

Imagine the Plausibilities: Life after *Twombly* and *Iqbal*

by John S. Summers and Michael D. Gadarian

In a process started four years ago in *Bell Atlantic v. Twombly*, 550 U.S. 544, 566 (2007), and continued in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Supreme Court changed the interpretation of the pleading standard that had been in use in federal court for 50 years. No longer does a party state a claim “unless it appears beyond doubt that [he] can prove no set of facts in support of his claim which would entitle him to relief.” See *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Instead, a party must now allege “enough factual matter” to make the claim “plausible on its face.” Although it is now clear that the plausibility standard applies in all cases, confusion and controversies exist as to what the standard means in practice.

In *Twombly* and *Iqbal*, the Court clearly meant to provide district courts with new directions to follow in reviewing motions to dismiss. Yet, after scores of appellate and district court decisions, consensus on the precise application of the decisions remains unclear. Still, as we have waded through the case law, we have developed a number of practice pointers for plaintiff’s counsel and defense counsel wanting to know how best to respond to the new plausibility standard.

In addition, after reviewing the case law, it strikes us that the Court’s rulings have extraordinary institutional implications and signal more than a sharp change in the direction of precedent. Rather than rely upon Congress or the Federal Committee on Rules of Practice and Procedure (the Rules Committee) to exercise their respective authority to hold hearings and issue proposed rules for comment and then propose amendments to Rule 8 of the Federal Rules of Civil Procedure, the Supreme Court “interpreted” Rule 8 in a new and different way than it had been interpreted for half a century. To those who practice in federal court—and more importantly to our clients

John S. Summers is a shareholder with Hangley Aronchick Segal & Pudlin in Philadelphia, Pennsylvania. Michael D. Gadarian is a former associate at Hangley Aronchick Segal & Pudlin and is now clerking for a federal judge in California.

who are parties—the Court’s approach was neither modest nor mere umpiring. Current developments further signal the possibility that Congress or the Rules Committee may either return federal courts to the *Conley* interpretation of Rule 8 or codify or modify the plausibility standard. We also wonder whether the Court’s re-engineering of the pleading standard may signal its appetite to incorporate a plausibility component in the Rule 56 summary judgment standard.

Bell Atlantic v. Twombly and *Ashcroft v. Iqbal*

Twombly was a class action antitrust case under section 1 of the Sherman Act, alleging conspiracy to prevent competitive entry into local telephone and Internet markets and to avoid competition. The district court dismissed the case for failure to state a claim, and the Second Circuit reversed. Both applied *Conley*’s “no set of facts” standard. The Supreme Court granted certiorari and reversed the Second Circuit, holding that a complaint alleging a violation of section 1 must contain enough factual allegations to render the claim “plausible” and that the claim before it did not meet that standard.

According to the majority opinion written by Justice Souter, the new plausibility standard was not akin to a probability requirement. *Twombly*, 550 U.S. at 566. Rather, it required the allegation of “enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” Because the complaint in *Twombly* alleged only parallel conduct—conduct that could be legal or illegal depending on the existence of an antecedent agreement to act in such a fashion—it was insufficiently suggestive of an anti-trust conspiracy to render the claim plausible. A conclusory allegation of conspiracy was not enough to cure the pleading deficiency. The Court recognized the tension between the plausibility requirement and a literal (and liberal) interpretation of *Conley*’s “no set of facts” standard and said unequivocally that the latter had “earned its retirement.”

The Court primarily grounded its rationale for requiring increased pleading specificity in the need to protect defendants from exposure to costly discovery. To the Court, neither allowing the case to move forward under careful district court management nor waiting until summary judgment for careful scrutiny of the evidence provided enough efficiency or protection from burdensome discovery costs. Only by requiring more specific factual allegations could a lower court weed out weak claims and protect defendants from being forced to settle questionable cases to avoid the costs of discovery, summary judgment, and possibly trial.

Twombly left two related questions somewhat open: (1) Does the plausibility standard apply to *all* civil claims or only antitrust claims? and (2) If the standard applies to all claims, is there a particular process a district court should go through to determine whether a claim is plausible?

Justice Kennedy, writing for the *Iqbal* majority, answered the first question with a definitive “yes” and tried to provide guidance as to the second by outlining a method for district courts to follow in ruling on motions to dismiss. Although *Twombly* represented a relatively unified Court, *Iqbal* did not. The latter case divided the justices 5–4, with Justice Souter, who wrote the majority opinion in *Twombly*, dissenting. *Iqbal*, 129 S. Ct. 1937.

Iqbal concerned the federal government’s detention of Muslim men in the wake of the September 11 terrorist attacks. The plaintiff, a Pakistani Muslim, was arrested in November 2001 and charged with fraud concerning his identification documents. In 2004, he commenced a *Bivens* action alleging multiple violations of his constitutional rights regarding his treatment while in detention. He alleged, as a general matter, that all Muslim men who were detained on criminal or immigration charges during the government’s investigation of the September 11 attacks were classified as “of interest” to the investigation and subjected to harsh conditions of confinement, regardless of whether the arrest had anything to do with the investigation.

The Court followed through on its desire to protect defendants from burdensome discovery in potentially baseless claims.

Iqbal also directed allegations toward two individual defendants: John Ashcroft (then Attorney General) and Robert Mueller (then and current director of the FBI). He alleged that (1) Ashcroft and Mueller approved the policy of holding the detainees in harsh conditions; (2) Ashcroft was the “principal architect” of the policies and Mueller was “instrumental” in their “adopt[ion], promulgation, and implementation”; and (3) Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject [*Iqbal*] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin.”

Iqbal survived a motion to dismiss before the district court, which applied the *Conley* “no set of facts” standard. While

Iqbal was pending before the Second Circuit, the Supreme Court decided *Twombly*. The Second Circuit affirmed the district court’s denial of the motion to dismiss, holding that *Iqbal*’s claims of racial, ethnic, and religious discrimination were plausible as a general matter. The court of appeals further held that “the allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves” with the detention policies at issue in the complaint.

A sharply divided Supreme Court, 5–4, reversed and remanded. Although Justice Kennedy, writing for the majority, did not take issue with the Second Circuit’s use of the plausibility standard, the majority concluded that *Iqbal*’s complaint lacked the factual allegations necessary to “nudge” his claims “across the line from conceivable to plausible.”

Why did the majority find implausible that which the Second Circuit found plausible? The Court took a fairly broad view of which allegations qualified as “conclusory” and were therefore *not* entitled to a presumption of truth; and it functionally superimposed a *probability requirement* onto the plausibility standard. As to the first point, the Court excised from the complaint the allegations it labeled “conclusory,” namely that (a) the policy of harsh detention was based solely on account of race, religion, or national origin; and (b) Ashcroft was the “principal architect” and Mueller was instrumental in adopting and executing the policy.

With these allegations no longer entitled to a presumption of truth, two key allegations remained: (1) the FBI “arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11”; and (2) the policy of keeping the detainees in harsh conditions was approved by Ashcroft and Mueller. As if highlighting the impact of its new standard, the Court acknowledged that, “[t]aken as true, these allegations are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin.” Nevertheless, the claim of intentional discrimination was not plausible, according to the majority, “given more likely explanations” for the detention policy. A “more likely explanation” was that a legitimate policy of detaining people with suspected terrorism links would have a disparate impact on Muslim men because the perpetrators of the September 11 attacks were Muslim.

Although the majority stated that plausibility is not probability, and continued to suggest that it was not creating a heightened pleading standard, its discussion of why *Iqbal*’s complaint failed to state a claim—the existence of “more likely [legal] explanations” for the defendants’ conduct—clearly creates a higher bar than the *Conley* interpretation of Rule 8 by requiring district courts to evaluate various explanations for a defendant’s conduct and consider whether any more plausible, benign ones explain the alleged facts. *Iqbal*’s plausibility standard is thus not merely a new gloss on the same Rule 8 standard. Rather, it is a wholesale new *probability* standard requiring courts at the outset of a case, without the benefit of any actual facts or discovery, to assess the relative probabilities of various explanations for factual allegations.

That the Court intended to (and did) raise the pleading standard is clear not only from an analysis of what the Court did but for at least one additional reason as well: By raising the pleading bar, the Court followed through on its express desire

to protect defendants from burdensome discovery in potentially baseless cases. According to the majority's logic, the motion to dismiss stage is an opportunity to get a defendant out of a case with a relatively small legal bill and, if immunity is at issue, the last opportunity meaningfully to protect a defendant from suit. Thus, the majorities in *Twombly* and, especially, in *Iqbal* used their own novel interpretation of Rule 8 to protect defendants by making it easier for them to win motions to dismiss.

Trial and Appellate Court Reaction to and Application of *Twombly* and *Iqbal*

The best way to understand the impact of a Supreme Court decision is to see what the appellate and trial courts are saying about the decision and how they are applying it. Also helpful is assessing empirically, through social science statistical techniques, the actual impact of the decision. Not surprisingly, appellate courts are noting that the plausibility standard is different from the *Conley* standard and that this new standard is a move away from pure notice pleading. For example, in *Boykin v. KeyCorp*, the Second Circuit said that the Court intended to "make some alteration in the regime of pure notice pleading" but "does not offer much guidance to plaintiffs regarding when factual 'amplification [is] needed to render [a] claim plausible.'" 521 F.3d 202, 213 (2d Cir. 2008). Likewise, in *Fowler v. UPMC Shadyside*, the Third Circuit recognized that "pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading." 578 F.3d 203, 210 (3d Cir. Aug. 2009); see also *Courie v. Alcoa Wheel & Forged Products*, 577 F.3d 625, 629 (6th Cir. 2009) (noting that (1) "the Supreme Court recently raised the bar for pleading requirements," and (2) "exactly how implausible is 'implausible' remains to be seen. . . ."); *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009) (providing that *Twombly* "repudiated the general notice pleading regime of Rule 8. . . ."); *Nemet Chevrolet Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 262 (4th Cir. 2009) (providing that (1) "*Twombly* and *Iqbal* announced a new, stricter pleading standard"; and (2) "[T]he present federal pleading regime is a significant change from the past. . . ."); *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010) (describing *Twombly* and *Iqbal* as creating a "new pleading standard[.]").

One appellate court raises an interesting question: Does this heightened pleading standard apply to all types of claims or, rather, should it apply to just some? Although *Iqbal* seems to say that the heightened standard is not restricted to certain types of claims—a debate left open after *Twombly*—Seventh Circuit Judge Richard Posner recently suggested that the Supreme Court's "new pleading rule" requires a floating plausibility standard that rises and falls with the circumstances of the case. Circumstances requiring application of a higher plausibility standard include complexity (as in *Twombly*), immunity (as in *Iqbal*), and allegations of conspiracy, at least when made by possibly "paranoid" pro se litigants. *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009); see also *Swanson v. CitiBank, N.A.*, 614 F.3d 400, 404–5 (7th Cir. 2010) ("[I]n many straightforward cases, it will not be any more difficult today for a plaintiff to meet [his pleading] burden than it was before the Court's recent decisions . . . [but] [a] more complex case . . . will require more detail. . . .").

At the close of 2010, the appellate courts basically have settled into the post-*Twombly/Iqbal* framework, and extended

discussions of the plausibility standard are becoming less common. Still, particular issues continue to be litigated. For example, the Seventh Circuit recently held that "while raising the bar for what must be included in the complaint in the first instance, [*Twombly/Iqbal*] did not eliminate the plaintiff's opportunity to suggest facts outside the pleading, including on appeal, showing that a complaint should not be dismissed." *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1147 (7th Cir. 2010). The Eighth Circuit, meanwhile, recently sought guidance as to the required level of pleading specificity in a negligence case by looking to the forms included with the rules. *Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir. 2010); Fed. R. Civ. P. 84. The forms, therefore, may present plaintiffs a back-door way of incorporating a slightly less demanding pleading standard, at least until the forms are updated with the plausibility standard in mind.

What courts do empirically—the direction that the law follows—is, of course, as important as the interpretation individual courts give. It remains uncertain, however, whether district courts, in the aggregate, are actually applying a heightened standard and dismissing complaints under *Twombly/Iqbal* that would have withstood *Conley* scrutiny. One might be tempted, for example, to think that *Twombly/Iqbal* would increase the likelihood of success on Rule 12(b)(6) motions where the likelihood is measured by the ratio of the number of successful 12(b)(6) motions divided by the total number of such motions. But this misses a key "supply" effect; thoughtful defense litigators are now taking a shot at filing 12(b)(6) motions arguing that complaints are asserting implausible theories when they never would have filed a motion to dismiss under *Conley*. Thus, even though the pleading standard may make it easier to win a 12(b)(6) motion, there may be more long-shot motions filed, leaving the overall likelihood of success unchanged. Likewise, as plaintiffs' lawyers adapt to the plausibility standard, they will likely craft more factually detailed complaints when in the past they might have omitted known detail for strategic and other reasons.

Notwithstanding the foregoing limitations, at least one early analysis found that there has been a statistically significant increase in the likelihood that a motion to dismiss will be granted under *Twombly/Iqbal*. Using multinomial logistic regression, Professor Hatamyar found that "under *Twombly/Iqbal*, the odds of a 12(b)(6) motion being granted rather than denied were 1.5 times greater than under *Conley*, holding all other variables constant." Hatamyar, "The Tao of Pleading," 59 *Am. Univ. L. Rev.* 553 (Feb. 2010). Of particular interest, the study found that the increase in the odds varied by subject matter, most significantly in civil rights cases, from 50 percent under *Conley* to 55 percent under *Twombly* and then to 60 percent under *Iqbal*. This is likely because plaintiffs in civil rights cases, due to the nature of such cases, lack access to the underlying facts necessary to nudge their lawsuits across the line from possible to plausible.

The Rules Committee has also released preliminary data, updated as of October 2010, that are less clear as to whether a motion to dismiss is more likely to be granted now as opposed to before *Twombly/Iqbal*. The committee's data, however, are subject to further study by the Federal Judicial Center. See Statistical Information on Motions to Dismiss re *Twombly/Iqbal* (rev. Oct. 20, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions%20to%20Dismiss%20Statistics%20-%20October%202010.pdf>). With

luck, the Federal Judicial Center and the academy will continue to add empirical analyses to help lawyers and the bench understand what's happening on the ground.

Crafting Complaints and Drafting and Responding to Motions to Dismiss Post-*Iqbal*

Regardless of what the statistics show, *Twombly* and *Iqbal* certainly can help careful federal litigators to increase their plaintiff-clients' chances of surviving a motion to dismiss or increase their defendant-clients' chances that such a motion will succeed. Obviously, you should become conversant in the language of plausibility. If you have not drafted a motion to dismiss in a while, do not cut and paste the standard of review section from a pre-*Iqbal* motion. Courts expect to see litigants apply the plausibility standard.

For plaintiffs' counsel, the plausibility standard becomes crucial when drafting the complaint, responding to a motion to dismiss, seeking limited discovery, and filing a Rule 12(f) motion:

Drafting the Complaint. Surviving a motion to dismiss starts with the complaint itself. A more factually detailed complaint is, all else being equal, more likely to survive a motion to dismiss for failure to state a claim. For example, under *Iqbal*, merely alleging that a defendant acted intentionally or knew of certain conduct may well be considered "conclusory" and be disregarded. That means at least the following:

- More pre-complaint investigation may be necessary to gather knowledge of as many pertinent facts as you can find without the aid of court-compelled discovery.
- You should plead direct and circumstantial factual support for each key allegation in the same paragraph in which the allegation is made.
- Do not incorporate key facts by reference. This may seem like elevating form over substance, but defense counsel may encourage the district court to excise "conclusory" allegations from consideration. You can help the court see that your key allegations are not conclusory by including at least some of your underlying factual support for those allegations right alongside them.
- You should think hard before withholding facts for strategic reasons. Although there may have been strategic reasons to withhold known facts under *Conley*, doing so now risks dismissal.
- If a pleading form exists for your type of case, use it as a specificity floor your pleading should not fall below.

Responding to a Motion to Dismiss.

- When discussing *Iqbal* and *Twombly*, focus on the sections where the Court says it is not imposing a heightened pleading requirement, and be sure to stress that the *Iqbal* Court said that plausibility is not probability. (Good luck, though, because you are facing a strong head wind to that position.)
- Encourage the district court to review the complaint as a whole, and direct it to the factual allegations that support each essential element. Remember, if you craft the complaint in the shadow of the motion to dismiss that you anticipate your adversary will file—which you should do—then you should have the factual support you need.
- Circumstantial factual allegations count in this analysis, so even if a fact is only indirect proof of an element of a

claim, include it in the complaint and direct the court's attention to it in responding to a motion to dismiss.

- If you followed a form, make sure you point that out to the judge because practitioners are supposed to be able to rely on those forms and presume they have met their pleading burden. Look for and cite authority to that effect.

Seeking Limited Discovery. Consider arguing, in the alternative, that the court should hold off ruling on the motion until you have taken limited discovery on select allegations that you believe, in good faith, are true but seem so conclusory that they risk excision by the court. *Iqbal*, however, makes this approach difficult because there is language in the decision saying that a plaintiff is not entitled to such discovery, *Iqbal*, 129 S. Ct. at 1953; a sympathetic district court, however, may entertain such an option as an alternative to dismissing an otherwise seemingly plausible case.

Flipping the Script. Although it won't help you to overcome a motion to dismiss, some district courts are responsive to motions to strike affirmative defenses that are not plausibly pleaded. Such motions can be made pursuant to Rule 12(f) and are worthwhile if your adversary pleads boilerplate affirmative defenses in a jurisdiction responsive to 12(f) motions to strike.

Defense counsel should keep the following in mind.

The Iqbal Method. Defense counsel should encourage a court to focus on the *method* the Supreme Court went through in *Iqbal*, rather than what it said about not raising the pleading standard. Here is what that means:

- Look for allegations you can attack as conclusory—more likely than not, those are the ones that parrot a statute or precedent but do not use quotation marks. Be surgical in your approach. Point out to the court, one by one, each allegation it should ignore as conclusory. *Iqbal* took a fairly broad view, encompassing not only classic legal conclusions (e.g., the defendant acted negligently) but also allegations of core elements that do not contain additional supportive facts.
- Think long and hard and creatively about all of the benign alternative theories that explain the underlying conduct that the complaint alleges. This task is enormously contextual and, under the new regime, promising. The discussion of plausibility, moreover, should be, at least subtly, about probability as well. A "more likely explanation" for your client's conduct may well be a magic bullet.

Protecting Your Client from Baseless Discovery. Remember that protecting defendants from costly and burdensome discovery is probably the over-arching interest of both *Twombly* and *Iqbal*. Keep in mind the four areas where the plausibility standard is likely to help the most. These are cases involving (1) complexity; (2) immunity; (3) parallelism (cases, like *Twombly* and to a lesser extent *Iqbal*, involving conduct that could be legal or illegal depending on the defendant's underlying motivation); and (4) overly litigious pro se plaintiffs. If possible, fit your case into one or more of these categories. If your case does not fit neatly into one of them, explain why, in your particular client's case, a more rigorous plausibility standard ought to be applied. We suggest this with the warning that if you highlight the discovery that has been avoided, the flip side

is that you have also highlighted the discovery that the plaintiff will point to as the very discovery he needs.

Taking a Careful Approach to Affirmative Defenses. Some district courts are becoming increasingly responsive to motions to strike affirmative defenses that do not meet the plausibility standard. If you get to the stage where you need to file a responsive pleading, avoid boilerplate affirmative defenses or be prepared to argue why those defenses are plausible based only on the facts pleaded in the complaint or elsewhere in your answer.

Who Should Set the Pleading Standard?

It is true that rising discovery costs are a genuine and significant problem that may be a reason to raise the pleading bar. A question remains, however: What institution is best positioned to make that judgment call? We think there are at least three contenders: the Rules Committee, which wrote Rule 8 and has the ongoing responsibility of revising the Federal Rules; Congress, which enacted the federal rules and has the authority to change them under the Rules Enabling Act; and the Supreme Court, which “interprets” the rules. In our view, the decision should lie with the first two institutions, not the last. *See generally* Herrmann, Beck & Burbank, “Plausible Denial: Should Congress Overrule *Twombly* and *Iqbal*?” 158 *U. Pa. L. Rev. PENumbra* 141, 141 (2009) (debating “whether th[e] plausibility standard is a proper ‘recalibration’ of the pleading rules or an illegitimate ‘innovation’ and whether Congress would be wise to overrule it”).

The Rules Committee is a deliberative body that regularly proposes amendments to the rules, holds hearings, and issues proposed changes for public comment. It would have been the natural place for the genesis and study of a new pleading rule like that articulated in *Twombly/Iqbal*. Because the Rules Committee is composed of practitioners, law professors, and trial and appellate judges, it is well designed to consider and propose changes in the pleading rule if warranted. Under the Rules Enabling Act, moreover, there is a political check on the Rules Committee’s authority, as Congress could step in and prevent a politically inapt proposed change. The Rules Committee is now examining the effect of *Twombly* and *Iqbal*.

Congress, too, is presently looking at the Court’s rulings in *Twombly* and *Iqbal*. The Senate and House Judiciary Committees are plainly appropriate drivers of change in federal pleading practice. Indeed, in the summer of 2009, Senator Arlen Specter, a long-time respected member of the Senate Judiciary Committee, submitted legislation to return federal courts to the *Conley* interpretation of Rule 8. The House is debating similar legislation. Hearings have already been held in both chambers, and more are likely on the way. At this point, though, with *Twombly* and *Iqbal* starting to become enmeshed in federal practice, any formal change in the rules will likely have to be made in the Rules Committee.

It seems reasonably likely that the Rules Committee will make recommendations and/or propose changes to Rule 8 (and possibly other rules) at some point. Such recommendations or proposed changes might include (1) validating the plausibility standard as is, with or without accompanying changes in the language of Rule 8 and/or Rule 9; (2) returning to the *Conley* standard; or (3) modifying the plausibility standard through Rule 8 or changing other rules to blunt its impact. If the Rules Committee decides to follow the third path, it could keep the plausibility standard and provide for easier access to limited

pre-complaint or post-complaint pre-motion-to-dismiss discovery. For example, the rules might allow plaintiffs who can meet the *Conley* standard, but not the new plausibility standard, specific, targeted discovery of facts solely in the control of the defendant. Such plaintiffs could then be given an opportunity to amend their complaints with the information learned and have it tested again under the plausibility standard. Although the Court pooch-pooched the idea that district courts are willing or able to control discovery adequately to protect defendants from unwarranted exposure to costs, providing a narrow avenue for closely monitored, limited discovery could be a workable middle ground. Congress’s and the Rules Committee’s study could be valuable in striking a more substantive balance to a new pleading rule and ensuring greater legitimacy and accountability to rule reform.

The body least well positioned to make the dramatic change from *Conley* to *Twombly/Iqbal* is the Supreme Court. Rule 8 says that a plaintiff must make “a short and plain statement of the claim showing that the pleader is entitled to relief.” This one-line statement left a fairly wide space for the Court to step in and provide guidance, which it did in *Conley*. It set forth the “no set of facts” standard based on its belief that the drafters of Rule 8 intended there to be a relatively low pleading bar. As evidence of the drafters’ intent, the Court relied on (1) the requirement in Rule 8 of only “a short and plain statement”; (2) the “illustrative forms” appended to the rules that provide examples of acceptable pleadings; and (3) the fact that “notice pleading” was backstopped by “the liberal opportunity for discovery,” which in 1957, the Court believed would provide defendants with sufficient opportunities to test plaintiffs’ allegations. Easy access to discovery, for the *Conley* Court, protected defendants from baseless suits because it enabled them to winnow down and test broad allegations.

So, what led the Court to revisit *Conley* in *Twombly* and *Iqbal*? There has been no obvious change in either of the first two pieces of evidence the Court relied on in 1957 when it set forth the “no set of facts” interpretation of Rule 8. The Court’s motivation appears to be its belief that changes in litigation practice since *Conley* have turned “the liberal opportunity for discovery” from a shield that a defendant could use to test a plaintiff’s broad allegations to a sword used against defendants to expose them to burdensome discovery and force settlement even of weak cases.

This, though, is hardly a basis for a new *interpretation* of a rule (as opposed to directly targeting the discovery rules and amending *them*). So dramatically re-interpreting the language of Rule 8 after more than 50 years is hardly the type of “modest” “umpiring” that Chief Justice Roberts, at least, has promoted as his judicial ideal. This is particularly so where the Rules Committee and Congress are so plainly well suited to consider the type of pleading change the Court made.

What’s Next? The Plausibility Creep to Summary Judgment?

If the motion to dismiss is the first opportunity for defendants to remove themselves from a case at a relatively low cost, summary judgment is often their last opportunity to do so. In modern practice, summary judgment often constitutes the end of the case regardless of who wins. The cost of litigating a trial (to say nothing of uncertain potential exposure) is so large that many defendants feel compelled to settle even if they think they have the better of the case. If the Court is

newly interested in protecting defendants from exposure to costs, making it easier for them to win summary judgment may well be next in its sights. We do not endorse such a move but only note that it may be this Court's next step. Because summary judgment occurs at a point when the facts should already be known, the district court is arguably in a better position at the summary judgment stage than at the motion to dismiss stage to exercise its judicial intuition as to whether the case ought to be held over for trial.

If the Court is newly interested in protecting defendants from exposure to costs, making it easier to win summary judgment may be next in its sights.

Summary judgment motions are governed by Rule 56, which provides that such motions should be granted “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” The Supreme Court could determine that it accords with due process to (1) have the facts on summary judgment viewed “in the most plausible light” rather than in

the light most favorable to the non-moving party and/or (2) require heightened proof of seemingly implausible claims. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (“[I]f the factual context renders [a] claim *implausible* . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”) (emphasis added); see also Brunet, “The Substantive Origins of ‘Plausible Pleadings,’” 14 *Lewis & Clark L. Rev.* 1 (Spring 2010) (discussing relationship between plausibility concepts in motions to dismiss and summary judgment motions). Embracing up front the plausibility concept already present, at least to some degree, in current summary judgment practice would further empower district courts to dispose of cases that, in their judicial experience, ought not to go to trial. Litigators, particularly defense counsel, should pay special attention to whether subtle changes in summary judgment practice in the coming months will open the door to argue that the facts on summary judgment should be viewed in the most plausible light, under a heightened showing, rather than in the light most favorable to the non-moving party.

One year after *Iqbal* and three years after *Twombly* this much is clear: The plausibility standard applies to all federal civil actions. This change is more than merely formulaic. The pleading bar has been raised, although exactly what that means on a day-to-day basis is still being sorted out. With both Congress and the Rules Committee now involved in analyzing the impact of *Twombly* and *Iqbal*, we think the right questions are now being asked by those best situated to make policy judgments and, in the case of Congress, be held accountable for them. For the time being, though, litigators need to adapt to the plausibility standard and use it to their clients' best advantage. □