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Take Me Home to Conley v. Gibson, Country Roads: An Analysis of the Effect of Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal on West Virginia's Pleading Doctrine

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# TAKE ME HOME TO CONLEY V. GIBSON, COUNTRY ROADS: AN ANALYSIS OF THE EFFECT OF BELL ATLANTIC CORP. V. TWOMBLY AND ASHCROFT V. IQBAL ON WEST VIRGINIA'S PLEADING DOCTRINE

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1 The title of this article is a play on the lyrics from "Take Me Home, Country Roads." JOHN DENVER, Take Me Home, Country Roads, on POEMS, PRAYERS, AND PROMISES (RCA 1971).
I. INTRODUCTION

Conley\(^2\) is out, and Twombly\(^3\)-Iqbal\(^4\) is in. Conley’s “no set of facts” standard, which has been the heart of federal pleading doctrine for fifty years, has been retired. Twombly and Iqbal raise the threshold test for evaluating the sufficiency of a complaint in federal courts. A complaint now must state more than a legally sufficient claim; it must also disclose a nonconclusory, plausible entitlement to relief.

Federal judges, academics, and Congress followed the usual model of grief through the five stages of loss.\(^5\) Some courts and academics denied that Twombly changed anything, insisting that Conley was still viable.\(^6\) Others wrestled with the Twombly decision and challenged its institutional competence to amend the Federal Rules of Civil Procedure (“the Federal Rules”).\(^7\) One court bargained with Twombly, calling it a “flexible standard.”\(^8\) A few academics lamented the loss of Conley, announcing the death of notice pleading and access to the courts.\(^9\) But in the wake of Ashcroft v. Iqbal, federal courts have had to accept Twombly.\(^10\)

\(^2\) Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (overruled in part by Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)) (“[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

\(^3\) Twombly, 550 U.S. 544 (2007).

\(^4\) Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1953 (2009) (holding that Twombly applies to all claims within the scope of Rule 8, not just anti-trust claims).

\(^5\) See Elisabeth Kübler-Ross & David Kessler, On Grief and Grieving: Finding the Meaning of Grief Through the Five Stages 7 (2005). The five stages of grief are denial, anger, bargaining, depression, and acceptance. Id. Of course, it is a fanciful notion that academics and courts could have comparable reactions to the type of grieving envisioned by Kübler-Ross and Kessler, but the variety of reactions demand a means of classification, and loss is appropriate in light of the thesis of this article.


\(^8\) Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007) (overruled by Iqbal, 129 S. Ct. at 1953).

\(^9\) A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. REV. 431, 431–33 (2008) (“Notice pleading is dead. Say hello to plausibility pleading. . . . [Plausibility pleading] is an unwarranted interpretation of Rule 8 that will frustrate the efforts of plaintiffs with valid claims to get into court.”) (footnote omitted).

\(^10\) Iqbal, 129 S. Ct. at 1953.
Prior to *Twombly-Iqbal*, the motion to dismiss under Rule 12(b)(6)\textsuperscript{11} practically tested only the legal sufficiency of a complaint in what has been called “notice pleading.”\textsuperscript{12} The standard governing the motion to dismiss was articulated in the United States Supreme Court’s opinion in *Conley*,\textsuperscript{13} where a complaint could survive a motion to dismiss for failure to state a claim “unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief.”\textsuperscript{14} Based on this language, a complaint would have to satisfy both a legal and a factual test to state a claim that would entitle the pleader to relief. As a legal test, a complaint had to bring to the defendant’s attention a claim for which the law would provide a remedy. For example, a complaint would fail the legal test if it sought a remedy on the basis of a claim that is missing an element or does not exist at law. In contrast, as a factual test, *Conley* presumed the truth of all facts in the complaint except those facts that were so inconceivable that “no set of facts” exists that could prove the claim for relief.\textsuperscript{15} By setting the pleader’s burden at conceivability, *Conley* thus assured that the motion to dismiss would be primarily a legal test, not a factual test, of complaints.

Since 2007, federal pleading doctrine has undergone a shift, arguably backward, away from notice pleading and in the direction of fact pleading. Whereas the *Conley* standard was primarily a legal test, under *Twombly-Iqbal*, the motion to dismiss for failure to state a claim imports a requirement to plead factual matter that satisfies a heightened factual test.\textsuperscript{16} To satisfy that factual test, a complaint must pass two filters. First, allegations based upon nothing more than a threadbare recitation of the elements of a claim are deemed “conclusory” and not entitled to a presumption of truth.\textsuperscript{17} Any conclusory allegations are removed from the complaint. Second, the remaining allegations are weighed to determine whether they demonstrate a plausible entitlement to re-

\textsuperscript{11} *Fed. R. Civ. P. 12(b)(6).*

\textsuperscript{12} CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FEDERAL PRACTICE & PROCEDURE, § 1202 (3d ed. 2004).

\textsuperscript{13} At least, as argued by the majority in *Twombly*, the quoted language in *Conley* “puzzl[ed] the profession” and affected the analysis of such motions. *Twombly*, 550 U.S. at 563. Nevertheless, critics point out that some courts never followed the quoted language from *Conley* literally. See, e.g., Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 112 (2009) (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (“Nonetheless, as this court has recognized, *Conley* has never been interpreted literally.”)).

\textsuperscript{14} *Conley*, 355 U.S. at 45–46.

\textsuperscript{15} The *Twombly* opinion implicitly acknowledged that conceivability was the standard that courts were following under *Conley* because *Twombly* changed the standard from conceivability to plausibility. See *Twombly*, 550 U.S. at 570 (“Because the plaintiffs have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

\textsuperscript{16} *Id.* at 556–63.

\textsuperscript{17} *Iqbal*, 129 S. Ct. at 1940 (citing *Twombly*, 550 U.S. at 555) (“[T]he tenet that a court must accept a complaint’s allegations as true is inapplicable to the threadbare recitals of a cause of action’s elements, supported by mere conclusory statements.”).
Plaintiffs must nudge their complaints across the line from conceivable to plausible. Any allegations that do not cross that threshold are removed from the complaint. Then, a judge evaluates the surviving allegations to determine whether what remains is legally sufficient to state a claim. For example, a negligence complaint may identify all the elements of a legal claim, but it may be dismissed if, for example, the alleged breach of the standard of care is conclusory, or if an alleged cause of the complainant's injury is implausible.

Although Iqbal may have secured Conley’s retirement in federal courts, it remains to be seen what will become of Conley among state courts. Some states failed to adopt a version of the Federal Rules in the first instance. Other states adopted the rules but failed to adopt Conley. Among the states that adopted both the Federal Rules and Conley, some have followed the federal courts to retire the “no set of facts” standard, and others have rejected it. Most have failed to take a position, and West Virginia falls into this category.

States will have to consider the competing policy interests at issue in considering the Twombly decision. The Twombly court made it clear that the retirement of Conley was made necessary by the rising costs of discovery and its abuse. To remedy this problem, Twombly-Iqbal pleading better protects societal resources from meritless claims by shifting some of the focus in litigation from discovery to pleadings. But judicial efficiency comes at a price. A factual test in early stages of litigation presents a new barrier to discovery not only for me-

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18 Twombly, 550 U.S. at 570 (“Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”).

19 Id. (“Because the plaintiffs here have not nuded their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

20 After Iqbal, there is no likely judicial means to return to the Conley standard, but see pending legislation before Congress cited infra at note 188.

21 See John B. Oakley, A Fresh Look at the Federal Rules in State Courts, 3 Nev. L.J. 354 (2003), for a discussion of states which failed to adopt a version of the Federal Rules, as well as states which adopted a version of the Federal Rules but maintained the prior practice for pleadings.

22 Compare Twombly, 550 U.S. at 578 n.5 (Stevens, J., dissenting) (providing a list of states which followed Conley as of 2007) with Oakley, supra note 21 (providing a list of states which adopted the Federal Rules).


25 See infra Part IV. In Part IV, this Note will argue that the West Virginia Supreme Court of Appeals has yet to take a position and that, while the court’s language shows an increasing affection for rejecting Twombly-Iqbal, it has nonetheless failed to strike a definitive blow.


ritless claims but for legitimate claims as well, running the risk of over-deterrence. States will also have to consider *Twombly-Iqbal* pleading in light of the liberal thrust of the Federal Rules to decide whether the Court’s new pleading standard comports with notions of fairness and to assure that procedure remains the “hand-maid rather than [the] mistress of justice.”

When the debate is settled, will the impact of *Twombly-Iqbal* be isolated to the federal judiciary, or will it revolutionize procedure throughout the country by vanquishing *Conley* everywhere? The answer lies in state courts which have adopted a version of the Federal Rules and *Conley* in the past but have yet to decide whether to adopt the *Twombly* standard. Whether *Twombly-Iqbal* will rise to the next level depends upon the judicial response in state courts like the West Virginia Supreme Court, which have yet to address this question. It is therefore “only a matter of time” before the issue confronts the West Virginia Supreme Court. When it does, will the West Virginia Supreme Court adopt *Twombly-Iqbal*, or will the country roads take West Virginians home to *Conley*?

This Note will examine that question in three Parts. In Part II, this Note will explore the development of pleading doctrine under the Federal Rules before the *Twombly* and *Iqbal* decisions. In Part III, this Note will consider the *Twombly* and *Iqbal* opinions and judicial, academic, and federal legislative responses. Finally, in Part IV, this Note will analyze state court responses to *Twombly-Iqbal*, specifically the West Virginia Supreme Court’s response, to conclude that while the West Virginia Supreme Court may not have completely buried *Twombly-Iqbal*, *Twombly-Iqbal* pleading is not suited to West Virginia’s system of justice; therefore, it should not be adopted.

II. PRE-*TWOMBLEY-IQBAL* HISTORY OF PLEADING

A. **Common Law Pleading and Code Pleading**

Pleadings serve four functions: they (1) provide notice to a defendant of the nature of a plaintiff’s claim, (2) state facts, (3) narrow the issues, and (4) promote judicial efficiency. Pleading regimes emphasized varying aspects of these four functions throughout the history and development of pleadings. The development of pleading regimes may be understood as a history of intergenera-

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I suspect it will be only a matter of time before this Court is confronted with the issue of whether West Virginia should adopt an interpretation of our *Rules of Civil Procedure* akin to that of the United States Supreme Court and should change our standard for dismissing a pleading under Rules 8(a) and (e), and 12(b)(6) of the *West Virginia Rules of Civil Procedure*.

Id.

30 WRIGHT, supra note 12.
tional reactions; succeeding generations of pleading regimes reflected a response to perceived problems with the immediately prior pleading regimes.

Common law pleadings emphasized narrowing the issues. Through a highly “scientific” process, parties would plead issues back and forth, dispensing insufficient claims with demurrer and dispensing issues of law before the judge first, until finally only issues of fact remained for the trier. “The whole grand scheme was premised on the assumption that by proceeding through a maze of rigid, and often numerous, stages of denial, avoidance, or demurrer, eventually the dispute would be reduced to a single issue of law or fact that would dispose of the case.”

The problem with common law pleading was that it was “excruciatingly slow, expensive, and unworkable.”

Common law pleading gradually gave way to code pleading, the so-called “Field Codes.” Under code pleading, the emphasis shifted from narrowing the issues to stating facts. Rather than engage in a back-and-forth contest to parse out the issues, code pleading required a “statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.” The plaintiff’s task was to state the facts constituting a cause of action without pleading evidence and without stating conclusions.

In contrast, the defendant’s task was easy: a general denial was sufficient. The defendant did not have to provide even minimal notice to the plaintiff of the nature of the defenses. Code pleading proved problematic because the distinctions between facts, evidence, and conclusions were merely of degree, not kind. The West Virginia legislature followed the code pleading regime and shared the same frustrations that challenged most courts.

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31 Id.
32 Id.
33 Id.
34 Twombly, 550 U.S. at 573–74 (Stevens, J., dissenting). “Code pleading” is also commonly known as the “Field Code” named after David Dudley Field, who authored the “highly influential New York Code of 1848.” Id. at 574.
35 Wright, supra note 12.
37 Wright, supra note 12.
38 Id. (citing Thomas E. Skinner, Pre-Trial and Discovery Under the Alabama Rules of Civil Procedure, 9 Ala. L. Rev. 202, 204 (1957)).
39 Id.; Twombly, 550 U.S. at 574 (Stevens, J., dissenting). Justice Stevens argued that it is virtually impossible logically to distinguish among ‘ultimate facts,’ ‘evidence,’ and ‘conclusions.’ Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described.
The Adoption of Rule 8(a)(2)

Rule 8 of the Federal Rules was adopted in response to the failures of code pleading. Because of the confusion bred by requiring parties to plead facts under code pleading, the Federal Rules shifted the development of facts in litigation from pleadings to discovery. Rule 8 of the Federal Rules emphasized notice, not defining the issues or the facts, earning the label “notice pleading.”

While the clear emphasis of Rule 8 is upon providing notice, the degree to which pleadings under Rule 8 perform other functions has been unclear since it was drafted. The Federal Rules were drafted by an Advisory Committee, appointed by the United States Supreme Court on June 3, 1935 to prepare and submit a draft of the Federal Rules. Judge Charles E. Clark was designated as


MARLYN E. LUGAR & LEE SILVERSTEIN, W. VA. RULES OF CIVIL PROCEDURE 73–74 (The Michie Company 1960). Lugar and Silverstein note in particular that, while there were statutory reforms to code pleading, “the fundamentals remained very much the same as under the Virginia Code of 1849.” Id. at 73. Lugar and Silverstein particularly highlight the inconsistency of the effect of “pleading the general issue,” e.g., “not guilty,” depending upon the form of action. Id. at 74. For example, a statute of limitations defense was properly within the general issue for ejectment but not trover or assumpsit. Id.

WRIGHT, supra note 12.

See id. (“Because the only function left exclusively to the pleadings by the federal rules is that of giving notice, federal courts frequently have said that the rules have adopted a system of ‘notice pleading.’”); Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 451 (1986) (“Whatever the earlier function of pleadings, the stated modern justification is limited to notice.”); see also Conley, 355 U.S. at 47–48 (“Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”); Swierkiewicz v. Sorena N. A., 534 U.S. 506, 511–14 (2002) (referring to the system of “notice pleading.”). Academics now debate whether the pleading regime post Twombly-Iqbal should properly be called notice pleading. Compare Spencer, supra note 9, at 431 (“Notice pleading is dead. Say hello to plausibility pleading.”) (footnote omitted) with Douglas G. Smith, The Twombly Revolution?, 36 Pepp. L. Rev. 1063, 1098 (2009) (“[T]he Twombly standard does not represent a deviation from traditional notice pleading.”).

the Reporter for the original Advisory Committee. Judge Clark, in particular, espoused a liberal perspective on procedural reform, believing that cases should be decided on their merits and not on the basis of procedural technicalities.

While the resulting Federal Rules brought about a new regime of procedure, the provisions were drawn from a variety of other sources and preexisting practices. The language from Rule 8 was adapted from the language in code pleading, particularly the phrase “facts constituting the cause of action.” “Facts” was qualified by the phrase, “[a] short and plain statement of the facts,” and “cause of action” was changed to “[a] claim showing that the pleader is entitled to relief.” By changing the language, the Advisory Committee intended to avoid the distinctions among “evidentiary facts,” “ultimate facts,” and “conclusions,” as well as the confusion of proving a “cause of action” under code pleading. Hence, under Rule 8, a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief . . . .”

Yet, it is unclear whether Rule 8 instituted a regime of pure “notice pleading,” that is, a rule whereby the only function of pleading is notice and no factual matter is required. Much of Judge Clark’s rhetoric at that time indicated a clear intent to adopt such a system of notice pleading. Judge Clark indicated that the Advisory Committee did not intend the pleadings to supply proof or evidence, but rather, to distinguish the case from all others on the record and “to serve as a basis for the binding force of the judgment.” However, with the idea of “notice pleading” floating around the academic ether, the

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46 See Clark, supra note 28.
47 See WRIGHT, supra note 12, § 1201.
48 See FED. R. CIV. P. 8(a)(2).
49 WRIGHT, supra note 12, at § 1202.
50 FED. R. CIV. P. 8(a)(2).
51 Geoffrey C. Hazard, Jr., From Whom No Secrets Are Hid, 76 TEX. L. REV. 1665, 1685 (1998) (“Prior to the line of lower court cases that culminated in Conley v. Gibson, it was quite possible to interpret Rule 8’s requirement of a ‘short and plain’ statement to require, in essence, a detailed narrative in ordinary language . . . .”).

[T]he old requirement that a party must plead only facts, avoiding evidence on the one hand and law on the other, was logically indefensible, since the actual distinction is at most one of degree only and in actual practice it caused more confusion than any possible worth it might have as admonition.

Id.
53 Id. (citing AM. BAR ASS’N, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 40–46 (1939)) [hereinafter WASHINGTON INSTITUTE].
Advisory Committee notably failed to include that phrase in the rules. Moreover, Judge Clark observed that Rule 8 was susceptible to interpretation about the degree of detail pleadings would require and that his views might "be considered rather extreme," even to members of the Advisory Committee. When asked whether Rule 8 does away with the rule on pleading "ultimate facts," Judge Clark responded that good pleading would call for such general fact pleading, but a plaintiff would not be "hung, drawn, and crucified" for failing to follow the rule. Judge Clark nevertheless maintained that some factual matter would be required, at least enough to satisfy the model on the former Form 9. Adding to the confusion, however, Judge Clark later argued that "notice pleading," in its pure sense, is not the prevailing idea among the judiciary. Rather, he argued, the prevailing idea among the judiciary is only a moderate form of notice pleading, one that requires the pleader to state facts upon which the claim is based. The Federal Rules, according to Judge Clark, are an example of such a form of moderate notice pleading. Thus, it might be argued that even Judge Clark did not believe that the Federal Rules required courts to administer a regime of liberal notice pleading. Instead, it may have simply permitted courts to adopt liberal notice pleading judicially.

While the Advisory Committee intended to require a degree of factual matter in pleading, it is unclear how much. Form 11, formerly Form 9 in the official forms, contains a very short statement of the facts, to wit: "On date, at place, the defendant negligently drove a motor vehicle against the plaintiff." In discussing former Form 9, Judge Clark noted that the lesser allegation, "I am suing 'X' because he caused me injury by negligence," would not suffice under

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54 Id. (quoting AM. BAR ASS'N, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO 220 (William W. Dawson ed., 1938) [hereinafter CLEVELAND INSTITUTE]).
55 Id. (quoting CLEVELAND INSTITUTE, supra note 54 at 230–31).
56 See id. at 14 (quoting WASHINGTON INSTITUTE, supra note 53, at 69); see also FED. R. CIV. P. APP. FORM 11. Former Form 9 is now Form 11.
57 Campbell, supra note 52, at 15–16 (quoting CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38, at 240 (2d ed. 1947)) (arguing that "notice pleading" requires only "a very general reference to the happening out of which the case arose" without a need to "state the details of the cause of action").
58 Id. at 16.
59 Id. Judge Clark also called pure notice pleading "a nice hopeful thing," but he urged that it "isn't anything that we can use with any precision." Marcus, supra note 43, at 451 (citing Charles E. Clark, PLEADINGS UNDER THE FEDERAL RULES, 12 WYO. L.J. 177, 181 (1958)). However, Marcus points out that other scholars have argued that Judge Clark's views about pleading changed with time after the enactment of the Federal Rules, representing a political retreat. Id. at n.113 (citing Michael E. Smith, Judge Charles E. Clark and the Federal Rules of Civil Procedure, 85 YALE L.J. 914, 925–26 (1976)).
60 See FED. R. CIV. P. 84 ("The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.").
61 FED. R. CIV. P. APP. FORM 11.
the Federal Rules.62 By a comparison of Form 11 to Judge Clark’s hypothetical, there are two types of facts that differ: first, there are the background facts—date and place—and second, there are facts which disclose the manner of the occurrence—“drove a motor vehicle.” The pleading function of notice would require allegations of background facts as to distinguish the claim on the record. The manner of the occurrence, by motor vehicle, also advances the goal of notice by apprising the defendant to the nature of the claim, an automobile negligence claim. Of course, even Form 11 leaves room for dispute about the facts such that it may even be unclear what legal theory is alleged.63 But, what if, for example, the complaint identifies the background facts but does not identify the manner of the occurrence? That is, while Form 11 satisfies the requirements of a complaint, is there an even simpler complaint that will suffice?

C. Early Federal Opinions Interpreting Rule 8

After the Federal Rules were promulgated, courts began to ask these questions and others. One of the early cues about what the Federal Rules required came from an opinion written by Judge Clark himself.64 In Dioguardi v. Durning, a pro se plaintiff had two claims. First, the plaintiff alleged that on an auction day, when the defendant sold merchandise at “public custom,” “he sold my merchandise to another bidder with my price of $110, and not of his price of $120.”65 Second, the plaintiff alleged that “three weeks before the sale, two cases, of 19 bottles each case, disappeared.”66 It is unclear from the face of the complaint what laws the plaintiff alleges were violated, particularly because there was no citation to substantive law. Yet, Judge Clark found that the basic facts alleged in the complaint gave rise to an inference that the plaintiff and the defendant were in a dispute about whether Dioguardi or his consignor in Italy owed money due on the import of medical tonics.67 Thus understood, the allegation that the defendant sold to another bidder at the plaintiff’s price implies that the defendant violated the rules for public auction of unclaimed merchandise under 19 U.S.C. § 1491.68 Further, the allegation about disappearing bottles disclosed a claim against the defendant for conversion.69 Judge Clark con-

62 Campbell, supra note 52, at 14 (quoting Washington Institute, supra note 53, at 69).
63 There are many possible factual variations because there is factual ambiguity in the use of the phrase “against the plaintiff.” It is unclear whether the defendant was in a vehicle collision (which is probably what the drafters had in mind), a vehicle collision with a pedestrian on a sidewalk, or if the defendant was driving the plaintiff’s vehicle and negligently damaged it. The factual discrepancy would impact different legal theories and defenses.
64 See Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).
65 Id.
66 Id.
67 Id.
68 Id. at 775.
69 Id.
cluded that the complaint should not be dismissed under the Federal Rules because “however inartistically they may be stated, the plaintiff has disclosed his claims...”

Judge Clark’s opinion in Dioguardi had a significant impact on the development of the pleading regime. Reading Judge Clark’s opinion in Dioguardi, it appears that the Advisory Committee intended to require only a minimal amount of factual matter, only enough to disclose a claim when aided by inferences to be drawn from the complaint. In response to the Dioguardi opinion, there was a movement to amend Rule 8 to reinstate the code pleading language of “facts constituting the cause of action.” Nevertheless, the 1955 Advisory Committee rejected the call to amend Rule 8, arguing that there was a “plethora” of circumstances, occurrences, and events alleged in the Dioguardi complaint that disclose the nature of what happened. Accordingly, while the Advisory Committee notes in 1955 were not officially adopted, the opinion in Dioguardi has garnered the endorsement of a subsequent Advisory Committee as a sufficient complaint for purposes of Rule 8.

D. The Apex of Liberal Pleading: Conley v. Gibson

After nearly twenty years following the promulgation of the Federal Rules, the United States Supreme Court finally provided a standard to test the sufficiency of fact matter contained within a complaint in Conley v. Gibson. It all began with a complaint alleging discrimination under the Railway Labor Act. The plaintiffs, African-American members of the Brotherhood of Railway and Steamship Clerks, alleged that their collective bargaining agent discriminated against them in negotiations by not giving them representation comparable to that of white members of the union. Specifically, the plaintiffs alleged that the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees. The

70 Dioguardi, 139 F.2d at 775.
71 However, it is also possible that Judge Clark was articulating a rule for the Second Circuit and not for Rule 8 generally. See Marcus, supra note 43 (noting that Judge Clark believed that Rule 8 gave judges discretion about the amount of detail required).
72 See WRIGHT, supra note 12, § 1201.
73 See id. at § 1201 n.11.
74 See id. at § 1201.
75 Conley, 355 U.S. at 41.
76 Id. at 45–46.
78 Conley, 355 U.S. at 42–43.
complaint then went on to allege that the Union had failed in
general to represent Negro employees equally and in good
faith.\footnote{\textit{Id.} at 43.}

The defendants moved to dismiss on several grounds, among them ju-
risdiction and failure to state a claim.\footnote{\textit{Id.}} The district court and the circuit court
on appeal affirmed the dismissal of the complaint on the ground of jurisdiction,
without addressing whether the complaint failed to state a claim.\footnote{\textit{Id.}} After reversing
the dismissal on grounds of jurisdiction, the Court took the initiative to ad-
dress whether the complaint stated a claim for relief.\footnote{\textit{Id.}}

The Court addressed the proper standard upon which to review the fac-
tual sufficiency of a complaint, saying, "[i]n appraising the sufficiency of the
complaint we follow, of course, the accepted rule 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 in support of his claim which would entitle
him to relief."\footnote{\textit{Id.}} The defendants claimed that "the complaint failed to set forth
specific facts to support its general allegations of discrimination . . ."\footnote{\textit{Id.}} But the
Court responded that the Federal Rules
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. The illustrative forms appended to
the Rules plainly demonstrate this. Such simplified "notice
pleading" is made possible by the liberal opportunity for dis-
covery and the other pretrial procedures established by the
Rules to disclose more precisely the basis of both claim and de-
fense and to define more narrowly the disputed facts and issues.
Following the simple guide of Rule 8(f) that "all pleadings shall
be so construed as to do substantial justice," we have no doubt

\footnote{\textit{Id.} at 45–46 (citing Leimer v. State Mut. Life Assur. Co., 108 F.2d 302 (8th Cir. 1940);
Dioguardi, 139 F.2d at 774; Cont'l Collieries v. Shober, 130 F.2d 631 (3rd Cir. 1942)). The Lei-
mer court held, "[W]e think there is no justification for dismissing a complaint for insufficiency of
statement, except where it appears to a certainty that the plaintiff would be entitled to no relief
under any state of facts which could be proved in support of the claim."\textit{Leimer}, 108 F.2d at 306.
The Shober court held that a complaint should not be dismissed "except where it appears to a
certainty that the plaintiff would not be entitled to relief under any state of facts which could be
proved in support of the claim."\textit{Shober}, 130 F.2d at 635. However, Judge Clark's opinion in
Dioguardi does not explicitly reference a "no set of facts" or "any set of facts" standard.}

\footnote{\textit{Conley}, 355 U.S. at 47.}
that petitioners’ complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. 85

In the above quoted language, the Court articulated two important points of law. First, because a complaint will suffice if the functional purpose of notice is satisfied, the Court endorsed the Federal Rules as an embodiment of “notice pleading.” Second, the working standard for factual sufficiency on a motion to dismiss for failure to state a claim is that the complaint will not be dismissed unless there is “no set of facts” which would entitle the plaintiff to relief. That is, a claim would be sustained unless it is impossible for a plaintiff to prove the claim, sustaining any complaint that could conceivably be proven. On this ground, the Conley Court reversed the dismissal of the plaintiff’s complaint. 86

Conley represents the apex of liberal pleading within the federal system. Because the only purpose of the complaint was notice, the plaintiff need only plead enough facts to provide notice of the nature of the claim. Because a complaint did not need to constitute a prima facie showing of a cause of action, it was not necessary to identify all elements of the claim as long as the court could draw an inference from the complaint that the element was satisfied. 87 Further, the complaint did not need to identify or intend to identify a sustainable theory of liability as long as the elements of such a theory could be inferred from the face of the complaint. 88 Finally, any complaint that stated a conceivable right to relief was sufficient.

III. JUDICIAL RESISTANCE TO CONLEY: THE REVIVAL OF FACT PLEADING AND TWOMBLY

A. The Revival of Fact Pleading: Judicially Heightened Pleading

Conley settled the debate about the applicable pleading standard under Rule 8 for twenty years. 89 But federal courts began to believe that filings escalated throughout the 1960s and 1970s, and that the cost of discovery allowed the threat of discovery to arm plaintiffs with a strong hand for negotiating settle-

85 Id. at 47–48 (footnotes omitted).
86 Id. at 48.
87 WRIGHT, supra note 12, § 1216 (“Pleadings need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided.”).
88 Id.
89 Marcus, supra note 43, at 434.
ments. The Supreme Court itself argued that discovery was increasingly used as a threat to increase a plaintiff’s bargaining position. Whether the courts were accurate in believing that the system was overrun with abusive suits has been subject to much scholarly debate, but it is undisputed that this belief gave rise to a judicial movement, what Professor Marcus has called “[t]he [r]evival of [f]act [p]leading.” Armed with the belief that abusive, frivolous complaints were crowding federal dockets, federal judges began to require heightened pleadings for certain types of claims, like civil rights claims. For example, the Fifth Circuit required plaintiffs in § 1983 actions to include a high degree of particularity in their pleadings. The United States Supreme Court responded in 1993 by rejecting the Fifth Circuit’s heightened pleading standard for § 1983 claims alleging municipal liability. However, federal courts proved anxious to limit the breadth of the Court’s opinion to municipal liability in civil rights.

90 See, e.g., Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976) (abrogation recognized by Alston v. Parker, 363 F.3d 229, 233 (3d Cir. 2004)). The court stated, In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants public officials, policemen and citizens alike, considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.

91 Id. (quoting Kauffman v. Moss, 420 F.2d 1270, 1276 (3d Cir. 1970)).

92 Many scholars urge that the courts’ fears were well founded. Professor Marcus observed, “The result of this synergy was a litigation industry in which the value of litigation appeared only slightly connected to the merits of claims being asserted—a ‘gigantic slot machine’ approach to litigation in which the status of being a defendant overshadowed the merits of the underlying dispute.” Marcus, supra note 43, at 442–43. On the other hand, scholars such as Linda S. Mullenix have urged that the rise of abusive suits is but a myth. See Linda S. Mullenix, The Pervasive Myth of Pervasive Discovery Abuse: The Sequel, 39 B.C. L. REV. 683, 684–85 (1998) (arguing that empirical studies show that there has been no increase in discovery events throughout the life of the Federal Rules and that evidence suggesting otherwise is merely anecdotal).

93 Marcus, supra note 43, at 444–51.

94 See, e.g., Rotolo, 532 F.2d at 922; Jones v. Cnty. Redevelopment Agency, 733 F.2d 646 (9th Cir. 1984); Rodriguez v. Avita, 871 F.2d 552 (5th Cir. 1989).

95 See Rodriguez, 871 F.2d at 554. The court reasoned, In view of the enormous expense involved today in litigation, however, of the heavy cost of responding to even a baseless legal action, and of Rule 11’s new language requiring reasonable inquiry into the facts of the case by an attorney before he brings an action, applying the stated rule to all § 1983 actions has much to recommend it.


97 Spencer, supra note 9, at 437–38.
The United States Supreme Court once again admonished federal courts to stop crafting judicial exceptions to Rule 8 in Swierkiewicz v. Sorema N.A.\textsuperscript{98} The Second Circuit required plaintiffs alleging employment discrimination to allege all the elements of a prima facie claim, including circumstances sufficient to give rise to an inference of discrimination.\textsuperscript{99} But the Supreme Court rejected the Second Circuit’s standard, saying that “prima facie” is an evidentiary standard, not a pleading requirement.\textsuperscript{100} Ultimately, the Court held that complaints generally do not need to satisfy a heightened pleading standard, and the exceptions are specifically listed in Rule 9(b).\textsuperscript{101} Thus, the Court sent a strong message that heightened pleading would only apply to the claims listed in Rule 9(b) and simplified notice pleading would apply to everything else.\textsuperscript{102}

But while the Supreme Court seemingly closed the door on the revival of fact pleading, the perceptions that gave rise to the judicial trend persisted. Once again armed with the belief in costly modern litigation, rising meritless claims, and increases in court filings,\textsuperscript{103} the Supreme Court retired Conley’s “no set of facts” language in Bell Atlantic Corp. v. Twombly.\textsuperscript{104}

\textsuperscript{98} 534 U.S. 506 (2002).

\textsuperscript{99} Swierkiewicz, 534 U.S. at 509 (citing Tarshis v. Riese Org., 211 F.3d 30, 35–36, 38 (2d Cir. 2000); Austin v. Ford Models, Inc., 149 F.3d 148, 152–153 (2d Cir. 1998)).

\textsuperscript{100} Swierkiewicz, 534 U.S. at 511. The Court also implied once again that the Federal Rules follow a regime of “notice pleading.” See id. (“In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the McDonnell Douglas framework does not apply in every employment discrimination case.”).

\textsuperscript{101} Id. at 513. While the exceptions are listed in Rule 9(b), the Court significantly fails to say that the only exceptions are in Rule 9(b). Judicially-created exceptions to Rule 8(a)(2) are not gone (although their use may be unnecessary in light of Twombly-Iqbal). The Court cites Leatherman for the classic rule of construction, expressio unius est exclusio alterius, reasoning that because employment discrimination is not listed in Rule 9(b), the drafters did not intend for it to be there. However, the Court came short of completely eliminating all judicially crafted exceptions because the Court does not unequivocally say that the only exceptions are contained within Rule 9(b). For a discussion of heightened pleading throughout the country that survived Swierkiewicz, see generally Christopher M. Fairman, The Myth of Notice Pleading, 45 ARIZ. L. REV. 987 (2003). Nevertheless, the Court sent a signal that it would not lightly sustain judicially-created exceptions to Rule 8(a)(2).

\textsuperscript{102} The 2002 Swierkiewicz opinion is a relatively recent entry to the Court’s pleading jurisprudence, and judicial exceptions to Rule 8(a)(2) continue to survive. See id. Professor Fairman has analyzed the reality of pleading practice in federal courts and has dismissed the idea that there are simply two regimes at play—notice pleading for Rule 8 and fact pleading for Rule 9. See id. at 989. Instead, pleading should be understood as a circular model of the degree of factual particularity required. Id. Complaints stating too little (conclusory) or too much (prolix) are dismissed, and the amount of factual detail that will suffice between those extreme varies with the cause of action. Id.

\textsuperscript{103} Although the reasons listed here are limited to the ostensible motivation behind the Twombly opinion, one more is considered here. The Supreme Court had just cut off (or at least greatly curtailed) the federal court system’s chosen method to respond to perceived docket pressure in Swierkiewicz. Although the Court seemed to have settled the issue in Leatherman, the circuits’ creative efforts to distinguish Leatherman demonstrate the desperation for relief which gave rise to the need for judicial forms of heightened pleading. When the Court’s command failed once
B. Conley Retired: Bell Atlantic Corp. v. Twombly¹⁰⁵

The story of Twombly began in 1984 when the federal government split the local and long distance telecommunication industry.¹⁰⁶ The local telecommunication industry was left to a series of regional service providers—the Baby Bells or Incumbent Local Exchange Carriers (ILECs)¹⁰⁷—operating pursuant to a government-sanctioned monopoly while the Atlantic Telephone & Telegraph Company (AT&T) was divested of its right to compete in the local telecommunication industry.¹⁰⁸ In turn, the long distance industry was left to the competitive markets.¹⁰⁹ But Congress withdrew the local monopolies in 1996 and required that the ILECs facilitate private entrants, Competitive Local Exchange Carriers (CLECs)¹¹⁰, to the industry.¹¹¹

William Twombly and Lawrence Marcus brought an action against the big four ILECs¹¹² on behalf of all local telephone subscribers in the United States alleging that the ILECs were engaged in an unlawful anti-trust conspiracy.¹¹³ In the complaint, the plaintiffs alleged that the ILECs conspired to restrain trade through (1) parallel conduct and (2) unlawful agreements to keep CLECs out of the market in violation of § 1 of the Sherman Act.¹¹⁴ Specifically, the complaint alleged,

In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high

following Leatherman, there was a strong probability that it would fail again or that courts would find a less desirable way to seek relief. Rather than wait and see, the Court came up with an alternative to assure that the inevitable free-fall to heightened pleading would at least be controlled.

¹⁰⁴ Twombly, 550 U.S. at 562–63.
¹⁰⁵ Id. at 544.
¹⁰⁶ Id. at 549.
¹⁰⁷ Id.
¹⁰⁸ Id.
¹⁰⁹ Id.
¹¹⁰ Twombly, 550 U.S. at 549.
¹¹¹ Id.
¹¹² BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc., successor-in-interest to Bell Atlantic Corporation. Together, the Baby Bells controlled approximately 90% of the local telecommunication industry in the forty-eight contiguous States. Id. at 550 n.1.
¹¹³ Id. at 550.
¹¹⁴ Id. at 550–51. In relevant portion, § 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Sherman Act, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. § 1 (2006)).
speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.115

The Supreme Court granted certiorari "to address the proper standard for pleading an anti-trust conspiracy through allegations of parallel conduct."116 The Court then created a framework with which to evaluate the sufficiency of facts within the pleadings.117 Within this framework, the Court identified three categories of facts in pleadings: conclusory facts, facially neutral facts, and suggestive facts.118 Complaints must contain facts which cross two thresholds: (1) the threshold between conclusory and facially neutral and (2) the threshold between facially neutral and suggestive.119

First, a complaint must cross the threshold from conclusory to facially neutral. The Court held that formulaic recitations of the elements of a cause of action alone are deemed conclusory or speculative and, therefore, are not entitled to the presumption of truth.120 The Court stated,

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,121 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 . . . .122 Factual allegations must be enough to raise a right to relief above the speculative level123 . . . on the assumption that all

115 Id. at 551.
116 Twombly, 550 U.S. at 553.
117 Id. at 554–56.
118 Twombly, 550 U.S. at 557 (citing DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 56 (1st Cir. 1999)).
119 See Spencer, supra note 9, at 448 (arguing that the Supreme Court has classified three "zones of pleading" in which only suggestive facts are sufficient).
120 Twombly, 550 U.S. at 554–56.
121 Id. at 555 (citing Conley v. Gibson, 355 U.S. 41, 47 (1957); Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)).
122 Twombly, 550 U.S. at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986) (holding that courts "are not bound to accept as true a legal conclusion couched as a factual allegation.")).
123 Id. (citing WRIGHT, supra note 12 ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.")).
the allegations in the complaint are true (even if doubtful in fact) . . . .

The Court emphasized that Rule 8(a)(2) does not eliminate the requirement to plead facts, thereby settling that the Federal Rules require pleadings to serve functions other than notice.

Second, a complaint must contain facts which cross the threshold between facially neutral facts and suggestive facts. Whether a fact crosses the threshold between facially neutral and suggestive turns upon whether the fact shows a plausible entitlement to relief under the substantive law governing the claim.

The policy driving the Court’s decision was sprinkled throughout the remainder of the opinion. In particular, the Court focused upon plaintiffs’ incentive to use discovery as a tool to increase the settlement value for meritless claims. The Court explained that the “practical significance” of the plausibility standard is that a “largely groundless claim” could “take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.” The plausibility standard gives effect to this policy by measuring the merit of claims and dismissing claims with a low probability of success. The Court argued that the time to apply a filter for meritless claims is at the motion to dismiss stage because that is the point of minimum expense and exposure to litigation and therefore, most effectively destroys the incentive to pursue meritless claims. “[C]areful case management,” the Court insisted, “is no answer” because courts have not been effective at dismissing meritless cases during discovery.

124 Id. at 555–56 (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1; Neitzke v. Williams, 490 U.S. 319, 327 (1989) (“Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations.”); Scheuer v. Rhodes, 416 U.S. 323, 236 (1974) (a well-pleaded complaint may proceed even if it appears “that a recovery is very remote and unlikely”).
125 Twombly, 550 U.S. at 556 n.3.
126 Id. at 556.
127 Although the definition of suggestive facts provided here is vague, it is the only generally-applicable definition that may be read into the Twombly opinion because the Court analyzed the meaning of “suggestive” by reference to “prior rulings and considered views of leading commentators” on anti-trust law. Id. at 556. Iqbal would later clarify the meaning, but it did so without the support of two Justices in the majority of the Twombly opinion, including the author of the Twombly opinion. The vagueness of the Twombly decision that now strikes the reader became the subject of a debate among even those who joined in the Twombly majority.
128 Twombly, 550 U.S. at 557–58. In particular, the Court examined the trend of weaponizing discovery in anti-trust litigation. See id. at 558–59 (citing several cases and commentaries which all suggest that anti-trust actions are particularly susceptible to discovery abuse).
129 Id. at 557–58 (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).
130 Id. at 558 (citing WRIGHT, supra note 12, at 233–34).
131 Id. at 559.
The Court retired Conley's "no set of facts" standard. Retirement was made necessary, the Court urged, because a literal reading of the Conley language would sustain any claim unless it was impossible to prove, a standard which would sustain conclusory allegations. By implication, then, the Court did not suggest that the Conley holding was incorrect, but rather, that it was inartfully stated and therefore susceptible to misinterpretation. In fact, the Court went on to cite several lower court opinions and scholars (some of which are discussed supra[134]) which "correctly" interpreted Conley as a rule that could not be read literally. But, to the Court, many courts read Conley too literally.

Therefore, the Court held,

[T]he passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.[135]

The final point of law to consider (and perhaps the one subject to the greatest ambiguity) is that the Twombly Court insisted that it was not requiring heightened pleading.[136]

In reaching this conclusion, we do not apply any "heightened" pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished "by the process of amending the Federal Rules, and not by judicial interpretation."[137] . . . On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires.[138]

Hence, the Court preserved the rule in Swierkiewicz which prohibits judicial exceptions to Rule 8 and emphasized that its holding is to be applied generally.

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132 Twombly, 550 U.S. at 562–63.
133 Id. at 561–62.
134 See Hazard, supra note 51.
135 Twombly, 550 U.S. at 563.
136 Id. at 569 n.14.
137 Id. (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002)).
138 Id. at 569 n.14.
In applying the procedural law, the Court searched for facts suggestive of an entitlement to relief.\textsuperscript{139} Under Section 1 of the Sherman Act, a contract, agreement, or conspiracy to restrain trade is actionable ("concerted agreement").\textsuperscript{140} The allegation that the ILECs were engaged in a concerted agreement is a conclusory allegation not entitled to the presumption of truth. It fails to cross the first threshold. There are two facts that could potentially show concerted agreement: (1) the "absence of any meaningful competition between [the ILECs] in one another's markets," and (2) "the parallel course of conduct that each [ILEC] engaged in to prevent competition from CLECs."\textsuperscript{141}

First, the absence of competition is merely a neutral fact. In light of the divestiture of the ILECs' monopolies, it was only "natural" that individual ILECs would resist new competition pursuant to "routine market conduct."\textsuperscript{142} The plaintiffs also argued that there is a collective incentive among the ILECs to resist competition, but each ILEC naturally would still act upon the collective interest whether or not they had violated the Sherman Act.\textsuperscript{143} The lack of competition is neutral in that it fails to "nudge" the likelihood of a concerted agreement from conceivable to plausible.\textsuperscript{144} As a result, it fails to cross the second threshold.

Second, parallel conduct is also a neutral fact. Under § 1 of the Sherman Act, parallel conduct alone is not actionable, but concerted agreement is actionable.\textsuperscript{145} Although parallel conduct may be evidence of a concerted agreement, the Court reasoned that parallel conduct does not advance the plausibility of a claim of a concerted agreement because, as the complaint itself suggested, it was in the ILECs' best interest to maintain its turf, even without a concerted agreement.\textsuperscript{146} Accordingly, parallel conduct does not show a plausible entitlement to relief and fails to cross the second threshold. Therefore, there are no facts within the complaint suggestive of a concerted agreement, so the Court held that the allegations failed to state a claim for relief under the Sherman Act, and the complaint was dismissed.\textsuperscript{147}

\textsuperscript{139} Id. at 564.
\textsuperscript{140} Id. at 556–57 (holding that there must be "enough factual matter (taken as true) to suggest that an agreement was made").
\textsuperscript{141} Twombly, 550 U.S. at 565–66.
\textsuperscript{142} Id. at 566.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{146} Id. at 568. It is possible that the plaintiffs pled themselves out of court on this ground by providing reasons which made the existence of a concerted agreement, as shown by parallel conduct, factually neutral.
\textsuperscript{147} Twombly, 550 U.S. at 570.
C. Confusion in the Aftermath of Twombly

Following Twombly, pleading rules became a "hot topic" in civil procedure.\footnote{Robert G. Bone, Twombly, Pleading Rules, and Regulation of Court Access, 94 IOWA L. REV. 873 ("Pleading rules are once again a hot topic in civil procedure circles.").} Only two weeks after the Supreme Court "retired" Conley in Erickson v. Pardus, the Court once again recited language from Conley and Swierkiewicz.\footnote{See Erickson v. Pardus, 551 U.S. 89 (2007) (Twombly was issued May 21, 2007, and Erickson was issued June 4, 2007).} Although the Court did not quote the "no set of facts" language from Conley, it reiterated the old philosophy that a complaint need only provide fair notice of the claim and its grounds,\footnote{Id. at 93 (citing Conley, 355 U.S. at 47).} and the Court must accept as true all factual allegations in the complaint.\footnote{Id. at 94 (citing Swierkiewicz, 534 U.S. at 508 n.1). Although it may be tempting to suggest that the Court was focused upon the substantive law and was casually reciting the procedural standards, the opinion was per curiam, and the substantive law was largely a recitation of accepted case law. See id. at 90 (citing Estelle v. Gamble, 429 U.S. 97, 104–05 (1976)). It is unclear why the Court would review such a claim if it were not adding to the Twombly case law. In this regard, it is notable that Justice Scalia dissented from granting the petition for writ of certiorari. Id. at 95.}

Twombly proved confusing to the lower courts, and Erickson did not help. Just a few weeks after the Twombly opinion, in Iqbal v. Hasty, the Second Circuit observed that Twombly fostered "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings . . ."\footnote{Id. at 94 (quoting Estelle, 429 U.S. at 106). The Court then held that the complaint "alone was enough to satisfy Rule 8(a)(2)." Id. While Erickson is illustrated here to highlight the grounds for a belief among some courts that Twombly may not be generally applicable, a perspective that is later put to rest by Iqbal, even in light of Iqbal, this opinion is difficult to reconcile with plausibility pleading. It is questionable, and beyond the scope of this Note, as to whether Conley may survive as a vestige in complaints filed by pro se litigants.} The Second Circuit identified factors that pointed in the direction of a new pleading standard and factors that pointed away from a new pleading standard.\footnote{Id. at 155–57.}

Four factors pointed toward a new standard. First, Twombly disavowed Conley’s "no set of facts" language.\footnote{Id. at 155.} Second, the Court indicated that plead-
ings must do more than provide notice. Third, the Court rejected the alternative of "careful case management" in discovery to weed out meritless claims. Finally, the Court liberally used some variation of the term "plausible" to describe the proper pleading standard.

However, five factors pointed away from a new standard, suggesting that the Twombly opinion might be limited to anti-trust or other similar types of claims. First, the Court insisted that it would not require heightened pleading and embraced Swierkiewicz. Second, the Court approved the negligence complaint in former Form 9, which appears to make a conclusory allegation of negligence. Third, because the policy underlying the Court's decision was to subvert abusive discovery, it implied that the resulting opinion only applied to cases with costly discovery. Fourth, although the Court disapproved of Conley, it left undisturbed its prior case law which suggested that summary judgment is the proper mechanism to weed out unmeritorious claims. Finally, the Erickson opinion again cited Conley for the proposition that the purpose of pleadings is to provide notice.

After weighing these factors, the Second Circuit concluded that the "essential message" from the Twombly Court was that Rule 8 should be governed by a "flexible ‘plausibility standard’" whereby certain claims would require amplification to demonstrate a plausible entitlement to relief.

However, "the mammoth weight of the case law" from other circuits suggested that Twombly was not limited to its "initial contextual boundaries."

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155 Id. at 156.
156 Id.
157 Id.
158 Hasty, 490 F.3d at 156.
159 Id.
160 Id. at 156–57.
161 Id. at 157.
162 Id.
158 Id. at 157–58. Some federal district court judges were reluctant to apply Twombly wholesale, including Judge John T. Copenhaver from the Southern District of West Virginia. See Massey Energy Co. v. Supreme Court of Appeals of West Virginia, Civil Action No. 2:06-0614, 2007 U.S. Dist. LEXIS 70330, at *9 n.4. (S.D. W. Va. Sept. 21, 2007) ("In [Twombly], the Supreme Court ‘address[ed] the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct . . . .’"). Id. ("Although so limited, the majority opinion nevertheless contains broader language some believe to be in tension with the settled notice pleading standards arising from [Conley] and its progeny . . . ."); Allman v. Chancellor Health Partners, Inc., Civil Action No. 5:08CV155, 2009 U.S. Dist. LEXIS 44501, at *9 (N.D. W. Va. May 26, 2009) ("Specifically, it is unclear whether Twombly alters the pleading standard only for complex antitrust cases or whether it has a broader application."). Academics also questioned whether Twombly would be applied universally. See, e.g., Bradley, supra note 6, at 122 ("In sum, we must read Twombly in the context of antitrust law . . . . ‘Plausibility’ is an element of a certain kind of antitrust conspiracy claim, not a standard for pleadings in general.").
While the Court's pronouncement of heightened pleading may have been too equivocal for the Second Circuit, all other circuits considering the question applied *Twombly* outside the anti-trust context.\(^{165}\)

**D. Answers in Ashcroft v. Iqbal**

*Conley* ended with a civil rights claim.\(^{166}\) In *Iqbal*, Javaid Iqbal was labeled a person "of high interest" by the FBI for purposes of investigating the September 11th attacks.\(^{167}\) Iqbal brought a *Bivens* action against officials, alleging that "they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin."\(^{168}\) In particular, Iqbal alleged that former Attorney General Ashcroft was the "principal architect" of such a policy, and that former FBI Director Robert Mueller "was instrumental in its adoption and execution."\(^{169}\) Under the substantive law, a plaintiff would have to allege facts that suggest the differing treatment was carried out "not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin."\(^{170}\)

The Court clarified the *Twombly* methodology. In determining whether a complaint should survive a motion to dismiss, first, a court must determine which elements must be alleged to state a claim under the substantive law.\(^{171}\) Second, a court must remove all allegations from the complaint that are mere legal conclusions.\(^{172}\) Third, a court must remove all allegations from the complaint that do not state a plausible entitlement to relief in light of judicial experience and common sense.\(^{173}\) Finally, if what remains in the complaint satisfies the elements of a claim under the substantive law, then the pleader has stated a sufficient claim for relief.


\(^{166}\) See *Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1937.

\(^{167}\) *Id.* at 1939.

\(^{168}\) *Id.* at 1941.

\(^{169}\) *Id.* at 1939.

\(^{170}\) *Id.* at 1949.

\(^{171}\) *Id.* at 1947.

\(^{172}\) *Iqbal*, ___ U.S. ___, 129 S. Ct. at 1949–50. Once legal conclusions are removed, the Court calls the remaining facts "well-pleaded facts." *Id.* at 1950. In response to whether plausibility pleading was tantamount to restoration of code pleading, the Court added, "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." *Id.*

\(^{173}\) *Id.*
The Court illustrated the application of this standard in the Iqbal opinion.\textsuperscript{174} The plaintiffs would have to plead facts suggestive of a "contract, agreement, or conspiracy."\textsuperscript{175} The allegation that the defendants entered a contract, agreement, or conspiracy is conclusory.\textsuperscript{176} The fact that the defendants engaged in parallel behavior does not show a plausible entitlement to relief in light of judicial experience and common sense.\textsuperscript{177} Therefore, there remained no facts from which to establish the conspiracy element of an anti-trust claim.\textsuperscript{178}

Turning to the Iqbal complaint, the Court first noted that the allegation that Ashcroft and Mueller were the architect and instrument of the allegedly invidiously motivated policy is a conclusory, formulaic recitation of the elements of a claim and not entitled to the presumption of truth.\textsuperscript{179} Second, the Court examined two other facts: (1) the FBI arrested and detained thousands of Arab Muslim men, and (2) Ashcroft and Mueller approved the policy to hold detainees until they are cleared.\textsuperscript{180} But the FBI was investigating persons with a link to Al-Qaeda, an organization only incidentally spear-headed by an Arab Muslim. Hence, judicial experience and common sense strongly indicated to the Court that the investigation of September 11th leads had only an incidental, not intentional, impact on Arab Muslims.\textsuperscript{181} Instead, "[a]ll it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."\textsuperscript{182} Therefore, the Court held that the complaint did not nudge the plaintiff's claim across the line from conceivable to plausible.\textsuperscript{183}

The Court then addressed several lingering questions about the Twombly opinion. Is it limited to anti-trust claims? No.\textsuperscript{184} Is the Twombly rule tem-

\textsuperscript{174}Id.
\textsuperscript{175}Id.
\textsuperscript{176}Iqbal, ___ U.S. ___, 129 S. Ct. at 1950.
\textsuperscript{177}Id.
\textsuperscript{178}See id.
\textsuperscript{179}Id. at 1951.
\textsuperscript{180}Id.
\textsuperscript{181}Id.
\textsuperscript{182}Iqbal, 129 S. Ct. at 1952.
\textsuperscript{183}Id. at 1950–51.
\textsuperscript{184}Id. at 1953. Specifically, the Court held,

This argument is not supported by Twombly and is incompatible with the Federal Rules of Civil Procedure. Though Twombly determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. . . . That Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.' Fed. R. Civ. P. 1. Our decision in Twombly expounded the pleading standard for 'all civil actions,' . . . and it applies to antitrust and discrimination suits alike.

Id. (footnote omitted).
pered where discovery is cabined in such a way as to preserve a defense of qualified immunity? No.\textsuperscript{185} Does Rule 9’s permission to allege intent “generally” allow a plaintiff to make a conclusory allegation as to mental state? No.\textsuperscript{186} The term “generally” is a lower bar than Rule 9’s particularity requirement, but “[i]t does not give him license to evade the less rigid—although still operative—strictures of Rule 8.”\textsuperscript{187}

Thus, \textit{Iqbal} permanently cemented \textit{Twombly} as the unqualified authority for interpreting Rule 8, equally assuring that at least \textit{Conley}’s “no set of facts” language will not re-emerge by judicial means.\textsuperscript{188}

\textbf{IV. WEST VIRGINIA SHOULD NOT ADOPT \textit{TWOMBLY-IQBAL}}

How will \textit{Twombly-Iqbal} impact the states? Which states can provide guidance? To understand the answers to these questions, one should consider states which (1) adopted a replica of the Federal Rules, (2) originally embraced \textit{Conley}, (3) have yet to definitively accept or reject \textit{Twombly}, and (4) have hinted that they will consider the question by citing \textit{Twombly} in majority opinions in their high courts. Only one state satisfies all these criteria: West Virginia. There is no discernable trend among the states regarding adoption or rejection of \textit{Twombly-Iqbal}, and there have been no state decisions adopting or rejecting \textit{Twombly} since the \textit{Iqbal} decision. Therefore, the West Virginia Supreme Court is a prime candidate to be the next state court to decide which way to go with \textit{Twombly}, and its decision has the potential to set a trend toward adoption or rejection throughout the country.\textsuperscript{189} This Note will argue that the West Virginia Supreme Court should reject \textit{Twombly-Iqbal}.

\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id. at 1954.}
\textsuperscript{187} \textit{Iqbal}, ___ U.S. ___, 129 S. Ct. at 1954.

\textsuperscript{188} However, Congress has proposed legislation in response to \textit{Iqbal} in an effort to restore \textit{Conley}. See Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009). Yet, preliminary drafts of the Notice Pleading Restoration Act have drawn criticism for being insufficient to overturn \textit{Twombly} because they merely state that the courts are to follow the standard given in \textit{Conley}, which, as the Supreme Court itself insisted, could be read as consistent with \textit{Twombly}. See Bahar Dejian, \textit{Will the Notice Pleading Restoration Act be Enough?}, CONSUMER ADVOC. LEGAL UPDATE (Aug. 24, 2009), http://www.consumeradvocatelegalupdate.com/tags/notice-pleading-restoration-ac/. In response, the House bill explicitly provides that the “no set of facts” language shall govern and explicitly prohibits dismissals on the basis that a claim is implausible. At this time, the Judicial Conference has taken no interest in amending Rule 8 to overturn the Court’s new precedents, arguing that \textit{Iqbal} seems to have had little impact on the number of motions to dismiss or the number of dismissals in general. See Dave Lenekus, \textit{Congress Eyes Pleading Standard: Some Say New Law Will Eliminate Costly Meritless Cases}, BUS. INS. (Nov. 9, 2009), http://www.businessinsurance.com/article/20091109/ISSUE03/311089984#.

\textsuperscript{189} West Virginia also has an added peculiarity in that its Supreme Court adopts amendments to the West Virginia Rules of Civil Procedure, so there is an essential link between rule adherence and case adherence. See W. VA. CONST. art. VIII, §3 (amended 1974).
A. West Virginia is a "Replica" State

It was predicted that the Federal Rules' influence on state procedure would someday effect "one procedure for state and federal courts." But "[w]here once the ideal 'one procedure for state and federal courts' was a beacon for procedural reform, its light has dimmed to barely a flicker." Nevertheless, "[f]ederal influence on state procedure, of course, remains substantial, and important." While many states patterned their rules after the Federal Rules, the degree of similarity with the Federal Rules varies greatly by state. Professor Oakley has documented state court adherence to the Federal Rules, tracking their fidelity to amendments as recently as 2003.

As of 1986, Oakley had argued that there were twenty-three jurisdictions that have true replicas of the Federal Rules. Three other states were not "true replicas," but they modeled the Federal Rules and implemented a regime of notice pleading. While Oakley ultimately concluded that there may be no "true" replicas, save perhaps one, the 1986 classifications are still useful for purposes of this Note because Rule 8(a)(2)—the "short and plain statement" language—has not been amended.

Under Professor Oakley's analysis, West Virginia was originally a "replica" state in that it substantially patterned its rules of civil procedure after the Federal Rules. Since 1986, the year of Professor Oakley's initial study, the West Virginia Supreme Court has adopted amendments in step with the Federal Rules commensurate with the national trend, if not ahead.

191 See Oakley, supra note 21, at 384.
192 Id. at 383.
193 Id.
194 Id.
195 Id. Alabama, Alaska, Arizona, Colorado, the District of Columbia, Hawaii, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Montana, New Mexico, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming. Id. at 356–57.
196 Idaho, Mississippi, and Nevada. Id.
197 Utah. Oakley, supra note 21, at 374.
198 Id.
199 See id. Notably, West Virginia has adopted 69% of the amendments that were adopted by the Federal Rules between 1980 and 2000. See id. at 387, app. tbl. 3. The only significant provisions that West Virginia failed to adopt were mandatory disclosure and the waiver-of-service provisions in 1993. Id.
B. West Virginia Adheres to Conley

In 2007, Justice Stevens cited twenty-six states and the District of Columbia that all follow Conley's "no set of facts" language. The West Virginia Supreme has followed Conley since 1977. In Mandolidis v. Elkins Industries, Inc., the West Virginia Supreme Court articulated the philosophy:

All that the pleader is required to do is to set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist. The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings.

Accordingly, the Court sustained the plaintiff's complaint which alleged "that the defendant deliberately, intentionally, willfully [sic] and wantonly allowed employees, including plaintiff's decedent, to work in conditions which were in violation of the aforementioned laws, rules and regulations, and that the proximate result of such deliberate, intentional wilful [sic] and wanton misconduct was the death of plaintiff's decedent." "Taken collectively, it is clear that the Supreme Court of Appeals has approved a liberal standard for evaluating the adequacy of pleading. This, in turn, is consistent with a provision of Rule 8 which provides that "[a]ll pleadings shall be so construed as to do substantial justice."

West Virginia University College of Law Professor Dale P. Olson has observed,

[T]he Supreme Court of Appeals has elected to follow a course which, in regard to pleading, assures that an action is determined so far as possible on the merits of the cause of action, not on the technical compliance with rules of procedure. Pleading

\[\[\text{Disseminated by The Research Repository @ WVU, 2010}\]

\[\begin{align*}
\text{200} & \text{ Alabama, Alaska, Colorado, District of Columbia, Florida, Georgia, Hawaii, Idaho, Louisiana, Maine, Massachusetts, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin, Wyoming, and other states with similar language. Twombly, 550 U.S. at 578 n.5 (Stevens, J., dissenting).} \\
\text{201} & \text{See Chapman v. Kane Transfer Co., 236 S.E.2d 207, 212 (W. Va. 1977) ("A rule for testing the sufficiency of a complaint when challenged by a motion to dismiss for failure to state a claim has been well defined by the United States Supreme Court in Conley v. Gibson, 355 U.S. 41, 45–46 (1957) . . . .")}. \\
\text{202} & \text{246 S.E.2d 907 (W. Va. 1978).} \\
\text{203} & \text{Id. at 920.} \\
\text{204} & \text{Id.} \\
\text{205} & \text{Dale P. Olson, Modern Civil Practice in West Virginia 90 (The Michie Co. 1984).}
\end{align*}\]
is ideally designed for an uncomplicated and nontechnical approach inasmuch as it is supplemented by other provisions of the Rules of Civil Procedure, particularly the discovery rules. It is clear from the opinions of the Supreme Court of Appeals that a complaint cannot be dismissed unless the complaint fails to identify a basis for the institution of a lawsuit such that it forms the basis for further proceedings designed to elaborate the grounds and facts underlying the action.\textsuperscript{206}

Former West Virginia Supreme Court of Appeals Justice Franklin D. Cleckley has noted that, "[s]o long as the opponent is fairly apprised and presented with the opportunity to contradict, he/she should not lose the merits of his/her position by imprecise and less than conclusive pleading."\textsuperscript{207} Further, "[a]lthough entitlement to relief must be shown, a plaintiff is not required to set out facts upon which the claim is based."\textsuperscript{208} But "[s]ketchy generalizations of a conclusive nature unsupported by operative facts do not set forth a cause of action. However, conclusory allegations of fact or law in a pleading are permitted, when the allegations provide fair notice of the claim to the defendant."\textsuperscript{209}

The picture that emerges from the West Virginia literature is that although the West Virginia Supreme Court may be familiar with the \textit{Twombly} Court's insistence on non-conclusory allegations, the import of plausibility pleading would be a new idea to its pleading regime.

\textbf{C. States Reconsidering Conley}

As of the publication date of this Note, three states have openly embraced \textit{Twombly} and rejected \textit{Conley}: Massachusetts, South Dakota, and Delaware.\textsuperscript{210} Three other jurisdictions have favorably cited aspects of the \textit{Twombly}
opinion without adopting it wholesale.211 On the other hand, Arizona and Vermont have unequivocally rejected Twombly.212 A few high courts may soon be weighing in on Twombly either because their intermediate courts have taken a position on Twombly213 or because the high courts have already mentioned Twombly in their opinions.214

The West Virginia Supreme Court has delivered Twombly-Iqbal to the emergency room, but the issue is not altogether dead. The court has flirted with the Twombly and Conley standards several times since 2007, reaching seemingly conflicting results.215 At first, in Highmark West Virginia, Inc., v. Jamie, the Court appeared to reject Twombly, saying,

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We decline to preemptively settle that issue in this opinion. The standard expressed in *Chapman* and repeated in subsequent cases remains good law, and we note that shortly after the decision in *Bell Atlantic*, this Court . . . applied a standard similar to that in *Chapman* in the context of reviewing an order granting judgment upon the pleadings.216

Thus, even though *Chapman* and *Conley* remain good law, the court declined to preemptively settle the issue.217

After *Highmark*, it was unclear what the court intended to say about *Twombly*. One academic understood the court to say that “West Virginia adopt[ed] Conley’s standard but refrain[ed] to preemptively settle Twombly’s impact on that standard.”218 Accepting that view, the *Twombly* rule is not totally out because many courts have commented that *Twombly* is not inconsistent with *Conley* and is, therefore, not limited by *Conley*.219 Another academic believed that *Highmark* represented an explicit rejection of *Twombly*.220

The court clarified its *Highmark* comment in *Hoover v. Moran*, where it stated, “[f]or the purposes of the decision in this case, we need not decide whether this court will adopt the *Twombly* standard.”221 Hence, following *Hoover*, it appeared that the court was going to continue to apply *Chapman-Conley* without a definitive decision on whether it was indeed the proper standard until a case came along in which the applicable standard made a difference in the outcome.

The court’s dicta gained momentum. Whereas the court declined to consider *Twombly* in earlier opinions, in *In re Flood Litigation Coal River Watershed*, the court considered the plaintiff’s complaint in light of the *Twombly* standard.222 But the court’s analysis was not central to its holding because it came to the same result under *Twombly* and *Conley*, saying, “[a]lthough this

W. Va., Inc. v. Jamie, 655 S.E.2d 509 (W. Va. 2007) (per curiam) (declining to preemptively settle the impact of *Twombly*).

216 *Highmark*, 655 S.E.2d at 513 n.4.

217 *Id.*

218 Josephson, *supra* note 7, at 867 n.18.


220 Adam N. Steinman, *What is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 Notre Dame L. Rev. 245 n.25 (2008) (“[S]ome state courts have stated explicitly that *Twombly* would not cause them to change their states’ pleading standards.” (citing *Highmark*, 655 S.E.2d 509 n.4)).

221 *Hoover v. Moran*, 662 S.E.2d at 715 n.3 (citing *Highmark*, 655 S.E.2d 509, 513 n.4).

222 *In Re Flood Litig. Coal River Watershed* 668 S.E.2d at 216.
Court has not considered whether such a standard should be adopted, the Coal River plaintiffs’ complaint clearly meets that standard.”

Therefore, even though the West Virginia Supreme Court of Appeals continues to cite *Conley* and *Chapman* as espousing the applicable standard, there can be no inference that continued reliance on *Conley* is a rejection of *Twombly* by implication because the West Virginia Supreme Court has expressly declined to settle the issue. Moreover, the court has even acknowledged the new federal pleading standard in light of the *Iqbal* opinion.

Recently, the court delivered *Twombly* a hard blow, but once again, like in *Highmark*, without a knock-out punch. The language of the majority opinion in *Roth v. DeFelicecare, Inc.*, although harsh, still leaves a sliver of room for *Twombly-Iqbal* to make another appearance. The court cited the *Chapman* standard, as it had done many times in recent opinions. However, in footnote four, the court went on to note that,

> our interpretation of West Virginia Rule of Civil Procedure 8 is more liberal than what is allowed under the federal rules . . . . [U]nder the federal rules, more than a notice pleading is required insofar as a plaintiff is required to plead facts to show that the plaintiff has stated a claim entitling him to relief. Under West Virginia law, however, this Court has not adopted the more stringent pleading requirements as has been the case in federal court and all that is required by a plaintiff is “fair notice.”

The court thus generalized the state of West Virginia’s pleading standard, saying that it is more liberal than the federal standard, but it did not expressly decline or reject *Twombly-Iqbal*. While the language is critical of *Twombly-Iqbal*, it is still possible that the court is merely repeating its position from *Highmark* and *Hoover*. There are three reasons why this language may be read in this way.

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223 Id. at 216 n.10.
224 See cases cited supra note 215.
225 See Robinson v. Pack, 679 S.E.2d 660, 669 n.24 (W. Va. 2009). In *Robinson*, the *Iqbal* opinion was useful to the court’s analysis on other issues, namely supervisory liability for civil rights violations. However, the court did go on to acknowledge *Iqbal*’s analysis of *Twombly*, even leaving out its typical qualification that it “decline[s] preemptively to settle that issue.” *Id.*
227 *Id.*
228 *Id.* at *5* n.4 (citing State *ex rel* McGraw v. Scott Runyan Pontiac-Buick, Inc., 461 S.E.2d 516, 522 (1995)).
First, the opinion is per curiam, implying that the court decided the case without holding on new points of law.229 Because it is a per curiam opinion, the state of the law before the opinion is probably the state of the law after the opinion. As discussed above, the state of the law before the opinion was that the court had declined to preemptively settle the issue of whether to adopt or reject Twombly-Iqbal. Under In re Flood Litigation and Hoover v. Moran, the West Virginia Supreme Court refused to continue citing Chapman as precedent, but it was not going to settle preemptively the impact of Twombly-Iqbal upon Rule 12(b)(6) motions until a case arose where the standard was outcome-determinative. In other words, the state of the law under Twombly-Iqbal was on hold. Through that filter, it is fair to interpret the Roth opinion as saying merely that the present state of the law is Chapman-Conley, although it reserves its final decision until the right case comes along. Therefore, when the court states, “this Court has not adopted the more stringent pleading requirements,” it is quite possible that the court has not closed the window on adopting it later.

Second, if the court was trying to change the law, it did so unprompted. The lower court applied the same legal standard as the West Virginia Supreme Court, i.e., Chapman-Conley, only requiring a review of the application of the standard.230 Neither the appellant nor the appellee addressed Twombly-Iqbal in their briefs.231 Moreover, the language was not essential to the court’s holding. Justice Ketchum, although disagreeing with the majority about the outcome, felt that the outcome of this case did not turn upon which standard was applied.232 Thus, the language in Roth is a persuasive cue about what the court will do should the issue ever arise. However, for now, it remains dictum.

Finally, Justice Benjamin has directly stated that the West Virginia Supreme Court has yet to squarely address the question of whether to adopt Twombly-Iqbal. While declining to comment on how he might decide, Justice Benjamin has shown signs that he may be willing to join in rejecting Twombly-Iqbal.233 In the most searching analysis of Twombly-Iqbal yet in West Virginia

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229 Id. at *1. In the past the West Virginia Supreme Court has suggested that any language outside the syllabus points of a per curiam opinion is obiter dicta. See Lieving v. Hadley, 423 S.E.2d 600, 604 n.4 (W. Va. 1992) (abrogated by Walker v. Doe, 558 S.E.2d 290 (W. Va. 2001)). Recently, however, the Court has recognized that per curiam opinions have precedential value, disagreeing with the Lieving Court’s conclusion that everything outside the syllabus points is obiter dicta. See Walker, 558 S.E.2d at 294. Nevertheless, the Court “wholeheartedly” agrees that “if rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a per curiam opinion.” Id. at 296 n.16 (quoting Lieving, 423 S.E.2d at 604 n.4).


232 See Roth, 2010 WL 2346248 (Ketchum, J., dissenting).

233 See Roth, No. 08-C236 (Benjamin, J., dissenting), available at http://www.state.wv.us/wvsca/docs/Spring10/34805d2.htm. The portions of the opinion which
jurisprudence, Justice Benjamin flatly stated, "[a]s noted by the majority herein, the Conley standard, though it has now been abrogated by the United States Supreme Court, apparently remains viable in West Virginia—at least for now."234

To summarize, Twombly-Iqbal is down, but not out, in the West Virginia Supreme Court. Every time the court has looked at the issue, it has ultimately run back to Chapman-Conley, and it has ultimately decided for the plaintiff. Twombly-Iqbal is probably on hold, but it is definitely disfavored. It is therefore likely that the West Virginia Supreme Court will not join Massachusetts, Rhode Island, and South Dakota in embracing plausibility pleading.

D. West Virginia Should Not Adopt Twombly-Iqbal

Before the West Virginia Supreme Court buries Twombly-Iqbal, there are many issues that merit consideration: West Virginia’s history with pleading procedure, timing, and ultimately a review of the success of Twombly-Iqbal in the federal system and other states. First, Twombly-Iqbal would represent a significant break with West Virginia’s settled understanding and expectations for pleading and is, therefore, a step too far. Second, even if the West Virginia Supreme Court decides to adopt Twombly-Iqbal, now is not the time. Finally, a review of the relevant authorities discloses a sea of criticism of Twombly-Iqbal in the federal system which cannot lightly be ignored. The West Virginia Supreme Court should heed these well-founded criticisms.

1. West Virginia Should Not Adopt Twombly-Iqbal Based Upon Its History

The West Virginia Supreme Court of abandoned code pleading with the adoption of the Rules, yet Twombly-Iqbal would signal a detour back in that direction. Particularly, Twombly-Iqbal’s most influential addition to modern pleading has been in its prohibition on alleging “legal conclusions,” harkening of the code pleading conclusions. But states sought to abandon code pleading because the distinction between conclusions, evidence, and ultimate facts was one of degree, not of type.235 The Iqbal decision itself illustrates the confusion that marred fact pleading. Iqbal was decided by a threadbare majority (5–4).236 The Court lost two members of the deciding majority from Twombly, Justices

lead this author to believe that Justice Benjamin would join in rejecting Twombly-Iqbal are discussed infra in Part IV(D)(3).

234 Id.


Breyer and Souter, largely because of differences about how the Twombly rule applied to that case in particular.237

West Virginia has a particular affection for the liberal ethos of the Rules. First, the West Virginia Supreme Court of Appeals adopted the Federal Rules on the understanding that the Rules had the type of liberal effect that was characteristic of the time, forming a basis for the bargain. The Court modeled its rules of civil procedure after the Federal Rules,238 and Rule 8(a) of the West Virginia Rules of Civil Procedure (the West Virginia Rules) copied Rule 8(a)(2) of the Federal Rules verbatim.239 The West Virginia Rules took effect in 1960, a time at which the liberal thrust of federal pleading was at its apex, only three years after the Conley decision.240 Before the rules took effect, Professors Marilyn E. Lugar and Lee Silverstein published a text comparing the West Virginia Rules to the Federal Rules "to guide the practitioner quickly through the new rules of procedure . . . ."241 In that text, Lugar and Silverstein cite Judge Clark’s opinion in Dioguardi as one of the West Virginia Supreme Court’s influences regarding the amount of fact matter sufficient to withstand a motion to dismiss.242

The Reporters’ Original Notes to the West Virginia Rules make it clear that the West Virginia Supreme Court intended to adopt the liberal interpretation of pleadings that was about to reach its height in the late 1950s, saying, “A motion to dismiss . . . would be appropriate where it is obvious from the complaint that the plaintiff has failed to state a claim, i.e., where the complaint has omitted an essential element of the cause of action.”243 The Reporters’ comment espouses the type of liberal notice pleading doctrine first articulated by Justice Clark in Dioguardi in that the comment’s emphasis is upon the legal sufficiency of the claim, saying nothing about factual sufficiency. Of particular relevance was the Reporters’ choice to name the ground for a 12(b)(6) dismissal—omission of an element of the cause of action. This ground for dismissal is explained as if it were the exclusive ground for a motion to dismiss because of the

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237 See generally id. at 1954–62. Justice Breyer, writing a strong dissent in which three other justices Justices joined, argued that “the majority’s holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as non-conclusory.” Id. at 1961.

238 See Oakley, supra note 21, at 357. The West Virginia Rules took effect on July 1, 1960. See LUGAR, supra note 40, at vii.

239 Compare W. VA. R. CIV. P. 8(a) with FED. R. CIV. P. 8(a)(2). The subsection is different in West Virginia because the West Virginia rules do not require a statement of jurisdiction, although the Reporter’s Original Note to subdivision (a) suggests, “[o]f course, jurisdiction must still exist, and although plaintiff need not assert that jurisdiction does exist, defendant may raise the question by motion under Rule 12(b).” See LUGAR, supra note 40, at vii.

240 See LUGAR, supra note 40, at vii.

241 See LUGAR, supra note 40, at xv.

242 See id. at 75 (“Even a complaint drawn by a layman will suffice if it shows facts entitling him to relief.”) (citing Dioguardi v. Durning, 139 F.2d 774, 774 (2d Cir. 1944)).

243 LUGAR, supra note 40, at 97.
resort to the phrase “i.e.” and not “e.g.” Of course, even accepting this language as authoritative, it is possible to read it consistently with the Twombly opinion in the sense that a plaintiff “omits” an element by failing to plead plausible facts. But such a reading is a stretch of the natural reading of the term “omit.” As typically used, the term “omit” implies that the thing omitted was completely neglected, such that it was not even mentioned. Under the most natural understanding of the Reporters’ Notes, therefore, the West Virginia Supreme Court’s emphasis in adopting Rule 8 was upon testing the legal sufficiency of claims; factual sufficiency was not even an afterthought.

2. Now Is Not the Time to Adopt Twombly-Iqbal in West Virginia

Even if the West Virginia Supreme Court ultimately makes the decision to adopt Twombly-Iqbal, there are several reasons that militate in favor of waiting. First, the West Virginia Supreme Court only adopted Conley in the first instance twenty years after it was decided. In turn, the Court should allow federal case law to develop Twombly more before it makes the decision to adopt Iqbal. Iqbal was a slim 5–4 decision, and the differences between the majority and dissent, as discussed below, would have palatable effects on the way that Twombly is understood. Any changes in the Court may upset the balance and affect future case law. With such a strong dissent in Iqbal, it is likely that the Court will visit this issue again in the near future.

Second, although the judicial branch has embraced Twombly-Iqbal, the long-term status of Twombly-Iqbal in federal courts is unsettled. Congress considered legislation that would overturn the effects of Twombly-Iqbal. Early drafts of the legislation, particularly the Notice Pleading Restoration Act, drew heavy criticism because it merely said that courts should follow the decision in

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244 The American Heritage Dictionary of the English Language defines “omit” as, “[t]o fail to include or mention; leave out . . . . To pass over, neglect . . . . To desist or fail in doing; to forbear.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Houghton Mifflin, 4th ed. 2009).

245 Since Iqbal was decided in May of 2009, Justice Souter retired, and Justice Sotomayor succeeded him to the position. Justice Souter authored in the 7–2 Twombly majority, and it is uncertain whether Justice Sotomayor will succeed Justice Souter to support the Twombly majority. Justice Stevens has also retired since Twombly and Iqbal were decided, but because he already dissented in both Twombly and Iqbal, his successor, Justice Kagan, does not have the same opportunity as Justice Sotomayor to effect a shift away from Twombly-Iqbal. One academic has speculated that Justice Kagan would be critical of Twombly-Iqbal because Justice Kagan was critical of heightened pleading under the Private Securities Litigation Reform Act. See Adam Steinman, Reading the Kagan Tea Leaves on Iqbal/Twombly, CIVIL PROCEDURE AND FEDERAL COURTS BLOG (June 22, 2010), http://lawprofessors.typepad.com/civpro/twomblyiqbal/.

Conley, and it is possible to read Conley as consistent with Twombly.\textsuperscript{247} It is a sign that the initiative was purely symbolic and that Congress and Senator Specter were merely expressing their disagreement with the Iqbal opinion. But subsequent developments suggest that Congress may someday consider this issue seriously. The House’s bill, the Open Access to Courts Act, does more than refer to the Conley opinion; it carefully defines the proper standard, quoting the “no set of facts” language directly, and it makes clear that complaints will not be dismissed because they state an implausible entitlement to relief.\textsuperscript{248} In light of the uncertainty in Twombly’s future in the federal courts, State adoption would be hasty if the goal is to pattern after the civil procedure of the federal courts so that there is “one procedure for state and federal courts.”

Third, among the twenty-six states that adhered to Conley at the time of the Twombly opinion, only five have arrived at a decision about whether to adopt it.\textsuperscript{249} Further, only a handful of others have employed various aspects of Twombly.\textsuperscript{250} The remaining states have judicially recognized that Twombly is floating around in the academic ether, but they have not made a decision about whether to adopt it or have expressly declined to do so.\textsuperscript{251} Although Twombly citations carry a type of intellectual cache, as evidenced by the immense number of citing cases since 2007, there has thus been astonishingly little legal development. In fact, all states that have considered the issue did so before 2009 and the Iqbal opinion, and, in particular, before the subsequent legislative backlash.

Ultimately, there is an ironic theme that runs through the timing analysis. Although the Court’s purpose in writing Iqbal may have been to put to rest uncertainty about Twombly, by closing the door, the Court inflamed a wave of dissent that casts a new veil of uncertainty about its future at the hands of Congress. Until this issue is settled, state courts should hold back on making final decisions.

3. Twombly-Iqbal Does Not Strike the Proper Balance Among Competing Policy Interests

The Twombly opinion has inspired a number of academics to write in opposition or defense, and there is a rich national debate about the competing policy interests. But time is proving that Twombly is not achieving its goals, and Twombly criticism has the upper hand in the debate. The West Virginia Supreme Court should hear those criticisms and recognize that Twombly-Iqbal will not achieve its goals with respect to plaintiffs or the judiciary.


\textsuperscript{249} See cases cited supra Part IV(C).

\textsuperscript{250} Id.

\textsuperscript{251} Id.
There are three types of plaintiffs that are affected by plausibility pleading. First, there are plaintiffs who know that they have a plausible claim but inadvertently fail to file a plausible pleading. Second, there are plaintiffs who know that they do not have a plausible claim but file an action to seek an in terrorem settlement. And finally, there are plaintiffs who do not know whether they have a plausible claim but file an action to gain access to discovery.

First, for plaintiffs who know that they have plausible claims but inadvertently fail to file a plausible pleading, dismissal is granted under Twombly purely for procedural reasons, not substantive reasons. Dismissal on purely procedural grounds is against the spirit with which the Federal Rules were adopted. As noted above, Judge Clark reflected the Advisory Committee’s sentiment when he urged rules of procedure should be the “hand maid and not the mistress of justice.”

For such plaintiffs, Twombly is unnecessary.

Second, with regard to plaintiffs who seek in terrorem settlements, the Twombly rule has not yet achieved its policy goals. The Twombly Court articulated a new plausibility standard in response to what it perceived to be a rising cost of litigation and the weaponization of these costs by plaintiffs to seek an in terrorem increase in settlement value. Subsequent economic analysis by Professor Hylton, among others, suggests that heightened pleading may be more socially desirable with respect to the efficient use of societal resources by dismissing claims that fail to satisfy a minimum threshold in merit. Nevertheless, empirical studies have suggested that courts have not dismissed claims at a statistically different rate since Twombly was decided, except for civil rights claims. But civil rights claims were not the true target of the Twombly opinion; indeed, it was sympathy for discrimination claims that gave birth to Conley in the first instance. Rather than achieve its policy goal of reducing in terrorem settlements for claims based upon nothing more than conspiracy theories, as argued in the next paragraph, meritorious claims will be dismissed because

See Clark, supra note 28, at 297.

See supra Part III(B).

See Hylton, supra note 27, at 62.

plaintiffs commonly do not know and should not be required to know whether their claim has merit until they can reach discovery.

Finally, for plaintiffs who do not know the merit of their claims upon filing, as Professor Spencer has argued, dismissal of such claims moves civil procedure away from its intended liberal ethos toward a restrictive ethos. Of course, this is not a new concern. As early as 1986, when pre-

Leatherman judicial pleading standards were on the rise, it was observed that

where the plaintiff is unable to provide details because only the defendant possesses such information, no such confidence is possible. To the contrary, it may be that the defendant has so effectively concealed his wrongdoing that the plaintiff can unearth it only with discovery. To insist on details as a prerequisite to discovery is putting the cart before the horse.

Offending the rule’s liberal ethos would be particularly egregious in the West Virginia because the West Virginia Supreme Court adopted the Federal Rules at a time when notice pleading was at its apex, and it has always espoused a particularly liberal perspective of its pleading rules. Twombly would represent a break from that history.

Responding to the recent federal case law, the 2009 supplement to the Litigation Handbook on West Virginia Rules of Civil Procedure argues:

The intent of notice pleading is to ensure that a claim is determined on its merits and not tossed out of court through missteps in pleading. Requiring a plaintiff to plead detailed facts interferes with that goal in several ways. First, as a general matter the number of potentially relevant factual details in a case is astronomical. Therefore, requiring a plaintiff to plead facts that are not obviously important and easy to catalogue would result in needless controversies about what is required, which would

256 See Spencer, supra note 9, at 479. Professor Spencer argues,

The Twombly standard is troubling because, in relying on such concerns, the Court appears to have exalted goals of sound judicial administration and efficiency above the original core concern of the rules: progressive reform in favor of expanding litigant access to justice. Thus I believe what we are witnessing is simply the latest and perhaps final chapter in a long saga that has moved the federal civil system from a liberal to a restrictive ethos.

Id.

257 See Spencer, supra note 9, at 482 (quoting Marcus, supra note 43, at 468).

serve only to delay or prevent trial. Most factual details of [a] case are more efficiently learned through the flexible discovery process. Second, a plaintiff might sometimes have a right to relief without knowing every factual detail supporting his/her right. Thus, requiring a plaintiff to plead unknown details before discovery would improperly deny the plaintiff the opportunity to prove his/her claim. Encouraging a plaintiff to plead what few facts can be easily provided and will clearly be helpful, serves to expedite resolution of a case by quickly alerting the defendant to the basic, but critical factual allegations.\textsuperscript{259}

Therefore, with respect to any type of plaintiff, criticism of \textit{Twombly-Iqbal} is well-founded. \textit{Twombly} is also impractical to implement in the judiciary. The confusion first noted by the Second Circuit has not been resolved by the Court’s clarification in \textit{Iqbal}.\textsuperscript{260} First, plausibility will be conflated with the particularity requirement of Rule 9 because “it is hard to distinguish the Court's plausibility standard from the heightened pleading obligation of Rule 9(b).”\textsuperscript{261} Second, in weighing plausibility, judges are to consider “judicial experience and common sense,” but at the same time, a judge must accept the truth of an allegation even if it is “doubtful in fact.”\textsuperscript{262} How much deference should a judge accord an allegation when it conflicts with her judicial experience and common sense? Whether the answer in a particular case is within case law or a matter of case-by-case discretion, such a standard would breed mass uncertainty resulting in both judicial inefficiency and abuse.

The \textit{Iqbal} opinions illustrate the uncertainty. The majority’s decision relied upon a common sense understanding that the targeting of Arab Muslims could be either because of discriminatory intent or, alternatively, because of a legitimate intent to retain members of society who fit the profile of the September 11th perpetrators.\textsuperscript{263} Yet the dissent argued that the majority did not sufficiently accord the weight of truth to the allegations.\textsuperscript{264} To Justice Souter, plausibility would dismiss “claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.”\textsuperscript{265} But unless a complaint reflects an

\textsuperscript{259} \textit{LITIGATION HANDBOOK, supra} note 207, at 14 (citing E.E.O.C. v. Concentra Health Servs., Inc., 496 F.3d 773 (7th Cir. 2007)).

\textsuperscript{260} For example, one court has recently held that \textit{Twombly} requires a plaintiff to identify the statute he or she is relying upon. \textit{See} Chappey v. Ineos USA LLC, No. 2:08–CV–271, 2009 WL 790194 (N.D. Ind., March 23, 2009).

\textsuperscript{261} \textit{See} \textit{Spencer, supra} note 9, at 474.

\textsuperscript{262} \textit{Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)}


\textsuperscript{264} \textit{Id.} at 1959 (Souter, J., dissenting).

\textsuperscript{265} \textit{Id.} (Souter, J., dissenting).
example of Justice Souter’s alien encounters, in the wake of Iqbal, it is unclear how judges will apply common sense and experience to test complaints.

The potential unpredictability of Twombly-Iqbal is not lost on members of the West Virginia Supreme Court. Justice Benjamin foreshadows the looming debate in his dissenting opinion from the Roth majority.266 At first, Justice Benjamin admonishes the Court that it would be “foolish to simply stick its judicial head in the sand” with respect to the reasons which gave rise to the adoption of Twombly-Iqbal in federal courts.267 But after showing his respects to the federal judiciary, Justice Benjamin went on to explain that he was “not certain that a ‘plausibility’ standard at the initial pleading level is necessarily a good thing . . . .”268 As argued in this section, Justice Benjamin’s misgivings for Twombly-Iqbal are based upon the recognition that the standard “is certainly dependent on the legal and factual context of a given controversy” which “require[s] a judge to make a value determination” about the likelihood of success in discovery.269 To Justice Benjamin, such value determinations are not necessarily a good thing because “each judge has a different level of experience in making such determinations.”270

Perhaps the most persuasive reason not to adopt Twombly-Iqbal is implied by the disagreement among the Roth opinions about whether the factual detail of the complaints would satisfy Twombly-Iqbal. While the majority declined to consider Twombly-Iqbal, Justices Ketchum and Benjamin addressed the question head-on and reached different conclusions. Justice Ketchum believed that the factual detail would be sufficient to satisfy the Twombly-Iqbal standard, but Justice Benjamin believed it would not.271 How can the Court expect trial judges to achieve any greater consistency than the seasoned arbiters of justice on the benches of the highest courts in West Virginia and the United States?

Twombly’s failures notwithstanding, the issues that motivated the Court are real, and courts need a device to weed out meritless claims. But there are better options. Professor Spencer has suggested that Rules 11, 16, and 26 (as amended in 2000), along with summary judgment in Rule 56, already provide courts with the tools they need.272 Justice Benjamin has likewise suggested that these mechanisms address, at least in part, those concerns.273 If these problems

266 Roth v. DeFeliceCare, Inc., No. 08-C-23 (W. Va. June 8, 2010) (Benjamin, J., dissenting).
267 id. Justice Benjamin lists the reasons which gave rise to the adoption of Twombly-Iqbal: “[c]ase delays, litigation costs, costly procedures, and the like.” id.
268 id.
269 id.
270 id.
271 id.
272 See Spencer, supra note 9, at 485–86.
273 Roth v. DeFeliceCare, Inc., No. 08-C-23 (W. Va. June 8, 2010) (Benjamin, J., dissenting).
are real and persistent, then experience has already shown that changing the pleading rules will not help. Perhaps it is time to revisit those devices.

To summarize, when considering whether to adopt the Twombly formula, the West Virginia Supreme Court should weigh competing policy interests that compel its rejection. Twombly would represent a break with West Virginia’s history of a liberal pleading regime. The case law and legislative responses are not yet settled, so now is not the time to adopt Twombly. Twombly contradicts the liberal thrust of the rules for plaintiffs who make procedural errors. Twombly is ineffective against plaintiffs with in terrorem claims. Twombly is unfair to plaintiffs who do not know the merit of their claims. Finally, Twombly will breed uncertainty in the administration of justice, and there are alternatives that better effectuate the policy concerns that gave rise to the Twombly opinion.

V. CONCLUSION

Twombly-Iqbal may be on hold in the West Virginia Supreme Court, but it is definitely disfavored. In fact, by now it is clear that the court has all but rejected it. Nevertheless, it is an unsettled issue raising many questions. Why hasn’t the West Virginia Supreme Court closed the deal? Why is Twombly still kicking around its opinions? Why is all the abuse coming from footnotes, per curiam opinions, dicta, and now, dissenting opinions?

If Twombly-Iqbal is to rise from the ashes, it will have an uphill battle to overcome the sentiments of judges and academics who bemoan the loss of Conley. West Virginia has a long history of applying pleading rules within the liberal ethos that dominated the federal system when the West Virginia Supreme Court adopted its rules. It was part of the bargain that gave rise to the West Virginia Rules.

Even if Twombly-Iqbal is in West Virginia’s future, now is not the time to make that change. The law is unsettled, and Congress may be rolling back some of those changes. The West Virginia Supreme Court should allow the law to settle before making a decision.

Finally, Twombly presents many challenges in judicial administration. The stakes are high. Applied aggressively, Twombly could signify the end of an era of open access to the courts and discovery. The impact will not be felt by plaintiffs who bring conspiracy theories based on trips to Mars—those plaintiffs’ claims would have been dismissed through summary judgment anyway. Rather, it will affect plaintiffs who have been wronged but can bring nothing more than neutral facts consistent with both actionable and innocent conduct. The early studies already suggest that Twombly most significantly affects civil rights claims, not the anti-trust conspiracies that gave rise to plausibility pleading in the first place. The standard is also vague, leading to uncertainty in the administration of justice. What are the limits to the types of judicial experience and common sense that judges should consider? Justices Kennedy and Souter had differences in Iqbal, Justices Ketchum and Benjamin had differences in Roth, and the vagueness will continue to plague honest courts trying to adminis-
ter justice equally. Plaintiffs, in the wake of this uncertainty, necessarily have a new incentive to plead more facts, not just to assure that the elements are covered, but to be sure that the judge is thoroughly convinced that the claim has sufficient merit. This will come at considerable expense in investigating some cases before filing a complaint, and plaintiffs may be left without courtroom access because of pre-filing costs. This is the future of pleadings under Twombly-Iqbal.

Mistakes that were made at the federal level need not be repeated by states like West Virginia; it is unsound to retire fifty years of solid jurisprudence. The stakes are particularly high in West Virginia—citizens have a remedy through Congress to amend the Federal Rules, but citizens are without recourse to influence the rulemaking process politically in West Virginia. West Virginians now may only ponder: which way will these country roads lead?

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