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THE GATEKEEPERS KEEP CHANGING THE LOCKS: *SWANSON V. CITIBANK* AND THE KEY TO STATING A PLAUSIBLE CLAIM IN THE SEVENTH CIRCUIT FOLLOWING *TWOMBLY* AND *IQBAL*

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INTRODUCTION

In June 2009, less than a month after the Supreme Court decided *Ashcroft v. Iqbal*,¹ Justice Ruth Bader Ginsburg told her audience at the Second Circuit Judicial Conference that, in her opinion, “the Court’s majority messed up the Federal Rules.”² Justice Ginsburg’s comment was a sign of the federal courts’ growing struggle with *Bell Atlantic Corp. v. Twombly*³ and *Ashcroft v. Iqbal*, two cases that transformed the requirements for pleadings in all civil cases under the

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¹ 129 S. Ct. 1937 (2009).

² Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Remarks for Second Circuit Judicial Conference (June 12, 2009), http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_06-12-09.html.

³ 550 U.S. 544 (2007).

Federal Rules of Civil Procedure.⁴ In *Twombly*, a complex anti-trust case, the Supreme Court introduced plausibility as a new requirement for pleadings.⁵ The Court in *Twombly* held that a complaint must state “a claim to relief that is plausible on its face” to meet the requirements of Rule 8(a)(2)⁶ and to survive a Rule 12(b)(6)⁷ motion to dismiss.⁸ Two years later in *Iqbal*, a less complex discrimination case, the Court confirmed that the new plausibility requirement applies to “all civil actions.”⁹

Swanson v. Citibank,¹⁰ a case that the Court of Appeals for the Seventh Circuit decided on July 30, 2010, reveals just how “messed up” things have become. In *Swanson*, a pro se plaintiff sued Citibank, a real estate appraisal company, and the appraisal company’s employee for racial discrimination in connection with Citibank’s denial of her application for a home equity loan.¹¹ The district court dismissed the complaint under Rule 12(b)(6) for failure to state a plausible claim,¹² but the court of appeals reversed.¹³ Writing for the majority, Judge Diane Wood interpreted *Twombly* and *Iqbal* to mean that a complaint must include sufficient factual detail to “present a story that holds together.”¹⁴ In dissent, Judge Posner strongly criticized the majority’s liberal reading of *Twombly* and *Iqbal* and

⁴ The Supreme Court in *Iqbal* transformed the pleading requirements by confirming that the “plausibility” requirement from *Twombly*, 550 U.S. at 570, applied to “all civil actions.” *Iqbal*, 129 S. Ct. at 1953.

⁵ *Twombly*, 550 U.S. at 548.

⁶ FED. R. CIV. P. 8(a)(2) (“[a] pleading that states a claim for relief must contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief”).

⁷ FED. R. CIV. P. 12(b)(6) (“a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted”).

⁸ *Twombly*, 550 U.S. at 570.

⁹ *Iqbal*, 129 S. Ct. at 1953.

¹⁰ 614 F.3d 400 (7th Cir. 2010).

¹¹ *Id.* at 402.

¹² *Id.*

¹³ *Id.* at 407.

¹⁴ *Id.* at 404.

interpreted the two cases to mean that a complaint must contain sufficient factual allegations to override any “obvious alternative explanation” for the plaintiff’s injury.¹⁵ While the majority held that the plaintiff’s relatively minimalist complaint was sufficient to state a plausible claim,¹⁶ Judge Poser thought that “error” was the more obvious and natural explanation for the defendants’ denial of the plaintiff’s home equity loan application.¹⁷ Judge Posner argued that the court should have relied on its “judicial experience and common sense” to reach this conclusion, and that the district court’s dismissal should have been affirmed.¹⁸

The majority and dissenting opinions in *Swanson* reveal the strong disagreement in the Seventh Circuit over how courts should interpret and apply *Twombly* and *Iqbal*’s plausibility requirement. This Note will examine this disagreement and will ultimately argue that Judge Diane Wood’s majority opinion provides the correct approach. After providing a history of pleading in general and of pleading in the Seventh Circuit in particular, this Note will argue that, in deciding Rule 12(b)(6) motions to dismiss, judges must be careful to not overly rely on their “judicial experience and common sense” such that they effectively turn a motion to dismiss into a motion for summary judgment.¹⁹ Instead, as the court held in *Swanson*, the question judges must ask themselves when deciding whether a complaint presents a claim that is “plausible on its face” is whether the factual allegations, taken as true, “present a story that holds together” and upon which the plaintiff could recover.²⁰ In assessing this, a judge should look to his

¹⁵ *Id.* at 407–08 (Posner, J., dissenting) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951–52 (2010)).

¹⁶ *Id.* at 405.

¹⁷ *Id.* at 408.

¹⁸ *Id.* at 407–09.

¹⁹ See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Twombly and Iqbal*, 14 LEWIS & CLARK L. REV. 15, 17 (2010). This Note will heavily rely on the arguments of Professor Suja A. Thomas, who has argued that *Twombly* and *Iqbal* have effectively turned the Rule 12(b)(6) motion to dismiss into the “new summary judgment motion.” *Id.*

²⁰ *Swanson*, 614 F.3d at 404.

or her “judicial experience and common sense” only for an objective standard, not as a source for facts or considerations beyond the allegations of the complaint upon which to base inferences that favor the party moving for dismissal.²¹ In the end, this Note argues that the Court of Appeals for the Seventh Circuit reached the correct result in *Swanson*.

I. HISTORY OF PLEADING RULES

Professors Kevin M. Clermont and Stephen C. Yeazell have called pleading “the gatekeeper for civil litigation.”²² If pleading is the gatekeeper, then prior to the adoption of the Federal Rules of Civil Procedure in 1938, judges were quick to close the gates on plaintiffs’ claims because they followed technical pleading rules.²³ For the second half of the twentieth century, on the other hand, federal judges held the gates open because they followed the liberal notice pleading standard that the Supreme Court introduced in *Conley v. Gibson*.²⁴

²¹ See *infra* Part IV.

²² Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824 (2010) (“Pleading serves as the gatekeeper for civil litigation.”); see also CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202 (2004 ed. & 2009 supp.) (describing the four functions traditionally served by pleadings, one of which was to provide “a means for speedy disposition of sham claims and insubstantial defenses”).

²³ See WRIGHT & MILLER, *supra* note 22 (“At common law there was a generally held belief in the efficacy of pleadings. The whole grand scheme was premised on the assumption that by proceeding through a maze of rigid, and often numerous, stages of denial, avoidance, or demurrer, eventually the dispute would be reduced to a single issue of law or fact that would dispose of the case.”); see also David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 395 (1980) (describing the Field Code as a “scheme [that] placed considerable emphasis on hypertechnical artifices of pleading . . . [under which] any gains in precise issue-identification came at the expense of many otherwise valid claims that were dismissed for inadequate pleadings”).

²⁴ 355 U.S. 41, 45–46 (1957) (holding that a complaint need only contain “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests”) (quoting FED. R.

Very recently, the gatekeeper has become selective again. According to Clermont and Yeazell, the Supreme Court in *Twombly* and *Iqbal* developed “a robust gatekeeping regime” to replace liberal notice pleading.²⁵ To understand how pleading rules have evolved in this manner, it is necessary to give a brief overview of the history of pleading rules.

A. *1848 to 1938: The Field Code*²⁶

The Field Code was the first major departure from common law pleading in the United States.²⁷ David Dudley Field developed the Field Code during the mid-nineteenth century to reform the New York courts’ approach to pleading.²⁸ The Field Code provided that a complaint should contain “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”²⁹ Plaintiffs were required to plead the “dry, naked, actual facts” giving rise to a cause of action.³⁰ During its time,

Civ. P. 8(a)(2)); *see also* Clermont & Yeazell, *supra* note 22, at 825 (“Under the [Federal] Rules [of Civil Procedure] . . . pleading was a pervious gate.”).

²⁵ Clermont & Yeazell, *supra* note 22, at 823 (describing the Court’s decisions in *Twombly* and *Iqbal* as a “choice to replace minimal notice pleading with a robust gatekeeping regime”).

²⁶ The Field Code was adopted in New York in 1848. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986). The Federal Rules of Civil Procedure were adopted in 1938. *Id.* at 433.

²⁷ *Id.* at 438.

²⁸ *Id.* at 438–39.

²⁹ *Id.* (quoting An Act to simplify and abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 120(2), 1848 N.Y. Laws 521).

³⁰ WRIGHT & MILLER, *supra* note 22 (quoting POMEROY, CODE REMEDIES § 423 at 640 (5th ed. 1929)). Prior to the Field Code, plaintiffs were required under the common law to plead technical causes of action. Hon. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 459 (1943) (“With the development of code pleading . . . the emphasis was shifted from the detailed issue-pleading of the

the Field Code was the rule of procedure in effect in many federal courts because, from 1872 to 1938, the Conformity Act provided that each federal court was to employ the pleading rules of the state in which it was located.³¹

Although the Field Code aimed for simplicity, states that adopted it ultimately developed a complicated system that distinguished between “legal conclusions,” “ultimate facts,” and “evidentiary facts.”³² Pleading of legal conclusions and evidentiary facts was impermissible, while pleading of ultimate facts was desired.³³ Cases were often dismissed based upon technical distinctions between legal conclusions and ultimate facts, rather than on the merits.³⁴ A widespread criticism of the Field Code’s distinction between legal conclusions and ultimate facts was that there was no logical distinction to be made; because the difference was one of degree only, rather than of kind, the distinction was arbitrary.³⁵

B. 1938 to 2007: Federal Rule of Civil Procedure 8(a)(2) and Liberal Notice Pleading

The drafters of the Federal Rules of Civil Procedure sought to avoid the confusing distinction between “legal conclusions,” “ultimate facts,” and “evidentiary facts” that had mired pleadings under the Field Code.³⁶ Charles E. Clark and the drafters of the Federal Rules advocated a liberal approach to pleading.³⁷ Accordingly, the Federal

common law to a statement of facts, so simple, it was said at the time, that even a child could write a letter to the court telling of its case.”).

³¹ WRIGHT & MILLER, *supra* note 22, at n.4.

³² Roberts, *supra* note 23, at 395; *see also* Marcus, *supra* note 26, at 438.

³³ Roberts, *supra* note 23, at 395.

³⁴ *Id.* at 395–96.

³⁵ WRIGHT & MILLER, *supra* note 22; *see also* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38 at 301 (2d ed. 1947) (“[T]he attempted distinction between facts, law, and evidence, viewed as anything other than a convenient distinction of degree, seems philosophically and logically unsound.”).

³⁶ Marcus, *supra* note 26, at 438–39.

³⁷ *Id.* at 439.

Rules, adopted in 1938, substantially narrowed the function served by pleadings.³⁸ Federal Rule of Civil Procedure 8(a)(2) provides that a complaint need only provide “a short and plain statement of the claim showing that the pleader is entitled to relief.”³⁹ The other functions that pleadings historically served—stating the facts, narrowing the issues, and “providing a means for speedy disposition of sham claims and insubstantial defenses”—were left to devices other than pleadings, including discovery, pretrial conferences, and summary judgment.⁴⁰

The Federal Rules’ liberal approach to pleading became known as “notice pleading” following the Supreme Court’s 1957 decision in *Conley v. Gibson*.⁴¹ In *Conley*, several African-American union members brought an action for declaratory judgment and injunction against their union representative.⁴² The plaintiffs alleged that the representative, as their collective bargaining agent, had failed to protect the African-American union members from discriminatory discharge in favor of white employees, in violation of the Railway Labor Act.⁴³ The district court dismissed the complaint, and the court of appeals affirmed.⁴⁴

The Supreme Court reversed the district court’s dismissal of the plaintiffs’ complaint.⁴⁵ The Supreme Court famously held that a

³⁸ WRIGHT & MILLER, *supra* note 22 (“Because the only function left exclusively to the pleadings by the federal rules is that of giving notice, federal courts have frequently said that the rules have adopted a system of ‘notice pleading.’”).

³⁹ FED. R. CIV. P. 8(a)(2).

⁴⁰ WRIGHT & MILLER, *supra* note 22.

⁴¹ 355 U.S. 41 (1957). A similarly high water mark came in *Dioguardi v. Durning*, where Justice Charles E. Clark, former head of the drafting committee of the Federal Rules, reversed the dismissal of a pro se complaint because, although “obviously home drawn” and “however inarticulately they may be stated, the plaintiff has disclosed his claims . . . [and the court does] not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes.” 139 F.2d 774, 774–75 (2d Cir. 1944).

⁴² *Conley*, 355 U.S. at 42–43.

⁴³ *Id.* at 43.

⁴⁴ *Id.*

⁴⁵ *Id.* at 44.

complaint should not be dismissed under Rule 8(a)(2) “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.”⁴⁶ This sentence has become known as *Conley*’s “no set of facts” language.⁴⁷ The *Conley* Court went on to hold that the Federal Rules do not require plaintiffs to fill their complaints with detailed factual allegations, but instead require only “a short and plain statement of the claim” that is sufficient to give the opposing party “fair notice” of the claim and “the grounds upon which it rests.”⁴⁸ The Court’s holding in *Conley* became the precedent for a half-century of liberal notice pleading in federal courts.⁴⁹

The Supreme Court reaffirmed *Conley*’s liberal notice pleading standard as recently as 2002.⁵⁰ In *Swierkiewicz v. Sorema*, the plaintiff alleged that his employer had demoted and fired him based on his national origin and age.⁵¹ The district court dismissed the complaint on grounds that the plaintiff had not alleged sufficient facts to establish a discrimination claim.⁵² The court of appeals affirmed, reasoning that a discrimination claim in the Second Circuit must contain more than mere “naked assertions” to state a claim upon which relief can be granted.⁵³ The Supreme Court reversed, holding that the Second Circuit’s heightened pleading requirement did not comport with the liberal notice pleading standard of Rule 8(a)(2).⁵⁴ Although the Supreme Court reaffirmed liberal notice pleading as recently as *Swierkiewicz*, the Court has since changed course.

⁴⁶ *Id.* at 45–46.

⁴⁷ *See* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561 (2007).

⁴⁸ *Conley*, 355 U.S. at 47 (quoting FED. R. CIV. P. 8(a)(2)).

⁴⁹ *Conley*’s liberal notice pleading standard remained in full force until the Supreme Court retired *Conley*’s “no set of facts” language in *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 561.

⁵⁰ *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002).

⁵¹ *Id.* at 508–09.

⁵² *Id.* at 509.

⁵³ *Swierkiewicz v. Sorema*, No. 00-9010, 2001 WL 245077, at *1 (2d Cir. Mar. 12, 2001) (unpublished).

⁵⁴ *Swierkiewicz*, 534 U.S. at 512.

C. *2007 to the Present: A Trio of Cases that Transformed Pleading
(or that “Messed up the Federal Rules”)*

In *Bell Atlantic Corp. v. Twombly* and in *Ashcroft v. Iqbal*, the Supreme Court fundamentally altered its interpretation of what Rule 8(a)(2) requires of pleadings. In *Twombly*, the Court retired *Conley*’s “no set of facts” language and held that Rule 8(a)(2) requires that a complaint contain sufficient factual allegations to state “a claim to relief that is plausible on its face.”⁵⁵ In *Iqbal*, the Court held that this new plausibility requirement applies to “all civil actions.”⁵⁶ Yet, between its decisions in *Twombly* and *Iqbal*, the Court issued a per curiam opinion in *Erickson v. Pardus*,⁵⁷ in which it held that *Conley*’s “notice pleading” language was still good law following *Twombly*.⁵⁸

1. *Bell Atlantic Corp. v. Twombly*

The Court first introduced plausibility as a new requirement for pleadings in *Bell Atlantic Corp. v. Twombly*.⁵⁹ The plaintiffs in *Twombly* were the class of all individuals who had subscribed to telephone service since 1996 from the Baby Bells, which were the local telephone service providers that survived after the break-up of AT&T in 1984.⁶⁰ The plaintiffs alleged that several of the Baby Bells had engaged in parallel conduct in violation of § 1 of the Sherman Act, which proscribes any “contract, combination . . . or conspiracy, in restraint of trade or commerce.”⁶¹ The district court dismissed the plaintiffs’ complaint, holding that it alleged parallel conduct but did not allege the existence of a contract, combination, or conspiracy in

⁵⁵ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

⁵⁶ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

⁵⁷ 551 U.S. 89 (2007).

⁵⁸ *Id.* at 93.

⁵⁹ 550 U.S. at 570.

⁶⁰ *Id.* at 550.

⁶¹ *Id.* at 548 (quoting 15 U.S.C. § 1).

restraint of trade.⁶² The Second Circuit reversed, relying on *Conley* to hold that dismissal was improper because the defendants had not proven that there was “no set of facts” that could entitle the plaintiffs to relief.⁶³

The Supreme Court reversed the Second Circuit, holding that the plaintiffs’ complaint did not state a claim upon which relief could be granted.⁶⁴ In so doing, the Court departed from a half-century of permitting lower courts to apply a “focused and literal reading” of *Conley*’s “no set of facts” language.⁶⁵ The Court stated that it no longer sufficed for a complaint to merely reveal “the theory of the claim.”⁶⁶ Instead, the Court interpreted Rule 8(a)(2) to require that a complaint contain sufficient allegations “to state a claim to relief that is plausible on its face.”⁶⁷ Although the Court noted that a complaint still need not contain specific facts beyond those necessary to state a claim and give fair notice of the claim and the grounds upon which it rests,⁶⁸ the Court held that a complaint must contain sufficient facts to move the claim “across the line from conceivable to plausible.”⁶⁹ Filling a complaint with “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” will not get the claim over the line.⁷⁰

The Supreme Court went on to hold that *Conley*’s “no set of facts” language had earned its retirement.⁷¹ The Court criticized the “focused and literal reading” of *Conley* that permitted conclusory

⁶² *Id.* at 552.

⁶³ *Id.* at 553.

⁶⁴ *Id.* at 570.

⁶⁵ *Cf. id.* at 561–63. The Court in *Twombly* discussed and criticized the Court of Appeals’ “focused and literal reading of *Conley*’s ‘no set of facts’” language, *id.* at 561–62, but recognized that “we have not previously explained the circumstances and rejected the literal interpretation of the [‘no set of facts’] passage,” *id.* at 563 n.8.

⁶⁶ *Id.* at 561.

⁶⁷ *Id.* at 570.

⁶⁸ *Id.* at 555.

⁶⁹ *Id.* at 570.

⁷⁰ *Id.* at 555.

⁷¹ *Id.* at 563.

claims to survive a Rule 12(b)(6) motion to dismiss.⁷² Under that reading, a complaint would survive as long as there was some chance that the plaintiff could later prove some previously undisclosed facts to support his or her claim.⁷³ The Court said that courts taking this approach had misinterpreted the long-accepted rule that “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”⁷⁴ This long-held rule was meant to describe “the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint.”⁷⁵

The Court in *Twombly* held that the plaintiffs’ complaint did not state a plausible claim.⁷⁶ The Court reasoned that the “natural explanation” for the defendants’ alleged parallel conduct was not that the defendants had entered into an illegal anti-competitive agreement.⁷⁷ Rather, the Court reasoned that the more natural explanation was that the local telephone service providers had merely continued their monopolistic behavior in their respective markets after the government had ordered the AT&T Company broken up in 1984.⁷⁸ Because the allegations did nothing to override this more natural explanation, the Court held that the complaint did not “state a claim to relief that is plausible on its face” and should have been dismissed.⁷⁹

2. *Erickson v. Pardus*

Two weeks after the Supreme Court retired *Conley*’s “no set of facts” language and ushered in plausibility as a new requirement for pleadings, the Court issued a per curiam opinion that cast significant

⁷² *Id.* at 561.

⁷³ *Id.*

⁷⁴ *Id.* at 563.

⁷⁵ *Id.*

⁷⁶ *Id.* at 570.

⁷⁷ *Id.* at 564.

⁷⁸ *Id.* at 568.

⁷⁹ *Id.* at 570.

doubt on the transformative nature of *Twombly*.⁸⁰ In *Erickson v. Pardus*, a prisoner filed a pro se suit against several prison officials for terminating his treatment program for hepatitis C in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.⁸¹ The district court dismissed his complaint, holding that it contained only conclusory allegations that the plaintiff had suffered an "independent cognizable harm" as a result of the defendants' termination of his treatment.⁸² The Court of Appeals for the Tenth Circuit affirmed.⁸³

The Supreme Court reversed, holding that the court of appeals erred when it held that the plaintiff's allegations "were too conclusory" to state a claim to relief.⁸⁴ In reaching its holding, the Court made no mention of *Twombly*'s plausibility requirement.⁸⁵ Rather, the Court reiterated that Rule 8(a)(2) imposes a "liberal pleading standard."⁸⁶ The Court cited *Twombly* (which was citing *Conley*) for the rule that, under Rule 8(a)(2), a complaint need only give the defendant fair notice of the claim and the grounds upon which it rests.⁸⁷ Thus, despite overruling *Conley*'s "no set of facts" language two weeks earlier,⁸⁸ the Court held that *Conley*'s "notice pleading" language was still good law.⁸⁹ Following the Court's decision in *Erickson*, many courts interpreted it to mean that *Twombly*'s plausibility requirement was limited to complex anti-trust cases.⁹⁰

⁸⁰ *Erickson v. Pardus*, 551 U.S. 89 (2007).

⁸¹ *Id.* at 89–90.

⁸² *Id.* at 92–93.

⁸³ *Id.* at 92–93.

⁸⁴ *Id.* at 93.

⁸⁵ *See id.* at 89–95.

⁸⁶ *Id.* at 94.

⁸⁷ *Id.* at 93 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957))).

⁸⁸ *Twombly*, 550 U.S. at 563.

⁸⁹ *Erickson*, 551 U.S. at 93.

⁹⁰ *See, e.g., Doss v. Clearwater Title Co.*, 551 F.3d 634, 639 (7th Cir. 2008) ("The Supreme Court's decision in *Erickson v. Pardus* . . . put to rest any concern that *Twombly* signaled an end to notice pleading in the federal courts.").

3. *Ashcroft v. Iqbal*

The next development came in *Ashcroft v. Iqbal*, in which the Supreme Court dispelled everyone's doubts concerning the scope of *Twombly*'s holding and held that the plausibility requirement applies to "all civil actions."⁹¹ In *Iqbal*, the plaintiff, who was a Pakistani and a Muslim, sued former U.S. Attorney General John Ashcroft and FBI Director Robert Mueller for adopting a discriminatory policy of detaining Arab Muslim men in the aftermath of the September 11 attacks.⁹² Following the September 11 attacks, Iqbal had been detained on charges of identification fraud and conspiracy to defraud the United States.⁹³ He had been deemed to be "of high interest" to the investigation into the attacks and had been held in a maximum-security prison.⁹⁴ The plaintiff alleged that Ashcroft's and Mueller's policies led to him being confined on account of his race, religion, or national origin.⁹⁵

The defendants in *Iqbal* filed their Rule 12(b)(6) motion to dismiss before the Supreme Court decided *Twombly*.⁹⁶ As a result, the district court denied the defendant's motion, relying on *Conley*'s "no set of facts" language.⁹⁷ The defendants appealed, and the Supreme Court decided *Twombly* while the appeal was pending.⁹⁸ The Court of Appeals for the Second Circuit discussed *Twombly* but held that its plausibility requirement applied only to complex cases in which additional detail would prove helpful.⁹⁹ The court of appeals did not

⁹¹ 129 S. Ct. 1937, 1953 (2009).

⁹² *Id.* at 1942.

⁹³ *Id.* at 1943.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1944.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (quoting *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007)).

consider *Iqbal* to be such a case, so it affirmed the district court's ruling.¹⁰⁰

The Supreme Court granted certiorari and reversed.¹⁰¹ First, the Court held that the plausibility requirement from *Twombly* applies to "all civil actions."¹⁰² Next, the Court described the plausibility requirement as a two-pronged test for deciding a Rule 12(b)(6) motion to dismiss.¹⁰³ The first prong is to disregard legal conclusions, or "[t]hreadbare recitals of the elements of a cause of action."¹⁰⁴ The Court explained that, although Rule 8(a)(2) was a major departure from the technical requirements of the code-pleading era, "it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."¹⁰⁵ The second prong is to presume all remaining well-pleaded facts to be true and to dismiss any complaint that does not "state a plausible claim for relief."¹⁰⁶ The Court said that the task of determining whether a claim is plausible requires the court "to draw on its judicial experience and common sense."¹⁰⁷

Applying the first prong to the complaint in *Iqbal*, the Court disregarded two allegations because they were legal conclusions. First, the Court disregarded the allegation that Attorney General John Ashcroft and FBI Director Dan Mueller knowingly, willfully, and maliciously agreed to detain *Iqbal* on account of his religion, race, or national origin "as a matter of policy . . . and for no legitimate penological interest."¹⁰⁸ Second, the Court disregarded the allegation that Attorney General Ashcroft was the "principal architect" of the policy and that FBI Director Mueller was "instrumental" in adopting

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1945.

¹⁰² *Id.* at 1953 (quoting FED. R. CIV. P. 1) (stating that Rule 8 "governs the pleading standard 'in all civil actions in the United States district courts'").

¹⁰³ *Id.* at 1949–50.

¹⁰⁴ *Id.* at 1949.

¹⁰⁵ *Id.* at 1950.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1951.

and executing it.¹⁰⁹ The Court considered these allegations to be “formulaic recitation[s] of the elements” of a constitutional discrimination claim.¹¹⁰

Applying the second prong of its test to *Iqbal*'s complaint, the Court assumed to be true the plaintiff's factual allegations that FBI Director Mueller directed the FBI to arrest and detain “thousands of Arab Muslim men” during its investigation into the September 11 attacks and that the policy of detaining these men “in highly restrictive conditions” was approved by Attorney General Ashcroft and FBI director Mueller.¹¹¹ The Court held that, even taking these allegations to be true, the plaintiff failed to state a plausible claim for relief.¹¹² The Court reasoned that the allegations had an “obvious alternative explanation,” namely, that the arrests were lawful and were motivated by a “nondiscriminatory intent” to hold in custody persons who may have had connections to the Al Qaeda members who committed the September 11 attacks.¹¹³ Just as it had in *Twombly*, the Court considered the plaintiff's claim to be implausible in light of this more obvious explanation.¹¹⁴

II. SEVENTH CIRCUIT DECISIONS BEFORE AND AFTER *TWOMBLY* AND *IQBAL*

A. *Seventh Circuit Cases Prior to Twombly*

Prior to *Twombly*, the Court of Appeals for the Seventh Circuit was a strict devotee of *Conley*'s liberal notice pleading standard.¹¹⁵

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citations omitted).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007)).

¹¹⁴ *Id.*

¹¹⁵ *See, e.g.,* *Riley v. Vilsack*, 665 F. Supp. 2d 994, 1000–01 (W.D. Wis. 2009) (noting that, prior to *Twombly*, “the Court of Appeals for the Seventh Circuit interpreted Rule 8 to require plaintiffs to do no more than provide enough notice to allow the defendant to file an answer. . . . Plaintiffs did not need to plead facts for

The case of *Vincent v. City Colleges of Chicago* exemplifies the Seventh Circuit's pre-*Twombly* approach.¹¹⁶ In *Vincent*, the author of a book on buying foreclosures sued the City Colleges of Chicago and the publisher of the book for alleged violations of the federal copyright and trademark laws.¹¹⁷ The City Colleges of Chicago had offered a course under the same name as the book's title, and the publisher had continued publishing the book without the author's permission and without paying her royalties.¹¹⁸ The district court dismissed most of the complaint under Rule 12(b)(6), finding defective, among other things, the complaint's failure to include the plaintiff's registered U.S. Patent and Trademark numbers.¹¹⁹

The Court of Appeals for the Seventh Circuit reversed.¹²⁰ Writing for the court, Judge Easterbrook provided a terse and strongly worded summary of the Seventh Circuit's approach to notice pleading under Federal Rule of Civil Procedure 8(a)(2):

[A] judicial order dismissing a complaint because the plaintiff did not plead facts has a short half-life. "Any decision declaring 'this complaint is deficient because it does not allege X' is a candidate for summary reversal Civil Rule 8 calls for a short and plain statement; the plaintiff pleads claims, not facts or legal theories. . . . Factual detail comes later—perhaps in a motion for a more definite statement, . . . perhaps in response to a motion for summary judgment. Until then, the possibility that facts to be adduced later, and consistent with the complaint, could prove the claim, is enough for the litigation to move forward."¹²¹

each element of a claim. . . . A complaint could 'not be dismissed on the ground that it is conclusory or fails to allege facts.')

¹¹⁶ 485 F.3d 919 (7th Cir. 2007).

¹¹⁷ *Id.* at 921.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 922–24.

¹²⁰ *Id.* at 926.

¹²¹ *Id.* at 923 (citations omitted).

Judge Easterbrook went on to reason that, although a plaintiff must ultimately prove some fact at trial, the plaintiff does not have to allege that fact in his or her complaint.¹²² After noting that Rule 8(a)(2) was adopted in 1938 and that *Conley v. Gibson* emphasized that the Rule does not impose a strong fact-pleading requirement,¹²³ Judge Easterbrook reprimanded the district judge for granting the defendant's motion to dismiss: "It is disappointing to see a federal district judge dismiss a complaint for failure to adhere to a fact-pleading model that federal practice abrogated almost 70 years ago."¹²⁴

There were numerous other cases prior to *Twombly* in which the Court of Appeals for the Seventh Circuit reversed the district court's dismissal of a complaint for failure to state a claim under Rule 12(b)(6).¹²⁵ Just two weeks after Judge Easterbrook handed down his decision in *Vincent*, however, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*.

¹²² *Id.* at 923–24.

¹²³ *Id.* at 924.

¹²⁴ *Id.*

¹²⁵ *See, e.g., id.* at n.† (citing twelve cases in the year prior to *Vincent* in which the Seventh Circuit Court of Appeals reversed decisions that had dismissed complaints for failure to state a claim: *Christensen v. Boone County*, 483 F.3d 454, 465–66 (7th Cir. 2007); *Miller v. Fisher*, 2007 WL 755187 (7th Cir. Mar. 12, 2007); *Edwards v. Snyder*, 478 F.3d 827 (7th Cir. 2007); *Thomas v. Kalu*, 2007 WL 648312 (7th Cir. 2007); *Argonaut Ins. Co. v. Broadspire Servs., Inc.*, 209 F. App'x 573 (7th Cir. 2006); *Tompkins v. The Women's Cmty., Inc.*, 203 F. App'x 743 (7th Cir. 2006); *McCann v. Neilsen*, 466 F.3d 619 (7th Cir. 2006); *Hefferman v. Bass*, 467 F.3d 596 (7th Cir. 2006); *Pratt v. Tarr*, 464 F.3d 730 (7th Cir. 2006); *Floyd v. Aden*, 184 F. App'x. 575 (7th Cir. 2006); *Simpson v. Nickel*, 450 F.3d 303 (7th Cir. 2006); *Marshall v. Knight*, 445 F.3d 965 (7th Cir. 2006)).

B. *Seventh Circuit Cases Following Twombly but Preceding Iqbal*

The Court of Appeals for the Seventh Circuit took a narrow view of *Twombly* prior to *Iqbal*.¹²⁶ In many instances, the court relied on *Erickson v. Pardus* to support its narrow reading.¹²⁷ The court's interpretation of *Twombly* in *Airborne Beepers & Video v. AT&T Mobility* provides a good example of this.¹²⁸ In *Airborne*, the plaintiff sued a cell phone service provider for breach of an "authorized dealer agreement" after the provider stopped paying commissions on activations of new cell phone plans.¹²⁹ After the district court dismissed the plaintiff's complaint four times over the course of three years, the court denied the plaintiff's motion for leave to file a fourth amended complaint.¹³⁰ On appeal, the Court of Appeals for the Seventh Circuit affirmed.¹³¹

Writing for the court in *Airborne*, Judge Diane Wood addressed the standard for pleadings under Rule 8(a)(2) following *Twombly*.¹³² Judge Wood noted that the Supreme Court in *Twombly* held that a complaint must not contain merely "labels and conclusions" or "a formulaic recitation of the elements of a cause of action."¹³³ But Judge Wood went on to say that the Court's decision in *Erickson*, decided two weeks after *Twombly*, confirmed that liberal notice pleading had

¹²⁶ Riley v. Vilsack, 665 F. Supp. 2d 994, 1000–01 (W.D. Wis. 2009) ("The court of appeals acknowledged that *Twombly* 'retooled federal pleading standards,' . . . but in most cases the court declined to revisit previous holdings in light of the new case, adhering to the view that Rule 8 required nothing more than 'fair notice.'").

¹²⁷ E.g., Doss v. Clearwater Title Co., 551 F.3d 634 (7th Cir. 2008) ("The Supreme Court's decision in *Erickson v. Pardus* . . . put to rest any concern that *Twombly* signaled an end to notice pleading in the federal courts.").

¹²⁸ 499 F.3d 663, 667 (7th Cir. 2007).

¹²⁹ *Id.* at 664.

¹³⁰ *Id.* at 664–66.

¹³¹ *Id.* at 668.

¹³² *Id.* at 667.

¹³³ *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

not been replaced by a fact-pleading regime.¹³⁴ Thus, in Judge Wood’s view, lack of plausibility under *Twombly* merely equated to a complaint that was “so sketchy” as to provide insufficient notice of the nature of the claim and the grounds upon which it rests.¹³⁵ Because the appellant did not raise this issue on appeal, however, Judge Wood affirmed the district court on other grounds.¹³⁶

*EEOC v. Concentra Health Services, Inc.*¹³⁷ is another interesting post-*Twombly* case; however, in *Concentra*, the complaint failed to meet the liberal notice pleading standard despite the Seventh Circuit’s narrow reading of *Twombly*.¹³⁸ In *Concentra*, an employee had filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that Concentra fired him in retaliation for reporting two co-workers’ sexual affair.¹³⁹ The EEOC subsequently filed suit against Concentra for retaliatory discharge in violation of Title VII of the Civil Rights Act.¹⁴⁰ The district court dismissed the original complaint because it held that the employee’s report of the affair was not protected under Title VII.¹⁴¹ The EEOC subsequently filed an amended complaint, which was “markedly less detailed” and that did not include the specific facts contained in the employee’s report to the EEOC.¹⁴² The district court dismissed the amended complaint for failure to state a claim upon which relief could be granted, and the

¹³⁴ *Id.*

¹³⁵ Judge Wood concluded as follows: “Taking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.” *Id.*

¹³⁶ *Id.*

¹³⁷ 496 F.3d 773 (7th Cir. 2007).

¹³⁸ *Id.* at 781.

¹³⁹ *Id.* at 775.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

EEOC appealed.¹⁴³ The Court of Appeals for the Seventh Circuit affirmed.¹⁴⁴

Judge Cudahy wrote the majority opinion and held that the complaint failed to provide the notice required under Rule 8(a)(2).¹⁴⁵ Judge Cudahy read *Twombly* “to impose two easy-to-clear hurdles.”¹⁴⁶ The first hurdle is to meet *Conley*’s requirement of giving the defendant fair notice of the claim and the grounds upon which it rests.¹⁴⁷ The second hurdle is to plead factual allegations that bring the plaintiff’s claim beyond the “speculative” level to the level of “plausible.”¹⁴⁸

Applying this standard to the plaintiff’s complaint in *Concentra*, Judge Cudahy addressed the second hurdle first.¹⁴⁹ Surprisingly, Judge Cudahy suggested that the EEOC had not failed to state a plausible claim even with its barebones complaint.¹⁵⁰ Instead, Judge Cudahy reasoned that plausibility was a low threshold.¹⁵¹ Referring to the facts of *Erickson v. Pardus*, Judge Cudahy reasoned that the plaintiff’s retaliation claim seemed “no less plausible than that a prison doctor might improperly withhold desperately needed medication.”¹⁵² Thus, just like Judge Wood in *Airborne*,¹⁵³ Judge Cudahy relied on *Erickson v. Pardus* to support a narrow reading of *Twombly*.¹⁵⁴

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 781.

¹⁴⁶ *Id.* at 776.

¹⁴⁷ *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

¹⁴⁸ *Id.* (quoting *Twombly*, 550 U.S. at 555).

¹⁴⁹ *Id.* at 777.

¹⁵⁰ *See id.* at 777–79. This was in part because “*Concentra* does not contend that the bare allegations of the amended complaints’ seventh paragraph fail to plausibly suggest a right to relief.” *Id.* at 777.

¹⁵¹ *Id.* at 777 n.1.

¹⁵² *Id.*; *see also* *Erickson v. Pardus*, 551 U.S. 89, 89–91 (2007).

¹⁵³ *Airborne Beepers & Video v. AT&T Mobility*, 499 F.3d 663, 667 (7th Cir. 2007).

¹⁵⁴ *Concentra*, 496 F.3d at 777 n.1.

Returning to the first hurdle, Judge Cudahy then wrote that a complaint must contain “very minimal” factual detail to satisfy the notice requirements of Rule 8(a)(2).¹⁵⁵ Judge Cudahy held that the EEOC’s complaint was too minimal to provide fair notice, however.¹⁵⁶ He pointed out that, after the EEOC’s original complaint had been dismissed for failure to state a claim, the EEOC had merely deleted information from its complaint to “disguise the nature of the claim before the court.”¹⁵⁷ Judge Cudahy wrote that this practice of “obfuscation” was inconsistent with the principles of notice pleading, and, therefore, the complaint was properly dismissed.¹⁵⁸

While the court’s holding in *Concentra* that the EEOC’s complaint did not provide sufficient notice because it was too vague and obfuscated seems correct, *Concentra* says a lot about the Seventh Circuit’s view of plausibility following *Twombly*. Judge Cudahy suggested that the EEOC’s barebones complaint¹⁵⁹ stated a plausible claim¹⁶⁰ even though the complaint was too vague to provide fair notice.¹⁶¹ This suggests that, even though Judge Cudahy saw the two “hurdles” facing pleadings to be “easy to clear,” he may have considered providing fair notice to be a higher hurdle than stating a

¹⁵⁵ *Id.* at 779 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (stating that the “classic verbal formulation” of Rule 8(a)(2)’s requirements is that the complaint “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests”).

¹⁵⁶ *Id.* at 781.

¹⁵⁷ *Id.* at 780.

¹⁵⁸ *Id.* at 780–81.

¹⁵⁹ *Id.* at 780 (“The claim itself was set forth in less than a page and the critical details were contained in a single eight-line paragraph, the very paragraph targeted for excision in the amended complaint.”).

¹⁶⁰ *Id.* at 777 n.1.

¹⁶¹ *Id.* at 781.

plausible claim.¹⁶² This is contrary to the widely held view that the Supreme Court raised the bar when it decided *Twombly*.¹⁶³

In one last post-*Twombly*, pre-*Iqbal* case, Judge Posner adhered to a fairly narrow reading of *Twombly* but held that it applied it to a complex case brought under the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁶⁴ The court's holding in *Limestone Development Corp. v. Village of Lemont, Illinois* comports with the view—which was widely held prior to *Iqbal*—that *Twombly*'s holding applied only to complex cases. In *Limestone*, the plaintiff sued a number of defendants, including the village in which his property was located, the mayor of the village, and the local park district, for acting in concert to prevent the plaintiff from developing his property, which resulted in the sale of the property at a loss.¹⁶⁵ The plaintiff alleged that the defendants' coordinated conduct violated RICO.¹⁶⁶ The district court dismissed the complaint for failure to state a claim, and the court of appeals affirmed.¹⁶⁷

Judge Posner reasoned that, although *Twombly* “must not be over-read,” the principle underlying its holding is that defendants “should not be forced to undergo costly discovery” unless a complaint shows “that the plaintiff has a substantial case.”¹⁶⁸ Judge Posner held that this principle is applicable to a RICO case, which is complex like the antitrust case that was the subject of *Twombly*.¹⁶⁹ Judge Posner held that dismissal of the complaint was proper because the plaintiff's allegations were “threadbare” and contained no indication of “a

¹⁶² See *id.* at 776–77, 777 n.1, 780–81.

¹⁶³ See *e.g.*, *Swanson v. Citibank*, 614 F.3d 400, 404 (7th Cir. 2010) (“[t]he question with which courts are still struggling is how much higher the Supreme Court meant to set the bar”).

¹⁶⁴ *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 799 (7th Cir. 2008).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 802–05.

¹⁶⁸ *Id.* at 802–03.

¹⁶⁹ *Id.* at 803.

structure of any kind,” which is necessary to state a claim under RICO.¹⁷⁰

C. *Seventh Circuit Cases Following Iqbal*

After the Supreme Court held in *Ashcroft v. Iqbal* that *Twombly*'s plausibility requirement applies “to all civil actions,”¹⁷¹ one would imagine that courts would stop reading *Twombly* narrowly. However, in *Smith v. Duffey*, one of the first Seventh Circuit cases decided following *Iqbal*, Judge Posner continued to take a narrow view of *Twombly* and declined to apply either *Twombly* or *Iqbal* to the facts of the case.¹⁷² In *Smith*, the plaintiff sued his former employer for fraud in connection with cancellation of stock options in the employer's Chapter 11 bankruptcy reorganization.¹⁷³ Prior to his employer's bankruptcy, the plaintiff had signed a termination agreement and received a \$1.4 million severance.¹⁷⁴ After he discovered that his stock options were extinguished in the reorganization, the employee sued.¹⁷⁵ He alleged that, had the defendants told him that his stock options were to be extinguished in the bankruptcy, he would have demanded a higher severance.¹⁷⁶ The district court dismissed the complaint for failure to state a claim, and the court of appeals affirmed.¹⁷⁷

Writing for the majority, Judge Posner held that the plaintiff had not stated a claim for fraud where he was in a weak bargaining position and where it would have been highly unlikely that he could have demanded a higher severance in exchange for his stock

¹⁷⁰ *Id.* at 803–05.

¹⁷¹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

¹⁷² *See Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (“So maybe neither *Bell Atlantic* nor *Iqbal* governs here. It doesn't matter.”).

¹⁷³ *Id.* at 336–37.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 337.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 336, 339.

options.¹⁷⁸ Judge Posner reasoned that the stock options were valueless at the time the plaintiff received his severance and that any reasonable businessperson would have known this.¹⁷⁹ Judge Posner did not rely on *Twombly* or *Iqbal*, but instead reasoned that it was apparent from the plaintiff's complaint and arguments alone "that his case has no merit."¹⁸⁰

Even if the inadequacy of the plaintiff's complaint was apparent, *Smith* is significant because of Judge Posner's proposed narrow reading of *Twombly* and *Iqbal*.¹⁸¹ In declining to apply either *Twombly* or *Iqbal* to the facts of *Smith*, Judge Posner suggested that *Twombly* was limited to complex litigation cases¹⁸² and that *Iqbal* was limited to cases in which the defendant had pleaded a defense of official immunity.¹⁸³ This reading is consistent with the court's trend pre-*Iqbal* of reading *Twombly* narrowly.

¹⁷⁸ *Id.* at 338–39.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 339–40.

¹⁸¹ *See, e.g.,* Boroff v. Alza Corp., 685 F. Supp. 2d 704, 707 (N.D. Ohio 2010) (citing *Smith*, 576 F.3d at 339–40) ("Questions as to the scope of the *Iqbal* and *Twombly* pleading standards have generated much discussion among lawyers and judges of late. . . . Judge Posner's proposed (narrow) reading of *Iqbal* and *Twombly* holds obvious appeal to lawyers and judges familiar with the venerable *Conley* pleading standard. But it cannot be reconciled with the clear statement in *Iqbal* that the *Twombly* standard applies to 'all civil actions'").

¹⁸² *Smith*, 576 F.3d at 339–340 ("In our initial thinking about the case, however, we were reluctant to endorse the district court's citation of the Supreme Court's decision in [*Twombly*], fast becoming the citation du jour in Rule 12(b)(6) cases, as authority for the dismissal of this suit. The Court held that in complex litigation . . . the defendant is not to be put to the cost of pretrial discovery . . . unless the complaint says enough about the case to permit an inference that it may have real merit. The present case, however, is not complex.").

¹⁸³ *Id.* at 340 (noting that *Iqbal* had extended the holding of *Twombly* to all civil cases, but that, nonetheless, "*Iqbal* is special in its own way, because the defendants had pleaded a defense of official immunity and the Court said that the promise of minimally intrusive discovery 'provides especially cold comfort in *this* pleading context') (emphasis in original).

By the time the Court of Appeals for the Seventh Circuit decided *Cooney v. Rossiter*,¹⁸⁴ Judge Posner had become slightly more willing to rely upon *Twombly* and *Iqbal*.¹⁸⁵ In *Cooney*, after the plaintiff lost custody of her two children in a state court child custody proceeding, she brought a § 1983 action pro se against the state court judge who presided over the proceeding, against the court-appointed children’s representative, and against the court-appointed children’s psychiatrist.¹⁸⁶ During the child custody proceeding, the state court judge had found that the plaintiff suffered from Munchausen syndrome by proxy, which is a disorder in which “an individual produces or feigns physical or emotional symptoms in another person under his or her care.”¹⁸⁷ Based upon this finding, the judge had granted custody to the children’s father.¹⁸⁸ In her subsequent federal case, the mother alleged that the defendants had conspired together to deprive her of numerous constitutional rights.¹⁸⁹ The district court dismissed the complaint for failure to state a claim, and the plaintiff appealed.¹⁹⁰

Judge Posner wrote for the court and affirmed the district court’s dismissal of the complaint.¹⁹¹ In reaching his holding, Judge Posner took a slightly less narrow reading of *Twombly* and *Iqbal* than he had in *Smith v. Duffey*.¹⁹² However, even though Judge Posner acknowledged that *Iqbal* extended *Twombly*’s plausibility requirement

¹⁸⁴ 583 F.3d 967 (7th Cir. 2009).

¹⁸⁵ See *id.* at 971 (applying *Twombly* and *Iqbal* to a complaint alleging civil conspiracy).

¹⁸⁶ *Id.* at 969.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 970.

¹⁹⁰ *Id.* at 969.

¹⁹¹ *Id.* at 972.

¹⁹² Compare *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (limiting *Twombly* to complex cases and *Iqbal* to cases involving the defense of official immunity), with *Cooney*, 583 F.3d at 971 (holding that the decision whether to apply *Twombly* and *Iqbal* “is relative to the circumstances” and is not strictly limited to those two situations).

“to litigation in general,”¹⁹³ he did not take this to mean that the same level of plausibility applies to all civil cases.¹⁹⁴ Instead, Judge Posner reasoned that “the height of the pleading requirement is relative to the circumstances.”¹⁹⁵

Under the circumstances of *Cooney*, Judge Posner felt that a high standard of plausibility was warranted.¹⁹⁶ Judge Posner saw *Cooney* as a case in which a “paranoid pro se” alleged that the parties involved in a contentious child custody battle were guilty of a “vast [and] encompassing conspiracy.”¹⁹⁷ Judge Posner held that, under these circumstances, the complaint did not meet the requisite level of plausibility and, therefore, was properly dismissed.¹⁹⁸

Finally, in *Brooks v. Ross*, the Court of Appeals for the Seventh Circuit continued to take a fairly narrow reading of *Twombly* and *Iqbal* but affirmed the district court’s dismissal of a complaint.¹⁹⁹ In *Brooks*, the plaintiff brought a § 1983 action against members of the Illinois Prison Review Board (PRB) and other state officials for malicious prosecution, civil conspiracy, and other claims.²⁰⁰ The plaintiff alleged that the defendants had conspired to indict him on charges of official misconduct and wire fraud in connection with a 2002 PRB hearing, of which the plaintiff was later acquitted.²⁰¹ The district court dismissed the complaint for failure to state a claim, and the court of appeals affirmed.²⁰²

The opinion that Judge Diane Wood wrote for the court in *Brooks* was reminiscent of her pre-*Iqbal* opinions. Judge Wood held that the plaintiff’s allegations of conspiracy and malicious prosecution did not

¹⁹³ *Cooney*, 583 F.3d at 971.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 972.

¹⁹⁹ 578 F.3d 574 (7th Cir. 2009).

²⁰⁰ *Id.* at 577–78.

²⁰¹ *Id.*

²⁰² *Id.* at 578, 582.

state a claim upon which relief could be granted.²⁰³ In reaching this holding, Judge Wood reasoned that the allegations were too conclusory and formulaic to give the defendants fair notice of the plaintiff's claims and the grounds upon which they rested.²⁰⁴ Judge Wood's emphasis on the notice pleading aspect of *Twombly* and *Iqbal* was similar to her approach in prior cases in which she interpreted *Twombly*'s plausibility requirement to mean that some allegations may be "so sketchy or implausible" that they fail to give sufficient notice.²⁰⁵

III. THE DEBATE HEATS UP: *SWANSON V. CITIBANK*

Until recently, the differing interpretations of *Twombly* and *Iqbal* espoused by the judges on the Court of Appeals for the Seventh Circuit had not directly clashed. But that changed in *Swanson v. Citibank*, where the plaintiff sued Citibank, a real estate appraisal company, and the appraisal company's employee for discrimination in violation of the Fair Housing Act²⁰⁶ after Citibank denied her application for a home-equity loan.²⁰⁷ The pro se plaintiff alleged that the defendants had discriminated against her on the basis of race by under-appraising her home for the purpose of denying her loan application.²⁰⁸ The district court granted the defendants' Rule 12(b)(6)

²⁰³ *Id.* at 581–82.

²⁰⁴ *Id.*

²⁰⁵ See *Airborne Beepers & Video v. AT&T Mobility*, 499 F.3d 663, 667 (7th Cir. 2007) ("Taking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8."); see also *Doss v. Clearwater Title Co.*, 551 F.3d 634, 639 (7th Cir. 2008) ("The Supreme Court's decision in *Erickson v. Pardus* . . . put to rest any concern that *Twombly* signaled an end to notice pleading in the federal courts.").

²⁰⁶ 42 U.S.C. § 3605 (2006).

²⁰⁷ *Swanson v. Citibank*, 614 F.3d 400, 402 (7th Cir. 2010).

²⁰⁸ *Id.*

motion to dismiss, and the court of appeals reversed.²⁰⁹ The court of appeals held that, under *Twombly* and *Iqbal*, the plaintiff's complaint sufficiently stated a plausible claim upon which relief could be granted.²¹⁰

Judge Diane Wood wrote for the majority in *Swanson* and read *Twombly* and *Iqbal* very liberally.²¹¹ Although Judge Wood's reading of *Twombly* and *Iqbal* did not change significantly from prior cases, she stated her position more strongly than she had before. First, Judge Wood began by acknowledging that courts are still struggling to determine "how much higher the Supreme Court meant to set the bar" when it decided *Twombly* and *Iqbal*.²¹² She then repeated her oft-stated position that, following the trio of *Twombly*, *Erickson*, and *Iqbal*, notice pleading is still the applicable standard in federal courts.²¹³ Next, she reasoned that notice pleading "is the light in which" *Twombly* and *Iqbal*'s plausibility requirement must be read.²¹⁴ Judge Wood held that, reading *Twombly* and *Iqbal* in this light, a complaint must only include sufficient factual detail "to present a story that holds together."²¹⁵ Judge Wood explained that, in assessing this, judges should ask themselves "could these things have happened, not *did* they happen."²¹⁶

Judge Wood further supported her liberal reading of *Twombly* and *Iqbal* by reasoning that "[t]he Supreme Court's explicit decision to reaffirm the validity of *Swierkiewicz v. Sorema*, which was cited with approval in *Twombly*, indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet [the

²⁰⁹ *Id.* at 402, 407.

²¹⁰ *Id.* at 402–07. The court affirmed the district court's dismissal of the plaintiff's common-law fraud claims because her complaint failed to plead facts with the particularity required under Federal Rule of Civil Procedure 9. *Id.* at 406.

²¹¹ *See id.* at 402–07.

²¹² *Id.* at 403 (citations omitted).

²¹³ *Id.* at 404.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

requirements of notice pleading] . . . than it was before the Court’s recent decisions.”²¹⁷ This may not be true in complex cases, Judge Wood acknowledged, because complex cases “require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff’s mind at least, the dots should be connected.”²¹⁸

Applying her liberal reading of *Twombly* and *Iqbal* to the facts of *Swanson*, Judge Wood held that the plaintiff’s complaint was sufficiently detailed.²¹⁹ Judge Wood reasoned that the plaintiff’s complaint, which identified the type of discrimination, who was responsible for it, and when it occurred, included all it needed to give the defendants fair notice of the claim and, thus, to survive a motion to dismiss.²²⁰

In dissent, Judge Richard Posner criticized the majority’s reading of *Twombly* and *Iqbal* and, in a departure from prior cases, advocated for a broader application of *Twombly* and *Iqbal*.²²¹ Instead of following the narrow reading of *Iqbal* that he formulated in *Smith v. Duffy*,²²² and promulgated in *Cooney v. Rossiter*,²²³ Judge Posner seemed to agree this time that *Iqbal* was not limited to cases involving the defense of qualified immunity, reasoning that the language of the *Iqbal* opinion suggests that *Iqbal* was “a strong case for application of the *Twombly* standard, rather than . . . the only type of discrimination case to which the standard applies.”²²⁴

Next, Judge Posner criticized the majority’s liberal reading of *Twombly* and *Iqbal*. Judge Posner wrote that the majority’s reading suggests “that discrimination cases are outside the scope of *Iqbal*,

²¹⁷ *Id.* (citations omitted)

²¹⁸ *Id.* at 405.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 407–12 (Posner, J., dissenting).

²²² 576 F.3d 336, 340 (7th Cir. 2009).

²²³ 583 F.3d 967, 971 (7th Cir. 2009).

²²⁴ *Swanson*, 614 F.3d at 407 (Posner, J., dissenting).

itself a discrimination case.”²²⁵ Judge Posner pointed out that the majority’s opinion distinguished between simple discrimination cases, of which the majority required minimal allegations to survive a motion to dismiss, and complex cases, of which the majority required more detailed allegations.²²⁶ Judge Posner agreed that requiring more detail for the complex cases made sense, because *Twombly* itself was a complex case.²²⁷ But Judge Posner suggested that it was illogical to lower the bar for even straightforward discrimination claims, because *Iqbal* was a discrimination case, and it “was not especially complex.”²²⁸

Judge Posner went on to offer his own interpretation of *Twombly* and *Iqbal*’s plausibility requirement. He read *Twombly* and *Iqbal* to mean that a complaint must contain sufficient allegations to defeat any “obvious alternative explanation” for the plaintiff’s injury.²²⁹ In this case, Judge Posner saw error to be an obvious alternative explanation for the defendant’s denial of the plaintiff’s loan application.²³⁰ He reasoned that “errors in appraising houses are common because ‘real estate appraisal is not an exact science.’”²³¹ Therefore, Judge Posner concluded that the allegation of discrimination was not plausible and that the district court’s dismissal should have been affirmed.²³²

Based on Judge Posner’s dissent in *Swanson*, it is clear that his interpretation of *Twombly* and *Iqbal*’s plausibility requirement has continued to evolve. In *Smith v. Duffy*, Judge Posner seemed unwilling to apply *Iqbal* outside of the qualified immunity context at all.²³³ In *Cooney v. Rossiter*, Judge Posner held that a heightened plausibility

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 407–08.

²²⁸ *Id.* at 408.

²²⁹ *Id.* (quoting *Iqbal*, 129 S. Ct. at 1951–52).

²³⁰ *Id.* at 408–09.

²³¹ *Id.* at 408 (quoting *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 (7th Cir. 1998)).

²³² *Id.* at 407–12.

²³³ 576 F.3d 336, 340 (7th Cir. 2009).

standard made sense in the case of a “paranoid pro se” whose lawsuit threatened multiple defendants with costly discovery.²³⁴ But in *Swanson*, Judge Posner’s dissent suggested that a heightened plausibility requirement should be imposed in even the simplest of discrimination cases.²³⁵ No longer is Judge Posner advocating for a narrow reading of *Twombly* and *Iqbal*.²³⁶ Instead, the reading that Judge Posner advocates in *Swanson* is reminiscent of the “robust gatekeeping regime” that Professors Clermont and Yeazell warn us about²³⁷—if the plaintiff’s complaint does not contain sufficient factual allegations to override any other natural, legal explanation for the plaintiff’s injury, the complaint will be dismissed and the gates closed.²³⁸

IV. SETTLING THE SEVENTH CIRCUIT’S DEBATE OVER THE PLAUSIBILITY REQUIREMENT

In 1928, Judge Charles E. Clark said that “[i]n pleading, an eternal dilemma presents itself: How shall we make procedural rules definite enough to work and yet flexible enough to do justice?”²³⁹ Judge Clark’s observation has stood the test of time, because the United States Supreme Court is clearly still grappling with that dilemma. In 2007, the Supreme Court thought that the standard for pleading had become too flexible, because in *Bell Atlantic Corp. v. Twombly*, it raised the bar by jettisoning *Conley v. Gibson*’s “no set of facts” language²⁴⁰ and replacing it with a heightened plausibility requirement.²⁴¹ But, as Seventh Circuit Judge Diane Wood recently pointed out in *Swanson v. Citibank*, “courts are still struggling [with]

²³⁴ 583 F.3d 967, 971 (7th Cir. 2009).

²³⁵ *Swanson*, 614 F.3d at 407–12 (Posner, J., dissenting).

²³⁶ *Id.* at 407.

²³⁷ See Clermont & Yeazell, *supra* note 22, at 823

²³⁸ *Swanson*, 614 F.3d at 408 (Posner, J., dissenting).

²³⁹ CLARK, *supra* note 35, at vii.

²⁴⁰ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

²⁴¹ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563–70 (2007).

how much higher the Supreme Court meant to set the bar.”²⁴² According to Judge Wood’s majority opinion in *Swanson*, the Court did not raise the bar very much.²⁴³ According to Judge Richard Posner’s dissent in the same case, however, the Court raised the bar significantly.²⁴⁴ Which view is a better one—the one that gives pleading rules more bite, or the one that keeps them flexible? Put another way, should federal courts keep the gates relatively wide open, or should they lock them up?

A. The Two Competing Interpretations: Judge Wood’s “Could this Have Happened?” View Versus Judge Posner’s “Obvious Alternative Explanation” View

The disagreement between the majority and dissenting opinions in *Swanson v. Citibank* can be characterized as a debate over which one of two views should prevail. One view, adopted by Judge Wood in *Swanson*, interprets *Twombly* and *Iqbal*’s plausibility requirement to mean that the allegations contained in a complaint must set forth a scenario that *could* have happened (*i.e.*, the claim to relief is plausible because the scenario alleged in the complaint could have occurred).²⁴⁵ The other view, adopted by Judge Posner in his dissent in *Swanson*, interprets *Twombly* and *Iqbal*’s plausibility requirement to mean that a complaint’s allegations must contain sufficient factual detail to override any “obvious alternative explanation” for the defendant’s conduct (*i.e.*, the claim to relief is plausible because there is not a more

²⁴² *Swanson*, 614 F.3d at 403.

²⁴³ *See id.* at 404 (“As we understand it, the Court is saying that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together.”).

²⁴⁴ *See id.* at 408 (Posner, J., dissenting) (“The Supreme Court would consider error the plausible inference in this case, rather than discrimination, for it said in *Iqbal* that ‘as between that ‘obvious alternative explanation’ for the [injury of which the plaintiff is complaining] and the purposeful, invidious discrimination [the plaintiff] asks us to infer, discrimination is not a plausible conclusion.’”).

²⁴⁵ *Id.* at 404.

natural, lawful explanation for the plaintiff’s injury).²⁴⁶ Thus, the central debate concerns whether Judge Wood’s “could this have happened?” view or Judge Posner’s “obvious alternative explanation” view should prevail.

Providing a framework that helps to harmonize these competing views, Professor Allan Ides has broken down the principles underlying Federal Rule of Civil Procedure 8(a)(2) into three separate requirements.²⁴⁷ The first principle, “transactional sufficiency,” is the idea that a complaint must include sufficient factual detail to move the claim beyond an “abstract assertion of a right” to a claim that is “premised on an actual, identifiable event.”²⁴⁸ The second principle, “procedural sufficiency,” is the idea that a complaint should include sufficient factual detail to give the opposing party fair notice of the claim and the grounds upon which it rests (this is *Conley v. Gibson*’s notice requirement).²⁴⁹ The third and final principle, “substantive sufficiency,” is the idea that the complaint’s factual allegations should be sufficient to give rise to a recognized legal claim.²⁵⁰

Using Ides’s framework, Judge Diane Wood’s “could this have happened?” view and Judge Richard Posner’s “obvious alternative explanation” view differ significantly in the level of emphasis that they place on “transactional sufficiency,” “procedural sufficiency,” and “substantive sufficiency.” Judge Wood’s view emphasizes “transactional sufficiency” and “procedural sufficiency.” When Judge Wood writes that *Twombly* and *Iqbal*’s plausibility requirement means that a complaint must provide enough factual detail “to present a story that holds together,”²⁵¹ she asks for a minimal indication that the complaint’s claim to relief is “premised on an actual, identifiable

²⁴⁶ *Id.* at 408 (Posner, J., dissenting).

²⁴⁷ Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 607 (2007).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Swanson*, 614 F.3d at 404.

event.”²⁵² Under this approach, if it appears from the complaint’s factual allegations that the underlying event *could* have happened, then the complaint is sufficient.²⁵³

But Judge Wood’s view of the requisite “transactional sufficiency” must be interpreted in light of *Twombly* and *Iqbal*’s holdings. Although the Court in *Iqbal* said that the “plausibility standard is not akin to a ‘probability requirement,’”²⁵⁴ and although the Court in *Twombly* said that “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable”²⁵⁵—both of which support Judge Wood’s liberal reading of the cases—the Court in *Iqbal* went on to say that plausibility “asks for more than a sheer possibility that a defendant has acted unlawfully.”²⁵⁶ So, in order to read Judge Wood’s majority opinion in harmony with *Twombly* and *Iqbal*, one must read it as requiring more than sheer possibility. One must read her inquiry—“*could* this have happened?”—as referring to the line that divides sheer possibility from plausibility. Judge Wood premised her holding in *Swanson* by stating that “[i]t is by now well established that a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, *might* suggest that something has happened to her that *might* be redressed by the law.”²⁵⁷ Thus, we can interpret Judge Wood as equating the term “*might*” with sheer plausibility, which is insufficient to state a plausible claim, and equating the term “*could*” with plausibility, which is sufficient.

Additionally, as mentioned several times already, Judge Wood’s reading of *Twombly* and *Iqbal* places much emphasis on the principle of “procedural sufficiency.” In nearly every one of her post-*Twombly* cases, Judge Wood has focused her interpretation of “plausibility” on whether the plaintiff’s complaint provides sufficient factual detail to

²⁵² *Ides*, *supra* note 247, at 607.

²⁵³ *Swanson*, 614 F.3d at 404.

²⁵⁴ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

²⁵⁵ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

²⁵⁶ *Id.*

²⁵⁷ *Swanson*, 614 F.3d at 403.

give the defendant fair notice of the claim and the grounds upon which it rests.²⁵⁸

Judge Posner’s “obvious alternative explanation” view, on the other hand, focuses more on “substantive sufficiency” than “transactional sufficiency” or “procedural sufficiency.” For example, Judge Posner described his view of the line dividing sheer possibility and plausibility this way:

In statistics the range of probabilities is from 0 to 1, and therefore encompasses “sheer possibility” along with “plausibility.” It seems . . . what the Court was driving at was that even if the district judge doesn’t think a plaintiff’s case is more likely than not to be a winner (that is, doesn’t think $p > .5$), as long as it is substantially justified that’s enough to avert dismissal.²⁵⁹

But what does Judge Posner mean by “substantially justified”? We must read this in context with his view that *Twombly* and *Iqbal* require courts to dismiss as implausible any claim to relief that is based upon an injury that has an “obvious alternative explanation.”²⁶⁰ So, in Judge Posner’s view, it is not sufficient for a complaint to merely give an indication that the plaintiff’s claim is “premised on an actual, identifiable event” or to give the defendant notice of the claim and the grounds upon which it rests.²⁶¹ Instead, the complaint’s factual allegations must be sufficiently detailed to override any more natural,

²⁵⁸ See *Airborne Beepers & Video v. AT&T Mobility*, 499 F.3d 663, 667 (7th Cir. 2007) (“Taking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.”); see also *Doss v. Clearwater Title Co.*, 551 F.3d 634, 639 (7th Cir. 2008) (“The Supreme Court’s decision in *Erickson v. Pardus* . . . put to rest any concern that *Twombly* signaled an end to notice pleading in the federal courts.”).

²⁵⁹ *Swanson*, 614 F.3d at 411 (Posner, J., dissenting).

²⁶⁰ See *id.* at 408.

²⁶¹ See *Ides*, *supra* note 247, at 607.

legal explanation for the plaintiff's injury.²⁶² Because a plaintiff's injury that has an obvious natural explanation that does not involve wrongful conduct would not give rise to a recognized legal claim, one can see that Judge Posner's "obvious alternative explanation" view places most of its emphasis on "substantive sufficiency."²⁶³ Notably, Judge Wood directly disagreed with Judge Posner's emphasis on heightened substantive sufficiency: She wrote that plausibility "does not imply that the district court should decide whose version to believe, or which version is more likely than not."²⁶⁴

B. The Problem with "Judicial Experience and Common Sense"

Professor Suja A. Thomas has argued that, following *Twombly* and *Iqbal*, the Rule 12(b)(6) motion to dismiss has become the "new summary judgment motion."²⁶⁵ Professor Thomas bases her argument, in part, on judges' tendency following *Twombly* and *Iqbal* to rely on their own opinions of the sufficiency of the evidence to decide motions to dismiss.²⁶⁶ The language from *Iqbal* that courts must look to their "judicial experience and common sense"²⁶⁷ to decide a motion to dismiss encourages judges to look beyond allegations of a complaint to decide whether the claim is plausible.²⁶⁸ This practice, which is apparent in Judge Posner's dissent in *Swanson*,²⁶⁹ is problematic because it tends to transform a motion to dismiss into a

²⁶² *Swanson*, 614 F.3d at 408.

²⁶³ See Ides, *supra* note 247, at 607. Substantive sufficiency requires that the complaint "allege facts sufficient to show that the pleader is entitled to relief." *Id.*

²⁶⁴ *Swanson*, 614 F.3d at 404.

²⁶⁵ Thomas, *supra* note 19, at 17.

²⁶⁶ *Id.* at 31, 41.

²⁶⁷ *Iqbal*, 129 S. Ct. at 1950.

²⁶⁸ Thomas, *supra* note 19, at 31 ("This language in *Iqbal* seems to permit judges to use their own opinions to assess the sufficiency of facts to decide motions to dismiss similar to what we see judges do in deciding summary judgment.").

²⁶⁹ See *Swanson*, 614 F.3d at 407–12 (Posner, J., dissenting).

motion for summary judgment, thus giving judges too much power over the parties at an early stage in the litigation.²⁷⁰

1. Comparison of Rule 12(b)(6) and Rule 56

On their faces, the standards for a Rule 12(b)(6) motion to dismiss and for a Rule 56 motion for summary judgment are very different.²⁷¹ Rule 12(b)(6) provides that a court may dismiss a complaint on motion for “failure to state a claim upon which relief can be granted.”²⁷² Rule 56 provides that summary judgment “should be rendered if . . . there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.”²⁷³ Rule 12(b)(6) focuses on defects on the face of a pleading, while Rule 56 focuses on the lack of disputed material facts underlying a controversy.²⁷⁴

Judges are also to consider different things when deciding the motions.²⁷⁵ Traditionally, when deciding a Rule 12(b)(6) motion to dismiss, judges are to look only to the allegations contained within the four corners of the complaint.²⁷⁶ The court is to assume as true all well-pleaded facts, although not legal conclusions,²⁷⁷ and then to

²⁷⁰ Thomas, *supra* note 19, at 31.

²⁷¹ *Id.* at 28.

²⁷² FED. R. CIV. P. 12(b)(6).

²⁷³ FED. R. CIV. P. 56(c)(2).

²⁷⁴ FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56(c)(2).

²⁷⁵ Thomas, *supra* note 19, at 28.

²⁷⁶ Karagiannis v. Allcare Dental Mgmt., LLC, No. 10-2085, 2010 WL 3724767, at *1 (C.D. Ill. Aug. 26, 2010) (citing *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993)) (“When considering a motion to dismiss for failure to state a claim, the Court is limited to the allegations contained in the pleadings.”); *see also* FED. R. CIV. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”).

²⁷⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (holding that, “[a]lthough for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we ‘are not bound to accept as true a legal conclusion couched as a factual allegation’”).

determine if those facts “state a claim upon which relief can be granted.”²⁷⁸ If the parties present facts outside of the pleadings in support of or in opposition to a Rule 12(b)(6) motion to dismiss, the court is to treat the motion as one for summary judgment.²⁷⁹

When deciding a motion for summary judgment under Rule 56, on the other hand, a court is to look to “the pleadings, the discovery and disclosure materials on file, and any affidavits.”²⁸⁰ Judges are not limited to the four corners of the complaint but are to examine all of the evidence that has been developed through discovery.²⁸¹ If these materials reveal a “genuine issue of material fact,” then summary judgment is improper.²⁸² A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”²⁸³

2. Convergence of Motion to Dismiss and Motion for Summary Judgment

Professor Thomas argues that *Twombly* and *Iqbal* threaten to convert the Rule 12(b)(6) motion to dismiss into the new motion for summary judgment.²⁸⁴ She provides three similarities between the motion to dismiss following *Twombly* and *Iqbal* and the motion for summary judgment.²⁸⁵ First, following *Twombly* and *Iqbal*, a complaint must state a claim that is plausible,²⁸⁶ which is also a standard that the Supreme Court has used in deciding summary

²⁷⁸ FED. R. CIV. P. 12(b)(6).

²⁷⁹ FED. R. CIV. P. 12(d).

²⁸⁰ FED. R. CIV. P. 56(c)(2).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

²⁸⁴ Thomas, *supra* note 19, at 17.

²⁸⁵ *Id.* at 29–31.

²⁸⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

judgment motions.²⁸⁷ Professor Thomas points out that, in *Bell Atlantic Corp. v. Twombly*, the Supreme Court cited one of its seminal summary judgment opinions, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,²⁸⁸ as support for its new plausibility requirement.²⁸⁹ In *Matsushita*, the Supreme Court held, in part, that summary judgment was proper and that there was no genuine issue of material fact concerning the plaintiff's allegations of antitrust conspiracy where it was "equally plausible" based on the evidence presented that the defendants' conduct was entirely legal.²⁹⁰

The second similarity is that judges tend to draw inferences in favor of both the moving and the non-moving parties when deciding both motions to dismiss and motions for summary judgment.²⁹¹ Professor Thomas points to the Court's decision in *Matsushita*, in which it held that, although a court must view "the inferences to be drawn from the underlying facts . . . in the light most favorable" to the non-moving party, it must view these inferences "in light of the competing inferences."²⁹² Professor Thomas also points to the Court's decisions in *Twombly* and *Iqbal*, in which the Court drew inferences in favor of the parties moving for dismissal as well as the non-moving parties.²⁹³ In *Twombly*, the Court drew the inference in favor of the moving party that the defendants' conduct was consistent with uncoordinated monopolistic behavior.²⁹⁴ In *Iqbal*, the Court drew the inference in favor of the moving party that the defendants' policy of arresting Arab-Americans was consistent with a "nondiscriminatory intent" to detain aliens who were illegally in the United States and

²⁸⁷ Thomas, *supra* note 19, at 29 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

²⁸⁸ 475 U.S. 574.

²⁸⁹ Thomas, *supra* note 19, at 25 (citing *Twombly*, 550 U.S. at 561 n.7).

²⁹⁰ *Id.* at 20 (citing *Matsushita*, 475 U.S. at 588).

²⁹¹ *Id.* at 30.

²⁹² *Id.* at 20 (quoting *Matsushita*, 475 U.S. at 587–88).

²⁹³ *Id.* at 25, 27 (citing *Twombly*, 550 U.S. at 567–69 n.13; *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009)).

²⁹⁴ *See* 550 U.S. at 568–70.

who had potential connections to the September 11 terrorist attacks.²⁹⁵ The Court in *Iqbal* held that judges must use their “judicial experience and common sense” to draw these inferences and that a claim is plausible only when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”²⁹⁶

The third similarity between the motion to dismiss following *Twombly* and *Iqbal* and the motion for summary judgment is judges’ reliance on their own opinions of the sufficiency of the evidence to decide the motions.²⁹⁷ Professor Thomas argues that judges deciding motions for summary judgment rely on their own opinions of the sufficiency of the evidence—judges use phrases like “a reasonable jury could find” but nonetheless often disagree over whether summary judgment is proper.²⁹⁸ Regarding motions to dismiss, on the other hand, the Supreme Court in *Iqbal* expressly stated that judges are to rely on their “judicial experience and common sense” to decide such motions.²⁹⁹ Professor Thomas quotes one commentator who criticized this language because “it obviously licenses highly subjective judgments . . . [t]his is a blank check for federal judges to get rid of cases they disfavor.”³⁰⁰ As discussed below, the invitation for judges to look to their “judicial experience and common sense” to decide motions to dismiss gives them too much power over parties at an early stage in litigation.³⁰¹

²⁹⁵ See 129 S. Ct. at 1951.

²⁹⁶ Thomas, *supra* note 19, at 27 (quoting *Iqbal*, 129 S. Ct. at 1949–50).

²⁹⁷ *Id.* at 31.

²⁹⁸ *Id.*

²⁹⁹ *Iqbal*, 129 S. Ct. at 1950.

³⁰⁰ Thomas, *supra* note 19, at 32 (quoting Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 20, 2009, at A10).

³⁰¹ *Id.* at 41.

3. The Problem with Converting the Motion to Dismiss into a Motion for Summary Judgment

As Professor Thomas argues, one important problem with converting the motion to dismiss into the “new summary judgment motion”³⁰² is that the parties have not had the opportunity to develop evidence through discovery at the motion-to-dismiss stage.³⁰³ A judge deciding a motion for summary judgment examines all of the evidence that the parties have uncovered through discovery to determine whether there are any genuine issues of material fact and whether a “reasonable jury” could find for the non-movant.³⁰⁴ At this stage, the parties have had the opportunity to develop evidence through discovery and to present it to the judge in a persuasive manner.³⁰⁵

At the motion-to-dismiss stage, on the other hand, the parties have not had the opportunity to develop evidence through discovery.³⁰⁶ The judge is limited to those factual allegations contained in the complaint.³⁰⁷ Asking a judge to determine whether those factual allegations present a plausible claim is akin to asking the judge to decide whether the evidence before him on a motion for summary judgment presents a genuine issue of material fact, but without the benefit of having fully-developed evidence before him.³⁰⁸ Therefore, when a judge is permitted to look to his or her “judicial experience and common sense” to determine plausibility, the judge is given great power over the parties.³⁰⁹ The judge is granted the power to draw inferences in favor of the defendant moving for dismissal based upon his or her opinion of the sufficiency of the scant allegations in the

³⁰² *Id.* at 17.

³⁰³ *Id.* at 41.

³⁰⁴ *Id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

³⁰⁵ Thomas, *supra* note 19, at 41.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

complaint.³¹⁰ The risk is that judges will dismiss cases that would have been plausible had the parties had the opportunity to develop evidence through discovery and present it to the judge.³¹¹

C. *An Argument for Judge Wood’s Interpretation of the Plausibility Requirement*

Analyzing the majority and dissenting opinions in *Swanson* using Professor Thomas’s “new summary judgment motion” argument and Professor Ides’s Rule 8(a)(2) framework leads to two conclusions. First, Judge Posner’s “obvious alternative explanation” view of *Twombly* and *Iqbal*’s plausibility requirement gives judges too much power to rely on their own opinions of what is plausible and focuses too heavily on determinations of substantive sufficiency at the motion-to-dismiss stage. Second, Judge Wood’s “could this have happened” view is better because it limits a court’s power to draw inferences in favor of the moving party and requires only a minimal, yet appropriate, amount of transactional and substantive sufficiency at the motion-to-dismiss stage.

1. Judge Posner’s Interpretation Gives Judges Too Much Power over Parties at the Motion-to-Discard Stage

Judge Posner’s interpretation of *Twombly* and *Iqbal*’s plausibility requirement places too much power in the hands of judges when deciding motions to dismiss. In his dissent in *Swanson*, Judge Posner did exactly what Professor Thomas warns us about: He delved into an extensive discussion of matters beyond the allegations of the complaint to conclude that the plaintiff’s claim of discrimination was not plausible.³¹² Judge Posner looked to the frequency of errors in real estate appraisals and to the difficulty of obtaining credit as a result of

³¹⁰ *Id.* at 29–31, 41.

³¹¹ *Id.* at 39.

³¹² See *Swanson v. Citibank*, 614 F.3d 400, 408–09 (7th Cir. 2010) (Posner, J., dissenting).

the housing crisis.³¹³ These are considerations that went beyond the complaint's allegations and that would have been more properly considered in deciding a motion for summary judgment than a motion to dismiss.³¹⁴

Judge Posner also drew inferences in favor of the defendants moving for dismissal in *Swanson*. Although Judge Posner agreed that the court must assume to be true the plaintiff's allegation that the defendants' low appraisal of her home was a mistake, he immediately countered that assumption by drawing an inference in favor of the defendants.³¹⁵ Judge Posner wrote that, although "[w]e must assume that the appraisal was a mistake, and the house is worth considerably more, . . . errors in appraising a house are common because 'real estate is not an exact science.'"³¹⁶ But why is error the more obvious inference in this case? Why does error so strongly outweigh discrimination as a plausible explanation for the defendants' low appraisal of Gloria Swanson's home? Judge Posner says that "real estate appraisal is not an exact science,"³¹⁷ but does that necessarily mean that it is implausible that a real estate appraiser could discriminate on the basis of race? Did Gloria Swanson's complaint present only a "sheer possibility" of racial discrimination because "real estate appraisal is not an exact science"? Judge Posner ignored these questions and, without explanation, jumped to the conclusion that "[t]he Supreme Court would consider error the plausible inference in this case, rather than discrimination."³¹⁸ But why was error conclusively more plausible than discrimination?

The problem with Judge Posner's approach is that it gives a judge too much power to look to his or her "judicial experience and common sense" to decide a motion to dismiss. The judge's experience and

³¹³ *Id.*

³¹⁴ *See* Thomas, *supra* note 19, at 31.

³¹⁵ *Swanson*, 614 F.3d at 408.

³¹⁶ *Id.* (quoting *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 (7th Cir. 1998)).

³¹⁷ *Id.*

³¹⁸ *Id.*

common sense should be sources for an objective standard, not sources for extrajudicial facts or considerations upon which to base inferences of plausibility.³¹⁹ In *Swanson*, Judge Posner went beyond the allegations of the complaint to look toward the frequency of error in real estate appraisals and the difficulty of obtaining credit following the housing crisis.³²⁰ But the parties had not had the opportunity to conduct discovery or to present evidence that would counter Judge Posner's findings. At this early motion-to-dismiss stage, the parties would have been powerless to counter Judge Posner's conclusion that error was a more plausible inference than discrimination.

2. Judge Wood's Interpretation of the Plausibility Requirement Requires the Appropriate Level of Transactional and Substantive Sufficiency

Judge Wood's interpretation of *Twombly* and *Iqbal*'s plausibility requirement, on the other hand, exhibits restraint and is fairer to the parties at the early motion-to-dismiss stage. Under Judge Wood's approach, a court is not to "draw on its judicial experience and common sense" such that it draws inferences in favor of the movant based upon considerations beyond the allegations of the complaint.³²¹ In fact, Judge Wood warned against this: "'Plausibility' in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not."³²² Judge Wood also warned against granting a motion to dismiss based solely upon inferences favoring the movant: "[I]t is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences."³²³ Instead, Judge Wood directed courts to draw on their "judicial experience and common sense" only to ask if the plaintiff has

³¹⁹ See Thomas, *supra* note 19, at 31, 41.

³²⁰ See *Swanson*, 614 F.3d at 408–09.

³²¹ See *id.* at 402–07.

³²² *Id.* at 404.

³²³ *Id.*

given “enough details about the subject-matter of the case to present a story that holds together.”³²⁴ The central question for Judge Wood is “*could* these things have happened?”³²⁵ In answering this question, there is no room for judges to look towards facts or considerations beyond the complaint to draw inferences in favor of the defendant; a judge assessing whether a complaint’s “story” *could* have happened will not respond with discussions of the frequency of errors in real estate appraisals or the difficulty of obtaining credit in a bad housing market. Instead, the judge will look solely to the factual allegations contained in the complaint and ask whether, based upon his or her experience and common sense, there is enough to present a plausible claim of discrimination—is there enough to present a story of discrimination that “holds together”? Is there more than a “sheer possibility” of discrimination?

CONCLUSION

Judge Diane Wood’s majority opinion in *Swanson v. Citibank* provides a fair approach to interpreting and applying *Twombly* and *Iqbal*’s plausibility requirement. It is consistent with the traditional function of pleadings in the federal courts, which is to provide “a short and plain statement of the claim showing that the pleader is entitled to relief”³²⁶ and to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”³²⁷ After all, the Supreme Court’s trio of *Twombly*, *Erickson*, and *Iqbal* did not “cast any doubt on the validity of Rule 8.”³²⁸ The approach for which Judge Posner advocated in his dissent, on the other hand, would give judges too much power over the parties at a very early stage in litigation.³²⁹ By

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ FED. R. CIV. P. 8(a)(2).

³²⁷ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

³²⁸ *Swanson*, 614 F.3d at 403.

³²⁹ *See Thomas, supra* note 19, at 41.

permitting judges to look to their “judicial experience and common sense” for facts and considerations that support inferences that favor the party moving for dismissal, Judge Posner’s approach would become the “robust gatekeeping regime” that scholars have warned against.³³⁰ Judge Wood’s inquiry into “*could* this have happened?” and “does the story hold together?” provides an approach to pleadings that is “definite enough to work and yet flexible enough to do justice.”³³¹

³³⁰ See Clermont & Yeazell, *supra* note 22, at 823.

³³¹ See CLARK, *supra* note 35, at vii.