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Blurring the Lines Between Pleading Doctrines: The Enhanced Rule 8(a)(2) Plausibility Pleading Standard Converges With the Heightened Fraud Pleading Standards Under Rule 9(b) and the PSLRA

Marc I. Steinberg* and Diego E. Gomez-Cornejo**

ABSTRACT

This article focuses on the Supreme Court's recent enhancement of Rule 8(a)(2)'s pleading standard to approach the heightened fraud pleading standards under Rule 9(b) and the Private Securities Litigation Reform Act (PSLRA). The authors posit that the

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introduction of a tacit "probability requirement" into the basic pleading standard impedes the heightened fraud pleading standards under Rule 9(b) and the PSLRA from fulfilling the policy rationales for which they were created. By elevating the basic requirements that must be met in any federal civil case for a complaint to be legally sufficient, the Supreme Court has caused an evident convergence of pleading standards that blurs the lines between pleading doctrines. The authors assert that this convergence produces incongruity in the federal civil litigation system by at times treating plaintiffs bringing fraud claims more leniently than those alleging non-fraud claims under Rule 8(a)(2)'s new plausibility pleading standard.

The modern rules of civil procedure permit defendants to attack both the factual and legal sufficiency of a complaint.[1] Thanks to the liberal "no set of facts" notice pleading standard adopted by the United States Supreme Court in *Conley v. Gibson*,[2] however, Rule 12(b)(6) motions—asking the court to dismiss the complaint "for failure to state a claim upon which relief may be granted"[3]—were rarely granted by federal courts in civil litigation.[4] As noted by Justice Stevens, "[u]nder the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in."[5] The Supreme Court, however, has recently abandoned this liberal pleading standard in favor of plausibility pleading, requiring plaintiffs to plead "enough facts to state a claim to relief that is plausible on its face."[6] It is not surprising, therefore,

1. *See generally* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 62 (2007) (examining the legal and factual uncertainty under the present federal rules and arguing that *Twombly* "was a disguised motion for summary judgment that is best defended as properly balancing the relative error costs of stopping too soon or going too far").

2. 355 U.S. 41, 45–46 (1957).

3. FED. R. CIV. P. 12(b)(6).

4. *See, e.g.*, Test Masters Educ. Servs., Inc. v. Singh, 428 F.3d 559, 570 (5th Cir. 2005) ("Motions to dismiss are viewed with disfavor and are rarely granted."); Kingwood Oil Co. v. Bell, 204 F.2d 8, 13 (7th Cir. 1953) ("'Motions to dismiss pleadings . . . are to be granted sparingly and with caution.'" (quoting CYCLOPEDIA OF FEDERAL PROCEDURE § 15.204 (3d ed. 1951))).

5. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 575 (2007) (Stevens, J., dissenting).

6. *Id.* at 570.

that complaints that would have previously survived motions to dismiss under the notice pleading standard are now dismissed before any opportunity for discovery.[7]

By enhancing the basic pleading standard applicable in every federal civil case, the Supreme Court has elevated the previously liberal Rule 8(a)(2) pleading standard to approach the heightened pleading standards predicated on allegations of fraud—the Rule 9(b) fraud pleading standard[8] and the pleading standard for scienter in securities fraud actions under the PSLRA.[9] This evident convergence of pleading standards blurs the lines between pleading doctrines that were adopted to address different policy concerns, thus creating a federal civil litigation system that is unfair and incongruous.

Part I of this article briefly outlines the new Rule 8(a)(2) plausibility pleading standard, as established under *Twombly*[10] and *Iqbal*;[11] the Rule 9(b) heightened fraud pleading standard; and the PSLRA's pleading standard for scienter in securities fraud, as interpreted in *Tellabs*.[12] Part II posits that the enhanced Rule 8(a)(2) pleading standard espoused by the Supreme Court in *Twombly* and *Iqbal* converges with the heightened pleading standards under Rule 9(b) and the PSLRA. By comparing and contrasting the pleading standards as understood by federal courts, analyzing *Iqbal*'s broadening of the *Twombly* pleading standard, and examining the way in which plaintiffs are affected when opposing inferences have equal weight, it will become apparent that recent Supreme Court

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7. *See* Panther Partners, Inc. v. Ikanos Commc'ns, Inc., 347 F. App'x 617, 620 (2d Cir. 2009) (dismissing a complaint alleging violations of §§ 11, 12, and 15 of the Securities Act of 1933 because, applying *Twombly*'s plausibility pleading standard, the plaintiffs "did not allege facts sufficient to complete the chain of causation needed to prove that defendants negligently made false statements").

8. *See* FED. R. CIV. P. 9(b) ("[I]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

9. *See* 15 U.S.C. § 78u-4 (2006) ("[T]he complaint shall specify each statement alleged to have been misleading.").

10. *Twombly*, 550 U.S. at 550–61 (setting forth the "plausibility standard" for pleading conspiracy claims under § 1 of the Sherman Act).

11. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (finding that the plaintiff pleaded insufficient facts to state a claim for unlawful discrimination and expanding the plausibility pleading standard to all federal civil claims).

12. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 323 (2007) (holding that courts must consider both fraudulent and non-fraudulent plausible inferences of intent in determining whether a securities fraud complaint alleges sufficient facts to meet the "strong inference" requirement under the PSLRA).

decisions blur the lines distinguishing the pleading doctrines. Part III discusses the consequences of this convergence, asserting that it produces incongruity in the federal civil litigation system by at times treating plaintiffs alleging fraud more leniently than those stating a non-fraud claim under Rule 8(a)(2)'s plausibility pleading standard. After briefly examining the different policy concerns behind each pleading standard, Part III proposes that the Supreme Court, seeking in part to deter vexatious litigation, engaged in judicial activism by enhancing the basic pleading requirements for all federal civil suits under Rule 8(a)(2) and failed to consider the repercussions of the convergence of pleading standards, which has effectively disadvantaged plaintiffs bringing forward claims not involving fraud.

I. THREE EVOLVING PLEADING STANDARDS: PLAUSIBILITY, PARTICULARITY, AND COGENCY

The simple notice pleading standard adopted in *Conley v. Gibson* has been abandoned in favor of plausibility pleading, as established by the Supreme Court in *Twombly* and *Iqbal*.[13] When fraud is alleged in a complaint, however, the heightened pleading requirements of Rule 9(b) must still be met.[14] And, in the case of private securities litigation, after the Supreme Court's interpretation of the PSLRA's pleading requirements in *Tellabs*, a securities fraud complaint must allege plausible theories of relief through particularized allegations, with the inference of scienter being cogent and at least as compelling as any competing inference.[15] In order to properly discuss the convergence phenomenon proposed in Part II of this article, these three pleading standards will be examined below.

A. Rule 8(a)(2) and the Death of Notice Pleading: Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal

Notice pleading, as understood by federal courts, practitioners, and law students for over fifty years,[16] has been

13. *See* discussion *infra* Part I.A.

14. *See* discussion *infra* Part I.B.

15. *See* discussion *infra* Part I.C.

16. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (holding that an employment discrimination claim need not contain specific facts

effectively overhauled by the U.S. Supreme Court through two recent decisions.[17] The Rule 8(a)(2) pleading standard was embodied in the long accepted rule, established by the Supreme Court in the 1957 decision *Conley v. Gibson*, "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."[18] Even though the simplified notice pleading standard adopted in *Conley* was challenged by lower federal courts,[19] this Supreme Court ruling

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to establish a prima facie case, but rather "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests'" (quoting Conley v. Gibson, 335 U.S. 41, 47 (1957))); Judge v. City of Lowell, 160 F.3d 67, 72 (1st Cir. 1998) ("In an oft-quoted gloss, the Supreme Court stated over forty years ago 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.'" (quoting *Conley*, 335 U.S. at 45–46)); O'Mara v. Erie Lackawanna R.R. Co., 407 F.2d 674, 678 (2d Cir. 1969) (finding the dismissal of a portion of the complaint proper "because it did not give defendants 'fair notice' of the basis of plaintiffs' claim under the [Interstate Commerce] Act"); Garcia v. Bernabe, 289 F.2d 690, 692–93 (1st Cir. 1961) (finding the complaint sufficient under *Conley* and explaining that "[t]he Federal Rules of Civil Procedure do not require that a claimant set out in detail the facts upon which he bases his claim.").

17. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

18. *Conley*, 355 U.S. at 45–46.

19. *See, e.g.*, Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989) ("[*Conley*] unfortunately provided conflicting guideposts."); Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (explaining that "*Conley* has never been interpreted literally" and finding that complaints require "either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory") (emphasis in original); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 574–96 (2002) (examining federal cases embracing heightened pleading burdens in contravention of *Conley*); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) (noting that the problem with Rule 8(a)(2) is its interpretation by federal courts and arguing that the Supreme Court "turned Rule 8 on its head" in *Conley*); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 463–65 (1986) (examining the tension between the notice pleading standard established in *Conley* and subsequent interpretations of Rule 8(a)(2) by lower federal courts); Matthew A. Josephson, Note, *Some Things Are Better Left Said: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 42 GA. L. REV. 867, 881 (2008) ("[T]he history of notice pleading can be characterized as a tug-of-war between the Supreme Court and the lower federal courts, with the federal courts continually

remained good law for fifty years.[20] In *Bell Atlantic Corp. v. Twombly*,[21] however, the Supreme Court expressly overruled this part of *Conley*'s pleading standard in favor of a stricter plausibility standard, holding that a complaint must provide "enough facts to state a claim to relief that is *plausible on its face*."[22] Although there was some uncertainty about whether the Court's holding in *Twombly* extended beyond the antitrust context,[23] the Supreme Court resolved that issue two years later in *Ashcroft v. Iqbal*,[24] holding that the plausibility standard extends beyond pleadings in the antitrust context and encompasses all civil federal actions.[25]

In 1938, the enactment of the Federal Rules of Civil Procedure replaced the "cumbersome and inelegant" code pleading

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requiring the pleading of more facts and the Supreme Court responding with a 'no facts necessary' interpretation of Rule 8.").

20. *See supra* note 16 and accompanying text.

21. 550 U.S. 544 (2007).

22. *Id.* at 570 (emphasis added).

23. *Compare* ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 n.2 (2d Cir. 2007) ("We have declined to read *Twombly*'s flexible 'plausibility standard' as relating only to antitrust cases."), *and* Ocwen Loan Servicing, LLC Mortg. Servicing Litig., 491 F.3d 638, 649 (7th Cir. 2007) ("The present case is not an antitrust case, but the district court will want to determine whether the complaint contains 'enough factual matter (taken as true)' to provide the minimum notice of the plaintiffs' claim that the Court believes a defendant entitled to."), *with* Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans Inc., 525 F.3d 8, 15 (D.C. Cir. 2008) ("Many courts have disagreed about the import of *Twombly*. We conclude that *Twombly* leaves the long-standing fundamentals of notice pleading intact."), *and* McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1356 n.4 (Fed. Cir. 2007) (refusing to apply *Twombly* to a patent infringement claim by arguing that *Twombly* did not change the pleading requirement of Rule 8 as articulated in *Conley*). *See also* Jason G. Gottesman, *Speculating as to the Plausible: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 17 WIDENER L.J. 973, 1004–05 (2008) (noting how the circuit courts' disparate interpretations of *Twombly* are confusing the legal profession); Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1099 (2009) ("The full scope and effect of *Twombly* has yet to play out in the courts. Nonetheless, faithful adherence to the Court's decision would have potentially sweeping effects."); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 494 (2008) ("The new plausibility standard, which is being and will continue to be applied by lower courts outside the antitrust context, bodes ill for plaintiffs who will now have to muster facts showing plausibility when such facts may be unavailable to them.").

24. 129 S. Ct. 1937 (2009).

25. *Id.* at 1953 (explaining that the *Twombly* decision "expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike").

system and introduced a simplified pleading system, in which "the complaint simply would initiate the action and notify the parties and the court of its nature."[26] Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[27] It was not until 1957, in *Conley v. Gibson*, however, that the Supreme Court interpreted the notice pleading standard.[28] In *Conley*, the Supreme Court interpreted the language of Rule 8(a)(2) as requiring a plaintiff to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[29] Noting that Rule 8 did not require a plaintiff to provide detailed facts, the Court rejected the view that pleading is simply "a game of skill"[30] and found that the complaint at bar adequately set forth a claim upon which relief could be granted.[31]

The *Conley* decision was long perceived as properly embodying the drafters' original intent since it reflected the view that "procedural rules should efficiently foster decisions on the merits."[32]

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26. Spencer, *supra* note 23, at 434 (noting that the new rules introduced a system in which "pleadings were no longer to be a substantial hurdle to be overcome before plaintiffs could gain access to the courts"); *see also* Robert L. Carter, *Civil Procedure as a Vindicator of Civil Rights: The Relevance of* Conley v. Gibson *in the Era of "Plausibility Pleading"*, 52 HOW. L.J. 17, 25 (2008) ("The Rules were created, in part, to promote the resolution of lawsuits on the merits, not on procedure. They replaced a cumbersome system that distinguished between 'ultimate facts' and 'evidentiary facts' or 'conclusions.'").

27. FED. R. CIV. P. 8(a)(2).

28. Conley v. Gibson, 355 U.S. 41, 47–48 (1957). The Supreme Court refused to dismiss a complaint filed by a group of black railway employees against their union because the complaint properly alleged that the union breached its statutory duty of equal representation of its members. *Id.* at 45–46.

29. *Id.* at 47. The Court explained that this simplified form of pleading was "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." *Id.* at 47–48.

30. *Id.* at 48; *see also* Saritha Komatireddy Tice, *A "Plausible" Explanation of Pleading Standards:* Bell Atlantic Corp. v. Twombly, *127 S. Ct. 1955 (2007)*, 31 HARV. J.L. & PUB. POL'Y 827, 834 (2008) (explaining that because the pre-*Twombly* interpretation of the Rules focused mainly on simplicity, federal courts "enabled a plaintiff to state his claim without technical finesse").

31. *Conley*, 355 U.S. at 47.

32. *See* Carter, *supra* note 26, at 18 ("[The *Conley* decision] emphasized that the Rules were designed to aid the enforcement of substantive justice rather than create hypertechnical traps for the unwary, while serving dual purposes of efficiency and fairness.").

Moreover, as recently as 2002, in the employment discrimination context, the Supreme Court reiterated that the notice pleading standard established in *Conley* still applied in all civil actions.[33] Nonetheless, as subsequent case law examined below will show, the notice pleading standard has been abandoned in favor of a stricter plausibility standard, in which the plaintiff must provide sufficient factual allegations to move a claim across "the line between possibility and plausibility."[34]

In *Bell Atlantic Corp. v. Twombly*, decided in 2007, the U.S. Supreme Court was presented with the issue of whether to dismiss an antitrust conspiracy claim brought by a putative class of telephone and internet service subscribers.[35] The subscriber-plaintiffs brought their liability claim under § 1 of the Sherman Act, which prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[36] The plaintiffs alleged that various regional telephone service monopolies, called Incumbent Local Exchange Carriers (ILECs), had engaged in a conspiracy to hinder the entrance of competing local companies, referred to as Competitive Local Exchange Carriers (CLECs), into the local telephone and internet service market.[37] More specifically, they argued that the ILECs had conspired to restrain trade by "'engag[ing] in parallel conduct' in their respective service areas to inhibit the growth of upstart CLECs" and by entering

33. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) ("This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."); *see also* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 346 (2005) (relying on *Conley* to find that the plaintiffs' complaint failed to adequately allege proximate causation and economic loss in a private federal securities fraud action); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 167–68 (1993) (reaffirming the notice pleading standard established in *Conley* in rejecting the application of a heightened pleading standard to a Fourth Amendment civil rights case alleging municipal liability under 42 U.S.C. § 1983).

34. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

35. *Id.* at 548–49.

36. 15 U.S.C. § 1 (2006). Section 1 of the Sherman Act only prohibits restraints of trade "effected by a contract, combination, or conspiracy." Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984). "The crucial question," therefore, is whether the alleged anticompetitive actions stem from "independent decision or from an agreement, tacit or express." Theatre Enterprises., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954).

37. *Twombly*, 550 U.S. at 550–51.

into agreements not to compete against each other.[38] These actions, the subscribers alleged, resulted in them having to pay inflated rates for the services provided.[39]

The District Court for the Southern District of New York dismissed the complaint, finding that the subscribers' "allegations of parallel ILEC actions to discourage competition" were inadequate because mere "conscious parallelism" was insufficient to state a claim of conspiracy under § 1 of the Sherman Act.[40] Furthermore, as to the alleged non-compete agreements, the district court found that they were insufficient to infer a conspiracy because the complaint failed to allege facts to suggest that "refraining from competing in other territories as CLECs was contrary to [the ILECs'] apparent economic interests."[41] The Court of Appeals for the Second Circuit reversed, however, holding that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal."[42] The U.S. Supreme Court granted certiorari in order to determine the proper pleading standard for antitrust conspiracy cases based upon allegations of parallel conduct.[43]

The Supreme Court began its analysis by noting that a plaintiff bringing an antitrust conspiracy claim may not proceed by

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38. *Id.* at 550. The complaint alleged the following:

> 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 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.

Id. at 551.

39. *Id.* at 550.

40. *Id.* at 552. Judge Lynch, presiding over the district court, explained that "parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions." Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003), *rev'd*, 425 F.3d 99 (2d Cir. 2005), *rev'd sub nom.* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

41. *Twombly*, 313 F. Supp. 2d at 188.

42. *Twombly*, 425 F.3d at 114.

43. *Twombly*, 550 U.S. at 553.

merely providing evidence of parallel conduct, but rather must provide evidence that properly rules out the possibility of independent action by the defendants.[44] In determining whether the subscribers' complaint had sufficiently pleaded antitrust conspiracy, the majority focused on the notice pleading system established under Federal Rule of Civil Procedure 8(a)(2), as described in *Conley*.[45] Nonetheless, the Court reasoned that factual allegations that would sufficiently "raise a right to relief above the speculative level" were required, rejecting the view that "a formulaic recitation of the elements of a cause of action" would be sufficient.[46] Thus, in holding that a claim under § 1 of the Sherman Act requires a complaint that pleads enough facts to allege that there was an agreement, the Court noted:

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, 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."[47]

Interestingly, in agreeing with the district court's finding that the subscribers failed to state a claim under § 1 of the Sherman Act because the facts alleged did not sufficiently suggest antitrust

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44. *Id.* at 554 ("The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.").

45. *Id.* at 554–55.

46. *Id.* at 555. The majority was mainly concerned about the possibility of excessive discovery costs: "[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Id.* at 558; *see also* Tice, *supra* note 30, at 830 ("[*Twombly*] reflects a significant shift away from the litigation-promoting mindset embodied in *Conley* and instead solidifies what has been a growing hostility towards litigation.").

47. *Twombly*, 550 U.S. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

conspiracy, the Supreme Court emphasized that it was neither applying a heightened pleading standard nor attempting to "broaden the scope of Federal Rule of Civil Procedure 9."[48] More specifically, the Court explained that it did "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is *plausible on its face*," and that the subscribers' complaint had to be dismissed because they failed to "nudge[] their claims across the line *from conceivable to plausible*."[49]

Two years later, in *Ashcroft v. Iqbal*, the U.S. Supreme Court decidedly resolved the question as to whether this stricter plausibility standard applied in civil cases generally or only in antitrust cases.[50] Javaid Iqbal, a Pakistani Muslim, claimed to have been deprived of his constitutional rights after being arrested on criminal charges in the wake of the terrorist attacks of September 11, 2001.[51] Because Iqbal was deemed to be of "high interest" by the FBI, he was held in a maximum security housing unit and, after pleading guilty to criminal fraud and conspiracy charges, was removed to his native country.[52] Iqbal then filed a *Bivens* complaint against Attorney General John Ashcroft and FBI Director Robert Mueller, alleging that the policies adopted by Ashcroft and Mueller unconstitutionally discriminated against him while he was detained.[53] After the District Court for the Eastern District of New York refused to grant the defendants' motion to dismiss, Mueller and Ashcroft filed an interlocutory appeal to the Court of Appeals for the Second Circuit.[54]

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48. *Twombly*, 550 U.S. at 569 n.14 ("Here, our concern is not that the allegations in the complaint were insufficiently 'particular[ized]'; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.").

49. *Id.* at 570 (emphasis added).

50. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009).

51. *Id.* at 1942. More specifically, Iqbal contended that he was invidiously discriminated against in contravention of the First and Fifth Amendments to the United States Constitution. *Id.* at 1944.

52. *Id.* at 1943.

53. *Id.* at 1943–44. A *Bivens* action is "an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (examining Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)); *see also* Ryan D. Newman, *From* Bivens *to* Malesko *and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 476 (2006) (explaining *Bivens*'s doctrine of implied constitutional damage remedies and arguing that it does not violate separation of powers principles).

54. *Iqbal*, 129 S. Ct. at 1944.

Concluding that the flexible plausibility standard established in *Twombly* "obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*," the court found Iqbal's pleading adequate since it did not involve one of those contexts where amplification was required.[55]

The Supreme Court granted certiorari to determine whether sufficient facts were pleaded under the Rule 8 plausibility standard for a complaint stating a claim of purposeful and unlawful discrimination to survive dismissal.[56] Examining *Twombly*'s analysis of the plausibility standard under Rule 8(a)(2), the Supreme Court explained that, even though "detailed factual allegations" are not necessary, the Rule 8(a)(2) pleading standard requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[57] The Court then examined the factual allegations and determined that they failed to "plausibly suggest an entitlement to relief," since the complaint did not contain facts that would allow the Court to plausibly conclude that the defendants "purposefully adopted a policy of classifying post-September 11 detainees as 'of high interest' because of their race, religion, or national origin."[58] In the end, the Supreme Court not only found that Iqbal's complaint failed to nudge his claims "across the line from conceivable to plausible," but also explicitly clarified that *Twombly*'s pleading standard applied to both antitrust and discrimination suits alike, since that decision was primarily based on properly interpreting Rule 8.[59] Thus, *Iqbal* not only expanded the scope of the Rule 8(a)(2) plausibility standard proposed in *Twombly*, but also "changed the

55. Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

56. *Iqbal*, 129 S. Ct. at 1942–43.

57. *Id.* at 1949.

58. *Id.* at 1951–52 (noting that all the complaint 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," which was insufficient for a court to properly infer that defendants had purposely adopted an invidiously discriminatory policy).

59. *Id.* at 1951, 1953 ("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.'" (quoting FED. R. CIV. P. 1)).

landscape for Rule 12(b)(6) motions."[60]

The liberal notice pleading standard established in *Conley*, therefore, is now obsolete.[61] In the wake of *Twombly* and *Iqbal*, lower federal courts must decipher the scope and reach of the plausibility pleading standard in every civil case.[62] As will be examined later in the article, the problem becomes more acute once the enhanced Rule 8(a)(2) pleading standard is compared and contrasted to the Rule 9(b) heightened fraud pleading standard and the PSLRA's scienter pleading standard for securities fraud. And, as will be discussed, the new Rule 8(a)(2) plausibility standard converges with the two heightened pleading standards predicated on allegations of fraud.[63]

B. Rule 9(b) and the "Heightened" Fraud Pleading Standard

Unlike Rule 8(a)(2), which requires "a short and plain

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60. Robert L. Rothman, Twombly *and* Iqbal*: A License to Dismiss*, LITIG., Spring 2009, at 1, 2; *see also id.* at 1–2 ("[U]nder the guise of explaining the concept of 'plausibility' first announced in *Twombly*, the Court imposed a gatekeeper-type duty on the district court that applies even if the allegations of the complaint are well pleaded and thus assumed to be true.").

61. *See id.* at 1 ("[A]t a minimum, it seems fair to conclude that *Conley* is not merely retired, it is dead and buried."); Spencer, *supra* note 23, at 431 ("Notice pleading is dead. Say hello to plausibility pleading.").

62. *See, e.g.*, Amber A. Pelot, Note, Bell Atlantic Corp. v. Twombly*: Mere Adjustment or Stringent New Requirement in Pleading?*, 59 MERCER L. REV. 1371, 1379 (2008) (noting that, except for the heightened pleading standards of Rule 9 and the PSLRA, "the Supreme Court has insisted, and still maintains in *Bell Atlantic Corp.*, that the more forgiving standard of pleading Rule 8(a)(2) is to apply transubstantively to all other types of claims.").

63. *See* discussion *infra* Part II. Moreover, those state courts that had their procedural systems modeled after the *Conley* pleading standard and the Federal Rules must now determine whether to move towards the new plausibility standard to maintain procedural uniformity. *See* Z. W. Julius Chen, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1432 (2008) ("[A] state should not abandon *Conley* simply to preserve uniformity between state and federal interpretations of Rules 8(a) and 12(b)(6)."); *see also* Andrée Sophia Blumstein, Twombly *gets* Iqbal*-ed: An Update on the New Federal—and Tennessee?—Pleading Standard*, TENN. B.J., July 2009, at 23, 23 ("*Twombly*, of course, controls only federal litigation, but its influence will likely come to be felt in state civil litigation as well."). This issue, however, is beyond the scope of this article.

statement of the claim" when pleading in a civil action,[64] Rule 9(b) requires the circumstances of an alleged fraud or mistake to be plead with particularity.[65] Federal Rule of Civil Procedure 9(b) states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[66]

The term "generally," however, as discussed by the Supreme Court in *Iqbal*, is relative; to be properly understood, the term must be compared to the particularity requirement of the first sentence of Rule 9(b).[67] Specifically, averments such as the time, place, identity of the parties, and nature of the fraud or mistake must be pleaded in detail.[68] Pleading with absolute particularity, however, is not required by the federal rules. Rather, a balance must be reached between the purported simplicity of Rule 8 and the particularity that Rule 9 demands.[69] As explained by the majority opinion in *Iqbal*, in the invidious discrimination context, "Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8."[70] Therefore, even when the Rule 9(b) heightened pleading standard is inapplicable because neither fraud nor mistake is alleged, the complaint must nonetheless meet the basic requirements of the Rule 8(a)(2) plausibility standard,

64. FED. R. CIV. P. 8(a)(2).

65. FED. R. CIV. P. 9(b).

66. *Id.*

67. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009).

68. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1241 (3d ed. 2009); *see also* DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990) ("Although states of mind may be pleaded generally, the 'circumstances' must be pleaded in detail. This means the who, what, when, where, and how: the first paragraph of any newspaper story.").

69. *See* WRIGHT & MILLER, *supra* note 68, § 1298 ("[T]he rule regarding the pleading of fraud does not require absolute particularity or a recital of the evidence, especially when some matters are beyond the knowledge of the pleader and can only be developed through discovery."). It has also been argued, however, that *Twombly*'s plausibility standard rejects the generalized pleading suggested by the second sentence of Rule 9(b). *See* Spencer, *supra* note 23, at 474 ("Any standard that requires 'more than labels and conclusions' and explicitly calls for the pleading of suggestive facts supporting legal assertions such as the existence of an unlawful agreement or conspiracy fails to permit matters to be averred generally.").

70. *Iqbal*, 129 S. Ct. at 1954.

as established by *Twombly* and *Iqbal*.[71]

The Rule 9(b) heightened pleading standard—more specifically, the pleading fraud with particularity requirement—is aimed primarily at avoiding groundless lawsuits, safeguarding one's reputation, and supplying defendants with sufficient information in the complaint to allow them to prepare a proper defense.[72] But, as observed by the Supreme Court, some argue that Rule 9(b)'s standard rarely achieves these objectives: "In the absence of [an amendment to the Federal Rules of Civil Procedure], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."[73] This view of Rule 9(b)'s heightened pleading standard, however, may be disputed; the Court of Appeals for the Second Circuit, for example, generally gives a strict interpretation to the Rule 9(b) heightened pleading standard, regularly dismissing complaints alleging fraud that fail to plead fraud with particularity.[74]

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71. *See, e.g.*, Richard D. Bernstein & Frank M. Scaduto, *Court Toughens Application of Rule 8 Pleading Standards for Civil Cases*, N.Y. L.J., July 6, 2009, at 4 ("[T]he heightened pleading standards of *Iqbal/Twombly* apply to allegations of all elements of a claim, including knowledge and intent. [The holding in *Iqbal*] expressly applies even when Rule 9(b) is inapplicable because the plaintiff has not alleged fraud.").

72. WRIGHT & MILLER, *supra* note 68, § 1296.

73. Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–169 (1993) (holding that a "heightened pleading standard," more stringent than the Rule 8(a)(2) standard, was not required of complaints alleging municipal liability under 42 U.S.C. § 1983); *see also* WRIGHT & MILLER, *supra* note 68, § 1296 ("Rule 9(b) motions often yield no more than litigation delays or slightly amended complaints, and plaintiffs may not be deterred by the rule from instituting an action on the basis of information that may prove to be insufficiently particular."). Revising or amending the Federal Rules of Civil Procedure, however, would also involve several difficulties. *See, e.g.*, Carter, *supra* note 26, at 20 (arguing that caseload management at the federal court level would be preferable to outright revision of the Rules). "[R]evision of the Rules or their interpretation cannot spring from political attempts to undercut certain classes of individuals who rely solely on the federal courts to vindicate their substantive rights. Modifying the Rules for sociopolitical purposes would be inconsistent with the drafters' intent." *Id.*

74. As recently as 2009, the Court of Appeals for the Second Circuit explained that claims of fraud under Rule 9(b) may be based neither on speculation nor conclusory allegations, mainly supporting its position on Rule 9(b)'s threefold purpose: "to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit." Wood *ex rel.* U.S. v. Applied

Commentators have also criticized application of the Rule 9(b) heightened fraud pleading standard in cases of securities fraud.[75] Plaintiffs in securities fraud cases are unlikely to have firsthand knowledge of the details involved in a fraudulent transaction, since that kind of information is generally unavailable from public documents, thus making it problematic for these plaintiffs to plead fraud with the particularity required under Rule 9(b).[76] Nonetheless, as will be examined below, the enactment of the PSLRA by Congress, in an attempt to prevent abusive fraud-based shareholder lawsuits, further enhanced the pleading standards for scienter in securities fraud cases.

C. *The PSLRA and the Pleading Standard for Scienter in Securities Fraud: Tellabs, Inc. v. Makor Issues & Rights, Ltd.*

Prior to 1995, any securities complaint that included allegations regarding a defendant's state of mind only had to meet the generality requirement under the second sentence of Rule 9(b), while complaints alleging securities fraud had to meet Rule 9(b)'s particularity requirement.[77] Prompted by the perception that abusive

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Research Assocs., Inc., 328 F. App'x 744, 747 (2d Cir. 2009) (quoting O'Brien v. Nat'l Prop. Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991) (dismissing a complaint under the False Claims Act because it lacked the particulars required to support the fraud claim)); *see also* Wexner v. First Manhattan Corp., 902 F.2d 169, 172 (2d Cir. 1990) (dismissing a securities fraud complaint for failure to plead fraud with particularity and noting that, "[a]lthough scienter need not be alleged with great specificity, plaintiffs are still required to plead the factual basis which gives rise to a 'strong inference' of fraudulent intent").

75. *See, e.g.*, Richard G. Himelrick, *Pleading Securities Fraud*, 43 MD. L. REV. 342, 378 (1984) ("While there have undoubtedly been many frivolous securities claims, attempting to deter such claims through specialized pleading that is enforced through dismissal and denial of discovery is in conflict with the intent and format of the federal scheme of pleading."); Note, *Pleading Securities Fraud Claims with Particularity under Rule 9(b)*, 97 HARV. L. REV. 1432, 1432–33 (1984) ("The courts' mechanical application of rule 9(b) to claims brought under investor-protection statutes illustrates their failure to resolve the conflict between the philosophy of notice pleading embodied in rule 8 and the heightened pleading standard of rule 9(b).").

76. Note, *Pleading Securities Fraud Claims with Particularity under Rule 9(b)*, *supra* note 75, at 1436–37.

77. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 (2007) ("Prior to the enactment of the PSLRA, the sufficiency of a complaint for

practices were rampant in private securities litigation, however, Congress decided to enact reforms to deter frivolous litigation while maintaining confidence in the nation's capital markets.[78] As noted in the House Conference Report, Congress had acquired evidence of various forms of abusive litigation practices: routine lawsuits whenever stock prices changed significantly, the "targeting of deep pocket defendants," abusive use of costly discovery requests to encourage settlements, and client manipulation by class-action lawyers.[79] Due to these abusive practices committed in private securities litigation, innocent parties were reportedly being forced to pay exorbitant settlements and qualified people were unwilling to serve in directorial positions for fear of baseless lawsuits.[80] Thus, in 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA),[81] which implemented various procedural protections to curtail frivolous securities lawsuits.[82]

Among the new measures was the imposition of heightened requirements for the pleading of scienter in private securities litigation:

> In any private action arising under this chapter in

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securities fraud was governed not by Rule 8, but by the heightened pleading standard set forth in Rule 9(b)."); *see also* Thomas F. Gillespie III, Note, Dura Pharmaceuticals, Inc. v. Broudo*: A Missed Opportunity to Right the Wrongs in the PSLRA and Rebalance the Private Rule 10b-5 Litigation Playing Field*, 3 J. BUS. & TECH. L. 161, 167 (2008) ("Generally speaking, federal civil actions are governed by the Federal Rules of Civil Procedure . . . . However, in 1995 Congress passed the PSLRA, which, among other measures, created heightened pleading requirements in federal securities fraud actions under Rule 10b-5.").

78. H.R. REP. NO. 104-369, at 26 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730.

79. *Id.* at 31.

80. *Id.* at 32.

81. 15 U.S.C. § 78u-4 (2006).

82. Patrick Berarducci & Larry J. Obhof, *Keeping Current: Securities Supreme Court Clarifies Scienter Pleadings*, BUS. L. TODAY, Nov.–Dec. 2007, at 10, 10. Some of the most important substantive and procedural controls imposed by the PSLRA include "procedures for appointment of lead plaintiffs and lead counsel, limitations on damages and attorney fees, a statutory 'safe harbor' for defendants' forward-looking statements, a stay of discovery pending a motion to dismiss, and mandatory sanctions for frivolous lawsuits." *Id.*; *see also* MARC I. STEINBERG, SECURITIES REGULATION 442–45, 488–89 (rev. 5th ed. 2009) (examining the changes imposed by the PSLRA regarding the safe harbor for certain forward-looking statements and the PSLRA's effect on issues relating to contribution and proportionate liability).

> which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.[83]

Based in part on the language of the Second Circuit's pleading standard—"the most stringent pleading standard"[84]—and Rule 9(b)'s particularity requirement for pleading fraud, the PSLRA's scienter pleading standard was intended to create uniformity among the circuit courts.[85] Congress, however, failed to provide guidance regarding the proper interpretation of "strong inference," which led to confusion among lower federal courts trying to determine what facts and circumstances would be sufficient to find a strong inference of scienter.[86] Ultimately, the circuits adopted

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83. 15 U.S.C. § 78u-4(b)(2) (2006). This heightened pleading standard, however, only applies in private litigation; enforcement actions by the Securities and Exchange Commission are not required to meet the additional pleading requirements established under the PSLRA. *See id.* § 78u-4(a)(1) (stating the PSLRA "shall apply in each *private* action arising under this chapter that is brought as a *plaintiff class action* . . . .") (emphasis added).

84. H.R. REP. NO. 104-369, at 41. Even prior to the enactment of the PSLRA, the Second Circuit required plaintiffs "to allege facts that give rise to a strong inference of fraudulent intent." Shields v. Citytrust Bancorp., Inc., 25 F.3d 1124, 1127–28 (2d Cir. 1994) (noting that a complaint making securities fraud allegations under § 10(b) and Rule 10b-5 must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent").

85. H.R. REP. NO. 104-369, at 41 (explaining that the federal courts of appeals had "interpreted Rule 9(b)'s requirement in conflicting ways, creating distinctly different standards among the circuits").

86. *Compare* Friedberg v. Discreet Logic Inc., 959 F. Supp. 42, 49–50 (D. Mass. 1997) (holding that pleading a strong inference of scienter under the PSLRA requires setting forth "specific facts that constitute strong circumstantial evidence of conscious behavior by defendants"), *with* Marksman Partners, L.P. v. Chantal Pharm. Corp., 927 F. Supp. 1297, 1309 (C.D. Cal. 1996) (finding that recklessness is sufficient to plead scienter because, although in certain specified situations the PSLRA requires "actual knowledge," the higher standard applies only in expressly specified situations). *See also The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 385, 385 (2007) [hereinafter *The Supreme Court*] (noting that even though uniformity was one of the objectives of the PSLRA's pleading

differing standards.[87] Twelve years after the enactment of the PSLRA, the Supreme Court finally resolved the circuit split in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[88] a decision that had been long-awaited by both the lower federal courts and practitioners.[89]

Tellabs was a manufacturer of specialized equipment used in fiber optic networks and, during the relevant time period, Richard

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standard for scienter in securities litigation, "it instead produced disarray among the circuit courts over how high Congress intended to set the bar for pleading scienter"); Laura R. Smith, Comment, *The Battle Between Plain Meaning and Legislative History: Which Will Decide the Standard for Pleading Scienter After the Private Securities Litigation Reform Act of 1995?*, 39 SANTA CLARA L. REV. 577, 579 (1999) (examining the controversy that arose among courts regarding the various interpretations given to PSLRA's scienter pleading standard based on the PSLRA's plain meaning and its legislative history).

87. *See, e.g.*, Geoffrey P. Miller, *Pleading After Tellabs*, 2009 WIS. L. REV. 507, 509–10 (2009) (stating different interpretations of "strong inference" among circuits); John M. Wunderlich, Note, Tellabs v. Makor Issues & Rights, Ltd.: *The Weighing Game*, 39 LOY. U. CHI. L.J. 613, 623–26 (2008) (same). The First Circuit adopted the view that the strong inference test is not met where, "viewed in light of the complaint as a whole, there are legitimate explanations for the behavior that are equally convincing." *In re* Credit Suisse First Boston Corp., 431 F.3d 36, 48–49 (1st Cir. 2005). The Sixth Circuit, for example, took a different approach, permitting allegations of scienter to survive motions to dismiss only where they constituted the "most plausible" of the competing inferences. Fidel v. Farley, 392 F.3d 220, 227 (6th Cir. 2004). The Seventh Circuit, on the other hand, would only allow complaints to survive the Rule 12(b)(6) motion if they alleged "facts from which, if true, a reasonable person could infer that the defendant acted with the required intent." Makor Issues & Rights, Ltd. v. Tellabs Inc., 437 F.3d 588, 602 (7th Cir. 2006), *vacated*, 551 U.S. 308 (2007).

88. 551 U.S. 308 (2007).

89. The widely-anticipated Supreme Court decision settled the standard for pleading a "strong inference" of scienter under the PSLRA and resolved the split among the circuits on this important legal issue. *See id.* at 317–18, 322–26 (acknowledging circuit split and adopting a uniform standard); James D. Cox, Randall S. Thomas & Lynn Bai, *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WIS. L. REV. 421, 434 (2009) (noting that the Supreme Court decision in *Tellabs* had been "anticipated, and eagerly so, in many quarters," and arguing that the circuits nonetheless maintained disparate interpretations of the scienter pleading standard under the PSLRA); Steven Wolowitz & Joseph De Simone, *Did* Tellabs' *Raise PSLRA Scienter Bar?*, N.Y. L.J., Dec. 3, 2007, at S3 (noting that *Tellabs* "was among the most anticipated opinions of the past Supreme Court term," with its framework being widely applied by lower federal courts in the five months after the decision was issued).

Notebaert was the company's chief executive officer and president.[90] Shareholder-plaintiffs alleged that they had been induced to buy artificially inflated stock by false statements knowingly made by Notebaert and other executive officers.[91] The shareholders brought a class action under § 10(b) of the Securities Exchange Act of 1934 (the Exchange Act) and SEC Rule 10b-5 in the District Court for the Northern District of Illinois.[92] Finding that the plaintiffs' "conclusory allegations regarding Notebaert d[id] not create a strong inference that he acted with the requisite state of mind under the

90. *Tellabs*, 551 U.S. at 314.

91. Johnson v. Tellabs, Inc., 303 F. Supp. 2d 941, 946, 950 (N.D. Ill. 2004), *aff'd in part, rev'd in part sub nom.* Makor Issues & Rights v. Tellabs, 437 F.3d 588 (7th Cir. 2006), *vacated*, 551 U.S. 308 (2007). More specifically, the plaintiffs alleged that defendants "made a series of false statements and omissions regarding Tellabs' fourth quarter 2000 financials, Tellabs' products, and its future projects that resulted in the artificial inflation of Tellabs' stock price." *Johnson*, 303 F. Supp. 2d at 946. The Supreme Court only focused on the allegations relating to Notebaert, however, because the claims against the other executives had already been dismissed and therefore were not before the Court. *Tellabs*, 551 U.S. at 315 n.1.

92. *Johnson*, 303 F. Supp. 2d at 950. Section 10(b) of the Exchange Act prohibits the "use or employ, in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (2006). SEC Rule 10b-5 implements § 10(b) by providing that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2010). Furthermore, the Supreme Court has recognized an implied private right of action for sellers or purchasers of securities injured by a violation of § 10(b). Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005); *see also* MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW § 8.01 (5th ed. 2009) (examining the elements of a private 10b-5 claim); Jerod Neas, Dura *Duress: The Supreme Court Mandates a More Rigorous Pleading and Proof Requirement for Loss Causation Under Rule 10b-5 Class Actions*, 78 U. COLO. L. REV. 347, 351–57 (2007) (same).

PSLRA," the district court dismissed the complaint.[93] The Court of Appeals for the Seventh Circuit, however, reversed in relevant part.[94] After examining the positions taken by other circuit courts, the Seventh Circuit held that a complaint would survive a Rule 12(b)(6) motion to dismiss if "it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent."[95] Applying this reasonable person standard, the Seventh Circuit found that the facts alleged in the complaint met the PSLRA's threshold with regard to Notebaert; since he was acting within the scope of his role as chief executive officer, the alleged knowledge of the falsity of Notebaert's statements was also imputed upon Tellabs.[96]

In 2007, the U.S. Supreme Court granted certiorari in order "to prescribe a workable construction of the 'strong inference' standard" and finally solve the split among the federal courts of appeals.[97] The Court began by interpreting the PSLRA heightened pleading standard as requiring a plaintiff to plead "with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, i.e., the defendant's intention 'to deceive, manipulate, or defraud.'"[98] Rejecting the Seventh Circuit's "broader and more plaintiff-friendly" interpretation of "strong inference,"[99] the majority found that a comparative evaluation was required: a court must consider not only the inferences provided by the plaintiff, "but also competing inferences rationally drawn from the facts alleged."[100] The Court explained:

> An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant's conduct. To qualify as "strong" within the intendment of [the PSLRA], we hold, an

93. *Johnson*, 303 F. Supp. 2d at 969.

94. Makor Issues & Rights Ltd. v. Tellabs, Inc. (*Tellabs II*), 437 F.3d 588, 602 (7th Cir. 2006) (rejecting the position taken by the Sixth Circuit).

95. *Id.*

96. *Id.* at 603.

97. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

98. *Id.* at 313 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976)).

99. *See* Wolowitz & De Simone, *supra* note 89, at S3 (examining the holding in *Tellabs* and discussing various questions left unanswered by the Supreme Court).

100. *Tellabs*, 551 U.S. at 314.

> inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.[101]

After so holding, the Supreme Court reversed and remanded to the Seventh Circuit, which later found that the shareholder-plaintiffs had successfully pleaded scienter as required under the PSLRA.[102]

Although decided prior to *Tellabs*, another relevant U.S. Supreme Court decision interpreting the pleading requirements for a § 10(b) claim—and also providing insight into the Supreme Court's later reasoning in *Twombly* and *Iqbal*[103]—is *Dura Pharmaceuticals, Inc. v. Bruodo*.[104] Between April 1997 and February 1998, Michael Bruodo and other class members bought stock of Dura Pharmaceuticals, Inc. (Dura), a company dedicated to marketing

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101. *Id.*

102. Makor Issues & Rights Ltd v. Tellabs, Inc. (*Tellabs II*), 513 F.3d 702 (7th Cir. 2008). The Seventh Circuit interpreted *Tellabs* as a two-prong test: "first the inference must be cogent, and second it must be as cogent as the opposing inference, that is, the inference of lack of scienter." *Id.* at 705. The court began with the second prong and rejected the opposing inference—that the misstatements were the product of "merely careless mistakes"—as "exceedingly unlikely." *Id.* at 709. Then it moved to the first prong—whether the inference was cogent—and found that the plaintiff's hypothesis was cogent because defendant's explanation of the occurrences was "far less likely than the hypothesis of scienter." *Id.* at 711; *see also* John P. Stigi III & Martin White, *Courts Interpret 'Tellabs': They Appear to View Case as Heightening Standard for Pleading Scienter*, NAT'L L.J, Mar. 17, 2008, at S1, S4 (examining the Seventh Circuit's holding and noting that "[Judge] Posner in [*Tellabs II*] addressed the sufficiency of the plaintiff's confidential source allegations only after reaching his conclusions regarding the comparative strength of the opposing inferences, [thus] effectively collapsing the first prong of the *Tellabs* test into the second prong").

103. *See* discussion *infra* Part II.A–C (discussing the effects of the new plausibility standard established in *Twombly* and *Iqbal*); *see also* Steven R. Paradise & Ari M. Berman, *Pleading the Loss Causation Link*, N.Y. L.J., Dec. 3, 2007, at S4 (discussing the application of *Dura* and *Twombly* on motions to dismiss and noting that "[i]n many ways, *Dura* set the stage for *Twombly*"). As will be discussed in this section, an examination of the Supreme Court's reasoning in *Dura* provides support for the argument that the new Rule 8(a)(2) plausibility pleading standard converges with the heightened pleading standards under Rule 9(b) and the PSLRA. *Infra* Part

104. 544 U.S. 336 (2005).

niche pharmaceutical drugs.[105] During the class period, Dura allegedly issued materially false statements regarding its drug profits and the future approval of a new asthmatic spray device by the Food and Drug Administration, which artificially inflated Dura's stock price.[106] When the price of Dura's stock subsequently dropped by 47%, the class members brought a consolidated securities fraud class action suit against Dura and its managers and directors in the District Court for the Southern District of California.[107] The district court found that the plaintiffs failed to adequately plead loss causation and dismissed the case.[108] The Court of Appeals for the Ninth Circuit, however, reversed, holding that the plaintiffs, by alleging that they had bought artificially overpriced stock, sufficiently plead loss causation to survive Dura's motion to dismiss.[109] In 2005, in order to solve the confusion among the federal circuits regarding loss causation, the Supreme Court granted Dura's petition for certiorari.[110]

Although mainly addressing the issue of what was required to establish the element of loss causation under § 10(b) of the Exchange

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105. *In re* Dura Pharm., Inc. Sec. Litig., No. Civ. 99CV0151-L(NLS), 2001 WL 35925887, at *1 (S.D. Cal. Nov. 2, 2001).

106. *Id.* at *1–2.

107. *Id.* at *2. The complaint alleged that the defendants had violated § 10(b) of the Exchange Act, SEC Rule 10b-5, and § 20(a) of the Exchange Act. *Id.* Section 20(a) of the Exchange Act provides for joint and several liability of controlling persons. *See* 15 U.S.C. § 78t(a) (2006); *see also supra* note 92 (providing further discussion on § 10(b) and Rule 10b-5).

108. *Dura Pharm.*, 2001 WL 35925887, at *10. The court explained:

> The [complaint] does not contain any allegations that the FDA's non-approval had any relationship to the February price drop. Accordingly, the [complaint] does not explain how the alleged misrepresentations and omissions regarding Albuterol Spiros [the new asthmatic spray device] "touched" upon the reasons for the decline in Dura's stock price. Rather, the decline in Dura's stock price was the result of an expected revenue shortfall. Accordingly, the [complaint's] allegations regarding Albuterol Spiros are insufficient to state a claim.

Id.

109. Broudo v. Dura Pharm., Inc., 339 F.3d 933, 938, 941 (9th Cir. 2003), *rev'd*, 544 U.S. 336 (2005) ("[L]oss causation does not require pleading a stock price drop following a corrective disclosure or otherwise. It merely requires pleading that the price at the time of purchase was overstated and sufficient identification of the cause.").

110. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 340 (2005).

Act and SEC Rule 10b-5,[111] the Supreme Court also addressed the loss causation pleading issue.[112] Without embracing a specific standard for the pleading of loss causation, the Court opted to apply the traditional notice pleading standard of Rule 8(a)(2).[113] The majority explained:

> We concede that ordinary pleading rules are not meant to impose a great burden upon a plaintiff. But it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind. At the same time, allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would bring about harm of the very sort the statutes seek to avoid.[114]

Thus, finding that the "artificially inflated purchase price" was not itself a relevant economic loss and that the complaint failed to provide notice of either the relevant economic loss or the connection between that loss and the alleged misrepresentations, the Supreme Court found the complaint legally insufficient.[115]

Although the Supreme Court's language in *Dura* referring to the Rule 8(a)(2) notice pleading standard may have been displaced

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111. *Id.* at 342–46. The element of loss causation may be defined as a "direct causal link between the misstatement and the claimant's economic loss." Nathenson v. Zonagen, Inc., 267 F.3d 400, 413 (5th Cir. 2001).

112. *Dura*, 544 U.S. at 346–48 ("Our holding about plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the plaintiffs' complaint here failed adequately to *allege* these requirements.").

113. *Id.* at 346–47 (arguing that reaching the heightened pleading standard was unnecessary because the complaint did not even meet the minimum pleading standard under Rule 8(a)(2)); *see also* Gillespie, *supra* note 77, at 170 (examining the holding in *Dura* and noting that "the Court chose not to articulate any particular standard with respect to the proper pleading standard for plaintiff's loss causation pleadings, again opting for an addition-by-subtraction approach"). In making its decision, the Supreme Court assumed, "at least for argument's sake, that neither the Rules nor the securities statutes impose any special further requirement in respect to pleading of proximate causation or economic loss." *Dura*, 544 U.S. at 346.

114. *Dura*, 544 U.S. at 347 (internal citations omitted).

115. *Id.* at 347–48.

by subsequent case law, it may nonetheless imply that the Court believed at that time that notice pleading was a sufficiently challenging standard to meet.[116] Accordingly, the Court's later enhancement of the basic pleading requirements under Rule 8(a)(2) may be seen as misguided. As will be discussed below, by enhancing the basic pleading standard under Rule 8(a)(2), the Supreme Court has elevated it to approach the level set forth by the heightened pleading standards for allegations of fraud.

II. BLURRING THE LINES BETWEEN PLEADING DOCTRINES

Surviving a Rule 12(b)(6) motion to dismiss used to be customary, but the new plausibility standard established in *Twombly* and *Iqbal* has elevated the basic requirements that must be met in any civil case for a complaint to be legally sufficient under Rule 8(a)(2). Federal courts and legal scholars, however, are still trying to understand this notion of "plausibility" and the extent to which it has enhanced the basic pleading requirements of Rule 8(a)(2).[117] Nonetheless, after *Tellabs* and *Iqbal*, the plausibility pleading standard has been elevated to approach the level of the heightened fraud pleading standard under Rule 9(b) and the scienter pleading standard for securities fraud under the PSLRA, effectively blurring

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116. The Supreme Court examined *Dura* in explaining the policy behind the *Twombly* decision:

> We alluded to the practical significance of the Rule 8 entitlement requirement in [Dura] when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a "largely groundless claim" be allowed to "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." So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court."

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–58 (2007) (citations omitted); *see also* Spencer, *supra* note 23, at 451 ("[S]imply offering a complaint that sets forth facts that render liability *possible* must be treated as insufficient given the ability of high-dollar suits to coerce defendants into settlement in the interest of avoiding the expense and uncertainty of discovery.").

117. *See infra* Part II.A.

the lines between the pleading doctrines.[118] Furthermore, when these converging pleading standards balance equivocal inferences—inferences that are equally consistent with liability and non-liability—a tacit "probability requirement" present in the *Twombly/Iqbal* plausibility standard may make it more difficult for plaintiffs alleging non-fraud claims to succeed against a Rule 12(b)(6) motion to dismiss.[119] As will be examined in the final part of this article, this convergence of pleading doctrines creates an incongruent federal civil litigation system because it may at times treat plaintiffs more harshly in the pleading stage under Rule 8(a)(2) than when alleging fraud under Rule 9(b) or the PSLRA.[120]

A. What is "Plausible"?

There is little doubt that *Twombly* elevated the pleading requirements a plaintiff's complaint must meet under Rule 8(a)(2).[121] Nonetheless, the notion of plausibility is still far from being clearly understood.[122] In dismissing the complaint in *Twombly*, the Court noted: "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. Because plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be

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118. *See infra* Part II.B.

119. *See infra* Part II.C.

120. *See infra* Parts III–IV.

121. *See, e.g.*, *Pleading Standards*, 121 HARV. L. REV. 305, 314 (2007) ("There is no doubt that a heightened pleading standard will reduce the costs that discovery imposes generally, because fewer complaints will survive Rule 12(b)(6) motions and reach the discovery phase. Yet the heightened standard might result in the dismissal of some complaints that would be highly socially beneficial if successful."); Richard M. Steuer, *Plausible Pleading:* Bell Atlantic Corp. v. Twombly, 82 ST. JOHN'S L. REV. 861, 875 (2008) ("The lesson to be learned from *Twombly* is to investigate more thoroughly than ever before filing a complaint. A strong hunch plus the prospect of substantiating that hunch in discovery is no longer enough.").

122. *See, e.g.*, Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 853 (2008) ("We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim."). Judge Colleen McMahon is a District Judge in the United States District Court for the Southern District of New York. *Id.* at 851 n.2.

dismissed."[123] The Court also indicated that plausibility under Rule 8(a)(2) requires factual allegations that are "enough to raise a right to relief above the speculative level," with neither labels nor conclusions being sufficient.[124] Furthermore, in *Iqbal*, the Supreme Court explicitly clarified that facial plausibility exists "when the plaintiff pleads *factual content* that allows the court to draw the *reasonable inference* that the defendant is liable for the misconduct alleged."[125] Under this standard, therefore, courts have the "context-specific task" of determining whether the well-pleaded facts permit a reasonable inference that plausibly—not merely possibly—indicate liability; conclusory allegations are insufficient.[126] Thus, the Supreme Court has determined that claims that are merely "possible," "conceivable," or "speculative" are legally insufficient to meet the plausibility standard.[127]

Federal courts of appeals, in interpreting Rule 8(a)(2)'s plausibility pleading standard, generally have followed *Twombly* and *Iqbal*'s definition of plausibility.[128] The Third Circuit, for example,

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123. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

124. *See id.* at 555 (noting also that "a formulaic recitation of the elements of a cause of action will not do").

125. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (emphasis added).

126. *See id.* at 1950 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task."); *see also* Edward D. Cavanagh, Twombly*: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 15 (2008) ("Once again, trial courts are assigned the task of fathoming the unfathomable—the distinction between allegations that are 'factual' and hence valid, and those which are merely 'conclusory' and hence deficient.").

127. According to Merriam Webster's Collegiate Dictionary, the word "plausible" is defined as: (1) "superficially fair, reasonable, or valuable but often specious"; (2) "superficially pleasing or persuasive"; and (3) "appearing worthy of belief." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 892 (10th ed. 1996). The Supreme Court in *Iqbal* correctly applied the term "plausible" when examining the holding in *Twombly*, noting that, "[b]ecause the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed." *Iqbal*, 129 S. Ct. at 1950.

128. *See, e.g.*, Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) ("The plausibility standard requires the plaintiff to show at the pleading stage that success on the merits is more than a 'sheer possibility.'"); Brooks v. Ross, 578 F.3d 574, 581–82 (7th Cir. 2009) (finding that equivocal allegations are insufficient to meet the plausibility standard); Fowler v. UPMC Shadyside, 578 F.3d 203, 211–12 (3d Cir. 2009) (requiring the complaint to nudge the plaintiff's claim "across the line from conceivable to plausible"); Courie v. Alcoa Wheel & Forged Prods., 577 F.3d 625, 629–30 (6th Cir. 2009) (noting that a complaint need

in finding that the plaintiff's complaint sufficiently alleged enough facts to plausibly suggest a failure-to-transfer claim under the Rehabilitation Act,[129] explained that, in order to show a plausible claim for relief, "a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to 'show' such an entitlement with its facts."[130] Similarly, in requiring the plaintiff's legal conclusions to be grounded in a sufficiently plausible factual basis, the Seventh Circuit affirmed the dismissal of a § 1983 due process claim because the allegations were "merely a formulaic recitation of the cause of action" and failed to put the defendants on notice.[131] However, as noted by the Sixth Circuit, the proper interpretation of plausibility is still being fleshed out by federal courts:

> [W]hile this new *Iqbal/Twombly* standard screens out the "little green men" cases just as *Conley* did, it is designed to also screen out cases that, while not utterly impossible, are "implausible." Exactly how implausible is "implausible" remains to be seen, as such a malleable standard will have to be worked out in practice.[132]

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only contain sufficient facts to be plausible); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1270 (11th Cir. 2009) (finding that "vague and conclusory allegations" are insufficient to meet the plausibility standard).

129. The Rehabilitation Act provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a) (2006). After the enactment of the Americans with Disabilities Act (ADA), the Rehabilitation Act was amended to incorporate the ADA's standards for determining whether an employer has engaged in employment discrimination. *Id.* at § 794(d).

130. *Fowler*, 578 F.3d at 211–12 ("Although [the plaintiff's] complaint is not as rich with detail as some might prefer, it need only set forth sufficient facts to support plausible claims.").

131. *Brooks*, 578 F.3d at 581–82.

132. *Courie*, 577 F.3d at 629–30 (citations omitted); *see also* Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 521 (noting that even though federal courts quickly began applying the new plausibility standard under Rule 8(a)(2), they generally failed to properly define its requirements). Scholars have similarly struggled with the definition of plausibility and the proper interpretation of the new Rule 8(a)(2) plausibility standard. Professor A. Benjamin Spencer, for example, proposes a presumption-

Thus, while federal courts continue their quest to ascertain the proper definition of "plausibility" and the correct application of the enhanced Rule 8(a)(2) pleading standard, plaintiffs may continue to suffer from an unpredictable system that, as will be examined below, fails to protect their interests by putting them at a disadvantage when bringing forward civil claims not involving fraud.

B. Pleading Standards Converge After Tellabs and Iqbal

Although *Twombly* left many pleading questions unanswered, *Iqbal* served to clarify that the plausibility pleading standard would apply in all civil cases.[133] This expansion of the Supreme Court's holding in *Twombly*, however, may have contributed to the convergence of pleading standards. A strong indication that the Supreme Court went too far in *Iqbal* is the fact that Justice Souter, the author of the *Twombly* opinion,[134] strongly criticized the holding

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based theory of pleading, under which the plausibility standard may be met when a complaint creates a presumption of impropriety by alleging objective facts and supported implications. *See* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 13–18 (2009) (explaining that, under his descriptive theory of pleading, "legal claims that apply liability to factual scenarios that otherwise do not bespeak wrongdoing will be those that tend to require greater factual substantiation to traverse the plausibility threshold"). Another view is that the plausibility standard may be equated with logical coherence—that in order to meet the requirements of Rule 8(a)(2), a complaint must contain "allegations necessary and sufficient to warrant liability." *See* Smith, *supra* note 23, at 1088–89 (arguing that the plausibility pleading requirement "simply requires that plaintiffs include allegations in their complaint that, if believed, are not merely consistent with liability or non-liability, but rather affirmatively establish liability"). A third approach, advocated by Professor Robert G. Bone, is to view *Twombly*'s plausibility pleading standard from a process-based perspective. *See* Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 900–10 (2009) (outlining a justification for the *Twombly* standard in terms of balance between fairness to defendants and fairness to plaintiffs). Under this last approach, the plausibility standard "requires no more than that the allegations describe a state of affairs that differs significantly from a baseline of normality and supports a probability of wrongdoing greater than the background probability for situations of the same general type." *Id.* at 878.

133. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009).

134. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007). Justice Souter was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito. *Id.*

in *Iqbal*.[135] Justice Souter's dissent—joined by Justices Stevens, Ginsburg, and Breyer[136]—asserted that "*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true[;]" to the contrary, "a court must take the allegations as true, no matter how skeptical the court may be."[137] In arguing that Iqbal's complaint satisfied Rule 8(a)(2)'s plausibility pleading standard, Justice Souter explained his disagreement with the majority:

> Under *Twombly*, the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible. That is, in *Twombly*'s words, a plaintiff must "allege facts" that, taken as true, are "suggestive of illegal conduct." . . . The difficulty [in *Twombly*] was that the conduct alleged was "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." . . . Here, by contrast, the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct.[138]

As Justice Souter reasons, when presented with a Rule 12(b)(6) motion to dismiss, a court's inquiry is not to determine whether the factual allegations themselves are plausible, since they must be taken as true. Rather, courts must focus on whether the complaint, as a whole, states a claim that is plausible. In other words, courts must ask whether the complaint provides enough facts to raise a reasonable expectation that evidence of actionable misconduct may be revealed through discovery, thus allowing the

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135. *Iqbal*, 129 S. Ct. at 1954–61 (Souter, J., dissenting) (arguing that the majority misapplied the pleading standard in *Twombly*); *see also* Rothman, *supra* note 60, at 1 (noting that Justice Souter's dissent in *Iqbal* criticized the majority opinion "for taking the holding in *Twombly* far beyond its original intent").

136. *Iqbal*, 129 S. Ct. at 1954. Justice Breyer also wrote a separate dissenting opinion to point out that "prevent[ing] unwarranted litigation from interfering with 'the proper execution of the work of the Government'" was an inadequate justification for the majority's interpretation of *Twombly*. *Id.* at 1961.

137. *Id.* at 1959.

138. *Id.* at 1959–60 (citations omitted).

court to draw a reasonable inference that the defendant is liable and plausibly suggesting an entitlement to relief.[139]

Moreover, the majority in *Iqbal* adopted a two-pronged approach to determining whether the allegations in the complaint allowed a reasonable inference of liability to be drawn and thereby satisfy the plausibility standard.[140] The Supreme Court explained that a reviewing court must begin its analysis by identifying which allegations in the complaint are factual allegations, which must be taken as true, and which are legal conclusions, which do not enjoy the presumption of truth.[141] Under the second prong, the reviewing court must examine the factual allegations and determine if the well-pleaded facts plausibly suggest that the plaintiff is entitled to relief.[142] This approach comports with Rule 8(a)(2)'s two-pronged requirement, as characterized by the Supreme Court in *Twombly*: "the requirement of providing not only 'fair notice' of the nature of the claim but also 'grounds' on which the claim rests."[143] Hence, the Rule 8(a)(2) plausibility pleading standard, as adopted in *Twombly* and expanded by *Iqbal*, may be somewhat easier to meet than the fraud pleading standard under Rule 9(b) and the PSLRA's scienter pleading standard for securities fraud. But, as will be discussed later,

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139. *See generally supra* Part II.A (discussing the meaning of "plausible").

140. *See* Blumstein, *supra* note 63, at 24–25 (arguing that *Iqbal* requires the reviewing court to (1) "weed out the legal conclusions" and (2) "evaluate the factual allegations").

141. *Iqbal*, 129 S. Ct. at 1950–51. In rejecting Iqbal's allegations of invidious discrimination, the Court notes that they are not being rejected because they are "unrealistic or nonsensical," but because of their "conclusory nature." *Id.* at 1951.

142. *Id.* at 1951. *See* Elizabeth Thornburg, *Law, Facts, and Power*, 114 PENN ST. L. REV. PENN. STATIM 1, 2 (2010), http://pennstatelawreview.org/114/114 Penn%20Statim%201.pdf ("The Supreme Court's opinion in *Ashcroft v. Iqbal* is wrong in many ways, [including] the Court's single-handed return to a pleading system that requires lawyers and judges to distinguish between pleading facts and pleading law.").

143. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 n.3 (2007). Under the new plausibility pleading standard, however, plaintiffs must engage in a delicate balancing test when determining how much detail to include in the complaint, since pleading facts too comprehensively or too technically may result in dismissal of the complaint. *See* Tice, *supra* note 30, at 839–40 (explaining the risk of plaintiffs pleading themselves out of court under *Twombly* and noting that "[p]laintiffs should thus be careful in their pleading of detail and take comfort in knowing that an error of less detail is rectifiable through a motion for a more definitive statement, whereas too much detail risks summary dismissal altogether").

the way balances are weighed is different, which may lead to different results for plaintiffs depending on whether their claims involve fraud.[144]

Interestingly, the PSLRA's strong inference requirement for pleading scienter in securities fraud cases may sometimes be satisfied merely by meeting the plausibility requirement of Rule 8(a)(2), further suggesting the convergence of pleading standards. Under *Tellabs*, the Supreme Court established that the PSLRA—by requiring the pleading of sufficient facts to establish a strong inference of scienter—required that a complaint allege facts that would allow a reasonable person to draw an inference of scienter that is "cogent and at least as compelling as any opposing inference."[145] The PSLRA's cogency requirement establishes a plausibility baseline that must be met by every inference of scienter to survive a motion to dismiss: "to be cogent, an inference of scienter must be substantial, even if not strong enough to compel a reasonable jury to find in the plaintiff's favor."[146] And, in order for an inference to be compelling, a balancing test—in which plausible culpable and non-culpable explanations are examined—must be performed, after which the inference must be found to be "strong in light of other explanations."[147] Thus, the inference of scienter need only be "*at least as likely as* any plausible opposing inference."[148]

Furthermore, given a strict interpretation of plausibility pleading and fraud pleading, these pleading standards may also appear to be nearly equivalent.[149] In *Iqbal*, by expanding the plausibility pleading standard to all elements of a claim, the Supreme Court required allegations of falsity and culpability to meet the plausibility pleading standard, even where Rule 9(b)'s specificity

144. *See infra* Part II.C.

145. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 (2007).

146. Miller, *supra* note 87, at 514–15 (advocating the view that the cogency standard should fall between a preponderance standard—the inference of scienter being sufficiently strong for a reasonable jury to be able to find for the plaintiff if the facts alleged are proved at trial—and a summary judgment standard).

147. *Tellabs*, 551 U.S. at 323–24; *see also* Berarducci & Obhof, *supra* note 82, at 10 (arguing that *Tellabs* gave "significant teeth" to the statutory language of the PSLRA).

148. *Tellabs*, 551 U.S. at 328–29 (emphasis added).

149. *See, e.g.*, Spencer, *supra* note 23, at 473–75 (arguing that *Twombly*'s plausibility requirement "is tantamount to a particularity requirement").

requirement does not apply.[150] Rule 9(b)'s second sentence, however, allows conditions of the mind to be averred generally, but *Twombly*'s new plausibility standard—requiring the pleading of facts enough to raise a reasonable expectation of entitlement to relief—seems to be analogous to the particularity requirement in the first sentence of Rule 9(b).[151] This view is further reinforced when examining the Supreme Court's explanation that, even though "generally" in the context of Rule 9(b) is a relative term that must be compared to the particularity pleading requirement for fraud, the plausibility pleading requirements of Rule 8(a)(2) must still be met.[152] The Court explicitly noted, "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context."[153] Thus, in requiring a plaintiff to plead specific facts to state a claim that is facially plausible, thereby allowing the court to make a reasonable inference of liability, the Supreme Court seems to be elevating the basic pleading requirements of Rule 8(a)(2) to approach a particularity pleading standard equivalent to Rule 9(b)'s heightened fraud pleading standard.[154] This finding becomes even more relevant when examined in conjunction with the scienter pleading requirement for securities fraud examined above, which was governed by Rule 9(b), rather than Rule 8(a)(2), prior to the enactment of the PSLRA.[155]

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150. Blumstein, *supra* note 63, at 24; *see also* Bernstein & Scaduto, *supra* note 71, at 4 (noting that, in securities litigation, "*Iqbal/Twombly* will require the pleading of factual content that makes allegations such as causation, falsity, and negligence plausible, even when fraud is not alleged").

151. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007); *see also* Spencer, *supra* note 23, at 475–77 (examining the pleading standard rejected by the Supreme Court in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) to argue that "plausibility pleading is heightened particularized pleading plain and simple").

152. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009) ("Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.").

153. *Id.*

154. *See, e.g.*, ABC Arbitrage Plaintiffs Group v. Tchuruk, 291 F.3d 336, 349 (5th Cir. 2002) (equating Rule 9(b)'s fraud pleading standard to the PSLRA's pleading standard).

155. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319–20 (2007) ("Prior to the enactment of the PSLRA, the sufficiency of a complaint for securities fraud was governed not by Rule 8, but by the heightened pleading standard set forth in Rule 9(b)."). Moreover, the Fifth Circuit Court of Appeals, for example, has equated Rule 9(b)'s fraud pleading standard to the PSLRA's

Therefore, even though meeting the scienter pleading standard's strong inference requirement in cases of securities fraud under the PSLRA and the heightened fraud pleading standard's particularity requirement in civil fraud cases under Rule 9(b) places a higher burden on plaintiffs, Rule 8(a)(2)'s plausibility requirement is not far from requiring cogency and particularity. Furthermore, as will be examined below, the way in which these pleading standards weigh inferences that are equally consistent with liability and non-liability affects plaintiffs differently, in a manner that is counterintuitive and incongruent with the purpose of the pleading doctrines.

C. *Ties Make a Difference*[156]

In *Twombly*, the Supreme Court suggested that equally weighing inferences would be insufficient to meet the plausibility pleading standard: "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) [unlawful conduct] reflects the threshold requirement of Rule 8(a)(2) . . . ."[157] The complaint, therefore, must contain sufficient factual allegations to allow a reasonable inference that the defendant is liable, which may be viewed as analogous to a preponderance of the evidence standard (even though the Supreme Court seemingly rejects any notion that a "probability requirement" is being imposed by the plausibility

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pleading standard for misleading statements and omissions in securities litigation. *ABC Arbitrage*, 291 F.3d at 348–50; *In re* Fleming Cos. Inc. Sec. & Derivative Litig., No. CivA503MD1530TJW, 2004 WL 5278716, at *6 (E.D. Tex. June 16, 2004).

156. Unlike in baseball—where participants follow the unwritten rule that a "tie goes to the runner"—a tie goes to the defendant under the new Rule 8(a)(2) plausibility pleading standard when there are equally weighing inferences at the pleading stage. *See* Tim McClelland, *Ask the Umpire*, MLB.COM, http://mlb.mlb.com/mlb/official_info/umpires/feature.jsp?feature=mcclellandqa (last visited Nov. 11, 2010) (explaining that, although no "tie goes to the runner" rule exists in the books, "the runner must beat the ball to first base, and so if he doesn't beat the ball," he is called out).

157. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007); *see also* Spencer, *supra* note 23, at 445 (explaining that a plaintiff's complaint may no longer survive a motion to dismiss if it contains equivocal facts, "meaning the allegations are consistent both with the asserted legality and with an innocent alternate explanation").

standard).[158] This position is further developed in *Iqbal*, where the majority explains:

> The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"[159]

Thus, under the Rule 8(a)(2) plausibility standard, if the allegations contained in the plaintiff's complaint raise equivocal inferences, the defendant may be successful in dismissing the complaint by a Rule 12(b)(6) motion to dismiss.[160] In other words, under the *Iqbal/Twombly* Rule 8(a)(2) plausibility pleading standard, a tie goes to the defendant.

On the other hand, under the PSLRA's scienter pleading standard for securities fraud, a tie goes to the plaintiff. In *Tellabs*, the Supreme Court clarified that, in order to survive a motion to dismiss, a plaintiff alleging securities fraud was required to plead sufficient facts to suggest a strong inference of scienter—a cogent inference that is "*at least as compelling* as any opposing inference of non-fraudulent intent."[161] Moreover, writing for the majority, Justice Ginsburg explained that plausible opposing inferences of culpability and non-culpability must be taken into account when determining

158. *See Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."). The preponderance of the evidence standard requires a plaintiff to demonstrate that the factual allegations more likely than not suggest liability. Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997).

159. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

160. *E.g.*, Brooks v. Ross, 578 F.3d 574, 581–82 (7th Cir. 2009) (affirming the dismissal of a complaint containing equivocal allegations). The court in *Brooks* stated, "The behavior [the plaintiff] has alleged that the defendants engaged in is just as consistent with lawful conduct as it is with wrongdoing. Without more, [the plaintiff's] allegations are too vague to provide notice to defendants of the contours of his § 1983 due process claim." *Id.*

161. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314 (2007) (emphasis added).

whether an inference of scienter is "strong" under the PSLRA.[162] The inference of culpability "need not be irrefutable . . . or even the 'most plausible of competing inferences,'" but it must be at least as compelling as opposing inferences of non-culpability.[163] Thus, at the pleading stage, a plaintiff is only required to demonstrate that the inference of scienter is "*at least as likely as* any plausible opposing inference[;]" it is not until the actual trial stage that the plaintiff must prove his case by a preponderance of the evidence—in other words, that "it is *more likely* than not that the defendant acted with scienter."[164]

Hence, upon examining the convergence of pleading standards after *Tellabs* and *Iqbal*, the Supreme Court has elevated the basic Rule 8(a)(2) pleading standard to approach the level of Rule 9(b)'s fraud pleading standard and the PSLRA's scienter pleading standard.[165] Moreover, when the plausibility pleading standard and the scienter pleading standard under the PSLRA are compared, an apparent probability requirement in Rule 8(a)(2)'s plausibility pleading standard makes it an unduly onerous standard towards plaintiffs. As will be further discussed below, although these pleading standards converge, the plaintiff is affected differently in the case of a tie depending on which pleading standard the complaint is required to meet.[166] This convergence creates

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162. *Id.* at 323–24 ("The strength of an inference cannot be decided in a vacuum."). Concurring in the judgment, Justice Scalia asserted the following:

> I fail to see how an inference that is merely "at least as compelling as any opposing inference," can conceivably be called what the statute here at issue requires: a "strong inference." If a jade falcon were stolen from a room to which only A and B had access, could it *possibly* be said there was a "strong inference" that B was the thief? I think not, and I therefore think that the Court's test must fail. In my view, the test should be whether the inference of scienter (if any) is *more plausible* than the inference of innocence.

Id. at 329 (Scalia, J., concurring). Justice Ginsburg defends the majority's standard against Justice Scalia's argument by noting that "an inference at least as likely as competing inferences can, in some cases, warrant recovery." *Id.* at 324 n.5 (citing Summers v. Tice, 199 P.2d 1, 3–5 (Cal. 1948)).

163. *Tellabs*, 551 U.S. at 324.

164. *Id.* at 328–29.

165. *See supra* Part II.B.

166. Although not examined in this article, convergence may also suggest that the heightened pleading standards predicated on allegations of fraud may be

incongruity in the federal civil litigation system because, under the recent Supreme Court decisions examined above, plaintiffs may be treated as harshly when pleading non-fraud claims as when pleading fraud, especially when compared to claims of securities fraud under the PSLRA.

III. JUDICIAL ACTIVISM MAY PLAUSIBLY RESULT IN HARSHER TREATMENT OF PLAINTIFFS PLEADING NON-FRAUDULENT CLAIMS

The lines between pleading doctrines have been blurred by the Supreme Court's recent introduction of a tacit "probability requirement" into the basic pleading standard under *Twombly* and *Iqbal*, making it more difficult for plaintiffs alleging non-fraudulent claims to survive motions to dismiss under Rule 12(b)(6). This result is especially disturbing due to the fact that each pleading standard was influenced by different policy concerns, which explains why there should be different levels of pleading depending on the nature of the claims.[167] Moreover, the convergence of pleading standards has produced incongruity in the federal civil litigation system by at times treating plaintiffs more leniently when bringing fraud claims under the PSLRA than when stating non-fraudulent claims under the enhanced Rule 8(a)(2) plausibility pleading standard.[168] Therefore, it appears as if the Supreme Court, while heightening the basic pleading standard for all federal civil cases, engaged in judicial activism by overturning fifty years of precedent and bypassing the proper rule amendment process in order to protect litigants from extravagant discovery costs and to deter vexatious litigation.[169] Although there may be merit to the Supreme Court's concern with abusive litigation, the basic pleading standard under

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superfluous. *See, e.g.*, Neil Pandey-Jorrin, *A Case for Amending the Private Securities Litigation Reform Act: Why Increasing Shareholders' Rights to Sue Will Help Prevent the Next Financial Crisis and Better Inform the Investing Public*, BUS. L. BRIEF, Spring 2009, at 15, 18 (arguing that *Twombly* and Rule 9 "already encompass many of the concerns that Congress contemplated when it passed the PSLRA in 1995, and such requirements in the Act are duplicative and unfairly burden plaintiffs when pleading their case").

167. *See infra* Part III.A.

168. *See infra* Part III.B.

169. *See infra* Part III.C.

Rule 8(a)(2) should nonetheless be nowhere near the level of the heightened pleading standards predicated on allegations of fraud.

A. *Differing Policy Concerns Lead to Different Pleading Standards*

Rule 8 should be understood in light of the entire federal procedural system, in which the main function of pleadings is to provide notice.[170] But although the original policy concern when enacting Rule 8(a)(2) may have been to prevent the premature dismissal of meritorious claims,[171] the Supreme Court in *Twombly* abandoned the notice pleading standard and adopted the plausibility pleading standard, primarily because of its concern with the risk of astronomical discovery costs being used to force litigants into settling cases.[172] Relying on *Dura*, the Supreme Court rejected various arguments before concluding that application of the plausibility pleading standard was probably the only way "to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal

170. *See* Fairman, *supra* note 19, at 556–58 (explaining that pleadings have an important dual function: providing notice to litigants while also encouraging determination of claims on the merits).

171. *See* ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, 1955 REP. OF THE ADVISORY COMM. PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE U.S. DISTRICT COURTS (1955), *reprinted in* 12A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE app. F at 655 (3d ed. 2010) ("The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement."); *see also* Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 10–21 (2008) (examining the evolution of the basic pleading standard under Rule 8(a)(2)); Cavanagh, *supra* note 126, at 19 (noting that the drafters' goal was to allow meritorious claims to easily move to trial and to prevent technical pleading rules from blocking legitimate claims); Epstein, *supra* note 1, at 98–99 (arguing for the application of a mini-summary judgment at the motion-to-dismiss stage where the full record fails to support any plausible factual inference of liability and noting that "[t]he current provisions of the Federal Rules of Civil Procedure were designed in an earlier era for litigation that on average has been far simpler than litigation today").

172. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–60 (2007).

relevant evidence' to support an inference of liability."[173] The majority noted that it was concerned with the increasing costs of modern federal antitrust litigation and asserted that judicial supervision, clear jury instructions, and increased scrutiny of evidence at the summary judgment stage would all be insufficient to combat discovery abuse.[174] Thus, the Court chose to err on the side of dismissal rather than acquiescing in the specter of defendants being "forced" to settle due to the high costs of discovery.[175]

Justice Stevens, however, dissenting from the majority opinion in *Twombly*, argued that the "transparent policy concern" driving the majority's decision was the interest in protecting wealthy corporate defendants from the high costs of pretrial discovery in federal antitrust litigation.[176] Similarly, Justice Breyer, in his *Iqbal* dissent, expressed his disagreement with using the new plausibility pleading standard "to prevent unwarranted litigation from interfering with 'the proper execution of the work of the Government'" because the law provides for other legal weapons to protect the government against unwarranted interference.[177] Thus, as discussed below, the Supreme Court elevated the basic pleading standard seemingly due

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173. *Id.* at 559 (quoting Dura Pharm., Inc. v. Bruodo, 544 U.S. 336, 347 (2005)); *see also Pleading Standards*, *supra* note 121, at 312–13 (noting that the Supreme Court appeared to be "motivated by a desire to increase efficiency by allowing judges to dismiss the cases in which discovery seems least likely to be fruitful," and arguing that the Court acted under the assumption that "procedural rules should ultimately be normatively evaluated under a social welfare calculus").

174. *Id.* at 559 (noting that, if left unresolved, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [the proposed] proceedings").

175. In examining the possibility of allowing discovery, Justice Scalia emphasized the expense of the discovery process:

> How much money do you think it would have cost the defendants by then to assemble all of the documents that you're going to be interested in looking at? How many buildings will have to be rented to store those documents and how many years will be expended in, in gathering all the materials?

Transcript of Oral Argument at 54, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 3422211.

176. *Twombly*, 550 U.S. at 596–97 (Stevens, J., dissenting).

177. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1961 (2009) (Breyer, J., dissenting) (noting that, for example, "where a Government defendant asserts a qualified immunity defense, the trial court . . . can structure discovery in ways that diminish the risk of imposing unwarranted burdens on public officials").

to its concern with vexatious litigation and excessive discovery costs.[178]

Unlike with Rule 8(a)(2)'s new plausibility standard, various policy reasons have been offered to justify the inclusion of the particularity requirement of Rule 9(b) from its inception.[179] Because of the implication of moral turpitude inherent in fraud claims, the desire to protect a potential defendant's reputation has historically been the strongest justification for the particularity requirement.[180] Rule 9(b) has also been justified as an adequate strike-suit and frivolous-claim deterrent due to the higher pleading burden imposed upon plaintiffs.[181] Yet another policy reason behind Rule 9(b)'s heightened fraud pleading standard is the reluctance of courts to

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178. Dating back to 1975, the Supreme Court has confined the scope of the federal securities laws due to its concern with strike suit litigation. *E.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 769 (1975). Dissenting in *Blue Chip Stamps*, Justice Blackmun stated:

> [T]he greater portion of the Court's opinion is devoted to its discussion of the 'danger of vexatiousness' that accompanies litigation under Rule 10b-5 and that is said to be 'different in degree and in kind from that which accompanies litigation in general.' It speaks of harm from the 'very pendency of the lawsuit,' something like the recognized dilemma of the physician sued for malpractice; of the 'disruption of normal business activities which may accompany a lawsuit'; and of 'proof . . . which depend(s) almost entirely on oral testimony,' as if all these were unknown to lawsuits taking place in America's courthouses every day.

Id. (Blackmun, J., dissenting) (citations omitted).

179. WRIGHT & MILLER, *supra* note 68, § 1296; *see also* Fairman, *supra* note 19, at 563–65 (discussing the four most popular reasons supporting the imposition of a particularity requirement in cases of fraud); William M. Richman, Donald E. Lively & Patricia Mell, *The Pleading of Fraud: Rhymes without Reason*, 60 S. CAL. L. REV. 959, 961–65 (1987) (examining and criticizing the different policy reasons behind Rule 9(b)).

180. WRIGHT & MILLER, *supra* note 68, § 1296; *see* Fairman, *supra* note 19, at 563–64 (arguing that the protection-of-reputation rationale is important because of the potential damage to a defendant's reputation). *But see* Richman et al., *supra* note 179, at 962 (arguing that reputation-saving may be an inadequate justification for the particularity requirement because Rule 9(b)'s pleading standard does not cover claims such as malpractice and wrongful death, which may also be damaging to reputation or involve moral turpitude).

181. Fairman, *supra* note 19, at 564; Richman et al., *supra* note 179, at 962–63; *see also* WRIGHT & MILLER, *supra* note 68, § 1296 (noting the frequent misuse of fraud or mistake allegations solely as nuisances or to encourage settlements and arguing that "unfounded fraud claims should be identified and disposed of early").

reopen completed transactions.[182] Finally, the particularized pleading required under Rule 9(b) has probably been most commonly justified by the need to provide the defendant with fair and adequate notice of the substance of the claim, due mainly to the "intrinsic amorphousness" of fraud claims and because they may reach back many years and implicate a large number of defendants.[183]

The PSLRA, on the other hand, is of more recent vintage, and the drafters' intent is easier to ascertain. In prescribing a workable construction of the PSLRA's scienter pleading standard in *Tellabs*, the Supreme Court explained that its interpretation of the "strong inference" standard was based on the PSLRA's two main goals: "to curb frivolous, lawyer-driven litigation, while preserving investor's ability to recover on meritorious claims."[184] Yet the Court emphasized that the scienter pleading requirements "are but one constraint among many the PSLRA installed to screen out frivolous suits, while allowing meritorious actions to move forward."[185] The House Report, however, clarifies that, because Rule 9(b)'s particularity requirement had failed to thwart private litigants' abuse of the securities laws, the Conference Committee's intention in enacting the heightened scienter pleading standard was to "strengthen the existing pleading requirements."[186] Thus, Congress passed the PSLRA to protect litigants from being forced to settle meritless claims due to excessive litigation and discovery costs inherent in securities claims.[187]

The policy concerns that inspired the Supreme Court's heightening of the basic pleading standard through *Twombly* and *Iqbal* seem to be the same as those that motivated Congress to pass the PSLRA in 1995. It should therefore come as no surprise that the standards converge. The original intent behind Rule 8(a)(2),

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182. WRIGHT & MILLER, *supra* note 68, § 1296; Fairman, *supra* note 19, at 564–65; Richman et al., *supra* note 179, at 964–65.

183. Fairman, *supra* note 19, at 565; Richman et al., *supra* note 179, at 963–64.

184. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

185. *Id.* at 324.

186. H.R. REP. NO. 104-369, at 41 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 1995 WL 709276.

187. *See supra* notes 78–83 and accompanying text; *see also* Wunderlich, *supra* note 87, at 654 ("Congress was concerned that plaintiffs file frivolous lawsuits in an effort to find a sustainable claim, not yet alleged in the complaint, through the discovery process.").

however, was not to deter vexatious litigation, but rather to provide defendants with adequate notice and prevent early dismissal of meritorious claims.[188] Hence, the pleading standards that were originally adopted with different policy concerns in mind now converge, thus plausibly discriminating against those plaintiffs bringing forward non-fraud claims in federal courts.

B. *The Convergence of Pleading Standards Creates an Incongruous and Unfair Federal Civil Litigation System*

Even if the costs of litigation and abusive discovery practices are reduced by enhancing the basic pleading standard for federal civil litigation, there are various social costs and benefits that must be weighed.[189] One of the costs apparently not considered by the Supreme Court in adopting the plausibility pleading standard is that the inclusion of a tacit "probability requirement" at the pleading stage is unfair to allegedly aggrieved plaintiffs, especially when compared to the requirements for pleading scienter in securities fraud cases under the PSLRA. As discussed above, the PSLRA requires an inference of scienter to be at least as compelling as any opposing inference,[190] rather than requiring enough facts to allow the reviewing court to make a reasonable inference of liability at the motion-to-dismiss stage, as is the case under the Rule 8(a)(2) enhanced plausibility pleading standard.[191]

Prior to the establishment of the plausibility pleading standard in *Twombly*, there were four main aspects to the Rule 8(a)(2) pleading doctrine: the complaint served a notice function; factual detail was unnecessary; only when the absence of a claim was certain was dismissal warranted; and other pretrial procedures,

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188. *See supra* note 171 and accompanying text.

189. *See Pleading Standards*, *supra* note 121, at 314 ("[E]ven if the Court's new pleading standard weeds out numerous meritless claims, it might still be detrimental to social welfare if it results in the dismissal of valid claims whose benefits would exceed the costs of meritless claims.").

190. *See Tellabs*, 551 U.S. at 314 ("[A]n inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent."); *see also supra* notes 78–102 and accompanying text.

191. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (discussing that a probability requirement is not required at the pleading stage).

rather than the pleadings, were the proper tools to screen out unmeritorious claims.[192] In abandoning the notice pleading standard adopted in *Conley*, the Supreme Court deviated from these basic tenets and elevated the basic pleading standard for all federal civil cases to a point where it now converges with the two heightened pleading standards predicated on allegations of fraud.

In raising the basic pleading standard to approach the scienter pleading standard required under the PSLRA for cases of securities fraud, the Supreme Court has put plaintiffs alleging non-fraudulent claims at a disadvantage. It has been argued, however, that the practical effect of the difference between having a pleading standard that requires the inference of culpability to be at least as likely as an opposing inference and one that requires the inference of culpability to be more plausible than the inference of innocence is probably small, because "federal courts are unlikely to see a deluge of cases where the inference of scienter is exactly as plausible as the inference of innocence."[193] Nonetheless, the enhanced plausibility pleading standard under Rule 8(a)(2) will likely be harsher towards plaintiffs putting forward claims in which evidence of actionable misconduct is harder to obtain at the motion-to-dismiss stage, such as discrimination, conspiracy, and certain securities claims.[194] This may be true even where there are no allegations of fraud in the complaint:

> [P]roducts liability, civil conspiracy, antitrust, and civil rights claims, for example, are more challenging

192. Spencer, *supra* note 23, at 438–39; *see also* WRIGHT & MILLER, *supra* note 68, § 1202 (noting that the four major functions of pleadings have historically been "(1) giving notice of the nature of a claim or defense; (2) stating the facts each party believes to exist; (3) narrowing the issues that must be litigated; and (4) providing a means for speedy disposition of sham claims and insubstantial defenses").

193. Berarducci & Obhof, *supra* note 82, at 11; *see also The Supreme Court*, *supra* note 86, at 392 (examining the Supreme Court's opinion in *Tellabs* and noting that "both Justice Alito and Justice Scalia seemed to believe that the change from the majority's 'at least as compelling' rule to Justice Scalia's 'more compelling' rule would not make much of a practical difference").

194. *See* Spencer, *supra* note 23, at 459 ("Although *Twombly*'s plausibility pleading standard does not just apply to antitrust cases, it is probably correct to say that the standard will be more demanding in the context of claims in which direct evidence supporting the wrongdoing is difficult for plaintiffs to identify at the complaint stage.").

> to allege because each claim requires the proffering of a supposition of some sort to turn what happened into an actionable event. . . . It thus appears that if a claim places liability on occurrences or omissions for which objective facts make the implication of wrongdoing apparent, that claim will require less factual detail than a claim that depends on subjective motivations or concealed activities.[195]

In the case of securities litigation, there are numerous claims that were subject to the flexible Rule 8(a)(2) notice pleading standard that are now subject to *Twombly*'s plausibility pleading standard; for example, claims brought under § 11 of the Securities Act of 1933 (the Securities Act),[196] claims brought under § 12(a) of the Securities Act,[197] as well as claims brought under § 14(a) of the Exchange Act.[198] But these claims are now at risk of being prematurely dismissed under the plausibility pleading standard due to the inherent difficulty in providing evidence at the motion-to-dismiss stage in securities cases—even those in which there are no allegations of

195. Spencer, *supra* note 132, at 33–34.

196. 15 U.S.C. § 77k (2006). Section 11 of the Securities Act provides a private right of action for materially false or misleading statements contained in a registration statement. *See* STEINBERG, *supra* note 82, at 309–20 (examining the statutory framework and the elements of the § 11 right of action).

197. 15 U.S.C. § 77l (2006). Section 12(a)(1) of the Securities Act provides purchasers of securities with an express private right of action against the seller, if such seller offers or sells the security in violation of § 5 of the Securities Act. *See* STEINBERG, *supra* note 82, at 362 (explaining how a violation of § 5 generally imposes strict liability against the seller of the security). Section 12(a)(2) of the Securities Act provides purchasers of securities with an express private right of action against the seller where the purchasers acquired the securities by means of a prospectus or oral communication that contained a material misstatement or omission. *See* STEINBERG, *supra* note 82, at 362–84 (examining the meaning of "seller" under § 12(a)(2), the Supreme Court's limitation of § 12(a)(2)'s scope to public offerings, the "in pari delicto" and reasonable care defenses, and whether there is a right of action for either indemnification or contribution under § 12(a)(2)).

198. 15 U.S.C. § 78n (2006). Section 14(a) of the Exchange Act prohibits the solicitation of proxies containing any materially false or misleading statement. *See* STEINBERG, *supra* note 82, at 517–37 (explaining the manner in which § 14(a) "regulate[s] the solicitation of proxies with respect to securities registered under § 12 of the Exchange Act").

fraud.[199] As noted by Professor Spencer:

> [G]etting past neutral facts to those suggestive of liability will be more difficult in those cases where suppositions about the defendants' subjective motivations or concealed activities are needed to overcome the presumption of propriety. When such information is unknown or unknowable from the plaintiff's perspective at the pleading stage, the doctrine is too unforgiving and unaccommodating, leaving plaintiffs with potentially valid claims with no access to the system.[200]

Similarly, the plausibility standard should not resemble the heightened fraud pleading standard under Rule 9(b), which clearly creates an exception to Rule 8(a)(2) by imposing a particularity

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199. *See, e.g.*, Panther Partners, Inc. v. Ikanos Commc'ns, Inc., 347 F. App'x 617, 620 (2d Cir. 2009) (dismissing a complaint alleging violation of §§ 11, 12, and 15 of the Securities Act because the plaintiffs failed to allege sufficient facts under *Twombly*'s plausibility pleading standard to complete the chain of causation required to prove that false statements were negligently made by defendants); *In re* Thornburg Mortg., Inc. Sec. Litig., 683 F. Supp. 2d 1236, 1261 (D.N.M. 2010) (granting underwriter/defendants' motion to dismiss where purchasers failed to adequately allege that the offering documents contained false or misleading statements or omissions); *In re* Morgan Stanley Tech. Fund Sec. Litig., 643 F. Supp. 2d 366, 380–81 (S.D.N.Y. 2009) (granting defendants' motion to dismiss after holding that, even if the court had accepted the plaintiffs' "'conclusory allegations' that the mutual funds[']" prospectus materials were materially misleading, plaintiffs nonetheless failed to plead sufficient facts to show that defendants owed a duty to disclose); *see also Pleading Securities Fraud with Particularity under Rule 9(b)*, *supra* note 76, at 1436 (discussing the difficulty in pleading securities fraud even before the PSLRA enhanced the scienter pleading requirements, and noting that, "[b]ecause the plaintiff in a securities fraud case is likely to have little first-hand knowledge about the particulars of a fraudulent transaction, such a plaintiff will typically have greater difficulty pleading fraud with particularity than will a plaintiff alleging common law fraud"). The difficulty in pleading securities claims, however, is not restricted to those including allegations of fraud. *See generally* Michael C. Tu & Lucy E. Buford, *Supreme Court's* Twombly *Ruling Will Mean Higher Pleading Requirements for Some Securities Litigation Claims*, SEC. REFORM ACT LITIG. REP. (2007), http://www.orrick.com/fileupload/1203.pdf (discussing the difficulty in pleading securities claims under *Twombly*).

200. *See* Spencer, *supra* note 132, at 36.

requirement.[201] Requiring particularity at the pleading stage in every civil case would not only make the mandate of Rule 9(b) superfluous, but would impose an undue burden upon plaintiffs and violate one of the basic objectives of Rule 8—preventing civil cases from turning on technicalities.[202]

Thus, by enhancing the basic pleading requirements for all federal civil suits under Rule 8(a)(2), the Supreme Court has put plaintiffs at a disadvantage by including a hidden "probability requirement" at the pleading stage that will effectively reduce their chances of surviving a Rule 12(b)(6) motion to dismiss when there exist equally plausible inferences of liability as there are of non-liability.[203] Yet, this convergence of pleading standards does not only have the potential of being unfair towards plaintiffs, but may also create a federal civil litigation system that is incongruous. Even though Rule 8(a)(2) of the Federal Rules of Civil Procedure was designed to facilitate access to the courts and allow claims to be resolved on the merits, the new plausibility pleading standard focuses primarily on deterring vexatious litigation (for which purpose the system has already imposed heightened pleading requirements for different types of claims).[204] Moreover, as will be discussed below, the Supreme Court sidestepped the appropriate rule amendment process and overturned fifty years of precedent, suggesting that the Court engaged in judicial rulemaking.

C. The Supreme Court's Judicial Activism

After examining the different policy concerns that motivated

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201. *See* FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); *see also Pleading Standards*, *supra* note 121, at 311 ("Rule 9 creates clear exceptions to the rule that facts do not need to be pleaded with any specificity; thus, the action to which Rule 9 is inapplicable must not require particularized pleading of facts.").

202. WRIGHT & MILLER, *supra* note 68, § 1215.

203. *See, e.g.*, Cavanagh, *supra* note 126, at 25–26 (noting that dismissing claims at the pleading stage before any discovery "puts prospective plaintiffs at a severe disadvantage because it denies them equal access to proof"); Spencer, *supra* note 23, at 447 ("[T]he Court's rejection of *Conley*'s 'no set of facts' standard is a clear indication of the fact that the Court's plausibility pleading is a new, more stringent pleading standard that deprives plaintiffs the benefits of inferences in their favor when the pleaded facts are consistent with alternative explanations that do not involve wrongdoing.") (internal quotations omitted).

204. *See supra* notes 170–88 and accompanying text.

the creation of different pleading standards and how these pleading standards are now converging—the plausibility pleading standard approaching the level of the heightened pleadings standards predicated on allegations of fraud under Rule 9(b) and the PSLRA—one question remains: Was the Supreme Court[205] heightening the basic pleading standard for all federal civil cases in order to deter vexatious litigation? If so, the Court has engaged in judicial activism by overturning fifty years of precedent and bypassing the proper procedures set forth to amend the Federal Rules of Civil Procedure.[206]

There are various ways in which judicial behavior may be considered "activist,"[207] and judicial activism is not restricted to judges of a specific ideology.[208] As noted by Dean Erwin Chemerinsky, "[c]onservative justices are happy to be activists when it serves their ideological agenda."[209] But judicial activism from the

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205. The opinion in *Twombly* was authored by Justice Souter and joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007). The opinion in *Iqbal* was authored by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1941 (2009).

206. *See* Kimberly Atkins, *Congress Questions Pleading Decisions: Lawmakers, Witnesses Discuss Impact of 'Iqbal', 'Twombly' Rulings*, LAWS. USA, Oct. 28, 2009, *available at* http://www.allbusiness.com/legal/evidence-witnesses/13363806-1.html (discussing the congressional reaction to the *Twombly* and *Iqbal* decisions). Some commentators, however, defend the *Twombly* decision as flowing from prior holdings. *See, e.g.*, Smith, *supra* note 23, at 1091–97 ("*Twombly* must be viewed as part of a broader trend in which the Court recognizes the importance of imposing real and meaningful judicial scrutiny at the pleading stage, particularly as cases become more costly and complex to litigate.").

207. *See* Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1144–61 (2002) (describing six broad categories of activist behavior).

208. *See id.* at 1141 ("[W]hile we may plausibly describe different *aspects* of judicial acts as either 'activist' or 'restrained,' such terminology will rarely yield persuasive on-balance characterizations of decisions, much less of particular judges or courts.") (emphasis added).

209. *See* Erwin Chemerinsky, Op-Ed., *Conservatives Embrace Judicial Activism in Campaign Finance Ruling*, L.A. TIMES, Jan. 22, 2010, *available at* http://articles.latimes.com/2010/jan/22/opinion/la-oe-chemerinsky22-2010jan22 (discussing the Supreme Court's recent holding in *Citizens United v. Federal Election Commission* and noting that "[t]here is no way to see this other than as the conservative justices using judicial review to advance the traditional conservative ideological agenda"); *see also* Sherrilyn A. Ifill, *Judicial Activism from the Right*, THE ROOT.COM (Jan. 24, 2010), http://www.theroot.com/views/judicial-activism-right (noting how the conservative five-justice majority in *Citizens United v.*

right is not a new trend;[210] there have been numerous rulings coming from the Supreme Court's conservative majority in recent years that are inconsistent with the view that judicial activism is a tool used exclusively to advance liberal ideologies.[211] Most recently, in *Citizens United v. Federal Election Commission*,[212] the Supreme Court held that corporations and labor unions are not limited in the amount of money they can spend on election campaigns.[213] The opinion, authored by Justice Kennedy and joined by Chief Justice Roberts and Justices Thomas, Scalia, and Alito,[214] is considered a strident example of modern judicial activism by many

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Federal Election Commission "reversed over 100 years of jurisprudence in which the court had affirmed Congress' authority to regulate corporate campaign speech, and directly overturned several key precedents").

210. *See* Adam Cohen, Editorial, *Psst . . . Justice Scalia . . . You Know, You're an Activist Judge, Too*, N.Y. TIMES, Apr. 19, 2005, *available at* http://www.nytimes.com/2005/04/19/opinion/19tue3.html?_r=1 ("The idea that liberal judges are advocates and partisans while judges like Justice Scalia are not is being touted everywhere these days, and it is pure myth. . . . The conservative partisans leading the war on activist judges are just as inconsistent: they like judicial activism just fine when it advances their own agendas."); *see also* Ian Frederick Finseth, *Conservative Judicial Activism*, COMMONWEAL INST. (Apr. 21, 2005), http://www.commonwealinstitute.org/archive/conservative-judicial-activism ("What we've seen in recent years, however, is a sharp rise in conservative judicial activism, with federal jurists appointed by Republican Presidents exerting power from the bench much more aggressively.") (emphasis omitted).

211. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 100–03 (2000) (finding the Florida Supreme Court's ballot recounting scheme for the 2000 presidential election unconstitutional); United States v. Morrison, 529 U.S. 598, 601, 617–19 (2000) (invalidating the civil damages provisions of the Federal Violence Against Women Act and holding that Congress may not regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce); United States v. Lopez, 514 U.S. 549, 551 (1995) (finding the Gun-Free School Zones Act of 1990 invalid as exceeding the authority of Congress under the Commerce Clause); *see also* Larry D. Kramer, *The Supreme Court v. Balance of Powers*, N.Y. TIMES, Mar. 3, 2001, at A13 ("For nearly a decade, the court's five conservative justices have steadily usurped the power to govern by striking down or weakening federal and state laws regulating issues as varied as gun sales, the environment and patents . . . .").

212. 130 S. Ct. 876 (2010).

213. *Id.* at 913–14 (finding that the government is not allowed to suppress political speech of corporations and that the federal statute prohibiting independent corporate expenditures for electioneering communications was unconstitutional).

214. *Id.* at 886. Justice Thomas joined as to all but Part IV, and Justices Ginsburg, Breyer, Stevens, and Sotomayor joined only as to Part IV.

commentators,[215] who argue that the conservative majority failed to defer to the elected branches of government by striking down the McCain–Feingold Bipartisan Campaign Reform Act of 2002.[216]

By downplaying the requirements imposed by Congress when enacting Rule 8(a)(2), the Supreme Court has managed to elevate the basic pleading standard for all federal civil cases to approach the level of the heightened pleading standards of Rule 9(b) and the PSLRA. These latter provisions were purposefully designed to be stricter in order to provide adequate notice in cases alleging fraud, protect the reputation of innocent defendants, and curb abusive litigation practices (which frequently involve securities fraud claims due to their high nuisance value).[217] Thus, it appears as if the

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215. *See, e.g.*, Chemerinsky, *supra* note 209 (noting that, even though conservatives have generally argued that judicial restraint entails deference to the elected branches of government, "[n]o such deference was evident when the court's five most conservative justices struck down this provision of the McCain-Feingold law"); Ifill, *supra* note 209 ("[*Citizens United*] marks a new level of brazen determination by the court's conservative majority to reach the conclusions it wants by any means necessary."); Thomas E. Mann, *Commentary:* Citizens United v. FEC *Is an Egregious Exercise of Judicial Activism*, MCCLATCHY (Jan. 26, 2010), http://www.mcclatchydc.com/opinion/story/82982.html ("In spite of its imperative to rule on 'cases and controversies' brought to the Court, to defer to the legitimate lawmaking authority of the Congress and other democratically elected legislatures, and to not allow simple disagreement with past judicial decisions to overrule precedent (stare decisis), the Roberts Court ruled unconstitutional the ban on corporate treasury funding of independent political campaigns.").

216. *See* Bipartisan Campaign Reform Act of 2002, H.R. 2356, 107th Cong. (2002) (amending the Federal Election Campaign Act of 1976, which regulates the financing of political campaigns).

217. *See supra* notes 179–88 and accompanying text. Even Congress has recently taken notice of the Supreme Court's recent redefinition of pleading doctrines and has begun taking steps to restore the notice pleading standard that the Court's conservative majority retired through *Twombly* and *Iqbal*. Senator Arlen Specter has introduced a bill into the Senate to reinstate the *Conley* notice pleading standard. Titled "Notice Pleading Restoration Act of 2009," the bill provides:

> Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).

Court, in enhancing the basic Rule 8(a)(2) pleading requirements, has inappropriately bypassed the proper process for amending the Federal Rules of Civil Procedure because of its concern with abusive litigation and excessive discovery costs, notwithstanding the fact that the system already has two heightened pleading standards designed to address similar issues.[218]

IV. CONCLUSION

The plausibility pleading standard under Rule 8(a)(2) should be nowhere near the heightened pleading standards under Rule 9(b) and the PSLRA. By heightening the basic pleading standard for all federal civil cases, the Supreme Court has not only made it more difficult for disgruntled plaintiffs to meet the basic pleading requirements when bringing forward complex claims,[219] but has also introduced a measure of incongruity in a legal system that was based upon rules that were designed to encourage the resolution of claims on the merits.[220] The way in which these different pleading standards weigh inferences that are equally consistent with liability and non-liability may lead to different results for plaintiffs, in a way that is incongruent with the purpose of the pleading doctrines.

Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009). Representative Jerrold Nadler has also introduced a bill to restore the notice pleading standard that includes specific language from *Conley*, titled "Open Access to Courts Act of 2009." Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009). At a hearing before the House Judiciary Committee, Representative Nadler criticized the decision in *Iqbal* as being "judicial activism at its worst." *See* Atkins, *supra* note 206.

218. The *Twombly* decision has also been considered to be motivated by a desire to reduce tort litigation. *See* Cavanagh, *supra* note 126, at 26–27 ("The solution offered by the majority in *Twombly* makes little sense unless it had another goal in mind: tort reform through reduction in the number of private civil enforcement suits in the federal courts. Tort reform is the unspoken principle at the heart of the *Twombly* decision.").

219. *See* Spencer, *supra* note 23, at 494 ("Ultimately, *Twombly* raises the pleading bar to a point where it will inevitably screen out claims that could have been proven if given the chance.").

220. *See* Cavanagh, *supra* note 126, at 19 ("The goal of the drafters was to facilitate moving meritorious claims to trial and to make certain that technical rules of pleading would no longer be a stumbling block for a legitimate claim, as had been the case under the codes and at common law, where the goal had been to avoid trial.").

Moreover, the notion of justice that is the foundation of our legal system requires that any system of civil litigation provide litigants a fair opportunity to bring forward meritorious claims without having to jump through complicated procedural hoops.[221] The most basic pleading standard for all federal civil cases should not converge with heightened pleading standards that are more stringent due to special policy concerns.

As observed by Justice Stevens, those complaints that traditionally failed to provide sufficient notice to a defendant portrayed the type of "bareness" that the Federal Rules of Civil Procedure were designed to dismiss.[222] On the other hand, "[a] plaintiff's inability to persuade a district court that the allegations actually included in her complaint are 'plausible' is an altogether different kind of failing, and one that should not be fatal at the pleading stage."[223] In order to fulfill the policy rationales for which they were created, the heightened pleading standards under Rule 9(b) and the PSLRA should be markedly more stringent than the basic pleading standard under Rule 8(a)(2). It is imperative that particularity and cogency remain challenging standards to meet; there should be no doubt as to their stringency. The plausibility standard, on the other hand, although it is now more onerous to meet than the previous notice pleading standard, should nonetheless be focused on its main objectives of providing adequate notice and serving as a filter for unmeritorious claims, rather than addressing other policy concerns that would be better handled through the legislative rulemaking process that created the rules in the first place.

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221. *See* WRIGHT & MILLER, *supra* note 68, § 1202 ("[T]he simplified pleading standard expressed in [Rule 8(a)(2)] is reinforced by the mandate in Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice.'"); *see also* Carter, *supra* note 26, at 25–26 (explaining that one of the purposes of the Federal Rules of Civil Procedure was to promote the disposition of cases on the merits rather than on procedure).

222. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 580 n.6 (2007) (Stevens, J., dissenting).

223. *Id.*