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THE PLAUSIBILITY OF PLEADINGS AFTER *TWOMBLY* AND *IQBAL*

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The Supreme Court's pleadings standards decisions in *Bell Atlantic v. Twombly*[2] and *Aschcroft v. Iqbal*[3] have ignited a firestorm of judicial and academic analysis. *Twombly* is already one of the 20 most cited cases of all time in the federal courts, and *Iqbal* averages over 300 new citations per month.[4] But this abundance of analysis has so far failed to coalesce around a concrete and workable interpretation of the "plausibility standard" introduced by these two important decisions.

A review of the analysis to date reveals a broad range of theories and narratives, which often appear to be shaped by the authors' pre-existing beliefs about the proper role of pleadings in federal civil litigation. However, a brief look at some of the key cases and academic analysis can highlight the primary areas of confusion and conflict to focus the analysis and enable practitioners to negotiate these new uncertainties.

I. *TWOMBLY* AND *IQBAL*

Bell Atlantic v. Twombly involved a class action antitrust claim against the so-called "Baby Bells," massive telecommunications companies known as Incumbent Local Exchange Carriers (ILECs).[5] The complaint alleged that the Baby Bells violated the Sherman Act § 1 by engaging in anticompetitive parallel conduct.[6] The plaintiff class encompassed approximately 90 percent of all subscribers of local telephone and high-speed Internet service.[7] The Southern District of New York dismissed the complaint for failure to state a claim, and the Second Circuit reversed.[8] In a 7-2 decision, the Supreme Court reversed, holding that the allegations of parallel conduct, without more, were insufficient to sustain a claim under the Sherman Act.[9] The Court noted that the Sherman Act bans only anticompetitive conduct that is the result of "a contract, combination, or conspiracy."[10] Parallel conduct may be consistent with such illegal behavior, but it is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[11] Thus, the Court held that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice."[12] Rather,

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2 550 U.S. 544 (2007).
3 129 S.Ct. 1937 (2009).
4 *See* Adam Steinman, *The Pleading Problem*, 62 STANFORD L. REV. 1293, 1360 (May 2010).
5 550 U.S. at 549.
6 *Id.* at 548.
7 *Id.* at 559.
8 *Id.* at 552-53.
9 *Id.* at 570.
10 *Id.* at 553 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984)).
11 *Id.* at 554.
12 *Id.* at 556.

the allegations of a complaint must "plausibly suggest" (not be "merely consistent with") illegal conduct.[13] Because plaintiffs had not provided the "further factual enhancement" necessary to "nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed."[14]

The *Twombly* Court also addressed the potential for oppressive litigation in antitrust cases, noting that the mere threat of such discovery can be used to coerce settlement, even with weak claims.[15] For a time, courts and commentators attempted to limit the *Twombly* holding to antitrust cases or complex litigation involving a similar risk of expansive discovery.[16] The Court's per curiam decision in *Erickson v. Pardus*,[17] which was issued two weeks after *Twombly*, seemed to validate the narrow interpretation of *Twombly* by applying traditional notice pleading principles to a prisoner's Eighth Amendment claim of improper medical treatment, without any mention of *Twombly* or its plausibility standard.[18]

The Court explained and expanded *Twombly* in *Ashcroft v. Iqbal*. In *Iqbal*, a Pakistani man brought a Bivens action against former Attorney General Ashcroft and former FBI Director Mueller alleging that he was detained under harsh conditions after September 11.[19] The plaintiff further alleged that his detention was the result of an "unconstitutional policy that subjected [Iqbal] to harsh conditions of confinement on account of his race, religion, or national origin."[20] The Eastern District of New York denied defendants' motion to dismiss, and the Second Circuit affirmed.[21] In a 5-4 decision, the Supreme Court reversed.[22] The Court held that Iqbal's general factual allegations of a policy of restrictive confinement for detainees of high interest in the wake of the September 11 attacks did not sufficiently allege the individual discriminatory intent required to sustain a Bivens action.[23] The Court also explicitly applied *Twombly* to "all civil actions and proceedings in the United States district courts."[24]

The *Iqbal* Court further explained *Twombly* by establishing a two-part test for evaluating complaints under the plausibility standard. First, it invited the district courts to identify and set aside wholly conclusory allegations, which are not entitled to the presumption of truth.[25] The Court alternately described these wholly conclusory allegations as "labels and conclusions," "naked assertions," "formulaic recitation of the elements of a cause of action," or "unadorned, the-defendant-harmed-me accusation[s]."[26] Then, the Court instructed the district courts to examine whether the remaining allegations, accepted as true, plausibly state a claim for relief.[27]

Like *Twombly*, the *Iqbal* decision was also rooted in concerns over discovery. Specifically, the Court voiced concern that intrusive discovery procedures would interfere with vital government functions.[28] However, the Court again declined to respond to this

13 *Id.* at 557.
14 *Id.* at 557, 570.
15 *Id.* at 558-59.
16 *See* Steinman, 62 STANFORD L. REV. at 1305 (noting the interpretations limiting the application of *Twombly*).
17 551 U.S. 89 (2007).
18 *Id.*
19 *Iqbal*, 129 S.Ct. at 1943.
20 *Id.* at 1942.
21 *Id.* at 1942.
22 *Id.*
23 *Id.* at 1952.
24 *Id.*
25 *Id.* at 1950.
26 *Id.* at 1949-50.
27 *Id.* at 1950.
28 *Id.* at 1953.

concern by arming district courts with more effective ways to manage discovery.[29] The Court's indirect approach to addressing discovery concerns has created uncertain effects on the role and scope of discovery in civil litigation in federal courts. But before we can begin to consider *Twombly* and *Iqbal*'s effects on discovery, we must first examine how this new plausibility standard is being applied in the lower courts.

II. THE CIRCUIT COURTS ADDRESS THE "PLAUSIBILITY STANDARD"

The circuit courts have largely taken *Twombly* and *Iqbal* in stride, but there are significant and problematic differences of interpretation over several key questions.

A. Does Conley*'s Concept of Notice Pleading Still Exist?*

The courts have been more restrained than some commentators in their analysis of *Twombly* and *Iqbal*. Though their interpretations and applications vary, most courts have gone about the business of incorporating plausibility into more familiar concepts of notice pleading.[30]

The Third Circuit, in contrast, has made dramatic statements asserting the death of notice pleading. However, its opinions appear to be more cautious than its language would suggest. In *Fowler v. UPMC Shadyside*,[31] the Third Circuit addressed *Swierkiewicz v. Sorema N.A.*,[32] a pre-*Twombly* decision in which the Supreme Court reiterated *Conley*'s liberal pleading standard, declaring that complaints need not demonstrate a likelihood of success on the merits or a likelihood of later discovery of evidence to support plaintiff's claims.[33] The Third Circuit summarily declared that "because *Conley* has been repudiated . . . , so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relied on *Conley*."[34] The court's application of this pronouncement turned out to be less dramatic. The *Fowler* court upheld the validity of a Rehabilitation Act complaint, finding it was sufficient that the plaintiff pleaded an impairment and alleged that the impairment was a disability under the Rehabilitation Act, that the defendant hospital was aware of the impairment, and that the hospital failed to accommodate the impairment.[35] In other words, "[t]he complaint pleads how, when, and where [defendant] allegedly discriminated against [plaintiff].[36]

B. Do Twombly *and* Iqbal *Establish a Heightened Fact Pleading Requirement?*

The Sixth Circuit has interpreted *Twombly* and *Iqbal* as introducing an elevated pleading standard. In *Hensley Mfg. v. ProPride, Inc.*,[37] the court upheld the dismissal of a trademark action because the complaint did not "allege facts sufficient to show that ProPride's use of the 'Hensley' name create[d] a likelihood of confusion as to the source of the products."[38] This elevated standard resembles the summary judgment standard. The *Iqbal* Court did appear at times to engage in an elevated, probability-type analysis.[39]

29 *Id.*
30 *See Riley v. Vilsck*, 665 F. Supp. 2d 994, 1001 (W.D. Wis. 2009) (remarking that "little changed in this circuit as a result of *Twombly*," and that the Seventh Circuit has continued to adhere "to the view that [Federal Rule of Civil Procedure 8] required nothing more than "fair notice."); *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (maintaining that *Erickson* "put to rest" any "doubt that *Twombly* had repudiated the general notice-pleading regime of Rule 8").
31 578 F.3d 203 (3d Cir. 2009).
32 534 U.S. 506 (2002).
33 *Id.* at 511-12, 515.
34 *Fowler*, 578 F.3d at 211.
35 *Id* at 212.
36 *Id.*
37 579 F.3d 603 (6th Cir. 2009).
38 *Id.* at 610.
39 *See, e.g.*, *Iqbal*, 129 S.Ct. at 1951.

However, the Sixth Circuit's broad reading seems at odds with the Supreme Court's explicit rejection of any requirements of evidentiary support or calculations of probability of success at the motion to dismiss stage of the case.[40]

The Fifth Circuit has exhibited more nuance in its approach. In *Floyd v. City of Kenner, Louisiana*,[41] the court rejected assertions that plaintiff must provide evidentiary support at the pleading stage. "At a later stage, [plaintiff] will be required to produce specific support for his claim of unconstitutional motive. But at the pleading stage, his allegation that [defendant's] actions were spurred by [an associate's] ill will suffices."[42] The court affirmed the dismissal of plaintiff's claims against a different defendant, observing that "[u]nlike his allegations [against the first defendant], this bare assertion does not provide any detail about what [defendant, in his official capacity] *did*.[43] Here, the problem was not pleading of insufficient facts, but failure to plead any facts that described the defendant's wrongful actions.

The Eight Circuit has maintained a liberal pleading standard, as exemplified by its decision in *Braden v. Wal-Mart Stores, Inc.*[44] The *Braden* court reversed the district court's dismissal of plaintiff's claim for violation of fiduciary duties under the Employee Retirement Income Security Act (ERISA).[45] The court emphasized that the plausibility standard does not change the rule that plaintiffs are entitled to all reasonable inferences supported by the facts alleged.[46] In addition, it is improper for courts to draw inferences in the defendant's favor, thereby faulting the plaintiff for failing to plead facts tending to contradict those inferences.[47] The court specifically rejected the idea that plaintiffs must plead specific facts regarding the ways in which they were wronged by defendant.[48] Rather, "indirect facts showing unlawful behavior" are sufficient, as long as they give notice and allow reasonable inferences to be drawn in plaintiff's favor that show entitlement to relief.[49] The court further observed that at the plausibility stage, the complaint is to be viewed as a whole, not as individual allegations.[50] This broad view of the plausibility standard may be the most like traditional notice pleading of any of the circuit interpretations.

As noted above, the Seventh Circuit also takes a limited view of *Twombly* and *Iqbal*. Nevertheless, in what is perhaps intended to be a compromise of sorts, the Seventh Circuit has adopted a sliding scale for pleading standards.[51] However, "the plausibility standard has its most force when special concerns exist about the burden of litigation on the defendant or when the theory of the plaintiff seems particularly unlikely."[52] In addition, although the *Smith* court found that the plaintiff's fraud claim had "no merit" and was dismissible "under any reasonable interpretation of Rule 12(b)(6)," the court implied that *Twombly* and *Iqbal* may not apply to all cases.[53] This holding is curious, given that *Iqbal* expressly applied *Twombly* to "all civil actions."[54]

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40 *See Twombly*, 550 U.S. at 569 n.14 ("In reaching this conclusion, we do not apply any 'heightened' pleading standard . . . ."); *Iqbal*, 129 S.Ct. at 1949 ("The plausibility standard is not akin to a 'probability requirement' . . . .").
41 2009 WL 3490278 (5th Cir. Oct. 29, 2009).
42 *Id.* at *5.
43 *Id.* at 8 (emphasis added).
44 588 F. 3d 585 (8th Cir. 2009).
45 *Id.* at 603.
46 *Id.* at 595.
47 *Id.*
48 *Id.* (citing *Erickson*, 551 U.S. at 93.)
49 *Id.*
50 *Id.* at 594 (citing *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 285 (D.C. Cir. 2009)).
51 *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) ("[T]he height of the pleading requirement is related to circumstances."). "[I]n the ordinary case, the burden remains low." *Riley*, 665 F. Supp. 2d at 1003-04.
52 *Id. See also Smith v. Duffey*, 576 F.3d 336 (7th Cir. 2009) (distinguishing *Twombly*'s complex factual landscape from the case before the court).
53 *Id.* at 340 (noting that "maybe neither *Bell Atlantic* nor *Iqbal* governs here").
54 *Iqbal*, 129 S.Ct. at 1951.

In contrast, it appears that at least some courts are taking seriously *Iqbal*'s instruction that *Twombly* applies to all civil cases. The Western District of Virginia recently dismissed a slip-and-fall claim because it failed to satisfy the plausibility standard.[55] It was not enough, the court reasoned, for the plaintiff to plead that she slipped on liquid on the store's floor.[56] To survive a motion to dismiss, the plaintiff must also plead that the owner of the store caused the liquid to be on the floor or had actual or constructive notice of the wet floor and that the owner failed to either remove the liquid in a reasonable time or to warn the plaintiff.[57]

C. What Does "Plausibility" Really Mean?

The First Circuit appears to have embraced a highly subjective and expressly comparative version of plausibility. In *Chao v. Ballista*,[58] the Massachusetts District Court upheld a complaint for sexual abuse of a prison inmate by a guard. The court distinguished the required showing for qualified immunity in *Chao* from that in *Iqbal*.[59] However, in so holding, the court announced a surprising interpretation of the plausibility standard. The court held that an allegation is conclusory when it "recites only the elements of the claim and, at the same time, the court's commonsense credits a far more likely inference from the available facts."[60] The court's subjective inquiry is highly context-specific and "depends on the full factual picture, the particular cause of action, and the available alternative explanations."[61] However, "a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible."[62] This formulation incorporates directly into the legal standard *Iqbal*'s invitation for courts to employ their experience and common sense. This is not particularly controversial, but the court's full-throated endorsement of a comparative element resembles the probability analysis that the *Iqbal* Court expressly rejected.[63] It will likely be small comfort to plaintiffs, who must now refute myriad alternative explanations of the case at the motion to dismiss stage, that those alternatives must be "far more likely" and "so overwhelming."[64]

The Second Circuit, in contrast, has heard cases factually similar to both *Twombly* and *Iqbal* and has taken a more conservative approach to plausibility. In *Starr v. Sony*,[65] the court upheld a Sherman Act antitrust complaint. The court distinguished the facts of the case before it from those in *Twombly*, noting that the *Twombly* complaint based its claims of illegal antitrust activity purely on the presence of parallel dealing among the defendant phone companies.[66] In contrast, the Second Circuit noted that the *Starr* complaint also alleged facts regarding the underlying agreement between the defendants.[67] The court found the complaint to be plausible, even though plaintiff did not allege specific dates or times that the defendants' conspiracy supposedly took place. The context of the defendant's parallel actions raised the suggestion of illegal behavior, because the defendants' parallel conduct would have been harmful to their individual interests absent an agreement to act in

55 *Branham v. Dolgencorp, Inc.,* Civil No. 6:09-CV-00037 (W.D. Va. Aug. 24, 2009).
56 *Id.24,*
57 *Id.*
58 630 F. Supp. 2d 170 (D. Mass. 2009).
59 *Id.* at 178, n.2.
60 *Id.* at 177 (citing *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009)).
61 *Id.*
62 *Id.* (citing *Thomas v. Rhode Island*, 542 F.3d 944, 948 (1st Cir. 2008)).
63 *See Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 556).
64 *Chao*, 630 F. Supp. 2d at 177.
65 2010 U.S. App. LEXIS 768 (2d Cir. Jan. 10, 2010).
66 *Id.* at *17.
67 *Id.* at *18-23.

concert.[68] The Second Circuit also decided a case since *Iqbal* that involved Bivens claims against former Attorney General Ashcroft related to post-September 11 law enforcement activity.[69] The Second Circuit rejected the complaint as insufficient under *Iqbal*.[70] The court stated that the plaintiff's passive allegations of conspiracy against undifferentiated plaintiffs did not satisfy the requirement that Bivens actions allege unconstitutional discriminatory intent on the part of each individual defendant.[71] The court's vote to rehear *Arar* en banc, a very rare decision in the Second Circuit, may be an indication of the importance the court placed on establishing a clear pleading standard post-*Iqbal*.[72]

The Ninth Circuit has also adopted a cautious approach to *Twombly* and *Iqbal*. The court has rejected arguments that *Twombly* and *Iqbal* impose a heightened pleading standard, and in *al-Kidd v. Ashcroft*,[73] it upheld a Bivens complaint against former Attorney General Ashcroft that was similar to the complaint in *Iqbal*. The court distinguished *Iqbal*, noting that the complaint included facts that plausibly alleged that the defendant had the requisite knowledge and intent.[74] Importantly, the Ninth Circuit also accepted the Supreme Court's invitation to employ its own subjective expertise in evaluating plausibility. "Drawing on our 'judicial experience and common sense,' as the Supreme Court urges us to do, we find that al-Kidd has met his burden of pleading a claim for relief that is plausible."[75]

In the Tenth Circuit, plausibility relates to the scope of the allegations. "[I]f [the allegations] are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible."[76] This formulation finds support in *Twombly*'s treatment of allegations of parallel conduct.[77] Like some other circuit interpretations, the "plausibility as scope" approach seems to impose a heightened burden on the plaintiff to plead facts that not only support its own claims but also exclude all possible competing explanations.

As these cases illustrate, the conclusory nature of allegations and the plausibility of claims are close questions that involve a degree of subjectivity. Courts are likely to come to different conclusions even on similar sets of facts. But a realistic look at notice pleading reflects similar ambiguities at the margins. Therefore, the direction of pleading standards going forward will likely depend more on the content given to the standard than on whether the standard is inherently liberal or restrictive.[78]

D. Carve-Outs From Plausibility Standard

Courts have declined to extend *Iqbal* and *Twombly* to several areas.

In *Mitchell v. Federal Bureau of Prisons*,[79] the Court of Appeals for the District of Columbia declined to extend *Iqbal* to a case in which the court sought to determine

68 *Id.* at 20-21, 32.
69 *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (*en banc*).
70 *Id.* at 563.
71 *Id.* at 569.
72 *See* Michael B. de Leeuw & Samuel P. Groner, *En Banc Review In the Second Circuit*, 242 N.Y. L. J. 115 (Dec. 18, 2009).
73 580 F.3d 949 (9th Cir. 2009).
74 *Id.* at 975 ("Here, unlike Iqbal's allegations, al-Kidd's complaint 'plausibly suggest[s]' illegal conduct, and does more than contain bare allegations of an impermissible policy." (quoting *Iqbal*, 129 S.Ct. at 1950)).
75 *Id.* at 978 (quoting *Iqbal*, 129 S.Ct. at 1950).
76 *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (pre-*Iqbal*); *Phillips v. Bell*, 2010 WL 517629, at *5 (10th Cir. Feb. 12, 2010) (post-*Iqbal*).
77 *See Twombly*, 550 U.S. at 554.
78 *See* Steinman, 62 STANFORD L. REV. at 1324.
79 587 F.3d 415 (D.C. Cir. 2009).

whether a prisoner's *in forma pauperis* claims satisfied the imminent danger exception to the Prison Litigation Reform Act.[80] Following *Ibrahim v. District of Columbia*,[81] the court held that it would accept all of the plaintiff's allegations as true, regardless of whether they were conclusory or plausible.[82] The court held that Iqbal had "no applicability to [*in forma pauperis*] proceedings where we are exercising our discretion to grant or withhold a privilege made available by the courts. [*In forma pauperis*] proceedings are nonadversarial and implicate none of the discovery concerns lying at the heart of *Iqbal*."[83] The court noted, however, that if IFP status was granted, defendants could then rely on *Iqbal* in seeking to dismiss the underlying complaint.[84] The court's emphasis on the discovery concerns in *Iqbal* resembles the Seventh Circuit's rationale for its sliding scale approach.

In the *NuvaRing* multi-district litigation,[85] the Eastern District of Missouri recently held the master complaint in a multi-district litigation cannot be challenged under *Iqbal*. *Iqbal* does not change the precedent that master complaints are "administrative tools" not intended to be subject to motions to dismiss aimed at dismissing the entire action.[86]

III. ACADEMIC COMMENTARY

The commentary surrounding *Twombly* and *Iqbal* has been as varied as the judicial interpretation.

The *Twombly* decision generated a great deal of academic criticism alleging that it was overturning decades of precedent and flying in the face of the basic principles of notice pleading and the Federal Rules of Civil Procedure. *Iqbal* has done little to change critics' minds. In fact, *Iqbal*'s introduction of a two-part test and its invitation for judges to apply their "personal experience and common sense" has fueled criticism that may be even harsher than that levied against *Twombly*.[87]

However, scholars have also now had some time to attempt to harmonize the case law, and substantial emerging commentary argues that *Twombly* and *Iqbal* are not inherently radical departures from notice pleading and earlier case law.[88]

Adam Steinman's draft article is particularly interesting. In it, Steinman emphasizes the importance of the sequence of the Supreme Court's two-step analysis in *Iqbal*, noting that it is improper for courts to jump immediately to considerations of plausibility.[89] Rather, courts must first engage in the analysis of whether the allegations in a complaint are conclusory.[90] If the complaint pleads non-conclusory allegations for each element of the claim, the plausibility analysis is unnecessary, since a claim logically must be plausible if all of its allegations are entitled to the assumption of truth.[91] In order to evaluate

80 *Id.*
81 463 F.3d 3, 6 (D.C. Cir. 2006).
82 *Id.* at 420.
83 *Id.* (internal citations omitted).
84 *Id.*
85 *In re Nuvaring Prods. Liab. Litig.,* MDL No. 4:08-md-1964 (E.D. Mo. Aug. 6, 2009).
86 Memorandum and Order, at 3, *In re Nuvaring*, PACER Doc. No. 231.
87 *See Pleading Standards*, 123 HARV. L. REV. 252 (2009); Kenneth S. Klein, Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009); Robert L. Rothman, Twombly *and* Iqbal*: A License to Dismiss*, 35 NO. 3 LITIGATION 1 (2009).
88 *See, e.g.,* Robert G. Bone, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009) (asserting that it is incorrect to assume that *Twombly* tightens pleading standards); Edward A. Hartnett, *Taming* Twombly*, Even After* Iqbal, 158 U. PA. L. REV. 473 (2010) (emphasizing *Twombly*'s connection to prior case law); 62 STANFORD L. REV. 1293, n.14 (advancing a theory of "transactional pleading").
89 *Id.* at 24.
90 *Id.*
91 *Id.* at 26.

the conclusory nature of allegations, Steinman advances a theory he calls "plain pleading," in which the facts in a complaint focus on the transaction underlying the claim.[92] Steinman argues that both notice pleading and plausibility pleading are different methods of describing pleading the underlying transaction.[93] This theory of pleading may go a long way toward creating continuity throughout the evolving pleading standards.[94]

IV. THE IMPACT ON DISCOVERY

The plausibility standard's impact on discovery is unclear. Although the *Twombly* Court voiced concern about the cost and abuses of discovery, the Court's "gatekeeper" remedy of addressing pleading standards only impacts discovery issues indirectly.

Nevertheless, the plausibility standard may moderate discovery in a few important ways. Most obviously, some discovery will be eliminated when complaints that fail to meet the plausibility standard are dismissed. In the case of *Twombly*, for example, discovery involving 90 percent of the local telephone subscribers in the nation was rendered unnecessary by the dismissal. As commentators have noted, however, this benefit comes at a cost. As an initial matter, the plausibility standard will create a roadblock for at least some meritorious claims, particularly those claims containing an element of conspiracy or scienter. Evidence regarding elements such as these is typically only in the hands of the defendant. Therefore, a heightened pleading standard will guarantee that plaintiff's allegations of those elements will always be conclusory. Therefore, plaintiffs may find themselves inevitably cut off from the very discovery that they need in order to prove up their allegations.[95] Second, the uncertainties of the plausibility standard are likely to increase the amount of litigation at the pleading stage, something that notice pleading was intended to avoid.[96]

The heightened pleading standard may also indirectly limit discovery by incentivizing parties to plead more facts. Since the permissible scope of discovery under Federal Rule of Civil Procedure 26(b) is determined according to the foundation laid by the facts and allegations in the complaint, supplementing allegations with additional facts may subsequently limit plaintiffs to discovery on their narrowed facts. The uncertainty surrounding the plausibility standard will lead cautious plaintiffs to plead more factual detail than necessary, narrowing the scope of potential discovery even further.

On the other hand, by linking discovery management to pleadings standards, *Twombly* and *Iqbal* may have the perverse effect of strengthening some plaintiffs' demands for comprehensive discovery. Instead of reviewing each discovery request on its merits, courts may deem claims that survive the plausibility analysis to be stronger and therefore deserving of full discovery. The Supreme Court's manifest lack of faith in the district courts' ability to control the discovery process further reinforces an all-or-nothing approach to discovery.[97]

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92 *Id.* at 37-57.
93 *Id.* at 44-49.
94 *See, e.g., Fowler*, 578 F.3d at 212 ("Under the 'plausibility paradigm' . . . these averments are sufficient to give UPMC notice of the basis for Fowler's claim. The complaint pleads how, when, and where UPMC allegedly discriminated against Fowler.") (citiations omitted).
95 *See* Robert Rothman, *Twombly and Iqbal: A License to Dismiss*, 35 No.3 LITIGATION 1, 2 (Spring 2009).
96 *See* Steinman, 62 STANFORD L. REV. at 1355 ("[A] stricter pleading standard has the potential to encourage costly, time-consuming litigation over pleading sufficiency . . . .").
97 *See Twombly*, 550 U.S. at 560 ("Given the system that we have, the hope of effective judicial supervision [of discovery] is slim."); *Iqbal*, 129 S.Ct. at 1953-54 (rejecting the "careful-case-management approach" and finding that it "provides especially cold comfort" in cases involving qualified immunity claims of high-level Government officials).

V. THE ROAD TO RESOLUTION

The cases and literature compiled thus far do not lend themselves to easy reconciliation. It seems likely that the Supreme Court will be required to take up this issue again, if only to attempt to clarify its intentions in *Twombly* and *Iqbal*.