

New Pleading Standards in Federal Court: Will They Impact Franchise Cases?

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For decades, law students have learned in their first-year civil procedure class that federal courts require notice pleading only and that a complaint cannot 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 its claim that would entitle it to relief.¹ In two recent cases, the U.S. Supreme Court retired the ubiquitous “no set of facts” standard and thrust the fundamental principles of notice pleading into a state of flux. In May 2007, the Court decided *Bell Atlantic Corp. v. Twombly*,² an antitrust conspiracy case, and created a new “plausibility” standard that requires a plaintiff to plead “enough facts to state a claim to relief that is plausible on its face.”³ Then, in May 2009, *Ashcroft v. Iqbal*⁴ clarified that the plausibility standard applies to all civil actions, not just those alleging antitrust conspiracies, and further counseled that federal courts draw on “judicial experience and common sense” when determining the plausibility of claims.⁵ This gatekeeper function, which requires federal courts to determine the sufficiency and plausibility of pleadings at the outset of a case, stands traditional notice pleading on its head. Whether the new pleading standard will truly affect the ultimate outcome of motions to dismiss remains to be seen. At a minimum, however, *Twombly* and *Iqbal* undeniably have breathed new life into such motions.



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How will these decisions affect franchise cases? Although a full-blown empirical study analyzing the outcomes of recent motions to dismiss is beyond the scope of this article, the author did review hundreds of franchise cases in federal court citing to *Twombly* and *Iqbal* and applying the plausibility standard in a variety of contexts. The net result is that there is a lot of uncertainty and inconsistency surrounding the application of the newly fashioned plausibility standard. Courts have largely determined that plausibility depends on context; and the sufficiency of pleadings will differ depending on the facts, causes of action, and complexity of each case. That context-driven analysis essentially “makes every complaint a test case on a motion to dismiss”⁶ and likely will increase the volume of motions to dismiss in the future.⁷ Whether that increased volume will result in a higher rate of dismissal remains to be seen.

This article examines the significance of the Supreme Court’s recent jurisprudence on pleading standards and its implications

for federal court litigation, including franchise cases. Starting with a discussion of the pleading standards before the 2007 decision in *Twombly*, the article then turns to the *Twombly* and *Iqbal* decisions, including the subsequent response from courts and commentators wrestling to grasp the Court’s significant change in pleading standards. The article then explores how the plausibility standard has been applied in some recent franchise cases and concludes with some predictions on what the future may hold.

FEDERAL RULE OF CIVIL PROCEDURE 8(A)(2)

As with most procedural questions in federal court, the Federal Rules of Civil Procedure serve as a starting place. Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁸ The requirement for a short and plain statement was intended to simplify the federal pleading standard and move away from the old system of fact-intensive code pleading.⁹ Thus, under the Federal Rules, the core purpose of a complaint is to provide a defendant with “fair notice” of the nature of the claims against it so that the defendant may respond to the claims.¹⁰ A leading federal treatise recounts that “[i]t was the design of the rulemakers that the discovery procedures should give the parties an opportunity for securing an elaboration of the allegations,” not the pleadings.¹¹

In 1957, the Supreme Court elaborated on the pleading standards in Rule 8 in *Conley v. Gibson*.¹² There, plaintiffs were African American railway employees who sued their union, alleging that the union breached its statutory duty to represent all employees fairly. The district court dismissed the complaint for lack of jurisdiction, holding that the National Railroad Adjustment Board had exclusive jurisdiction over the claims, and the U.S. Court of Appeals for the Fifth Circuit affirmed.¹³ The Supreme Court reversed, holding that the federal courts had jurisdiction to resolve plaintiffs’ claims under the Railway Labor Act.¹⁴ The Court then proceeded to consider defendants’ alternative grounds for affirmance, namely, that the complaint failed to state a claim upon which relief could be granted.¹⁵ Writing for a unanimous Court, Justice Black penned the famous standard 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.”¹⁶ Applying this standard, the Court rejected defendants’ claim that the complaint was deficient because it failed to set forth specific facts. Justice Black wrote:

The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts

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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.¹⁷

In the ensuing years, the “no set of facts” dicta from *Conley* seemed to take on a life of its own. A favorite for plaintiffs’ lawyers, the language has been “reaffirmed and applied in innumerable cases decided by courts in every quadrant of the federal judicial system.”¹⁸ The Supreme Court itself has cited the language favorably in a dozen decisions.¹⁹ At least twenty-six states and the District of Columbia have adopted some version of the *Conley* test as their pleading standard.²⁰ As a practical matter, the liberal pleading standard embodied in Rule 8 has made it very difficult for defendants to succeed on pre-discovery motions to dismiss in complex cases because “relatively few complaints fail to meet this liberal standard and thereby become subject to dismissal.”²¹

BELL ATLANTIC CORP. V. TWOMBLY

Fifty years after *Conley*, the Court in 2007 retired the oft-cited “no set of facts” language in an antitrust case, *Bell Atlantic Corp. v. Twombly*.²² In *Twombly*, the complaint alleged that major telecommunications providers engaged in certain parallel conduct unfavorable to competition in violation of § 1 of the Sherman Act. By way of background, after the divestiture of the American Telephone & Telegraph Company (AT&T) in 1984, the Telecommunications Act of 1996 required the Baby Bells, or incumbent local exchange carriers (ILECs), to share their networks with competitive local exchange carriers (CLECs). Plaintiffs, a putative class of all subscribers of local telephone services, high-speed Internet services, or both, alleged that the ILECs conspired to restrain trade in several ways, including agreeing not to compete with one another and entering into unfair agreements with the CLECs. The complaint further alleged that the ILECs’ “parallel course of conduct” demonstrated an illegal conspiracy in restraint of trade.

The U.S. District Court for the Southern District of New York dismissed the complaint for failure to state a claim, based on inadequate allegations of antitrust conspiracy, holding that “allegations of parallel business conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that tend to exclude independent self-interested conduct as an explanation for defendants’ parallel behavior.”²³ The U.S. Court of Appeals for the Second Circuit reversed, holding that antitrust plaintiffs need not plead “plus factors” in order to state a claim based on parallel conduct. According to the Second Circuit, “a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”²⁴

The Supreme Court reversed the Second Circuit in a seven-to-two decision, holding that the complaint was properly dismissed. Justice Souter, writing for the majority, began with a summary of the proof required to succeed on a § 1 conspiracy claim, noting that “it is well established that

[a]n antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict . . . ; proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action . . . ; and at the summary judgment stage a § 1 plaintiff’s offer of conspiracy must tend to rule out the possibility that the defendants were acting independently.”²⁵

Twombly presented the “antecedent question” of what a plaintiff must plead to state a claim under § 1 of the Sherman Act.²⁶

The seven justices in the majority held that “stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. . . . [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.”²⁷ The Court emphasized that it was not requiring a “heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”²⁸ According to the majority, “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”²⁹ The Court then concluded that the district court properly dismissed the complaint because “the plaintiffs here have not nudged their claims across the line from conceivable to plausible.”³⁰

Expense of Litigation a Factor

The Court was clearly motivated by the fact that “proceeding to antitrust discovery can be expensive.”³¹ The majority expressed skepticism that “careful case management” and judicial oversight of the discovery process could alleviate that potential expense.³² The Court worried that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases” and therefore concluded that “it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim.”³³

Ironically, if limited to allegations of antitrust conspiracy, the *Twombly* decision might have been an uncontroversial and natural extension of prior antitrust precedents to the pleading stage. Consistent with *Monsanto v. Spray-Rite Service Corp.*³⁴ and *Matsushita Electric Industrial Co v. Zenith Radio Corp.*,³⁵ the majority in *Twombly* emphasized the long-established rule that defendants should not be subject to the treble damages of an antitrust claim for conduct that could easily be explained by independent, competitive action. *Twombly* did not diverge far from *Monsanto*, *Matsushita*, and similar precedents when it held that plaintiffs failed to state a claim because their entire complaint rested on “descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs.”³⁶

But the Court did not limit its holding to allegations of antitrust conspiracy. Instead, the majority decision makes several broad statements that bring its holding well past § 1 of the Sherman Act. For example, the Court unequivocally rejected *Conley*’s “no set of facts” language as overbroad. According to the Court, that language “can be read in isolation as saying

that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings.”³⁷ Justice Souter explained that the “no set of facts” language has been “questioned, criticized, and explained away long enough”³⁸ and that “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.”³⁹ At the same time, the Court insisted that it was not adopting a radical change in the federal pleading standard or requiring a heightened form of pleading.⁴⁰

Justice Stevens's Dissent

Justice Stevens, joined in part by Justice Ginsburg, issued a scathing dissent. Contrary to the majority, the dissenters viewed the Court's decision as a “dramatic departure from settled procedural law” that creates a “significant new rule.”⁴¹ Justice Stevens recounted the history of Rule 8, as compared to the rigidity of previous pleading standards, and noted that the Federal Rules’ “relaxed pleading standards” were intended “not to keep litigants out of court but rather to keep them in.”⁴² Justice Stevens then defended *Conley* as a proper embodiment of the federal standard: “Consistent with the design of the Federal Rules, *Conley*’s no set of facts formulation permits outright dismissal only when proceeding to discovery or beyond would be futile.”⁴³ Justice Stevens noted that far from being “questioned, criticized and explained away,” as the majority claimed, the “no set of facts” language has been cited as authority in a dozen opinions of the Court.⁴⁴ Moreover,

[t]aking their cues from the federal courts, 26 states and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears “beyond doubt” that “no set of facts” in support of the claim would entitle the plaintiff to relief.⁴⁵

Justice Stevens pinpointed the “[t]wo practical concerns” that presumably explain the Court's decision: “Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions.”⁴⁶ According to Justice Stevens, neither concern justifies the majority's new interpretation of the Federal Rules. Instead,

[t]hose concerns merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking.⁴⁷

According to Justice Stevens, “[t]he potential for ‘sprawling, costly, and hugely time-consuming’ discovery is no reason to throw out the baby with the bathwater.”⁴⁸ Moreover, the dissent noted the unfairness of requiring a plaintiff to plead facts in the complaint, especially in antitrust conspiracy cases where the necessary proof “is largely in the hands of the

alleged conspirators.”⁴⁹

Since *Twombly*, federal district and appeals courts have struggled with *Twombly*'s enhanced pleading standards.⁵⁰ According to a leading federal treatise, “it is difficult to reconcile the ‘plausibility’ standard with traditional notice pleading.”⁵¹ Although a few courts have held that plausibility was required only for allegations of antitrust conspiracy, the majority of courts have applied the new pleading standard more generally.⁵² Courts have also wrestled with applying the plausibility test at all.⁵³ As the U.S. Court of Appeals for the Tenth Circuit summarized, “The most difficult question in interpreting *Twombly* is what the Court means by ‘plausibility.’”⁵⁴

ASHCROFT V. IQBAL

The Supreme Court revisited its plausibility test again on May 19, 2009, just two days shy of *Twombly*'s second birthday, when it decided *Iqbal*.⁵⁵ *Iqbal* confirmed that the *Twombly* plausibility standard extends beyond antitrust to “all civil actions” and also extends the plausibility rule substantially. The Justices split five-to-four over whether the allegations of the complaint were plausible, and the majority decision arguably raises more questions than it answers.

In *Iqbal*, plaintiff Javaid Iqbal, a Pakistani Muslim, was detained as a person of “high interest” following the September 11 terrorist attacks on the United States. He filed a *Bivens* action⁵⁶ against thirty-four current and former federal officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller. The complaint did not challenge Iqbal's arrest or incarceration but asserted twenty-one causes of action related to his treatment while confined. According to the complaint, for example, Iqbal and other detainees were kept in lockdown twenty-three hours a day and spent the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. Other allegations included that Iqbal was beaten and subjected to serial strip and body cavity searches. Iqbal alleged that defendants, including Ashcroft and Mueller, “knew of, condoned, and willfully and maliciously agreed to subject” detainees to harsh conditions of confinement “as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate penological interest.”⁵⁷

Ashcroft and Mueller moved to dismiss the complaint for failure to state sufficient allegations to show their own direct involvement in the alleged unconstitutional conduct. The district court denied their motion, and the Second Circuit affirmed. Considering the significance of *Twombly* to the motion to dismiss, the Second Circuit held that *Twombly* called for a “flexible ‘plausibility standard’” that required “a pleader to amplify a claim with some factual allegations in those contexts where amplification is needed to render the claim *plausible*.”⁵⁸ The Second Circuit then concluded that Iqbal's complaint sufficed to state claims of racial, ethnic, and religious discrimination against Ashcroft and Mueller, among others, that could proceed to limited and court-supervised discovery.⁵⁹

The Supreme Court disagreed by a narrow margin. Writing for a five-to-four majority, Justice Kennedy extracted two “working principles” from *Twombly*.⁶⁰ “First, the tenet that a

court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.”⁶¹ According to Justice Kennedy, determining whether a complaint states a plausible claim for relief will require “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”⁶²

The majority found the complaint in *Iqbal* deficient because it lacked “facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees of high interest because of their race, religion, or national origin.”⁶³ The Court also noted that the complaint did not “contain any factual allegation sufficient to plausibly suggest petitioners’ discriminatory state of mind.”⁶⁴ Leaving aside any discussion of how a prospective plaintiff is supposed to have information concerning a government official’s discriminatory state of mind before it even files a complaint or engages in any discovery, the Court simply held that the complaint does not “meet the standard necessary to comply with Rule 8.”⁶⁵

Expansion of *Twombly*

In so holding, the Court officially rejected the argument that *Twombly* applies only to complaints “sounding in antitrust” and confirmed that *Twombly* “expounded the pleading standard for all civil actions.”⁶⁶ The Court also rejected the suggestion that “careful case management” could protect high-ranking defendants like Ashcroft and Mueller from the expense and burdens of discovery.⁶⁷ According to Justice Kennedy, litigation against government officials “exact[s] heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”⁶⁸ The promise of limited or cabined discovery provided “cold comfort” to the Court, where “we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties.”⁶⁹

Justice Souter, author of the majority decision in *Twombly*, penned the dissent in *Iqbal*: “*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be.”⁷⁰ Justice Souter explained that “[t]he sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel. That is not what we have here.”⁷¹ Instead, Justice Souter concluded, “the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct” (as in *Twombly*).⁷² Where Ashcroft and Mueller had conceded that they would be liable for the acts of their subordinates if they had knowledge of or were “deliberately indifferent” to the alleged discriminatory practices,⁷³ the dissent contended that the complaint contained “enough facts to state a claim to relief that is plausible on its face.”⁷⁴ Looking at the complaint as a whole, the allegations gave Ashcroft and Mueller “fair notice of what the . . . claim is and the grounds upon which it rests”⁷⁵ and therefore were sufficient under Rule 8.

Fallout from *Iqbal*

The fallout from *Iqbal* has just barely begun. One commentator has noted that *Iqbal*, in essence, imposed a “gatekeeper-type duty” on the district courts and encouraged those courts “to draw on [their] judicial experience and common sense” in considering pleadings.⁷⁶ The decision thus “invites district court judges to dismiss cases based on their own subjective notions of what is *probably* true—a determination that apparently can be made based on events outside the four corners of the complaint.”⁷⁷ Requiring plaintiffs to plead facts regarding a defendant’s “discriminatory state of mind” reaches far beyond the requirements of notice pleading and verges on requiring the impossible in many contexts.⁷⁸ Given this standard, it is likely that *Iqbal* will lead to the dismissal of potentially meritorious claims.⁷⁹

In both *Twombly* and *Iqbal*, the majority decisions appear to be fixated on several practical concerns. The decisions emphasize the expense and burden that discovery can impose on a defendant and express skepticism that careful case management can alleviate these concerns.⁸⁰ *Iqbal* presents the additional concern about the government’s ability to respond effectively in a period of national crisis.⁸¹

Although the Court’s desire to protect Ashcroft and Mueller from the burdens of a lawsuit over their actions in response to September 11 is understandable,⁸² broad and sweeping changes to the federal pleading standards were not necessary to accomplish that task. The standards in *Iqbal* will likely be applied in many contexts and reach far beyond the exigent circumstances following September 11.⁸³ Most troubling, there are procedures in place for amending the civil procedure rules, and the Court has held in prior cases that it will not amend the procedural rules by judicial interpretation.⁸⁴ It remains to be seen whether the Civil Rules Committee or Congress will act to overturn the Court’s recent rule amendment by judicial interpretation.⁸⁵

PLAUSIBILITY IN FRANCHISE CASES

So, what does this all mean in franchise cases? Although it is important for franchise lawyers to consider the implications of *Twombly* and *Iqbal*, franchise cases likely will not be impacted any differently than federal cases generally. In the two years since *Twombly* was decided, hundreds of franchise cases have cited to its holding and attempted to apply its new plausibility pleading standard.⁸⁶ Even before *Iqbal*, courts applied the *Twombly* plausibility standard to a wide variety of claims, including breach of contract,⁸⁷ breach of the implied covenant of good faith and fair dealing,⁸⁸ unjust enrichment,⁸⁹ misrepresentation,⁹⁰ tortious interference,⁹¹ breach of implied and express warranties,⁹² and many statutory claims.⁹³ Although most of these cases simply cite *Twombly* as the boilerplate standard for a motion to dismiss, several of the decisions expressly consider whether a given claim is “plausible on its face.”

For example, in *Ramada Worldwide, Inc. v. AB Associates Midland Management*,⁹⁴ plaintiff sought damages against a corporation and individual under a guaranty. The court held that the complaint gave “fair notice” of the claims, where the guaranty was “absolute in most respects” and the “allegations of the Complaint raise a right to relief above the speculative

level.”⁹⁵ However, because the guaranty expressly disclaimed any “personal liability,” the court dismissed plaintiff’s claim for damages against an individual personally, noting that “[t]he allegations do not include essential factual components beyond speculation that Plaintiff is entitled to relief as against [the guarantor] individually.”⁹⁶

In *DavCo v. Wendy’s International, Inc.*,⁹⁷ the district court granted defendants’ motion to dismiss breach of contract and unjust enrichment claims for lack of plausibility. Plaintiffs were Wendy’s franchisees that challenged Wendy’s approval of Coca-Cola Fountain (CCF) products as opposed to Pepsi products. The court concluded that the franchise agreement expressly provided Wendy’s with “absolute unilateral authority” to approve or disapprove suppliers and did not impose any duty on the franchisor to investigate plaintiffs’ proposed alternate supplier (Pepsi).⁹⁸ The court concluded that there was no factual basis supporting plaintiffs’ claimed breach of contract and breach of the implied covenant of good faith and fair dealing.⁹⁹ Plaintiffs also alleged that Wendy’s had entered into a “secret agreement” with CCF whereby CCF artificially increased the price of beverage syrup to franchisees and then contributed those funds into the Wendy’s National Advertising Program (WNAP).¹⁰⁰ The court dismissed this breach of contract claim, noting that “[t]he complaint asserts plaintiffs’ mere speculations that Coca-Cola paid for its WNAP contributions by inflating the price of syrup sold to plaintiffs, but there are no facts alleged in support of this theory.”¹⁰¹ The court therefore dismissed the case in its entirety because “the complaint lacks factual allegations sufficient to raise the claimed right to relief above the speculative level, to create a reasonable expectation that discovery will reveal evidence to support the claim, or to state a claim to relief that is plausible on its face.”¹⁰²

In *Luther v. KIA Motors America, Inc.*,¹⁰³ the court refused to dismiss a prospective franchisee’s claims for breach of an oral contract and negligent misrepresentation. Plaintiff alleged that defendant told plaintiff it would become a KIA franchisee. In reliance on that statement, plaintiff took various steps to prepare for the franchise, including purchasing \$15,000 worth of signage.¹⁰⁴ Defendant never approved plaintiff’s franchise application. After a lengthy review of the new standards under *Twombly*, the court concluded that the facts in the complaint were sufficiently detailed and denied defendant’s motion to dismiss.¹⁰⁵

Faced with claims of negligence against a franchised hotel and its franchisor, the district court in *Chrobak v. Hilton International*¹⁰⁶ held that the complaint did not plausibly establish the franchisor’s vicarious liability for negligent supervision of a security guard. Plaintiff alleged that “Hilton International exhibited a significant amount of control over the internal and external policies of Costa Caribe concerning safety and maintenance of Hilton standards for guests,”¹⁰⁷ but the court concluded that this conclusory allegation was insufficient to survive

a motion to dismiss. According to the district court, plaintiff “fails to allege a plausible claim that the Hilton defendants exerted such day-to-day control over the security policies of the Costa Caribe. She also fails to allege a nexus between the Hilton defendants’ policies and the Costa Caribe’s negligence in hiring, training, or supervising” an employee.”¹⁰⁸ Accordingly, the court dismissed the claims against Hilton “for failure to state a plausible claim.”¹⁰⁹

In many cases, courts continue to provide plaintiffs with some leeway in their complaints and have been hesitant to dismiss claims based on mere skepticism that the plaintiff will ultimately prevail. In *General Motors Corp. v. Dealmaker*,¹¹⁰ for example, the court refused to dismiss the dealer’s counterclaim that GM breached the dealer sales and service agreement by denying the dealer’s request to relocate. Noting that “it seems unlikely that the claim would ultimately succeed given the discretion afforded GM to exercise its business judgment,” the court concluded that the dealer had “pleaded enough” to survive the motion to dismiss.¹¹¹ Similarly, in *Olsen v. RT West Palm Beach Franchise Ltd.*,¹¹² the court refused to dismiss a claim for negligent infliction of emotional distress, noting that the allegations

of physical injury were “vague” but “sufficient.” The court in *Counter Active, Inc. v. Tacom, L.P.*¹¹³ denied defendants’ motion to dismiss a tortious interference claim because plaintiffs had pleaded sufficient facts to meet the pleading requirements, but the court commented that its

conclusion “in no way indicates the likelihood that it will survive summary judgment.” These holdings, denying motions to dismiss despite the courts’ skepticism that the case will ultimately succeed, are consistent with *Twombly*’s admonition that “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.”¹¹⁴ However, following *Iqbal*’s teaching that courts should use their “judicial experience and common sense”¹¹⁵ when reviewing the plausibility of claims, it is unclear whether courts will continue to provide this deference to a plaintiff asserting claims that appear to be meritless.

The cases highlighted in this section illustrate that the post-*Twombly* analysis of franchise cases will vary depending on the terms of any applicable agreement, the allegations in the complaint, and the causes of action asserted. As one commentator noted, “Context determines the level of detail required in a pleading. While simple claims might establish ‘plausibility’ under the *Twombly* standard using relatively broad, simple allegations, more complex claims will call for more complex allegations in order to establish ‘plausibility.’”¹¹⁶ Whether a complaint states a plausible claim has been and will continue to be a context-driven, case-specific inquiry.¹¹⁷ However, “the problem with the *Twombly* plausibility standard, in which context determines the level of pleading detail required, is that it gives little guidance as to what degree of detail, whether factual

Post-*Twombly* analyses of franchise cases will depend on the applicable agreement, the allegations in the complaint, and the causes of action.

specificity or something else, courts must now require.”¹¹⁸ Under this new framework, it will be difficult for plaintiffs to plead their complaints with confidence that they contain sufficient factual allegations and easier for defendants to argue that a complaint is insufficient and should be dismissed.

WILL MOTIONS TO DISMISS BE MORE SUCCESSFUL?

Twombly and *Iqbal* may have “shifted the balance of power in federal courts decidedly in favor of defendants.”¹¹⁹ However, the full impact that *Twombly* and *Iqbal* will have on pleadings and the ultimate outcome of federal court motions to dismiss remain to be seen. For each of the decisions highlighted above, it is difficult, if not impossible, to know whether the outcome would have been any different under pre-*Twombly* pleading rules. It is also difficult to know whether (and how) the Court’s recent statements in *Iqbal*—requiring courts to employ a gate-keeping function that draws on its “judicial experience and common sense”¹²⁰—will affect the outcome of future motions to dismiss. Only empirical studies comparing the rates of granting motions to dismiss before and after *Twombly* will answer that question over time.

At least one empirical study, conducted shortly after the *Twombly* decision, concluded that the Court’s “new linguistic veneer” on Rule 8 “appears to have had almost no substantive impact” on the outcome of motions to dismiss.¹²¹ More empirical studies are needed, however, as the courts continue to address motions to dismiss in this brave new world of pleading plausibility. These studies may be difficult to structure because no two complaints are exactly the same; however, it would be significant if the rate of dismissal in certain types of cases trended upward over time. Several commentators have speculated that *Twombly* may not alter the specificity of complaints significantly because even under the old rule, “[a]ctual pleadings were rarely as ‘barebones’ as we imagine.”¹²²

Although studies are illuminating, statistical rates of dismissal should not significantly affect litigators or the parties they represent. Instead, plaintiffs and their counsel in any given case will focus on making sure that their complaint passes the new threshold of plausibility. And defendants and their counsel will aim to chip away at the allegations in almost every complaint, arguing that the allegations are conclusory and lack adequate facts to render them plausible. This will be the new dance in federal court.¹²³ Where in the past defendants may not have bothered with motions to dismiss, now they will file them as a matter of course, confident that the Supreme Court has ratcheted up their chances of success.¹²⁴ Thus, at a minimum, *Twombly* “invites defendants to file motions to dismiss under Rule 12(b)(6) with greater frequency where the complaint does not allege supporting facts, and it suggests that at least some of those motions should be granted with more regularity.”¹²⁵

Determining what is plausible will be the most difficult aspect of the Court’s new framework. Indeed, the Supreme Court itself seems conflicted over how to apply the plausibility standard and whether it requires a drastic (or only slight) alteration to

traditional pleading standards. The author of *Twombly*, Justice Souter, disagreed vehemently with the application of *Twombly*’s plausibility standard to dismiss the claims in *Iqbal*.¹²⁶ These internal inconsistencies in the Supreme Court’s own definition of *plausibility* will only exacerbate the confusion in the lower courts. “The issues raised by *Twombly* [and now *Iqbal*] are not easily resolved, and likely will be a source of controversy for years to come.”¹²⁷

It is possible that motions to dismiss may be more successful in complex cases that threaten to expose defendants to years of expensive and burdensome discovery, given the considerations that appeared to motivate the Court’s analyses in both cases. Thus, despite the Court’s insistence that it is not creating a “heightened” pleading standard, lower courts may in the end interpret plausibility more strictly in certain complex matters (i.e., antitrust, securities, actions against high-ranking government officials), resulting in a de facto heightened standard of pleading in these types of cases.

Alternatively, there may be an increase in motions for a more definite statement. Federal Rule of Civil Procedure 12(e) permits defendants to file motions requesting a more definite statement of the allegations against them, but courts generally disfavor these requests.¹²⁸ Perhaps, in the wake of *Twombly* and *Iqbal*, these motions will come into favor. For example, in *Letap Hospitality v. Days Inns Worldwide, Inc.*,¹²⁹ the court sua sponte asked plaintiff for a more definite statement of several claims in order to evaluate their plausibility. Courts may begin to require more definite statements as an intermediate alternative to dismissing a complaint entirely.

WILL THE RULES CHANGE?

In the wake of *Twombly* and *Iqbal*, many commentators have called for the Civil Rules Advisory Committee to revisit the appropriate pleading standard under Rule 8.¹³⁰ Congress may act sooner, however. On July 22, 2009, Senator Arlen Specter (D-PA) introduced a bill in the Senate that would overrule *Twombly* and *Iqbal* and return pleading standards to the *Conley* standard. The Notice Pleading Restoration Act of 2009 provides that “a Federal court shall not dismiss a complaint . . . except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).”¹³¹ Whether this bill will gain momentum or whether the advisory committee will act on its own in due course remains to be seen. In the meantime, *Twombly* and *Iqbal* undeniably have effected a sea change in the framework for pleading claims in federal court.

CONCLUSION

Twombly and *Iqbal* are must-read cases for anyone filing or defending a motion to dismiss in federal court. Plausibility has, in reality, replaced the liberal standards of notice pleading in all federal cases. There is significant uncertainty about the factual specificity necessary to plead a plausible claim in federal court. Although that uncertainty may remain for years to come, one thing is for sure: for the moment, *Conley*’s “no set of facts” language is undeniably dead, and plausibility is here to stay in

every federal case. Defense counsel are now armed with new weapons in support of their motions to dismiss, and plaintiffs must carefully plead their claims with enough facts to be “plausible on [their] face.”¹³² It is too soon to tell how big a change *Twombly* and *Iqbal* will have, on a practical level, and the plausibility standard is likely to be applied differently depending on the context of a particular case. At a minimum, the Supreme Court has breathed new life into defense motions to dismiss, and it likely will take many years of litigation to appreciate the full impact of *Twombly* and *Iqbal* on federal court litigation, including franchise litigation.

ENDNOTES

1. *Conley v. Gibson*, 355 U.S. 41, 45 (1957).
2. 550 U.S. 544 (2007).
3. *Id.* at 570.
4. 129 S. Ct. 1937 (2009).
5. *Id.* at 1950.
6. Scott Dodson, *Pleading Standards After Bell Atlantic v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 142 (July 2007).
7. In the light of the uncertainty, “lawyers will do what they have been trained to do—namely, testing the limits and meaning of the new phraseology used by the *Twombly* court to measure and examine pleadings.” Ettie Ward, Symposium, *The Future of Pleading in the Federal System: Debating the Impact of Bell Atlantic v. Twombly: The After-Shocks of Twombly: Will We ‘Notice’ Pleading Changes?* 82 ST. JOHN’S L. REV. 893, 895 (Summer 2008).
8. FED. R. CIV. P. 8(a).
9. See 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1216, at 207–08 (Supp. 2009).
10. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).
11. WRIGHT & MILLER, *supra* note 9, § 1215, at 174, 190; see also Ward, *supra* note 7, at 896.
12. 355 U.S. 41 (1957).
13. *Id.* at 43–44.
14. *Id.* at 44.
15. *Id.* at 45.
16. *Id.* at 45–46.
17. *Id.* at 47.
18. 5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1357, at 571–639 n.45 (citing cases); see also *Iqbal v. Hasty*, 490 F.3d 143, 157 n.7 (2d Cir. 2007), *overruled in part by* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (noting that *Conley*’s “no set of facts” language has been cited in 10,000 federal court decisions).
19. See, e.g., *Bell Atl. v. Twombly*, 550 U.S. 544, 577–78 (2007) (Stevens, J., dissenting).
20. *Id.* at 578.
21. WRIGHT & MILLER, *supra* note 18, § 1357, at 557, 565.
22. 550 U.S. 544 (2007).
23. *Id.* at 552. This is a relatively uncontroversial statement of law under § 1 of the Sherman Act. See, e.g., 6 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 1433a, at 236 (2d ed. 2003) (“The courts are nearly unanimous in saying that mere independent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act § 1.”); see also ABA SECTION OF ANTITRUST LAW, ANTITRUST

LAW DEVELOPMENTS 11 (6th ed. 2007) (discussing the need for “other facts and circumstances (often referred to as ‘plus factors’) in combination with conscious parallelism to support an inference of concerted action”).

24. 425 F.3d 99, 114 (2d Cir. 2005).
25. 550 U.S. at 554 (citations omitted).
26. *Id.* at 554–55.
27. *Id.* at 556.
28. *Id.* at 570.
29. *Id.* at 556.
30. *Id.* at 570.
31. *Id.* at 558–59. According to the majority, “[t]hat potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high speed Internet service in the continental United States, in an action against America’s largest telecommunications firms . . . for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.” *Id.* at 559.
32. *Id.* at 559 (noting the “common lament that the success of judicial supervision in checking discovery abuse has been on the modest side”).
33. *Id.*
34. 465 U.S. 752, 764 (1984) (“There must be evidence that tends to exclude the possibility that the [alleged co-conspirators] were acting independently.”).
35. 475 U.S. 574, 588 (1986) (“[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.”).
36. 550 U.S. at 564.
37. *Id.* at 561.
38. *Id.* at 562.
39. *Id.* at 563.
40. *Id.* at 562. In fact, the Court cited other aspects of *Conley* favorably and emphasized that “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” *Id.* at 556.
41. *Id.* at 573, 596.
42. *Id.* at 575.
43. *Id.* at 577.
44. *Id.* at 577–78.
45. *Id.* at 578.
46. *Id.* at 573.
47. *Id.*
48. *Id.* at 593, n.13.
49. *Id.* at 586.
50. See, e.g., 2 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE 3D § 8.04[1][a] at 8-27 (“The courts of appeals have acknowledged that the *Twombly* opinion creates considerable uncertainty about pleading standards.”); WRIGHT & MILLER, *supra* note 9, § 1216, at 39 (noting that “courts continue to struggle with the meaning of ‘plausibility’”).
51. MOORE, *supra* note 50, § 8.04[1][a], at 8-27; see also 1 JAMES WM. MOORE, MOORE’S MANUAL: FEDERAL PRACTICE FORMS 10-20.1 (criticizing *Twombly* for “pay[ing] lip service to liberal notice pleading”).
52. See, e.g., MOORE, *supra* note 50, ¶ 8.04[1][a], at 8-28 (“The courts of appeals have not limited [*Twombly*’s] application to antitrust or even complex claims.”) (citing cases); see also Ward, *supra* note 7, at 906–07 (“[C]ourts have already applied the *Twombly* ‘plausibility’ standard in a wide range of cases outside the antitrust context.”) (citing cases).

53. For example, the Second Circuit noted that the Court's opinion included "conflicting signals" that created "uncertainty as to the intended scope of the Court's decision." 490 F.3d at 157 (2d Cir. 2007). Among other things, the Second Circuit noted that the *Twombly* Court cited favorably to Form 9 in the appendix of the Federal Rules of Civil Procedure, which contains a form complaint for negligence that states only that the defendant "negligently drove a motor vehicle against plaintiff." *Id.* at 156. According to the Second Circuit, the *Twombly* Court "took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been negligent." *Id.*

54. *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008).

55. 129 S. Ct. 1937 (2009).

56. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

57. 129 S. Ct. at 1944.

58. 490 F.3d 143, 157–58 (2d Cir. 2007).

59. *Id.* at 158–59, 175–76.

60. 129 S. Ct. at 1949.

61. *Id.* at 1949–50.

62. *Id.* at 1950.

63. *Id.* at 1952.

64. *Id.*

65. *Id.*

66. *Id.* at 1953.

67. *Id.*

68. *Id.*

69. *Id.* at 1954.

70. *Id.* at 1959.

71. *Id.*

72. *Id.* at 1960.

73. *Id.* at 1957 (accusing the majority of "ignoring" this "critical concession").

74. *Id.* at 1960.

75. *Id.* at 1961 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

76. Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, 35 LITIG. *1, 2 (Spring 2009).

77. *Id.* at *2 (emphasis in original).

78. "Without [some limited discovery], dismissal becomes far more likely, especially in cases involving facts generally not available to plaintiffs without discovery, such as evidence of fraudulent concealment or of concerted antitrust conduct." *Id.* at *3.

79. *Id.* at *2 ("*Iqbal* has the potential to short-circuit the adversary process by shutting the doors of federal courthouses around the nation to large numbers of legitimate claims based on what amounts to a district court judge's effectively irrefutable, subjective assessment of probable success."); *see also* Edward D. Cavanagh, Symposium, *The Future of Pleading in the Federal System: Debating the Impact of Bell Atlantic v. Twombly: Twombly, the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 889 (Summer 2008) ("Query whether it makes good sense to invoke the drastic remedy of dismissal at the point in the case where the plaintiff and the court know the least about it.").

80. *Iqbal v. Hasty*, 129 S. Ct. 1937, 1953–54 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

81. 129 S. Ct. at 1953 (citing 490 F.3d at 179 (Cabrane, J., concurring)).

82. *See* Rothman, *supra* note 76, at *2 ("Perhaps *Iqbal* is best

explained as a result driven by the majority's stated goal of supporting the qualified immunity defense, designed to 'free officials from the concerns of litigation, including avoidance of disruptive discovery,' particularly in the context of those decisions made in the heat of post-9/11 fears and emotions.") (citing *Iqbal*, 129 S. Ct. at 1953).

83. *Id.* It is possible, however, that *Iqbal*'s biggest impact will be in qualified immunity cases. *See Moss v. U.S. Secret Serv.*, 2009 U.S. App. LEXIS 15694 (9th Cir. July 16, 2009); *Maldonado v. Sol Luis Fontanes*, Mayor of Barceloneta, 568 F.3d 263 (1st Cir. June 4, 2009).

84. For example, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993), the Court refused to impose a heightened pleading standard for allegations against a municipality, noting that such a result "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." The Court continued: "In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.* at 168–69. After *Twombly* and *Iqbal*, that statement may no longer be true.

85. *See infra* notes 130–31 and accompanying text.

86. The cases discussed here are merely a representation of the types of franchise cases in which these new Supreme Court decisions have been cited and applied.

87. *See, e.g., Sunshine Rest. Partners v. Shivshakti One, Inc.*, 2008 U.S. Dist. LEXIS 89899, at *8 (S.D. Fla. 2008) (allegations of breach of contract "rise above the level of speculative"); *W. L.A. Pizza, Inc. v. Domino's Pizza, Inc.*, 2008 U.S. Dist. LEXIS 45977, at *25–28 (C.D. Cal. 2008) (dismissing several contract claims that were not supported by the plain terms of the franchise agreement); *Dunkin' Donuts Franchised Rests. LLC v. Colonial Donuts, Inc.*, 2007 U.S. Dist. LEXIS 46120, at *7–8 (M.D. Fla. 2007) (dismissing claims for breach of contract and breach of the covenant of good faith and fair dealing, where the complaint failed to pinpoint a "specific provision" of the contract that defendant allegedly breached).

88. *See, e.g., Barkan v. Dunkin' Donuts, Inc.*, 520 F. Supp. 2d 333, 339–40 (D.R.I. 2007) (denying motion to dismiss claimed breach of covenant of good faith and fair dealing); *Sunshine Rest. Partners*, 2008 U.S. Dist. LEXIS 89899, at *10 (dismissing claim under covenant where conduct complied with express contract provision).

89. *In re McDonald's French Fries Litig.*, 503 F. Supp. 2d 953, 958 (N.D. Ill. 2007) (refusing to dismiss unjust enrichment claim); *HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys.*, 590 F. Supp. 2d 677, 692 (D.N.J. 2008) (unjust enrichment claim dismissed where express contract governed parties' relationship).

90. *See, e.g., MRW, Inc. v. Big-O Tires, LLC*, 2009 U.S. Dist. LEXIS 13041, at *8 (E.D. Cal. 2009) (denying motion to dismiss claims of intentional and negligent misrepresentation); *Luther v. KIA Motors Am., Inc.*, 2008 U.S. Dist. LEXIS 46579, at *18 (W.D. Pa. 2008) (denying motion to dismiss negligent misrepresentation claim); *Gentle Laser Solutions, Inc. v. Sona Int'l, Inc.*, 2008 U.S. Dist. LEXIS 47645, at *31 (D.N.J. 2008) ("[P]laintiffs have plead enough facts to go forward with their claim for negligent misrepresentation."); *Letap Hospitality, LLC v. Days Inns Worldwide, Inc.*, 2008 U.S. Dist. LEXIS 62442, at *15–16 (E.D. La. 2008) (dismissing misrepresentation claim where plaintiff "has not alleged sufficient facts to make its claim for relief plausible on its face") (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

91. See, e.g., *Barkan v. Dunkin' Donuts, Inc.*, 520 F. Supp. 2d 333, 341–42 (D.R.I. 2007) (tortious interference claim dismissed); *Counter Active, Inc. v. Tacom*, 2008 U.S. Dist. LEXIS 22669, at *13 (D. Minn. 2008) (motion to dismiss denied where “[p]laintiffs have alleged enough facts to state a claim to relief that is plausible on its face”); *Hyatt Corp. v. Epoch Fla. Capital Hotel Partners*, 2008 U.S. Dist. LEXIS 12693, at *12 (M.D. Fla. 2008) (denying motion to dismiss tortious interference claim because the “allegations are sufficient to allege malicious purpose or wrongful means”); *Bowser Cadillac v. Gen. Motors Corp.*, 2008 U.S. Dist. LEXIS 4206, at *13–14 (W.D. Pa. 2008) (motion to dismiss tortious interference claim denied because disputed issue of justification “cannot be determined solely by examination of the pleadings”).
92. See, e.g., *In re McDonald's French Fries Litig.*, 503 F. Supp. 2d 953, 957–58 (N.D. Ill. 2007) (dismissing claim for implied warranty of fitness for failure to state a claim but refusing to dismiss claim for breach of express warranty under Magnusson Moss Warranty Act).
93. See, e.g., *Counter Active*, 2008 U.S. Dist. LEXIS 22669, at *19–20, 23 (denying motion to dismiss claims under the Florida Franchise Misrepresentation Act and the Florida Deceptive and Unfair Trade Practices Act); *Gentle Laser Solutions, Inc. v. Sona Int'l, Inc.*, 2008 U.S. Dist. LEXIS 47645, at *18, 26 (D.N.J. 2008) (dismissing claims under the New Jersey Franchise Practices Act and the New Jersey Consumer Fraud Act); *United Energy Distribs. v. Conoco Phillips*, 2008 U.S. Dist. LEXIS 75962, at *12, 26–27 (D.S.C. 2008) (denying motion to dismiss claims under Petroleum Marketing Practices Act and South Carolina Unfair Trade Practices Act because claims are “plausible on [their] face”); *HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys.*, 590 F. Supp. 2d 677, 689–90 (D.N.J. 2008) (Racketeered Influenced and Corrupt Organizations Act claims not dismissed where “[p]laintiffs’ pleadings are sufficiently specific”); *Abdelkhaleq v. Precision Door of Akron*, 2008 U.S. Dist. LEXIS 66464, at *10–11 (N.D. Ohio) (Fair Labor Standards Act claim dismissed); *Wooley v. Jackson Hewitt, Inc.*, 540 F. Supp. 2d 964, 975 (N.D. Ill. 2008) (RICO claim dismissed for failure to adequately allege existence of an enterprise); *Patterson v. Denny's Corp.*, 2008 U.S. Dist. LEXIS 6747, at *1–6 (W.D. Pa. 2008) (refusing to dismiss claim under Fair and Accurate Credit Transactions Act).
94. 2008 U.S. Dist. LEXIS 30924 (M.D. Fla. 2008).
95. *Id.* at *6–7.
96. *Id.* at *8.
97. 2008 U.S. Dist. LEXIS 27108 (S.D. Ohio 2008).
98. *Id.* at *13–20.
99. *Id.* at *17.
100. *Id.* at *22–23.
101. *Id.* at *27. Plaintiffs’ claim for unjust enrichment arising out of the same allegations also failed because “Wendy’s does not benefit from the WNAP contributions” and because the franchise agreement expressly addresses WNAP contributions, making an unjust enrichment claim improper as a matter of law. *Id.* at *32.
102. *Id.* at *37–38 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
103. 2008 U.S. Dist. LEXIS 46579 (W.D. Pa. 2008).
104. *Id.* at *3.
105. *Id.* at *5–7.
106. 2008 U.S. Dist. LEXIS 76888 (S.D.N.Y. 2008).
107. *Id.* at *14.
108. *Id.* at *15.
109. *Id.*
110. 2007 U.S. Dist. LEXIS 62383, at *21–22 (N.D.N.Y. 2007).
111. *Id.* at *21; but see *Bright Bay GMC Truck v. Gen. Motors Corp.*, 593 F. Supp. 2d 495, 500 (E.D.N.Y. 2009) (distinguishing *Deal-maker* and dismissing complaint where the “facts at bar are quite different and far less compelling”).
112. 2008 U.S. Dist. LEXIS 30381, at *5 (S.D. Fla. 2008).
113. 2008 U.S. Dist. LEXIS 22669, at *13 (D. Minn. 2008).
114. 550 U.S. 544 556 (2007).
115. 129 S. Ct. 1937, 1950 (2009).
116. MOORE, *supra* note 50, § 8.04[1][a], at 8-28, n.4.14.1 (2009) (citing cases).
117. See, e.g., *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008) (noting that “the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context”); *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (“[T]he *Twombly* decision focuses our attention on the ‘context’ of the required short, plain statement. Context matters in notice pleading.”).
118. MOORE, *supra* note 50, § 8.04[1][a], at 8-28, n.4.14.1 (2009) (citing cases).
119. Cavanagh, *supra* note 79, at 892.
120. 129 S. Ct. at 1950.
121. Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (May 2008) (studying *Twombly*’s effect on motions to dismiss in the first seven months after the decision and finding no significant effect).
122. Ward, *supra* note 7, at 895; see also Hannon, *supra* note 121, at 1839–40 (“Complaints in the federal judiciary are neither short nor plain—in fact, it appears that there is a habitual practice among attorneys to overplead. . . . This tradition of overpleading in the pre-*Twombly* federal court system could be masking *Twombly*’s true effect.”).
123. Dodson, *supra* note 6, at 142 (“Motions to dismiss will change from challenges to the legal sufficiency of a complaint to those challenging the factual sufficiency.”).
124. Ward, *supra* note 7, at 916 (“From a defendant’s perspective, *Twombly* makes a Rule 12(b)(6) motion a desirable first gambit.”).
125. Dodson, *supra* note 6, at 140.
126. 129 S. Ct. 1937, 1959–61 (2009).
127. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008).
128. See, e.g., MOORE, *supra* note 50, § 12.36, at 12-121 (Rule 12(e) motion “is not favored, because pleadings are to be construed liberally to do substantial justice”); see also 5C WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1377, at 338–39 (Rule 12(e) requests are “disfavored” and rarely granted).
129. 2008 U.S. Dist. LEXIS 62442, at *13–14 (E.D. La. 2008).
130. “Now that *Twombly* has overturned *Conley v. Gibson*, it is imperative that the Advisory Committee revisit the pleading standards under Rule 8.” Cavanagh, *supra* note 79, at 891. See also Rothman, *supra* note 76, at *3 (noting that the advisory committee “is planning a major conference on civil litigation in federal courts for the spring of 2010 to examine pretrial costs, burdens and delays”).
131. See S. 1504, 111th Congress (1st Sess. 2009).
132. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).