon which relief can be granted").

⁷⁹ Coors Brewing Co. v. Floyd, 978 P.2d 663, 665 (Colo. 1999).

⁸⁰ Western Innovations, Inc. v. SonitrolCorp., 187 P.3d 1155, 1158 (Colo. App. 2008) (internal quotation marks omitted).

Colorado state courts continued to apply *Conley* style pleading as matter of Colorado procedural law.⁸¹

More than a year after the Supreme Court's decision in *Iqbal*, the Colorado Supreme Court justices forcefully declared that they "view with disfavor a . . . motion to dismiss for failure to state a claim."⁸² The court did not mention *Iqbal* in its analysis, nor did it discuss the issue of "plausibility."⁸³ Not surprisingly, in a later decision determining a contract dispute under Colorado law,⁸⁴ the U.S. District Court for the District of Colorado conducted an *Iqbal* analysis when determining the sufficiency of a complaint vis-à-vis a motion to dismiss.⁸⁵ Whereas the Federal District Courts in Colorado must follow *Iqbal*, the Colorado state courts do not, because the Colorado Supreme Court decided that its trial courts should continue to follow the *Conley* language when ruling on motions to dismiss. The federal-state dichotomy present in Colorado highlights the Erie and reverse-Erie doctrines.⁸⁶

The procedural rules of Pennsylvania provide a contrast to Colorado's rules because Pennsylvania has never adopted the Federal Rules. Pennsylvania state procedural rules differ from the Rules under *Conley* due to a fact based pleading requirement.⁸⁷ When "testing the legal sufficiency of the challenged pleading," Pennsylvania courts "[admit] as true all well-pleaded, material, relevant facts."⁸⁸ Consistent with *Conley*, a Pennsylvania court must view the facts of the complaint in the light most

⁸¹ See *id.* (citing *Coors*, 978 P.2d at 665). However, in citing *Twombly*, the court noted that "[a] court is not required to accept as true legal conclusions couched as factual allegations" and "a complaint may be dismissed if the substantive law does not support the claims asserted." *Id.*

⁸² *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010) (en banc).

⁸³ See *id.* ("Accepting all allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, the trial court properly grants a [motion to dismiss] only where the plaintiff's factual allegations cannot, as a matter of law, support a claim for relief.").

⁸⁴ *Ciena Commc'ns, Inc. v. Nachazel*, No. 09-CV-02845-MSK-MJW, 2010 WL 3489915, at *1 (D. Colo. Aug. 31, 2010). It is important to note that the complaint stated causes of action under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 and the Stored Communication Act, 18 U.S.C. § 2701. Thus, federal subject matter jurisdiction was proper. However, numerous other causes of action arose under a contract dispute dictated by state substantive law. I mention that the federal court was using federal procedure to determine the sufficiency of state law claim here merely to highlight the interchangeability of state substantive law being litigated with the federal procedural rules. See discussion *supra* Part II.B.

⁸⁵ *Ciena*, 2010 WL 3489915, at *2.

⁸⁶ The U.S. Supreme Court has called the differences between the state and federal systems "fundamental to our system of federalism." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

⁸⁷ See 231 PA. R. C.P. NO. 1019(a) ("The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.").

⁸⁸ *MacGregor v. Mediq Inc.*, 576 A.2d 1123, 1125 (Pa. Super. Ct. 1990) (citing *Savitz v. Weinstein*, 149 A.2d 110 (Pa. 1959)).

favorable to the plaintiff. However, Pennsylvania courts diverge from the *Conley* pleading standard by requiring that the complaint allege detailed facts that go beyond pure notice. *Conley*'s more lenient test required a court to come up with any and all hypothetical facts that could entitle a plaintiff to relief based on the cause of action alleged.⁸⁹ However, Pennsylvania requires that a complaint "must do more than 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"⁹⁰ A complaint must "formulate the issues by fully summarizing the material facts . . . i.e., those facts essential to support the claim."⁹¹ Whereas Pennsylvania procedure views the complaint in the light most favorable to the plaintiff, the complaint is still required to plead sufficient facts in which to establish a cause of action.

Interestingly, a type of the heightened pleading standard promulgated in *Iqbal* was already well ingrained in Pennsylvania's jurisprudence. The U.S. Supreme Court's clarification in *Iqbal* that legal conclusions are not entitled to the presumption of truth⁹² mimics Pennsylvania's procedural requirement that a court must "admit as true all facts which are averred in the complaint . . . but not the pleader's conclusions or averments of law."⁹³ In order to withstand a motion to dismiss, plaintiffs in both jurisdictions must allege a higher degree of facts than what is required under *Conley* pleading standards. However, Pennsylvania jurisprudence does not include the second prong of *Iqbal*'s new test, that the plaintiff must "nudge[] his claims . . . across the line from conceivable to plausible."⁹⁴ Pennsylvania does not require that a plaintiff show "plausibility," but rather that the complaint alleges sufficient facts.⁹⁵ Prior to *Iqbal*'s promulgation, Pennsylvania's pleading standard had already

⁸⁹ See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("[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.").

⁹⁰ *Gen. State Auth. v. Sutter Corp.*, 356 A.2d 377, 381 (Pa. Commw. Ct. 1976) (quoting *Conley*, 355 U.S. at 47).

⁹¹ *Id.*

⁹² *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

⁹³ *Eden Roc Country Club v. Mullhauser*, 204 A.2d 465, 466 (Pa. 1964).

⁹⁴ *Iqbal*, 556 U.S. at 680 (brackets omitted).

⁹⁵ See *Sutter Corp.*, 356 A.2d at 381 (requiring a plaintiff to allege sufficient facts to allow the defending party to prepare his case).

independently adopted a version of the first prong of the *Iqbal* holding, but not the second.⁹⁶

B. States that wholly adopt or firmly reject Iqbal

Massachusetts state courts progressively follow U.S. Supreme Court pleading doctrine jurisprudence. Shortly after the *Twombly* decision, Massachusetts' highest court, the Massachusetts Supreme Judicial Court, refined the state's parameters for evaluating a complaint's sufficiency.⁹⁷ Massachusetts wholly adopted *Twombly's* heightened pleading standard, abandoning *Conley's* pleading standard by declaring "we follow the [Supreme] Court's lead in retiring its use."⁹⁸

In comparison to the federal circuit courts, the Massachusetts Supreme Judicial Court was more proactive in swiftly declaring the state's departure from *Conley*. Federal courts took more time to debate and consider whether or not to limit *Twombly's* standards to the antitrust context. One year prior to *Iqbal*, Massachusetts was already leading the charge by mandating the threshold requirement that a complaint contain "factual allegations plausibly suggesting an entitlement to relief."⁹⁹

After the Massachusetts Supreme Judicial Court issued its version of the heightened pleading standards, lower Massachusetts state courts deftly applied the new standards when ruling on a motion to dismiss.¹⁰⁰ In attempting to follow the federal standard, the trial judges of Massachusetts are invariably in the same position as all of the U.S. district court judges in attempting to decipher the correct method of *Iqbal's* application.

In stark contrast to the Massachusetts approach, the Washington Supreme Court became "the first state supreme court post-*Iqbal* to abandon the ideal of national procedural uniformity over the contentious issue of plausibility pleading."¹⁰¹ In *McCurry v. Chevy Chase Bank*,¹⁰² the

⁹⁶ The first prong is that legal conclusions are not entitled to be treated as true. The second prong requires that a complaint must state a claim to relief that is plausible on its face in order to withstand a motion to dismiss for failure to satisfy the short and plain statement requirement. To meet the plausibility requirement, the complaint must allege facts that would allow a court to draw a reasonable inference that the defendant is liable. See *Iqbal*, 556 U.S. at 678-81.

⁹⁷ See *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See, e.g., *Plante v. Town of Blackstone*, 27 Mass. L. Rptr. 147, 150 (Mass. Super. Ct. 2010) ("A threadbare recital of the elements of a cause of action, supported by mere conclusory statements, does not suffice.").

¹⁰¹ Michalski, *supra* note 59, at 109.

court denounced the applicability of the *Iqbal* standard in Washington state courts because the “plausibility standard is predicated on policy determinations specific to the federal trial courts.”¹⁰³ The court held that those “policy determinations [do not] hold sufficiently true in the Washington trial courts to warrant such a drastic change in court procedure.”¹⁰⁴ The court rationalized its decision because of the detrimental effect that *Iqbal*’s plausibility pleading standard will have on plaintiffs’ ability to gain access to information via discovery,¹⁰⁵ a proposition that has been a subject of much discussion among legal scholars since the promulgation of the plausibility standard.¹⁰⁶

Prior to *McCurry*, the state of Washington, like Colorado, followed the Federal Rules with regard to their state’s standards for determining the sufficiency of a complaint. Now, however, Colorado and Washington apply different pleading standards than the federal system. Colorado continues to follow *Conely*’s interpretation of the Rules, and Washington courts have completely rejected any state court application of the *Iqbal* standard. Prior to the U.S. Supreme Court’s departure from *Conley*, Washington accepted the federal interpretations of the Rules, and considered those interpretations to be highly persuasive.¹⁰⁷ But after *Iqbal*, the *McCurry* court clearly indicated that it would no longer follow the U.S. Supreme Court’s interpretation of the Federal Rules, at least to the extent of the relationship between Rules 8(a)(2) and 12(b)(6). The Washington court was of the opinion that the *Iqbal* decision was based on policy and not grounded in legal precedent.¹⁰⁸ The *McCurry* decision strongly suggests that Washington courts will likely be skeptical of future federal interpretations of procedural rules.

¹⁰² *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861 (Wash. 2010) (en banc).

¹⁰³ *Id.* at 863.

¹⁰⁴ *Id.*

¹⁰⁵ *See id.* at 863–64 (describing plaintiff’s inability to access information exclusively in possession of defendants).

¹⁰⁶ *See CIVIN & ADEGBILE, supra* note 24, at 5 (“In many civil rights cases, most, if not all, pertinent information is within the exclusive province of the defendant.”).

¹⁰⁷ *See Michalski, supra* note 59, at 110 n.3.

¹⁰⁸ The Washington Supreme Court posed questions that went unaddressed in the *Iqbal* decision, notably: “do current discovery expenses justify plaintiffs’ loss of access to that discovery and general access to the courts, particularly in cases where evidence is almost exclusively in the possession of defendants?” *McCurry*, 233 P.3d at 863. The *McCurry* decision disdainfully highlighted the negative impact of a Supreme Court case as based purely on policy and not in precedent in the law. *See id.*

C. Hybrid States

The Nebraska Supreme Court, while not as skeptical as Washington or as accepting as Massachusetts, has acknowledged the usefulness of plausibility pleading. In determining whether dismissal was proper, the Nebraska high court noted its belief that “the Court’s decision in *Twombly* provides a balanced approach for determining whether a complaint should survive a motion to dismiss and proceed to discovery.”¹⁰⁹ Despite the court’s praise of *Twombly*’s balanced approach, it recognized a major flaw in the *Iqbal* method: different judges may have vastly divergent understandings and conclusions when viewing identical allegations set forth in a plaintiff’s complaint. “For example, even the *Iqbal* majority treated what were basically the same allegations both as implausible factual allegations and as a mere recitation of the elements.”¹¹⁰ The Nebraska Court’s identification and preoccupation with this inherent flaw in *Iqbal*’s plausibility pleading standard is one of the principal concerns of determining plausibility.

Despite expressing its concerns that trial judges may inconsistently apply the “plausibility” standard set forth in *Iqbal*, the Nebraska Supreme Court nonetheless adopted the *Twombly* analysis without speculating on the application of the U.S. Supreme Court’s attempt at further guidance in the *Iqbal* decision. The Nebraska court noted, however, that “[i]n cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.”¹¹¹ This language suggests that although the plausibility standard is present in Nebraska, it is not as strict as *Iqbal*’s test, insofar as a court must be willing to grant further discovery in order to allow a plaintiff’s claim to rise to the level of plausibility.¹¹²

The District of Columbia Court of Appeals had a different view of *Twombly* than the Nebraska Court. The D.C. court initially ignored *Twombly*’s holding and cited *Twombly* for the purpose of reiterating the

¹⁰⁹ Doe v. Bd. of Regents of Univ. of Neb., 788 N.W.2d 264, 278 (Neb. 2010).

¹¹⁰ *Id.* (“We recognize that the Court’s decision in *Iqbal* reflects a tension in how different judges might view the same allegations.”).

¹¹¹ Cent. Neb. Pub. Power and Irrigation Dist. v. N. Platte Natural Res. Dist., 788 N.W.2d 252, 258 (Neb. 2010).

¹¹² See *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) (holding plaintiff not entitled to any discovery to assist in the plausibility showing).

holding of *Conley*.¹¹³ Instead of immediately following the U.S. Supreme Court's lead into plausibility pleading, the D.C. court relied on precedent within its own jurisdiction before changing its pleading standards in light of *Iqbal*. "[I]t may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test" for judging the sufficiency of a complaint in D.C. trial courts.¹¹⁴ Rather, all facts are taken as true and "all that is required . . . is a short and plain statement of the claim showing that the pleader is entitled to relief."¹¹⁵ More recently, the D.C. high court declared that "a complaint should not be dismissed because a court does not believe that a plaintiff will prevail on his claim."¹¹⁶ Additionally, the court specifically reserved the question of whether it will follow the plausibility standard promulgated in *Iqbal* in the future.¹¹⁷ However, in a later decision, the D.C. court recognized that it was required by statute to "conduct its business according to the Federal Rules of Civil Procedure."¹¹⁸ Therefore, the court determined that it was required to adopt U.S. Supreme Court's interpretation of Rule 8(a) as decided in *Iqbal* notwithstanding the court's earlier reservations concerning plausibility pleading.

A recent statement by a West Virginia Supreme Court Justice is indicative of the situation states face in the post-*Iqbal* era: "I suspect it will be only a matter of time before this Court is confronted with the issue of whether West Virginia should adopt an interpretation of our *Rules of Civil Procedure* akin to that of the United States Supreme Court."¹¹⁹ When it comes time to rule on the applicability of *Iqbal* in a particular jurisdiction, the states should be cognizant of the considerations to take into account before deciding on the adoption of *Iqbal* and plausibility pleading.

¹¹³ See *Solers, Inc. v. Doe*, 977 A.2d 941, 948 (D.C. 2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (The purpose of this statement is to "give the defendant fair notice of what the pleader's claim is and the grounds upon which it rests." (brackets omitted))).

¹¹⁴ *Solers*, 977 A.2d at 947.

¹¹⁵ *Id.* at 948.

¹¹⁶ *Grayson v. AT&T Corp.*, 15 A.3d 219, 229 (D.C. 2011) (brackets omitted).

¹¹⁷ See *id.* at 229 n.16 ("[T]his court has not yet decided whether it will follow the facial plausibility standard enunciated in *Ashcroft v. Iqbal*." (internal citations omitted)).

¹¹⁸ *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543-44 (D.C. 2011) (citing D.C. Code § 11-946).

¹¹⁹ *Roth v. DeFeliceCare, Inc.*, 700 S.E.2d 183, 196 (W.Va. 2010) (Benjamin, J., dissenting); see also *Robinson v. Pack*, 679 S.E.2d 660, 669 (W. Va. 2009) (adopting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) on other grounds and holding no supervisory liability in connection with civil rights violation).

V: CONSIDERATIONS TO TAKE INTO ACCOUNT FOR STATES PONDERING A CHANGE IN PLEADING

The states must make their own policy determinations when implementing changes to their procedural systems. In doing so, the states should be mindful of both the problems that plausibility pleading imposes on the judicial system and the unsound method by which the U.S. Supreme Court created this new approach. In promulgating plausibility pleading, the U.S. Supreme Court made clear that conclusory allegations based on an inadequate set of facts will no longer entitle a plaintiff to the benefit of the judicial process.¹²⁰ Plausibility pleading is a tool that can be liberally employed by district judges in their efforts to efficiently manage their dockets because they can prevent meritless claims from entangling the federal courts. Additionally, plausibility pleading prevents defendants from being dragged into litigation where there is minimal factual support for the claims alleged. Although *Iqbal* has strong benefits for judges and defendants, the disadvantages it presents to plaintiffs are substantial.¹²¹ The states should assess both the drawbacks and benefits inherent in a new pleading doctrine.

Whatever policy issues concerned the Supreme Court Justices, the appellate judges and legislators of the states undoubtedly have different ideas.¹²² Although states such as Massachusetts and Washington have made their position on plausibility pleading clear, many other states have yet to take a position on whether to adopt *Iqbal* into their own rules of procedure.¹²³ Because states often assume the wisdom of Supreme Court

¹²⁰ See *Iqbal*, 556 U.S. at 678.

¹²¹ See Eaton, *supra* note 27, at 301 (“*Iqbal* has unquestionably erected substantial barriers to the judicial system for certain plaintiffs that were nonexistent under the notice pleading regime.”); see also Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. Rich. L. Rev. 603 (January 2012) (using a statistical approach to confirm that *Iqbal's* effect on pleading is undeniable).

¹²² See *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 863 (Wash. 2010) (finding that the federal policy determinations that gave rise to the plausibility standard are specific to federal trial courts and do not hold true in Washington state courts).

¹²³ While each state is free to choose its own course in crafting a system of civil procedure, Massachusetts, in particular, adopted *Iqbal* blindly without examining the negative consequences. See *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008) (“[W]e take the opportunity to adopt the refinement of that standard that was recently articulated by the United States Supreme Court”). If a state believes that a change in pleading doctrine is in fact necessary at all, then they should carefully examine the consequences of any particular course of action instead of blindly adopting any doctrinal changes promulgated by federal courts.

jurisprudence and are thus more willing to hastily adopt its rulings,¹²⁴ it is imperative that state courts and legislatures are made aware of the potential consequences of following the Supreme Court's lead in this particular instance. Because the *Iqbal* decision has the "the potential to usher in a new era of procedural diversity,"¹²⁵ the states should adopt procedural systems that reflect that state's particular policy needs, without blindly relying on the Supreme Court's guidance.

The *Iqbal* decision has two major deficiencies: the application of plausibility pleading and the method by which the Supreme Court created it.¹²⁶ The application of plausibility pleading is flawed because the manner in which facts are scrutinized by trial judges allows for too much of the judge's personal discretion. This problem is compounded by the lack of facts available to the judge at the commencement of litigation as well as the Supreme Court's failure to provide clear guidance for trial judges when they issue rulings on the existence of plausibility. Furthermore, the Supreme Court's method of creating plausibility pleading standard through its holdings in *Twombly* and *Iqbal* was flawed because those cases were decided without legal precedent or prior debate on the merits of plausibility pleading. When formulating a procedural system to fit their own unique policy concerns the states should proceed with caution in order to avoid these serious problems in the *Iqbal* decision.

A. Judging Facts: The New Role of the Trial Judge

Plausibility pleading presents the trial judge with an entirely new fact-interpreting role at the beginning of litigation. Under the *Iqbal* test, adequate facts must be stated in the complaint, and this adequacy determination is the duty of the judge alone.¹²⁷ In order to satisfy this test, the judge must engage in factual interpretation, a role that under *Conley* was otherwise reserved for later in litigation and was less often the role of the judge at all. In the federal courts, the right to jury trial in most civil actions is a constitutional right.¹²⁸ As the fact-finder, the jury makes credibility determinations on the facts presented to it and is the ultimate

¹²⁴ See sources cited *supra* note 37.

¹²⁵ Michalski, *supra* note 59, at 111.

¹²⁶ For a discussion of other leading scholarly interpretations of *Iqbal*'s deficiencies see generally Eaton, *supra* note 27, at 315-16.

¹²⁷ See, e.g., Wright ET AL., *supra* note 6.

¹²⁸ U.S. CONST. amend. VII; see also FED. R. CIV. P. 38. It is worth noting that certain categories of civil actions are not triable by jury. See, e.g. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996) (holding patent disputes require sophisticated analysis to be determined by judge, not jury).

decider on what actually transpired in a given case. Under *Iqbal*, however, the judge determines whether the facts alleged state a plausible cause of action at the pleadings stage. In making this assessment of facts, judges are now able to usurp the fact-finding power of a jury and dismiss claims in which reasonable minded jurors may have disagreed.¹²⁹

Constitutional concerns aside, judges generally have a discordant ability to ascertain factual reasonableness. The criteria set forth in *Iqbal* requires that a district judge make a "reasonable inference" to determine whether the facts alleged give rise to a plausible claim.¹³⁰ When a judge engages in this type of fact-interpreting endeavor, litigants should be skeptical. As a comparison, other portions of the Federal Rules recognize situations where the district judge must make determinations regarding the sufficiency of the facts presented to him. For example, in ruling on a motion for a judgment as a matter of law,¹³¹ the judge may not "weigh the evidence,"¹³² but may only grant the motion if "no jury could decide in that party's favor."¹³³ Furthermore, if "reasonable minds could differ" as to the conclusion to be adduced from the facts, it is improper for the judge to make the determination himself.¹³⁴ In this context, the fact-finding process is protected because a judge must defer to what a hypothetical person could ascertain, rather than his own opinions standing alone.

In contrast, in ruling on a motion to dismiss under *Iqbal*, the judge must make "reasonable inferences" without determining whether reasonable minds could differ, but merely by what is reasonable to that individual judge.¹³⁵ As articulated by the Supreme Court, the judge's role

¹²⁹ See Clermont & Yeazell, *supra* note 8, at 837 ("[O]ne should worry that the Court was improperly intruding on the factfinder's domain."); see also Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 Harv. C.R.-C.L. L. Rev. 399, 403 (Summer 2011) ("[*Twombly* and *Iqbal*] are an implicit attack on the jury trial and, in turn, on our democracy."). Burbank and Subrin also point out, "[t]here would not have been an acceptable Bill of Rights without a right to trial by jury." *Id.* at 402.

¹³⁰ See *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

¹³¹ See FED. R. CIV. P. 50(a).

¹³² See *Hurd v. Am. Hoist and Derrick Co.*, 734 F.2d 495, 498 (10th Cir. 1984). "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for the party." *Id.* at 499 (quoting C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2524, at 543 (1971)).

¹³³ *Indian Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891, 894 (3d Cir. 1985).

¹³⁴ See *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985); see also *RESTATEMENT (THIRD) OF TORTS: GEN. PRINCIPLES* § 5(a) (D.D., 1999).

¹³⁵ See *Iqbal*, 556 U.S. at 663.

is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”¹³⁶ Whereas a motion for a judgment as a matter of law protects the non-moving party from a judge’s own opinions and biases by forcing him to make his determination based upon whether “no jury could decide,”¹³⁷ in a motion to dismiss, the judge is free to determine what is plausible from his own common sense.¹³⁸ This ruling should not be taken lightly given that it is the standard that dictates whether cases are even considered eligible for litigation.¹³⁹

The 2007 Supreme Court decision in *Scott v. Harris*¹⁴⁰ provides a beneficial illustration of when a judge’s common sense determination of facts can differ from that of other reasonable people. In *Scott v. Harris*, the Court was charged with determining what a reasonable juror would conclude in assessing following situation: “a police officer deliberately rammed his car into that of a fleeing motorist who refused to pull over for speeding and instead sought to evade the police in a high-speed chase.”¹⁴¹ In order to accomplish this task, the Justices watched a video tape of the events, instead of relying on the facts found by the jury at trial, and refused to take the defendant’s version of the facts into account.¹⁴² Not surprisingly, the Court had “little difficulty in concluding it was reasonable” for the police officer to act way the way in which he did.¹⁴³

When the video tape was shown “to a diverse sample of 1350 Americans . . . there were sharp differences of opinion along cultural, ideological, and other lines.”¹⁴⁴ The Court’s “insistence that there was

¹³⁶ *Id.* at 679 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2nd Cir. 2007)).

¹³⁷ *See Indian Coffee Corp.*, 752 F.2d at 894.

¹³⁸ *See Iqbal*, 556 U.S. at 664.

¹³⁹ *See Clermont & Yeazell*, *supra* note 8, at 833 n.47 (“[T]he Court’s articulation and application of the new test in *Twombly* and *Iqbal* may appear to require a stronger claim than does summary judgment, but that relationship would be nonsensical. It would instead make policy sense to require a weaker claim at the pleading stage.”). Considering that the motion for judgment as a matter of law is made after the presentation of all the evidence, and the motion to dismiss is made by judging only the parties’ initial allegations, providing the non-moving party more protection after he has had ample opportunity to present his case and less protection at the preliminary stage in litigation is troubling in the least. Furthermore, by examining the requirements placed on a judge in ruling on a motion pursuant to Rule 50(a) is example of how the new *Iqbal* standard for judging the relationship between Rules 8(a)(2) and 12(b)(6) runs afoul with the rest of the Federal Rules.

¹⁴⁰ *Scott v. Harris*, 550 U.S. 372 (2007).

¹⁴¹ Daniel M. Kahan, et. al., *Whose Eyes are you Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009).

¹⁴² *See id.* at 839.

¹⁴³ *See Scott v. Harris*, 550 U.S. at 384.

¹⁴⁴ Kahan, et. al., *supra* note 141, at 838.

only one 'reasonable' view of the facts itself reflected a form of bias" and seriously calls into question a judge's ability to make an objective assessment of facts.¹⁴⁵

Scott v. Harris illustrates my argument that viewing facts objectively and making a determination on "reasonableness" is an ambiguous process. Fact specific causes of action, such as negligence, require a judge to make determinations on facts that can only be deduced through the judge's own personal history.¹⁴⁶ Because discovery is unavailable at the pleadings stage, the judge's own prejudices and beliefs will fill the gaps in between the facts. "In cases like *Iqbal*, where the defendant has critical private information, the plaintiff will not get past the pleading stage if she cannot ferret out enough facts before filing to get over the merits threshold for each element of her claim."¹⁴⁷ The limited factual nature of a complaint will cause a judge to speculate and hypothesize creating an atmosphere where litigants will be at the mercy of a judge's own personal history.¹⁴⁸ Therefore, it becomes critical for a plaintiff to provide the judge with enough facts at the pleading stage to reduce the likelihood of a judge dipping into his own breadth of experience, as the Justices did in Scott v. Harris.

B. Difficulty of Pleading Adequate Facts Without the Benefit of Discovery

Depending on the type of pleading standard, whether it be pure notice, fact specific, or something analogous to plausibility, the roles of the plaintiff, defendant, and judge differ based on their burdens and activity required. In plausibility pleading, the three roles are as follows: there exists a heavy burden on the plaintiff to produce facts; the judge must make difficult determinations based on the minimal facts a plaintiff is able to produce; and the defendant can largely sit back and rely on a

¹⁴⁵ *Id.*

¹⁴⁶ *Cf.* Burbank & Surbin, *supra*, note 129, at 401-02 ("Issues such as negligence, intentional discrimination, material breach of contract, and unfair competition are not facts capable of scientific demonstration. Nor are these issues pure questions of law. Rather, they are concepts mixing elements of fact and law that become legitimate behavioral norms when the citizenry at large, acting through jury representatives, decides what the community deems acceptable.").

¹⁴⁷ Bone, *supra* note 4, at 878-79 ("[S]trict pleading will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery.")

¹⁴⁸ In *Scott v. Harris*, Justice Scalia compared what he saw in the video tape to a scene from the film "The French Connection." See Kahan et. al., *supra* note 141, at 839.

well drafted motion to dismiss, with a promising chance of never having to delve further into pleadings by producing an answer.¹⁴⁹

A plaintiff's complaint must provide enough facts to convince a judge of the plausibility of a defendant's wrongdoing and a plaintiff's failure to plead adequate facts poses a substantial risk for an adverse ruling, specifically dismissal. Aside from the disparate litigation resources that are often present between a plaintiff and defendant,¹⁵⁰ the defending party usually controls access to pertinent information needed by the plaintiff in order to provide factual support for its claim.¹⁵¹ This proposition presents a unique conundrum in light of the *Iqbal* decision:

In order to enter the discovery phase of the litigation process, where litigants may use the power of the court to gain access to evidence in an opponent's possession, plaintiffs must now state their claims in more factual detail than before. Often, however, plaintiffs cannot allege detailed facts until they gain access to detailed evidence through the discovery process.¹⁵²

Under *Iqbal*, a plaintiff is now required to engage in pre-complaint fact investigation in order to carry his burden, but without the help of a court's subpoena power or the numerous discovery devices provided in the Federal Rules.¹⁵³

The *Iqbal* Court, while perhaps not unmindful of the plaintiff's conundrum, was unyielding in providing a plaintiff with a discovery mechanism. The majority in *Iqbal* determined that when a "complaint is deficient under Rule 8, [the plaintiff] is not entitled to discovery, cabined or otherwise."¹⁵⁴ This has dire implications for a plaintiff who has no

¹⁴⁹ See Eaton, *supra* note 27, at 313 ("Following the Supreme Court's decision, *Iqbal* motions to dismiss became commonplace in federal courts with remarkable speed and success.").

¹⁵⁰ Defendants are often institutional actors such as corporations or government units that have in-house counsel or attorneys on retainer and are accustomed to litigation. Whereas a plaintiff likely has never been involved in a lawsuit and does not have the financial resources set aside to pursue one. I am mindful, however, of the ability of class actions and pro bono work to balance this disparity.

¹⁵¹ See CIVIN & ADEGBILE, *supra* note 24, at 5.

¹⁵² Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in Ashcroft v. Iqbal*, 62 Fla. L. Rev. 951, 952 (2010).

¹⁵³ See, e.g., FED. R. CIV. P. 30(a)(1) ("The deponent's attendance may be compelled by subpoena.").

¹⁵⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009). But see Jonathan D. Frankel, *May We Plead the Court?* Twombly, *Iqbal* and the "New" Practice of Pleading, 38 HOFSTRA L. REV. 1191, 1217 (2010) (arguing for brief targeted discovery before a complaint is filed).

means to compel a defendant to cough up the information necessary to comply with *Iqbal's* factual adequacy requirement.

District judges are faced with a similar lack-of-facts dilemma at the pleadings stage since a judge must determine plausibility of a claim based on facts that are largely incomplete and unavailable. Whereas judges are allowed to inquire into the nature of facts when making a procedural determination on certifying a class action,¹⁵⁵ there is no such device for a judge making a determination on a motion to dismiss. Aside from argument by counsel at a hearing on the motion to dismiss or any pre-trial conferences, if available, the judge must take the plaintiff's complaint as it is stated without any additional information as to the facts stated within. In figuring out how to proceed under *Iqbal's* murky guidelines, district judges may be tempted to use a limited form of discovery to ascertain the factual basis upon which a complaint is founded. Although, the *Iqbal* decision was adamant about preventing the disclosure of information to plaintiffs for the purpose of satisfying the plausibility requirement,¹⁵⁶ district judges may seek opportunities to discover information necessary to fill in the holes of a plaintiff's complaint. In doing so however, judges may risk crossing the line of impartiality thus threatening the adversarial process.¹⁵⁷ For that reason, "[j]udges may conclude that the increased risk of dismissal of . . . claims is unfortunate, but that this outcome is simply an unintended consequence of the application of neutral procedural rules."¹⁵⁸

When a plaintiff's claim is based on facts that are difficult for a judge to objectively verify, judges will have further difficulty during factual interpretation. Consider the example of claims such as the ones alleged by the plaintiff in *Iqbal*, where discriminatory intent is alleged.

This type of information is often within the exclusive knowledge of the defendant and the plaintiff will usually have considerable difficulty learning much about it before filing. As a result, general

¹⁵⁵ See Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 66 (2010) ("Courts already use early, targeted, pre-merits discovery to resolve threshold issues such as class certification, qualified immunity and jurisdiction.").

¹⁵⁶ See *Iqbal*, 556 U.S. at 686.

¹⁵⁷ In order to prevent oneself from going beyond what the parties have presented to the court, district judges may simply rely on their own common sense without attempting to read further into the alleged facts. See *id.* at 679 (making determination based on judicial "common sense"); cf. Kahan et. al., *supra* note 141, at 839 (arguing that the Justices simply call it as they see it).

¹⁵⁸ Malveaux, *supra* note 155, at 106.

allegations merely reciting the existence of a state of mind or a private action are not likely to instill much confidence that the plaintiff will be able to prove those allegations at trial.¹⁵⁹

Just as in *Iqbal*, other plaintiffs pleading claims involving the intent of a defendant, will have little factual matter to state in the complaint since the facts that are needed to provide a plausible claim are wholly within the province of the defendant.

The Supreme Court appears to understand the difficulty of alleging the subjective intent of a defendant. For example, in *Harlow v. Fitzgerald*,¹⁶⁰ the Court eliminated the subjective “good faith” defense in qualified immunity claims due to the difficult nature of determining the state of mind of a defendant as it related to his conduct.¹⁶¹ The Court opined that “variables explain in part why questions of subjective intent so rarely can be decided by summary judgment.”¹⁶² The Supreme Court held that it is proper to examine the objective reasonableness of a defendant’s conduct when determining qualified immunity.¹⁶³ Conversely, under *Iqbal*, claims of subjective intent are now ruled on at the pleadings stage of litigation,¹⁶⁴ much earlier than the summary judgment stage, which typically occurs after some discovery has taken place.

By changing the pleading standard, but not the process for gaining discovery, the Supreme Court created a large discrepancy in favor of the party defending a lawsuit. The deficiency this creates in the procedure itself will likely manifest in district judges finding unique ways in which to attempt to fashion an avenue for a plaintiff to gain relief, or at least the ability to obtain discovery in order to fairly attempt to gain relief.¹⁶⁵ Local rules aside,¹⁶⁶ district judges will not be able to fashion procedural

¹⁵⁹ Bone, *supra* note 4, at 873.

¹⁶⁰ *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

¹⁶¹ See *id.* at 818.

¹⁶² *Id.* at 816.

¹⁶³ *Id.* at 818 (“[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

¹⁶⁴ See *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (“[T]he plaintiff must plead and prove that the defendant acted with discriminatory purpose.”).

¹⁶⁵ See *Butt v. United Broth. of Carpenters & Joiners of America*, No. 09-4285, slip op. at 1, 2010 WL 2080034, at 1 (E.D. Pa. May 19, 2010) (refusing to follow *Iqbal* because the court interpreted it as dicta); *Waterfront Renaissance Assocs. v. City of Phila.*, 701 F.Supp.2d 633, 639 (E.D. Pa. 2010) (continuing to rely on *Conley v. Gibson*).

¹⁶⁶ See generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ.

remedies with any sort of regularity or equality. Whereas some may indeed attempt to provide plaintiffs with a low threshold of what constitutes “plausible” others, especially with frustratingly large dockets may side with defendants. A scrupulous defendant will be mindful of a particular judge’s rationale for determining “plausibility.” Therefore, a well drafted motion to dismiss will be successful in achieving the primary goal of every defendant, the termination of litigation without providing access to discovery.

Since “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions,”¹⁶⁷ the best attack a defendant can make in its motion to dismiss is arranging a plaintiff’s well-pleaded facts, as mere legal conclusions. Creating doubt in the district judge’s mind as to the difference between a factual allegation and a legal conclusion will pay dividends in drafting the motion to dismiss. Justice Souter’s dissent in *Iqbal* provides insight into the problems that district judges will have in interpreting a complaint. “[T]he majority’s holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory.”¹⁶⁸ The majority in *Iqbal* itself could not distinguish between conclusory and nonconclusory allegations, which makes it unlikely that any district judge would fare much better.¹⁶⁹ “[There is] a serious difficulty with the degree-of-generality approach to distinguishing conclusions from facts. There is no obvious way to draw a line along the generality-specificity continuum, and the *Iqbal* majority offers nothing to guide the analysis in a sensible way.”¹⁷⁰

Due to the *Iqbal* decision’s deficiencies, district judges, when ruling on a motions to dismiss, (1) must not give legal conclusions the presumption of truth, yet *Iqbal* provides no guidance for judges to distinguish between conclusory and nonconclusory allegations; and (2) must determine whether factual allegations are plausible based on a scarce set of facts by

ST. L.J. 1393, 1396-99 (1992) (describing the use of local rules in response to the increase in federal court litigation).

¹⁶⁷ See *Iqbal*, 556 U.S. at 678 (“A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.” (internal quotation marks omitted)).

¹⁶⁸ *Id.* at 699 (Souter, J., dissenting); see also Bone, *supra* note 4, at 858 (“It is highly significant that Justices Souter and Breyer dissented in *Iqbal*. Both were with the majority in *Twombly*. Moreover, Justice Souter, who wrote the principal dissenting opinion in *Iqbal*, actually authored the majority opinion in *Twombly*. These are strong signs that *Iqbal* is not just a straightforward application of *Twombly*.”).

¹⁶⁹ See *Doe v. Bd. of Regents of University of Nebraska*, 788 N.W.2d 264, 278 (Neb. 2010) (discussing the concern that different judges view the same allegations differently).

¹⁷⁰ Bone, *supra* note 4, at 861.

using their own personal experience.¹⁷¹ These problems are not surprising considering a tribunal of 9 justices, particularly in a 5-4 decision, changed fifty years of jurisprudence concerning whether lawsuits can even be heard in federal court. Every federal civil action is bound by the new interpretation of the Federal Rules. It is because of these far reaching effects that the rule-making process has been the traditional model utilized to make changes in the rules of procedure.¹⁷²

C. The Rulemaking Process Should Be Used

The leniency of the pre-*Twombly* gatekeeping rules was a “fundamental choice in procedural design.”¹⁷³ It was neither the best nor the only equation for the proper form of procedure in American trial courts. In that same vein, the *Iqbal* standard is also a choice of procedural design and is by no means the best pleading standard for civil actions. The rules-makers themselves, even after being prompted by the “bench and bar,” did not disturb notice pleading as it existed under *Conley*.¹⁷⁴ Rather it was the Supreme Court in a decision fraught with homeland security concerns that prompted the departure.¹⁷⁵ The panic that ensued shortly after 9/11 is hardly the context in which to formulate an entirely new procedural regime particularly “without [any] precedent in the law.”¹⁷⁶ Interestingly, the pre-9/11 Supreme Court was serious about preserving an individual’s access to the federal courts when pleading a cause of action involving the deprivation of rights by a government

¹⁷¹ See *Iqbal*, 566 U.S. at 663–64, 683 (promulgating and applying this two-pronged test).

¹⁷² See sources cited *infra* notes 181–82.

¹⁷³ Clermont & Yeazell, *supra* note 8, at 825.

¹⁷⁴ See *id.* at 826 n.12.

¹⁷⁵ Clermont and Yeazell provide an interesting discussion regarding the Court’s understanding of the context in which *Iqbal*’s discrimination occurred. “Defending these cases would very likely have involved many hours of depositions of high public officials with possibly discouraging effects on future public servants. It might also require the United States to lay bare substantial amounts of information about the early, and perhaps panicked, behavior in the months immediately following September 11.” See *id.* at 829. Moreover, “high-ranking officials charged with national law enforcement . . . surely had incentives temporarily to disregard constitutional constraints.” *Id.* at 843. The Second Circuit, in finding for *Iqbal*, had determined that “the exigent circumstances of the post-9/11 context do not diminish the Plaintiff’s right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches.” *Iqbal v. Hasty*, 490 F.3d 143, 159–60 (2d Cir. 2007).

¹⁷⁶ Clermont & Yeazell, *supra* note 8, at 831 (“No prior model exist[ed] to help us understand how to test factual sufficiency now.”).

actor.¹⁷⁷ The fact that the *Iqbal* Court's ad hoc approach to dealing with a Pakistani Muslim and his claim of discrimination in the wake of 9/11, formulated a change in pleading for all civil actions, certainly demonstrates the need for a deliberative body to examine the legitimacy of far reaching procedural changes before they go into effect.

The U.S. Supreme Court completely bypassed the step of thorough premeditated debate and declared the new plausibility standard without considering any empirical data. Furthermore, there was not any lower court jurisprudence on which the court could build. In deciding *Iqbal*, the Court formulated an entirely new gatekeeping role to be used by district judges across the country, without any basis to do so. "That this shift to more fact-specific pleadings happened without advanced warning to litigants in a legal system which for some seventy years has been notice-based . . . is something worthy of note."¹⁷⁸ It is imperative that states question the sudden and radical departure taken in *Iqbal* and perhaps more importantly, scrutinize the decision for the lack of precedent contained therein and the disregard for the consequences that have followed.

States are free to make their own fundamental choices when crafting their procedural systems, consistent with the spirit of federalism, balanced between the concerns of judicial economy and providing parties adequate means of securing relief. If a state finds that it is indeed in the best policy interests of that state to adopt a change in procedure, then the rules-making process should be the method in which to adopt a new regime because it provides a manageable and gradual change in procedural reform. Some state supreme courts have already articulated their understandings of this approach with statements such as "[t]he appropriate forum for revising the Washington rules is the rule-making process,"¹⁷⁹ and "I believe it preferable that we consider it in the reflection of rule-making rather than in the vacuum of an individual case before us on appeal."¹⁸⁰ This alternative to the U.S. Supreme Court's approach may ensure that hasty judicial decisions alone do not supplant prior well-

¹⁷⁷ See *Leatherman v. Tarrant County Narcotics*, 507 U.S. 163, 168 (1993) (holding a heightened pleading standard may not be imposed on §1983 cases).

¹⁷⁸ *Roth v. DeFeliceCare, Inc.*, 700 S.E.2d 183, 196 (W.Va. 2010) (Benjamin, J., dissenting) ("The same policy considerations facing federal cases are also applicable in the state court system.")

¹⁷⁹ *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 864 (Wash. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 595 (2007) (Stevens, J., dissenting)). The rule making "process permits policy considerations to be raised, studied, and argued in the legal community and the community at large." See *McCurry*, 233 P.3d at 864.

¹⁸⁰ *Roth v. DeFeliceCare, Inc.*, 700 S.E.2d 183, 197 (W.Va. 2010) (Benjamin, J., dissenting).

reasoned portions of the procedural system.¹⁸¹ Any change to pleading doctrine should also incorporate other sections of the rules of procedure so that they may continue to operate as a cohesive unit.¹⁸² Whereas when a court is tasked with deciding the outcome of a particular case at bar, the use of a deliberative rules-making body allows multiple minds to consider the prudence of one rule change and its place within the rules as a whole.

Prior to *Iqbal*, the Supreme Court seemed to understand the importance a rule-making process free from judicial intervention.¹⁸³ However, in promulgating the plausibility standard the Court abandoned a long line of jurisprudence steadfastly giving deference to the rule-making process.¹⁸⁴ By building up of the importance of rule-making through a line of Supreme Court cases, only to completely reverse course upon deciding *Iqbal* gives great weight to Clermont and Yeazell's classification of the *Iqbal* decision as a "destabilization."¹⁸⁵ Conversely, the

¹⁸¹ See Clermont & Yeazell, *supra* note 8, at 847 ("The Court had given no forewarning adequate to generate public discussion. The complicated issues were not sufficiently developed by lower-court percolation, by academic or empirical studies, or even by parties' position-taking.").

¹⁸² See Watson Clay, *May the Federal Civil Rules Be Successfully Adopted to Improve State Procedure?*, 24 F.R.D. 437, 439 (1960) ("[T]he federal rules . . . embody an interlocking scheme of procedure, and any change in one rule may adversely affect the application or interpretation of other rules."). As we have seen with *Iqbal* the change in pleading without any change of discovery has placed a heavy burden on plaintiffs and conflicts with other Federal Rules. See *supra* pp. 29-30. There were alternatives available to the Supreme Court rather than the reworking of the entire system of pleading. For example, "a trial court, responsible for managing a case . . . can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials." *Ashcroft v. Iqbal*, 556 U.S. 662, 700 (2009) (Breyer, J., dissenting) (quoting *Iqbal v. Hasty*, 490 F.3d 143, 158 (2007)).

¹⁸³ See *Jones v. Bock*, 549 U.S. 199, 224 (2007) ("[A]dopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts."); see also Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010) (pointing to the fact that *Jones v. Bock* was decided just 5 months prior to *Twombly*).

¹⁸⁴ The Supreme Court itself reiterates, in a fashion almost scolding district judges, that pleading standards may only be established through rulemaking procedures. See *Jones v. Bock*, 549 U.S. 199, 224 (2007) (citing *Leatherman v. Tarrant County Narcotics*, 507 U.S. 163 (1993)); *Hill v. McDonough*, 547 U.S. 573 (2006); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002).

¹⁸⁵ See Clermont & Yeazell, *supra* note 8, at 823 ("[T]hey have destabilized the entire system of civil litigation."). In light of the *Iqbal* decision, it is interesting to examine the Supreme Court's prior sentiment that it was wrong for courts to adopt different pleading rules on a "case-by-case basis." See *Jones v. Bock*, 549 U.S. 199, 224 (2007). With the advent of *Iqbal* plausibility pleading, a district court judge must make determinations about a complaint's factual nature on a case-by-case basis. Since the sufficiency of a complaint will be largely controlled by the judge's interpretation of facts and their sufficiency vis-à-vis a stated cause of action, the Supreme Court has essentially mandated that pleading be determined on a case-by-case basis. To grant a judge the latitude to determine pleading standards in individual cases in his docket is to allow precisely what the Supreme Court cautioned about in *Jones v. Bock*. See *id.*

hallmark of the rule-making process is the long and well-thought out collaboration of many minds from various fields in order to curtail the destabilizing effects brought on by an abrupt change to a far-reaching system.

Not only was the *Iqbal* decision rash, but the panel of justices who decided *Iqbal* were wholly unfamiliar with the intricacies of the trial process. To put it bluntly, they were simply unqualified to determine practicalities of pre-trial practice.¹⁸⁶ The *Iqbal* decision made sweeping reforms without an adequate understanding of the effects of the new gatekeeping role in practical litigation process. The Supreme Court adopted a pleading device that was limited to antitrust suits and developed by the Second Circuit, where it had minimal success.¹⁸⁷ This judge-made form of rule-making provides for haphazard manipulation of procedural rules to suit the particular case at bar,¹⁸⁸ which is particularly apparent in the post-9/11 atmosphere. Conversely, the rules-making process ensures that “notice, comment, and a good deal of consultation among bench and bar will precede significant . . . procedural change.”¹⁸⁹

VI. CONCLUSION

State appellate courts will soon be met with thorough briefs of defendants attempting to take advantage of the heightened pleading standard. Since the advent of plausibility pleading, the largest increase of dismissals have come against civil rights claimants.¹⁹⁰ This is troubling, considering that the federal courts are the traditional forum for litigating civil rights cases.¹⁹¹

¹⁸⁶ See Clermont & Yeazell, *supra* note 8, at 851 (“Only Justice Souter had ever sat on a trial bench, and he did so in the non-Federal Rules state of New Hampshire.”).

¹⁸⁷ See *id.* at 852.

¹⁸⁸ “[The plausibility] standard is certainly dependent on the legal and factual context of a given controversy and since it would seem to require a judge to make a value determination on the likelihood of whether a claim will ultimately succeed or not before meaningful discovery occurs, even if the law provides a remedy for the conduct alleged. Furthermore, I am uncertain how predictable the current federal standard may be given that each judge has a different level of experience in making such determinations. I believe we must also be wary of a procedure which could be harsh on *pro se* litigants or otherwise be viewed as imposing unnecessary hurdles at the courthouse door to the substantial rights of parties.” *Roth v. DeFeliceCare, Inc.*, 700 S.E.2d 183, 197 (W.Va. 2010) (Benjamin, J., dissenting).

¹⁸⁹ Clermont & Yeazell, *supra* note 8, at 846.

¹⁹⁰ See, e.g., Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215 (2011).

¹⁹¹ The biases of local officials at the state level were thought to poison the litigation of civil rights in state court, since the state actors violating litigants rights were typically connected with the judicial process at

While it is true that the state courts have been the primary forum for the redress of wrongs for the majority of parties bringing civil actions, this is largely due to the jurisdictional bars that dramatically restrict access to the federal courts.¹⁹² However, the requirements that *Iqbal* places on a plaintiff creates an entirely new bar to federal court adjudication.

One major hallmark of the federal courts following the Reconstruction Amendments, and later the Civil Rights Act of 1964, was predicated on the inadequacy of state courts in which to vindicate federal civil rights.¹⁹³ However, there is now a predicament for plaintiffs filing civil rights claims in post-*Iqbal* era because the federal courts' heightened pleading standard makes them an uncertain venue, particularly where a state court provides for the traditional "notice" pleading.¹⁹⁴ Although state courts hear the vast majority of civil actions, they may now in fact be necessary to vindicate certain federal civil rights. States should be aware that by adopting *Iqbal* there will be no forum remaining for some plaintiffs to ever be heard, particularly, those who may not be able to plead concrete facts rising to the level of plausibility.¹⁹⁵

Under *Iqbal*'s framework the "short and plain" statement of a complaint is highly scrutinized by a judge, which allows defendants to quite easily prevent an aggrieved plaintiff from obtaining necessary facts. Claims that were traditionally brought in federal court are now being squeezed out by the heightened pleading standard. The concerns that the Supreme Court had in *Brown v. Western Railway* are now present in every district court throughout the United States. The impact of *Iqbal* upon the delicate system of federalism is leading to unique changes within state procedural systems operating under jurisprudence that has traditionally followed the federal model. The Supreme Court's new plausibility pleading standard has disrupted civil procedure as a whole and has large implications for civil actions in the years to come. In order to maintain a judicial system that allows aggrieved parties consistent access to the courts,

the state level.

¹⁹² Only certain types of case are meant to be heard in a federal forum. See U.S. CONST. art. III; 28 U.S.C. § 1331-1332 (2006).

¹⁹³ See generally CIVIN & ADEGBILE, *supra* note 24.

¹⁹⁴ See, e.g., Thomas, *supra*, note 190 (arguing against plausibility pleading in employment discrimination cases).

¹⁹⁵ If the real purpose of plausibility pleading was to allow for a more manageable system of federal court dockets, then the U.S. Supreme Court would not entirely care if the states adjudicate federal substantive claims because that only takes up state court dockets. States should be free to provide relief for plaintiffs under federal law even if those actions when brought in federal court, would be weeded out through a procedural system now with a disparate burden on the plaintiff.

the states play a crucial role in a procedural system, in which uniformity should not be the goal.