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A Pleading Problem: Seventh Circuit Decision in Swanson v. Citibank Illustrates the Unstable State of Federal Pleading Standards in the Post-Iqbal Era

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A Pleading Problem: Seventh Circuit Decision in *Swanson v. Citibank* Illustrates the Unstable State of Federal Pleading Standards in the Post-*Iqbal* Era

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I. INTRODUCTION

Historically, courts have been a place where individuals could obtain justice and relief for their grievances. Ordinary people have used courts to desegregate schools, protect the environment, punish corporate misconduct, and preserve fundamental liberties. For Gloria Swanson, a plaintiff in the Seventh Circuit, the courts were where she looked to avoid dismissal of her

Fair Housing Act claim after Citibank rejected her home loan application.¹ Citizen access to federal courts, however, has become much more difficult in recent years in the wake of two Supreme Court decisions: *Bell Atlantic Corp. v. Twombly*² in 2001 and *Ashcroft v. Iqbal*³ in 2009, which raised the pleading standard a plaintiff must satisfy before her case can go to court.

In civil litigation, a pleading serves as an individual's key to the courthouse door. The pleading itself explains how the defendant harmed the plaintiff and what remedies the plaintiff seeks from the court.⁴ Rule 8 of the Federal Rules of Civil Procedure lays out the minimum requirements for pleading federal civil cases.⁵ Prior to *Twombly* and *Iqbal*, courts interpreted Rule 8 to require a plaintiff to allege a relatively basic set of facts that explained how the plaintiff was harmed and how the defendant violated the plaintiff's rights.⁶ The pleading is followed by discovery, a fact-finding process that prepares parties for trial or settlement in the matter at issue.⁷ Under the new standard, referred to as "plausibility pleading," plaintiffs must plead some facts to demonstrate that their claim is plausible on its face.⁸

The heightened pleading standard has made it much more difficult for plaintiffs to have their claims heard in court because they do not, at such an early stage in the proceeding, have access to the necessary factual information in the defendant's possession.⁹ As such, the new standard places a nearly impossible burden on plaintiffs, making it harder for them to get beyond the pleading stage in civil litigation. As a result, claims with merit can often be dismissed since plaintiffs are required to prove factual allegations before having an opportunity to gather evidence, thus allowing defendants, often corporations and other large entities, to evade judicial review.¹⁰

1. See *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010).

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

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

4. BLACK'S LAW DICTIONARY 1270 (9th ed. 2009).

5. FED. R. CIV. P. 8(a)(2) states that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

6. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (explaining that all that is required of a plaintiff under the Federal Rules is a statement that puts the defendant on notice of the nature of the plaintiff's claim and the grounds upon which it rests).

7. BLACK'S LAW DICTIONARY 533 (9th ed. 2009).

8. *Iqbal*, 129 S. Ct. at 1949-50 (2009).

9. See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 850 (2010).

10. The effects of *Twombly* and *Iqbal* on motions to dismiss under Federal Rule 12(b)(6) are still relatively unknown. Studies conducted after the rulings have shown that there was an increase in the number of motions to dismiss granted after each decision, while others have determined that there has been no notable effect. See Bone, *supra* note 9, at 879 n.139 ("One empirical study based on published opinions found an increase in dismissal

By examining a recent Seventh Circuit decision, *Swanson v. Citibank*, this Note illustrates the substantial difficulty that lower court judges now face when they interpret pleadings in federal courts.¹¹ While the majority opinion in *Swanson* interprets *Twombly* and *Iqbal* as consistent with Rule 8 and allows the plaintiff's claim to proceed, the split among the circuit court judges illustrates the inherent difficulty in assessing how the new plausibility standard is to be applied and how high the Supreme Court meant to place the bar when it established a higher pleading standard. The Seventh Circuit missed the opportunity to remedy the ambiguity in the new standard, which, in fact, is not consistent with Rule 8 and notice pleading principles at all. Instead, the Seventh Circuit has adopted a context-specific approach that requires district courts to apply a sliding scale to the alleged facts.¹² This will inevitably lead to a greater burden on plaintiffs, who now must provide enough factual detail from which legal conclusions could plausibly flow. Part II discusses the relevant background necessary to understand the Seventh Circuit's decision in *Swanson v. Citibank*. This background includes legal history of the common law and equity systems of pleading and the eventual drafting of the Federal Rules of Civil Procedure, particularly Rule 8. Part III tracks the development of the new plausibility standard by dissecting the Supreme Court's opinion in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. Part IV provides the factual detail of *Swanson v. Citibank, N.A.* This Note concludes (Part V) with an analysis of both prongs of the plausibility standard as articulated in the *Swanson* decision and discusses its implications on federal civil litigation in the circuit. It includes a discussion of how the policy rationale behind the plausibility pleading, primarily reducing "the scope for extortionate discovery,"¹³ is inconsistent with the notice pleading standards that the Seventh Circuit seems to suggest are still valid in federal courts.

II. HISTORICAL BACKGROUND ON FEDERAL PLEADINGS

A. COMMON LAW AND EQUITY SYSTEMS

Rule 8 of the Federal Rules of Civil Procedure was adopted in 1938.¹⁴ It requires "a short and plain statement of the claim showing that the

rates after *Twombly*, and again after *Iqbal*, with the strongest impact observed in constitutional civil rights suits.").

11. *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010).

12. *Id.* at 404.

13. *Id.* at 412 (Posner, J., dissenting).

14. See ALEXANDER HOLTZOFF, *NEW FEDERAL PROCEDURE AND THE COURTS* 6 (American Bar Association 1940).

pleader is entitled to relief.”¹⁵ The purpose for Rule 8 was to merge the systems of equity and common law pleading.¹⁶ The Rule mandates that all pleadings “be construed so as to do [substantial] justice.”¹⁷ Prior to the recent shift precipitated by *Bell Atlantic Corp. v. Twombly*¹⁸ and *Ashcroft v. Iqbal*,¹⁹ the Rule accomplished its goal.

In the early days of English common law, the procedural system was interconnected with the writ system.²⁰ Because the legal system was subordinate to the king, all access to the courts was controlled by the King’s representatives, the justiciars.²¹ An action began once the court issued a writ, which in effect granted the king’s permission for the complaining party to bring an action against another one of the king’s subjects in one of his courts.²² Different types of action had their own specified writs and each writ had a set of distinct procedural rules for pleading.²³ For example, when property was illegally taken or wrongfully withheld, the owner could seek a writ of replevin in order to regain possession of the property.²⁴ Because the writ system narrowed disputes into a single issue and into a limited number of writs, each with its own set of technical procedural rules, a body of substantive law emerged and began to govern disputes between parties.²⁵

If an adequate remedy was unavailable at the common law, the aggrieved party could look to equity, which provided a broader set of remedies, including injunctive relief and specific performance.²⁶ The chancellor, the king’s secretary, oversaw courts of equity.²⁷ While the issuance of writs in common law courts sought to compartmentalize disputes into a single

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

16. See Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1060 (1955).

17. FED. R. CIV. P. 8(e).

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

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

20. See R. ROSS PERRY, *COMMON-LAW PLEADING: ITS HISTORY AND PRINCIPLES* 148 (1897).

21. *Id.* at 21. Writs were a precursor to the modern day “forms” of action. In order to obtain a writ, a complaining party appeared before the king and presented his claim. If the claim fell within the scope of the court’s authority, the court would issue a writ and allow the claim to proceed to court by demanding that the defendant appear before the court to defend himself. If the alleged facts did not fall within the court’s authority or under one of the specialized writs, then the complaining party simply had no recourse. Thus, the writ writers played a vital role in determining whether a grievance could be addressed in the King’s court. *Id.* at 138-39.

22. *Id.* at 138.

23. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 915 (1987).

24. PERRY, *supra* note 20, at 73.

25. Subrin, *supra* note 23.

26. *Id.* at 920.

27. *Id.* at 918.

issue, petitions in equity courts intended to tell a story about the dispute so that a party could gain relief.²⁸ Pleadings were required to provide a more detailed description of the facts and statements from the parties that often times included the evidence upon which the case could be decided.²⁹ Because the focus was not on finding a single issue, the equity system led to more complex litigation. As such, the “[c]hancellor was required to look at more parties, issues, documents, and potential remedies, but he was less bound by precedent and was permitted to determine both questions of facts and law.”³⁰ Judges in equity courts, therefore, had far more power and discretion than in common law courts because they were neither bound by a single writ or one form of action, nor did they share their decision making power with juries.³¹

Beginning in the mid-nineteenth century, procedural reform began to take place in England and the United States.³² Many states began to merge the common law and equity systems and developed procedural codes that established a single form of civil action and gave pleadings a clearer role in civil litigation.³³ The Field Code of Civil Procedure was established in New York in 1848 and was later adopted in whole or in part by many other states and the federal courts.³⁴ Similar codes required that a pleading include factual support for all elements of a cause of action, which essentially replaced

28. *Id.*

29. *Id.* at 920.

A bill in equity came to consist of three distinct parts, the narrative, the charging, and the interrogative. The first of these contained a statement of the complaint’s case for relief; the second anticipated and rebutted the defendant’s supposed positions; while the last was used to probe the defendant’s conscience, and to extract from him admissions under oath in his answer.

BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON LAW PLEADING 11 (3d ed. 1923) (quoting JOHN NORTON POMEROY, CODE REMEDIES § 401 (4th ed. 1904)).

30. Subrin, *supra* note 23, at 920.

31. *Id.*

32. See Mark D. Robbins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637 (1993).

33. *Id.*

34. See Holtzoff, *supra* note 16, at 1060-61. The adoption of the Field Code in U.S. federal courts was led by Chief Justice Taft. In an address at a meeting of the American Bar Association, he stated that this “perfectly possible and important improvement in the practice in the federal courts ought to have been made long ago. It is the abolition of two separate courts, one of equity and one of law, in the consideration of civil cases . . .” *Id.* at 1061. Among the provisions in the Field Code of 1848 is that “there shall be but one form of action for the redress of wrongs, which shall be denominated as ‘civil action.’” *Id.* at 1062 (quoting N.Y. CODE § 554 (1850)). A nearly identical provision is found in Rule 2 of the FEDERAL RULES OF CIVIL PROCEDURE.

issue pleading under the common law with fact pleading.³⁵ This shift proved to be one of the most problematic aspects of the code system.³⁶ Under this system,

The pleader had to state ultimate facts, but not evidentiary facts or conclusions of law. This system led to hopelessly formalistic disputes over what constituted an ultimate fact and whether it was even possible to distinguish law from fact. As the factual patterns underlying legal disputes grew more complicated, the precision required seemed less feasible.³⁷

This discrepancy raised one of the inherent issues with fact pleading, which is that it “attempt[ed] to apply rigid rules to a matter where flexibility is a necessity.”³⁸ The federal reform that soon followed sought to bring more simplicity to the state court-led reform and presented a new approach to pleading that eventually would be established in the Federal Rules of Civil Procedure in 1938.

B. NOTICE PLEADING UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

There are two types of pleading in the United States today, fact pleading and notice pleading.³⁹ Fact pleading, as previously stated, was central to the procedural reform that took place beginning in the mid-nineteenth cen-

35. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 23 (2d ed. 1947).

36. See generally *id.* at 225-27 (discussing the differences between law, facts, and evidence).

37. Robbins, *supra* note 32, at 642 (footnotes omitted).

38. CLARK, *supra* note 35, at 226 (discussing the extent of a plaintiff's knowledge that must be revealed in a pleading, Clark states, “The pleader himself may not know his case before evidence is produced; and if he does he will hardly desire to give it away in advance. His opponent and, to a certain extent at least, the court will naturally wish to tie him down to a definite declaration before trial. Absolutely to reconcile these two opposing positions is impossible; all the court can do is to attempt a reasonable middle ground between them.”).

39. See UNIV. OF DENVER INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FACT-BASED PLEADING: A SOLUTION HIDDEN IN PLAIN SIGHT 1 (2010), <http://www.du.edu/legalinstitute/pubs/Fact-BasedPleading.pdf> (on file with author). While fact-based pleading is not required in the federal court system, many states still use fact pleading in their state courts. These states include California, New York, Pennsylvania, Florida, Texas, Missouri, Virginia, Illinois, New Jersey, Connecticut, and Louisiana. See *id.*

ture. The traditional view has been that notice pleading was established under the Federal Rules of Civil Procedure.⁴⁰

Federal reform began in 1934 with the Rules Enabling Act, which granted the Supreme Court the authority to make and present to Congress procedural rules to govern actions in federal courts.⁴¹ In 1935, the Supreme Court appointed a Supreme Court Advisory Committee to draft the new set of rules.⁴² When it came to drafting the new federal rules on pleading, the Advisory Committee looked to the principles established in the Federal Equity Rules, particularly Rule 25.⁴³ Rule 25 requires “a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.”⁴⁴ The proposed Rule 8 in the Federal Rules drew upon the same principles. The Advisory Committee worded Rule 8 as “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁴⁵ Using this broad language, the Advisory Committee intended that it “no longer [be] necessary for a complaint to comply with all the technical requirements of a statement of a cause of action.”⁴⁶ Instead, the aggrieved party’s complaint had to merely “put the defendant on notice as to what was the subject matter of the suit.”⁴⁷ The adoption of more liberal pleading guidelines was done with the understanding that the development of facts would occur later in the pretrial process and that analysis of the legal issues would be addressed once litigation commenced.⁴⁸

Since the Federal Rules of Civil Procedure were adopted, courts, for the most part have applied Rule 8 broadly.⁴⁹ Its simplicity even translated into the sample forms appended to the Rules, such as Form 11, which pro-

40. See, e.g., Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010).

41. See Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure I: The Background*, 44 YALE L.J. 387, 392 (1935).

42. See Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291, 1291 (1935).

43. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1201 (3d ed. 2004).

44. *Id.* at n.2.

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

46. Holtzoff, *supra* note 16, at 1066.

47. *Id.*

48. See generally Clark & Moore, *supra* note 42, at 1302. In discussing pleading under the old code courts, the authors state that fine lines between facts, law, and evidence had been drawn and disputes about their distinctions made litigating claims difficult. As such, the authors suggest that a pleader should be given significant form flexibility and instead of setting forth all facts and details during the pleading stage, all the pleader should be obligated to present is an “adequate statement of the fact transaction to identify it with reasonable certainty.” *Id.*

49. Holtzoff, *supra* note 16, at 1066.

vides a one-sentence complaint for a negligence claim.⁵⁰ It states, “On [September 4, 2011], at [the corner of Normal Road and Lincoln Highway in DeKalb, Illinois], the defendant negligently drove a motor vehicle against the plaintiff.”⁵¹ In addition to an uncomplicated pleading process, the Federal Rules also provided defendants with a means for challenging complaints that failed to meet the pleading standard under Rule 8. Rule 12(b)(6) allows defendants to seek a motion to dismiss for “failure to state a claim upon which relief can be granted.”⁵²

In 1957, the Supreme Court firmly established notice pleading under the Federal Rules in *Conley v. Gibson*.⁵³ The Court held that a complaint should not be dismissed “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.”⁵⁴ In other words, a court should dismiss a complaint “only when proceeding to discovery or beyond would be futile.”⁵⁵ The Court rejected the notion that Rule 8 “require[d] a claimant to set out in detail the facts upon which he bases his claim.”⁵⁶ Instead, the plaintiff must only provide “‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”⁵⁷ After the decision, it was noted that the notice pleading standard in *Conley* set the bar so low that a claimant would, in effect, have to “[plead] himself out of court.”⁵⁸

50. Form 11: *Complaint for Negligence*, FED. R. CIV. P.; see also *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (discussing the simplicity of the notice pleading standard, the Supreme Court makes note of the forms appended to the Federal Rules: “The illustrative forms appended to the Rules plainly demonstrate this. Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 n.10 (2007) (holding that the Court will not invalidate the general pleading form attached to the Federal Rules).

51. Form 11: *Complaint for Negligence*, FED. R. CIV. P. (date and location examples were inserted by the author in the sample pleading for purposes of illustration).

52. FED. R. CIV. P. 12(b)(6). The Supreme Court has stated that dismissal of a case is only appropriate in a small number of cases: “Given the Federal Rules’ simplified standard for pleading, ‘[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’” It did not matter if relief was likely; all that mattered was that the defendant was given fair notice. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

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

54. *Id.* at 45-46 (emphasis added).

55. *Twombly*, 550 U.S. at 577 (Stevens, J., dissenting).

56. *Conley*, 355 U.S. at 47.

57. *Id.* (quoting FED. R. CIV. P. 8(a)(2)).

58. Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33

In the subsequent decades after *Conley*, the Supreme Court seemed to embrace the broad spirit of Rule 8. The Court suggested to lower court judges that they could not depart from this liberal pleading standard even when the circumstances of a particular type of claim seemed to indicate a heightened standard was necessary.⁵⁹ In other words, even in litigation that was more complex, the same liberal standard that applied in garden-variety cases applied. Nevertheless, civil litigation grew more complex, and concerns began to rise about whether meritless and frivolous claims in specific types of cases were making it past the pleading stage.⁶⁰

III. THE PLAUSIBILITY STANDARD

A. *BELL ATLANTIC CORP. V. TWOMBLY*

Beginning in 2007, pleadings under Rule 8 underwent a broad shift and the liberal notice pleading standard that had reigned in federal courts for seventy years was reversed. Some commentators went as far as to say that liberal notice pleading was dead.⁶¹ Despite validating notice pleading principles,⁶² the Supreme Court nevertheless heightened the pleading standard under Rule 8, requiring plaintiffs to include a sufficient number of facts in their pleading to make it *plausible*—not just possible or conceivable—that they will be able to prove facts to support their claim.⁶³

Bell Atlantic Corp. v. Twombly was a complex antitrust litigation case.⁶⁴ A class of consumers brought an action against a group of local telephone companies alleging anticompetitive behavior in violation of the

HARV. J.L. & PUB. POL'Y 1107, 1120 (2010) (quoting Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998)).

59. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). In this 2002 civil rights case, the Supreme Court ruled that a plaintiff alleging employment discrimination under Title VII does not have to plead a prima facie case in the complaint. Any requirement for a heightened pleading standard “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.” *Id.* at 514-15 (quoting *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

60. This was one of the Supreme Court’s underlying concerns when it established the plausibility pleading in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557-61 (2007).

61. See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008).

62. *Twombly*, 550 U.S. at 569-70 (2007) (stating that the new heightened pleading standard does not undermine broad pleading principles that the Court established in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002), with respect to employment discrimination cases).

63. *Id.* at 555-56. At the time of the ruling, it was believed that the new heightened standard only applied to complex antitrust cases. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), extended the plausibility pleading rule to *all* federal civil cases.

64. *Twombly*, 550 U.S. at 548.

Sherman Act.⁶⁵ The complaint was two-fold: first, it alleged that the companies had conspired to not compete with each other in order to prevent other companies from entering into the telephone service market, and, second, that they hindered the efforts of new companies who tried to compete in the market.⁶⁶ While the complaint did not provide details about the agreement between the local phone companies, it claimed that the agreement and anticompetitive behavior could be inferred from the fact that the defendants did not pursue “‘attractive business opportunit[ies]’ in contiguous markets where they possessed ‘substantial competitive advantages.’”⁶⁷

The Supreme Court, in a seven to two decision, held that to bring a claim under the Sherman Act, a complaint must include “enough factual matter (taken as true) to suggest that an agreement was made.”⁶⁸ In overruling *Conley v. Gibson*, it created a new standard for pleadings in antitrust cases, stating that in order to avoid a Rule 12(b)(6) motion to dismiss, the alleged facts must be sufficient “to state a claim to relief that is *plausible* on its face,”⁶⁹ and not merely pleading “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.”⁷⁰ The Court also distinguished plausibility from a probability requirement, stating that the new standard “simply calls for enough facts to raise a *reasonable expectation* that discovery will reveal evidence” of the alleged misconduct.⁷¹

The Court’s reasoning focused in large part on policy considerations. By raising the standard to plausibility pleading, the Court attempted to give federal judges more power in deciding which cases could proceed beyond the pleading stage.⁷² Under the plausibility standard, judges could now protect defendants from frivolous claims, reduce a defendant’s discovery costs, and maintain a more manageable caseload.⁷³ Justice Stevens shared these practical concerns in his dissenting opinion; he, however, believed that

65. *Id.* According to the Sherman Act, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1 (2006).

66. *Twombly*, 550 U.S. at 550-51.

67. *Id.* at 551 (quoting Complaint at ¶¶ 40-41, App. 21-22, *Bell Atl. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126)).

68. *Id.* at 556. The Court further states that “asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Id.*

69. *Id.* at 570 (emphasis added).

70. *Id.* at 555.

71. *Twombly*, 550 U.S. at 556 (emphasis added).

72. *Id.* at 558.

73. *Id.* at 557-58. In its discussion of how expensive discovery can be in antitrust cases, the Court noted that “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Id.* at 558 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984)).

heightening the standard indicated a “dramatic departure from settled procedural law.”⁷⁴ To the dissenting Justices, the liberal pleading standard was not meant “to keep litigants out of court but rather to keep them in,” and that the trial process, rather than the pretrial stages, was meant to sort out the merits of their claim.⁷⁵ Furthermore, Justice Stevens argued, the majority’s interpretation of *Conley* and its reversal of the notice pleading standard essentially established an *evidentiary* standard under Rule 8(a)(2), which the *Conley* Court never intended to do.⁷⁶

After the Supreme Court’s decision in *Twombly*, the lower courts and commentators grappled with how to apply the new plausibility standard and the nature of its reach and impact.⁷⁷ Justice Stevens was among the many who expressed concern about whether this new interpretation of Rule 8(a)(2) was limited to antitrust cases or whether it would apply to all civil litigants.⁷⁸ Others maintained that the new plausibility standard would not have much practical effect on civil cases and Rule 12(b)(6) motions to dismiss because the scope of *Twombly* was limited to complex litigation, such as antitrust cases.⁷⁹

B. *ASHCROFT V. IQBAL*

Two years later, the Supreme Court clarified these issues when it revisited the pleading requirements in *Ashcroft v. Iqbal*.⁸⁰ In *Iqbal*, Javid Iqbal, a Pakistani Muslim who was detained following the September 11th terrorist attacks, challenged the constitutionality of the Federal Bureau of

74. *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting).

75. *Id.* at 575 (Stevens, J., dissenting).

76. *Id.* at 580 (emphasis in original).

77. See, e.g., Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1011 (2009) (“Amorphous. This is how the Supreme Court’s recent pleading paradigm has been appropriately described.”).

78. See *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting) (“Whether the Court’s actions will benefit only the defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer.”).

79. In a Seventh Circuit decision, *Smith v. Duffey*, 576 F.3d 336, 339-40 (7th Cir. 2009), Judge Posner wrote,

The [*Twombly*] Court held that in complex litigation (the case itself was an antitrust suit) the defendant is not to be put to the cost of pretrial discovery—a cost that in complex litigation can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak—unless the complaint says enough about the case to permit an inference that it may well have real merit.

Id.

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

Investigation's (FBI) anti-terrorism detention program.⁸¹ The complaint alleged that former Attorney General John Ashcroft, FBI Director Robert Mueller, and numerous other federal officials "knew of, condoned, and willfully and maliciously agreed to subject' [Mr. Iqbal] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin . . .'" and that such confinement was in violation of the First and Fifth Amendments.⁸² To support his claim, Mr. Iqbal noted that in the months following the terrorist attacks, the FBI questioned more than a thousand individuals with suspected links to the attacks, 762 of whom were held on immigration charges and 184 who were designated as being of "high interest" to the investigation.⁸³

The Second Circuit Court of Appeals held that Mr. Iqbal's complaint was sufficient in light of the Court's decision in *Twombly*.⁸⁴ The Supreme Court, however, reversed and remanded the case, and in doing so made clear that the plausibility pleading standard it established in *Twombly* extended to all civil actions under the Federal Rules of Civil Procedure in U.S. district courts.⁸⁵ The Court held that the plaintiff's allegations against government officials were nothing but "labels and conclusions" and a "formulaic recitation of the elements of a cause of action," which were insufficient under the new standard to survive the motion for summary judgment.⁸⁶ The Court clarified that under the plausibility standard, the factual detail in a plaintiff's complaint must allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."⁸⁷

The Court also provided a two-pronged approach for how to apply this standard to civil cases. First, a judge must make the distinction between factual allegations and legal conclusions, and only factual allegations, not the latter, should be accepted as true.⁸⁸ Here, the Court held that the plaintiff did not plead sufficient facts that could be taken as true.⁸⁹ The plaintiff stated that the FBI arrested and detained thousands of Arab Muslims, including Mr. Iqbal, and that Mr. Mueller and Mr. Ashcroft approved the detention policy. These facts, however, do not *plausibly* suggest that the

81. *Id.* at 1942.

82. *Id.* at 1944 (quoting Appendix to Petition for Writ of Certiorari, Ashcroft v. Iqbal, 129 S. Ct. 1937, ¶ 96, at 172a-173a (No. 07-1015) (2009)).

83. *Id.* at 1943.

84. *Id.* at 1944.

85. *Iqbal*, 129 S. Ct. at 1953. *See also* FED. R. CIV. P. 1, which states the FEDERAL RULES OF CIVIL PROCEDURE "govern the procedure in all civil actions and proceedings in the United States district courts . . ."

86. *Iqbal*, 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

87. *Id.*

88. *Id.*

89. *Id.* at 1951.

petitioners intended to discriminate on grounds of race, religion, and national origin.⁹⁰ According to the Court, “It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.”⁹¹ Thus, the allegations brought by the plaintiff, without any further factual detail about the defendants’ intent to discriminate, would lead to an unreasonable inference of discrimination in violation of the Constitution.⁹²

The dissenting Justices disagreed with the notion that the allegations here could not be found to be true. Justice Souter⁹³ wrote, “*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be.”⁹⁴ After *Twombly*, the central question is “whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible.”⁹⁵ Rather than assessing whether the facts alleged by Mr. Iqbal could probably be true, the plausibility standard suggests that the facts should be taken as true, so long as they do not lead to vague and unsupported legal conclusions.⁹⁶ Because Mr. Iqbal’s complaint alleged factual detail to support the claim that Mr. Mueller and Mr. Ashcroft “knew of, condoned, and willfully and maliciously agreed to subject [him] to a particular, discrete, discriminatory policy detailed in the complaint,” rather than merely stating that such practices resulted in some kind of general discrimination, the pleading was sufficient under the plausibility standard.⁹⁷

In addition to drawing the line between factual detail and legal conclusions, the Supreme Court ruled that when they decide the sufficiency of a pleading, judges should subjectively determine whether the claim is plausi-

90. *Id.*

91. *Iqbal*, 129 S. Ct. at 1951.

92. *Id.* at 1951-52.

93. Interestingly, Justice Souter wrote the majority opinion in *Twombly*, but dissented in *Iqbal*. Justice Breyer, a part of the majority in *Twombly*, also dissented. Many commentators have considered this a sign that the scope of the plausibility pleading established in *Twombly* is not as broad as the *Iqbal* court suggested. See Bone, *supra* note 9, at 858.

94. *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting). Justice Souter clarified that this is not a blanket rule: “The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.” *Id.*

95. *Id.*

96. *Id.* at 1950-60.

97. *Id.* at 1961.

ble on its face.⁹⁸ The majority of Justices in *Iqbal* agreed that this second step is “a *context-specific task* that requires the reviewing court to draw on its judicial experience and common sense.”⁹⁹ If the reviewing judges feel that the alleged facts do not allow the court to infer “more than the mere possibility of misconduct,” the facts alleged are not enough to grant a plaintiff relief under Rule 8(a)(2).¹⁰⁰

In the *Twombly* and *Iqbal* decisions, the Supreme Court changed the role that pleadings play in civil litigation from a relatively limited function to one that, in many instances, determines whether a case proceeds further at all. *Iqbal* has been called “the most significant Supreme Court decision in a decade for day-to-day litigation in the federal courts.”¹⁰¹ Justice Ruth Bader Ginsburg, one of the dissenting Justices in *Iqbal*, told a group of federal judges that the ruling was both important and dangerous. “In my view,” she said, “the Court’s majority messed up the federal rules.”¹⁰² Federal courts are now forced to decide the sufficiency of a plaintiff’s allegations at the very start of trial, and should the allegations not seem plausible on their face, the courthouse door will be closed to plaintiffs.

IV. THE FACTS OF *SWANSON V. CITIBANK*

Ms. Gloria Swanson, an African-American woman, took advantage of a Citibank announcement offering loans from the federal government’s Troubled Asset Relief Program (TARP) by applying for a home equity loan.¹⁰³ She disclosed to Citibank that another bank had previously denied her a loan, after which the branch manager warned Ms. Swanson that Citibank’s loan criteria were much more rigorous than other banks.¹⁰⁴

Nevertheless, the plaintiff submitted her application. Citibank conditionally approved Ms. Swanson for a \$50,000 home equity loan.¹⁰⁵ The bank, however, denied her loan after a contractor appraised Ms. Swanson’s home at \$170,000, stating that its conditional approval was based on an estimated appraisal of \$270,000 in her application.¹⁰⁶

98. *Iqbal*, 129 S. Ct. at 1949.

99. *Id.* at 1950 (emphasis added).

100. *Id.*

101. Adam Liptak, *9/11 Case Could Bring Broad Shifts on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10 (quoting Thomas C. Goldstein), available at http://www.nytimes.com/2009/07/21/us/21bar.html?_r=2.

102. *Id.*

103. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 402 (7th Cir. 2010).

104. *Id.*

105. *Id.* at 403.

106. *Id.*

Ms. Swanson proceeded to pay for her own independent home appraisal, which came in at \$240,000.¹⁰⁷ She then filed a suit pro se,¹⁰⁸ alleging that Citibank, its contractor, and one of its employees did not want to make loans available to African-Americans.¹⁰⁹ As such, they deliberately reduced the appraisal value of her home below the actual market value in order to deny her application.¹¹⁰ She alleged that this was in violation of the Fair Housing Act (FHA), which bars discrimination on the basis of race in making home mortgage loans.¹¹¹ Ms. Swanson also alleged a common law fraud claim.¹¹²

The district court dismissed the suit for failure to state a claim, ruling that the statements on which Ms. Swanson's allegations were based were too "indefinite and her reliance was unreasonable."¹¹³

V. ANALYSIS

A. THE SEVENTH CIRCUIT SPLIT

1. *How High Did the Supreme Court Intend to Set the Bar?*

The Seventh Circuit affirmed the motion to dismiss Ms. Swanson's state fraud claim, but reversed the lower court's ruling dismissing the Fair Housing Act claim.¹¹⁴ The majority opinion, penned by Judge Diane P. Wood and joined by Judge Frank H. Easterbrook, evaluated the new plausibility standard and ruled that the district court had set the bar too high in assessing Ms. Swanson's FHA claim.¹¹⁵ Judge Richard A. Posner's dissent, however, stated that the majority's decision did not coincide with *Iqbal*

107. *Id.*

108. The fact that this suit was filed pro se becomes an important factor since the court conducts a context-specific analysis of the plaintiff's claims. Pro se cases are often given more latitude at the pleading stage. See Memorandum from Andrea Kuperman on Case Law Applying *Twombly* and *Iqbal* to the Civil Rules and Standing Rules Committees 3 (July 26, 2010) (on file with author) [hereinafter Kuperman Memorandum].

109. *Swanson*, 614 F.3d at 403.

110. *Id.*

111. *Id.* The Fair Housing Act states,

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

42 U.S.C. § 3605(a) (2006).

112. *Swanson*, 614 F.3d at 403.

113. *Id.*

114. *Id.* at 407.

115. *Id.* at 404-06.

because the plaintiff's allegations were too implausible.¹¹⁶ This split in the Seventh Circuit illustrates the fundamental question federal courts are now faced with—How high did the Supreme Court intend to set the bar when it decided both *Twombly* and *Iqbal*? The underlying issue, according to Judge Wood, is that the Court has adopted a plausibility standard for all federal civil cases, but “it has insisted that it is not requiring fact pleading, nor is it adopting a single pleading standard to replace [Rule 8].”¹¹⁷

The majority acknowledges that the Supreme Court meant to change course from its decision in *Conley v. Gibson*.¹¹⁸ Under the *Conley* standard, “a complaint could go forward if any set of facts,”¹¹⁹ “in the hands of an imaginative reader, *might* suggest that something has happened to her that *might* be redressed by the law.”¹²⁰ *Twombly*, however, requires that the pleader “state a claim to relief that is plausible on its face.”¹²¹ Building upon this, *Iqbal* clarified that the “plausibility standard is not akin to a ‘probability requirement.’”¹²² The Seventh Circuit gleaned from this language that

[a] court will ask itself *could* these things have happened, not *did* they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences.¹²³

Judge Wood insists that the Supreme Court “was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system.”¹²⁴ The questions that should be given more prominent attention, according to the Seventh Circuit,¹²⁵ relate to the nature of notice: What exactly does fair notice mean? How much detail should be provided? How can the pleader adequately indicate what kind of litigation it is bringing to court? According to

116. *Id.* at 411 (Posner, J., dissenting).

117. *Swanson*, 614 F.3d at 403.

118. *Id.*

119. *Id.* at 405.

120. *Id.* at 403; *Cf.* *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *disapproved by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

121. *Twombly*, 550 U.S. at 570.

122. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 556).

123. *Swanson*, 614 F.3d at 404.

124. *Id.* Judge Wood relied on the Supreme Court's opinion in *Erickson v. Pardus*, which stated that “the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Erickson*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555).

125. *Swanson*, 614 F.3d at 403-04 (arguing that the Supreme Court's decisions in *Twombly* and *Iqbal* are reevaluations of Rule 8, rather than attempts to rewrite the rule).

the Seventh Circuit, in light of the new standard, the pleader is now obligated to “give enough details about the subject-matter of the case to present a story that holds together.”¹²⁶

Here, Ms. Swanson’s FHA claims against Citibank “identif[ied] the type of discrimination that she thinks [occurred] (racial), by whom (Citibank, through [the employee], the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home-equity loan).”¹²⁷ According to Judge Wood, this is all that was required to be in Ms. Swanson’s complaint because there was a sufficient amount of factual detail to tell a coherent story from which legal conclusions could plausibly flow.¹²⁸ In doing so, Judge Wood acknowledges that the principles underlying Rule 8 were never abandoned.¹²⁹ She relies on *Twombly*’s reaffirmation of a previous notice pleading case, *Swierkiewicz v. Sorema, N.A.*, which stated that it was not necessary for a plaintiff to plead facts, regardless of how complex the substantive nature of a case may be.¹³⁰ She states that the Court’s unwillingness to abandon this “indicates that in many *straightforward* cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court’s recent decisions.”¹³¹ Rather than consider the complexity of this matter, Judge Wood assessed Ms. Swanson’s claims as a straightforward case.

2. Judge Posner’s Dissent: “The Statistical Range of Probabilities”

In his dissent, Judge Posner states that Ms. Swanson’s FHA claim was, simply put, implausible and that the majority provided too much leeway when it allowed a pleading that was just a mere possibility to go forth.¹³² He reasoned that under *Iqbal* “the plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”¹³³ Here, two lenders, including the defen-

126. *Id.* at 404.

127. *Id.* at 405.

128. *See id.*

129. *Id.* at 403.

130. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 513 (2002).

131. *Swanson*, 614 F.3d at 404 (emphasis added). But, Judge Wood stated that [a] more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff’s mind at least, the dots should be connected.

Id. at 404-05.

132. *Id.* at 411 (Posner, J., dissenting).

133. *Id.* (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)).

dant, turned down Ms. Swanson's application for a home equity loan.¹³⁴ According to Judge Posner, an inference of a mistake by Citibank is plausible, as in *Iqbal*, but an inference of discrimination by Citibank is not.¹³⁵ To support his position, Judge Posner relies on other types of discrimination cases, such as employment discrimination, which have, at their core, a competitive element—"man and woman, or white and black, vying for the same job and the man, or the white, getting it."¹³⁶ In this case, "[t]here is no allegation that the plaintiff in this case was competing with a white person for a loan. It was the low appraisal of her home that killed her chances for the \$50,000 loan that she was seeking."¹³⁷ Thus, the majority should have assumed that the appraiser made a mistake and the house was worth more than was alleged, because, according to Judge Posner, mistake is the more plausible inference under the standard, rather than an inference of unlawful discrimination on the part of Citibank.¹³⁸

Judge Posner's proposed solution to *Iqbal*'s "opaque language"¹³⁹ is, not surprisingly, a statistical analysis of pleadings:

In statistics the range of probabilities is from 0 to 1, and therefore encompasses "sheer possibility" along with "plausibility." It seems (no stronger word is possible) that what the Court was driving at was that even if the district judge doesn't think a plaintiff's case is more likely than not to be a winner (that is, doesn't think $p > .5$), as long as it is substantially justified that's enough to avert dismissal. But when a bank turns down a loan applicant because the appraisal of the security for the loan indicates that the loan would not be adequately secured, the alternative hypothesis of racial discrimination does not have substantial merit; it is implausible.¹⁴⁰

Ironically, however, Judge Posner concedes that the Supreme Court never intended the plausibility rule to be a "probability requirement,"¹⁴¹ but rather asks that the pleading make it more possible than not that the defendant acted unlawfully.¹⁴² He never reconciles this position with his own

134. *Id.* at 402 (majority opinion).

135. *Swanson*, 614 F.3d at 408 (Posner, J., dissenting).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 411.

140. *Swanson*, 614 F.3d at 411 (Posner, J., dissenting) (citation omitted).

141. *Id.* (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)).

142. *See id.*

suggested statistical analysis, but simply concludes by stating that Ms. Swanson's claim is implausible under the equation.¹⁴³

B. THE TWO-PRONGED PLAUSIBILITY STANDARD AND ITS IMPLICATIONS ON THE SEVENTH CIRCUIT

1. *Subverting Precedent and Applying a Sliding Scale to the Facts*

The aftermath of *Twombly* and *Iqbal* in the Seventh Circuit—where the law has considered minimal notice pleading in the past¹⁴⁴—is still unfolding, and many of the implications from these two decisions remain to be seen. Nevertheless, the court in *Swanson v. Citibank, N.A.* began to discern the meaning of the heightened plausibility standard and reaffirmed the validity of notice pleading in the Seventh Circuit despite the Court's shift. The majority's rather optimistic interpretation demonstrates that the plausibility standard is still subject to broad interpretation and can be consistent with longstanding Rule 8 principles.¹⁴⁵ In fact, in stating that a plaintiff must give enough factual detail to allow for legal conclusions to plausibly flow, the majority maintains that the new standard is not as demanding as the Supreme Court implied in *Twombly*.¹⁴⁶ Plausibility, according to the circuit court, simply means that the facts in a pleading must present a story in which the alleged conduct *could* have happened, without straying into the realm of probabilities and hypothetical situations.¹⁴⁷

This storytelling approach could arguably leave uncomplicated civil actions unaffected, even if the Seventh Circuit imposed the demands of plausibility pleading and required factual allegations for each element of an action.¹⁴⁸ However, when examined in the light of the first *Iqbal* prong, a plaintiff is still posed with a greater burden of proof. *Twombly* states that factual allegations, not mere legal conclusions, are required in order to pass

143. *See id.*

144. Justice Souter's use of "plausibility" in *Twombly* was not the first time the term has been used with respect to pleading standards. The Seventh Circuit's own Judge Richard Posner stated previously that "some threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase." *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation).

145. The majority assessed Ms. Swanson's claim noting that Rule 8 notice pleading principles were still valid. They relied partly on the reasoning of *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), rather than basing their ruling on *Twombly* and *Iqbal* entirely. *Swanson*, 614 F.3d at 403-04.

146. *Id.* at 403-04 ("[A]t all times [the Court] has said that it is interpreting Rule 8, not tossing it out the window.").

147. *See id.*

148. *Id.* ("[I]n many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions.").

the plausibility burden.¹⁴⁹ *Iqbal* built upon this and stated that in order to apply the new standard, a court must first determine which allegations are “entitled to the assumption of truth.”¹⁵⁰ Thus, for example, under the official Complaint for Negligence,¹⁵¹ Form 11 in the Federal Rules of Civil Procedure, a court could interpret the word “negligence” to be a legal conclusion,¹⁵² similar to the way in which the term “unlawful agreement”¹⁵³ was interpreted in *Twombly* and how the term “discrimination” was interpreted in *Swanson*.¹⁵⁴ Thus, a court would need specific facts in the pleading that could lead to a logical inference that the defendant actually acted negligently. This degree of specificity would require a plaintiff to look to tort law in order to find facts that specifically meet the elements of negli-

149. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (“Factual allegations must be enough to raise a right to relief above the speculative level.”). Put differently, a complaint must plead “enough facts” to make a claim for relief “plausible on its face,” *id.* at 1974, must contain “allegations plausibly suggesting (not merely consistent with)” actionable conduct, *id.* at 1966, or must show a “reasonably founded hope” that discovery will support a claim, *id.* at 1967, 1969 (internal quotation marks omitted).

150. *Aschroft v. Iqbal*, 129 S. Ct. 1937, 1950 (reciting that the elements of a cause of action and “conclusory statements” are not sufficient enough to meet the standard).

151. *See Bone*, *supra* note 9, at 864-66. Professor Bone uses a standard Complaint for Negligence to illustrate the difference between a factual allegation and a legal conclusion as discussed in *Iqbal* and discusses the type of facts that would need to be stated in a complaint under both a notice pleading system and plausibility. Under notice pleading, simply stating that a defendant negligently hit a plaintiff would not be enough because it does not give fair and adequate notice to a defendant. “The complaint had to relate facts that at least *loosely* fit the elements of some legal theory, and the plaintiff was not allowed to fill gaps with conclusory assertions or general allegations . . .” *Id.* at 866 (emphasis added).

152. Unlike factual allegations, legal conclusions are not taken as true:

A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are not more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 129 S. Ct. at 1950.

153. In dismissing the antitrust complaint in *Twombly*, the Court noted that “the plaintiffs’ assertion of an unlawful agreement was a ‘legal conclusion’ and, as such, was not entitled to the assumption of truth. Had the Court simply credited the allegation of conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce.” *Iqbal*, 129 S. Ct. at 1950 (citing *Twombly*, 550 U.S. at 555) (citation omitted). In *Iqbal*, the allegation that the government “‘knew of, condoned, and willfully and maliciously agreed to subject [Mr. Iqbal]’ to harsh conditions of confinement ‘as a matter of policy, solely on the account of [his] religion, race, and/or national origin . . .’” was seen as a legal conclusion and, thus, needed factual allegations in order to be taken as true. *Id.* at 1951.

154. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 405-06 (7th Cir. 2010).

gence.¹⁵⁵ The plaintiff would have to explain the exact actions or inactions by Form 11's defendant motorist that made his or her driving negligent.

When this burden is imposed on plaintiffs in larger and more complex civil cases, it becomes increasingly difficult to recite enough facts to make a plaintiff's claim plausible. As stated in *Swanson*, under the new standard

[a] more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected.¹⁵⁶

One could argue that had Ms. Swanson's case not been argued pro se, her Fair Housing Act claim could have been considered just as complex and perhaps have been held to the higher standard.¹⁵⁷ At the district court level, Judge Zagel dismissed Ms. Swanson's claim, stating that in order to state an accurate claim of discrimination under the FHA, the plaintiff would have to state "(1) that she is a member of a protected class; (2) that she applied for and was qualified for a loan; (3) that the loan was rejected despite her qualifications; and (4) that the defendants continued to approve loans for appli-

155. See, e.g., *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009) (relying on the logic of *Twombly* and *Iqbal*, this federal court dismissed a complaint for a standard slip and fall case because the plaintiff failed to state "facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff's accident occurred." This demonstrates that many courts are extending the plausibility standard beyond the two contexts that the Court has considered it in—antitrust and governmental immunity—and are starting to impose heightened scrutiny on ordinary claims. See *id.*)

156. *Swanson*, 614 F.3d at 405.

157. See *Erickson v. Pardus*, 551 U.S. 89 (2007). *Erickson* was the Supreme Court's first pleading decision following *Twombly*. The Court stressed that the pro se status of a plaintiff should be considered when assessing a plaintiff's pleading:

The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed pro se is "to be liberally construed," and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."

Id. at 94 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). See also *Swanson*, 614 F.3d at 412. Judge Posner, in his dissent, outwardly admits that Ms. Swanson would have absolutely no chance to proceed on remand without proper assistance of counsel. "Not that the plaintiff is capable of conducting such proceedings as a pro se, but on remand she may—indeed she would be well advised to—ask the judge to help her find a lawyer." See Kuperman Memorandum, *supra* note 108 at 3 (pro se cases tend to be given more leniency at the pleading stage because finding specific details is more difficult). See generally FED. R. CIV. P. 8(f) ("All pleadings shall be so construed as to do substantial justice.").

cants with qualifications similar to those of the plaintiff.”¹⁵⁸ According to Judge James Zagel, Ms. Swanson failed to meet the fourth factor because she did not state specific facts that showed that Citibank continued to approve loans to others who were similarly situated to Ms. Swanson.¹⁵⁹ Under a stricter standard, a plaintiff would need to gather some information about Citibank’s loan approval process at the earliest possible stage in order to proceed beyond the pleading; whereas under notice pleading, indicating the type of discrimination, by whom it was conducted, and when it occurred sufficed.¹⁶⁰ This new standard changes the role that pleadings play in civil litigation; once broad under *Conley v. Gibson*,¹⁶¹ the Court has now imposed a greater factual burden on a plaintiff than was previously conceived or required.¹⁶²

The degree of specificity required under plausibility pleading has even greater implications when considered in complex cases. Complex litigation—cases that often involve corporate misconduct, constitutional or statutory rights, and national or state policies—are causes of action in which factual detail is incredibly hard to access at such a preliminary stage in the trial process; plaintiffs have to wait until the discovery stage. It is in these instances, however, that plausibility seems to be the most problematic because, as the Seventh Circuit has illustrated, courts will apply the new standard more strictly and will require a more detailed pleading.¹⁶³ Cases involving civil rights and employment discrimination, standard conspiracy actions, or Ms. Swanson’s housing discrimination action have already shown greater vulnerability under the new standard.¹⁶⁴ However, rather than

158. *Swanson v. Citibank*, 706 F. Supp. 2d 854, 858 (N.D. Ill. 2009) (quoting *Lati-more v. Citibank*, 151 F.3d 712, 713-16 (7th Cir. 1998)).

159. *Id.*

160. In reversing the district court decision, Judge Wood stated that Ms. Swanson’s statement alleging the type of discrimination (racial), identification of the defendants, and when the conduct occurred was sufficient enough to meet the plausibility requirement. However, the court, in making this determination, relied on the much lower standard stated in *Swierkiewicz*, rather than *Iqbal. Swanson*, 614 F.3d at 405.

161. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Supreme Court in *Conley* gave its broadest interpretation of Rule 8 pleading standards: “[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.” *Id.*

162. *See Bell Atl. Corp. v. Twombly*, 550 U.S. at 575 (Stevens, J., dissenting). In his dissenting opinion, Justice Stevens wrote, “Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during the a flexible pretrial process and, as appropriate, through the crucible of trial.” *Id.* (citing *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002) (“The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.”)).

163. *See, e.g., Swanson*, 614 F.3d at 404-05.

164. *See, e.g., Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (dismissing a conspiracy claim because the pleading lacked “any suggestion, beyond a bare conclusion,

being dismissed without an opportunity to proceed to discovery, these kinds of cases should be given more latitude and more attention by lower court judges. Civil rights, consumer protection, and environmental protection are among the many major issues in our court system today, and a heightened standard may keep claims of merit out of court before they have a chance to gather necessary evidence. Broadly speaking, by frustrating a plaintiff's efforts to hold a large corporation or governmental entity accountable for misconduct, simply because the information she needs is unobtainable, undermines national and state policies that are often shaped by this type of litigation. Plaintiffs involved in this type of litigation are the very litigants that notice pleading rules were meant to assist,¹⁶⁵ but instead, the civil justice system has become a battle to find the unknown in order to proceed beyond the initial stage.¹⁶⁶

2. *Context-Specific Will Lead to Increased Subjectivity*

The Seventh Circuit acknowledges that cases relying on *Twombly* and *Iqbal* are meant to be decided in a context-specific manner and that judges should exercise their own discretion when deciding whether to grant a defendant's motion to dismiss.¹⁶⁷ As such, *Iqbal*'s second requirement—to interpret factual allegations in a context-specific manner—seems to present lower court judges with a number of factors to consider. Context is not an easy concept to discern; its very definition is founded upon a certain sense of subjectivity. Thus, the facts alleged in a pleading are unlikely to be influenced by the substantive law alone. The Court has suggested a number of

that the remaining defendants were leagued in a conspiracy with the dismissed defendants"); *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2009 WL 2246194, at *8-11 (N.D. Cal. July 27, 2009) (dismissing a discrimination complaint because the plaintiff failed to allege enough facts to show that the defendant took action because of the fact that the plaintiff was Muslim and a citizen of Malaysia); *Fletcher v. Phillip Morris U.S., Inc.*, No. 3:09 CV 284-HEH, 2009 WL 2067807, at *5-7 (E.D. Va. July 14, 2009) (dismissing an employment discrimination case because the plaintiff failed to allege specific factual allegations that showed that similarly situated employees, who were not members of a protected class, received more favorable treatment from the employer than the plaintiff).

165. See *Twombly*, 550 U.S. at 575 (Stevens, J., dissenting) (discussing that the spirit of Rule 8 meant to give plaintiffs access to courts, not keep their claims out).

166. See *Spencer*, *supra* note 61, at 459 (arguing that it is harder for plaintiffs to meet the plausibility standard when the evidence needed is harder to identify or access; "claims for which intent or state of mind is an element—such as discrimination or conspiracy claims—are more difficult to plead in a way that will satisfy the plausibility standard").

167. See *Swanson*, 614 F.3d at 404 (Judge Wood discusses the definition of plausibility in the context of Ms. Swanson's case); see also Judge Posner's dissent in *Swanson*, 614 F.3d at 411-12; Kuperman Memorandum, *supra* note 108, at 3 (stating that many circuits interpreting *Twombly* and *Iqbal* accept that cases must be evaluated in a context-specific manner).

other factors that should be considered, such as the consumption of court resources and the potential cost of discovery on defendants.¹⁶⁸ The Seventh Circuit, for instance, emphasizes that in a case against a multinational corporation such as Citibank, the cost of discovery and the pro se nature of the case are vital factors in the decision-making process, in addition to Ms. Swanson providing sufficient detail regarding her claim to meet the elements of discrimination under the Fair Housing Act.¹⁶⁹ But, they also acknowledge that the district court set the bar too high, perhaps because this was a pro se case.¹⁷⁰ This kind of discretionary power can be damaging for many plaintiffs because courts may choose whether the level of factual detail alleged is sufficient to meet the nature of the claim, thereby disrupting the overall uniformity of the plausibility rule and removing much of the impartiality in the system. Judge Wood noted that cases involving financial derivatives or tax fraud would require more factual detail in order to meet the plausibility threshold than a standard tort or property claim.¹⁷¹ Arguably, a Fair Housing Act claim, had it not been argued pro se, could be considered to be just as complex. However, all that was required of Ms. Swanson was a brief statement of the type of discrimination and when it occurred.¹⁷² Compare this with *Iqbal*, which was a discrimination case: Mr. Iqbal stated allegations of unlawful discriminatory conduct, but the Court rejected the allegations and required that the plaintiff state specific facts regarding the defendants' intent to discriminate, even though Rule 9(b) states that intent may be stated generally.¹⁷³ The variation in factual analysis demonstrates that the Court has not adequately guided the lower courts about exactly how to implement the plausibility requirement, thereby leaving ample room for judges to subjectively determine whether a plaintiff has stated enough facts to make his or her claim plausible.

While the Seventh Circuit reiterates that the spirit of notice pleading is still solidly intact in its jurisdiction, it still accepts the rationale that the

168. See, e.g., *Twombly*, 550 U.S. at 558-61 (discussing the practical significance of the plausibility standard and curbing abusive discovery practices); *Swanson*, 614 F.3d at 411-12 (Posner, J., dissenting) (discussing the astronomical costs of discovery).

169. See *Swanson*, 614 F.3d at 404 (beginning her analysis of Ms. Swanson's case, Judge Wood states what plausibility means in the context of her specific case). Judge Wood also acknowledges the high cost of discovery as a compelling reason to grant a defendant's motion to dismiss. *Id.* at 405. See also *Cooney v. Rossiter*, 583 F.3d 967 (7th Cir. 2009) (emphasizing that the level of pleading depends on the context of the case).

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

171. *Swanson*, 614 F.3d at 405.

172. *Id.*

173. FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged *generally*.") (emphasis added).

plausibility burden fluctuates on a case-by-case basis.¹⁷⁴ This has, inevitably, led to inconsistency in the Seventh Circuit that will only grow until more guidance on the standard emerges.¹⁷⁵ In *Apps Communications, Inc. v. S2000, Corp.*, the Northern District of Illinois stated that courts should “take into consideration the complexity of the case when addressing whether a complaint alleges sufficient facts.”¹⁷⁶ In one of its first cases after the *Twombly* decision, the Seventh Circuit affirmed this stance, stating that “in a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the civil rules’ Appendix of Forms may be necessary”¹⁷⁷ On the other hand, the Northern District of Illinois ruled in a Fourth Amendment case that the issue of search and seizure was not as complicated as an anti-trust case or a discrimination case, such as *Iqbal*; thus, the pleading standard should not be too high.¹⁷⁸ The *Swanson* case itself was a civil rights case against a large bank, yet the court diverted from its previously stated position that a higher burden would be imposed in more complex cases.¹⁷⁹ In *Swanson*, the plaintiff’s pleading states even less than what was required under the elements of the Fair Housing Act—it simply states the type of discrimination suffered, by whom it was conducted, and when.¹⁸⁰ And, yet, Judge Wood stated that “‘abstract recitations of the elements of a cause of action or conclusory legal statements,’ do nothing to distinguish the particular case that is before the court Such statements therefore do not add to the notice that *Rule 8* demands.”¹⁸¹ If examined in light of the plausibility standard, Ms. Swanson’s claim does nothing to “put the defendants on notice of *what exactly they might have done to violate*” an individual’s rights under federal law.¹⁸² These cases demonstrate that, while the new plausibility rule is meant to be a universal standard, it is difficult to assess a pleading when courts consider the facts in context.

174. See *Swanson*, 614 F.3d at 403-04.

175. According to a Citing References search conducted on WestlawNext on Dec. 9, 2011, the *Swanson* decision has been cited over three hundred times within the circuit and by other federal courts since it was handed down in 2010.

176. *Apps Commc’ns, Inc. v. S2000, Corp.*, No. 10 C 1618, 2010 WL 3034189, at *1 (N.D. Ill. Aug. 3, 2010).

177. *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008).

178. *Wiek v. Keane*, No. 09 CV 920, 2010 WL 1976870, at *4 (N.D. Ill. May 12, 2010).

179. *Swanson*, 614 F.3d at 405 (assessing Ms. Swanson’s claim under the *Swierkiewicz v. Sorema*, 534 U.S. 506, 511-12 (2002), standard, which states that a plaintiff in a discrimination case is not required to state specific facts at the pleading stage).

180. *Id.* at 403.

181. *Id.* at 405 (citation omitted) (quoting *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009)).

182. *Brooks*, 578 F.3d at 582 (emphasis added).

The variation in exactly what kind of information must be presented in a pleading and which factors are eventually considered in a particular case exemplifies some of the central concerns with context-specific analysis. As a result, legal outcomes will become far more subjective. Because the Supreme Court has advised lower courts to use “judicial experience and common sense”¹⁸³ when applying the plausibility standard, the standard is driven nearly entirely by subjective experiences and the discretion of the presiding judge. The Supreme Court has provided very little guidance for how the plausibility pleading is to be implemented, so judges are operating within very few (if any) constraints.¹⁸⁴ Even though more courts are beginning to assess cases under *Twombly* and *Iqbal*,¹⁸⁵ and the definition of plausibility will hopefully become clearer, courts will still have a great degree of discretion when deciding whether or not to dismiss an action because *Iqbal* mandates context-specific review.¹⁸⁶ Furthermore, taking into consideration the history and function of pleadings,¹⁸⁷ this part of the pretrial process is no place for a judge to decide if one set of facts is more accurate than another. It inevitably leads to discretion and bias that may hinder any impartiality the plaintiff may have hoped for in seeking relief.

C. COST OF LITIGATION AS A DRIVING FORCE BEHIND THE PLAUSIBILITY STANDARD

The plausibility pleading was established, due in large part, to concerns regarding the excess of meritless litigation, abusive trial practices, and the rising costs of litigation.¹⁸⁸ It was alluded to in *Twombly* that there had been little oversight in the past,¹⁸⁹ but the generalization seems to run contrary to changes that have been made in the Federal Rules of Civil Procedure since their adoption. For instance, Rule 16 was expanded to give district judges more power to impose constraints on disproportionate discovery under Rule 26.¹⁹⁰ In addition, the role and function of sanctions under Rule 11 have been enhanced in order to promote responsible attorney behav-

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

184. *See Swanson*, 614 F.3d at 403 (stating that it is unclear how high the Supreme Court meant to raise the bar for plaintiffs when it established plausibility pleading and that lower courts are still grappling with how to implement the new standard when the court insists that it is not requiring fact pleading).

185. *See Kuperman Memorandum*, *supra* note 108.

186. *Iqbal*, 129 S. Ct. at 1950.

187. *See supra* Part II.

188. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-60 (2007).

189. *Id.* at 559 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)) (discussing discovery costs, Justice Souter states that case management concerns and the high cost of discovery have not been actively addressed in the past).

190. FED. R. CIV. P. 16 advisory committee’s note.

ior.¹⁹¹ Congress has also encouraged case management by enacting the Civil Justice Reform Act of 1990, which requires all district courts to develop and implement plans to reduce expenses and curb delay.¹⁹² Under the Act, courts were required to “facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.”¹⁹³ These improvements demonstrate a commitment to ensuring litigation is effective and streamlined, thereby reducing the overall cost of federal litigation.

Prior to *Twombly*, the Supreme Court articulated its support for these types of changes.¹⁹⁴ Yet, the Court reversed course in *Twombly*, stating that there has not been adequate management of cases in the past: “[T]he success of judicial supervision in checking discovery abuse has been on the modest side.”¹⁹⁵ The *Twombly* Court reassessed the ability of federal court judges to manage the pretrial process. This ultimately served as the justification for the plausibility pleading standard; rather than put the burden of high discovery costs on defendants, the Court found that it would be more effective to filter out cases that are not plausible right from the start.¹⁹⁶

The Seventh Circuit in *Swanson* recognizes that the intent of the plausibility standard was to make it more difficult for a plaintiff to proceed to discovery.¹⁹⁷ In his dissent, Judge Posner writes that the unbalanced nature of discovery in a notice pleading system is one of its most fundamental flaws; and, therefore, the plausibility standard is justified.¹⁹⁸ A heightened standard brings the overall cost of discovery down because it requires the plaintiff to conduct more information gathering before a complaint is filed, thus creating “greater symmetry between the plaintiff’s and the defendant’s litigation costs.”¹⁹⁹ Judge Posner does not buy into the reasoning that a more restrictive standard ultimately hurts plaintiffs because it requires a certain level of fact finding from the beginning. Evaluating a pleading

191. FED. R. CIV. P. 11 advisory committee’s note.

192. See Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 *FORDHAM L. REV.* 833, 837 (1994).

193. 28 U.S.C. § 471 (2006).

194. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002) (arguing that the provisions for discovery, pretrial procedure, and summary judgment were effective means to bring to light any meritless claims or qualms regarding federal practice).

195. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (Stevens, J., dissenting). Justice Stevens’ dissent stated that the Court’s majority “vastly underestimates a district court’s case-management arsenal.” *Id.* at 593 n.13 (Stevens, J., dissenting).

196. *Id.* at 558 (“Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive.”).

197. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 405 (7th Cir. 2010).

198. *Id.* at 412 (Posner, J., dissenting).

199. *Id.*

within context, as the new plausibility standard requires, will allow judges “to draw on their experience and common sense,”²⁰⁰ and allow for plaintiffs to proceed to discovery if they can show that they are unable to “conduct an even minimally adequate investigation without limited discovery.”²⁰¹ As stated, however, this places an “evidentiary standard”²⁰² on plaintiffs, because they are forced to conduct some discovery at the very beginning. For many plaintiffs, therefore, this costly and strenuous burden may discourage them from bringing a claim entirely.

The Supreme Court’s illogical cost-focused reasoning for the plausibility pleading poses a number of issues that have yet to be addressed by either the Supreme Court or lower courts attempting to interpret the plausibility standard. First, judges have to consider the hypothetical cost of discovery imposed on a defendant when considering the merits of a pleading, but they are discouraged from considering other techniques for lowering those very costs, such as scrutinizing evidence more carefully.²⁰³ Furthermore, if litigation costs are to be considered when applying the plausibility standard, then *all* costs should be considered, including the plaintiff’s lost opportunity to obtain relief and the broader public policy concerns raised by the lack of enforcement and accountability over defendants. The costs to defendants, large corporate and government entities in particular, have been represented—*Twombly* justified establishing the heightened pleading standard on the very basis of excessive discovery costs hurting such organizations—but what about plaintiffs?²⁰⁴ Even non-monetary pressures that can adversely affect a corporation or government entity have been cited, including disruption of operations and interference with business negotiations.²⁰⁵ Complex litigation does indeed come at a high cost, but the extent of these costs is limited. The excessive costs cited in *Twombly* involved a very small number of cases, antitrust cases specifically.²⁰⁶ Yet, *Twombly* and *Iqbal* have established a heightened pleading rule to apply to *all* civil cases based on concerns arising from select types of litigation. For the majority of civil cases, the plausibility standard can potentially frustrate the efforts of ordi-

200. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009).

201. *Swanson*, 614 F.3d at 412 (Posner, J., dissenting).

202. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 580 (2007) (Stevens, J., dissenting) (stating that the Court in *Conley* would have considered the new heightened plausibility standard an “evidentiary standard,” not consistent with notice pleading principles).

203. *Id.* at 559 (“And it is self-evident that the problem of discovery abuse cannot be solved by ‘careful scrutiny of evidence at the summary judgment stage,’ much less ‘lucid instructions to juries.’”).

204. *Id.* at 557-58.

205. *See, e.g., Swanson*, 614 F.3d at 411 (Posner, J., dissenting) (discussing how unwarranted discovery can disrupt corporate operations and raise litigation costs astronomically).

206. *Twombly*, 550 U.S. at 558.

nary plaintiffs attempting to obtain relief. Furthermore, both Judge Wood and Posner cited the high cost of litigation as a reason to implement a more rigorous standard for pleadings, but the benefits of this pre-trial process were never even considered. Discovery provides transparency and increases oversight of the litigation process. These interests are diluted by a heightened standard and, as such, represent just as much of an important cost to society as monetary ones imposed on defendants.

VI. CONCLUSION

For nearly seventy years, the federal court system used a simple and objective pleading system under the Federal Rules, which was meant to save the factual development and analysis of legal issues until later on in the pretrial litigation process.²⁰⁷ In *Twombly* and *Iqbal*, the Supreme Court established a new plausibility standard that undermines this goal.²⁰⁸ It imposes a higher burden on plaintiffs to try and “prove” their case before they have had a chance to proceed to discovery.²⁰⁹ It also changes the function of pleading in federal courts by giving judges nearly unrestricted discretion to dismiss a plaintiff’s claim based on their subjective analysis of the facts presented in a pleading.²¹⁰ Additionally, the issues that the plausibility pleading were meant to address—protecting defendants from meritless cases, reducing a defendant’s discovery costs, and reducing the number of cases in the system—have been overly exaggerated in light of alternative case management techniques that were highlighted in the Court’s opinions.²¹¹

The Seventh Circuit issued a ruling in *Swanson v. Citibank* where it attempted to discern the definition of plausibility and how high the Court meant to set the bar for plaintiffs when it issued the *Twombly* and *Iqbal* opinions. The majority’s opinion in *Swanson* is context-specific, as the *Iqbal* Court required, and operates under the validity of notice pleading principles.²¹² In acknowledging the pro se nature of the case, the court subverts existing precedent for this specific case but inadvertently embraces the heightened plausibility standard in more complex cases. Furthermore, the court cites similar policy concerns as the Supreme Court, primarily the cost of discovery on defendants, as a driving force behind the plausibility pleading.²¹³ However, such concerns do not seem to be consistent with the notice

207. See generally Clark and Moore, *supra* note 42, at 1302; see also *supra* Part II.

208. See *supra* Part III.

209. See *supra* Part V.B.1.

210. See *supra* Part V.B.2.

211. See *supra* Part V.C.

212. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010).

213. *Id.* at 405.

pleading principles that the Seventh Circuit has acknowledged are still valid, since curbing costs prompts judges to keep more claims out.

Many issues remain unresolved after the Supreme Court's reconstruction of Rule 8 pleading rules. As lower courts continue to address federal cases in light of the plausibility requirement, this area of procedural law will hopefully start to become clearer. Courts beyond the Seventh Circuit have begun to shape this area of law; as of midyear 2011, every circuit had handed down a case analyzing the *Iqbal* decision.²¹⁴ The concern over plausibility pleading has also prompted congressional action.²¹⁵ The House of Representatives' Judiciary Committee held hearings to assess the effects of the *Iqbal* ruling.²¹⁶ Shortly after *Iqbal*, Congress also attempted to restore notice pleading in federal courts through legislation. Senator Arlen Specter (D-PA) introduced S. 1504, the Notice Pleading Restoration Act of 2009 in the Senate, which provides that a federal court cannot dismiss a complaint under Rule 12(b)(6) or (e), except under the standards set forth in *Conley v. Gibson*.²¹⁷ Representative Jerrold Nadler (D-NY) introduced a similar bill in the House in the same year, the Open Access to Courts Act of 2009,²¹⁸ to accomplish the same purpose.²¹⁹

214. According to a WestlawNext Citing References search generated on Dec. 28, 2011, *Iqbal* has been cited 71,585 times.

215. Ashby Jones, *Sick of Iqbal, Part II: House Dems Working to Override SCOTUS Ruling*, THE WALL STREET JOURNAL (Oct. 28, 2009), <http://blogs.wsj.com/law/2009/10/28/sick-of-iqbal-part-ii-house-dems-working-to-override-scotus-ruling/>.

216. *See Access to Justice Denied: Aschroft v. Iqbal: Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Comm. on the Judiciary*, 111th Cong. (2009) (on file with author).

217. S. 1504, 111th Cong. (2009).

218. H.R. 4115, 111th Cong. (2009).

219. The House bill states,

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

Id. at § 2(a). The House bill also states that its provision applies "except as otherwise expressly provided by an Act of Congress enacted after the date of the enactment of this section of by amendments made after such date to the FEDERAL RULES OF CIVIL PROCEDURE pursuant to the procedures prescribed by the Judicial Conference under this chapter." *Id.* at § 2(b). The Senate bill states that its provision applies "[e]xcept as otherwise expressly provided by an Act of Congress or by an amendment to the FEDERAL RULES OF CIVIL PROCEDURE which takes effect after the date of enactment of this Act." S. 1504, 111th Cong. § 2 (2009).

The discrepancy between the Supreme Court in *Twombly* and *Iqbal* and lower courts, such as the Seventh Circuit, illustrates that the federal rules on pleading are in state of transition. The case-by-case approach has led to instability and confusion. Meanwhile, ordinary plaintiffs are caught in-between, burdened by a standard that frustrates any hope they may have had to obtain relief and put up against the whim of a federal court judge who can exercise his or her subjectivity to whatever extent desired. Rather than leaving this task to the courts, there are mechanisms in place to make amendments to the Federal Rules, such as through the Advisory Committee.²²⁰ As courts continue to grapple with *Twombly* and *Iqbal*, it will become more important than ever that judges consider pleadings as the Federal Rules originally envisioned—“so as to do justice.”²²¹

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220. See *supra* Part II.B.

221. FED. R. CIV. P. 8(f).

* Juris Doctor Candidate, May 2012, and Editor-in-Chief of the NORTHERN ILLINOIS UNIVERSITY LAW REVIEW. I would like to thank my husband, Agostino, for his continuous support, patience, and unique insight throughout the process of writing this Note. Thank you to Professor Emeritus Jeffery Parness, for his invaluable guidance on this article and for sparking my interest in Civil Procedure. I would also like to give a special thanks to the Editors and Staff of the NORTHERN ILLINOIS UNIVERSITY LAW REVIEW for dedicating countless hours to our publication. Your hard work and dedication are truly appreciated.