

Pleading Plausibility

By D. Michael Henthorne

Truth is so hard to tell, it sometimes needs fiction to make it plausible.

—Francis Bacon

Applying *Twombly* and *Iqbal* to Employment Litigation

Federal Rule of Civil Procedure 8(a)(2) provides that a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.”

Who would have imagined that this deceptively simple

standard, which has been in place since the adoption of the Federal Rules of Civil Procedure in 1938, would create intense controversy, about both its meaning and application, especially during the last two years.

In *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), the Supreme Court of the United States articulated a heightened pleading standard that requires a complaint to “state a claim to relief that is plausible on its face.” In *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009), the Supreme Court elaborated on the new plausibility standard and extended its application to all civil cases.

This article will endeavor to provide a practical overview of the plausibility pleading standard. Additionally, this article will gauge some of the mixed reaction to *Iqbal* and provide some insight on application of the plausibility standard to recent employment cases.

in response to a motion to dismiss a complaint filed by a number of African-American railroad workers against their union, held that “a complaint should not be dismissed for failure to state a claim unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). The Court explained that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Id.* at 47 (citing FED. R. CIV. P. 8 (a) (2)). *Conley* would figure prominently—and with little resistance or opposition—in the federal court pleading landscape for the next 45 years. As a result, Federal Rule of Civil Procedure 12(b)(6) motions to dismiss in federal courts were less frequent, and far less successful, than they have been

A Brief History of Pleading Standards

In 1957, the United States Supreme Court,



■ D. Michael Henthorne, a specialist in employment and labor law as certified by the South Carolina Supreme Court, serves as of counsel to Littler Mendelson, PC, in Columbia, South Carolina. The focus of his practice is the representation of business, healthcare, and governmental entities in employment litigation, employment-related appeals, employment counseling and training, and the mediation and arbitration of employment disputes.

since 2007, when the Supreme Court revisited the standard in *Twombly*.

Long after *Conley*, the Supreme Court addressed the appropriate pleading standard in employment discrimination cases. In 2002, in *Swierkiewicz v. Sorema N.A.*, the Supreme Court reversed both the trial and appellate courts' dismissal of age and national origin discrimination complaints. 534 U.S. 506 (2002). The lower courts had ruled that the plaintiff had failed to plead all of the elements of a prima facie case under the *McDonnell Douglas* framework and that this failure was fatal to his Title VII and ADEA claims of discrimination. Rejecting the notion that *McDonnell Douglas* established a different pleading standard under these statutes, the Court unanimously held "the ordinary rules for assessing the sufficiency of a complaint apply" and "easily" determined that the plaintiff had satisfied the notice pleading requirements of FED. R. CIV. P. 8(a). *Id.* at 511–14. At the conclusion of its opinion, the Court refuted the common argument that "allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits" and reiterated that "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits." The Court made clear that requiring "greater specificity for particular claims" "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* at 515 (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

In his insightful article, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, Professor Joseph A. Seiner of the University of South Carolina School of Law set the stage for the change that would follow in the wake of *Conley* and *Swierkiewicz*, writing:

Thus, after *Conley* and *Swierkiewicz* it was fairly clear that an employment discrimination plaintiff need only provide a basic statement of the claim in order to proceed during the early stages of the case. There was still some ambiguity in the Court's pronouncement of the proper standard, but, for the most part, it would cause difficulty only for those cases in the margins. The typical employment

discrimination plaintiff knew what must be alleged to survive a motion to dismiss. That is, until the Supreme Court's recent decision in *Twombly*.

Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1021 (2009).

The Plausibility Standard of *Twombly* and *Iqbal*

In 2007, the Court revisited the applicable federal pleading standard in *Bell Atlantic Corporation v. Twombly*, an antitrust case arising under the Sherman Act in which subscribers to local telephone and high-speed Internet services sued local exchange carriers, alleging that the carriers conspired to engage in similar or "parallel" conduct in an effort to prevent competition and restrain trade. The district court dismissed the subscribers' complaint for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6). The Second Circuit reversed, and the Supreme Court "granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct." *Twombly*, 550 U.S. at 553.

In a 7–2 decision authored by Justice David H. Souter, the Court reversed the appellate court and upheld the district court's dismissal of the complaint. In doing so, the Court abrogated *Conley* in favor of a new "plausibility" pleading standard:

While a complaint attacked by a Rule 12(b)(6) 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, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)...

Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

Twombly, 550 U.S. at 555–56, 570 (internal citations omitted).

Although the *Twombly* Court acknowledged the "short and plain statement"

requirement of Federal Rule 8(a)(2) at the outset of its opinion, the Court ultimately dismissed the "no set of facts" language in *Conley* as "best forgotten as an incomplete negative gloss on an accepted pleading standard." *Id.* at 563. The Court concluded its opinion by emphasizing "...we do not require heightened fact pleading of specifics, but only *enough facts to state a claim to*

Generalized allegations of discriminatory intent in a pleading will not survive a Fed. R. Civ. P. 12(b)(6) motion.

relief that is plausible on its face." *Id.* at 570 (emphasis added).

In a dissenting opinion, Justice John Paul Stevens called the majority opinion a "stark break from precedent," including *Conley* and *Swierkiewicz*, and wondered whether *Twombly* would "benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants." He would not have to wait long for an answer.

In 2009, the Supreme Court issued its opinion in *Ashcroft v. Iqbal*, in which a Pakistani Muslim sued the former attorney general of the United States and the director of the Federal Bureau of Investigation for allegedly depriving him and other detainees of constitutional protections because of their race, religion, and national origin after they were arrested in the wake of the September 11, 2001, attacks. 129 S. Ct. 1937. In reversing the trial and appellate courts' denial of the defendants' motion to dismiss, the Court extended the plausibility standard in *Twombly* to "all civil actions... antitrust and discrimination suits alike." 129 S. Ct. at 1953.

Specifically citing both *Twombly* and FED. R. CIV. P. 8(a)(2), the Court further explained the plausibility standard as follows:

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short

and plain statement of the claim showing that the pleader is entitled to relief.” As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require “detailed factual allegations,” but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers “labels and conclusions” or “a

The application by federal courts of *Iqbal* has, at times, been as varied as the public response to the opinion.

formulaic recitation of the elements of a cause of action will not do.” Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.”

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.”...

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we “are not bound to accept as true a legal conclusion couched as a factual allegation”). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.

Id. at 1949–50 (internal citations omitted) (emphasis added).

For employment practitioners, perhaps the most notable aspect of *Iqbal* is the Court’s firm rejection of the argument

“that [a plaintiff’s] complaint is sufficiently well-pleaded because it claims that [the defendant] discriminated against him on account of [plaintiff’s] religion, race, and/or national origin.” *Id.* at 1954. The Court concluded, “the Federal Rules do not require courts to credit a complaint’s conclusory statements without reference to its factual context.” *Id.* As a result, generalized allegations of discriminatory intent in a pleading will not survive a FED. R. CIV. P. 12(b)(6) motion. Ultimately, the Court concluded that *Iqbal*’s “complaint fail[ed] to plead sufficient facts to state a claim for purposeful and unlawful discrimination.” *Id.*

Despite the Court’s clear reliance on, and extension of, *Twombly*, both Justice Souter and Justice Stevens dissented, finding that the Court was required to “take the plaintiff’s allegations as true, no matter how skeptical the court may be.” *Id.* at 1959.

A Mixed Response

The reaction to *Iqbal* has been copious, to say the least. In fact, if you performed an Internet search using the terms “*Iqbal v. Ashcroft*,” you would have more than ample reading material—well over 100,000 results, at the time this article was authored. Although certainly abundant, the response has been mixed.

An appellate lawyer in Washington, D.C., with the law firm of Akin Gump was quoted by *The New York Times* as stating, “*Iqbal* is the most significant Supreme Court decision in a decade for day-to-day litigation in the federal courts.” Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. Times, July 20, 2009. Indeed, over the last 12 months, more than 3,000 federal court cases have discussed the pleading standards of *Iqbal* and *Twombly*. Nearly 2,400 of those cases have discussed these decisions in the context of a FED. R. CIV. P. 12(b)(6) motion to dismiss. New York University School of Law professor Arthur Miller, a recognized expert in the field of civil procedure and co-author with the late Charles Wright of *Federal Practice and Procedure*, echoed the significance of *Iqbal* when he said, “I have spent my whole life with the federal rules, and this is one of the biggest deals I have ever seen.” Tony Mauro, *Plaintiffs Groups Mount Effort to Undo Supreme Court’s ‘Iqbal’ Ruling*, NATIONAL LAW

JOURNAL, Sept. 21, 2009. Professor Miller added that, in his opinion, *Iqbal* poses “serious problems with democratic values here, with access to the courts, with resolution of disputes with a jury of peers.” *Id.*

Justice Souter said the majority had adopted a “crabbed” view of plausibility and had, in the process, “upended the civil litigation system.” Liptak, *supra*. As mentioned above, in his dissenting opinion in *Iqbal*, Justice Souter wrote that a judge was required to accept the accusations in a complaint as true, despite skepticism about the likelihood of a plaintiff’s success on the merits. “The sole exception to this rule,” Justice Souter continued, “lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.” *Iqbal*, at 1959 (Souter, D., dissenting). Justice Ruth Bader Ginsburg, who likewise dissented from the majority opinion in *Iqbal*, told a group of federal judges in June 2009 that, in her mind, “the court’s majority messed up the federal rules [of civil procedure].” Liptak, *supra*.

Even law students have entered the discussion. One law student posting on the Marquette University School of Law Faculty Blog astutely wrote, “[i]t seems a FRCP 12(b)(6) motion to dismiss for ‘failure to state a claim upon which relief will be granted’ citing *Iqbal*, will be on the checklist for the defense counsel of every federal civil case from here on out.” Indeed, the National Law Journal reported in September of 2009 that more than 1,500 district court decisions discussing *Iqbal* were filed in the first four months after the opinion was released. Mauro, *supra*. The utility of *Iqbal* to defense lawyers seeking to have courts dismiss cases for failing to state claims prior to discovery has not escaped the plaintiffs’ bar, not to mention several federal legislators.

On July 22, 2009, Senator Arlen Specter introduced Senate Bill 1504, the “Notice Pleading Restoration Act of 2009,” which provides in pertinent part:

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule

12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).

In introducing the bill, Specter remarked that it would “restore the system of notice pleading that has served our Federal judicial system well since 1938, the year the Federal Rules of Civil Procedure were adopted.” 154 Cong. Rec. S7890. The bill has been referred to the Senate Judiciary Committee, which held hearings in December of 2009. During the hearings, Gregory Garre, the former solicitor general who successfully argued the *Iqbal* case, was grilled by committee members expressing concern that courts had been dismissing plaintiffs’ cases unfairly as a result of the heightened pleading standard.

The continuing reaction to *Iqbal* is hardly surprising given the similar reaction to *Twombly* after the Supreme Court issued that opinion in 2007. In April of 2008, United States District Court Judge Rudolph Randa from Milwaukee told a panel audience that, when he read *Twombly*, his reaction was “what the hell?” Posting of Richard M. Esenberg to Jay Rabindeaux, *Ashcroft v. Iqbal and the Pleading Standard*, to Marquette University Law School Faculty Blog, <http://law.marquette.edu/facultyblog/2009/08/27/ashcroft-v-iqbal-and-the-pleading-standard/> (Aug. 27, 2009). Richard M. Esenberg, a civil procedure professor and fellow panelist, cleverly added that Judge Randa had “captured the essence of the matter” and “anything said by the other panelists would be an elaboration on that theme.” *Id.*

***Iqbal* in the Employment Arena**

The application by federal courts of *Iqbal* has, at times, been as varied as the public response to the opinion. Briefly reviewing some examples from employment cases in 2009 provides limited insight into how courts have recently evaluated whether pleadings have been sufficient to survive Federal Rule of Civil Procedure 12(b)(6) motions to dismiss.

For instance, in December 2009 the Fourth Circuit deemed a plaintiff’s allegations conclusory and insufficient to defeat the district court’s dismissal of her Title VII, Age Discrimination in Employment Act, and section 1918 claims. *Har-*

man v. Unisys Corp., 2009 U.S. App. LEXIS 26396, at **5–6 (4th Cir. Dec. 4, 2009). The employee, “upon information and belief,” had argued that her employer believed that a younger, African-American or male employee would not have challenged its actions or would have been more easily influenced to abide by its decisions. *Id.*

The Third Circuit reviewed a complaint alleging that the plaintiff was “an Egyptian native of Arab descent, that [his employer] discharged him, and that his termination occurred in violation of his civil rights,” finding the complaint “inadequate to surmount a Rule 12(b)(6) challenge.” In this case the Third Circuit reasoned that the district court had correctly decided that the complaint warranted dismissal under FED. R. CIV. P. 12(b)(6) because the complaint never intimated that national origin motivated the employer’s actions, failing to provide context. *Guirguis v. Movers Specialty Servs.*, 2009 U.S. App. LEXIS 21229, at **7–9 (3d Cir. 2009).

In another employment discrimination case also decided by the Third Circuit, the plaintiff’s complaint had alleged sufficient facts to state a plausible failure-to-transfer claim in that it contained factual allegations that: (1) the plaintiff was injured at work and that, because of this injury, her employer regarded her as disabled within the meaning of the Rehabilitation Act; (2) there was an opening for a telephone operator at work, which was available prior to the elimination of her position and for which she applied; (3) she was not transferred to that position; (4) her employer never contacted her about the telephone operator position or any other open positions; and (5) the plaintiff believed the employer’s actions were based on her disability. In this case the Third Circuit emphasized that the plaintiff “has adequately pleaded a claim for relief under the standards announced in *Twombly* and *Iqbal*” because her complaint set out how, when, and where the employer allegedly discriminated against her. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 209–12 (3d Cir. 2009).

In *Courie v. Alcoa Wheel & Forged Prods.*, however, although the Sixth Circuit determined that the plaintiff had provided “sufficient” detail for a court to assume that an employment discrimination settlement agreement had existed in attach-

ing an unsigned settlement proposal as an exhibit to his complaint for purposes of a Federal Rule 12(b)(6) motion, the court nevertheless found that the plaintiff’s complaint did not sufficiently state claims on which he could seek relief. *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629–30 (6th Cir. 2009) (“Exactly how implausible is ‘implausible’ remains to be seen, as

Determining plausibility

involves an element
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cannot be ignored.

such a malleable standard will have to be worked out in practice.”).

The Ninth Circuit reviewed a class action lawsuit in which employees of foreign companies that sold goods to Wal-Mart sued Wal-Mart over working conditions in each of their employers’ factories. The claims relied primarily on a code of conduct included in Wal-Mart’s supply contracts, which specified basic labor standards that suppliers must meet. The Ninth Circuit ruled that the district court had properly dismissed the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) because “Plaintiffs’ general statement that Wal-Mart exercised control over their day-to-day employment is a conclusion, not a factual allegation stated with any specificity. We need not accept Plaintiffs’ unwarranted conclusion in reviewing a motion to dismiss.” *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682–83 (9th Cir. 2009).

On the other hand, the Ninth Circuit deemed sufficient a plaintiff’s allegations that his former employer defrauded the United States about the quality of the turbine blades in its engines because “the complaint alleges that five contracts between Rolls-Royce and the United States require all of the engine’s parts to meet particular specifications; that the parts did not do so (and the complaint describes tests said to prove this deficiency); that Rolls-Royce knew that the parts were non-compliant. . . ;

and that Rolls-Royce nonetheless certified that the parts met the contracts' specifications... [and] [t]he complaint names specific parts shipped on specific dates, and it relates details of payment." In this instance, the court wrote, "accusations are not vague." *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853–55 (7th Cir. 2009) (noting that "[n]o complaint

Colloquially speaking, the skeletal legal theory of recovery needs some "meat on the bones" in the form of well-pleaded facts.

needs to rule out all possible defenses.").

Finally, for the purpose of illustration, a district court denied an employer's motion to dismiss in a case in which an employee's complaint alleged that he had been referred to as "Magilla the Gorilla," and that his supervisor had used a racial epithet to describe undesirable work. In denying the motion, the district court stated that:

Plaintiff does not state how often such comments were made, but alleges that he 'repeatedly' complained to management about the harassment. Although the complaint is not specific about the frequency of the comments, such specificity is not required at this stage of the litigation. Under the notice pleading practice established by Rule 8, plaintiff is not required to set forth all facts on which he relies to support his claim....

Viewing the allegations in the light most favorable to plaintiff, the court finds that the plaintiff has stated 'a claim to relief that is plausible on its face.'

Myles v. A & L, 2009 U.S. Dist. LEXIS 115638, at **7–8 (W.D.N.Y. 2009).

Has the Standard Really Changed?

What do these decisions mean for employers and their counsel? Without question, after *Twombly* and *Iqbal*, the Federal Rule of Civil Procedure 12(b)(6) motion has reemerged as an increasingly useful and

powerful tool to assail complaints that are factually deficient. Unfortunately, as several courts have already observed, determining plausibility involves an element of subjectivity that cannot be ignored. What one judge may deem plausible on a given day will strike another judge as implausible the day after.

In the end, though, perhaps the standards under Federal Rules of Civil Procedure 8(a)(2) and 12(b)(6) have not changed as much as we might think. First, FED. R. CIV. P. 8(a)(2) still requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," to "give the defendant fair notice of what the... claim is and the grounds upon which it rests." *Twombly*, 127 S. Ct. at 1964–65. Second, a motion made under FED. R. CIV. P. 12(b)(6) still challenges the legal sufficiency of a claim to determine whether it should proceed. The central purpose of the rule—to allow a court to eliminate fatally flawed actions and to spare the litigants the cost and burdens of unnecessary discovery—remains intact. This is an especially salient consideration in defending employment claims. A common refrain from plaintiffs is that discovery is necessary, even in cases in which complaints are factually deficient, because the information necessary to fill-in-the-blanks, and perhaps advance employees' claims in the process, is generally in the possession of employers. Third, a reviewing court must still accept all of the factual allegations contained within a complaint as true and it must still draw all reasonable inferences in favor of the plaintiff. Finally, the moving party still bears the burden of demonstrating that dismissal is appropriate. It is hardly a "whole new world" for employment litigators.

On the other hand, defense counsel will no doubt find *Twombly* and *Iqbal* invaluable to support Federal Rule of Civil Procedure 12(b)(6) motions to dismiss. A complaint is simply insufficient if it merely recites the elements of a cause of action and that a defendant is liable or that a plaintiff is entitled to relief. *Twombly* established that the allegations of fact in a complaint "must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." 127 S. Ct. at 1959. In turn, *Iqbal* eliminated any question whether the plausibility

standard articulated in *Twombly* was limited to antitrust cases and conferred its universal application to *all* civil cases. In fact, state courts in Michigan, Rhode Island, Vermont, and West Virginia, as well as the District of Columbia, have already considered *Twombly's* and *Iqbal's* applicability to motions to dismiss. See, e.g., *Grayson v. AT&T Corp.*, 980 A.2d 1137 (D.C. Ct. App. 2009); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. Ct. App. 2009); *Duncan v. State*, 284 Mich. App. 246, 774 N.W.2d 89 (Mich. Ct. App. 2009); *Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (W. Va. 2009); *Siemens Fin. Servs. V. Stonebridge Equip. Leasing, LLC*, 2009 R.I. Super. LEXIS 147 (R.I. Super. Nov. 24, 2009); *D.B. Zwirn Special Opportunities, Ltd. v. E. Display Acquisition*, 2008 R.I. Super. LEXIS 73 (R.I. Super. 2008); *Colby v. Umbrella, Inc.*, 184 Vt. 1, 955 A.2d 1082 (Vt. 2008).

Toward a Practical Definition of Plausibility

Determining the sufficiency of pleadings ultimately depends on plausibility. Far from a rigid standard, plausibility is flexible concept, intended to allow a court to exercise its discretion and experience.

Nevertheless, the standard begs the question, what is "plausibility" anyway? More importantly, how do we distinguish plausible claims from those that miss the mark? Fortunately, the Court gave us a working definition of plausibility:

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. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'

Iqbal, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556–57) (internal citations omitted).

The Court explained that "[d]etermining whether a complaint states a plausible claim for relief will... be a context-specific task that requires the reviewing court to draw on its judicial experience and com-

mon sense.” *Id.* at 1950. As an Illinois district court has observed, “[t]his means the definition of plausibility will depend on the type of claim brought.” *Jones v. Bull Moose Tube Co.*, 2009 U.S. Dist. LEXIS 100278 (N.D. Ill. 2009).

The most common definitions of “plausible”—reasonable, believable, colorable, credible, likely—help highlight what courts look for in making this important determination. Defense counsel prepared to identify the specific deficiencies in a pleading’s plausibility will be ahead of the game. The ability to explain which allegations of a complaint fall short of reasonableness, credibility, or likeliness, and why, to a reviewing judge’s satisfaction, may result in a dismissal or, at the very least, an amended pleading that gives a defendant a better idea of the basis for a plaintiff’s claims.

Evaluating the Motion to Dismiss

There is little doubt that defense counsel will routinely utilize *Twombly* and *Iqbal* to support motions to dismiss under Federal Rule of Civil Procedure 12 (b)(6). Counsel should not file a boilerplate motion to dismiss as a knee-jerk reaction to every complaint, but make a thoughtful decision that comports with a client’s objectives after carefully examining a complaint in light of the two-step inquiry articulated in *Iqbal*. Initially, counsel should identify whether the complaint contains rote legal conclusions or, in the words of Justice Anthony Kennedy, a “formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555–56. If so, these allegations are not entitled to a presumption of truth by a reviewing court, and the court should disregard them. This is not always as simple as it sounds. Certainly, reasonable people can disagree about what constitutes a legal conclusion; however, view a complaint as a whole, focusing on whether a pleading consists of more than scant assertions of unlawful conduct. Colloquially speaking, the skeletal legal theory of recovery needs some “meat on the bones” in the form of well-pleaded facts.

Next, counsel should evaluate whether the “nonconclusory factual allegations” of the complaint “give rise to a plausible suggestion” of a theory of recovery. If not, a motion to dismiss is in order. Keep in mind, however, that a court does not

look for exhaustive and unnecessary detail. To the contrary, a number of courts have openly criticized pleadings that ignore the “short and plain statement” model. *See, e.g., Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (stating that a plaintiff’s 58-page “complaint is a quintessential ‘shotgun’ pleading of the kind we have condemned repeatedly” and that “any allegations that are material are buried beneath innumerable pages of rambling irrelevancies”).

When a complaint fairly gives notice to the defendant of the claims asserted, articulates the grounds for relief, and supports the claims with soundly pled facts, a motion to dismiss will unlikely find success and may even damage defense counsel’s credibility with a court. Defense counsel should note that, in employment discrimination cases, courts have generally been satisfied with pleadings that clearly allege who discriminated against the plaintiff, as well as how, when, and where the discrimination allegedly took place. *See, e.g., Gregory v. Dillard’s, Inc.*, 494 F.3d 694 (8th Cir. 2007).

Defense counsel also should consider that some judges view the plausibility standard of *Twombly* and *Iqbal* as a sword that cuts both ways—for defendants and plaintiffs alike. In recent cases, courts have been asked to consider whether affirmative defenses have been pled with the requisite specificity.

For example, in *Sun Microsystems, Inc. v. Versata Enterprises*, 630 F. Supp. 2d 395 (D. Del. 2009), the court observed that “The parties dispute whether the pleading standard announced by the Supreme Court in *Twombly* with respect to Rule 8(a) also applies to pleading affirmative defenses under Rule 8(c). The parties are not alone in this dispute; the District Courts themselves do not agree on the matter.” *Id.* at 408 n.8. While declining to resolve the dispute in the case, the Delaware district court noted that even courts in the same district have not always agreed on this issue. *Compare Safeco Ins. Co. of Am. v. O’Hara Corp.*, 2008 U.S. Dist. LEXIS 48399, at *3 (E.D. Mich. 2008) (“defenses fall within the ambit of *Twombly*” and striking affirmative defenses without prejudice), with *First Nat’l Ins. Co. of Am. v. Professional Pool Techs, LLC*, 2009 U.S. Dist. LEXIS 149, at *5

(E.D. Mich. 2009) (“*Twombly*’s analysis of the ‘short and plain statement’ requirement of Rule 8(a) is inapplicable to [motions to strike affirmative defenses]”).

Similarly, in *Tracy v. NVR, Inc.*, 2009 U.S. Dist. LEXIS 90778 (W.D.N.Y. 2009), the district court held that, although courts generally disfavor motions to strike affirmative defenses, courts should strike affirmative defenses that contain only “bald assertions” unaccompanied by supporting facts: “Indeed, the *Twombly* plausibility standard applies with equal force to a motion to strike an affirmative defense under Rule 12(f).” *Id.* at 28–29 (citing cases from Delaware, Florida, Texas, and Wisconsin). Moreover, in *Bank of Montreal v. SK Foods, LLC*, 2009 U.S. Dist. LEXIS 106577 (N.D. Ill. 2009), the district court, specifically relying on *Twombly* and *Iqbal*, as well as a California district court case, clearly stated that “[t]he good-faith affirmative defense, which is properly brought as an affirmative defense, must satisfy Rules 8 and 12(b)(6).”

Parting Thoughts

The principles articulated in *Twombly* and *Iqbal* present both challenges and opportunities. Commentators have suggested that the plausibility standard serves both plaintiffs and defendants, and their counsel, not only by seeking to ensure that defendants have fair and adequate notice of the nature of claims made against them, but also by providing criteria for the early disposition of complaints that have little or no chance of success. Judges, practitioners, scholars, and even senators, have fervently debated these contentions, and the debate is unlikely to conclude any time soon.

One thing is clear. Understanding the pleading standards applied by federal courts, defending affirmative defenses under similar standards, and preparing to attack civil complaints, are required skills for the seasoned litigator. As more than challenging intellectual exercises in civil procedure appropriate for the law-school classroom, the concepts discussed in these two key decisions, which will continue to evolve and change as they are debated, applied, and refuted, squarely impact the claims that are asserted in our courts as well as the costs and burdens to our clients of defending them. 