
Do the New Pleading Standards Set Out in *Twombly* and *Iqbal* Meet the Needs of the Replica Jurisdictions?

The Honorable John P. Sullivan***

I. INTRODUCTION

The fundamental goal of the Federal Rules of Civil Procedure (Federal Rules), as set out in Rule 1, is “to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹ Prior to the adoption of the Federal Rules, both state and federal courts had long battled a list of obstacles that prevented courts from securing a fair and effective litigation system. Chief among those difficulties were the excessive technicalities of pleading practice and the substantial backlog of cases awaiting trial. But today, almost seventy-five years after the adoption of the Federal Rules, discovery, a necessary complement to notice pleading, has often become a nightmare in the judicial administration of complex federal litigation.

Problems cry out for solutions, but solutions often create newer and bigger problems. One solution to the discovery problem is the one adopted by the Supreme Court in *Bell Atlantic Corp. v. Twombly*² and reaffirmed in *Ashcroft v. Iqbal*.³ Reduced to its essentials, *Twombly* abandoned notice pleading and the “no set of facts” standard set out in *Conley v. Gibson*,⁴ and imposed a new standard of “plausibility” that must be satisfied before a plaintiff can proceed to discovery.⁵ An immediate question arises—how will the *Twombly/Iqbal* standard impact state jurisdictions that have adopted or are influenced by the Federal Rules?⁶

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1. FED. R. CIV. P. 1.

2. 550 U.S. 544 (2007).

3. 556 U.S. 662 (2009).

4. 355 U.S. 41, 45 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

5. *See Twombly*, 550 U.S. at 561-63.

6. The author has already published an article critical of the new standard as applied in federal

There are twenty-three so called replica jurisdictions that have adopted the Federal Rules;⁷ another four jurisdictions with similar rules that are set out in statutory codes;⁸ and three jurisdictions that “show strong affinity to the content and organization of the Federal Rules.”⁹ Finally, three jurisdictions replicate many of the Federal Rules except they utilize fact pleading rather than notice pleading.¹⁰ Thus, a majority of thirty jurisdictions, including the District of Columbia, have rules or statutes that adopt the language of Federal Rule 8(a)(2), the precise rule that was subject to interpretation in the *Twombly/Iqbal* decisions. It is the author’s position that there are at least seven factors those thirty replica jurisdictions should consider before adopting the *Twombly/Iqbal* standard.

II. THE RISE OF THE DISCOVERY PROBLEM

In its 1970 Explanatory Statement Concerning Amendments to the Discovery Rules, the Advisory Committee to the Federal Rules of Civil Procedure made reference to the Columbia Survey’s conclusion “that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules.”¹¹ Yet only thirty years later, in its comments on the 2000 Amendments to Rule 26, the Advisory Committee referenced a survey of lawyers who claimed that the number one concern of the trial bar was for “increased availability of judges to resolve discovery disputes.”¹² By 2006, the dramatic increase in the volume of electronic documentary discovery led the Advisory Committee to propose an amendment to Rule 26(f) to address waiver of privilege. The Advisory Committee noted that “[t]he volume of [electronically stored information] . . . and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming.”¹³ By this time, discovery in certain

jurisdictions. *See generally* John P. Sullivan, *Twombly and Iqbal: The Latest Retreat from Notice Pleading*, 43 SUFFOLK U. L. REV. 1 (2009).

7. These jurisdictions are: Alabama, Alaska, Arizona, Colorado, District of Columbia, Hawaii, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Montana, New Mexico, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377 (1986).

8. These jurisdictions are: Georgia, Kansas, Oklahoma, and North Carolina. *See id.* at 1378.

9. *Id.* at 1377. The authors utilized nine criteria in determining actual replica jurisdictions; Idaho, Mississippi, and Nevada did not meet all of the criteria. *See id.*

10. These jurisdictions are: Arkansas, Delaware, and South Carolina. *See id.* at 1378.

11. *See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 488 (1970). The Columbia Survey is the product of Columbia Law School’s Project for Effective Justice, which the Advisory Committee commissioned to “conduct a field study of discovery.” *See id.*

12. FED. R. CIV. P. 26 advisory committee’s note (2000).

13. FED. R. CIV. P. 26 advisory committee’s note (2006).

complex federal litigation had frequently overwhelmed both the district court judges and the federal bar.

But how widespread was the discovery problem and what percentage of cases were actually involved? There were two important cost studies of civil discovery undertaken in the late 1990s: the first by the RAND Institute for Civil Justice¹⁴ and the second by the Federal Judicial Center (FJC).¹⁵ Both studies concluded that the overwhelming number of cases pass through the federal litigation process without incurring significant discovery costs.¹⁶ They further concluded that only a small percentage of the cases filed—those involving a high degree of complexity and substantial damages—resulted in excessive discovery costs.¹⁷

If we are to accept the conclusion of these studies, the real problem facing the courts is not runaway discovery costs across the spectrum of cases filed, but rather early identification of discovery problems in the small percentage of cases that actually generate excessive costs and require extensive and detailed supervision. The challenge facing any court system attempting to solve the discovery dilemma is severely complicated by the nature of the Federal Rules. As drafted, the Federal Rules make no distinction between simple and complex cases. Thus, any attempt to solve the discovery problems produced in complex litigation would necessarily also apply to the less complex cases. The FJC study demonstrated that antitrust, patent, securities, and trademark litigation made up a substantial percentage of the cases involving extensive discovery.¹⁸ The inventory of cases filed in the replica jurisdictions would not, for the most part, include those categories of cases and thus would almost certainly have an even smaller percentage of the type of cases that generate serious discovery issues.

What further complicated the ongoing discovery problem was the fact that discovery costs were substantially increasing every year. Those costs were not only imposed on litigants through legal expenses, but judicial supervision of discovery disputes placed a growing strain on limited federal district court resources. Whatever judicial enthusiasm there was for resolving those disputes was diminished by the opinion in some judicial circles that the time spent on supervising discovery had little impact on reducing the inventory of the hundreds of cases assigned to each judge.

In the meantime, the Advisory Committee continued to experiment with the

14. See generally James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998) (examining various discovery management policies).

15. See generally Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998) (reporting survey results concerning volume and costs of discovery).

16. See Kakalik et al., *supra* note 14, at 682; Willging et al., *supra* note 15, at 527.

17. See Kakalik et al., *supra* note 14, at 637, 639; Willging et al., *supra* note 15, at 593.

18. See Willging et al., *supra* note 15, at 577-78.

scope of discovery. Since 1938, there have been ten amendments to Rule 26 alone. The amendments to the discovery rules limited the quantity of depositions, their time and length, and the number of interrogatories. But the greater problem in discovery proved to lie elsewhere. Over time, it became clear that the most acute problem, and the source of the greatest cost, was document discovery. The number of relevant participants naturally limits depositions, but the addition of electronic storage to paper files and the substantial increase in electronic communication has further complicated the problems and costs of Rule 34 discovery. This, in brief, was the state of federal litigation in 2007, when the Supreme Court directly faced the issue of discovery costs in *Twombly*.

A. Role of the Trial Judge Evolves from the Trial of Cases to the Supervision of Discovery and Other Pretrial Matters

Before the adoption of the Federal Rules, the principal role of a federal or state trial judge was to try those cases that had not already been resolved by demurrer or settlement. The modern concept of a designated docket managed by a single judge who was specifically assigned to oversee an inventory of cases from filing to resolution was, as yet, unknown. Many states operated under a trial-assignment system supervised by either an assignment clerk or an assignment judge whose primary responsibility was to keep the trial sessions busy.

Initially, if counsel for the parties were immediately prepared to resolve their dispute at trial, the case would be sent to an open session. However, if either plaintiff or defendant wanted a delay, counsel would request and most often obtain a continuance. In many jurisdictions, the readily granted continuance became an integral part of the trial court's culture. It was a culture that was accepted by both bench and bar. The grounds for continuance were unlimited, and an assignment judge soon heard them all: death in the family, illness, assignment in another court, a long needed vacation already paid for, a missing witness, a last minute need for an expert, serious ongoing settlement negotiations, etc.

After a while, when too many continuances had been granted and the list of untried cases backed up, the chief justice would assign one of his more aggressive colleagues to attack the docket. Some forced cases to trial or settlement, while some referred cases to masters even where the parties had requested a jury trial. Despite all these stop-gap measures, over time, a stubborn backlog continued to accumulate, and hundreds of cases had to be called for trial to keep even a few trial sessions busy.

Meanwhile, trial courts in many jurisdictions held motion sessions where judges, expert in the niceties of pleading practice, ruled on demurrers and pleas in bar. In cases where the court sustained a demurrer and where the plaintiff was not allowed to plead over, the ruling became dispositive. In many

jurisdictions, motion judges applied the “Goldilocks” formula—judges ruled the complaints, declarations, or bills in equity either too simple or too complex, too conclusory or too detailed. In many code and common-law jurisdictions, rulings on pleadings became excessively technical and courts frequently avoided the merits of the case.¹⁹ Consequently, careful pleading practice became essential if a plaintiff wanted to avoid an early and unfavorable resolution of his or her claim before the court could reach the merits. In many jurisdictions, strict judicial enforcement of pleading standards became an effective instrument for case-flow management.

In the early decades of the twentieth century, most jurisdictions provided only limited discovery. For example, Massachusetts limited discovery to thirty interrogatories.²⁰ Consequently, during this period, discovery abuse was virtually unknown. The civil system, as it then existed, effectively reduced the formal process of litigation to two steps, pleadings and trial. Cases could be resolved at either stage, but if the court resolved them on the pleadings, then it did not reach the merits. Rulings on the pleadings had become excessively technical and the trial calendar was limited by multiyear backlogs. This historical context set the stage for reform, and subsequently led to the adoption of the Federal Rules.²¹

Over the following decades, the Federal Rules were adopted by over half the states and influenced procedures in many more.²² The Federal Rules created a four-step process that added two significant steps to previous procedures. In step one, the plaintiff notified the opposing party in “a short and plain statement” of the claim.²³ In step two, both parties discovered the specifics of the other party’s claims and defenses through one or more discovery methods.²⁴ After the completion of a reasonable period of discovery, step three allowed a party to bring a motion for summary judgment, and if there were no disputed facts, the court could enter judgment for one of the parties.²⁵ Finally, step four provided for trial.²⁶

Pretrial judicial management developed, at least in part, as a result of the creation of expansive discovery rights under the Federal Rules. Theoretically, litigants must attempt to resolve discovery disputes between themselves, but frequently these disputes require judicial intervention. Because effective intervention in pretrial motions and discovery requires some acquaintance with

19. See Sullivan, *supra* note 6, at 8-13 (discussing historical development of pleading).

20. See MASS. R. CIV. P. 33(a)(2).

21. See Steven S. Gensler, *Justness! Speed! Inexpense! An Introduction to the Revolution of 1938 Revisited: The Role and Future of the Federal Rules*, 61 OKLA. L. REV. 257, 257 (2008) (highlighting adoption of Federal Rules abandoned inflexible pleading practices).

22. See Oakley & Coon, *supra* note 7, at 1377-78 (summarizing state adoption of Federal Rules).

23. See FED. R. CIV. P. 8(a)(1).

24. See FED. R. CIV. P. 26-37 (setting forth various methods of discovery).

25. See FED. R. CIV. P. 56.

26. See FED. R. CIV. P. 38-53 (providing rules relative to trials).

the details of the case, the federal system transitioned to a designated docket wherein a single judge followed a case from filing through trial. The “designated docket” evolved over the early decades after the adoption of the Federal Rules as the norm in the federal district courts. Thus, the judge’s role evolved from merely trying individual cases to managing many cases from commencement to resolution, and much of the federal district court’s workload began to include supervision of discovery and other pretrial matters.²⁷

During the 1970s and 1980s, the managed system spread to the states, especially the replica jurisdictions that had adopted the Federal Rules.²⁸ Judges managed cases under either a designated docket or a master calendar. But in both approaches, cases proceeded within a judicially managed system. Such a system proved to be an effective way to manage an existing inventory of cases and dispose of an existing backlog.²⁹

During this period, the procedures set out in the Federal Rules essentially did away with technical pleading practice. Given the nature of notice pleading, relatively few cases were disposed of by motions to dismiss.³⁰ Nonetheless, immediately after the adoption of the Federal Rules, there were complex cases, such as antitrust cases, where some commentators and judges believed that notice pleadings created unnecessary confusion in managing discovery.³¹ Over the following decades, concern about unnecessary and uncontrolled discovery costs continued to grow. For many, discovery abuse became the Achilles’ heel of the Federal Rules.³² The fact that two significant studies of the federal courts conducted in the 1990s concluded that the so-called discovery problem was confined to as few as 5% of cases did not allay the concern.³³ As

27. See Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 377-79 (1982). As the role of the judge evolved, the court had broad discretion and wielded great power over the shape of the litigation. See *id.* at 377. Moreover, because the court’s pretrial decisions were often informal and always interlocutory, judicial management decisions were not easily reviewed. See *id.* at 380. Professor Resnick was a strong critic of managerial judges and her article is an excellent analysis of the very real problems of that system. A further discussion is beyond the scope of this Article.

28. See Resnick, *supra* note 27, at 376 n.4 (acknowledging judicial management of dockets in state courts).

29. The author was appointed a Superior Court judge in the Commonwealth of Massachusetts in April 1973 and retired on December 31, 1992. During that twenty-year period, the adoption of the Federal Rules of Civil Procedure on July 1, 1974 influenced major changes in the Massachusetts trial system, which ultimately evolved into a managed system. Because judges were members of a circuit court in Massachusetts, the court applied the designated-docket concept to individual room sessions, and judges rotated into those sessions, generally, on a three-month basis. A uniform system of time standards governed each room list.

30. See *infra* notes 41-50 and accompanying text (discussing lower rate of dismissal before *Twombly* and *Iqbal*).

31. See Archie O. Dawson, *The Place of the Pleadings in a Proper Definition of the Issues in the “Big Case,”* in PROCEEDINGS OF THE SEMINAR ON PROTRACTED CASES FOR UNITED STATES JUDGES, 23 F.R.D. 430, 432-35 (1958) (suggesting some cases may require further particularization of issues under Federal Rules’ pleading standards).

32. See Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685-86 (1998) (opining pleading standard under Federal Rules fails to control scope of discovery).

33. See Willging et al., *supra* note 15, at 593 (noting survey results inconclusive with regard to

referenced above, the bar was still clamoring for more judicial involvement in discovery disputes.³⁴

While the supervision of discovery has always been a critical part of judicial management, it remained unpopular with many judges. The highly regarded Judge Easterbrook gave support to this widespread attitude among judges when he wrote in an article cited by both the majority and dissenting opinions in *Twombly* that “[t]he judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find.”³⁵ With this reservation in mind, the majority in *Twombly* recognized the common concern about the trial court’s lack of success in managing discovery disputes stating,

[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.³⁶

B. The Supreme Court’s Recent Solution to the Problem of Discovery Abuse

In 2007, when the Supreme Court addressed the issue of discovery abuse in *Twombly*, the Court required that a complaint satisfy a plausibility test to avoid dismissal and allow a plaintiff to advance to discovery.³⁷ Two years later in *Iqbal*, the Court clarified the extent and application of the new standard.³⁸ *Twombly* was a class action antitrust case, while *Iqbal* was a complex discrimination case. *Iqbal* made it clear that the plausibility test extended beyond antitrust cases to *all* civil actions.³⁹ The new standard not only provides a precondition to obtaining the extensive discovery that normally arises in complex litigation, but the same pleading requirement also extends to

explaining prevalence of discovery problems).

34. *See id.* at 542 (reporting increased judicial resolution of discovery disputes most favored discovery reform).

35. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989); *see* Bell Atl. Corp. v. *Twombly*, 550 U.S. 544, 559, 595 n.14 (2007).

36. *Twombly*, 550 U.S. at 559 (citation omitted).

37. *See id.* at 556 (requiring complaint allege sufficient “fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement”).

38. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 684-85 (2009) (“[T]he question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.”). The practical effect of the judicial mandate that decisions in response to motions to dismiss should be decided before discovery may commence appears to be identical to the prohibition imposed by the Private Securities Litigation Reform Act where discovery is to “be stayed during the pendency of any motion to dismiss.” 15 U.S.C. § 78u-4(b)(3)(B) (2012).

39. *See Iqbal*, 556 U.S. at 684.

that vast majority of cases where discovery problems do not ordinarily arise.⁴⁰

Professor Patricia Hatamyar performed a statistical analysis of how the *Twombly/Iqbal* decisions affected federal district court rulings on Rule 12(b)(6) motions.⁴¹ The study involved 1,039 cases randomly selected from the period two years before and two years after *Twombly*. In summary, she found that during the pre-*Twombly* period, which was controlled by the *Conley* standard, 46% of the motions filed resulted in the motion being granted (with or without leave to amend).⁴² Subsequent to *Twombly*, the motions granted increased to 48% and after *Iqbal*, 56% were granted.⁴³ Professor Hatamyar also performed a multinomial logistic regression to test “the strength of [the] model’s various independent variables in predicting the outcome, or dependent variable.”⁴⁴ This approach indicated that a judge was over four times more likely to grant a Rule 12(b)(6) motion with leave to amend under *Iqbal* than under *Conley*.⁴⁵ The data also indicated that motions to dismiss in constitutional civil rights cases were granted at an even higher rate than in cases overall.⁴⁶ The post-*Iqbal* rate was 60%.⁴⁷

The pre-*Twombly* rate of 46% is surprisingly high, but may reflect federal district court judges’ changing attitudes towards motions to dismiss even before *Twombly*. The common belief had been that motions to dismiss are rarely granted. That belief probably remains accurate in replica jurisdictions. For example, examination of the annotations under Massachusetts Rule 12(b)(6) indicates that the Massachusetts appellate courts have favorably reviewed relatively few 12(b)(6) motions since the Rule’s adoption in 1974 up until the 2008 decision in *Iannacchino v. Ford Motor Co.*,⁴⁸ which adopted the *Twombly*

40. The applicable provisions of Rule 11(b)(3) provide, “[b]y presenting to the court a pleading . . . an attorney . . . certifies . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support *after a reasonable opportunity for further investigation or discovery.*” FED. R. CIV. P. 11(b)(3) (emphasis added). There is a legitimate question whether the *Twombly/Iqbal* mandate—there can be no access to discovery unless plausibility is shown—is consistent with Rule 11(b)(3). See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 87 (2010) (suggesting holdings may have eclipsed operation of some Federal Rules); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 469–72 (2008) (arguing transition from factual to notice pleading precludes complaints contemplated under Rule 11).

41. See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 584–87 (2010) (outlining scope of court rulings included in study).

42. See *id.* at 556.

43. See *id.*

44. *Id.* at 616 n.280.

45. See Hatamyar, *supra* note 41, at 556.

46. See *id.*

47. See *id.*

48. 888 N.E.2d 879, 890 (Mass. 2008). Prior to 2008, Massachusetts operated under the *Conley* no-set-of-facts standard that was formally adopted in *Nader v. Citron*, 360 N.E.2d 870, 872 (Mass. 1977). Seven years later, the court reaffirmed that a complaint should not be dismissed for failure to state a claim unless it appeared beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. See *McCone v. New England Tel. & Tel. Co.*, 471 N.E.2d 47, 49 (Mass. 1984). In 2001, the Massachusetts Appeals Court held that a motion to dismiss must be denied unless it appears with certainty that

plausibility standard. Obviously, as discussed *infra*, a high percentage of litigation in replica jurisdictions easily adapts itself to the modified use of the suggested forms approved pursuant to Federal Rule 84.

Two additional points should be considered in this context. First, constitutional civil rights, Title VII, Americans with Disabilities Act/Age Discrimination Employment Act, other civil rights, Employee Retirement Income Security Act/Fair Labor Standards Act, Labor Management Relations Act, and antitrust cases make up a large percentage of the cases within Professor Hatamyar's study.⁴⁹ Second, those cases are either jurisdictionally limited to the federal system or are rarely found in state courts. Less than a third of the cases in her random group involved contract or tort actions, which make up a much larger proportion of cases filed in state jurisdictions.⁵⁰

More recently, a student note published in the Yale Law Journal provided a brilliant empirical analysis of the impact of the *Twombly/Iqbal* standard on litigation filed in the federal district courts.⁵¹ The author effectively demonstrated how the litigation decisions made by the parties at the pleading stage have an adverse impact on the value one can give to the simple comparison of grant rates of motions to dismiss before and after *Iqbal*.⁵² His analysis employs the use of the data from two FJC studies⁵³ and the utilization of a conceptual model based on the parties' behavior in litigation involving decisions regarding: commencing a lawsuit, filing and responding to motions

the plaintiff was not entitled to relief under any combination of facts. See *Murphy v. Cruz*, 753 N.E.2d 150, 153 n.4 (Mass. App. Ct. 2001). These decisions left a narrow window for the success of a motion to dismiss. In *Short v. Town of Burlington*, a wife's claim for loss of consortium failed because it was entirely derivative and had "no existence apart from a viable claim of the other spouse founded on personal injury." 414 N.E.2d 1035, 1036 (Mass. App. Ct. 1981). The SJC has also noted that a plaintiff could state facts so specifically that it would be clear from the complaint that the plaintiff would never be entitled to relief. See *Spence v. Bos. Edison Co.*, 459 N.E.2d 80, 87 (Mass. 1983) (citing *Fabrizio v. City of Quincy*, 404 N.E.2d 675, 676 (Mass. 1980)).

49. See Hatamyar, *supra* note 41, at 604-09.

50. See *id.* at 604 (detailing percentages of cases from federal district court in study).

51. See Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2274-75 (2012) (critiquing usefulness of simple grant-rate comparisons following *Twombly* and *Iqbal*).

52. See *id.* at 2338 (estimating *Twombly* and *Iqbal* negatively impacted over 20% of cases in post-*Iqbal* period).

53. See generally JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf); JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(B)(6) MOTIONS GRANTED WITH LEAVE TO AMEND: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/\\$file/motioniqbal2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf). The relatively neutral interpretation of the data uncovered in both studies has been critically examined. See Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions To Dismiss*, 6 FED. CTS. L. REV. 1, 6-8 (2011) (stating FJC's studies confuse readers into thinking Court's decisions created no impact on dismissal practice); see also Gelbach, *supra* note 51, at 2335 (questioning whether cross section of orders analyzed by FJC represent adequate sample).

to dismiss, amending complaints and further motions and responses, settlements, etc. This model demonstrated the negative impact of 12(b)(6) motions on plaintiffs in at least 15-20% of cases. The author further demonstrated these figures represented 25-40% of the cases that failed to reach discovery on at least some of the claims in the post *Twombly/Iqbal* period.

III. THE REPLICA JURISDICTIONS ADDRESS THE *TWOMBLY* STANDARD

Meanwhile, the so-called replica jurisdictions were confronting the *Twombly* plausibility standard as a substitute for the long-standing no-set-of-facts test from *Conley v. Gibson*.⁵⁴ While the Supreme Court's holding was, of course, not binding on state jurisdictions, defendants in replica jurisdictions were certain to argue that such jurisdictions should adopt the new federal standard. The relevant questions were: How should replica jurisdictions respond to the *Twombly/Iqbal* challenge to notice pleadings? Did the Supreme Court's concern about discovery abuse in the federal system apply equally to each state's litigation experience? And does the temptation toward a uniform interpretation of Rule 8 trump the very different circumstances that may exist between the federal courts and particular replica jurisdictions?

As previously noted, thirty jurisdictions, including the District of Columbia, have rules or statutes that replicate the pleading requirement of Federal Rule 8(a)(2), while the remaining jurisdictions continue to utilize fact pleading rather than notice pleading.⁵⁵ *Twombly/Iqbal* will not immediately affect fact-pleading jurisdictions. Indeed, as Professor Oakley observes, the nonconforming states that explicitly require fact pleading represent over 60% of the population of the United States.⁵⁶ As pointed out by the authors of a well-known case book on civil procedure, "[m]ost of the common pleading problems have by now been dealt with by the courts of the code states (although frequently with varying results from state to state and inconsistencies within a single state)."⁵⁷

In a perceptive article, *Three Myths About Twombly-Iqbal*, Professor Kevin M. Clermont argues the notion that the *Twombly/Iqbal* Courts revived fact pleading is a myth.⁵⁸ He points to the exaggerated uncertainty of fact pleading

54. 355 U.S. 41, 47 (1957), *abrogated by* Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007).

55. In addition to Arkansas, Delaware, and South Carolina, which replicate many of the Federal Rules, Professor Oakley lists California, Connecticut, Florida, Illinois, Iowa, Louisiana, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Texas, Virginia and Wisconsin as calling for fact pleading. See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 357-58 (2003).

56. See *id.* at 358.

57. See RICHARD H. FIELD ET AL., *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 441 (5th ed. 1984).

58. See Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1340 (2010).

that “[m]ore than a century and a half of interpretation helps. Officially approved forms for common types of actions, and unofficial practice books with forms, offer further assistance.”⁵⁹ No doubt, in another hundred years a new generation of editors will have produced a new set of form books that apply the plausibility standard to hundreds of separate types of actions. Meanwhile, federal trial and appellate courts in the replica jurisdictions that adopt the plausibility standard will struggle to apply that standard without the assistance of either *Conley*’s no-set-of-facts standard, or 150 years of judicial interpretation in fact-pleading jurisdictions.

While fact pleading has always dominated state pleading practice, the replica jurisdictions still cover 40% of the population. In addition, despite the fact that scholarly articles have often been critical of *Twombly* and *Iqbal*,⁶⁰ those who principally represent defendants, or who practice in fact-pleading jurisdictions, contend that pleading issues for the most part have been resolved.⁶¹

The long history of fact-pleading jurisdictions accommodating themselves to the vagaries of a heightened pleading requirement highlights a major problem with the adoption of the *Twombly/Iqbal* standard. Replica jurisdictions that adopt the *Twombly/Iqbal* standard will not be able to work out the vagaries of that specific test within their own jurisdiction for many years to come, nor will they be able to work out those pleading problems in a manner consistent with other replica jurisdictions. More likely, as with the fact-pleading jurisdictions, the problems will be dealt with over time, “frequently with varying results from state to state and inconsistencies within a single state.”⁶²

A. *An Up-to-Date Look at the Adoption Rate of the Twombly/Iqbal Standard in Replica Jurisdictions*

I have updated the data included in Professor Spencer’s paper delivered at the Pound Civil Justice Institute’s 2010 Forum for State Appellate Judges.⁶³ At that time, Professor Spencer found that fourteen appellate courts in replica jurisdictions, including the District of Columbia, had already reviewed the

59. *Id.* at 1342.

60. *See id.* at 1371 (refuting notion that *Twombly* and *Iqbal* revived fact pleading); Miller, *supra* note 40, at 127 (suggesting modern interpretations of Federal Rules deviate from original intent); *see also Has the Supreme Court Limited Americans’ Access to Courts? Hearing on S. 1504 Before the S. Comm. on the Judiciary*, 111th Cong. 2 (2009).

61. *See* FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 18 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008> (reporting disparity of views among respondents relative to summary judgment motions).

62. FIELD ET AL., *supra* note 57, at 441.

63. *See* A. Benjamin Spencer, *Pleading in State Courts After Twombly and Iqbal*, POUND CIV. JUST. INST. 14-16 (2010), available at <http://ssrn.com/abstract=2038349> (outlining which replica states adopted *Twombly* and *Iqbal*).

Twombly/Iqbal standard—two highest courts and five intermediate courts had rejected the standard, while five highest courts and two intermediate courts had embraced it.⁶⁴ In addition to the twenty-nine state jurisdictions and the District of Columbia, I have also included Arkansas, Delaware, and South Carolina in this update because, while they utilize fact pleading, they replicate many of the Federal Rules.

TABLE 1: REPLICA JURISDICTION DECISION CHART

State	Case	Holding	Adopt/Reject/ Declined To Adopt/ Not Addressed	Notes
AL	<i>Crum v. Johns Manville, Inc.</i> , 19 So. 3d 208 (Ala. Civ. App. 2009).	“Our supreme court has adopted the standard set forth in <i>Conley v. Gibson</i> for the dismissal of claims under Rule 12(b)(6), Ala. R. Civ. P. Until such time as our supreme court decides to alter or abrogate this standard, we are bound to apply it, the United States Supreme Court’s decision in <i>Twombly</i> notwithstanding.” <i>Crum</i> , 19 So.3d at 212 n.2.	Not addressed by the Alabama Supreme Court. Alabama Court of Appeals has declined to adopt.	
AK	N/A	N/A	Not addressed.	The Alaska Supreme Court continues to use the beyond-doubt standard. <i>See Larson v. Dept. of Corr.</i> , 284 P.3d 1, 6 (Alaska 2012).
AZ	<i>Cullen v. Auto-Owners Ins. Co.</i> , 189 P.3d 344 (Ariz. 2008).	“We granted review to dispel any confusion as to whether Arizona has abandoned the notice pleading standard under Rule 8 in favor of the recently articulated standard in <i>Bell Atlantic Corp. v. Twombly</i> . We hold that Rule 8, as previously interpreted by this Court, governs the sufficiency of claims for relief.” <i>Cullen</i> , 189 P.3d at 345 (citation omitted).	Rejected.	
AR	N/A	N/A	Not addressed.	

64. *See id.*

CO	N/A	N/A	Not addressed.	In 2008, the Colorado Court of Appeals cited <i>Twombly's</i> language about conclusory statements, but did not adopt the plausibility standard. See <i>W. Innovations, Inc. v. Sonitrol Corp.</i> , 187 P.3d 1155, 1158 (Colo. App. 2008). The court continues to use the beyond-doubt standard. See <i>Kobobel v. Dep't of Natural Res.</i> , 249 P.3d 1127, 1139 (Colo. 2011).
DE	<i>Cambium Ltd. v. Trilantic Capital Partners III L.P.</i> , No. 363, 2011, 2012 WL 172844 (Del. Jan. 20, 2012).	"In the federal court system, the United States Supreme Court recently adopted a new standard of plausibility. In <i>Central Mortgage</i> , this Court reaffirmed that, notwithstanding the holdings in <i>Iqbal</i> and <i>Twombly</i> , the governing pleading standard in Delaware to survive a motion to dismiss is reasonable conceivability." <i>Cambium</i> , 2012 WL 172844, at *1 (footnotes omitted) (internal quotation marks omitted).	Rejected.	
D.C.	<i>Potomac Dev. Corp. v. District of Columbia</i> , 28 A.3d 531 (D.C. 2011).	"Like the plaintiff in <i>Iqbal</i> , appellants would need to allege more by way of factual content to nudge [their claim] across the line from conceivable to plausible." <i>Potomac Dev. Corp.</i> , 28 A.3d at 550 (alteration in original) (internal quotation marks omitted).	Adopted.	
GA	<i>Bush v. Bank of N.Y. Mellon</i> , 720 S.E.2d 370 (Ga. Ct. App. 2011).	"We recognize that the pleading standards in a Georgia court and in a federal court may not be identical." <i>Bush</i> , 720 S.E.2d at 375 n.13.	Not addressed by the Georgia Supreme Court. The Georgia Court of Appeals declined to adopt.	

HI	N/A	N/A	Not addressed.	In 2012, the Hawaii Intermediate Court of Appeals quoted language from <i>Twombly</i> , but did not adopt the plausibility standard. See <i>Pavsek v. Sandvold</i> , 279 P.3d 55, 68 (Haw. Ct. App. 2012). The Hawaii Supreme Court continues to use the beyond-doubt standard. See <i>Cermelj v. Kawauchi</i> , No. SCEC-12-0000722, 2012 WL 3711449, at *3 (Haw. Aug. 28, 2012).
ID	N/A	N/A	Not addressed.	The Idaho Supreme Court continues to use the beyond-doubt standard. See <i>Shelton v. Shelton</i> , 225 P.3d 693, 698 (Idaho 2009).
IN	<i>Droscha v. Shepherd</i> , 931 N.E.2d 882 (Ind. Ct. App. 2010).	“Droscha additionally cites the recent change to the standard for reviewing Federal Rule of Civil Procedure 12(b)(6), which requires a complaint to contain factual allegations ‘enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true.’ Apart from listing this standard, Droscha does not contend that it is, or should be, applicable. Accordingly, we rely upon the Indiana standard.” <i>Droscha</i> , 931 N.E.2d at 887 n.1 (alteration in original) (citation omitted).	Not addressed by the Indiana Supreme Court. The Indiana Court of Appeals has declined to adopt.	
KS	N/A	N/A	Not addressed.	
KY	N/A	N/A	Not addressed.	
ME	<i>Bean v. Cummings</i> , 939 A.2d 676 (Me. 2008).	“More recently, however, in <i>Bell Atlantic Corporation v. Twombly</i> , the Supreme Court stated: ‘On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires.’” <i>Bean</i> , 939 A.2d at 680 (quoting <i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544, 569 n.14 (2007)).	Adopted.	Although the Maine Supreme Judicial Court does not explicitly adopt <i>Twombly</i> , it cites the decision and states that “[h]eighted pleading requirements are necessary” in civil perjury claims. <i>Bean</i> , 939 A.2d at 680.

MA	Iannacchino v. Ford Motor Co., 888 N.E.2d 879 (Mass. 2008).	“While we have concluded that the plaintiffs’ complaint is insufficient on the basis of the standard described in <i>Nader v. Citron</i> , we take the opportunity to adopt the refinement of that standard that was recently articulated by the United States Supreme Court in <i>Bell Atl. Corp v. Twombly</i> .” <i>Iannacchino</i> , 888 N.E.2d at 889-90 (citations omitted).	Adopted.	
MN	N/A	N/A	Not addressed.	In 2010, the Minnesota Supreme Court cited <i>Twombly</i> , but did not adopt the plausibility standard. <i>See Bahr v. Capella Univ.</i> , 788 N.W.2d 76, 80 (Minn. 2010).
MS	N/A	N/A	Not addressed.	In 2011, the Mississippi Court of Appeals quoted <i>Twombly</i> , but did not adopt the plausibility standard. <i>See Thompson v. True Temper Sports, Inc.</i> , 74 So. 3d 936, 938 (Miss. Ct. App. 2011).
MT	<i>Brilz v. Metro. Gen. Ins. Co.</i> , 285 P.3d 494 (Mont. 2012).	“For the most part, state high courts have declined to adopt the new ‘plausibility’ standard announced in <i>Twombly</i> and <i>Iqbal</i> . And, as the <i>Twombly</i> dissent noted, the new federal approach appears to be in tension with extant law in Montana and other states. A determination that <i>Brilz</i> ’s complaint failed to state a common law claim under the federal standard, therefore, is distinct from the issue whether her complaint stated a common law claim under Montana’s standard.” <i>Brilz</i> , 285 P.3d at 500 (citations omitted).	Declined to adopt.	The Montana Supreme Court in <i>McKinnon v. W. Sugar Coop. Corp.</i> , 225 P.3d 1221, 1223 (Mont. 2010), upheld a complaint on classic <i>Conley</i> grounds. However, the dissent referenced both <i>Twombly</i> and <i>Iqbal</i> . <i>See McKinnon</i> , 225 P.3d at 1228. The court in <i>Brilz</i> declined to adopt the <i>Twombly/Iqbal</i> standard, although the action was dismissed on other grounds. <i>See Brilz</i> , 285 P.3d at 504.
NV	N/A	N/A	Not addressed.	The Nevada Supreme Court continues to use the beyond-doubt standard. <i>See DeBoer v. Senior Bridges of Sparks Family Hosp., Inc.</i> , 282 P.3d 727, 730 (Nev. 2012).

NM	Madrid v. Vill. of Chama, 283 P.3d 871 (N.M. Ct. App. 2012).	“New Mexico is a notice-pleading state, requiring only that the plaintiff allege facts sufficient to put the defendant on notice of his claims. As a result, our appellate courts have never required trial courts to consider the merits of a plaintiff’s allegations when deciding a motion to dismiss, and we see no justification for requiring such technical forms of pleadings now. Moreover, the Village provides no argument or support for its position that New Mexico should incorporate the new federal standard into our state rules. Accordingly, we reject any invitation to depart from the following well-established standard for reviewing a motion to dismiss in state court.” <i>Madrid</i> , 283 P.3d at 876 (citation omitted).	Not addressed by the New Mexico Supreme Court. The New Mexico Court of Appeals has declined to adopt.	
NC	Holleman v. Aiken, 668 S.E.2d 579 (N.C. Ct. App. 2008).	“Plaintiff argues that this court should apply the ‘plausibility standard’ as set forth in <i>Bell Atl. Corp. v. Twombly</i> . Plaintiff has also correctly noted that ‘[t]o date, North Carolina has not adopted the plausibility standard set forth in <i>Bell Atlantic</i> for 12(b)(6) Motions to Dismiss[.]’ This Court does not have the authority to adopt a new standard of review for motions to dismiss.” <i>Holleman</i> , 668 S.E.2d at 584 (alterations in original) (citations omitted) (internal quotation marks omitted).	Not addressed by the North Carolina Supreme Court. The North Carolina Court of Appeals declined to adopt.	
ND	N/A	N/A	Not addressed.	The North Dakota Supreme Court continues to use the beyond-doubt standard. <i>See Bala v. State</i> , 787 N.W.2d 761, 764 (N.D. 2010).
OH	Boske v. Massillon City Sch. Dist., No. 2010-CA-00120, 2011 WL 444175 (Ohio Ct. App. Feb. 7, 2011).	“[T]he claims set forth in the complaint must be plausible rather than merely conceivable.” <i>Boske</i> , 2011 WL 444175, at *3.	Not addressed by the Ohio Supreme Court. Adopted by the Ohio Court of Appeals.	

OK	Edelen v. Bd. of Comm'rs, 266 P.3d 660 (Okla. Civ. App. 2011).	"Despite the Oklahoma Supreme Court's consistent articulation of this standard, the defendants argue that Edelen's petition, to the extent it relies on federal constitutional claims, should be tested pursuant to federal pleading standards and dismissed because it fails to state a 'plausible' claim. Oklahoma has not adopted this pleading standard. We decline to adopt a different pleading standard here." <i>Edelen</i> , 266 P.3d at 663 (citations omitted).	Not addressed by the Oklahoma Supreme Court. The Oklahoma Court of Civil Appeals declined to adopt.	
RI	<i>Jimenez v. People's Choice Home Loan, Inc.</i> , No. PC 2010-5586, 2012 WL 2873807 (R.I. Super. Ct. July 10, 2012).	"Although Rhode Island has adopted the Federal Rules of Civil Procedure, the Rhode Island Supreme Court has yet to explicitly accept the <i>Iqbal</i> and <i>Twombly</i> standard as the operative standard with which to judge a Rule 12(b)(6) motion." <i>Jimenez</i> , 2012 WL 2873807.	Not addressed by the Rhode Island Supreme Court.	The Rhode Island Supreme Court continues to use the beyond-doubt standard. <i>See Watson v. Fox</i> , 44 A.3d 130, 135 (R.I. 2012).
SC	N/A	N/A	Not addressed.	
SD	<i>Sisney v. Best Inc.</i> , 754 N.W.2d 804 (S.D. 2008).	"Because SDCL 15-6-8(a) also requires a 'showing' that the pleader is 'entitled' to relief, we adopt the Supreme Court's new standards." <i>Sisney</i> , 754 N.W.2d at 808-09 (footnote omitted).	Adopted.	
TN	<i>Webb v. Nashville Area Habitat for Humanity, Inc.</i> , 346 S.W.3d 422 (Tenn. 2011).	"We decline to adopt the new <i>Twombly/Iqbal</i> 'plausibility' pleading standard and affirm the judgment of the Court of Appeals." <i>Webb</i> , 346 S.W.3d at 424.	Rejected.	
UT	<i>Peak Alarm Co. v. Salt Lake City Corp.</i> , 243 P.3d 1221 (Utah 2010).	"Our holding here is not an indication that we adopt the Supreme Court's plausibility standard. Our reference to the Federal Rules of Civil Procedure is only for the purpose of agreeing that § 1983 claims require no heightened pleading standard." <i>Peak Alarm Co.</i> , 243 P.3d at 1245 n.13.	Rejected.	Although the Utah Supreme Court did not explicitly reject <i>Twombly</i> , the court refused to apply it in this instance. <i>Peak Alarm Co.</i> , 243 P.3d at 1245 n.13.

VT	Colby v. Umbrella, Inc., 955 A.2d 1082 (Vt. 2008).	“In determining whether a complaint can survive a motion to dismiss under Rule 12(b)(6), courts must take the factual allegations in the complaint as true, and consider whether it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.” <i>Colby</i> , 955 A.2d at 1086 (internal quotation marks omitted).	Rejected.	In the footnote to the quoted text, the Vermont Supreme Court rejected the dissent’s argument that <i>Twombly</i> requires use of a heightened pleading standard. <i>See Colby</i> , 955 A.2d at 1087 n.1.
WA	McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861 (Wash. 2010).	“[T]he United States Supreme Court has recently revised its dismissal standard under Fed. R. Civ. P. 12(b)(6), permitting dismissal unless the claim is <i>plausibly</i> based upon the factual allegations in the complaint—a more difficult standard to satisfy. Chevy Chase encourages this court to similarly construe CR 12(b)(6). We decline.” <i>McCurry</i> , 233 P.3d at 863 (citations omitted).	Rejected.	
WV	Roth v. DeFeliccare, Inc., 700 S.E.2d 183 (W. Va. 2010).	“Under West Virginia law, however, this Court has not adopted the more stringent pleading requirements as has been the case in federal court and all that is required by a plaintiff is fair notice.” <i>Roth</i> , 700 S.E.2d at 189 n.4 (internal quotation marks omitted).	Rejected.	The West Virginia Supreme Court continues to use the <i>Conley</i> standard. <i>See R.K. v. St. Mary’s Med. Ctr., Inc.</i> , 735 S.E.2d 715, 724 (W. Va. 2012).
WY	N/A	N/A	Not addressed.	

In summary, Table 1 indicates that the highest courts in three replica jurisdictions and the District of Columbia have adopted the *Twombly/Iqbal* standard. In eight jurisdictions the highest courts have rejected the standard, while eighteen jurisdictions have not addressed the issue. Thus, of the thirty-three jurisdictions listed in the table only twelve of the highest courts, including the District of Columbia, have already addressed and ruled on the issue.

As shown in Table 1, the Supreme Judicial Court of Massachusetts (SJC) in *Iannacchino v. Ford Motor Co.* adopted the new plausibility standard set out in *Twombly* even before the *Iqbal* clarification.⁶⁵ Subsequently, the Supreme

65. *See Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008) (expressly adopting *Twombly* standard one year in advance of *Iqbal*).

Court of Washington, a replica state, rejected *Twombly*.⁶⁶ The different approaches taken by the Massachusetts and Washington courts present a unique opportunity to focus on the factors that courts in replica jurisdictions should consider when deciding whether or not to adopt the new standard.

B. Washington Considers the Twombly Standard

The Washington Supreme Court struck right at the heart of the matter in *McCurry v. Chevy Chase Bank, FSB*:

The Supreme Court's plausibility standard is predicated on policy determinations specific to the federal trial courts. The *Twombly* Court concluded: federal trial courts are incapable of adequately preventing discovery abuses, weak claims cannot be effectively weeded out early in the discovery process, and this makes discovery expensive and encourages defendants to settle "largely groundless" claims. Neither party has shown these policy determinations hold sufficiently true in the Washington trial courts to warrant such a drastic change in court procedure.

Nor has either party here addressed countervailing policy considerations. For example, 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? Could runaway discovery expenses be addressed by better means—perhaps involving more court oversight of the discovery process or the change in the discovery rules?⁶⁷

Whether the court should adopt the new *Twombly* standard was clearly before the Washington Supreme Court in *McCurry*. The *McCurry* court recognized the Supreme Court's concern with discovery abuse, which proved to be a sufficient reason to limit access to discovery in cases that satisfied the *Twombly/Iqbal* standard at the pleading stage.⁶⁸ It was precisely this policy consideration that the Washington court chose to reject. In refusing to adopt *Twombly/Iqbal*, the court focused on the high price the Supreme Court paid for its "solution" to the discovery problem. For one thing, the Washington court was clearly concerned with how a plaintiff could meet the new *Twombly* standard where evidence of an essential element of a claim was "almost

66. See *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 862-63 (Wash. 2010) (declining to adopt pleading standard in *Iqbal*).

67. *Id.* at 863 (citation omitted).

68. See *id.* (disagreeing on policy grounds with *Twombly*'s requirement that pleadings satisfy plausibility standard before proceeding to discovery). The *McCurry* court quoted and disapproved of the *Twombly* language, "[a]sking 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.* at 863 n.3 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)).

exclusively” in the control of the defendant.⁶⁹

In *Twombly*, the Supreme Court addressed a serious policy issue. The plaintiffs in this class-action antitrust case included “90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States.”⁷⁰ The defendants were the largest telecommunication firms in the country and employed thousands of employees.⁷¹ In the course of business, those employees “generat[ed] reams and gigabytes of business records[] for unspecified (if any) instances of antitrust violations . . . over a period of seven years.”⁷² The Court was fully aware that if it allowed the plaintiffs to survive the motion to dismiss all the parties would necessarily incur substantial discovery expense and the trial court would expend significant (and already scarce) judicial resources attempting to supervise such discovery.⁷³ At the same time, the Court had limited confidence that the trial court would be successful because “the success of judicial supervision in checking discovery abuse has been on the modest side.”⁷⁴

A major downside of the Supreme Court’s solution to the problem, caused by its concern about the trial court’s supervision of discovery, is that the Federal Rules apply to all cases. The less complex cases are governed by the same procedures as the more complex, and as *Iqbal* made clear, the plausibility test that governed cases as complex as *Twombly* would also apply to the each and every case filed in the federal courts regardless of its lack of complexity.⁷⁵

Faced with the same issue as the Supreme Court, the *McCurry* court adopted a different policy because, in the judgment of that court, the discovery process in a typical case filed in the Washington trial courts did not present the same discovery nightmare that the Supreme Court faced in *Twombly*.⁷⁶ For the *McCurry* court, the advantage of notice pleading in the Washington court system was best illustrated by the plaintiff’s right to proceed to discovery in a case where evidence of an essential element of a cause of action was “almost exclusively in the possession of defendants[.]”⁷⁷

Given the Washington court’s judgment that its trial judges could effectively manage the range of discovery problems before them, the court found it unnecessary to adopt the heightened pleading standard the Supreme Court implemented precisely to solve the problem of discovery abuse occurring in

69. *See id.* at 863 (addressing countervailing policy considerations).

70. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

71. *See id.*

72. *Id.*

73. *See id.* at 558 (cautioning discovery expenses in antitrust cases often expensive).

74. *Twombly*, 550 U.S. at 559.

75. *See Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (acknowledging *Twombly* pleading standard governs all civil actions).

76. *See McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 863 (Wash. 2010) (noting plausibility standard predicated on policy decisions specific to federal courts).

77. *Id.*

complex federal litigation. Both the *McCurry* and *Twombly* courts addressed the pleading requirements set out in Rule 8 and as a matter of policy chose different paths. For the *McCurry* court, conceivability continued to be the standard, for the *Twombly* court plausibility.⁷⁸

C. Massachusetts Considers the Twombly Standard

In *Iannacchino v. Ford Motor Co.*, Massachusetts's SJC took a different position from the Washington court and adopted the *Twombly* standard even though the litigants had not put that issue before the court.⁷⁹ The defendant in *Iannacchino* filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the Massachusetts Rules of Civil Procedure⁸⁰ The trial judge dismissed the statutory consumer-protection count but sustained the count for implied warranty and reported the decision to the Massachusetts Appeals Court.⁸¹ The Massachusetts SJC then transferred the case on its own motion.⁸² Prior to setting the case down for argument, the court, in recognition of a significant state consumer-law question raised by *Iannacchino*, invited amicus curiae briefs on that point. There was, however, no request for a briefing on the use of the *Twombly* standard.⁸³

All parties argued their positions on the assumption that the no-set-of-facts standard set out in *Nader*, a case in which the Massachusetts court had adopted *Conley*, was controlling; none of the briefs, including the five submitted by

78. See *id.* at 862-83 (setting forth Washington's standard for reviewing sufficiency of allegations); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (requiring plausible grounds to infer allegations). The decision to reject the pleading standard set out in *Twombly* and *Iqbal* by the Washington Supreme Court and the seven other highest courts in the replica jurisdictions will almost certainly tempt plaintiffs in those jurisdictions to file complaints containing federal claims in a state trial court where such filings are jurisdictionally permissible. See Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 492 (2010) (predicting shift in filing claims in state courts). This in turn will understandably lead defendants to attempt to remove those actions to federal district court. See *id.*; see also *Brilz v. Metro. Gen. Ins. Co.*, 285 P.3d 494, 497 (Mont. 2012) (illustrating removal to federal court may preclude claim from review on merits in state court). Thus, an additional step will be added to the procedure delaying the ultimate resolution of the dispute. It is beyond the purview of this Article to explore the finality of the federal court's ruling dismissing a federal claim without granting permission to amend where the defendant exclusively knew an essential element of the federal cause of action and the remaining state claims are then remanded to the state court. In *Brilz*, the plaintiff filed an action in Montana state court setting out claims with respect to a delayed insurance settlement. See *Brilz*, 285 P.3d at 495. The action was removed to federal district court on diversity grounds. See *id.* at 496. The federal court granted summary judgment for the defendant on statute-of-limitation grounds and ruled a common-law claim had not been pleaded. See *id.* at 495. The plaintiff then filed a petition for declaratory relief in state court seeking to determine whether she could pursue her common-law claim. See *id.* The Supreme Court of Montana affirmed the federal district court's judgment on the grounds of claim preclusion; the plaintiff had available a leave to amend and it was either not requested or was requested and properly rejected under the circumstances. See *id.* at 503-04.

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

80. See *id.* at 883.

81. See *id.*

82. See *id.*

83. See *Iannacchino*, 888 N.E.2d at 882.

amicus curiae, argued for a change in that standard.⁸⁴ The court ultimately concluded that the allegations actually set out in the complaint failed to satisfy the *Nader/Conley* standard and ruled that both the consumer-protection claims and the breach of implied warranty that was “factually and legally intertwined with the [consumer protection] claim” should be dismissed without prejudice.⁸⁵ The court further instructed the trial court to give the plaintiff the opportunity to file an amended complaint with respect to those claims.⁸⁶

Having initially arrived at its conclusion on the basis of the *Nader/Conley* standard, the court then took the opportunity to adopt the “refinement” of that standard set out in *Twombly*, quoting the following statement by the Supreme Court with approval:

While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations are true (even if doubtful in fact). . . .⁸⁷

The court further noted that *Twombly* required allegations plausibly suggesting entitlement to relief as the threshold requirement under Federal Rule 8.⁸⁸ The court concluded its discussion of its new standard by stating:

We agree with the Supreme Court’s analysis of the *Conley* language, which is the language quoted in our decision in *Nader v. Citron*, and we follow the Court’s lead in retiring its use. The clarified standard for rule 12(b)(6) motions adopted here will apply to any amended complaint that the plaintiffs may file.⁸⁹

Thus, in three brief paragraphs, the SJC discarded the no-set-of-facts test of *Nader* and adopted the plausibility standard set out in *Twombly*.

While the Massachusetts court decided to adopt the *Twombly* standard without the benefit of briefing or input from the bar, the court referred to its decision in *Eigerman v. Putnam Investments, Inc.*,⁹⁰ which was decided seven

84. See Brief for Defendants-Appellees at 10, *Iannacchino*, 888 N.E.2d 879 (No. 2007-P-0183) (citing *Nader* for controlling authority); Brief for Plaintiffs-Appellants at 16, *Iannacchino*, 888 N.E.2d 879 (No. 2007-P-0183) (same).

85. *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 889 (Mass. 2008).

86. See *id.*

87. *Id.* at 890 (alterations in original) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

88. See *id.* at 890; see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

89. *Iannacchino*, 888 N.E.2d at 890.

90. 877 N.E.2d 1258 (Mass. 2007).

months after *Twombly*.⁹¹ Although the *Iannacchino* court decided to adopt *Twombly* after it had already ruled the complaint's allegations insufficient under the *Nader* test, on remand, the court allowed the plaintiffs to file an amended complaint that would, for the first time, be measured by the new standard.

The fact that the SJC adopted the Supreme Court's new construction of Rule 8 is not surprising since from its adoption of the Massachusetts Rules of Civil Procedure on July 1, 1974, the Massachusetts court has recognized that in interpreting the new rules, state courts should give considerable weight to the federal courts' interpretation of the corresponding Federal Rule. For example, in the spring of 1975, the court interpreted Rule 9(e) of the Massachusetts Rules of Appellate Procedure in *Giacobbe v. First Coolidge Corp.*⁹² During the course of his opinion, Justice Quirico noted that the court's conclusion was supported by the Federal Rules of Appellate Procedure.⁹³ Later the same year, in *Rollins Environmental Services, Inc. v. Superior Court*,⁹⁴ a case involving the inability to appeal a denied motion for summary judgment, Justice Quirico stated that, "[t]his court having adopted comprehensive rules of civil procedure in substantially the same form as the earlier Federal Rules of Civil Procedure, the adjudged construction theretofore given to the Federal rules is to be given to our rules, *absent compelling reasons to the contrary or significant differences in content.*"⁹⁵

Some twelve years later in *Solimene v. B. Grauel & Co.*,⁹⁶ a question arose about the construction of Rule 49(a). Justice Abrams wrote, "[b]ecause the Massachusetts Rules of Civil Procedure are patterned after the Federal rules, we interpret our rules consistently with the construction given their Federal counterparts."⁹⁷ Again in 1996, the interpretation issue involved the scope of "control" under Rule 34.⁹⁸ Justice Fried noted that the issue was "of considerable importance to the practical administration of discovery in our courts, and we have never addressed it."⁹⁹ In choosing the broad federal construction of control, the court stated, "[w]e follow the course of Federal decisions where they seem sensible, primarily because of the desirability of national uniformity, particularly in a matter such as this, which is likely to involve litigants with contacts in many jurisdictions."¹⁰⁰

Thus, while it is true that the SJC typically adopts the federal courts'

91. *See id.* at 1263 n.7 (recognizing *Eigerman* court considered adopting *Twombly* standard).

92. 325 N.E.2d 922, 927 (Mass. 1975).

93. *See id.*

94. 330 N.E.2d 814 (Mass. 1975).

95. *Id.* at 818 (emphasis added).

96. 507 N.E.2d 662 (Mass. 1987).

97. *Id.* at 668.

98. *See Strom v. Am. Honda Motor Co.*, 667 N.E.2d 1137, 1138 (Mass. 1996).

99. *Id.* at 1140.

100. *Id.* at 1141.

construction, it is also true that the court does not feel compelled to do so. In fact, in the case of *King v. Globe Newspaper Co.*,¹⁰¹ the court in reinstating two counts of defamation, noted, “[e]ven applying the [Rule 56 standard introduced by the Supreme Court in 1987], which we are not bound to do, we are satisfied that the material before the judge demonstrates the availability of clear and convincing evidence of [the defendant’s] reckless disregard for the truth.”¹⁰²

In 1991, the SJC faced the exact issue referred to in *King* when the defendants in *Kourouvacilis v. General Motors Corp.*,¹⁰³ specifically requested that the court adopt the Supreme Court’s interpretation of Rule 56 in *Celotex Corp. v. Catrett*.¹⁰⁴ The SJC responded, “[a]s we have previously observed, we are not bound to apply the summary judgment standard articulated by the United States Supreme Court in *Celotex Corp. v. Catrett*,” but the court concluded, “we think it makes eminent good sense to do so.”¹⁰⁵

In many situations, a trial court’s rulings under the Rules of Civil Procedure are interlocutory and hence not appealable, or are often not central to the ultimate issue on appeal. Consequently, the SJC infrequently focuses on interpretation of the rules. However, in the previously cited cases, a specific rule was central to the SJC’s resolution of the disputes. In these cases the issue involving the interpretation of the rule was fully briefed by both sides, and the court typically adopted the federal interpretation.¹⁰⁶ That result makes sense in most cases, given the federal courts’ long experience with linguistically identical counterparts.

Nonetheless, the SJC has conditioned its adoption of the federal interpretation on there being no compelling reasons to the contrary or sufficient differences in content, and where the federal interpretation is sensible or allows state courts to achieve national uniformity.¹⁰⁷ However, in the end, the SJC always made it clear that it was not bound to follow the federal interpretation.¹⁰⁸

Given the SJC’s oft-stated position of its obligation to examine “compelling reasons to the contrary,” it is surprising that the court adopted the *Twombly* standard without input from advocates’ arguments or from its own advisory committee. The *Iannacchino* decision raises the question of whether the Supreme Court’s concern in *Twombly* with discovery abuse in complex

101. 512 N.E.2d 241 (Mass. 1987).

102. *Id.* at 249 (emphasis added).

103. 575 N.E.2d 734 (Mass. 1991).

104. *See id.* at 740-41 (agreeing with Supreme Court’s interpretation of Rule 56). *See generally* *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

105. *Kourouvacilis*, 575 N.E.2d at 738 (emphasis added).

106. *See supra* notes 91-105 and accompanying text (describing Massachusetts cases involving interpretation of rules of civil procedure).

107. *See Strom v. Am. Honda Motor Co.*, 667 N.E.2d 1137, 1140-41 (Mass. 1996) (outlining previous rationales for adopting similar interpretations to state rules of civil procedure).

108. *See Kourouvacilis*, 575 N.E.2d at 738.

litigation is an equal concern in the typical cases filed in Massachusetts state courts.¹⁰⁹ Instead, the SJC adopted, sua sponte, a heightened pleading standard without balancing its many downsides and unintended consequences.¹¹⁰

The immediate downside of the Massachusetts court's adoption of *Twombly*, on a record where the issue was not litigated, is that it is now impossible to know whether the issues raised before the Washington court in *McCurry* would have made a difference in the SJC's ultimate decision to adopt the new pleading standard. The *McCurry* court's reservations about applying the *Twombly* standard to cases filed in the Washington state courts were well taken. It is not clear whether those same factors were even considered by the SJC. It seems reasonable that if discovery nightmares only arise in complex cases, a replica jurisdiction should consider whether its own experiences support a legitimate concern about widespread discovery abuse before it chooses to adopt a wholly new set of pleading requirements with a whole host of unintended consequences. The SJC's usual justifications for adopting the Supreme Court's interpretations could have best been reviewed on a record where advocates would have been motivated to test the applicability of the various rationales to Massachusetts practice. On the record in *Iannacchino*, the full consequences of the new pleading standard were simply never examined.

Subsequent to the adoption of the Federal Rules of Civil Procedure in 1938, and the replication of those rules by over half the state jurisdictions by the 1970s, it appeared that procedural uniformity was on its way to becoming a reality. But as Roger Michalski pointed out, by the 1980s a number of developments shut down the movement toward unification.¹¹¹ Local rules in the federal district courts, interest groups arguing against the policy of the Federal Rules, state jurisdictions reacting to the perceived disadvantages of the Federal Rules, and finally the issue of uniformity among states as opposed to uniformity with federal courts were all factors tending toward less unification.¹¹² As time went on and the Federal Rules were amended, many replica jurisdictions refused to adopt the amendments to the Federal Rules. Thus, while replica jurisdictions, such as Massachusetts, continued to place great reliance on the interpretation of individual rules by federal courts, especially the Supreme Court, other replica jurisdictions were not as enthusiastic about adopting the many amendments to the Federal Rules.

109. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (stating concern over potential abuse of discovery); *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008) (adopting *Twombly* standard without otherwise considering application in state court).

110. See *Iannacchino*, 888 N.E.2d at 890.

111. See Roger Michael Michalski, Essay, *Tremors of Things To Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 112-13 (2010), <http://yalelawjournal.org/2010/10/27/michalski.html> (noting states' reluctance to abdicate own procedures).

112. See *id.* at 113-114.

IV. SEVEN FACTORS REPLICA JURISDICTIONS SHOULD CONSIDER
BEFORE ADOPTING THE *TWOMBLY/IQBAL* STANDARD

While the *McCurry* decision set forth two reasons for rejecting the *Twombly/Iqbal* standard, namely confidence that the Washington trial courts could properly supervise discovery issues coming before them, and concern about the burden on plaintiffs when the information about an essential element of a claim was in the control of the defendant,¹¹³ there are at least five other significant factors that replica jurisdictions should consider in determining whether to adopt the heightened pleading standards of *Twombly/Iqbal*. These additional factors include: (1) the standard is too subjective to be applied in a consistent manner; (2) it is highly unlikely that *only* cases without merit will be dismissed under the standard; (3) saving costs and judicial resources by eliminating discovery at the trial level only transfers a host of new costs in the preparation, argument, and judicial consideration of an increasing pleading practice at both the trial and appellate level; (4) time and costs incurred in arguing the plausibility of a particular claim will often only delay commencement of discovery; and finally (5) the types of cases filed in most state jurisdictions will involve far fewer of the complex claims that tend to generate discovery abuses.

*A. State Trial Judges Are Capable of Managing Discovery in
Cases That Come Before Them*

The *McCurry* court was comfortable with the notion that Washington trial judges could properly supervise the discovery issues that came before them. On the other hand, the Supreme Court in *Twombly* focused on “the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.”¹¹⁴ Implied in the Washington court’s confidence was recognition of the contrast between state litigation and some complex federal cases that often create discovery nightmares.

Conversely, the Supreme Court’s pessimism about the federal district courts’ ability to supervise complex discovery seems to ignore the fact that only a relatively small percentage of federal cases actually require active and intense judicial supervision.¹¹⁵ Given the nature of state litigation, serious discovery disputes are even less frequent. Indeed, the difficulty of effective supervision of even complex litigation is substantially overstated.

For example, because *Twombly* was a complex class-action antitrust case, it was immediately identifiable that the case would involve significant discovery

113. See *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 863 (Wash. 2010).

114. *Twombly*, 550 U.S. at 559.

115. See *Kakalik et al.*, *supra* note 14, at 862 (concluding minority of cases with high discovery costs cause most problems); *Willging et al.*, *supra* note 15, at 554-55 (reporting certain classes of cases tend to elicit more discovery problems than others).

and potential discovery abuse. But, as the Supreme Court recognized, the significant issue in the case was whether there was an unlawful agreement among the defendants. The trial court could have directed initial discovery to this limited point, but the Supreme Court had rejected such supervised discovery because

determining whether some illegal agreement may have taken place between unspecified persons at different [Incumbent Local Exchange Carriers] (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking not easily susceptible to the kind of line drawing and case management that the dissent envisions.¹¹⁶

In critiquing the Supreme Court's reasoning it is prudent to note that the kind of complexity in *Twombly* is rarely present and does not justify heightened pleadings in a system composed of many uncomplicated cases and some few excessively complex cases. Moreover, the Supreme Court's argument provides a multilayered corporate defendant with a specialized defense, which is unavailable to a less complex organization, whether or not the multilayered corporate defendant is truly liable or not. Early and active judicial intervention is a better remedy for managing the small percentage of cases where extensive discovery can be anticipated, rather than resolving a higher percentage of case on the pleadings without ever reaching the merits of the claim. On balance, replica jurisdictions should give careful consideration to whether there are sufficient complex cases filed in their trial courts to justify the considerable downsides of heightened pleading requirements.

B. The Twombly/Iqbal Standard Is Too Subjective To Be Applied in a Consistent Manner

In *Twombly*, the dispute between the majority and the dissent was whether the Court should adopt the plausibility standard and abandon *Conley's* no-set-of-facts test.¹¹⁷ The dispute in *Iqbal* was whether the allegations of that complaint met or did not meet the new *Twombly* standard.¹¹⁸ In *Iqbal*, the majority outlined a two-pronged approach for trial courts to apply in determining whether a complaint passes muster in the face of a motion to dismiss.¹¹⁹ First, the court should identify those allegations that are no more than conclusions and are, therefore, not entitled to the assumption of truth.¹²⁰

116. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 560 n.6 (2007).

117. See *id.* at 559-62.

118. See Ashcroft v. Iqbal, 556 U.S. 662, 678-80 (2009).

119. See *id.* at 679.

120. See *id.* at 680.

Second, after isolating the “well-pleaded factual allegations” in the complaint and assuming “their veracity,” a court should “determine whether they plausibly give rise to an entitlement to relief.”¹²¹

In applying this new two-pronged plausibility test, a majority of five justices ruled that the *Iqbal* complaint did not establish plausibility while a minority of four, including Justice Souter, the author of *Twombly*, found that the same allegations satisfied the test.¹²² If four justices could not agree with the five-member majority on how to apply the new *Twombly* standard to the same set of complex facts set out in *Iqbal*, it is legitimate to ask how trial judges are supposed to apply that same standard to different but equally complex factual allegations.

The five-to-four decision in *Iqbal* should not be surprising given the Court’s advice to trial courts to rely on their “judicial experience and common sense” to determine the plausibility of a claim.¹²³ The wide and different judicial experiences within the Court itself, along with nine separate exercises of common sense virtually guaranteed a divided result. Equally likely will be the different perspectives among trial and appellate judges in determining the applicability of the new standard to a given set of allegations.¹²⁴ Prior to the adoption of Federal Rule 8(a), courts operating in code and common-law jurisdictions routinely had difficulty both distinguishing factual allegations from conclusory ones and in determining whether specific allegations established a cause of action.¹²⁵

As to the second prong of *Iqbal*, reasonable judges could disagree on whether inferences from “well-pleaded factual allegations” did or did not satisfy the plausibility standard. In addition, because the definition of plausibility is itself indefinite, courts find it difficult to apply the standard in a uniform manner. Thus, where does plausibility lie on the continuum between

121. *Id.* at 679.

122. *See Iqbal*, 556 U.S. at 682-84, 688.

123. *Id.* at 679.

124. In addition, the Supreme Court has left the distinction between the plausibility standard required under Rule 8 and the particularity standard required in Rule 9(b) in a state of confusion. The respondent in *Iqbal* argued that Rule 9 had specifically allowed him to “allege petitioners’ discriminatory intent ‘generally’” as opposed to the elevated standard required of “fraud or mistake.” *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). The Court replied, “Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8.” *Id.* at 687-88; *see Spencer, supra* note 40, at 473-77 (discussing interplay between Rule 8 and Rule 9 in light of *Twombly*).

125. Professor Donald J. Kochan has focused on the conclusory prong of the *Iqbal* approach rather than the more discussed plausibility standard. *See* Donald J. Kochan, *While Effusive, “Conclusory” Is Still Quite Elusive: The Story of a Word, Iqbal, and a Perplexing Lexical Inquiry of Supreme Importance*, 73 U. PITT. L. REV. 215, 243-50 (2011). After an extensive and detailed examination of the judicial use of the term conclusory he concludes that the “conclusory” prong has a low degree of predictability in its application and is largely subject to . . . a highly individualized, judge-specific [interpretation].” *Id.* at 221. One of the only methods available to determine whether an allegation is conclusory is “through analogical reasoning to previous cases using the same terms in similar contexts.” *Id.*

conceivability and probability? The Supreme Court asserted that the plausibility standard, while greater than the conceivability standard set out in *Conley*, required something less than “probability.”¹²⁶

C. It Is Unnecessarily Difficult for a Plaintiff To Satisfy the Twombly/Iqbal Standard When Information With Respect to an Essential Element of the Claim Is Totally in the Control of the Defendant

The *Twombly/Iqbal* standard is not simply problematic because it is difficult to apply in a uniform manner and because different judges will come to contrary conclusions on the adequacy of the same complaint. Indeed, many standards are difficult to apply. The real problem is that final resolution of the case is just as likely to be based on the technical limitations of the complaint as the merits of the claim.¹²⁷ Further, costs saved by denying discovery may simply be transferred to the pleading stage. Any approach that resolves disputes at the commencement of litigation without necessarily reaching the merits of the claim should leave us with a grave concern about the fundamental fairness of such a system.

Fair application of the *Twombly* standard is further complicated where an essential element in the allegations necessary to satisfy the plausibility standard involves a matter of intent or other state of mind, such as the existence *vel non* of an agreement among the defendants.¹²⁸ Knowledge of such an element is ordinarily almost exclusively within the control of the defendants.¹²⁹ It is no exaggeration that the plausibility standard makes it very difficult, indeed just short of impossible, to make out any claim that includes a state-of-mind component. Under *Conley*, any deficiency in the pleading could be supplied by discovery if such missing element proved to exist.¹³⁰ If the essential element does not exist, the case could be resolved in the defendant’s favor on the merits either at summary judgment or at trial.

However, because there is no discovery if the *Twombly/Iqbal* standard is not satisfied, the missing element, if in fact it exists, is left unknown to all but the defendants, and consequently the case is not resolved on the merits but on a technical deficiency on the pleadings. *Twombly* itself is a good example of the difficulties facing plaintiffs who are attempting to satisfy the standard. There,

126. See *Iqbal*, 556 U.S. at 678 (noting plausibility standard asks for more than sheer possibility defendant acted unlawfully). The author has also discussed this problem in detail. See Sullivan, *supra* note 6, at 56-61 (examining whether uniform application of plausibility possible).

127. See Hatamyar, *supra* note 41, at 582-83 (describing paradox of current pleading standards before courts followed *Twombly* and *Iqbal*).

128. See Spencer, *supra* note 63, at 12-13 (pleading standard faults plaintiffs for failure to allege unknown facts).

129. See *id.*

130. See *Conley v. Gibson*, 355 U.S. 41, 45-47 (1957) (acknowledging notice-pleading standard provides liberal opportunity for discovery), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

plaintiffs had to allege sufficient facts to establish that the defendants acted together under an unlawful agreement rather than independently.¹³¹ Because the defendants had, of course, not admitted the existence of an unlawful agreement, the plaintiffs had to plead sufficiently detailed facts and not simply conclusions to show that the existence of such “concerted action” was plausible.¹³²

Essentially, the plaintiffs were restricted to pleading sufficient circumstances surrounding the defendants’ actions to suggest a plausible inference of an agreement.¹³³ Mere parallel conduct was not sufficient by itself to create such a plausible inference.¹³⁴ Despite the fact that actual knowledge of the defendants’ agreement was solely within the defendants’ control, the Supreme Court was willing to dismiss the complaint to avoid the burden of discovery on the trial court and on the parties.¹³⁵ The difficulties the plaintiffs faced in both *Twombly* and *Iqbal* are now occurring every day in a significant percentage of the cases filed.¹³⁶ The *McCurry* court addressed this precise problem.¹³⁷ It is unknown whether the problem was even considered by the *Iannacchino* court.¹³⁸

*D. It Is Highly Unlikely That Only Cases Without Merit Will Be
Dismissed Under the Twombly/Iqbal Standard*

The assumption in imposing a heightened pleading standard is that cases lacking merit can be dismissed early in the proceeding and unnecessary discovery can be avoided. Thus, if there was no unlawful agreement among the *Twombly* defendants, there could be no antitrust violation. Consequently, a failure to meet a pleading standard that required plausible allegations of an agreement among the defendants would not only be a basis of dismissal at the pleading stage, but the expenses of discovery would not be incurred. It is at least conceivable that discovery would have uncovered an agreement. After all, participants in an unlawful agreement are not going to disclose its existence voluntarily. But the assumption in *Twombly/Iqbal* remains: if it is only

131. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007) (analyzing allegations in plaintiffs’ complaint).

132. See *id.* at 557.

133. See *id.*

134. See *id.* (“[L]awful parallel conduct fails to bespeak unlawful agreement.”).

135. See *Twombly*, 550 U.S. at 558 (noting expense of discovery in antitrust cases).

136. In addition to the two FJC studies, there are four articles that attempted an empirical examination of the impact of *Twombly/Iqbal*. See Hatamyar, *supra* note 41, at 584-85 (studying only federal district court cases); Hoffman, *supra* note 53, at 9-10 (examining FJC study results); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 127 (2011) (reviewing cases vulnerable to dismissal following *Iqbal* retrospectively); Gelbach, *supra* note 51, at 2295 (comparing case outcomes under new pleading regimes).

137. See *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 862-63 (2010).

138. See *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (2008) (providing no consideration of state courts’ application).

conceivable, the case is almost certainly not sufficiently meritorious to proceed to discovery.

Under this assumption, the plaintiff is caught in a circular bind: if there is an agreement, only the defendant knows, but unless the plaintiff pleads sufficient facts showing an agreement is plausible he will not be allowed to discover what only the defendant knows. On the other hand, if the plaintiff were allowed discovery on the issue of an unlawful agreement, there would be one of two possible results: discovery would provide evidence of an agreement or it would not. *Twombly* and *Iqbal* hold that the possible discovery of parallel conduct by agreement is not a sufficient basis to allow a plaintiff the opportunity to determine whether what is conceivable is, in fact, actual.¹³⁹

Such a holding simply allows a case to be dismissed on a technicality because the merits of the existence *vel non* of an agreement are never reached. In fact, the merits issue is avoided in order to save the defendants the expense of discovery (though plaintiffs are quite willing to pay for discovery) and to preserve limited judicial resources. This result is apparently justified by the presumption that what is merely conceivable is either not per se meritorious or, at least, not sufficiently likely to be meritorious to justify the considerable expense of discovery.

But what if there were some way to examine those cases to determine whether enough meritorious cases were being dismissed to create a significant policy concern about the fairness of the *Twombly/Iqbal* standard. Professor Alexander A. Reinert accepted that challenge and provided an interesting retrospective analysis of “thin” pleadings where the trial court’s dismissal under the *Conley* standard was reversed at the appellate level.¹⁴⁰ He examined the outcome of those cases on remand and concluded that those decisions were “just as likely to be successful as those cases that would survive heightened pleading [standards].”¹⁴¹

Initially, Professor Reinert recognized that it made no sense to attempt an independent assessment of cases that have been dismissed under the *Twombly/Iqbal* standard and compare the merits of those cases with those that survived.¹⁴² Aside from the sheer volume of cases that would need to be reviewed, the subjective nature of the standard posed the greatest problem. This problem is illustrated by the fact that four justices of the Supreme Court found that the allegations in the *Iqbal* complaint satisfied the *Twombly* standard, while the five-member majority concluded that they did not.¹⁴³

139. See *Ashcroft v. Iqbal*, 556 U.S. 662, 664-65 (2009) (holding review of pleading standard does not turn on controls placed over discovery); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (satisfying plausibility standard requires more than parallel behavior).

140. See Reinert, *supra* note 136, at 126 (studying thin pleadings subject to greater scrutiny after *Conley*).

141. *Id.* at 120.

142. See *id.* at 133.

143. See *Iqbal*, 556 U.S. at 687, 694.

Reinert's approach was to adopt a three-step methodology. First, isolate all the federal cases filed during the ten-year period of the 1990s where a district court judge had dismissed a case for failure to meet the *Conley* standard and where the circuit court of appeals reversed the decision and remanded the case back to the district court. Second, analyze the remanded cases and determine their success rate after remand. Third, consider the "ramifications of these data and alternative explanations for the outcomes reported."¹⁴⁴

The methodology produced 745 decisions that involved the review of a motion to dismiss where *Conley* was cited, and 303 decisions where the district court was reversed and the case remanded.¹⁴⁵ An analysis of those 303 cases revealed that 168 were *Conley* reversals, and of those 168, 137 cases could be coded as successful or unsuccessful.¹⁴⁶ Adequate information could not be uncovered in 31 of the 168 cases. Of those 137 cases, 76 were classified as successful—70 by settlement, 3 by plaintiffs' verdict, and 3 were classified as "other."¹⁴⁷ The underlying assumption of Reinert's approach was that if cases were dismissed under the more permissive *Conley* standard, they would have also been dismissed under *Twombly/Iqbal*.¹⁴⁸ After a detailed analysis of the 137 cases within the cohort group, Reinert concluded,

[w]hen considered as a whole, the rate of success is about 55%, with settlements and stipulated dismissals accounting for nearly all of the successful outcomes. When considered more closely, the data also reflect high levels of success for certain categories of claims—most notably securities fraud, consumer and contract claims—as well as a high percentage of civil rights cases within the cohort. And even the civil rights claims achieve a high degree of success¹⁴⁹

The remarkable conclusion of Reinert's analysis is that the rate of success of the cohort group was equal to cases that initially survived dismissal.¹⁵⁰ Far from being presumptively meritless, those cases that were supported with "thin" pleadings proved as successful on average as cases that had passed muster at the pleading stage. Reinert's study, at the very least, raises questions about the wisdom of deciding merit-based issues at the motion-to-dismiss stage of the proceedings.

144. Reinert, *supra* note 136, at 127 (discussing study methodology).

145. *Id.* at 140-41.

146. *Id.* at 144.

147. *Id.* at 144-45.

148. See Reinert, *supra* note 136, at 137 (assuming dismissals under *Iqbal/Twombly* likely on margins of sufficient pleading under *Conley*).

149. *Id.* at 148.

150. *Id.* at 169.

*E. Saving Costs and Judicial Resources on Discovery at the Trial Level
May Only Transfer Substantial Additional Costs to the
Preparation, Argument, and Judicial Consideration of an Increased
Pleading Practice at Both the Trial and Appellate Levels*

Apart from the two problems identified by the *McCurry* court, and the real concern that meritorious cases will be prematurely dismissed, additional practical questions remain. Does the judicial system itself receive a compensatory benefit from the elimination of extensive and possibly unnecessary discovery? Will the considerable expense to the litigants and to the court system from extensive discovery actually be saved? Or will those expenses show up somewhere else in the system such as in the costs for the extensive arguments and briefing on a whole host of new Rule 12(b)(6) motions that are virtually guaranteed by the plausibility standard?

Where a trial judge denies a motion to dismiss, there will ordinarily not be an appeal from that ruling because in most cases such a ruling would be interlocutory. The *Iqbal* decision was, of course, an exception because the trial court's denial of defendants' motion to dismiss was, as the Supreme Court ruled, final under the collateral order doctrine.¹⁵¹ It is probable that few, if any, interlocutory rulings on the denial of motions to dismiss will be reviewed by appellate courts under the limited provisions set out in of 28 U.S.C. § 1292(b) or its state counterparts, such as chapter 231, section 118 of the Massachusetts General Laws.

Where, however, the trial judge allows a motion to dismiss and the ruling resolves all the claims and all the rights and liabilities arising from the action, a final judgment will enter under Federal Rule 54 and the appellate court can then review the ruling.¹⁵² The reviewing court or a majority of its members sitting on the panel may either affirm the trial court's ruling or reverse and remand. If affirmed, the ruling is dispositive of the claims, absent a grant of further review by the Supreme Court.

An even more troubling result occurs, however, when the trial court has dismissed the complaint and the appellate court reverses. In these circumstances the parties have already expended significant expense in the drafting of briefs and the preparation of oral argument both at the trial and appellate levels and the further expense of discovery still remains. Given the difficulty in the uniform application of the *Twombly/Iqbal* standard, reasonable advocates will likely bring many more motions to dismiss than under the *Conley* standard. In turn, reasonable judges will disagree on its application to the specific allegations before them, and where a dismissal is granted, the losing advocates will see an enticing appellate opportunity. Clearly, additional

151. See *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) (permitting appeal of interlocutory order).

152. See FED. R. CIV. P. 54 (setting forth what constitutes "judgment").

empirical data is needed to establish the significance of this scenario.

F. In Many Cases Discovery Will Only Be Delayed

Subsequent to *Twombly* and *Iqbal* there have been a number of cases where the trial and appellate courts have disagreed on whether the plausibility test has been satisfied. *Starr v. Sony BMG Music Entertainment*,¹⁵³ is an excellent example. Both the Second Circuit's opinion and the lower court's decision, *In re Digital Music Antitrust Litigation*,¹⁵⁴ are well reasoned, but the appellate court had the last word. One can read and re-read the trial and appellate court opinions to try to decide whether one court had correctly applied the plausibility standard and the other court was simply wrong. The problem is that given the subjective nature of the standard, both courts presented reasonable conclusions that were contradictory.¹⁵⁵

Both courts correctly stated the *Twombly* holding, both courts detailed the same facts, and yet each reached diametrically opposite results—the trial court concluded plausibility was not shown, whereas the appellate court concluded it was shown.¹⁵⁶ The *Starr* decision demonstrates that reasonable judges applying the plausibility standard to the same allegation can reasonably arrive at different conclusions and, so long as the review is de novo, the decision of the reviewing court is final. In many cases, the conclusions reached by the trial and appellate courts are the product of a careful and reasoned analysis of the pleadings. Where the trial and appellate courts disagree, as they often do, there is no clear sense that one result is clearly right and the contrary result is clearly wrong.

Given the unpredictability of the judicial decision on the plausibility of the allegations, reasonable advocates are filing and will continue to file far more motions to dismiss than were filed under the conceivability standard set out in *Conley*. Defendants and plaintiffs are now involved and will continue to be involved in extensive briefing in support and in opposition to such motions. As a practical matter, trial courts will hear more oral arguments and write more opinions on whether or not to grant the motions to dismiss in many more cases.¹⁵⁷

In the event that the trial court grants the motion and final judgment is entered, there will be further extensive briefing and preparation for oral

153. 592 F.3d 314 (2d Cir. 2010).

154. 592 F. Supp. 2d 435 (S.D.N.Y. 2008).

155. See *Starr*, 592 F.3d at 327 (concluding amended complaint satisfies plausibility pleading standard); *In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d at 441-42 (concluding purchasers failed to state claim for relief).

156. See *Starr*, 592 F.3d at 327; *In re Digital Music Antitrust Litig.*, 592 F. Supp. 2d at 441-42.

157. See Hatamyar, *supra* note 41, at 624 (noticing increase in district court dismissals); Gelbach, *supra* note 51, at 2305-06 (describing interplay between plaintiffs' and defendants' motives resulting from *Twombly* pleading standard).

argument before the appellate court. That court will then have to write an opinion affirming or reversing the ruling below. If the appellate court reverses the dismissal, the parties will then commence the discovery that they would have otherwise undertaken many years earlier. If those “imaginary horrors” continue, and the burden on the courts and on the parties continues to expand, then the Supreme Court’s attempt to solve the discovery problem in *Twombly* by imposing the plausibility standard as a precondition to discovery will result in substantial new litigation costs at the pleading stage, and a substantial new judicial burden. In addition, a significant percentage of cases, yet to be determined, that are dismissed at the trial stage will be reversed at the appellate stage and those cases will later incur additional costs at the discovery stage.

In *Starr*, the plaintiffs separately filed their actions in various state and federal courts during the period from late December 2005 through July 2006.¹⁵⁸ Ultimately, the Judicial Panel on Multidistrict Litigation centralized a total of twenty-eight actions and transferred all the matters to the federal court in the Southern District of New York.¹⁵⁹ Some sixteen months after the filing of the first individual complaint, the plaintiffs filed a first consolidated amended complaint in April 2007.¹⁶⁰ The court immediately ordered the defendants to provide the plaintiffs with a letter summarizing the defendants’ grounds for dismissal.¹⁶¹ In response to the defendants’ letter, the plaintiffs filed a second consolidated amended complaint in June 2007.¹⁶² In July, the defendants filed a motion to dismiss pursuant to Federal Rule 12(b)(6) and the motion was granted on October 9, 2008, on the grounds that the plaintiffs had not met the plausibility test.¹⁶³ Subsequently, on January 13, 2010, four years after the first complaints were filed, the Second Circuit reversed and remanded by holding that the allegations had indeed satisfied the plausibility standard.¹⁶⁴ At this point, after four years of litigating the *Twombly* standard, the parties had to begin discovery.

Given the separate motives driving the trial and appellate courts, there is good reason to expect a significant percentage of appellate reversals of trial courts’ dismissals of cases under the plausibility standard. There may be an

158. See *Starr*, 592 F.3d at 320. Additional early post-*Twombly* decisions demonstrate a readiness in some circuits to reverse federal district courts’ actions. See, e.g., *Tamayo v. Blagojevich*, 526 F.3d 1074, 1092-93 (7th Cir. 2008) (concluding facts sufficient to allege some of plaintiff’s claims); *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 23 (D.C. Cir. 2008) (holding plaintiff adequately alleged priority); *Robbins v. Oklahoma*, 519 F.3d 1242, 1253-54 (10th Cir. 2008) (reversing and holding plaintiff failed to satisfy heightened pleading standard); *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 246 (3d Cir. 2008) (reversing dismissal and noting that standards of pleading separate from standards of proof).

159. See *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 320 (2d Cir. 2010).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Starr*, 592 F.3d at 320.

164. *Id.* at 327-28.

understandable tendency among some trial court judges to consider, at least subconsciously, the positive management impact on the court's inventory when a case is dismissed so early in the proceedings—there is one less case to supervise. There might be a contrary concern among some appellate judges that a case has been resolved too early on a technicality.

What is clear, however, is that the allowance or denial of a motion to dismiss is often going to be a close call. As aggressive advocates realize the extent of the difficulties imposed on plaintiffs in meeting the new pleading requirements, prudent lawyering will mandate the filing of many more Rule 12(b)(6) motions than under *Conley*. Given the vague and subjective meaning of “plausible,” if the defendant is successful before the trial court, the plaintiff may assume, given adequate economic motivation, that there is a reasonable chance of reversal on appeal. As time goes on, there will be much more lawyering at the pleading stage than in pre-*Twombly* days, and much more judge involvement. Whatever costs have been saved on the discovery side could be more than lost on the pleading side.¹⁶⁵ After all, runaway discovery costs actually impact a comparatively small percentage of cases, while the *Twombly/Iqbal* standard will encourage the filing of motions to dismiss in a significantly higher percentage of cases.¹⁶⁶

There will inevitably be cases, such as *Starr*, where discovery costs were not avoided, they were just postponed for an additional four years; and those discovery costs will only add on to the pleading costs already incurred. While *Starr* may be an extreme example of what could occur, it may very well illustrate what could become a common occurrence in the future. Exactly how often discovery will be delayed can only be determined by ongoing empirical study of cases in the federal courts after *Twombly/Iqbal*.

G. Cases Filed in Most State Jurisdictions Involve Far Fewer Complex Claims That Tend To Generate Discovery Abuse

State litigation largely involves common-law claims such as tort, contract, and real property; equitable remedies, miscellaneous actions against the state or municipalities; and relevant statutory claims. Many state jurisdictions have created special courts or trial sessions to handle complex business litigation, but these cases make up only a small percentage of the cases handled by the trial courts.¹⁶⁷ In 2010, state courts received over 18 million civil filings.¹⁶⁸

165. Because the *Twombly/Iqbal* standard will almost certainly increase the cost of filing, opposing, and appealing an increasing number of motions to dismiss, it will also have a negative impact on a litigant's decision whether to commence an action. This potential limitation on litigation is contrary to the spirit and intent of the Federal Rules. See Miller, *supra* note 40, at 71-77 (suggesting *Twombly* and *Iqbal* impact access to courts).

166. See *supra* notes 14-17 and accompanying text (describing studies suggesting small number of cases tend to create discovery problems).

167. For example in 2009, the Massachusetts Superior Court accepted 24,260 civil cases for filing of

Financial disputes, primarily contract and small-claims cases, comprised about 72% of the civil actions filed in state courts.¹⁶⁹ The vast majority of the work of state courts involves disputes between private parties.

On the other hand, federal litigation is more likely to involve governmental entities and questions of federal law. For example, of the 289,252 civil cases filed in the United States District Courts for the twelve-month period commencing October 1, 2010, more than half of the cases involved questions of federal law or included the United States as a party.¹⁷⁰ The United States was the plaintiff in 10,797 cases and the defendant in 36,072 cases, 53,611 cases involved petitions by state prisoners, and 37,020 cases were classified as civil rights cases, some of which involved state defendants.¹⁷¹ As referenced above, the FJC study concluded that antitrust, patent, securities, and trademark litigation made up a substantial percentage of the cases that involved extensive discovery.¹⁷² These cases are either not within the jurisdiction of state courts or only make up a very small percentage of state litigation. A comparative examination of the types of cases typically filed in federal and state jurisdictions and an examination of the typical cases that involve complex discovery issues leads us to the conclusion that there will be few, if any, state jurisdictions facing the discovery problems that were potentially involved in *Twombly*.

V. CONCLUSION

The basic proposition of this Article is that replica jurisdictions should hesitate to adopt the heightened pleading standard set out in *Twombly* and *Iqbal* because a final decision based solely on the pleadings that is adverse to the plaintiff will result in a purely technical and unfair resolution of a claim where the plaintiff may have actually had a reasonable chance of success. Excessively complex cases such as *Twombly*, that arguably support such a heightened standard, are rarely found in state litigation. In any event, a case that potentially requires judicial supervision of its discovery can be identified early in the proceedings. At that time, a court can become personally and actively involved in formulating a discovery plan. It is difficult to justify the

which 275 were accepted to the Business Litigation Session. See ANNUAL REPORT ON THE STATE OF THE MASSACHUSETTS COURT SYSTEM 13, 21 (2011), available at www.mass.gov/courts/fy10-annual-report.pdf.

168. R. LAFONTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 4 (2012), available at http://www.courtstatistics.org/other-pages/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx.

169. See *id.* at 11.

170. See ADMIN. OFFICE OF THE U.S. COURTS, 2011 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 15-16 (2012), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

171. See *id.* at 16, 125 tbl.C-2.

172. See Willging et al., *supra* note 15, at 577.

dismissal of cases where the merits of a claim have not been addressed or even tested in discovery.