Legal Memorandum
Published by The Heritage Foundation
No. 53
June 4, 2010

Overturning *Iqbal* and *Twombly* Would Encourage Frivolous Litigation and Harm National Security

Darpana M. Sheth

Abstract: *The ill-advised and unnecessary Notice Pleading Restoration Act of 2009 and the Open Access to Courts Act of 2009 would severely weaken the federal civil pleading standard, encouraging frivolous litigation and harming national security. Such an almost nonexistent pleading standard would weaken U.S. national security, and otherwise impede the government's ability to function free from vexatious litigation. The proposed legislation could act as an incentive to captured terrorists to allege all sorts of violations of the law in order to conduct discovery expeditions against senior government officials, including the President, to obtain sensitive information vital to protecting the nation's safety as well as to discourage and deter public officials from making lawful but necessary decisions to protect the country.*

> *If [the Notice Pleading Restoration Act of 2009 is] successful, it would undo a recent Supreme Court ruling that gave us this common sense standard: Before you can sue someone, you have to have a plausible claim they did something wrong.*
>
> —William McGurn, *Wall Street Journal*

Allowing injured plaintiffs to seek redress in the courts without burdensome procedural obstacles while protecting defendants from frivolous and abusive lawsuits is a delicate balancing act. It requires careful consideration of sometimes conflicting factors by the judges and administrators of the U.S. federal court system. For over 70 years, this balance has been maintained by the Federal Rules of Civil

Talking Points

- Trial lawyers and their allies in Congress are pushing legislation that, if enacted, would open the floodgates to frivolous lawsuits that would cripple American business and undermine national security.
- Two similar trial lawyer-backed bills seek to gut the federal pleading standard, which is the basis for a court's determination as to whether a case should proceed or be dismissed.
- The new standard proposed by the legislation would give lawyers access to invasive and punitive discovery without the barest showing that their lawsuit has merit.
- Such a weak pleading standard would also endanger national security and impede the government's ability to function free from frivolous lawsuits targeting government officials.
- America already has one of the most expensive and burdensome lawsuit systems in the world. Adding to this burden would be reckless, especially at a time when America faces serious economic and national security challenges.

This paper, in its entirety, can be found at:
http://report.heritage.org/lm0053

Produced by the Center for Legal & Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

Procedure, which require a complaint to consist of a "short and plain statement of the claim showing that the pleader is entitled to relief."[1] In two recent decisions, *Bell Atlantic Corp. v. Twombly*[2] and *Ashcroft v. Iqbal*,[3] the Supreme Court explained that this "short and plain statement" must include plausible, factual allegations—a low standard, but something more than unfounded, conclusory accusations.

In the wake of *Twombly* and *Iqbal*, plaintiffs' attorneys have launched a concerted effort to weaken this pleading standard by amending the Federal Rules.[4] The proposed amendments would allow unwarranted lawsuits to proceed against defendants who would be required to engage in extensive discovery to fight frivolous claims or to settle such claims in order to avoid the expense of protracted litigation. These amendments would also put national security at risk by making government officials, such as the Attorney General, the target of vexatious and abusive lawsuits, particularly in the fight against terrorism.

Contrary to the campaign of misinformation portraying these decisions as a change in the law that deny injured parties access to justice, traditional notice pleading has not been abolished. A review of pre-*Twombly* and -*Iqbal* decisions makes it clear that there has been no fundamental shift in the pleading standard. As former Assistant Attorney General Gregory G. Katsas testified, *Twombly* and *Iqbal* "faithfully interpret and apply the pleading requirements of the Federal Rules of Civil Procedure, are consistent with the vast bulk of prior precedent, and strike an appropriate balance between the legitimate interests of plaintiffs and defendants."[5] Former Solicitor General Gregory G. Garre agreed, concluding that both decisions "are firmly grounded in decades of prior precedent at both the Supreme Court and federal appellate court level concerning the pleading standards under Rule 8 of the Federal Rules of Civil Procedure."[6]

Those who want to reverse *Twombly* and *Iqbal* are not seeking to reestablish prior law. Rather, they want to enact an entirely new pleading standard that gives plaintiffs broad rights to discovery based on nothing more than conclusory allegations and parroting the legal elements of a particular claim. This is, in essence, no pleading standard at all. This change would "open the floodgates for what lawyers call 'fishing expeditions'—intrusive and expensive discovery into implausible and insubstantial claims."[7]

Proposed Legislation

Under rule 12(b)(6), a party may ask the court to dismiss a lawsuit for "failure to state a claim upon which relief can be granted"—for example, if the plaintiff's claim is not recognized by law or the plaintiff has failed to allege facts that amount to a violation of the law. This is the rule that courts use to quickly resolve frivolous or baseless claims without the enormous burdens and expense of protracted litigation.

Last year, Senator Arlen Specter (D–PA) introduced a bill to overturn *Twombly* and *Iqbal* by providing that "a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the stan-

1. Fed. R. Civ. P. 8(a)(2).
2. 550 U.S. 544 (2007).
3. 129 S. Ct. 1937 (2009).
4. *See* Tony Mauro, *Plaintiffs' Attorneys Mobilize to Soften New Pleading Standard*, N.Y. L.J., Sept. 24, 2009. *See also* Thomas H. Dupree, Jr., *Trial Bar Leads Unfounded Attacks on High Court's Iqbal Ruling*, WASHINGTON LEGAL FOUNDATION LEGAL OPINION LETTER, Vol. 18, No. 27 (Oct. 23, 2009).
5. *Ashcroft v. Iqbal: Access to Justice Denied*, Hearing before the H. Subcomm. on the Constitution, Civil Rights and Civil Liberties, H. Judiciary Comm., 111th Cong. (Oct. 27, 2009) [hereinafter *House Hearing*], *available at* http://judiciary.house.gov/hearings/hear_091027_1.html.
6. *Has the Supreme Court Limited Americans' Access to Courts?* Hearing before the S. Judiciary Comm., 111th Cong. (Dec. 2, 2009) [hereinafter *Senate Hearing*], *available at* http://judiciary.senate.gov/ hearings/hearing.cfm? id=4189.
7. *House Hearing*, (statement of Gregory G. Katsas), at 1.

dards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)."[8] A similar bill introduced in the House of Representatives provides that no court may dismiss a lawsuit "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim."[9] In a move severely restricting the traditional discretion of federal judges, the bill also mandates that a court may not dismiss a complaint "on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged."[10]

The House legislation would also override the heightened pleading standards imposed on certain types of litigation by other federal statutes. For example, Congress passed the Private Securities Litigation Reform Act (PSLRA) in 1995 to protect the "integrity of American capital markets" by deterring "abusive and meritless suits."[11] The PSLRA heightened the pleading standard required for securities fraud complaints to stop "unwarranted fraud claims." However, H.R. 4115 specifically says that its provisions will govern "except as otherwise expressly provided by an Act of Congress enacted *after* the date of the enactment of this section." Thus, the virtually nonexistent pleading standard of H.R. 4115 would nullify the special pleading standard required by Congress for securities litigation. It also seems to override Federal Rule of Civil Procedure 9(b), which requires plaintiffs alleging fraud to state "with particularity the circumstances constituting fraud"—that is, exactly what conduct or statement was allegedly fraudulent.

Both the House[12] and Senate[13] Judiciary Committees have conducted hearings on this issue. Additionally, the Judicial Conference Advisory Committee on Civil Rules[14] is gathering empirical data on whether these recent court decisions have resulted in a significant increase in dismissals at the pleading stage[15] and has urged the House not to pass legislation overturning *Iqbal*.[16]

Conley's "No Set of Facts" Standard in Context: Factual Specificity vs. Sufficiency

In its 1957 decision in *Conley v. Gibson*,[17] the Supreme Court held that black railway employees sufficiently alleged a violation of their statutory rights to fair representation by their union under Rule 8's pleading standard.[18] The railroad argued for dismissal because "the complaint failed to set

8. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).
9. Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009). The chief sponsors are Jerrold Nadler (D. NY), Henry Johnson (D. Ga.), and John Conyers (D. Mich.).
10. *Id*.
11. H.R. CONF. REP. 104-369 (Nov. 28, 1995).
12. *House Hearing*, (statement of Gregory G. Katsas), at 1, *available at* http://judiciary.house.gov/hearings/pdf/ Katsas091027.pdf.
13. *Senate Hearing*, (statement of Gregory G. Garre), at 11, *available at* http://judiciary.senate.gov/pdf/12-02-09%20Garre%20Testimony.pdf.
14. By statute, the Advisory Committee is directed to oversee the Federal Rules of Civil Procedure. 28 U.S.C. § 331. It is composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice.
15. *See* Memorandum from Andrea Kuperman regarding Application of pleading standards post-*Ashcroft v. Iqbal* to Civil Rules Comm. and Standing Rules Comm., [hereinafter *Kuperman Mem.*], *available at* http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf). Ms. Kuperman is the Rules Law Clerk for the Honorable Lee H. Rosenthal, Chair of the Standing Committee on the Federal Rules of Practice and Procedure.
16. *See* Letter from James C. Duff, Secretary of the Judicial Conference to House Judiciary Committee Chairman Conyers and Ranking Member Smith opposing H.R. 4115, dated May 11, 2010 ("H.R. 4115 thus conflicts with its stated purpose of providing a 'restoration of notice pleading in Federal courts.' Implementing the standard in H.R. 4115 would result in confusion, uncertainty, and consequent delays and inconsistencies…impairing the rights of those who seek redress in the federal courts.").
17. 355 U.S. 41 (1957).
18. *Conley*, 355 U.S. at 46–48.

forth specific facts to support its general allegations of discrimination."[19] Relying on Rule 8(a)'s requirement of a "short and plain statement of the claim," the Supreme Court said that the allegations were sufficiently detailed to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[20]

In addition to lack of specificity, the union also argued that the employees failed to state a claim because its duty of fair representation applied only to the collective bargaining process, which ended when the union entered into a contract with the railroad employer.[21] Because the complaint pertained only to post-contract discriminatory actions, the railroad contended that the employees failed to state a claim under the statute as a matter of law.[22] However, the Supreme Court held that "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* that would entitle him to relief."[23] Because the Railway Labor Act protected employees even after a collective bargaining contract became effective, plaintiffs' allegations, if proven, would constitute "a manifest breach of the Union's statutory duty."[24]

Thus, under *Conley*, a complaint can be dismissed under Rule 12(b)(6) if it fails to have the requisite minimal level of either factual specificity to put defendants on notice of the claims alleged against them or factual sufficiency under the substantive law.[25] In the former case, a court can dismiss the complaint without prejudice, allowing a plaintiff the opportunity to amend the complaint with additional specific facts.[26] In the latter case, however, a plaintiff has failed to provide sufficient facts to state a right to relief under the governing substantive law. Because courts have not required plaintiffs to allege all the elements of a claim, dismissal on this ground usually occurs because a plaintiff has essentially "pled himself out of court" by alleging facts inconsistent with an essential element of the claim or demonstrating that recovery is clearly precluded by an affirmative defense.[27] Any amendment to the complaint would prove futile and it can be dismissed with prejudice. *Conley*'s "no set of facts" language must be understood as espousing the standard for this second category of cases testing the sufficiency of factual allegations under the governing law.

Although *Conley* was widely cited by lower courts as the governing standard for motions to dismiss, most courts acknowledged that *Conley*'s "no set of facts" language could not be read in isolation or construed literally.[28] Some even recognized that it could not be used as the standard for factual specificity.[29] Indeed, the Supreme Court itself implicitly suggested that the "no set of facts" standard did not apply to evaluate complaints

19. *Id*. at 47.
20. *Id*. at 47–48.
21. *Id*. at 46.
22. *Id*.
23. *Id*. at 46–47 (emphasis added).
24. *Id*. at 46.
25. Perhaps a more cogent way to think of this distinction is that a complaint can be dismissed either (1) under Rule 8(a)(2) for failure to provide specific, non-conclusory facts that provide notice of the claim and the grounds upon which it rests; or (2) under Rule 12(b)(6) for failure to state a claim upon which relief can be granted under the governing substantive law.
26. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.").
27. *See generally* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE, § 1215, n 8.1 (citing cases).
28. *See*, *e.g.*, Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989) (recognizing tension between Conley's "no set of facts" language and its acknowledgment that plaintiffs must provide the "grounds" on which their claim rests); Carr Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (recognizing that Conley has never been taken literally).
29. O'Brien v. DiGrazia, 544 F.2d 543, 546, n.3 (1st Cir. 1976) (recognizing that *Conley* does not impose "a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim...into a substantial one.").

without factual detail when it cautioned courts against assuming a plaintiff could prove facts not even alleged[30]—something *Conley*'s "no set of facts" language would otherwise permit.

Twombly: From Impossible to Implausible

In light of a half century of qualifications and explanations for *Conley*'s "no set of facts" language (and some courts' increasing tendency to rely on this language in denying motions to dismiss based on lack of specificity), one would not think it controversial that the Supreme Court finally jettisoned this phrase in *Bell Atlantic v. Twombly*, reasoning that it:

> has been questioned, criticized, and explained away long enough…[to have] earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim is stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.[31]

In *Twombly*, the Supreme Court affirmed a district court's 12(b)(6) dismissal[32] of a nationwide antitrust class action alleging a conspiracy under Section 1 of the Sherman Antitrust Act against the four largest telecommunications companies in the United States.[33] The plaintiffs claimed the defendants conspired to restrain trade by entering into non-compete agreements and by engaging in specific parallel conduct unfavorable to competition.[34]

Writing for a seven-Justice majority, Justice Souter reaffirmed that Rule 8(a)'s standards do require a minimal level of factual specificity and factual sufficiency under the substantive law. With respect to factual specificity, the Supreme Court broke no new ground. Approvingly quoting *Conley*'s statement that the allegations must "give the defendant fair notice of what the…claim is and the grounds upon which it rests,"[35] the Supreme Court confirmed that Rule 8 required "more than labels and conclusions [or] a formulaic recitation of the elements of a cause of action."[36] Indeed, the Court expressly disavowed any notion that it was imposing a "particularity" requirement,[37] just as it had repeatedly rejected heightened pleading standards in prior cases.[38] It is only with respect to factual sufficiency that the Supreme Court modestly clarified that under Rule 8 a complaint must state "enough facts to state a claim to relief that is plausible on its face." [39]

Significantly, the Supreme Court emphasized the limited nature of both requirements under Rule 8(a)'s notice pleading standard. First, a plaintiff need not "set out *in detail* the facts upon which he bases his claim," but must make a "'showing,' rather than a blanket assertion, of entitlement to relief."[40] Second, "[a]sking for plausible grounds to infer an agreement does not impose a probabil-

30. *See* Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983).

31. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 562–63 (2007).

32. The district court opinion dismissing the complaint was authored by Gerald Lynch, who was nominated to the Second Circuit by President Obama and confirmed by the Senate on September 17, 2009.

33. *Twombly*, 550 U.S. at 550, n.1 (noting defendants as Bell-South Corporation, Qwest Communications International, Inc., SBC Communications, Inc, and Verizon Communications, Inc., which together "allegedly control 90 percent or more of the market for local telephone service in the 48 contiguous States").

34. *Id*. at 551.

35. *Id*. at 555.

36. *Id*. at 555, *citing* Papasan v. Allain, 478 U.S. 265, 286 (1986).

37. *Twombly*, 550 U.S. at 569, n.14 ("In reaching this conclusion, we do not apply any 'heightened' pleading standard.").

38. *See*, *e.g.*, Swierkiewica v. Sorema N.A., 534 U.S. 506, 507 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

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

40. *Id*. at 556, n.3.

ity requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[41]

The Court held that the plaintiff's allegations did not meet the minimal requirements of factual specificity and sufficiency "to raise a right to relief above the speculative level."[42] Bare assertions of conspiracy or conclusory allegations of an agreement do not satisfy the specificity requirement, while the claims of parallel business behavior by the defendants failed as a matter of law on their own to establish any illegal behavior because such behavior is just as consistent with rational and perfectly legal competitive business strategy and behavior.

Although *Twombly* could be read narrowly to apply only to antitrust pleadings,[43] federal courts largely embraced its plausibility standard more broadly. Last term, the Supreme Court confirmed this approach in *Ashcroft v. Iqbal*.[44]

Iqbal's "Two-Pronged" Approach

Iqbal was a *Bivens*[45] lawsuit filed against numerous officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller, by a Pakistani citizen arrested for fraud related to identification documents. He was convicted and removed from the United States in the immediate wake of the September 11, 2001, terrorist attacks.[46] Iqbal claimed that Ashcroft and Mueller implemented an unconstitutional policy of detaining Arab Muslim men as "persons of high interest."[47] Because Ashcroft and Mueller moved to dismiss on the grounds of qualified immunity,[48] the narrow issue before the Court was whether Iqbal's allegations, if taken as true, stated a claim that he was deprived of his constitutional rights.[49]

In a 5–4 opinion, the Supreme Court first clarified the governing substantive law on supervisor liability and concluded that the plaintiff "must plead sufficient factual matter to show that [Ashcroft and Mueller] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin."[50]

The Supreme Court then restated *Twombly*'s minimal specificity[51] and plausibility requirements[52] and applied "the two-pronged approach"[53] to the plaintiff's allegations. First, the Supreme Court

41. *Id*. at 556.

42. *Id*. at 555. *See also id*. at 556–57("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.").

43. *Id*. at 553 ("We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct").

44. 129 S. Ct. 1937, 1953 (2009).

45. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (recognizing an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights).

46. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942–43 (2009).

47. *Id*. at 1944.

48. The doctrine of qualified immunity protects government officials from civil lawsuits "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

49. *Iqbal*, 129 S.Ct. at 1943.

50. *Id*. at 1948–49.

51. *Id*. at 1949 (Rule 8 "does not require detailed factual allegations, but it demands more than an unadorned, the defendant-unlawfully-harmed me accusation.") (internal quotations omitted).

52. *Id*. ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

53. *Id*. at 1950.

presumption of truth. For example, the Court discounted bare assertions that Ashcroft was the "principal architect" of the detention policy which subjected Arab Muslim men "to harsh conditions of confinement...solely on account of [their] religion, race, and/or national origin," and that Mueller was "instrumental" in executing this policy, because such allegations "amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[54] On the other hand, the Court determined that the allegation that "the [FBI], under the direction of Defendant Mueller arrested and detained thousands of Arab Muslim men...as part of its investigation of the events of September 11" was specific and nonconclusory.[55]

Second, the Court evaluated the legal plausibility of the remaining allegations. Because the September 11 attacks were committed by Arab Muslim hijackers, the investigation into the attacks "would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims."[56] Thus unlawful discriminatory purpose was "not a plausible conclusion" in light of the "obvious alternative explanation."[57] However, even if the "well-pleaded facts gave rise to a plausible inference that [plaintiff's] arrest was the result of unconstitutional discrimination," the plaintiff did not challenge the constitutionality of his arrest or initial detention.[58] Plaintiff's constitutional claims were based solely on the alleged policy of holding high-interest detainees because of their race, religion, or national origin. Discounting conclusory allegations, the "complaint does not contain any factual allegation sufficient to plausibly suggest [Ashcroft and Mueller]'s discriminatory state of mind"—an essential element of the plaintiff's constitutional tort claim.[59]

The Supreme Court Did Not Amend the Federal Rules

Despite the fact that *Twombly* and *Iqbal* do not alter the crux of Rule 8 and reaffirm notice pleading as it has been generally understood since the enactment of the Federal Rules in 1938, critics have attacked the Supreme Court for exceeding its authority by supposedly rewriting the federal rules and denying litigants access to justice. Yet, such critics mischaracterize these decisions as an end-run around the Federal Rules.[60] To the contrary, both cases "properly construe the governing provisions of the Federal Rules of Civil Procedure, and they are consistent with decades of prior precedent."[61] Legislative attempts to override these decisions are "precipitous and unwise, especially insofar as the suggestion is to set a standard in terms of *Conley*...[a decision that] has generated enormous confusion over the last 50 years and virtually all agree that [its] 'no set of facts' language cannot mean what it says."[62]

Both *Twombly* and *Iqbal* reaffirmed notice pleading. Despite testifying in favor of legislatively overruling *Twombly*'s plausibility standard,[63] Professor Arthur R. Miller acknowledges that while *Twombly* retires *Conley*'s "no set of facts" language, it reaffirmed "simplified notice pleading" by "noting that 'a blanket assertion...without some factual allegation' would be unlikely to meet [Rule 8's] requirement."[64] And in a case decided later in the same term as *Twombly*, the Supreme Court confirmed its

54. *Id*. at 1951.

55. *Id*.

56. *Id*. at 1951–52.

57. *Id*.

58. *Id*. at 1952.

59. *Id*.

60. Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2d 413, 415, 416 (Summer 2009).

61. *House Hearing*, (statement of Gregory G. Katsas), at 8.

62. *Senate Hearing*, (statement of Gregory G. Garre), at 2.

63. *See House Hearing*, (statement of Arthur R. Miller), *available at* http://judiciary.house.gov/hearings/pdf/ Miller091027.pdf.

64. Wright, *supra* note 27, at 194 (3d ed.) (*quoting Twombly*, 550 U.S. at n. 3).

commitment to notice pleading when it labeled the Tenth Circuit's dismissal of a *pro se* complaint as a "pronounced" "departure from the liberal pleading standards set forth by Rule 8(a)(2)."[65]

For almost 70 years it has been black-letter law that while courts should accept well-pleaded factual allegations of a complaint as true, conclusory allegations are not entitled to this presumption.[66] Indeed, it is because such allegations are conclusory that they fail to provide a defendant with adequate notice under Rule 8. Prior to *Twombly*, every circuit court in this country applied this well-established rule of notice pleading.[67]

Critics also lament that these decisions purportedly allow judges to subjectively assess the factual plausibility of the allegations—something the Federal Rules do not permit at the pleading stage. However, the plausibility standard is a legal determination, not a weighing of factual allegations. As the Supreme Court explicitly cautioned in *Twombly*, "Rule 12(b)(6) does not countenance...dismissals based on a judge's disbelief of a complaint's factual allegations."[68] And again in *Iqbal*, the Supreme Court stressed that "[i]t is the conclusory nature of [plaintiff's] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."[69]

Access to Justice vs. Absolute Right to Discovery

Some have erroneously pointed to the number of times *Twombly* has been cited[70] as proof that courts are mechanically applying the plausibility standard

65. Erikson v. Pardus, 551 U.S. 89, 94 (2007). The Court went on to confirm that "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Id.* (*quoting* Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

66. *Id.* § 1216, § 1218. *See also* Crawford-El v. Briton, 523 U.S. 574, 598 (1998) (Plaintiffs must "put forth specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal."); Papasan v. Allain, 478 U.S. 265, 286 (1986) (Courts are "not bound to accept as true a legal conclusion couched as a factual allegation.").

67. *See*, *e.g.*, In re Colonial Mortgage Bankers Corp., 324 F.3d 12, 15 (1st Cir. 2003) (Court is "not bound, however, to credit bald assertions, unsupportable conclusions, and opprobrious epithets woven into the fabric of the complaint."); Cantor Fitzgerald Inc. v. Lutnik, 313 F.3d 704, 709 (2d Cir. 2002) ("[W]e give no credence to plaintiff's conclusory allegations."); City of Pittsburgh v. West Penn Power Co., 147 F.3d 258, 263 n. 13 (3d Cir. 1998) (Courts need not accept "unsupported conclusions and unwarranted inferences"); Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002) ("allegations must be stated in terms that are neither vague nor conclusory"); Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995) ("conclusory allegations or legal conclusions masquerading as factual assertions will not suffice to prevent a motion to dismiss"); Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1109 (6th Cir. 1995) ("liberal Rule 12(b)(6) review is not afforded to legal conclusions and unwarranted factual inferences"); Sneed v. Rybicki, 146, F.3d 478, 480 (7th Cir. 1998) (courts are "not obliged to accept as true conclusory statements of law or unsupported conclusions of fact"); Wiles v. Capitol Indemnity Corp., 280 F.3d 868, 870 (8th Cir. 2002) (Courts may ignore "unsupported conclusions" and "unwarranted inferences"); Ascon Prop., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989) ("conclusory allegations without more are insufficient to defeat a motion to dismiss"); Ryan v. Scoggin, 245 F.2d 54, 57 (10th Cir. 1957) (Rules do "not admit unwarranted inferences drawn from the facts or footless conclusions of law predicated upon them."); Marsh v. Butler County, 268 F.3d 1014, 1036 n. 16 (11th Cir. 2001) ("Unsupported conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal."); Mountain States Legal Found. v. Bush, 306 F.3d 1132, 1134 (D.C. Cir. 2002) (stating that despite Rule 8's "simplified notice pleading standard, the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations."); Samish Indian Nation v. United States, 419 F.3d 1355 (Fed. Cir. 2005) ("this court tests the sufficiency of the complaint as a matter of law, accepting as true all non-conclusory allegations of fact).

68. *Twombly*, 550 U.S. at 556 (*quoting* Neitzke v. Williams, 490 U.S. 319, 327 (1989)); *id.* ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.").

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

70. At the time of this publication, more than 28,000 decisions cite to *Twombly* and over 8,800 decisions cite to *Iqbal*. *See Senate Hearing*, (statement of Gregory G. Garre), at 20 ("Given the staggering number of suits filed in federal court each year—250,000...—and the number of motions to dismiss filed each year, it is not surprising that the *Twombly* and *Iqbal* cases have been cited with enormous frequency by the lower courts.").

to dismiss meritorious claims.[71] Because *Twombly* and *Iqbal* effectively clarified well-settled law, it is no surprise that lower courts have frequently cited these decisions. However, citations to *Twombly* or *Iqbal*, standing alone, reveal nothing about whether the same result would have ensued had the courts misapplied *Conley*'s "no set of facts" language.

Furthermore, the assertions that an insurmountable obstacle for injured parties has been raised are belied by even a cursory look at the post-*Iqbal* case law. As United States District Judge Mark Kravitz of Connecticut, who chairs the Judicial Conference Advisory Committee on Civil Rules, stated, *Iqbal* has not proved to be "a blockbuster that gets rid of any case that is filed."[72] A comprehensive study by the Advisory Committee concludes that "most of the case law to date does not indicate a drastic change in pleading standards."[73] Another empirical study of the 94 federal district court dockets from January 2007 through September 2009 (before and after both the *Twombly* and *Iqbal* decisions) revealed no significant rise in dismissals of civil complaints.[74] Both studies severely undercut any notion that post-*Iqbal*, civil complaints are being dismissed wholesale. To the contrary, courts have applied *Twombly* and *Iqbal* to deny motions to dismiss in a wide range of claims from civil rights[75] to commercial claims,[76] and even claims against government officials for actions taken to defend the nation against terrorism.[77]

Far from being "a padlock on the courthouse door,"[78] *Twombly* and *Iqbal* sensibly uphold the sequence of litigation procedures mandated by the Federal Rules: Before a plaintiff can enjoy the benefits of the broad discovery provisions under the Rules, he must state specific and legally sufficient facts plausibly showing entitlement to relief.[79] As the *Iqbal* court succinctly put it, when a complaint "is deficient under Rule 8, [a plaintiff] is not entitled to discovery."[80] Moreover, the Supreme Court acknowledged the "practical significance of the Rule 8 entitlement requirement"[81] in minimizing expenditures of time and money by all parties[82]—an especially significant concern in complex antitrust actions[83] and suits against government officials.[84]

71. *See, e.g.*, Hon. Colleen McMahon, "The Law of Unintended Consequences: Shockwaves in the Lower Courts After *Bell Atlantic Corp. v. Twombly*," 41 Suffolk U.L. Rev. 851, 852 (2008).
72. Mauro, *supra* note 4.
73. *Kuperman Mem.*, *supra* note 15.
74. Administrative Office of the United States Courts, Statistics Division, "Motions to Dismiss," (Dec. 2009) (*available at* http://www.uscourts.gov/rules/Motions%20to%20Dismiss.pdf). During the four-month period after *Iqbal* in 2009, only 16 percent of civil rights employment cases filed were dismissed, as compared to the 20 percent that were dismissed prior to *Twombly* in 2007. And in "other civil rights cases," only 25 percent of all filed cases were dismissed during the four-month period after *Iqbal*, compared to the 26 percent that were dismissed during the four-month period prior to *Twombly. Id.* at 9–11.
75. *See*, *e.g.*, Fowler v. UPMC Shadyside, 578 F.3d 203 (3d Cir. 2009).
76. *See*, *e.g.*, In re Rail Freight Fuel Surcharge Antitrust Litig., 587 F. Supp. 2d 27 (D.D.C. 2008).
77. *See*, *e.g.*, Al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009).
78. *See* Mauro, *supra* note 4 (*quoting* Lisa Bornstein, senior counsel at the Leadership Conference on Civil Rights).
79. *See Senate Hearing*, (statement of Gregory G. Garre), at 30 ("In our system, a litigant is required to cross the minimum pleading threshold set forth in Rule 8(a) before he may level [any] discovery demands; litigants are not entitled to discovery to fish around for an adequate claim in the first place.")
80. *Iqbal*, 129 S. Ct. at 1954.
81. *Twombly*, 550 U.S. at 558.
82. *Id.* The high costs of litigation have been well documented. *See* TILLINGHAST-POWERS PERRIN, U.S. TORT COSTS AND CROSS-BORDER PERSPECTIVES: 2005 UPDATE, ("Americans spend far more on lawsuits than any other country, and more than twice as much as all but one other country), *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200603/2005_Tort.pdf. Worse, this money does not primarily go toward compensating injured parties. For example in medical malpractice cases, exorbitant fees to trial lawyers and the costs of defending and processing claims amount to 54% of the compensation paid to plaintiffs. *See* David Studdert, *et al.*, *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, NEW ENG. J. M., (2006), *available at* http://content.nejm.org/cgi/reprint/354/19/2024.

For all their rhetoric about restoring notice pleading, what plaintiffs' attorneys actually seek is an absolute right to discovery upon the filing of any complaint, no matter how threadbare its allegations. Rather than using discovery to obtain details of an existing claim, they seek broad latitude to conduct fishing expeditions to find out whether they have a claim at all. This would transform Rule 8 from a shield weeding out meritless claims into a sword to extort settlements from defendants unwilling to bear the heavy costs and burdens of discovery.[85]

Ideologically driven attorneys also want to chill government officials from implementing public policy they disagree with and harass them with broad and intrusive discovery. The *Iqbal* case itself "graphically illustrate[s] these concerns." The plaintiff and his lawyers were trying to impose personal liability on the Attorney General and FBI Director for responding to what Second Circuit Judge Cabranes aptly described as "a national and international security emergency unprecedented in the history of the American Republic."[86] As former Justice Department official Gregory Garre testified, "it has never been more important to ensure that our officials are making the difficult decisions necessary to protect Americans from attack free from concerns about the costs and burdens of litigation targeting such officials for carrying out their vital duties…the Supreme Court appropriately recognized those concerns in reiterating that bare-bones allegations [against] high-ranking officials…do not open the door to discovery."[87]

A Frivolous and Abusive Amendment

The Supreme Court's recent rulings in *Twombly* and *Iqbal* are a welcome clarification of *Conley*'s central premise: in order to survive a motion to dismiss, a complaint must be both specific enough to provide fair notice of the claims and the grounds on which it rests and legally sufficient to state a claim under the governing substantive law. Overturning these decisions (and decades of precedent) and amending the Federal Rules to entitle plaintiffs to discovery as a matter of right would literally mean that "[n]o case would be subject to dismissal based on the conclusory nature of a complaint."[88] There is no question that such amendments would lead to an exponential increase in frivolous and abusive litigation at great cost to the parties, the federal courts, and the American taxpayer, and interfere with the ability of government officials to protect the national security of the United States.

*—**Darpana M. Sheth** is a constitutional litigator at the Institute for Justice and a former Assistant Attorney General for the State of New York. The views expressed in this article are her own.*

83. *Twombly*, 550 U.S. at 559 (noting the "potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years").

84. *Iqbal*, 129 S.Ct. at 1953 (noting that government officials would bear "heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government").

85. *See Twombly*, 550 U.S. at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial] proceedings.").

86. Iqbal v. Hasty, 490 F.3d 143, 179 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

87. *Senate Hearing*, (statement of Gregory G. Garre), at 29 *See also House Hearing*, (statement of Gregory G. Katsas), at 20–21 ("In sum, top American officials charged with prosecuting two ongoing wars and defending our homeland from further catastrophic attacks in the past have faced—and in the future predictably will face—an onslaught of litigation for their decisions and the decisions of their subordinates. Whatever the merits of individual cases, it simply cannot be right that these officials would face exposure to discovery, if not trial and personal liability, every time an individual harmed by the wartime activities or homeland defense is willing to make an unadorned allegation that the Attorney General or the Secretary of Defense was personally involved in the specific action at issue, and that the action was undertaken with an unconstitutional motive. *Iqbal*'s rejection of that absurd consequence is supported by the text and precedent of Rule 8, by settled principles of qualified immunity, and by commonsense.").

88. *House Hearing*, (statement of Gregory G. Katsas), at 25.