

PLEADING AND PRETRIAL MOTIONS—WHAT WOULD JUDGE CLARK DO?

PREPARED FOR THE
2010 LITIGATION REVIEW CONFERENCE
MAY 10–11, 2010
DUKE LAW SCHOOL
Revised 4/12/10

Arthur R. Miller*

History matters. When adopted in 1938, the Federal Rules of Civil Procedure represented a major break from the common law and code systems that preceded them. Although the drafters retained many of the prior procedural conventions, the Federal Rules reshaped civil litigation to reflect core values of citizen access to the justice system and adjudication on the merits based on a full disclosure of relevant information.¹ The structure of the Rules sharply reduced the prior emphasis on the pleading stage, aiming to minimize the pleadings and the extensive related motion practice that experience showed served more to delay proceedings and less to expose the facts, ventilate the competing positions, or further adjudication on the merits.² According to the Supreme Court in *Conley v. Gibson*,³ pleadings only needed to “give the defendant fair notice of what the plaintiff’s claim is and the grounds

* University Professor, New York University; former Reporter to and then member of the Advisory Committee on Civil Rules; Special Counsel to Milberg LLP. I am indebted to Professor Helen Hershkoff, my NYU Law School colleague, and Gabriel Bedoya, Amy Marshak, and John Miller, 2L’s at that law school, for their invaluable insights and assistance. Some of the themes discussed in this paper, as well as others, will be developed further in Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

¹ Charles E. Clark, *Pleading under the Federal Rules*, WYO. L.J. 177 (1958); see also Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 544–62 (2002) (providing a more thorough treatment of the history of Rule 8 and the liberal ethos of the Federal Rules).

² AM. BAR ASS’N, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES AT CLEVELAND, OHIO 240 (William W. Dawson ed.) (1938) [hereinafter *Cleveland Proceedings*]. See also Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty Eighth Cardozo Lecture*, 30 CARDOZO. L.REV. 1, 108 (2008).

³ See generally 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1202.

upon which it rests” to survive a motion to dismiss. Fact revelation and issue formulation would occur later in the pretrial process.⁴

Moreover, rather than eliminating claims based on technicalities,⁵ the Federal Rules created a system that relied on plain language and minimized procedural traps,⁶ with trial by jury as the gold standard for determining a case’s merits. Generalized pleadings, broad discovery, and limited summary judgment became integral, interdependent elements of the pretrial process.⁷ Although so-called notice pleading allowed a wide swath of cases into the system,⁸ discovery and summary judgment⁹ operated to expose and separate the meritorious from the meritless.

Beneath the surface of these broad procedural concepts lay several significant policy objectives. The Rules were designed to support a central philosophical principle—the procedural system should be premised on equality of treatment in the civil adjudication process. This certainly was a baseline democratic principle of the 1930s, and then of post-war America with regard to civil rights, the distribution of power, marketplace status, and equality of opportunity.

As significant new areas of federal substantive law emerged and existing ones were augmented, the importance of private enforcement of many of these national policies, as well as expanding state-based tort and consumer protection theories, came to the fore in various contexts. The openness and simplicity of the Rules enabled citizens to enforce congressional and

⁴ 355 U.S. 41, 47 (1957).

⁵ Under common law and code pleading, there “seem[ed] to be a persistent idea that you could get the other fellow to prove *your* case by making a misstep or by saying too much in his pleading.” AM. BAR ASS’N, PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. 40 (Edward H. Hammond ed.) (1939) [hereinafter D.C. Proceedings].

⁶ “The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Conley*, 355 U.S. at 48.

⁷ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); Clark, *supra* note 1, at 185.

⁸ “A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim” *Conley*, 355 U.S. at 45–46.

⁹ In seeking summary judgment, the movant had “the burden of showing the absence of a genuine issue as to any material fact.” *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

constitutional policies through private civil litigation. The federal courts increasingly were seen as an alternative or an adjunct to centralized or administrative governmental oversight in fields such as competition, capital markets, product safety, and discrimination. Even though private lawsuits might be viewed as an inefficient method of enforcing public policies, they have dispersed regulatory authority, achieved greater transparency, provided a source of compensation, deterrence and governance, and led to leaner government involvement. Eliminating the private attorneys general concept would require the substitution of an alternative methodology, which probably would mean the establishment of continental-style, centralized bureaucracies that many think are inconsistent with our culture and heritage.¹⁰

Perhaps the case that best represents the access-minded and merit-oriented ethos at the heart of the original Federal Rules is *Dioguardi v. Durning*.¹¹ As many may remember from law school, John Dioguardi, an immigrant and pro se plaintiff, asserted various grievances against the Collector of Customs of the Port of New York.¹² His home drawn complaint alleged in broken English a number of factual circumstances but failed to make any coherent legal presentation. Judge Charles E. Clark, the principal draftsman of the Federal Rules,¹³ wrote for the Second Circuit in overturning the district court's Rule 12(b)(6) dismissal of Dioguardi's action. The court found enough information within the complaint's allegations to satisfy Rule 8(a)(2)'s pleading standard.¹⁴ Judge Clark's opinion reminded the profession that the then new rule required only "a short and plain statement of the claim showing that the pleader is entitled to relief" and no longer demanded "facts sufficient to constitute a cause of action," as was required

¹⁰ See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2003).

¹¹ 139 F.2d 774 (2d Cir. 1944). See generally 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* 3d § 1220.

¹² 139 F.2d at 774.

¹³ See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 575 (2007) (Stevens, J. dissenting) (describing Judge Clark as the "principal draftsman" of the Federal Rules).

¹⁴ 139 F.2d at 775.

under code pleading.¹⁵ Judge Clark's lecture on the new pleading standard was confirmed thirteen years later by the Supreme Court's ruling in *Conley v. Gibson*.¹⁶

Much, of course, has changed in the world of litigation in the sixty-five years since *Dioguardi*. The culture of the law and the legal profession itself are far different. Long gone are the days of a fairly homogenous community of lawyers litigating relatively small numbers of what today would be regarded as modest disputes involving a limited number of parties. The federal courts have become a world unimagined in 1938: a battleground for titans of industry to dispute complex claims involving enormous stakes; a forum in which contending ideological forces contest some of the great issues of the day; and the situs for aggregate litigation on behalf of large numbers of people and entities pursuing theories and invoking statutes unknown in the 1930s. In some cases, the size of the claims and the litigation costs are stunning. Over the years the number of lawsuits filed has increased, but judicial resources do not seem to have kept pace.¹⁷ Opposing counsel compete on a national and even a global scale and some employ an array of litigation tactics often meant to wear out or deter opponents, making the maintenance of shared professional values difficult, if not impossible. Many cases seem interminable. The pretrial process has become so elaborated with time-consuming motions and hearings that it often seems to have fallen into the hands of some systemic Sorcerer's Apprentice. Yet trials are strikingly infrequent and in the unlikely event of a jury trial, only six or eight citizens are

¹⁵ 139 F.2d at 775. In his dissent in *Twombly*, Justice Stevens notes that Judge Clark's opinion in *Dioguardi* "disquieted the defense bar and gave rise to a movement to revise Rule 8 to require a plaintiff to plead a 'cause of action,'" but that the effort failed. *Twombly*, 550 U.S. at 582 (Stevens, J., dissenting). See also O. L. McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123, 125–26 (1952).

¹⁶ *Conley*, 355 U.S. at 45–46 (citing *Dioguardi* in support of a liberal pleading standard).

¹⁷ A sharp increase in criminal matters coupled with the federalization of such matters as securities litigation and class actions has outstripped the growth in the federal judiciary. However, I do not believe the data supports the notion that we have been struck by a "litigation explosion." See generally Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 459 (2004); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

empanelled.¹⁸ What some would call cults of judicial management and alternative dispute resolution have arisen, eroding certain aspects of the adversary system and access to the courtroom. In short, the world of those who drafted the original Federal Rules largely has disappeared. In many respects today's civil litigation is neither civil nor litigation as previously known.

Along with these changes in litigation realities have come corresponding judicial shifts in the interpretation of the Rules and the erection of other barriers to a meaningful day in court. The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*¹⁹ and *Ashcroft v. Iqbal*²⁰ should be seen as the latest steps in a long-term trend that has favored increasingly early case disposition in the name of efficiency, economy, and avoiding abusive and frivolous lawsuits.

A few illustrations should suffice. Two decades before these pleading decisions, the 1986 trilogy of Supreme Court summary judgment cases²¹ broke with prior jurisprudence restricting the motion's application to determining whether a genuine issue of material fact was present²² and sent a clear signal to the federal judiciary and the bar that Rule 56 provided an effective mechanism for disposing of cases short of trial when the district judge feels the plaintiff's case is not "plausible."²³ In 1995, Congress enacted the Private Securities Litigation

¹⁸ FED. R. CIV.P. 48.

¹⁹ 550 U.S. 544 (2007).

²⁰ ___ U.S. ___, 129 S. Ct. 1937 (2009).

²¹ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 312 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

²² "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). *See also* *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

²³ For a more in-depth discussion of the impact of the 1986 trilogy, *see* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

Reform Act,²⁴ which created a super-heightened pleading standard for certain aspects of securities claims and deferred discovery with the aim of reducing “frivolous suits.”²⁵ Despite the well established position of notice pleading under *Conley* and absent any revision of Rule 8 by the rulemaking process, lower federal courts frequently applied heightened pleading standards in many types of cases.²⁶ For more than a quarter of a century, amendments to the Federal Rules (along with various judicial practices) have been designed to contain or control discovery and enhance the power of judges to manage cases throughout the pretrial process.²⁷ In the background, rulemaking, once thought to reflect the efforts of neutral professionals, has been criticized by several commentators.²⁸

Yet, until *Twombly* in 2007, the Supreme Court stood firm in its commitment to the rulemaking process and to the access principle at the pleading stage.²⁹ But with the advent of “plausibility” pleading³⁰ the Rule 12(b)(6) motion to dismiss seems to have stolen center stage as the vehicle of choice for disposing of allegedly insufficient claims and for protecting defendants

²⁴ Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of Title 15 of the United States Code).

²⁵ S. REP. NO. 104-98, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683; H.R. Conf. Rep. No. 104-369, at 32 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 731. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), the Court adopted a stringent test for pleading scienter under the PSLRA. In examining a complaint for sufficiency, “an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” *Id.* at 314.

²⁶ See generally Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003); Fairman, *supra* note 1; Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

²⁷ FED. R. CIV. P. 16, 26. Rule 16 was amended in 1983 and 1993, and Rule 26 was amended in 1993 and 2000. See the Advisory Committee’s Notes to these changes for more information about these revisions. There have been other constraints imposed on discovery. See, e.g., FED. R. CIV. P. 30(d)(2), 33(a). See generally Richard L. Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 27 STAN. L. REV. 1, 7 (2004).

²⁸ See Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L. Q. 901 (2002); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

²⁹ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (“imposing the Court of Appeals’ heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)”); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (“We think that it is impossible to square the “heightened pleading standard” applied by the Fifth Circuit in this case with the liberal system of “notice pleading” set up by the Federal Rules.”).

³⁰ See *infra* Part I for a discussion of “plausibility” pleading.

from supposedly excessive discovery costs and resource expenditures by the federal courts—objectives previously thought to be achievable under other rules and judicial practices.

According to some, these procedural developments have come at the expense of the values of access to the federal courts and the ability of citizens to obtain an adjudication of the merits of their claims. It has been suggested that what has been done is not a neutral solution for an important litigation problem, but rather the use of procedure to achieve substantive goals that undermine important national policies by limiting private enforcement through various changes designed to benefit special economic interests.

Most—but not all—observers believe *Twombly* and *Iqbal* represent a major departure from the Court’s established pleading jurisprudence³¹ and have brought the long-simmering debate over the proper role of pleadings and pretrial motions to a feverish pitch in some quarters. The defense bar, along with the large entities it typically represents, asserts that a heightened pleading standard is necessary to keep the cost of litigation down, weed out abusive lawsuits, and protect American business interests at home and abroad.³² The plaintiffs’ bar, supported by various civil rights, consumer, and environmental protection groups, argue that heightened

³¹ For empirical studies indicating a greater frequency of dismissal under *Twombly-Iqbal* than under *Conley*, see Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, draft of Oct. 12, 2009, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1487764; Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009). Even judges and academics one assumes are sympathetic to the decisions recognize their significance. See, e.g., *Brotherhood of Locomotive Eng’g v. Union Pacific R.R. Co.*, 537 F.3d 789 (7th Cir. 2008) (Easterbrook, C.J., joined by Posner, J., concurring) (“In *Bell Atlantic* the Justices modified federal pleading requirements and threw out a complaint that would have been deemed sufficient earlier”); Richard Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Became (Disguised) Summary Judgments*, 25 WASH. J. OF L. & POLICY 61 (2007). (“The Supreme Court in *Twombly* held that the phrase ‘no set of facts’ has been ‘questioned, criticized, and explained away long enough’ But on this matter Justice Stevens’s dissent surely has the better argument. *Conley* has long been treated as an authoritative statement of the law that has been followed uniformly in the Supreme Court and elsewhere and the plaintiffs’ allegations are quite in the spirit of the Federal Rules. The *Conley* complaint is fact-free but gives notice of the basic elements of the claim. *Twombly* cannot be defended if the only question is whether it captures the sense of notice pleading in earlier cases.”) (citations omitted). For a dissenting view, see Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1069 (2009).

³² AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, FINAL REPORT (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053>.

pleading is a blunt instrument that will keep out or terminate meritorious claims before discovery, undermine national policies, and increase the burden on under-resourced plaintiffs who typically contest with industrial and governmental Goliaths, often in cases in which critical information is largely in the hands of defendants and is unobtainable without access to discovery.³³ This sharp divide even may imperil the credibility of the rulemaking process as it tries to meet the challenge of where to go from this point.³⁴

Given the dramatic changes and sharp debate precipitated by *Twombly* and *Iqbal*, the Federal Rules stand at a critical crossroads. In this writer's view, it is incumbent upon the courts and rulemakers to consider the full range of important questions and policy choices that have surfaced not just in *Twombly* and *Iqbal*, but as a result of the overarching trend toward pretrial disposition. That consideration should take account of the various policy objectives of federal litigation, many of which have not been accorded sufficient weight in connection with the procedural alterations of the past quarter century, which seem to have accreted in something akin to a one-degree-it-is process.

Part I of this paper explores the implications of the new plausibility pleading standard. Part II critiques the status of case management and the role that fears of discovery abuse and frivolous lawsuits as well as costs have played in influencing change in pleading and pretrial motion practice. Part III discusses the impact of the Court's decisions in *Twombly*, *Iqbal*, and the 1986 summary judgment trilogy on the continued viability of the rulemaking process, the future of the Federal Rules' transsubstantivity, and the possibility of congressional intercession.

³³ See generally Letter from Center for Constitutional Litigation, P.C. to Advisory Committee on Civil Rules (Nov. 10, 2008), available at [http://www.uscourts.gov/rules/2008%20Comments%20Committee%20Folders/CV%20Comments%202008/08-CV-046-Testimony-Center%20For%20Constitutional%20Litigation%20\(Vail\).pdf](http://www.uscourts.gov/rules/2008%20Comments%20Committee%20Folders/CV%20Comments%202008/08-CV-046-Testimony-Center%20For%20Constitutional%20Litigation%20(Vail).pdf).

³⁴ The cleavage between the plaintiff's and defendant's bar regarding pleading and motion to dismiss practice is manifest throughout AM. BAR ASS'N SECTION OF LITIGATION, MEMBER SURVEY ON PRACTICE: DETAILED REPORT (DECEMBER, 2009).

Part IV offers some suggestions for tackling the difficult issues and questions that have arisen concerning the pretrial process. Part V concludes by asking how the new pleading and pretrial motion philosophy might lead a judge to rule on Dioguardi's complaint or a contemporary variant thereof today. Because of my sense of the dimension of the subject assigned to me and its ramifications, I have written at length and asked many questions, some of which I leave unanswered. For that I apologize to the reader.

I. PLEADING UNDER *TWOMBLY-IQBAL*

A. "PLAUSIBILITY" IN THE EYE OF THE BEHOLDER

Under *Conley's* notice pleading standard, courts were authorized to grant motions to dismiss only when "it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."³⁵ Judges were to accept all factual (but not conclusory) allegations as true and draw all inferences in favor of the pleader. Despite the vagueness of the *Conley* standard, judges employing it on a motion to dismiss had years of precedent aiding them to achieve some consistency and continuity. Moreover, they understood that the motion should be denied except in clear cases. Although, in recent decades, lower courts frequently effectively ignored the standard while insisting on a heightened or inconsistent fact pleading in certain types of cases,³⁶ *Conley's* notice pleading approach remained the accepted articulated benchmark.³⁷

Plausibility pleading now has transformed the function of a complaint from *Conley's* limited role of providing notice of the claim into a more demanding standard that requires a more

³⁵ *Conley*, 355 U.S. at 45–46.

³⁶ See the sources cited *supra* note 31.

³⁷ *Swierkiewicz*, 534 U.S. at 512.

extensive factual presentation.³⁸ Indeed, it is striking to note that the *Iqbal* majority did not once use the word “notice” in its opinion.³⁹ It is now fairly common for federal courts to characterize allegations as merely “formulaic,” or “conclusionary,” or “cryptic,” or “generalized,” or “bare.”⁴⁰ Motions to dismiss based on *Twombly Iqbal* have become routine.⁴¹ The Supreme Court’s change in policy seems to suggest a movement backward in time toward code and common law procedure, with their heavy emphasis on detailed pleadings and frequent resolution by a demurrer to the complaint.⁴² The past practice of construing the complaint in the light most

³⁸ For a glimpse at the initial application of the enhanced factual pleading established by *Twombly* and *Iqbal* in a variety of substantive contexts, *see e.g.*, *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603 (6th Cir. 2009)(consumer confusion regarding trademark and fair use); *Farash v. Continental Airlines, Inc.*, 337 Fed.Appx. 7 (2d Cir. 2009) (negligence and assault claims under New York law); *Sheehy v. Brown*, 335 Fed.Appx 102 (2d Cir. 2009) (slip op.) (§§ 1983 and 1985 claims); *St. Clair v. Citizens Financial Group*, 2009 WL 2186515 (3d Cir. 2009) (slip op.) (RICO claim); *Lopez v. Beard*, 333 Fed.Appx. 685 (3d Cir. 2009) (slip op.) (First, Eighth, Fourteenth Amendments, and Age Discrimination Act claims); *Morgan v. Hubert*, 335 Fed.Appx. 466 (5th Cir. 2009) (slip op.) (Eighth Amendment deliberate indifference claim); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) (Alien Tort Statute and Torture Victims Protection Act claims); *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009) (First Amendment viewpoint discrimination claim); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) (employment standards); *Logan v. Sectek, Inc.*, 632 F.Supp. 179 (D. Conn. 2009) (Age Discrimination Act claim); *Spencer v. DHI Mortg. Co., Ltd.*, 642 F.Supp.2d 1153 (E.D. Cal. 2009) (negligent breach of duty); *Vallejo v. City of Tucson*, 2009 WL 1835115 (D. Ariz. 2009) (slip op.) (Voting Rights Act claim).

³⁹ The Court seemed to reaffirm notice pleading in *Erickson v. Pardus*, 551 U.S. 89, 93, (2007) three weeks after *Twombly*, but *Iqbal* casts doubt on the significance of that case. *See generally* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 6-9 (2009).

⁴⁰ *See, e.g.*, *Maldonado v. Fontanes*, 508 F.3d 263 (1st Cir. 2009); *Ocasio-Hernandez v. Fortuno-Burset*, 639 F.Supp.2d 217 (D.P.R. 2009); *Air Atlanta Aero Eng’g Ltd. v. SP Aircraft Owner I, LLC*, 637 F.Supp.2d 185 (S.D.N.Y. 2009); *Fletcher v. Philip Morris USA, Inc.*, 2009 WL 2067807 (E.D. Va. 2009). Several courts have acknowledged that complaints that would have survived under *Conley* do not do so under *Twombly-Iqbal*. *See, e.g.*, *Ocasio-Hernandez v. Fortuno-Burset*, *supra*; *Kyle v. Holinka*, 2009 WL 1867671, at *1 (W.D. Wis. 2009); *Coleman v. Tulsa County Board of County Comm’rs*, 2009 WL 2513520, at *1 (N.D. Okl. 2009).

⁴¹ Although the data as of this writing is limited to what is reported in Westlaw and LEXIS, there are a few studies documenting a greater frequency of dismissal under *Twombly-Iqbal* than under *Conley*. *See* Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008); Hatamyer, *supra* note 31; Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009) (a higher rate of dismissals in Title VII cases after *Twombly*). *But cf.* Andrea Kuperman, *Application of Pleading Standards Post-Ashcroft v. Iqbal*, available at <http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf> (a summary of cases prepared by a law clerk for the Chair of the Standing Committee for the Civil Rules Advisory Committee and the Standing Rules Committee). Some fragmentary statistics from the Administrative Office of the United States Courts show little change in the frequency of the motion to dismiss, Statistical Information on Motions to Dismiss re *Twombly/Iqbal* (Rev. 2/9/10), available at <http://www.uscourts.gov/rules/motions%to20dismiss.pdf>.

⁴² *See* Cleveland Proceedings, *supra* note 2, at 225.

favorable to the plaintiff seems to have been replaced by the long rejected practice of construing a pleading against the pleader.

Twombly and *Iqbal*, in fact, have altered the Rule 12(b)(6) procedure even more dramatically in some respects. The decisions have unmoored our long-held understanding of the motion to dismiss as a test of a pleading's legal sufficiency. The drafters of the Federal Rules replaced the demurrer with the Rule 12(b)(6) motion in the hope of reducing adjudications based on "procedural booby traps."⁴³ The lineage is clear. The demurrer, the code motion to dismiss, and our prior understanding of Rule 12(b)(6) focused on legal sufficiency, not on a judicial assessment of the case's facts or actual merits. *Twombly* and *Iqbal* may have transformed the relatively delineated purpose of the motion to dismiss into a potentially Draconian method of foreclosing access based on an evaluation of the challenged pleading's factual presentation, filtered through extra-pleading "judicial experience and common sense" factors. If the motion to dismiss has been transmogrified in this fashion, how far are the rulemakers willing to allow this threshold procedure to drift from its historical function and defined scope of inquiry?

Not only has plausibility pleading undone the relative simplicity of the Rule 8 pleading regime and the limited function of the Rule 12(b)(6) motion to dismiss, but it also grants virtually unbridled discretion in district judges. This newly enhanced discretion has sparked a concern that some judges will allow their own views on various substantive matters to intrude on the decision-making process and will not be bounded by the four corners of the complaint as historically was true.⁴⁴ Over two decades ago, Professor Richard L. Marcus recognized the

⁴³ *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

⁴⁴ See Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 852–53 (2008) ("As both district court and appellate court judges try to parse the meaning of a few key phrases in the *Twombly* decision, what was once uniform dogma about the pleading standard for most causes of action is being fragmented on a circuit-by-circuit—or sometimes a judge-by-judge—basis. We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim.").

reemergence of fact pleading and cautioned that a pleading system based on each trial judge's discretion carried dangerous implications for the Federal Rules' foundational principles.⁴⁵ He explained that the application of Rule 12(b)(6) would depend on "the very real attitudinal differences among judges," who, lacking the benefit of a developed record, would feel free to decide motions on "instinct."⁴⁶ Today, Professor Marcus' forewarning appears to have materialized.

Under the plausibility pleading standard, the Court has vested trial judges with the authority to evaluate the strength of the factual "showing"⁴⁷ of each claim for relief and thus determine whether or not it should proceed.⁴⁸ In *Iqbal*, the Court described a two-step approach to the plausibility inquiry that is quite different from the question of legal sufficiency that was the focus of prior Rule 12(b)(6) practice. First, district judges are to distinguish factual allegations from legal conclusions, since only the former need be accepted as true.⁴⁹ This fact-legal conclusion dichotomy, one that is shadowy at best, is precisely what the drafters of the original Rules rejected and sought to eliminate by substituting "short and plain" and "claim for relief" for any reference to "facts," "conclusions," "evidence," and "cause of action."⁵⁰

Although Justice Souter, *Twombly*'s author, consented to this step in theory, his disagreement with the *Iqbal* majority lay in the undefined method by which the Court distinguished the complaint's factual allegations from its legal conclusions. Justice Souter

⁴⁵ See Marcus, *supra* note 26, at 482.

⁴⁶ *Id.* at 482-83; see also Steven B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 *Judicature* 109, 117-20 (2009).

⁴⁷ FED. R. CIV. P. 8(a)(2). It appears that the textual core of the *Twombly* decision, namely its focus on the sufficiency of a complaint's factual "showing," is the first time that the Court emphasized this word in Rule 8 in considering a motion to dismiss. In *Iqbal* the Court offered what many would regard as a new construction of the word "generally" in the second sentence of Rule 9(b) relating to the pleading of conditions of a person's mind. *Iqbal*, 129 S.Ct. at 1954.

⁴⁸ *Twombly*, 550 U.S. at 556 n. 3.

⁴⁹ *Iqbal*, 129 S. Ct. at 1940.

⁵⁰ See generally 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* 3d §§ 1215-1218; Miller, *supra* note 23, at 1082-93; Walter W. Cook, *Statements of Fact in Pleading Under the Codes*, 21 *COLUM. L. REV.* 416 (1921).

criticized “[t]he fallacy of the majority’s position” because it considered only a select number of factual allegations “in isolation,” rather than construing the entire pleading in the plaintiff’s favor; he and the three other dissenters argued that the majority’s classification was entirely arbitrary and failed to provide lower courts with any guidance as to how to draw such a distinction.⁵¹ Some post-*Iqbal* decisions suggest the Justice’s concern may be well founded as the conclusion category is being applied quite expansively, embracing allegations that one reasonably might classify as factual and therefore potentially jury triable.⁵² By transforming factual allegations into legal conclusions and drawing inferences from them, judges are performing functions previously thought more appropriate for juries and doing so based only on the complaint.⁵³

Once trial judges have identified the factual allegations, they then must decide whether a plausible claim for relief has been shown by relying on their “judicial experience and common sense,”⁵⁴ highly subjective concepts largely devoid of accepted—let alone universal—meaning. Further, the plausibility of factual allegations appears to depend on the relative likelihood of wrongdoing as measured against a hypothesized innocent explanation. In both *Twombly* and *Iqbal*, the Court proposed explanations for the alleged factual pattern that were thought to be an “obvious alternative”⁵⁵ to or “more likely”⁵⁶ than the plaintiffs’ inferences of wrongdoing. As Justice Souter stated during Oral Argument for *Iqbal*, *Twombly* presented “an either or choice”

⁵¹ *Iqbal*, at 1960–61 (Souter, J., dissenting).

⁵² See the cases cited *supra* note 37. Compare *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) (*Iqbal* distinguished; complaint alleged sufficient facts to satisfy plausibility).

⁵³ This thesis and the ramifications of it are strikingly demonstrated in Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). See also Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 BOS. COLL. L. REV. 759 (2009) (asserting that judges dismiss cases based on their own views of the facts). With a few exceptions, the application of facts to legal principles has been left to the jury. See generally James B. Thayer, *Law and Fact in Jury Trials*, 4 HARV. L. REV. 147, 170 (1890).

⁵⁴ *Iqbal*, 129 S.Ct. at 1950.

⁵⁵ *Twombly*, 550 U.S. at 567.

⁵⁶ *Iqbal*, 129 S. Ct. at 1950.

between conspiracy and lawful parallel conduct,⁵⁷ which made the “obvious alternative explanation” of a lack of wrongdoing highly plausible given the context of the case. This in turn made it easier for the Court’s majority to demand more than what it characterized as legal conclusions to support a plausible conspiracy claim. In *Iqbal*, however, the majority’s description of the alleged conduct, the rounding up of Muslim men following September 11, as merely having incidental disparate impact on the plaintiff seemed neither obvious nor more likely to the dissenting Justices because the same kind of simple dichotomy was not present.

Many if not most aspects of judicial experience and common sense, which are now elements of balancing potential discovery costs against the likelihood that a claim plausibly has merit, are not matters found within the four corners of a pleading. Thus, the Court implicitly rejected the longstanding proposition that only matters found within or integrally related to the complaint may be considered on a motion to dismiss, unless the district judge chooses to convert it into one for summary judgment, further confusing Rule 12(b)(6) practice.

As is true of the division between fact and legal conclusion, the Court has provided little direction on how to measure the palpably subjective factors of “judicial experience,” “common sense,” and “more likely” alternative explanation it has inserted into the Rule 12(b)(6) dynamic.⁵⁸ The determination of a complaint’s factual sufficiency rests largely on the district judge’s discretion, which, if taken too far, allows judges to deny access to a merits adjudication whenever an equivocal set of facts can be interpreted as “more likely” to reflect lawful conduct, a process that feels uncomfortably close to a weighing of the evidence.⁵⁹ This concern is

⁵⁷ Transcript of Oral Argument at 10, *Ashcroft v. Iqbal*, 128 S.Ct. 2931 (2008) (No. 07-1015) (statement of Justice Souter), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1015.pdf.

⁵⁸ See Lonny S. Hoffman, *Burn Up The Chaff With Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1257 (2008) (“Virtually everyone (except, perhaps, the five Justices in the majority in *Twombly*) regards plausibility as an ambiguous standard.”).

⁵⁹ See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 445 (2008); see also Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

compounded by the fear that rulings on motions to dismiss may turn on individual ideology regarding substantive elements of the law, attitudes toward private enforcement of federal statutes, perhaps coupled with extra-pleading matters hitherto considered far beyond the scope of a Rule 12(b)(6) motion. As a result, inconsistent rulings on virtually identical complaints may well be based on different judges' having disparate subjective views of what allegations are plausible.⁶⁰ For instance, the *Iqbal* majority decided that its judicial experience and common sense refuted Iqbal's claims of intended invidious discrimination by government officials.⁶¹ Yet, the four dissenting Justices—and a majority of the Second Circuit panel—disagreed and found that his allegations established a plausible claim of constitutional violations. If each of the nine Supreme Court Justices had been serving instead as district court judges in separate cases, Iqbal's complaint would have survived the motion to dismiss nearly half of the time.

Other inconsistencies of application have arisen. For example, the Third Circuit has ruled that the 2002 Supreme Court decision in *Swierkiewicz v. Sorema, N.A.*,⁶² which upheld notice pleading in employment discrimination actions, no longer was valid law after *Twombly-Iqbal*.⁶³ Courts in other circuits disagree.⁶⁴

⁶⁰ Cf. Hoffman, *supra* note 58, at 1259–60 (“A more significant, though less well publicized, finding reached by the FJC was that summary judgment filing and grant rates vary - and sometimes wildly - by case type and by court. . . . These stark disparities in filing rates and, more importantly in grant rates, offer a powerful reason to be wary of expanding the scope of judicial pleading review authority, at least if the goal of transsubstantive rules is not to be entirely jettisoned.”).

⁶¹ Relying on facts found outside Iqbal's complaint, the majority reasoned that, “[t]he September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.” *Iqbal*, 129 S.Ct. at 1951.

⁶² 534 U.S. 506 (2002).

⁶³ *Guirguis v. Movers Specialty Services, Inc.*, 2009 WL 3041992 (3d Cir. 2009) (slip op.); *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009).

⁶⁴ *Al-Kidd v. Ashcroft* 580 F.3d 949, 974 (9th Cir. 2009); *EEOC v. Brixius, LLC* 2009 WL 3400940, at *3 (E.D. Wis. 2009); *Gillman v. Inner City Broadcasting Corp.* 2009 WL 3003244, at *3 (S.D.N.Y. 2009) (“*Iqbal* was not meant to displace *Swierkiewicz*'s teachings about pleading standards for employment discrimination claims because in *Twombly*, which heavily informed *Iqbal*, the Supreme Court explicitly affirmed the vitality of *Swierkiewicz*.”);

It is possible that the *Iqbal* Court’s willingness to substitute a benign explanation for the government defendants’ alleged purposeful discrimination may have been based on the case’s sensitive nature—a terrorism suspect claiming discrimination at the hands of federal officials in the wake of September 11—as much as it was on an assessment of the legal standards involved.⁶⁵ But, allowing trial judges to take external considerations into account on a threshold motion to dismiss that theoretically is to be based solely on a pleading’s content may provide yet another avenue of unrestrained discretion to deny a plaintiff’s access to an adjudication based on a developed record.

Plausibility pleading is the latest step toward a far different model of civil procedure than we previously have had: the Rules once advanced trials on the merits, but cases now turn on Rule 12(b)(6) and Rule 56 motions; jurors once were trusted with deciding issues of fact and applying their findings to the law following the presentation of evidence, but now judges are authorized to make these determinations using nothing but a single complaint and their own discretion.⁶⁶ In sum this new reliance on judicial experience and common sense to the exclusion of popular experience and common sense comes at the expense of the democratic values inherent in a jury

but see *Argeropoulos v. Exide Tech.*, 2009 WL 2132442, at *6 (E.D.N.Y. 2009) (“[T]his kind of non-specific allegation might have enabled Plaintiff’s hostile work environment claim to survive under the old ‘no set of facts’ standard for assessing motions to dismiss, . . . [b]ut it does not survive the Supreme Court’s ‘plausibility standard,’ as most recently clarified in *Iqbal*.”).

⁶⁵ The majority cited Judge Cabranes’ “concern at the prospect of subjecting high-ranking Government officials—entitled to assert the defense of qualified immunity and charged with responding to ‘a national and international security emergency unprecedented in the history of the American Republic’—to the burdens of discovery on the basis of a complaint as nonspecific as respondent’s.” *Id.* at 1945. Arguably, by terminating the case on the complaint the Court preempted what might have been a useful constitutional exploration of governmental immunity by substituting something tantamount to absolute immunity for what only should have been an issue of qualified immunity. *Compare* *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009).

⁶⁶ *See, e.g., Sioux City & P.Ry. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873) (Story, J.) (“It is asumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.”).

trial system and the utility of private enforcement of various national policies.⁶⁷ What effect this regime will have on appellate review remains to be seen.

Given the shift in federal litigation’s center of gravity to the pleadings and pretrial motion practice, it may not be heretical to suggest that the rulemakers give thought to what I believe is a critical concern, namely, identifying what type of a pleading and pretrial motion system would be appropriate for the future. That implicates two further questions. What should tomorrow’s federal procedural model be? What do we really mean by the words “just,” “speedy,” and “inexpensive” in Federal Rule 1 as they relate to pleadings and motions?

Although judicial discretion—and its potential for inconsistency—is hardly a novel aspect of Rule 12(b)(6) motion practice, *Twombly* and *Iqbal* may have made it the determinative factor in deciding whether plaintiffs will be allowed to proceed to discovery. Although awarding discretion to experienced, talented judges is a valuable keystone of the federal procedural system, it threatens to become excessive when taken to the extreme of causing unpredictability and permitting reliance on individual predilection, especially in light of the terminal potential of pretrial motions to dismiss and summary judgment. In short, everything—including motions to dismiss— should be practiced in moderation.

Both academics and jurists frequently have suggested that the application of a judge’s subjective impressions can lead to inappropriate and inconsistent results if devoid of strictures.⁶⁸ It is somewhat ironic that in *Burnham v. Superior Court of California, County of Marin*,⁶⁹ Justice Scalia, who voted for the results in *Twombly* and *Iqbal*, argued that Justice Brennan’s proposal for using “fairness” and “contemporary notions of due process” in deciding personal jurisdiction

⁶⁷ See the concerns along these lines expressed by Judge Merritt dissenting in *In re Travel Agent Commission Antitrust Litigation*, 583 F.3d 896, 911 (6th Cir. 2009).

⁶⁸ McMahon, *supra* note 44; Michael S. Vogel, *Unmasking “John Doe” Defendants: The Case Against Excessive Hand-Wringing over Legal Standards*, 83 OR. L. REV. 795, 809–10 (2004). See generally Thomas, *supra* note 59.

⁶⁹ 495 U.S. 604, 622–24 (1990).

questions involving the defendant’s physical presence in the forum was grounded in the “subjectivity” of a presiding judge and, thus, provided an “uncertain[]” and “inadequate” standard for lower courts to apply.⁷⁰ Yet, by instructing judges to measure complaints according to their “judicial experience and common sense,” the Court now has introduced the subjectivity and resulting variances that Justice Scalia suggested should be avoided in *Burnham*.⁷¹ If the protection of constitutional norms and the enforcement of substantive legislation are to be entrusted in part to federal civil litigation, the rulemakers must consider whether the pleading and motion structure that has emerged strikes a proper balance between those objectives and the concerns that apparently motivated the Court.

B. SHOULD THE PLAUSIBILITY STANDARD BE CABINED?

In *Iqbal*, the Court laid to rest any thought that *Twombly* might be limited to antitrust actions, by announcing that plausibility pleading “governs . . . all civil actions and proceedings in the United States district courts.”⁷² Despite that global statement, the application of the plausibility standard inevitably remains grounded in the substantive law invoked in each complaint. As the *Iqbal* majority made clear, determinations of a complaint’s plausibility is a “context-specific” task,⁷³ requiring courts to examine “the [substantive] elements a plaintiff must

⁷⁰ *Id.* at 623, 626.

⁷¹ Not surprisingly, as of this writing, courts have adopted varying approaches to interpreting *Twombly-Iqbal*. Although many courts have applied a demanding reading of the decisions for cases dealing with a defendant’s mental state, such as agreement, conspiracy, and discrimination, others apply a liberal pleading standard to ensure that plaintiffs have another opportunity to meet the standard. *See* the cases cited *supra* note 38; *see also* *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009) (“Having initiated the present lawsuit without the benefit of the Court’s latest pronouncements on pleadings, Plaintiffs deserve a chance to supplement their complaint with factual content in the manner that *Twombly* and *Iqbal* require.”).

⁷² *Iqbal*, 129 S.Ct. at 1953 (citing FED. R. CIV. P. 1) (citations omitted). The Court certainly did not have to reach that far. Nothing in the Court’s pre-*Twombly-Iqbal* jurisprudence suggests that today’s plausibility requirement somehow has been embedded in the word “showing” in Rule 8 since 1938.

⁷³ *Id.* at 1940.

plead to state a claim.”⁷⁴ Thus, context may confine the seemingly unbridled grant of discretion and universality that the Court seems to have promised for plausibility pleading.

For instance, in the antitrust context, substantive precedent may have constrained the Court’s judgment in deciding *Twombly*, leading the Justices to reach a similar conclusion on a motion to dismiss as it did on summary judgment in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,⁷⁵ in which the Court found that circumstantial evidence of parallel conduct was not enough to make claims of conspiracy factually or economically plausible.⁷⁶ Similarly, the *Iqbal* Court looked to existing jurisprudence regarding unconstitutional discrimination⁷⁷ when it held that the complaint had to plead sufficient facts regarding defendants Ashcroft’s and Mueller’s purposeful mental state.

But antitrust and constitutional deprivation claims represent a very small fraction of the federal court dockets. It remains to be seen whether district courts will extend the demands of plausibility pleading to require factual allegations of the elements of relatively uncomplicated civil actions, as illustrated by Official Form 11 (formerly Form 9), the paradigm negligence complaint. Although the *Twombly* Court was careful to assert the continuing validity of Form 11,⁷⁸ it nevertheless stated that factual allegations—not mere conclusions—would be required to survive the plausibility hurdle. However, a word such as “negligently,” which appears in Form 11, may be viewed as either a factual allegation or a legal conclusion. If considered a fact, courts should accept it as true and thereby confirm that Form 11 remains a sufficient model for this category of actions. On the other hand, if courts begin interpreting “negligently” as a legal

⁷⁴ *Id.* at 1947.

⁷⁵ 475 U.S. 574 (1986).

⁷⁶ *Id.* at 587; see also Stephen B. Burbank, *Pleading and the Dilemmas of General Rules*, 2009 WIS. L. REV. 535, 552 (2009); Miller, *supra* note 23, at 1030; Spencer, *supra* note 59, at 487.

⁷⁷ *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976).

⁷⁸ *Twombly*, 550 U.S. at 565 n.10.

conclusion, plaintiffs may have to channel tort law and specify the factual elements necessary to plead a plausible legal claim. As a result, additional factual allegations may be required to reach the required pleading level, such as insisting that the plaintiff recite the precise actions taken by a defendant motorist that made his or her driving negligent.⁷⁹ In highlighting the benefits of the liberal ethos of the Federal Rules, Judge Clark specifically pointed to this type of pleading burden as one that happily would be avoided.⁸⁰ That, of course, must have motivated the drafting of Form 11.

Should *Iqbal's* assertion of universality prove accurate, courts will be required to devote much more time to evaluating factual allegations than in the past—time that might be better spent appraising the merits of a well-developed record presented at summary judgment or trial, especially for simpler claims. Add to that burden the possibility that defendants might be obliged to show the plausibility of affirmative defenses such as contributory negligence or assumption of risk (or perhaps even a simple denial of negligence), a subject to be explored later. In other words, the full effect that plausibility pleading will have on judicial time and party resource expenditures is still uncertain, raising a basic question of whether the rulemakers should explore what has been gained by *Twombly-Iqbal*, if anything, in terms of efficiency. That inquiry might provide insight into whether the pleading rules should be revisited and how.

⁷⁹ In *Farash v. Continental Airlines, Inc.*, 2009 WL 1940653 (2d Cir. 2009) the court indicated that the plaintiff is required to allege in what manner he was injured and how the defendant was negligent. In connection with the plaintiff's assault claim, the court also wanted allegations of the circumstances that would induce a reasonable apprehension of bodily harm. See also *Branham v. Dolgencorp, Inc.*, 2009 WL 2604447, at *2 (W.D. Va. 2009); *Doe ex rel. Gonzales v. Butte Valley Unified School Dist.*, 2009 WL 2424608, at *8 (E.D. Cal. 2009)(sufficiency of Official Forms “have been cast into doubt”).

⁸⁰ Judge Clark told a story about a negligence lawyer who, under the code pleading regime, regularly attached “two and a half pages of type-written allegations of detailed things that might happen in an automobile accident” to his complaint in order to allege every fact that possibly could constitute negligence while driving. Cleveland Proceedings, *supra* note 2, at 224. See also Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L. J. 177, 191 (1958) (forms are “the most important part of the rules”).

The courts and rulemakers may well face something of a Catch 22 in the complex litigation environment. Those cases, frequently involving Constitutional and statutory rights implicating national policies and affecting large numbers of people, include actions in which factual sufficiency is most difficult to achieve at the pleading stage and tend to be resource consumptive. Courts likely will apply the plausibility standard more rigorously in this context since many have argued that complex cases require more extensive pleading to address the supposed shortfalls of notice pleading.⁸¹ Recent decisions suggest that complex cases, such as those involving claims of various types of alleged discrimination, conspiracy, and antitrust violations, have been particularly vulnerable to the demands of *Twombly-Iqbal*.⁸²

Still, it remains to be seen how plaintiffs with potentially meritorious claims are expected to plead with factual sufficiency without the benefits of discovery, especially when they are limited in terms of time, money, and access to important information that often is in the possession of the defendant.⁸³ As Professor Spencer writes, “claims for which intent or state of mind is an element—such as discrimination or conspiracy claims—are more difficult to plead in a way that will satisfy the plausibility standard.”⁸⁴ If left unconstrained, demands for plausibility

⁸¹ Stephen B. Burbank, *The Complexity of Modern American Civil Litigation: Curse or Cure?*, 91 JUDICATURE 163 (2008); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions To Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 66, 98 (2007); see also Hoffman, *supra* note 58.

⁸² See, e.g., Cooney v. Rossiter, 583 F.3d 967 (2009) (dismissing conspiracy claim); In re Travel Agent Comm’n Antitrust Litigation, 583 F.3d 596 (2009) (dismissing antitrust collusion claim); Ibrahim v. Dep’t of Homeland Sec., 2009 WL 2246194 (N.D.Cal. 2009) (dismissing discrimination complaint); Vallejo v. City of Tucson, 2009 WL 1835115 (D. Ariz. 2009)(Voting Rights Act brought by disabled Mexican American veteran for denial of a provisional ballot dismissed based on finding it was an “isolated incident”); Dorsey v. Georgia Dep’t of State Road & Tollway Auth., 2009 WL 2477565, at * 6-7 (N.D. Ga. 2009)(“numerous” racially discriminatory remarks held insufficient for hostile work environment claim); Fletcher v. Phillip Morris USA, Inc., 2009 WL 2067807 (E.D. Va. 2009)(discrimination and disparate treatment of employees); see also the articles cited in note 41, *supra*.

⁸³ See Burbank, *supra* note 76, at 561 (“Perhaps the most troublesome possible consequence of *Twombly* is that it will deny court access to those who, although they have meritorious claims, cannot satisfy its requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries. . . . Ultimately, of course, *Twombly* raises the question whether our society remains committed to private litigation as a means of securing compensation for injury and enforcing important social norms.”).

⁸⁴ Spencer, *supra* note 59, at 459.

pleading may shut “the doors of discovery”⁸⁵ on the very litigants who most need the procedural resources the Federal Rules previously made available. It might be appropriate to obligate the plaintiffs to plead in greater detail about those matters on which they are informed or on which they can reasonably inform themselves, although there may be understandable tactical reasons why they might not want to do so. The pleading system should not be reduced to a game of hide the ball or tolerate laziness or sloth.⁸⁶ But to demand fact pleading on pain of dismissal when the facts are unknown or unknowable is a negation of the pleader’s ability to access the civil justice system.

This problem of information asymmetry—which obviously is a far more formidable concern for plaintiffs than defendants—presents in many litigation contexts. It is prevalent in actions challenging the conduct of large institutions—for example, antitrust and securities cases—when the necessary information relating to issues such as fraud, conspiracy, price-fixing, and corporate governance can be found only in the defendant’s files and computers. The same is true of questions such as intent, malice, and motivation.

The federal court system once championed access for potentially meritorious claims in all cases, but *Twombly* and *Iqbal* appear to have swung the pendulum in the opposite direction, significantly confining plaintiffs’ access to information needed for a meaningful adjudication in a potentially significant number of important contexts. The rulemakers probably should consider how far they are willing to adjust the language of the pleading and motion rules to embrace or to deviate from *Twombly-Iqbal*. The challenge will be to construct pleading and motion standards that make sense given the substantive variety of federal litigation. This may necessitate

⁸⁵ *Iqbal*, 129 S. Ct. at 1950.

⁸⁶ The difference in the pleader’s obligation based on what is known and what is not is demonstrated by two fact patterns. District Judge John G. Koeltl has presented in conversation and in public. In the first the plaintiff asserts “I have been subjected to a hostile work environment because I am Black” and says nothing else.

exploring the possible desirability of a differential pleading system, which obviously departs from the transsubstantivity principle, a subject discussed below. In effect, the plausibility pleading standard risks establishing a class of disfavored actions making it difficult for many prospective claimants, some with claims that may well have merit, to survive a Rule 12(b)(6) motion,⁸⁷ which would be a far cry from the foundational philosophy of the original Rules and the handling of other procedural issues that have arisen in the not too distant past. Already, recent decisions suggest that complex cases, such as those involving claims of various types of alleged discrimination, conspiracy, and antitrust violations, have been treated as if they were disfavored actions.⁸⁸

In the late 1990s, for instance, the Civil Rules Committee considered a proposal to amend the Rule 23 procedures for certifying subdivision (b)(3) classes that, in effect, would vest judges with the discretion to deny certification according to something in the nature of an “it ain’t worth it” standard, through which district courts would balance “whether the probable relief to individual class members justify[d] the costs and burdens of class litigation.”⁸⁹ In the end, the rulemakers abandoned the plan as inconsistent with the value of merits-adjudication and a

⁸⁷ See Spencer, *supra* note 59, at 460 (“Such a fluid, form-shifting standard is troubling . . . it is likely to impose a more onerous burden in those cases where a liberal notice pleading standard is needed most: actions asserting claims based on states of mind, secret agreements, and the like, *creating a class of disfavored actions* in which plaintiffs will face more hurdles to obtaining a resolution of their claims on the merits.” (emphasis added)). See generally Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. ____ (2010), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467799, at 33.

⁸⁸ See, e.g., Cooney v. Rossiter, 583 F.3d 867 (2009) (dismissing conspiracy claim); In re Travel Agent Comm’n Antitrust Litigation, 583 F.3d 896 (2009) (dismissing antitrust collusion claim); Ibrahim v. Dep’t of Homeland Sec., 2009 WL 2246194 (N.D.Cal. 2009) (dismissing discrimination complaint); Vallejo v. City of Tucson, 2009 WL 1835115 (D. Ariz. 2009) (Voting Rights Act brought by disabled Mexican American veteran for denial of a provisional ballot dismissed based on finding it was an “isolated incident”); Dorsey v. Georgia Dep’t of State Road & Tollway Auth., 2009 WL 2477565, at * 6-7 (N.D. Ga. 2009) (“numerous” racially discriminatory remarks held insufficient for hostile work environment claim); Fletcher v. Phillip Morris USA, Inc., 2009 WL 2067807 (E.D. Va. 2009) (discrimination and disparate treatment of employees).

⁸⁹ COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, Draft Minutes June 1997 Standing Committee Meeting at 19 (June 19–20, 1997) (statement by Judge Niemeyer), available at <http://www.uscourts.gov/rules/Minutes/ST06-1997-min.pdf>. Judge Niemeyer, the then-chair of the Civil Committee, “pointed out that the debate over the amendment had disclosed competing economic interests and basic philosophical differences as to the very purposes of Rule 23 and class actions.” *Id.*

concern that what is and isn't "worth it" often lies solely in the eyes of the beholder.⁹⁰ The Committee's decision echoed a similar judgment by the Supreme Court more than twenty years earlier in *Eisen v. Carlisle & Jacquelin*,⁹¹ in which, the Court rejected a "preliminary inquiry into the merits of a suit" on a class certification motion as contrary to that procedure's purpose.⁹² Both of these episodes underscore the dramatic shift in attitudes regarding the federal civil procedure system that plausibility pleading reflects. Whereas the Justices and rulemakers once refused to grant judges the authority to filter out class actions on a non-merits-based cost-benefit analysis, years later the Court effectively may have done precisely that in the pleading-motion to dismiss context.

Of course, no procedure system can prevent the inevitable discarding of some wheat with the chaff; that is simply a reality of a mass legal system. However, the question must be asked, how many potentially meritorious claims are we willing to sacrifice in order to achieve a reasonable quantum of filtration? How frequently should we terminate plaintiffs without a meaningful day in court because they lack sufficient information to plead with factual plausibility even though they have no ability to access it? Should our judicial system only open

⁹⁰ For a glimpse of some reactions to the proposed Rule 23(b)(3)(F) amendment, see REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES at 36–38, 36 (May 21, 1997), available at <http://www.uscourts.gov/rules/Reports/CV5-1997.pdf> ("This proposal drew more comment than any other. The comments ranged from strong support to vehement opposition. In many ways, the proposal became the focal point for abiding disputes over the 'private attorney-general' function of (b)(3) class actions. The most fundamental question is whether a procedural rule that emanated from the Enabling Act process should become the authority that supports private initiation and control of public law-enforcement values."); see also CIVIL RULES ADVISORY COMMITTEE, Draft Minutes October 1997 Meeting (October 16–17, 1996), available at <http://www.uscourts.gov/rules/Minutes/cv10-1796.htm> ("As a group, these changes can be read either to encourage or to discourage small-claim class actions. A more accurate assessment is that they increase trial court flexibility, expanding discretion in ways that will further reduce the scope of effective appellate review.") (statement by Judge Niemeyer).

⁹¹ 417 U.S. 156 (1974).

⁹² *Id.* at 177. In the past decade, there have been notable adjustments in the procedures for class action certification as a result of which the merits of a suit may be examined as part of the inquiry into the prerequisites for class certification, such as predominance of the common questions and superiority. See, e.g., *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2d Cir. 2006); *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 632 F.Supp.2d 42 (1st Cir. 2009); *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008).

its doors for claimants with the necessary resources and pre-action information to satisfy a judge’s “judicial experience and common sense”? Have we abandoned our gold standard—adjudication on the merits, with a jury trial when appropriate—and replaced it with threshold judicial judgments based on limited information, discarding all suits that the district court believes “ain’t worth it”? These are some of the macro-questions that the rulemakers may need to address.

C. PLAUSIBILITY AND THE PRESSURE FOR PRE-ADJUDICATORY DISPOSITION

The advent of plausibility pleading raises obvious parallels to the role of plausibility in the context of summary judgment motions.⁹³ As a result of the Supreme Court’s 1986 summary judgment trilogy,⁹⁴ which introduced a new “plausibility standard” in that context, Rule 56 motions have become a potent weapon for terminating cases short of trial. As I have discussed elsewhere at length,⁹⁵ the 1986 trilogy produced a significant escalation of summary judgment activity in many substantive litigation areas, and, in my judgment, has taken the procedure beyond its past function of separating the factually trialworthy from the factually trialworthless.⁹⁶ As one of the nation’s most accomplished procedure scholars writes: ultimately, the federal judiciary’s “retreat from the goal of adjudication on the merits [saw] the trial-termination rate decline precipitously, to the point that it is a quarter or less of the termination rate by summary judgment.”⁹⁷ The same type of expansive characterization of matters as being issues of law rather than of fact and increased judicial decision-making in the fact application arena, commented on earlier in connection with some post-*Twombly-Iqbal* pleading decisions, has

⁹³ See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁹⁴ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 312 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁹⁵ See Miller, *supra* note 23, at 1048–56.

⁹⁶ *Id.* at 1048–49.

⁹⁷ Burbank, *supra* note 76, at 561.

occurred under Rule 56. But the Court’s summary judgment shift did not satisfy those demanding the system be tightened further, and heightened pleading requirements have become an even earlier method of securing pretrial termination.

Just as the 1986 trilogy was concerned with restraining the so-called “litigation explosion” through the “powerful tool” of summary judgment,⁹⁸ so too the Court in both *Twombly* and *Iqbal* was concerned with developing a stronger “judicial gatekeeping role” for Rule 12(b)(6) motions.⁹⁹ Plausibility pleading may well become the federal courts’ primary vehicle for achieving pre-adjudicatory disposition.¹⁰⁰ If so, the introduction of plausibility pleading has transferred the primary gatekeeping function performed in recent years by summary judgment motions even earlier in the life of a case to motions to dismiss.¹⁰¹

This is a significant difference. Whereas summary judgment typically follows discovery and prevents cases lacking genuine issues of material fact from proceeding to trial, the plausibility pleading standard adopts this function at a case’s genesis, withdrawing the opportunity to “unlock the doors of discovery.” This particularly is true if the district judge stays all proceedings pending the often lengthy period between the motion and its determination; for many plaintiffs, this effectively denies them any hope of investigating and properly developing their claims.¹⁰²

A potential transfer of function from Rule 56 to Rule 12(b)(6) raises questions about the newfound demanding application of the Federal Rules.¹⁰³ “Plausibility”—apparently the Court’s

⁹⁸ See Miller, *supra* note 23, at 1056.

⁹⁹ See Hoffman, *supra* note 58, at 1220, 1224.

¹⁰⁰ See Spencer, *supra* note 59, at 450 (“In effect, then, the Court has moved forward the burden that plaintiffs must carry at later stages in the litigation up front to the pleading stage.”).

¹⁰¹ See *id.* at 447 n. 93 (“It is my contention that such scrutiny inappropriately moves forward summary judgment-like screening to the pleading phase.”).

¹⁰² *Iqbal*, 129 S. Ct. at 1950.

¹⁰³ Spencer, *supra* note 59, at 479 (“Thus I believe what we are witnessing is simply the latest and perhaps final chapter in a long saga that has moved the federal civil system from a liberal to a restrictive ethos.”).

word *du jour*—now applies both to summary judgment and to pleadings, although the difference between these two utilizations of the word is murky at best. Some even have argued that the motion to dismiss under *Twombly* has become a disguised summary judgment motion, attacking not only the legal sufficiency of the pleadings, but striving for a resolution by appraising the facts.¹⁰⁴ The positioning of the two motions on opposite sides of the discovery process means that only plaintiffs who have survived the first have an opportunity of finding relevant information to back up their factual allegations in the hope of surviving the second. As Professor Spencer writes, “[t]he only distinction is that at the pleading stage, the plaintiff’s factual allegations simply may be asserted rather than evidenced. But in both instances, if the facts presented do not present a plausible picture of liability, the claims will not survive.”¹⁰⁵ This approach contradicts—or at least obscures—the text of the two Federal Rules; whereas Rule 56 demands that claimants “set forth specific facts” that are in dispute following the availability of discovery, Rule 8(a)(2) only asks for a “showing” of the pleader’s entitlement to relief based on pre-institution investigation.

If the Court has placed the same substantive burden on plaintiffs at both stages of pretrial, does a meaningful distinction between Rules 12(b)(6) and 56 survive *Twombly-Iqbal*? The rulemakers may need to redefine the respective roles, standards, procedures, and limitations of these two motions in order to illuminate that distinction and rationalize pretrial motion practice.

II. CASE MANAGEMENT, LITIGATION COSTS, AND ABUSE

The move to plausibility pleading in *Twombly* and *Iqbal* was motivated in significant part by a desire to develop a stronger gatekeeping role for motions to dismiss to filter out a

¹⁰⁴ Epstein, *supra* note 81, at 69; Suja A Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

¹⁰⁵ See Spencer, *supra* note 59, at 486.

hypothesized excess of frivolous litigation, to defer abusive practices, and to contain costs.

Indeed, assumptions concerning the frequency and significance of these phenomena have led to a series of dramatic changes in pretrial litigation procedure—an increase in judicial case management, a more powerful summary judgment motion, and, now, a heightened pleading standard. Although some of the criticisms of today’s civil justice system certainly have merit, the picture generally portrayed is incomplete and probably skewed. It is distorted by a lack of definition and empirical data, which generates rhetoric that often reflects ideology or economic self-interest. As a result, reliance on these assertions may well impair the ability of rulemakers and courts to reach dispassionate, reasoned conclusions as to what is needed. Moreover, the picture of how our federal civil system is functioning generally has been viewed in recent years through a lens trained on concerns voiced by defendants, with the other side of the litigation equation going largely ignored. If assumptions about frivolous and abusive use of the system, judicial management, and litigation costs are driving pretrial process changes, it seems reasonable that the rulemakers should strive to understand these matters fully and appraise what is real and what is illusion before they shape our process any further.

A. COMBATING COST AND DELAY WITH PRETRIAL MANAGEMENT

The increase in the complexity, magnitude, and number of cases on federal court dockets in the past few decades have caused many to lament the “twin scourges” of the adjudicatory system, namely, cost and delay—laments not unique to federal civil litigation but concerns that seem to affect other legal systems and can be traced back to ancient times.¹⁰⁶ Reacting to

¹⁰⁶ See Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 1 (1984) (“The inefficiency with which the wheels of justice grind is not unique to our time. In ancient China, a peasant who resorted to the courts was considered ruined, no matter what the eventual outcome of the suit. Hamlet rued ‘the law’s delay.’ Goethe quit the legal profession in disgust over cases that had been languishing in the German courts for three hundred years. And in *Bleak House* Charles Dickens applied his great talent for social criticism to the ramifications of one of the classic examples of English legal ineptitude-- Jarndyce v. Jarndyce.”); see also Charles Dickens, *Bleak House* (Bradbury & Evans 1853) (focusing his social commentary on the long-running litigation in

complaints about those negatives, increased judicial control over the pretrial process has been provided through rulemaking, Supreme Court decisions, and less formal means, most notably the *Manual for Complex Litigation*.

During my tour as Reporter to the Advisory Committee on Civil Rules beginning in the late 1970s, it became increasingly clear that rulemaking policy was turning away from the trial phase and toward pretrial practice. The Committee made the conscious choice to concentrate on the pretrial phase as the best hope of meaningfully attacking the cost and delay problems. The 1983 amendments to the Federal Rules were an attempt to reduce these negative factors by giving district judges the tools to prevent excessive discovery and to take a more active role in moving cases through pretrial and encouraging settlement.¹⁰⁷ The techniques included formally validating the concept of judicial management, giving the district judge the power to impose some constraints on redundant and disproportionate discovery, and enhancing the threat of sanctions in the hope of improving lawyer behavior.¹⁰⁸ Subsequent amendments to Rules 16 and 26 reflected the Committee's continued commitment to case management as an effective means to combat cost and delay¹⁰⁹ and to encourage rational, merits-based settlements.¹¹⁰

Jarndyce v. Jarndyce, which concluded only after the lawyers' fees have consumed all of the money in the estate in question).

¹⁰⁷ See generally Arthur R. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility, Education and Training Series* (Federal Judicial Center, 1984).

¹⁰⁸ "Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices." Advisory Committee Notes to the 1983 Amendment to Rule 11, *reprinted in* 12A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d*, at App. C; *see also* 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d* §§ 1334, 1521.

¹⁰⁹ Ettie Ward, *The After-Shocks of Twombly: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 913 (2008) ("The amendments to the Federal Rules of Civil Procedure in 1983, 1993, and 2000 have provided the parties and courts greater resources to control runaway, excessive discovery. The amendments to the rules include giving greater authority to district court judges to exercise meaningful managerial control of the scheduling and scope of discovery under Federal Rule of Civil Procedure 16."); *see also* Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28

Since the 1983 amendments, case management has been encouraged as a valuable judicial tool and now enjoys widespread use in various forms. In 1985, the second edition of the *Manual for Complex Litigation*¹¹¹ was released, and it, like the original *Manual*, suggested various case management techniques that had proven successful in practice and deserved further use and development.¹¹² Now published by the Federal Judicial Center and in its fourth edition, most would say that the *Manual* has been valuable in helping judges manage “complex” cases effectively.¹¹³ In 2006, the Center published a pocket book for judges that describes some additional management techniques thought to be useful.¹¹⁴

Congress furthered the management trend by enacting the Civil Justice Reform Act of 1990,¹¹⁵ which required all district courts to develop and implement plans to reduce expense and delay. “Litigation management” was an express element to be considered by each district.¹¹⁶ Although the resultant plans varied, most of them contained the core elements of Rule 16 and the *Manual*, thereby calling for a considerable amount of district judge management.

REV. LITIG. 1, 25 (Fall 2008) (“The judicial role in supervising discovery was broadened significantly by the 1993 Amendments to the Federal Rules.”).

¹¹⁰ “For example, there is evidence that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process.” Advisory Committee Notes to the 1983 Amendment to Rule 11, *reprinted in* 12A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL: 3d, at App. C; *see also* THOMAS E. WILLGING, LAURA L. HOOPER & ROBERT J. NIEMIC, FEDERAL JUDICIAL CENTER. EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES, 69 (1996) (concluding that case management practices “limit the ability of a party to coerce a settlement without regard to the merits of the case” in the class action context).

¹¹¹ MANUAL FOR COMPLEX LITIGATION (2d ed. 1985). The original *Manual* was published in 1969.

¹¹² Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. PA. L. REV. 2225, 2231 (2000) (“In the introduction, Judge Pointer wrote that “[t]he various techniques suggested . . . either have been used regularly with success or deserve, in the opinion of the Board of Editors, further use and experimentation in appropriate cases.”).

¹¹³ *See* Edward D. Cavanagh, *Twombly, the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN’S L. REV. 877, 888 (2008) (“The *Manual* has been used successfully in numerous cases to keep down discovery costs and reduce unnecessary delay, discovering that a willing court can exercise meaningful control over claims and defenses asserted by the parties and discovery).

¹¹⁴ *See* William W. Schwarzer & Alan Hirsch, *The Elements of Case Management: A Pocket Guide for Judges*, Federal Judicial Center, p. 1 (2d ed. 2006) (“This manual briefly describes techniques that judges have found effective in managing their cases at various stages of the litigation process.”).

¹¹⁵ 28 U.S.C. §§ 471-482. In major part the legislation was sunset after seven years.

¹¹⁶ The quoted words appear in a number of the statute’s sections. *See, e.g.*, 28 U.S.C. §§ 471, 473.

While the Rules and the *Manual* were making more tools available for managing pretrial procedure, the Supreme Court was strengthening the summary judgment motion in its 1986 trilogy, empowering judges to weed out cases not deemed trialworthy. Summary judgment coupled with the judge's power to manage were thought an effective combination for controlling the pretrial process. Some commentators, myself included, even have argued that the more stringent summary judgment procedure provided the Bench with too much power to dispose of cases before trial and that the motion occasionally was (and continues to be) used somewhat too hyperactively.¹¹⁷

Until *Twombly*, the Supreme Court consistently sanctioned the efficacy of case management and summary judgment for containing discovery costs and eliminating unmeritorious cases. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,¹¹⁸ Chief Justice Rehnquist wrote that, without formal amendments to Rules 8 and 9, “federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”¹¹⁹ The Court reaffirmed these sentiments in *Crawford-El v. Britton*¹²⁰ in 1998 and in *Swierkiewicz v. Sorema N.A.*¹²¹ in 2002. And, obviously, both the 1983 and 1993 amendments of Rule 16, which dramatically expanded the

¹¹⁷ See generally Miller, *supra* note 23, at 1044–48.

¹¹⁸ 507 U.S. 163 (1993).

¹¹⁹ *Id.* at 168–69.

¹²⁰ 523 U.S. 574 (1998). “The trial judge can therefore manage the discovery process to facilitate prompt and efficient resolution of the lawsuit; as the evidence is gathered, the defendant-official may move for partial summary judgment on objective issues that are potentially dispositive and are more amendable to summary disposition than disputes about the official's intent, which frequently turn on credibility assessments.” *Id.* at 599. The preceding pages of the opinion offer an extended look at the ways a federal judge can manage a case in the context of qualified immunity.

¹²¹ 534 U.S. 506 (2002). “The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.” *Id.* at 512–13 (quoting 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1202 (1990)).

scope and contours of judicial management, were approved by the Court, as was the 2006 amendment that gave the court extensive control and discretion in the context of e-discovery.¹²²

An unexpected shift in the Court's attitude toward case management occurred with *Twombly*. Based largely on a somewhat dated 1989 journal article by Judge Frank Easterbrook,¹²³ Justice Souter concluded that case management has not been a success¹²⁴—the first time the Court had questioned the ability of district judges to manage pretrial procedures in a way that might limit costs and delays.¹²⁵ This conclusion served as an important justification for establishing the plausibility pleading standard,¹²⁶ with Justice Souter citing the potential for imposing large discovery costs on defendants as a reason to weed out cases not deemed plausible at the very beginning of the litigation process.¹²⁷ The *Iqbal* majority extended this line of

¹²² Just five months before *Twombly*, the Court in a unanimous opinion in *Jones v. Bock*, 549 U.S. 199 (2007) stated: “We once again reiterate, however—as we did unanimously in *Leatherman*, *Swierkiewicz*, and *Hill*—that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.”

¹²³ “Judges can do little about imposition discovery when parties control the legal claims to be presented and conduct the discovery themselves.” *Twombly*, 550 U.S. at 559, quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U.L. REV. 635, 638 (1989). The Court also cited data that discovery can account for ninety percent of litigation costs when it is actively employed. *Id.*, citing *Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure* (May 11, 1999), at 192, F.R.D. 354, 357 (2000). Yet, this empirical data does not necessarily corroborate the failure of case management to control discovery costs. Moreover, its association with the claim that case management has failed seems to imply that Justice Souter does feel that it supports his conclusion that case management has failed.

¹²⁴ “[T]he success of judicial supervision in checking discovery has been on the modest side.” *Twombly*, 550 U.S. at 559. The basis for that statement is unknown. There is no data indicating how a particular case might fare without management. Not cited was Judge Posner’s excellent, almost contemporaneous essay on the use of management techniques to avoid a premature dismissal in *American Nurses’ Ass’n v. Illinois*, 786 F.2d 716 (7th Cir. 1986). Justice Stevens’ dissent contended that the Court’s majority “vastly underestimates a district court’s case management arsenal.” *Id.* at 593 n. 13.

¹²⁵ See Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 898–99 (2009) (pointing out that *Twombly* is the first time the Supreme Court questioned the effectiveness of case management; prior to that case, the Advisory Committee had operated on the assumption that the management tools were viable).

¹²⁶ The Court refers to the “common lament that the success of judicial supervision in checking discovery abuse has been on the modest side,” *Twombly*, 550 U.S. at 559, and only cites one article in support of the conclusion. The *Iqbal* Court refers to this as the “rejection of the careful-case management approach.” *Iqbal*, 129 S. Ct. at 1953, citing *Twombly*, 550 U.S. at 559.

¹²⁷ “Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive.” *Id.* at 558. The Court’s opinion pays little attention to the various management developments in case management described in text.

thinking to government defendants.¹²⁸ Justice Breyer, however, offered a dissenting view in that case, endorsing “alternative case-management tools” designed “to prevent unwarranted litigation.”¹²⁹

Twombly-Iqbal conceivably has set up a somewhat illogical dichotomy given the prior general support for pretrial management. In deciding a motion to dismiss, judges may consider the hypothesized cost of discovery for the defendant, but they cannot look at the potential to cabin those costs with possibly effective judicial management.¹³⁰ It is curious that, in the same opinions, the Court entrusted district judges with the freedom to use “judicial experience and common sense” to dismiss a claim at genesis for noncompliance with a heightened pleading requirement, but, at the same time, denied them the freedom to manage cases in an efficient and economic manner to test the viability of the challenged claim for relief. Moreover, it has been noted that it is odd that the Court so easily dismissed case management across the board when none of the then sitting Justices had been a federal district court judge and therefore collectively lack federal civil trial experience¹³¹—especially since many district court local rules actively endorse and most judges utilize case management,¹³² and a number of post-1989 Rule

¹²⁸ “Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity.” *Iqbal*, 129 S. Ct. at 1953.

¹²⁹ Justice Breyer argued that “[t]he law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference. As the Second Circuit explained, where a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case and ‘mindful of the need to vindicate the purpose of the qualified immunity defense,’ can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials. . . . A district court, for example, can begin discovery with lower level government defendants before determining whether a case can be made to allow discovery related to higher level government officials.” *Id.* at 1962 (Breyer, J., dissenting) (citations omitted).

¹³⁰ “We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.” *Id.* at 1954 (citing *Twombly*, 550 U.S. at 559).

¹³¹ McMahon, *supra* note 44, at 869.

¹³² *See id.* (“It is unfortunate that the *Twombly* majority views the efforts of district judges in this regard to be less than adequate, commenting that ‘the success of judicial supervision in checking discovery abuse has been on the modest side.’ But with hundreds of civil cases on their dockets, district court judges do their best. Moreover, criticism about case management from a Court that collectively lacks much experience with trial-level civil litigation is difficult to digest.”); Charles R. Richey, *Rule 16 Revised, and Related Rules: Analysis of Recent Developments for*

amendments have established constraints on discovery. Also significant is the recent empirical data collected by the Federal Judicial Center¹³³ and the American Bar Association Section of Litigation,¹³⁴ which reveals a general consensus of practicing attorneys in favor of preserving case management in its current form.¹³⁵ In addition, it should be noted that, by allowing a consideration of possible discovery costs, the Court implicitly impaired the longstanding proposition that only matters found within or integrally related to the complaint may be considered on a motion to dismiss, unless the district judge chooses to convert it into one for summary judgment, further confusing the character of practice under Rule 12(b)(6).¹³⁶

Judges now may use judicial experience and common sense to balance potential discovery costs against the likelihood that a claim plausibly has merit.¹³⁷ These are not matters found within the four corners of a pleading. Indeed, they are not even matters likely to be found in the record as it exists at the time of the motion to dismiss. This radical departure from prior practice raises novel questions for the rulemakers and courts. Should parties be permitted to

the Benefit of Bench and Bar, 157 F.R.D. 69 (1994); *but cf.* Robert E. Keeton, *Time Limits on Incentives in an Adversary System*, 137 U. PA. L. REV. 2053, 2057 (1989).

¹³³ EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

¹³⁴ AM. BAR ASS'N SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 3, 6, 11, 123-44 (December, 2009).

¹³⁵ "Taking questions 74 and 75 together, there appears to be some consensus that the Rules should not be revised to discourage case management by federal judges and that, moreover, the Rules should not be revised to encourage additional case management by those same judges." *Id.* at 68.

¹³⁶ Before *Twombly* and *Iqbal*, trial judges only had the ability to consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, order, items appearing in the record of the case and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment." 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1357; *see also* *Tellabs, Inc. v. Makor Issues & Rights, Inc.*, 551, U.S. 308, 322-23 (2007). A judge, if considering "matters outside the pleadings," is empowered to treat a Rule 12(b)(6) motion as one for summary judgment. *See* FED. R. CIV. P. 12(d).

¹³⁷ "[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense." *Iqbal*, 129 S. Ct. at 1940, citing *Twombly*, 550 U.S. at 556. Surprisingly, the Court cites to *Twombly* for the proposition, but the *Twombly* opinion makes no explicit mention of these two terms. *Twombly* does indicate that sufficiency "turns on the suggestions raised by this conduct in light of common economic experience." *Id.* at 565. In addition, the judge is only authorized to consult "prior rulings and considered views of leading commentators." *Id.* at 556. The *Iqbal* interpretation of this passage, one that should be construed in the antitrust context, seems like an overly broad expansion of a minor suggestion.

explore and contest the relevance as well as the content of a judge's experience and common sense in their Rule 12(b)(6) motion submissions? Since the costs of and time needed for discovery probably cannot be appraised accurately by examining the complaint, should that now also be a matter of adversarial combat on the motion? Are the conventions regarding the construction of pleadings and the inferences to be drawn from them a thing of the past? Is there a symbiotic relationship between whether a stated claim is plausible and the projected extent and expense of discovery—the claim being treated as less plausible when the assumed discovery activity appears extensive and vice versa? And has the traditional de novo standard of appellate review been compromised by the subjective appraisals the Court has authorized? If the answer to any of these questions is yes, then we have moved even further from the traditional motion to dismiss than even the Court may have realized. The answers also may provide guidance as to whether the text of Rule 12 needs to be amended or whether these and other issues should be left to be developed by the federal courts. .

B. THE COSTS OF LITIGATION

The Supreme Court's focus on case management in *Twombly* and *Iqbal* is instructive in that it shows just how much we do not know about litigation cost and delay. *Twombly*'s emphasis on the defendant's costs also reveals how one-sided the discussion about expense has become. And the Court's ready acceptance of the blunt instrument of plausibility pleading as a barrier to discovery indicates how little information we have on the potential benefits and costs of any solution to the perceived deficiencies of the pretrial system. It would be highly desirable if the rulemakers structured the much needed research and analysis of these issues and ensure it is executed before the system succumbs further to the current pressure for more frequent and earlier pretrial adjudication.

If litigation costs are to be factored into a consideration of revising the existing pleading and motion rules, all of those costs should be taken into account, including those borne by plaintiffs. The costs to defendants—in particular large corporate and government entities—in time, money, and reputation have been decried frequently. Large expenditures characterize complex cases that drag on for years. *Twombly* justified establishing plausibility pleading on the basis of assumptions about excessive discovery costs and the threat of extortionate settlements.¹³⁸ Justice Souter noted that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases,”¹³⁹ regardless of the merits. And corporate defendants face pressures beyond the monetary claims of plaintiffs. Pending litigation may disrupt a company’s operations, diminish its assets, decrease investor confidence, stock prices, and intrude on pending business negotiations.

How much of this is fact? How much is fiction? Although it cannot be denied that defendants may face significant costs in federal litigation, the extent of those costs may be somewhat overstated—or partially self-inflicted—and certainly are not imposed across the litigation universe. According to one study, forty percent of federal cases employed no discovery at all, and a substantial portion of the remaining docket employed very little; the study concluded, however, that discovery still generated fifty percent of litigation costs overall.¹⁴⁰ The excessive costs of discovery cited in *Twombly* seem to occur in a small percentage of cases, although—according to that same authority—discovery constituted ninety percent of the costs in

¹³⁸ “We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc. v. Broudo* . . . when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.” *Twombly*, 550 U.S. at 558.

¹³⁹ *Id.* at 559.

¹⁴⁰ *Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure* (May 11, 1999), 192 F.R.D. 354, 357 (2000).

cases in which it was actively employed.¹⁴¹ Some of these costs, which were not quantified, may well be attributable to frivolous suits and abusive discovery requests, but that source of costs may be smaller than claimed given judicial control and the system's techniques for early termination. Since there is no common definition of what is abusive or frivolous—let alone agreement on how frequently either occurs—significantly greater study is necessary to distinguish unavoidable high costs from those caused by inappropriate litigation behavior. Some recent research by the Federal Judicial Center does not bear out Justice Souter's major assertion that discovery costs "push" defendants to settle. The majority of the Center's survey respondents reported that discovery costs had no effect on the likelihood of settlement.¹⁴²

The costs incurred by plaintiffs are less commonly noted—indeed, they are not discussed anywhere in *Twombly* and *Iqbal*¹⁴³—but they are no less important. For example, the defense bar and their clients are not always innocent victims of frivolous litigation or abusive conduct; indeed, it is fairly common for defense attorneys, who usually are compensated by the hour and paid relatively contemporaneously, to file dubious motions, make unnecessary discovery demands, and stonewall discovery requests to protract cases, enhance their fees, avoid reaching trial and facing a jury, and coerce contingent-fee lawyers into settlement. The different litigation economics of the respective parties obviously encourage resource consumptive practices by

¹⁴¹ *Id.*

¹⁴² EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), *supra* note 133, available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

¹⁴³ The closest the Court came to discussing the plaintiffs' costs in *Twombly* is when it found that "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery." *Twombly*, 550 U.S. at 558. The Court alluded to a potential cost of throwing out a claim before discovery. After that, it only discussed the burdens of allowing a claim to proceed to discovery that would be imposed on a defendant. The Court in *Iqbal* only discussed the costs imposed on defendants: "The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Iqbal*, 129 S. Ct. at 1953.

defendants in many situations.¹⁴⁴ Moreover, large amounts of time and money usually must be expended by practitioners working on a contingent basis to develop and initiate a case of any complexity—often requiring the retention of experts and then incurring expenses to fend off sequential complicated pretrial motions that could be terminal.¹⁴⁵ These financial facts of life plus judicial scrutiny and the deterrent effect of possible sanctions means that there is little incentive to undertake a matter lacking in substance.

It simply is unclear whether access barriers and enhanced opportunities for pretrial disposition lead to a meaningful reduction in the overall costs of a case. The efforts of contingent-fee lawyers are not free goods; they have value and must be husbanded. For the reasons just noted, rational plaintiff attorneys are very cost and time conscious. They generally avoid marginal motions and screen cases using their own version of plausibility before taking on clients in order to avoid unreimbursed expenses and lost opportunities. These restraints have become increasingly important as summary judgment has been invoked and granted more freely; they certainly will become even more prevalent with the added burdens of *Twombly-Iqbal*, making it harder for plaintiffs to find representation, even for potentially meritorious claims. Additionally, plaintiffs and their attorneys will have to invest greater resources investigating claims prior to filing in hopes of being able to plead enough to survive under the plausibility standard. This again means that some meritorious claims never will be brought, as plaintiffs may not have the resources to investigate effectively without the availability of discovery, let alone

¹⁴⁴ In *Twombly*, the plaintiff sought to limit the scope of the initial discovery and proposed a phasing approach—a proposal that ultimately was defeated. *Twombly*, 550 U.S. at 593 (Steven, J., dissenting). At oral argument, counsel for the plaintiff made it clear that the first phase of discovery would be limited to the conspiracy claim, which would be followed by a summary judgment motion, which would establish plausibility or terminate the case. Transcript of Oral Argument, at 54, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007) (No. 05-1126) (statement of Mr. Richards), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1126.pdf.

¹⁴⁵ See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1422 (1992).

gain access to critical information held by possible defendants or third persons.¹⁴⁶ For others, this means that contingent-fee lawyers may bear a larger burden of unreimbursed costs as more cases are dismissed. Has the Supreme Court simply transferred some of the expenses typically borne by the defense to plaintiffs in the form of higher costs of entering the system? If so, is there collateral damage?

Even though adding the plaintiffs' expenses to the other elements of litigation cost and delay seems to magnify the perceived problems, if research and analysis is to address the entirety of the subject intelligently, both sets of expenses must be understood. Again questions abound. Realistically, which costs can be ameliorated? By what procedural approach—heightened pleading, dispositive Rule 12(b)(6) or Rule 56 motions, effective management, or some combination of them? And which better serves the “just, speedy, and inexpensive” triad of Rule 1?

Whereas the *Twombly* Court refers to the possibility that plaintiffs can extort settlements from defendants through threats of expensive discovery,¹⁴⁷ there is no mention that heightened pleading, motion to dismiss, and summary judgment barriers may skew plaintiffs' valuations of their claims downward. A plaintiff's pretrial bargaining position is related directly to the probability of gaining access to discovery and making the threat of trial realistic. Both are diminished by today's magnification of pretrial disposition opportunities for defendants,¹⁴⁸ potentially obliging plaintiffs to settle earlier and for less than the merits of their cases otherwise

¹⁴⁶ See Stephen J. Choi, *The Evidence in Securities Class Actions*, 56 VAND. L. REV. 1465, 1472-73, 1499 (2003).

¹⁴⁷ *Twombly*, 550 U.S. at 558–59.

¹⁴⁸ “Similarly, the denial of a defendant's motion for summary judgment may give the defendant an incentive to make a reasonable settlement offer, rather than face the risk and expense of going to trial.” EDWARD J. BRUNET, MARTIN H. REDISH & MICHAEL A. REITER, *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE* 325–26 (2d ed. 2000); see also Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) (“More important, the nature of our civil process drives parties to settle so as to avoid the costs, delays, and uncertainties of trial, and, in many cases, to agree upon terms that are beyond the power or competence of courts to dictate.”).

might dictate. Moreover, we simply do not know what is meant by excessive discovery cost. There is no established common ground for this metric, which, most assuredly, must be evaluated contextually. Many cases justifiably require a substantial investment by the contestants.

Perhaps the concern about costs is somewhat exaggerated. The Federal Judicial Center recently completed a preliminary study regarding attorneys' experiences with discovery and related matters.¹⁴⁹ Some of the statistics are informative; they indicate that expenditures for discovery, including attorney's fees, in the surveyed matters amounted to between 1.6 and 3.3 percent of the total value at stake in the litigation.¹⁵⁰ Nor do we have a litmus test to identify extortionate settlements or know how frequently they occur. Even more elusive and rarely adverted to—let alone quantified—are the benefits to society that discovery enhances by enabling the private enforcement of public policies (some statutorily or Constitutionally based), promoting deterrence, increasing oversight, providing transparency, and avoiding the expenditures that otherwise might be needed to support government bureaucracies. Isn't the absence of these benefits a "cost" to society?

Other aspects of the Center's study are sobering: overall satisfaction with the pretrial process is higher and discovery costs appear more reasonable than the apocalyptic rhetoric has suggested. A majority of survey respondents disagreed with the idea that "discovery is abused in almost every case in federal court." Respondents largely were satisfied with the current levels of case management, and over half reported that the costs and amount of discovery were the "right amount" in proportion to the stakes involved in their cases. Although the significance of these

¹⁴⁹ EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

¹⁵⁰ *Id.*

numbers may be debated, it certainly is not the litigant-crushing figures *Twombly* indicated it might be. Real estate brokers charge an even higher percentage for their services. Certainly, and no one doubts that discovery can be enormously expensive in a small percentage of cases. But, *Twombly-Iqbal* have stated a pleading rule that burdens all cases based on what may be happening in a small fraction of them. For the great body of federal litigation, *Twombly-Iqbal's* medicinal cure may be worse than the supposed disease. As the Center's work product makes clear, anecdotal evidence of cost, delay, and abuse can depart widely from the reality experienced by most litigants.

Other aspects of the Center's study are sobering: overall satisfaction with the pretrial process is higher and discovery costs appear more reasonable than the apocalyptic rhetoric has suggested. A majority of survey respondents disagreed with the idea that "discovery is abused in almost every case in federal court."¹⁵¹ Respondents largely were satisfied with the current levels of case management,¹⁵² and over half reported that the costs and amount of discovery were the "right amount" in proportion to what was involved in their cases.¹⁵³

Appraising the system overall, it is unclear that aggressive Rule 12(b)(6) and Rule 56 filtration will reduce costs in the segment of cases that utilize the discovery mechanisms more than the increased costs likely to be incurred as a result of enhanced pre-institution activities, greater resources devoted to a larger number of dismissal and summary judgment motions, and, potentially, appeals. One can assume that Rule 12(b)(6) and Rule 56 motions will increase in number and that adversary combat over them will intensify, ultimately consuming more litigant

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* Compare AM. BAR ASS'N SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 2, 6, 9 (December, 2009). The Federal Judicial Center also has issued another study, EMERY G. LEE III & THOMAS E. WILLGING, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.prf/\\$file/costciv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.prf/$file/costciv1.pdf), identifying the factors associated with higher litigation costs. The Report confirms that very predictable causes are dominant.

and court time than in the past. Expanding on that theme, when a Rule 12(b)(6) motion is granted, plaintiffs are likely to seek leave to replead,¹⁵⁴ and the resulting skirmishes about that and collateral Rule 15 amendment matters will generate their own expenditures, as will appeals should judgment be entered following a denial of leave to replead or a judgments following a dismissal of the amended pleading of the refusal to allow an amendment.¹⁵⁵ Similar questions have been raised about the supposed cost savings from the 1986 trilogy's enhancement of the summary judgment motion.¹⁵⁶ In short, increased pretrial dispositions generate their own time and monetary expenditures that have yet to be measured.

Calculating litigant and systemic cost is not an easy task, but a thoughtful analysis that takes account of all the litigation players and expense elements is necessary to reach a reasoned conclusion about the heft of the cost and delay problems. The efforts undertaken by the Federal Judicial Center in this regard are to be applauded. But more sophisticated data is needed and other inquiries undertaken to understand these issues. Without it, dramatic changes to the Federal Rules will be (and have been) made in an information vacuum that obscures the true costs of litigation and the net gain (or loss) elevated pleading and pretrial motion practice will produce. It admittedly is difficult to capture this data and even harder to compare the soft,

¹⁵⁴ See 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1357 (“As the numerous case citations in the note below make clear, dismissal under Rule 12(b)(6) generally is not immediately final or on the merits because the district court normally will give the plaintiff leave to file an amended complaint to see if the shortcomings of the original document can be corrected.”).

¹⁵⁵ Some commentators have suggested that the *Twombly-Iqbal* plausibility standard will take more time and expense and lead to more appeals. See McMahon, *supra* note 44, at 868 (“The Supreme Court may have thought it was providing relief to the federal docket by making it easier to dismiss complaints, but that will not be the result. Instead, district courts will have to entertain more motions to dismiss from defendants emboldened by *Twombly*, and they will spend more time deciding those motions.”); see also Jason Bartlet, *Into the Wild: The Uneven and Self-defeating Effects of Bell Atlantic v. Twombly*, 24 ST. JOHN’S J. LEGAL COMMENT 73, 109 (2009) (discussing how dismissals with prejudice under the *Twombly* pleading standard may increase cost and delay in contradiction to the purpose of the standard).

¹⁵⁶ See Miller, *supra* note 23, for a discussion of the need to investigate the claims of cost savings resulting from a more powerful summary judgment motion; see also Samuel P. Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990); Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U.L. REV. 875 (2006).

qualitative value of access, merit adjudication, and the other public benefits of private enforcement with the seemingly hard, quantitative calculations that can be made of the resource costs to plaintiffs, defendants, and the courts. For example, what is the “cost” in dollar terms of a meritorious discrimination, consumer fraud, or antitrust case that is prematurely terminated or that is never instituted because of the deterrent effect of today’s more stringent pleading and motion regime? And, how many cases of that description are there? Given the current state of procedural flux, this evaluation of the pretrial process seems a necessary precursor for developing workable solutions. Perhaps rulemaking should await knowledge.

The Court’s announcement of plausibility pleading with its emphasis on the need for factual allegations has a direct impact on the accessibility of the federal courts to the citizenry. To a degree not yet determined, it is bound to have a chilling effect on a potential plaintiff’s or a lawyer’s willingness to institute an action or result in potentially meritorious cases being terminated under Rule 12(b)(6). Even though some federal judges may have deviated from notice pleading in the years preceding *Twombly* or *Iqbal*, those cases do not reflect the design of the pleading and motion structure promulgated in 1938 or the one described by the Supreme Court in *Conley* or its other prior decisions or the one applied by most federal courts for decades after *Conley*. Nor is it consistent with the view of our courts as democratic institutions committed to the resolution of civil disputes on their merits and in an egalitarian, transparent fashion. Nor is it consistent with the view that the federal courts are important instruments for the private enforcement of federal law and public policy.

C. NEED FOR FURTHER RESEARCH AND DEFINITION

The dramatic change in attitude toward judicial management reflects the current divergence in philosophy as to how to handle the pretrial process. With *Twombly*, the Court

wiped the slate clean, starting anew with plausibility pleading as the system's initial gatekeeper, rather than building on the existing tools of case management and the more demanding summary judgment motion that emerged in 1986. Appraising change of that magnitude requires a greater understanding of the implications of the tectonic shift that has occurred and much more clarity about the actual quality of pretrial management. Empirical data of a highly sophisticated character must be gathered to determine what the deficiencies of management are—and what they are not.¹⁵⁷ Who was closer to the mark, Justice Souter in *Twombly* or Justice Breyer in *Iqbal*?

Despite the Rules Committee's and the Supreme Court's (as well as Congress') previous endorsement of case management as an appropriate method to contain cost and delay, some commentators have challenged this idea philosophically and practically.¹⁵⁸ Critics have argued that case management is doomed to fail on both theoretical and practical grounds. Practical objections express the view that judicial resources are limited and assert that some judges appear to choose to spend little time managing cases.¹⁵⁹ Indeed, management is said to be left largely in the hands of magistrate judges in many federal courts.¹⁶⁰ Philosophical objections range from

¹⁵⁷ Asking for impressions about whether litigation is “too expensive” or “takes too long” is of little value as few, if any, attorneys would say it is “inexpensive” or “not long enough.” See, e.g., AM. COLL. OF TRIAL LAWYERS AND INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, CIVIL LITIGATION SURVEY, FINAL REPORT, at 17 (2008). See the sharp criticism of the conclusions drawn in the second of the cited surveys as not being supported by the survey results in J. Douglas Richards & John Vail, *A Misguided Mission to Revamp the Rules*, TRIAL, at 52 (Nov. 2009).

¹⁵⁸ See Bone, *supra* note 125, at 900–01 (2009) (suggesting that *Twombly*'s skepticism about case management might be justified). See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982) (arguing that case management was not proven to be effective and that it may harm the standards of impartial adjudication and hinder constitutional rights such as due process safeguards).

¹⁵⁹ See Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 96–97 (2009) (“The Rules permit, but do not require that judges take an active role in case management, and judges and litigants have economic and social incentives to minimize judicial participation. As a result, courts tend to involve themselves only infrequently in the day-to-day administration of cases.”).

¹⁶⁰ See Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989) (“Abuse there is, but it is more likely to occur in a case supervised by a district judge, whose primary responsibilities lie in trying cases and managing-somehow-a huge docket, than in a case supervised by a magistrate, whose most challenging and responsible task is, precisely, to manage discovery in big civil cases.”).

the view that the function of judges is to adjudicate, not manage, to a concern about a loss of judicial impartiality and the possible deleterious effects management may have on the adversary system.¹⁶¹

Judge Easterbrook's 1989 article contended that it would be impossible for judges to separate abusive discovery from extensive and "impositional"¹⁶² discovery requests made by attorneys practicing in good faith.¹⁶³ He concluded that "[j]udges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves."¹⁶⁴ Some contemporary critics of case management continue to cite Judge Easterbrook's theoretical assumptions,¹⁶⁵ yet there has been little empirical research conducted to confirm his conclusions, let alone to measure the amount or consequences of any management shortfall.¹⁶⁶ Even less effort has been devoted to explaining how today's judicial practices might be enhanced. Moreover, the article is now over twenty years old and preceded the effects of the revolution in summary judgment practice, the narrowing amendments to the discovery rules, the district court expense and delay plans and local rules that have emerged following the Civil Justice Reform Act, the extensive control over discovery now commonly exercised by district

¹⁶¹ See generally Resnik, *supra* note 158, at 376–78; Michael E. Tigar, *Pretrial Case Management under the Amended Rules: Two Many Words for a Good Idea*, 14 REV. LITIG. 137 (1994).

¹⁶² See Easterbrook, *supra* note 123, at 637–38 (“Stated differently, an impositional request is one justified by the costs it imposes on one’s adversary rather than by the gains to the requester derived from the contribution the information will make to the accuracy of the judicial process.”).

¹⁶³ *Id.* at 641 (“Lawyers practicing in good faith, therefore, engage in extensive discovery; anything less is foolish. . . . Indeed, many lawyers do not know whether their own discovery requests are proper or impositional; it is almost impossible to tell one from the other, and both are in the interests of the lawyer’s client.”).

¹⁶⁴ *Id.* at 638. Note that this is the same passage cited in *Twombly* to justify its disparagement of case management.

¹⁶⁵ See, e.g., Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L. J. 561, 602 (2001) (“Even were it feasible to prevent all abusive discovery costs -- an all-but-impossible task -- the costs inherent in discovery would be inescapable.”) (citing Judge Easterbrook, *supra* note 123, at 642); Stancil, *supra* note 159, at 97–100.

¹⁶⁶ The articles listed above do not refer to empirical work that validates Judge Easterbrook’s conclusion. Moreover, the only evidence cited in the Easterbrook article concludes that discovery abuse may be a problem. This data does not seem relevant to a discussion that already has concluded that assumption is true.

judges, and the traction and sophistication management has achieved under Rule 16 and the *Manual*. Justice Souter’s reliance on that article is not persuasive.

Many of the supporters and critics of case management rely heavily on ideology, which colors their views about how to improve the civil justice system’s pretrial phase. Little has been done to research the efficacy of case management—or its component parts—through meaningful studies of what district courts actually do, what works, and what does not.¹⁶⁷ Anecdotal evidence, assumptions, and theory are not enough to validate the drastic changes that have been made to the pleading and motion processes. The rulemakers should evaluate this subject in light of comprehensive, intelligent, and dispassionate information regarding the costs and challenges of civil litigation; this examination must go well beyond recording the impressions and attitudes of participants if they are to achieve a credible balance of efficiency, access, and quality.

In addition to research on discovery and management, which clearly are inseparable from pleading and motion practice, it would be desirable—if possible—to reach a common understanding of what is meant by “abusive” discovery and “frivolous” litigation. These words are uttered in a mantra-like fashion time and again in litigation cost and delay discussions. Yet, despite their abundant utilization, it is unclear what they embrace. Does “abusive” discovery refer to almost all discovery, as Judge Easterbrook suggested?¹⁶⁸ If so, then the term basically is meaningless. Or is it abusive only when the plaintiff requests irrelevant information merely to pressure the defendant and extort a settlement? Are frivolous cases those “with no ‘reasonably

¹⁶⁷ None of the articles cited in the preceding notes contain any meaningful empirical data. Also, one commentator has claimed that there is no “reliable” empirical data about the ability of trial judges to curb discovery problems. See Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1989 (2007).

¹⁶⁸ Easterbrook, *supra* note 123. It is interesting to look at the sentence Justice Souter wrote in *Twombly* to reject the case management approach. The majority opinion seems to imply that costly discovery and discovery abuse are one in the same. “It is no answer to say that a claim just shy of plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management,’ given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.” *Twombly*, 550 U.S. at 559.

founded hope that the [discovery] process will reveal relevant evidence?” Or is the category broader than that?¹⁶⁹ And what about frivolous or abusive defensive behavior—dilatory motions, harassing discovery demands, or noncompliance with legitimate discovery requests, designed to delay any forward progress toward trial and to consume the typically limited resources of contingent-fee plaintiffs’ lawyers? Attrition, unfortunately, is a strategy of choice for some. And why isn’t all of this a matter for the sanction structure or discovery regime, rather than burdening the pleading and motion rules?

I spent a great deal of time during the first six months of my tenure as Reporter for the Advisory Committee on Civil Rules attending bar association meetings and judicial conferences, asking attendees what they thought constituted abusive discovery and frivolous litigation—phenomena I had been told were at the heart of the litigation cost and delay the Committee was trying to counteract. At times I felt like Diogenes with a lamp looking for an honest opinion. Although no single, generally agreed upon standard emerged from these discussions, there were two nearly universal themes in the various explanations and examples I heard. First, frivolous litigation is the lawsuit the other side brings against your client. Second, abuse is whatever the opposing counsel does. My “research” methods admittedly were unscientific and the foregoing summary of my “findings” somewhat glib, but I have yet to find a more specific or illuminating definition of these terms. The reality is that the line between zealous advocacy and litigation misbehavior is obscure at best and we really have no idea as to the frequency (or infrequency) of abuse and frivolity.¹⁷⁰ Yet cosmic anecdotes flood the Rialto. This is troublesome; the alleged

¹⁶⁹ *Id.*

¹⁷⁰ See THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE’S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES, 227 (2009), which characterizes the notion that there is “widespread frivolous antitrust litigation” as a “myth.”

phenomena, that have driven pretrial policy decisions over the past few decades remain largely subjective, unquantified, and anecdotal.

By leaving the notions of abusive discovery and frivolous litigation undefined in *Twombly* and *Iqbal* while simultaneously encouraging judges to factor these concerns into their Rule 12(b)(6) decisions, the Court has authorized judges to let their subjective views and attitudes regarding these phenomena and whether they occur with any significant frequency influence their decision-making. Is this appropriate? It compounds the subjectivity inherent in the plausibility inquiry. When exercised at the threshold, this virtually unbridled discretion may undermine historic norms and debilitate the private enforcement of important substantive policies, as well as Constitutional due process and jury trial rights.¹⁷¹ And it may lead to greater inconsistencies in the application of federal law, diminish the predictability of outcome that is critical to an effective civil dispute resolution system, as well as the confidence people have in it, and increase forum and judge shopping. These are potential consequences—and system costs—that the rulemakers should consider when evaluating the utility of case management and its relation to the current state of pleading and pretrial motion practice.

III. THE FUTURE OF RULEMAKING AND THE FEDERAL RULES

The Supreme Court's legislative decisions in *Twombly-Iqbal* and the 1986 trilogy have caused many to question the continuing role of the rulemaking process and its current statutory structure. The Rules Enabling Act¹⁷² long has been understood to mean: first, only the

¹⁷¹ See Resnik, *supra* note 158, at 427 (“Therefore, management becomes a fertile field for the growth of personal bias . . . Nevertheless, neither the Supreme Court, the lower federal courts, nor Congress has considered the effect of judicial management on impartiality.”). Since the Rule 12(b)(6) motion now acts as a gatekeeper, the greater discretion afforded the district judge gives him or her increased influence over the right to a day in court.

¹⁷² 28 U.S.C. § 2072 (1934).

rulemaking machinery or an act of Congress can change a properly promulgated Federal Rule;¹⁷³ and, second, the Federal Rules must be “general” and transsubstantive—they must apply in the same way to all types of federal actions. *Twombly* and *Iqbal* cast doubt on both of these foundational assumptions.

A. THE VALUE OF THE RULEMAKING PROCESS

The Supreme Court has expressed its faith in rulemaking as we have known it in several cases.¹⁷⁴ Less than a decade prior to *Twombly* and years after the 1986 trilogy, the Court noted that “our cases demonstrate that questions regarding pleading, discovery, and summary judgment are resolved most frequently and most effectively either by the rulemaking process or the legislative process.”¹⁷⁵ Indeed, forty years ago the Court said: “We have no power to rewrite the Rules by Judicial interpretations.”¹⁷⁶

Critics argue that, with *Twombly* and *Iqbal*, the Court may have forsaken its long-held commitment by reformulating the Rules’ pleading and motion to dismiss standards by judicial fiat. These assertions echo much of the criticism directed at the Court following its 1986 summary judgment trilogy, when complaints were voiced that the Justices had amended Rule 56 without employing the Enabling Act’s procedure.¹⁷⁷ Today, even those who defend the Court’s

¹⁷³ See Burbank, *supra* note 76, at 536.

¹⁷⁴ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993) (“Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”); see also *Miller*, *supra* note 23, at 1010–11.

¹⁷⁵ *Crawford-El*, 523 U.S. at 595.

¹⁷⁶ *Harris v. Nelson*, 394 U.S. 286, 298 (1969) (the discovery provisions of the Federal Rules do not apply to habeas proceedings).

¹⁷⁷ See *Miller*, *supra* note 23, at 1029; Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 99, 187–87 (1988) (arguing that changes wrought by the trilogy should have been instituted by the Advisory Committee through the amendment process because that process is more public and results in better and more substantial information for the profession than unilateral Supreme Court action); see also Nancy Levit, *The Caseload Conundrum*,

“pragmatic” shift away from notice pleading admit *Twombly* and *Iqbal* effectively have redefined Rules 8(a)(2) and 12(b)(6)¹⁷⁸—casting doubt on the Court’s commitment to the rulemaking process.

A significant drawback of amendment by judicial dictate is the Supreme Court’s lack of democratic accountability. Whereas the rulemakers generally conduct open meetings¹⁷⁹ and follow an extensive notice-and-comment procedure that allows anyone interested some—albeit a limited—form of participation,¹⁸⁰ the Court’s revision of the Rules grants five Justices the power to bypass the statutorily established process and legislate on important procedural matters, often in ways that determine whether litigants ultimately will be able to have a meaningful day in court and whether important Constitutional and Congressional mandates are enforced. In addition to its democratic pedigree, rulemaking provides other advantages, such as the Advisory Committee’s superior access to academic study and empirical research. As Professor Burbank points out, the Supreme Court is “ill equipped to gather the range of empirical data, and lacks the practical experience, that should be brought to bear on the questions of policy, procedural and substantive, that are implicated in considering standards for the adequacy of pleadings.”¹⁸¹ Considering the Court’s current ideological makeup and the continuing trend toward increasingly early case disposition, rulemaking by judicial mandate does not bode well for many of those policies that are furthered by private enforcement. The rulemakers therefore must determine whether they will reassert their role as the architects of the Federal Rules, or accept that a

Constitutional Restraint and the Manipulation of Jurisdiction, 64 NOTRE DAME L. REV. 321, 327–30, 360–62 (1989) (discussing summary judgment as one example that courts are inserting caseload concerns into formulation of jurisdictional doctrines and by doing so, treading on the legislature’s territory).

¹⁷⁸ See Bone, *supra* note 125 at 893–94; Epstein, *supra* note 81, at 64.

¹⁷⁹ 28 U.S.C. § 2073(c)(1).

¹⁸⁰ See Burbank, *supra* note 76, at 537. The rulemaking machinery is, to a significant degree, controlled by people appointed by the Chief Justice.

¹⁸¹ Burbank, *supra* note 76, at 537.

significant aspect of their responsibility now may be to codify the Court’s decisions, or simply remain silent and defer to case development.

This question becomes especially important in light of the difficulties that arise when the Court announces piecemeal procedural revisions in the context of a case’s particular facts, rather than on the basis of a holistic appraisal of the effects such changes might have on the application of other Federal Rules and on the tremendous array of variegated matters on federal court dockets. One commentator, for example, has described how plausibility pleading stands in conflict with several other Rules, most notably Rules 8(f), 9(b), 11(b), 12(e)¹⁸²—and one might add other parts of Rule 8 and Rule 15(a) to the list. This is an important point. At least in certain respects, the Court’s holdings in *Twombly* and *Iqbal* may have eclipsed the operation of these Rules, some of which have provided safeguards for ensuring that plaintiffs are given the opportunity to plead or replead potentially meritorious claims. The two decisions raise concerns that, instead of enabling plaintiffs to correct their factually insufficient pleadings, the motion to dismiss may be employed to dispose of claims the court believes should be disfavored.¹⁸³

Under the *Twombly-Iqbal* pleading standard, the role that other pretrial Rules will play in future cases is uncertain. For instance, although the Court denies creating a heightened pleading standard for substantive areas not mentioned in Rule 9(b),¹⁸⁴ the distinction between demands for “particularity” in Rule 9(b) and the Court’s insistence on a showing of “factual sufficiency” under *Twombly* is difficult to ascertain. Although the second sentence of Rule 9(b) allows mental states, including knowledge and intent, to be alleged “generally,” *Twombly* and *Iqbal*

¹⁸² See Spencer, *supra* note 59, at 469–70.

¹⁸³ Cf. Miller, *supra* note 23, at 1016 (“Surveys confirm that judges view prompt rulings on summary judgment and Rule 12(b)(6) motions as the most effective procedural devices for filtering out frivolous litigation.”) (citing Elizabeth C. Wiggins, Thomas E. Willging & Donna Stienstra, THE FEDERAL JUDICIAL CENTER’S STUDY OF RULE 11, 2 FJC DIRECTIONS 3, 31 (1991)).

¹⁸⁴ *Twombly*, 550 U.S. at 570.

required specific factual allegations on issues of precisely this character—namely, conspiracy and purposeful discrimination. And it is unclear whether the forgiving and “justice” seeking amendment policy of Rule 15(a) survives plausibility pleading. Did the Court intend to reduce the force of Rule 15? Should the rulemakers take action to prevent *Twombly-Iqbal* from being interpreted to reach that result?¹⁸⁵ Sounding a pragmatic note, there are potential cost consequences. If Rule 15 does survive unscathed, the growing number of dismissal motions will generate additional amendment requests and repleading; if the applicability of Rule 15 is narrowed, judgments following dismissals will be entered and additional appeals from denials of leave to replead may result.

In sum, if the principles articulated in *Twombly* and *Iqbal* are to be retained, either with or without formal Rule amendment, the rulemakers probably should canvas the remaining Rules, including Rule 84, as well as the Official Forms the latter authorizes,¹⁸⁶ to determine whether corrective textual steps are necessary to restore the overall coherence of the Rules relating to pleading and pretrial motion procedures. But before engaging in that process or codifying the two decisions, it would be desirable to step back and make a serious assessment of the Rules’ fundamental principles and objectives. What is at stake warrants that type of broad look at the Rules’ underpinnings.

B. THE END OF TRANSSUBSTANTIVITY?

¹⁸⁵ Preliminary research has shown that several courts have continued to grant leave to replead liberally, after *Twombly-Iqbal*. *E.g.*, *Dupros v. McDonald*, 2010 WL 231548 (D. Ariz. 2010). This does not contradict—if anything it supports—the next sentence in text. *See supra* note 78. Similar questions arise as to the future of Rule 11(b)(3), which allows court papers to be signed on the basis that “factual contentions” will have support “after a reasonable opportunity for further investigation or discovery.” *See generally* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1335.

¹⁸⁶ *See* *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374 (N.D. Cal. 2009) (noting the difficulty of “reconcil[ing]” Form 18 with *Twombly-Iqbal*).

In addition to establishing the rulemaking process, the Rules Enabling Act’s provision for “prescrib[ing] general rules of practice and procedure”¹⁸⁷ has been understood to mean that the Federal Rules should be “uniformly applicable in all federal district courts [and] uniformly applicable in all types of cases.”¹⁸⁸ Under the tenets of transsubstantivity, the general application of Rule 8’s pleading standard and the motion rules should not vary with the substantive law controlling a particular claim.¹⁸⁹ Thus, Rule 9 purportedly governs the only contexts in which different pleading standards can be applied.¹⁹⁰ In *Swierkiewicz v. Sorema, N.A.*,¹⁹¹ for example, the Supreme Court in 2002 rejected heightened pleading standards in employment discrimination cases and reaffirmed the status of the Federal Rules as “general rules.”¹⁹² The same principle applies to motions to dismiss and summary judgment. The Third Circuit, however, has ruled that *Swierkiewicz* no longer is authoritative after *Twombly-Iqbal*.¹⁹³ Courts in other circuits disagree.¹⁹⁴

¹⁸⁷ 28 U.S.C. § 2072 (1934).

¹⁸⁸ Burbank, *supra* note 76, at 536. See *id.* at 541–42 for a discussion of the 1935 Advisory Committee’s commitment to the transsubstantive quality of the Federal Rules.

¹⁸⁹ See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertion: An Exorcism of the Body of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2069 (1989); Spencer, *supra* note 59, at 457.

¹⁹⁰ See generally 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D §§ 1291-1315.

¹⁹¹ 534 U.S. 506 (2002).

¹⁹² *Id.* at 512. In *Flower v. UPMC Shadyside*, 578 F.3d 203 (2009), the Third Circuit recently found that *Swierkiewicz* is a victim of *Twombly-Iqbal*; *Guirguis v. Movers Speciality Services, Inc.*, 2009 WL 3041992 (3d Cir. 2009). Other courts disagree, *Gillman v. Inner City Broadcasting Corp.*, 2009 WL 3003244, at *3 (S.D.N.Y. 2009).

¹⁹³ *Guirguis v. Movers Specialty Services, Inc.*, 2009 WL 3041992 (3d Cir. 2009) (slip op.); *Fowler v. UPMC Shadyside*, 578 F.3d 203, (2009).

¹⁹⁴ *Gillman v. Inner City Broadcasting Corp.* 2009 WL 3003244, at *3 (S.D.N.Y. 2009) (“*Iqbal* was not meant to displace *Swierkiewicz*’s teachings about pleading standards for employment discrimination claims because in *Twombly*, which heavily informed *Iqbal*, the Supreme Court explicitly affirmed the vitality of *Swierkiewicz*.”); *but see* Argeropoulos v. Exide Tech., 2009 WL 2132442, at *6 (E.D.N.Y. 2009) (“[T]his kind of non-specific allegation might have enabled Plaintiff’s hostile work environment claim to survive under the old ‘no set of facts’ standard for assessing motions to dismiss, . . . [b]ut it does not survive the Supreme Court’s ‘plausibility standard,’ as most recently clarified in *Iqbal*.”).

Under *Twombly* and *Iqbal*, it is quite possible that, in reality, the Court has abandoned (or compromised) its devotion to the transsubstantive character of the Rules.¹⁹⁵ On the surface, however, the Court claims that the enhanced pleading standard will be applied uniformly for “all civil actions”¹⁹⁶ but it also indicated the principle is to be applied contextually. Thus far, of course, the Court has applied plausibility pleading only to two atypical actions for which several lower courts previously had advanced heightened pleading—antitrust and governmental discrimination claims.¹⁹⁷ Moreover, as noted earlier, the Court insisted in *Twombly* that Form 11 would continue to suffice for negligence pleading.¹⁹⁸ If that holds true, plausibility may be transsubstantive in name only; in practice, some form of notice pleading may survive for simpler, run-of-the-mine, actions. This distinction in the standard’s application may address some of the perceived deficiencies in applying the pre-existing pleading regime to today’s complex litigation while preserving the notion of transsubstantivity as a generic principle.¹⁹⁹ Thus, it may fall to the rulemakers to decide whether to reaffirm transsubstantivity, transmogrify it, or expressly abandon it.

It is arguable that the catechism of transsubstantivity actually had been discarded in all but name long before *Twombly* and *Iqbal*. In practice, many lower courts applied heightened factual pleading requirements in a variety of substantive areas, such as antitrust, discrimination, and securities.²⁰⁰ A system that accepts a three-page complaint for a negligence claim and

¹⁹⁵ See Burbank, *supra* note 76, at 555.

¹⁹⁶ FED. R. CIV. P. 1.

¹⁹⁷ It appears that the Court may be creating a hierarchy of actions, with a bias toward fairly stringent gatekeeping in three types of cases: disfavored actions, like libel or slander; actions that threaten to disrupt government functioning; and “mega cases” that impose large financial burdens on defendants. See the cases cited *supra* note 38.

¹⁹⁸ *Twombly*, 550 U.S. at 565 n.10.

¹⁹⁹ See Bone, *supra* note 125, at 890–91 (arguing that *Twombly*’s plausibility standard is in line with the rule drafters’ “pragmatic commitment to making procedure an efficient means to enforce the substantive law accurately”). See generally Epstein, *supra* note 81.

²⁰⁰ See Fairman, *supra* note 26, at 990; Fairman, *supra* note 1, at 617–18; Marcus, *supra* note 26, at 482; Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501 (1992).

effectively requires a one hundred-page complaint for an antitrust suit hardly can be described as applying the same standard.

There is other evidence that the bloom is off the transsubstantivity rose. Rule 16 provides judges with extensive discretion to manage cases on a differential basis depending on the complexity of the issues involved as well as other factors.²⁰¹ In the discovery arena, Rule 26(a)(1)(B) exempts certain classes of cases from the mandatory disclosure requirements.²⁰² In a related vein, the Civil Justice Reform Act of 1990 produced a plethora of district court expense and delay plans that are inconsistent in many respects and depart from the Federal Rules in various ways.²⁰³ Congress certainly disregarded the notion of transsubstantivity in creating super-heightened pleading and sanction rules under the PSLRA for private securities fraud litigation. But that was done by legislation. Local Rules and many individual judge's standing orders magnify the differences from case to case and district to district. And, of course, there us Rule 9(b). It is clear that, in reality, not all cases are treated alike, despite any ongoing aspirational devotion to transsubstantivity. Maybe the time has come to "retire" that principle, judicially, legislatively, or by benign neglect.²⁰⁴ A bit more of that later.

C. DEALING WITH *TWOMBLY-IQBAL*: A RETURN TO THE RULEMAKING PROCESS OR RESORT TO LEGISLATION?

²⁰¹ FED. R. CIV. P. 16. For example, Rule 16(c)(2)(L) encourages courts to consider "adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Some Local Rules call for systematic differential case management tailored based on complexity, time required for trial preparation, and the availability of judicial and other resources. *E.g.*, Rule 16, Northern District of New York. Congress clearly disregarded the notion of transsubstantivity in creating super-heightened pleading and sanction rules under the PSLRA for private securities fraud legislation; that legislation, of course, was not governed by the Enabling Act.

²⁰² FED. R. CIV. P. 26(a)(1)(B). For a number of years, the Rule empowered each district to decide whether to apply the provision. Many opted-out creating substantial inconsistency of application. Several of the Court's pre-*Twombly-Iqbal* decisions intimate that differential pleading standards could be established through the rulemaking process, a notion that is inconsistent with the assumed meaning of the Enabling Act's reference to "general rules." *See, e.g., Jones*, 549 U.S. at 224; *Leatherman*, 507 U.S. at 168-69.

²⁰³ *See generally* Tobias, *supra* note 145.

²⁰⁴ *See generally* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732, 739-40 (1975).

The Court's bypass of the rulemaking process in *Twombly* has raised a serious question. Ultimately, the rulemakers must give some thought to identifying the purpose of today's elaborate statutory process given the Supreme Court's willingness to revise aspects of the Rules on its own. If *Twombly* and *Iqbal* take us toward an era in which the role of the rulemakers is partially reduced to deciding whether to codify the Court's Rule-related decisions, it would be an unfortunate turn of events. Given the Justices' dependence on what issues reach the Court, they necessarily are reactive and their "rulemaking" inevitably interstitial. Moreover, rulemaking would be deprived of the talents typically found on the Advisory Committee and at other stages of the process. The better approach, I think, would be for the rulemakers to take a "business as usual" approach. Since fairly unique pleading contexts were before the Court in both *Twombly* and *Iqbal*, they had to be decided. However, it is possible that the two opinions simply were designed to signal the rulemaking bodies that a reexamination of pleading and pretrial motions was in order and intended to be a predicate for amending the Rules by the usual process in light of the concerns the Court expressed.

Unquestionably it is difficult for the rulemakers to second-guess the Court's decisions let alone turn away from them.²⁰⁵ Yet it is important to remember that they are expected to exercise independent judgment, and that the Court ultimately may accept their decisions. Further study and analysis of the objectives underlying *Twombly* and *Iqbal* as well as a full exploration of all the relevant but potentially countervailing policies may arm the rulemakers with a

²⁰⁵ An attempt to revise Rule 56 to take account of the Supreme Court's 1986 summary judgment trilogy eventually went nowhere. According to the then Reporter, "the argument that seemed to prevail in the Standing Committee against the revision of Rule 56 was that it would be inappropriate for our committees to be trespassing on a lawmaking role that the high Court had appropriated for itself. I was not the only person present who was resistant to a notion that seemed to be a misplaced modesty and deference by those to whom Congress had assigned the role of disinterested drafting of procedural law for its non-partisan approval." Paul D. Carrington, *Politics and Civil Procedure Rulemaking*, at 48, available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/A639D88AF7A5A7F5852576B6004D8D9F/\\$File/Paul%20Carrington%2C%20Politics%20and%20Civil%20Procedure%20Rulemaking.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/A639D88AF7A5A7F5852576B6004D8D9F/$File/Paul%20Carrington%2C%20Politics%20and%20Civil%20Procedure%20Rulemaking.pdf?OpenElement).

perspective and knowledge that were unavailable to the Court. Given the importance of the issues under discussion, a lesser effort would be unfortunate.

There are several avenues the rulemakers can take. As noted, they may decide to codify *Twombly-Iqbal* and rewrite Rule 8(a)(2), in which event corresponding amendments to the other pretrial rules impacted by the decisions would be necessary. Or the rulemakers may wish to await judicial developments and the emergence of a corpus of experience at the trial and appellate levels while conducting the analyses that are needed. In some quarters, the latter approach might be criticized as an abdication of responsibility or creating a risk that events overtake efforts that should be undertaken now. And, of course, the rulemakers can bring *Conley's* notice pleading philosophy out of “retirement”; certainly there is support for that.

An imponderable in appraising these possibilities is the extent to which Congress will participate in the formation of policy on this subject. Certainly the legislative pot has been stirred. Shortly after *Iqbal* was decided various interest groups, including civil rights and consumer interest advocates, began pressing for congressional action. Out of these efforts came the Notice Pleading Restoration Act of 2009,²⁰⁶ introduced in the Senate by Senator Arlen Specter, which seeks to accomplish exactly what its title suggests. Formal hearings that were held by the Committee on the Judiciary on December 2, 2009 and various constituencies have provided input in the months following those hearings. In March, 2010 a potential substitute bill was circulated by Senator Whitehouse that enumerates a number of congressional findings, assumes that the restoration will be followed by action by the Advisory Committee, and ties restoration to the Supreme Court’s jurisprudence as it existed before *Twombly*. As of this writing, therefore, the Senate bill is still a work in progress. The House of Representatives has been active as well. On October 27, 2009, a hearing entitled “Access to Justice Denied:

²⁰⁶ S. 1504, 111th Cong., 1st Sess. (2009). Several law professors have been providing assistance to the Senate staff.

Hearings on *Ashcroft v. Iqbal*” was held by the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, although no formal bill was before it. A Bill has now been drafted and introduced by another House Committee and additional hearings have been scheduled.²⁰⁷ Both the House and the Senate proposals, as well as others circulating on the Internet, purport to restore be respectful of the rulemaking process and assume the Advisory Committee would take up the subject from a pre-*Twombly* base point. Defense interests opposed to any legislation of this type have been mobilized, led by the Chamber of Commerce, and the fate of the proposals is unclear as of this writing.

Even if the rulemakers choose to codify plausibility pleading or some variant of it, they not only will need to ensure that other pretrial rules are made consistent with it, but they also may have to consider other changes to Rule 8 itself to preserve a balance in the pleading obligations of the parties. For instance, given the Court’s focus in *Twombly* on the precise language of Rule 8(a) and its conclusion that plaintiffs must provide a “showing” of factual sufficiency to support their claims, it follows that the plausibility standard similarly should apply to counterclaims, cross-claims, and third-party claims.²⁰⁸

Somewhat uncertain, however, is *Twombly-Iqbal*’s applicability to various forms of denials and affirmative defenses. Neither Rule 8(b) nor Rule 8(c) contains the magical word “showing,” and both modes of defensive pleading typically are alleged in a formulary, conclusory, and non-informative fashion. If, in fact, plausibility pleading is retained and held to turn strictly on the language of Rule 8(a)(2), federal courts might not extend it to Rules 8(b) and 8(c) as well. If that proves true, the rulemakers would have to consider whether to revise Rule 8

²⁰⁷ H.R. 4115, 111th Cong., 1st Sess. (2009). The present House Bill would preserve *Conley*’s “no set of facts” language.

²⁰⁸ *See, e.g.,* *Carpenters Health & Welfare Fund of Philadelphia v. Kia Enters. Inc.*, 2009 WL 2152276 (E.D. Pa. 2009) (counterclaim).

in order to correct this imbalance in pleading burden in deference to the quest for the metaphorical “level litigation playing field.” Conversely, if the new pleading structure is applied across the board by judicial decision or Rule revision, then in theory these defensive elements could be challenged by a Rule 12(f) motion to strike for insufficiency as a corollary to Rule 12(b)(6). Thus far, the cases are divided on the point.²⁰⁹

The Court obviously has not yet addressed this matter, since, as Justice Stevens noted in *Twombly*, the defendants in that case never were required to answer the plaintiffs’ claims despite years of litigation. Since that typically will be the case,²¹⁰ even if the plausibility standard includes and applies uniformly to all types of defensive pleadings, plaintiffs still will bear a disparate pleading burden as a practical matter as long as defendants only need move to dismiss following the complaint.²¹¹ Thus, even if the heightened pleading requirements were reciprocal, their application would not be fair or even-handed.

The preceding paragraph simply identifies one of a number of textual and policy issues confronting the rulemakers even if they decide to leave *Twombly-Iqbal* untouched or to codify it. Ironically, any changes to what a defendant might be obliged to plead to show the plausibility of affirmative defenses also would have cost and delay consequences that would have to be considered in determining whether efficiency savings actually are realized from the shift to

²⁰⁹ Compare *Shiner v. Wszola*, 2009 WL 1076279 (E.D.Mich. 2009); *Holtzman v. B/E Aerospace, Inc.*, 2008 WL 2225668, at *2 (S.D.Fla. 2008); *United States v. Quadri*, 2007 WL 4303213 (E.D.Mich. 2007), holding *Twombly* applicable, with *Charleswell v. Chase Manhattan Bank, N.A.*, 2009 WL 4981730, at *4 (D. V.I. 2009); *First Nat. Ins. Co. of America v. Camps Services Ltd.*, 2009 WL 22861, at *2 (E.D.Mich. 2009); *Romantine v. CH2M Hill Engineers, Inc.*, 2009 WL 317469 (W.D. Pa. 2009), holding *Twombly* inapplicable. Ironically, some courts have excused defendants from compliance with *Twombly-Iqbal* because of the need for discovery. See *Stoffels v. SBC Communications, Inc.*, 2008 WL 4391396, at *2 n.3 (W.D.Tex. 2008); *Voeks v. Wal-Mart Stores, Inc.*, 2008 WL 89434, at *6 (E.D.Wis. 2008).

²¹⁰ “Plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not ‘plausible’ provide a legally acceptable reason for dismissing the complaint? I think not.” *Twombly*, 550 U.S. at 571 (Stevens, J., dissenting).

²¹¹ One wonders how “admitted” or “denied” can be subjected to the plausibility standard, however. Although, affirmative defenses could be the subject if a motion to strike under Rule 12(f), plaintiffs rarely challenge them at the pleading stage.

plausibility pleading. Whatever pathways prove promising, variations in judicial practice born of habit, temperament, and context inevitably will continue to exist. One must be mindful, however, that, although judicial discretion is a necessity in the implementation of management techniques, it must be exercised in a realistic and even-handed manner that does not weaken substantive policies or reflect personal philosophical preferences or counterproductively burden the pretrial process.

IV. RE-BALANCING THE FEDERAL RULES: A FEW THOUGHTS ABOUT POSSIBILITIES

Surely there are procedural possibilities that lie between the *Conley* regime and that of *Twombly-Iqbal*. The rulemakers often have proven themselves to be an inventive lot; perhaps now is the time for that spirit of innovation to come to the fore. Ultimately, they may have to confront the task of reconciling the values of 1938 with the realities of 2010, finding a way to uphold the principle of access and the policy objectives underlying the original Rules while adjusting to today's litigation conditions. It is unclear at this juncture whether this will (or should) take the form of a few textual modifications or a wholesale revision of pretrial procedure.

If federal pleading and motion to dismiss practice are not returned to their pre-*Twombly-Iqbal* state or something approximating it and one assumes a continuation of the current condition of jurisprudence on these subjects, there is work to be done on the Rules and a few suggestions of lines of inquiry may be appropriate at this point.²¹² I do not pretend that any, let alone all, of these offerings are the best way forward, or imply that they are in any way comprehensive of what may be possible; at a minimum, each deserves some study and

²¹² Proposals similar to some of the ones I suggest below also have been raised by others. See, e.g., AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, FINAL REPORT, *supra* note 32; INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS (2009).

evaluation. The thoughts that follow are largely unelaborated and some overlap. As a past Reporter, I have no illusions about the difficulties of working out the details. Nor do I harbor any illusion about the political and ideological forces that are likely to beset the rulemaking process.

In considering these thoughts, the following questions seem basic—at least in my mind. Has litigation changed so much that the ethos of access, equalization, private enforcement, and merits-adjudication no longer can be served?²¹³ Do we need to abandon the foundational principles of the Federal Rules to meet the pressures of the complexity of modern litigation? And, what quality of justice do we want, and how much does it cost?

A. PROVIDING ACCESS TO INFORMATION NEEDED TO SATISFY THE PLAUSIBILITY STANDARD

Since the combined effect of *Twombly-Iqbal* and the summary judgment trilogy is to require the plaintiff to have greater knowledge concerning his or her claim either before filing or immediately thereafter, inequality of information access during those critical time frames pose a significant problem. Unfortunately, any solution is likely to add to the burdens and protraction of pretrial, but perhaps that is a price properly paid.

Thought might be given, for example, to some form of limited pre-institution discovery. Present Federal Rule 27 is too restricted to perform that function. Forms of pre-institution discovery currently are available in some states, such as New York, under Section 3102(c) of the New York Civil Practice Law and Rules, which allows the pretrial preservation of evidence and the identification of witnesses. Texas Rule of Civil Procedure 202.1(b) is somewhat broader and empowers the court to order a deposition “to investigate a potential claim on a suit.” Only a provision fo the Texas character would be a meaningful response to the information assemetry

²¹³ See Charles E. Clark, *Special Pleading in the “Big Case,”* 21 F.R.D. 45, 46 (1957) (“I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleading. . .”).

problem. Judicial authorization and narrow inquiry parameters would be necessary ingredients of any expansion of Rule 27.

A related possibility might be authorizing early, limited, and carefully sequenced discovery following the interposition of a motion to dismiss. Contained discovery before the motion's resolution could provide a fruitful middle ground for filtering cases that lie between the traditional Rule 12(b)(6) motion based on the complaint's legal insufficiency and a motion based on the complaint's failure to meet the precepts of *Twombly-Iqbal*. It would not permit full-fledged discovery—with its accompanying costs. The procedure, somewhat analogous to Rule 11(b)(3) and Rule 56(f), would provide the needed peek at the merits to avoid undesirable restraints on the institution or the premature termination of cases and reduce the possibility of failures of private enforcement.

Perhaps a formula can be crafted to permit this type of circumscribed post-institution and pre-motion to dismiss discovery under careful judicial management protocols that focus on the plausibility requirement, if that is to be retained, especially in contexts such as those involving a defendant's mental state and situations in which a private or government defendant is in sole possession of critical information. Obviously this approach must be constructed carefully to assuage those who fear anything that smacks of allowing the discovery camel's nose under the litigation tent.

In *Iqbal*, to be sure, the Court indicated that the current structure of Rule 8 forbids any access to discovery if the plausibility standard is not met.²¹⁴ That point is neither irrefutable nor immune from revision and I understand that a few courts have winked at it. Nor is there any automatic stay on discovery while a motion to dismiss is pending except in PSLRA cases. If the

²¹⁴ *Iqbal*, 129 S. Ct. at 1954 (“Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.”).

Court’s proscription is taken literally, however, a significant revision of the pleading rules may be necessary to create a more textured solution to the information access problem.

B. A NEW PROCEDURE RELATING TO PLAUSIBILITY

Possibly as an alternative to the suggestion discussed in subpart A, the rulemakers might consider creating a new motion that would lie between Rule 12(b)(6) and Rule 56 and provide a new management tool for district judges. As things now stand, the plausibility pleading standard has destabilized the long-held assumption that the motion to dismiss—and, previously, the code motion to dismiss and the common law demurrer—only is addressed to a pleading’s legal sufficiency. The summary judgment motion historically also has been thought to present a legal issue because it could be granted only when “there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.”²¹⁵ Even after the Supreme Court’s *Celotex* and *Liberty Lobby* decisions, which equated summary judgment with the directed verdict motion (now the motion for judgment as a matter of law), the Rule 56 motion continues—at least in theory—to be a matter-of-law motion.²¹⁶

Rule 12(b)(6) motions under *Conley* served the legal filtering function well, but plausibility now authorizes factual assessments and judgmental evaluations in addition to resolving legal questions. Perhaps a new procedure would be useful to address the new type of decision-making created by this shift. One approach might be to enhance the Rule 12(e) motion for a more definite statement. Rule 12(e) long has been considered a relatively weak and limited

²¹⁵ FED. R. CIV. P. 56(c).

²¹⁶ “The moving party is “entitled to a judgment as a matter of law” because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. “[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “In essence, though, the inquiry under each [summary judgment and directed verdict] is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986).

procedure because of its restrictive language,²¹⁷ but this need not continue to be the case. By expanding on elements of existing Rule 12(e) the rulemakers may be able to custom tailor a new procedure, which would be invoked in response to a motion to dismiss to enable the district court to permit a modicum of discovery when plausibility rather than pure legal sufficiency was in issue. This could be accomplished as a separate Rule, possibly denominated “Motion to Particularize of a Claim for Relief.”²¹⁸ It could be a free-standing motion or invocable as a cross-motion to a Rule 12(b)(6) motion (or both) and operate as something akin to the pre-Federal Rule discovery device known as the bill of particulars. A plaintiff might be allowed to anticipate the motion to dismiss, move for plausibility discovery, and, when appropriate, amend the complaint. When and how the procedure might be employed, the extent of the discretion given the district judge to grant or deny or modify the request, how much limited discovery might be permitted, and what form it would take obviously pose difficult policy questions. Presumably the complaint’s possible deficiencies would have to be identified and the “particularization” limited to those matters.

Another procedural route that might achieve the same access to information includes expanding the concept of automatic disclosure. This could be accomplished by increasing the number of categories in the mandatory disclosure provision now found in Rule 26(a).²¹⁹ It also could be done in a separate Rule or by empowering district judges to authorize specified

²¹⁷ See generally 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d §§ 1374–79.

²¹⁸ See, e.g., AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, FINAL REPORT, *supra* note 32, at 6 (“A new summary procedure should be developed by which parties can submit applications for determination of enumerated matters (such as rights that are dependent on the interpretation of a contract) on pleadings and affidavits or other evidentiary materials without triggering an automatic right to discovery or trial or any of the other provisions of the current procedural rules.”).

²¹⁹ Mandatory disclosure was adopted despite the objection of virtually the entire bar. See generally 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2053. A history of the process that led to the adoption of mandatory disclosure the Advisory Committee’s then Reporter. See Carrington, *supra* note 205, at 22-34.

disclosure on a case-by-case basis as part of the initial or an early Rule 16 conference. It might provide the district judge with the particularization needed for making a more informed judgment as to the plausibility of a particular claim for relief. Obviously a procedure of this type would be effective only if it could be utilized before resolution of the Rule 12(b)(6) motion challenging the complaint on plausibility rather than legal sufficiency grounds, although those categories often overlap. Unfortunately, these ideas, as was true of those in the preceding subpart, increase pretrial motion practice, which may be an inevitable byproduct of any attempt to ameliorate the information imbalance consequences of demanding plausibility pleading. Perhaps this suggests the rulemakers should seek pleading and motion formulae that lie between *Conley* and *Twombly-Iqbal*?

C. IMPROVING CASE MANAGEMENT

The rulemakers should evaluate the utility of case management because understanding the process is inextricably interwoven with any consideration of pleading and motion practice. Is it completely defunct, in need of serious modification, or just awaiting some experience-based tweaking? I cannot see the rulemakers simply accepting as determinative the negative comments about case management by Justice Souter in *Twombly*. Even assuming that, as practiced today, management does not offer an optimal set of tools for addressing the exigencies of contemporary litigation, it seems unlikely that it is—and has been for all these years—a failure or incapable of meeting at least some of the practical concerns expressed by the Court and others.

Abandonment is not a rational option and nothing in the Federal Judicial Center's preliminary work referred to earlier suggests it should be. The district judge, through his or her control over scheduling and the discovery process probably represents the best—if not the only—hope currently available for containing excessive litigation behavior and the type of

attrition activity that breeds cost and delay. Maybe that suggests strengthening it and being more directive about its use. Perhaps it would be useful if district judges were firmer in insisting on compliance with scheduling and other management orders, particularly discovery orders, and made it clear that a case's movement toward trial is inexorable. This may entail being willing to make the threat of sanctions of various types a more realistic deterrent.²²⁰

With the benefit of further empirical study that takes account of all the pretrial process costs, the rulemakers may be able to make educated, dispassionate decisions about the utility and proper role of case management as it relates to the pleading and motion structure. Inevitably variations in practice born of habit, temperament, and context will continue to exist. One must be mindful, however, that, although judicial discretion is a necessity in the implementation of management techniques, it must be exercised in a realistic and even-handed manner that does not weaken substantive policies or reflect personal philosophical preferences.

There may be procedural mechanisms, for example, that might compensate for the alleged defects in case management and meet legitimate concerns about cost, abuse, and frivolity, yet allow for the resurrection of some aspects or all of the pre-*Twombly-Iqbal* pleading and motion practice.

It is highly unlikely that the existing procedural tools are being put to optimum use. For example, the phased discovery offered by counsel but rejected in *Twombly* has been used in many cases and seems worthy of more consideration.

Moreover, other disciplines, such as information science and business management, may have something to offer the rulemakers in terms of identifying the best—or, at least, more effective—practices for minimizing litigation costs and delays. Importing relevant skills and

²²⁰ See, e.g., *In re Phenylpropanolamine (PPA) Litigation*, 460 F.3d 1217 (9th Cir. 2007); *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (9th Cir. 2001); *In re FELA Cases*, 2009 WL 129599 (M.D. Fla. 2009).

experiences from these fields, which may involve new forms of education of both district and magistrate judges, and restructuring the process may produce more flexibility, better management, less Rambo-like lawyer conduct, and reduce disparities in its use. This even may include reformulating the roles of magistrate judges and para-judicials in civil cases or rethinking the pretrial workload distribution among courthouse personnel or the modes of training that should be made available through the Federal Judicial Center. It may be that our thinking about management matters has been too static and that Rule 16 and the *Manual* are not yet sufficiently delineated and textured to meet the challenges of some elements of contemporary litigation. The foregoing raises the satellite question of how much detail is appropriate for inclusion in Rule 16, which was lengthened considerably in 1983 and 1993.

D. A TRACKING SYSTEM

Professor Hoffman has criticized some legal writers as “Traditionalists”—those who are so wedded to the principles the original drafters championed that they overlook the practical deficiencies of notice pleading in light of contemporary litigation realities. According to him, this relentless focus on the past leads many traditionalists to argue unconvincingly for the reinstatement of notions from a bygone era.²²¹ So, a personal *mea culpa* may be in order. As a traditionalist, I was brought up, educated, and trained in the heyday of the original conception of the Rules by people who believed in its liberal ethos of access, transsubstantivity, equality of treatment, private enforcement of public policies, and quality merit adjudication. But, as noted at the outset of this paper, the earth has moved, and transsubstantivity may be nothing but a cherished relic of the past. Procedure does not exist in a vacuum. It must serve and reflect the substantive law.

²²¹ See Hoffman, *supra* note 58, at 1236.

Not surprisingly, some “modern” thinkers have proposed a tracking system that has differential procedural rules depending on a case’s substantive underpinnings or its dimensions.²²² Although this and similar proposals have elicited strong resistance, there may be a great deal of legitimacy behind the concept that bears scrutiny. It is apparent that Rules 1 and 2, which once worked in harmony, now have become irreconcilable in some respects. A recent survey conducted for the Federal Judicial Conference bolsters this conclusion and shows sizable discontinuities in litigation costs, for example.²²³ A second document produced by the Center concluded, not surprisingly, that litigation cost variations resonate to such factors as higher monetary stakes, longer processing times, electronic discovery, and greater case complexity.²²⁴ The general applicability of the Federal Rules to every civil action²²⁵ may have come into conflict with the “just, speedy, and inexpensive determination”²²⁶ of those actions, especially for contemporary cases at either end of the complexity spectrum.²²⁷ Tracking is an idea whose time may have come.

Of course, I do not believe that the transsubstantive nature of the Rules should be abandoned based on unproven assumptions about abusive and frivolous lawsuits. Instead, the

²²² See *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 213 (1990) (testimony of Mr. Gerson); John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 555, 561–62 (1999); see also Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1398–98, 1418 (1992). *But see* Burbank, *supra* note 76, at 545.

²²³ The survey found that the median costs reported by defendant attorneys was \$20,000 in cases that employed at least one type of discovery. EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), at 37 *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf). Yet, the top fifth percentile group of cases reported \$300,000 in costs. *Id.* Obviously, it is only in a relatively small percentage of cases that these substantial litigation expenditures are experienced.

²²⁴ LEE & WILLGING, LITIGATION COSTS IN CIVIL CASES, *supra* note 153.

²²⁵ FED. R. CIV. P. 2.

²²⁶ FED. R. CIV. P. 1.

²²⁷ 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 1217 (“These rules fully reflect the basic philosophy of the federal rules expressed in Rule 1 that simplicity, flexibility, and the absence of legalistic technicality are the touchstones of a good procedural system.”). Perhaps tracking by case dimension would be more promising

rulemakers must insist on an extensive exploration of the present situation to determine how best to approach burdensome cases as opposed to simple cases. Without a doubt, it will be difficult to create a workable tracking or substantive law differential system, since at present it is unclear how best to define categories of cases and draft customized rules. I remember when working with the judicial authors of the original *Manual for Complex and Multidistrict Litigation* (as it was then titled) that they thought long and hard about a possible definition for “complexity” that would clarify the ambit of the document. In the end, their attempts were frustrated, and they decided only to include a highly generalized statement. Perhaps tracking by case dimension would be more promising.

Drafting a tracking system may well be arduous and contentious. Yet the British have constructed one. That system includes three tracks: the small claims track, for claims up to £5,000; the fast track, for claims between £5,000 and £15,000; and the multi-track, which takes cases of larger value, complexity, and importance.²²⁸ Claims not based on monetary value are assigned to the most appropriate track. Because each track provides standardized instructions that are meant to apply to all cases within its scope, most require little specialized judicial attention. Although there actually are multiple opportunities for judicial involvement under each track, small claims cases generally are handled with minimal supervision and technicality. The fast track provides litigants with an efficient means of bringing relatively simple cases to trial, with a focus on one-day hearings within thirty weeks of their assignment to the track. The multi-track offers the greatest variety in management, with procedures that can vary from simple

²²⁸ See generally ADRIAN ZUCKERMAN, CIVIL PROCEDURE 482-500 (2d ed. 2006). A number of countries employ special procedures for different types of actions. *E.g.*, German Code of Civil Procedure §§ 592, 689, described in PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 425-28 (2004). Many civilian systems have specialized commercial courts or panels.

standardized directions, similar to the fast track, to regular, hands-on judicial involvement in complex cases.

The British system is not weighted down by a discovery regime comparable to ours. That tracking model would have to undergo major revision in order to work in the federal courts, and assignment by dollar amount would have to be different. The British small claims track, with its modest cap on case value, for example, is difficult to square with the federal courts' more than \$75,000 diversity amount in controversy requirement. Or the rules delimiting the tracks might be more effectively based on complexity level or type of action. But the British system's focus on standardized rules for each track and differential levels of judicial involvement may provide a useful concept for a federal tracking experiment.²²⁹

Tracking is not a concept that is alien to the existing federal system. Rule 26(a)(1)(B) creates a track by allowing eight categories of cases to bypass the mandatory disclosure requirement. The *Manual for Complex Litigation* provides something in the nature of ad hoc tracking for an important portion of the federal docket. The *Manual's* management guidelines for complex cases encourage greater judicial involvement than typically is seen in simpler cases to minimize discovery costs and to reduce delay.²³⁰ Similarly, the Multidistrict Litigation statute²³¹ and the Judicial Panel on Multidistrict Litigation promote combining factually and legally related cases to simplify the pretrial process and avoid redundancy, effectively forming a track. The Civil Justice Reform Act of 1990 authorized the district courts to consider "differential treatment of civil cases" in formulating their expense and delay plans.²³² Some

²²⁹ It may be appropriate to reassess our understanding of the words "general rules" in the Rules Enabling Act. Rules general to a track, similar to those in the British system, may be sufficient without requiring a legislative change in the rulemaking authorization.

²³⁰ See Cavanagh, *supra* note 113.

²³¹ 28 U.S.C. § 1407.

²³² 28 U.S.C. § 473.

District Court Local Rules have the same effect.²³³ Moreover, some states, including New York and California use a form of tracking by assigning cases to courts based on amount in controversy or to specialized tribunals by type of action, as deemed appropriate.

Tracking may be a workable solution particularly if a cost-benefit analysis shows that the Federal Rules' procedural gold standard has become too expensive to be employed in all cases, but the rulemakers are unwilling to abandon our high quality system entirely. However, if there is resistance to abandoning transsubstantivity principle because of its long-standing character, it may be appropriate for Congress to recast the Rules Enabling Act to modify the "general rules" requirement to fit today's circumstances. Perhaps what is needed is a more open recognition that the "one size fits all" philosophy that prevailed in the 1930's no longer may be the most apt litigation model and there seems to be considerable recognition of that.²³⁴ Indeed, that was Congress' judgment in enacting the Civil Justice Reform Act of 1990.

E. SANCTIONS

I mention this subject with some trepidation given my prior involvement with it as an Advisory Committee Reporter. Consideration might be given to restoring some of the elements of the 1983 amendment to Rule 11 that were eliminated by the 1993 amendment, perhaps including a partial reinstatement of compensation and punishment as legitimate goals of the sanction process; these principles continue to be applicable under Rule 16(f) and parts of Rule 37.²³⁵ Meaningful judicial deterrence seems desirable to curtail inappropriate pleading motion

²³³ Local Rule 16.1(a)(3)(G) of the Western District of New York calls for a "meaningful" discussion of "the need for adopting special procedures for managing difficult actions involving complex issues, multiple parties or difficult legal questions."

²³⁴ The Federal Judicial Center Preliminary Report show support for conducting an experiment with a simplified procedure system in several district by party consent. *See* LEE & WILLGING, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE, *supra* note 133, at 53-54

²³⁵ Rule 16(f) authorizes the imposition of compensatory sanctions for certain types of noncompliance with that Rule. The Private Securities Litigation Reform Act preserves the mandatory sanction character of the 1983 version of Rule 11. 15 U.S.C. § 71z-1(c).

and discovery conduct and to strengthen effective management. Perhaps the sanction rules should be revisited to see if standards of lawyer behavior can be further articulated to produce a sophisticated and nuanced sanction regime that will minimize litigation misconduct whatever its form, always recognizing the need to protect adversary system values. Of course, any sanction structure would have to be applied in an even-handed manner and in a way that avoided the motion cottage-industry that arose under the Rule 11 version that existed between 1883 and 1993.²³⁶

V. CONCLUSION—*DIOGUARDI* REDUX

Admittedly, today's litigation realities are strikingly different from the world that generated the original Federal Rules. Strong forces have moved case disposition earlier and earlier in the litigation process in an attempt to solve the perceived problems of discovery abuse, frivolous lawsuits, and litigation expense. Although we must live in the present and plan for the future, it is important not to forget the important values and objectives at the heart of the 1938 Federal Rules. In that vein, one wonders: how would *Dioguardi* be decided today?²³⁷

John Dioguardi's complaint actually alleged a number of facts, but would those facts be sufficient today to support a plausible inference of wrongdoing? The allegations consisted of a series of disjointed statements; it left holes in many key elements and did not provide any articulated legal theory. Judge Clark identified a conversion claim, even though Dioguardi never stated that the Collector of Customs took his tonic bottles, but merely alleged that "it isn't so

²³⁶ Various legislative proposals regarding Rule 11 have been put forward in recent years. *See, e.g.*, Proposed Frivolous Lawsuit Prevention Act of 2009, Sen. Bill 603, 111th Cong., 1st Sess. (2009). Care must be taken to avoid the possible use of Rule 11 to undermine access through over-deterrence. *See generally* Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987).

²³⁷ Am. Compl., reprinted in JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, CIVIL PROCEDURE: CASES AND MATERIALS 561 (10th ed. 2009).

easy to do away with two cases of 37 bottles of one quart. Being protected, they can take this chance.”²³⁸ And any first year student also can see—or intuit—a trespass claim (as well as a number of other possible theories). Would the Second Circuit be so forgiving today?²³⁹

Now, unlike then, a federal judge is instructed to determine whether an inference of wrongdoing by the Collector of Customs is plausible. Judicial experience and common sense—necessarily matters beyond the complaint—might counsel a judge that property conversion or trespass was a realistic concern at Customs and thus plausible, depending on the reputation of the federal agency’s workings. Is there a more likely alternative explanation? Perhaps it is just as plausible that Dioguardi did not follow the applicable procedures to receive his goods, leading to their sale at auction, as it is that the Collector of Customs was dishonest or careless. In light of *Iqbal*’s assumption that it is not plausible that high-ranking government officials would act toward Muslim Pakistanis with discriminatory motives, a claim of conversion or trespass against a government official might be regarded as implausible. In truth, how do we—or more to the point, the district judge—know?²⁴⁰

The judge then might weigh the burdens of subjecting the Collector of Customs to discovery. Perhaps Dioguardi’s is one of the relatively modest, simple cases in which discovery would be limited. If a tracking system replaced transsubstantivity, his complaint might slide by on an easier pleading standard for small cases and be expedited. However, the Customs Collector runs a large, complex government operation that generates countless records each day. Discovery—especially e-discovery—could be quite costly and disruptive of the agency’s functions. A court today might conclude that allowing Dioguardi to go beyond the complaint “just ain’t worth it.”

²³⁸ Am. Compl. ¶ 5.

²³⁹ It is interesting to note that, the Second Circuit upheld the complaint’s sufficiency in both *Twombly* and *Iqbal*.

²⁴⁰ Obviously some would argue that the issue should be determined by a jury,

Perhaps most striking is the difference in attitude between Judge Clark and the thrust of the Supreme Court's decisions. He found two claims—and intimated there were more—within the muddled complaint²⁴¹ and evinced a desire to see Dioguardi's claim adjudicated on its merits rather than on a formalistic assessment of the linguistic quality of his statements.²⁴² Judge Clark apparently valued Dioguardi's right to a day in court and a judgment on the merits more highly than the potential cost to the defendant and the court system. In today's world, a complaint whose sufficiency was problematic as was Dioguardi's might be dismissed based on concerns about judicial resources, potentially frivolous lawsuits, and the costs of abusive discovery.²⁴³ That seems myopic. It fails to see the democratic significance of litigation as a form of governance, as an enforcement mechanism, and as a channel for citizens to express their grievances against their government or fellow citizens.

Of course, *Dioguardi* does not reflect the types of cases that motivated the procedural changes of the last quarter century and are reflected in today's quest for early disposition. Consider a contemporary version. Suppose that Dioguardi were the representative plaintiff in a class action on behalf of all importers who were of certain racial, ethnic, or religious backgrounds claiming systematic discriminatory behavior in the handling of their goods by the Collector of Customs in the Port of New York. What factual presentation would *Twombly-Iqbal* require on a motion to dismiss to meet the plausibility threshold and survive a Rule 12(b)(6) motion? Would judicial discretion be so broad as to empower a district judge to brand the claim implausible and dismiss on the basis of his or her experience and common sense even though

²⁴¹ *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944).

²⁴² *Id.* (“In view of the plaintiff's limited ability to write and speak English, it will be difficult for the District Court to arrive at justice unless he consents to receive legal assistance.”).

²⁴³ Perhaps Dioguardi could survive a plausibility standard on the ground that pleadings by pro se plaintiffs are to be construed liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). *See also* *Cann v. Hayman*, 2009 WL 3115752 (3d Cir. 2009). This, however, is a possibility of limited application.

critical information was in the sole possession of the defendant? And then, how would the Second Circuit effectively review that dismissal and with what result? Putting the question of certifiability aside, do the rulemakers believe that procedures should be available to assure that my hypothetical class has access to enough information to enable it to present an intelligent, principled, and non-speculative statement of their claim?

Returning to Rule 1, several questions are worth contemplating. Are we still serious about achieving “the just, speedy, and inexpensive determination of every action and proceeding”? Can we afford to preserve a gold standard procedural system? Can we afford not to? Even assuming it is efficient, does our current treatment of pleadings and pretrial motions undermine meaningful citizen access, the quality of justice, the governance effect, and the societal values of litigation? Today’s rulemakers should assume the responsibility to construct a procedural system that properly balances all of these values. After all, embedded in Rule 1 always has been a sense that the Federal Rules and their application should achieve balance and proportionality among the three objectives it identifies. “Speedy” and “inexpensive” should not be sought at the expense of what it “just.” The latter is a short word, but it embraces values and objectives of enormous significance.