

Show Me, Don't Tell Me: Rule 8(a)(2) And The New Paradigm of Plausibility Pleading

In a pair of landmark and somewhat controversial decisions, the Supreme Court announced a new pleading standard under Rule 8: a claim must be

“plausible on its face.”

JOSEPH P. NOONAN III

While 12(b)(6) motions to dismiss are a familiar mechanism for challenging complaints at the outset of litigation, the plausibility standard, first announced in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), but recently ratified and somewhat clarified in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), fortifies them with a new potency. In an era of costly and burdensome discovery, the plausibility requirement is intended to make it easier to dispose of meritless claims before handing over the keys to the doors of discovery. But critics fear it may deny plaintiffs with valid claims from having their day in court.

The language of Rule 8 has not changed. In order to state a claim for relief, a pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). For fifty years, this language was colored by the Supreme Court’s pronouncement in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” But, in *Twombly*, the Court proclaimed “this famous observation has earned its retirement” and the “no set of facts” language from *Conley* “is best forgotten.” *Twombly*, 550 U.S. at 563. Relying on Rule 8’s requirement of a “showing,” the Court declared that a pleading must contain “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 555 n.3 & 570. More recently, the Court made clear that the plausibility standard announced in *Twombly* is not limited to the circumstances of that case, but applies to all federal civil actions. *Iqbal*, 129 S. Ct. at 1953.

Notice Pleading and The Costs of Discovery

The 1938 introduction of the Federal Rules of Civil Procedure, including Rule 8, revolutionized federal practice. It liberalized the pleading standard, requiring only that the complaint “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Conley*, 355 U.S. at 47. It removed strict pleading technicalities that often impeded cases from being resolved on their merits under the older common law and code pleading regimes. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE §§ 5.1-5.8 (3d ed. 1999). Relaxing the pleading standard made disposal of groundless claims at the pleading stage less likely. However, the federal rules simultaneously introduced “broad rules of discovery and an elaborate provision for summary judgment,” which, it was thought, would effectively weed out sham claims and defenses on their merits. *Id.* at § 5.7; accord *Conley*, 355 U.S. at 47-48.

In *Twombly*, the Court retained the understanding that the purpose of pleading is to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (quoting *Conley*). But its adoption of the plausibility standard marked a sea change with respect to what suffices to state a claim and its grounds. Perhaps not surprisingly, the reaction to this paradigm shift, which raises the bar for plaintiffs, has been varied. In fact, legislation has been introduced in both the House and Senate to return the pleading standard to the *Conley* “no set of facts” standard. S. 1504, 111th Cong. (2009); H.R. 4115, 111th Cong. (2009).

The Court thought the “practical significance” of its plausibility requirement lies in precluding claimants whose allegations amount to no more than a mere possibility of entitlement to relief from wasting time and resources and driving up the nuisance/settlement value of groundless claims. *Id.* at 558. The Court balanced the virtues of notice pleading with the reality that “discovery

Notice Pleading and The Costs of Discovery

The 1938 introduction of the Federal Rules of Civil Procedure, including Rule 8, revolutionized federal practice. It liberalized the pleading standard, requiring only that the complaint “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Conley*, 355 U.S. at 47. It removed strict pleading technicalities that often impeded cases from being resolved on their merits under the older common law and code pleading regimes. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE §§ 5.1-5.8 (3d ed. 1999). Relaxing the pleading standard made disposal of groundless claims at the pleading stage less likely. However, the federal rules simultaneously introduced “broad rules of discovery and an elaborate provision for summary judgment,” which, it was thought, would effectively weed out sham claims and defenses on their merits. *Id.* at § 5.7; accord *Conley*, 355 U.S. at 47-48.

In *Twombly*, the Court retained the understanding that the purpose of pleading is to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (quoting *Conley*). But its adoption of the plausibility standard marked a sea change with respect to what suffices to state a claim and its grounds. Perhaps not surprisingly, the reaction to this paradigm shift, which raises the bar for plaintiffs, has been varied. In fact, legislation has been introduced in both the House and Senate to return the pleading standard to the *Conley* “no set of facts” standard. S. 1504, 111th Cong. (2009); H.R. 4115, 111th Cong. (2009).

The Court thought the “practical significance” of its plausibility requirement lies in precluding claimants whose allegations amount to no more than a mere possibility of entitlement to relief from wasting time and resources and driving up the nuisance/settlement value of groundless claims. *Id.* at 558. The Court balanced the virtues of notice pleading with the reality that “discovery

can be expensive” and concluded that basic deficiencies should be exposed “at the point of minimum expenditure of time and money by the parties and the court.” *Id.* “Given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side,” the Court reasoned that “[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management.’” *Id.* at 559. Concerned that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching” the later stages where groundless claims can be weeded out, the Court opined that only by requiring plausibility at the pleading stage, “can [we] hope to avoid the potentially enormous expense of discovery” in such cases. *Id.*

The Plausibility Standard

But what does it mean for a claim to be “plausible?” While the Court provided some guidance, it also declared that “whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129 S. Ct. at 1950. One thing is clear: plausibility lies somewhere between possibility and probability. Because Rule 8(a)(2) “requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief,” *Twombly*, 550 U.S. at 555 n.3, “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Id.* at 555. However, the standard does not impose a “probability requirement,” just “more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949.

In *Iqbal*, the Court articulated a two-pronged approach for courts to apply in assessing the sufficiency of a pleading. First, the court should identify and set aside conclusory allegations because they are not entitled to an assumption of truth. *Id.* at 1949-51. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 1949. Second, the court should assume the veracity of the remaining well-pleaded non-conclusory facts and “determine whether they plausibly give rise to an entitlement to relief.” *Id.* at 1950. A claim is facially plausible when the alleged facts permit the court “to draw the reasonable inference that the defendant is liable for the

misconduct alleged.” .. at 1949. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ [as required] – ‘that the pleader is entitled to relief.’” *Id.* at 1950.

In order to “show” an entitlement to relief under Rule 8, a complaint must contain facts that are more than merely consistent with the defendant’s liability. *Id.* at 1949 & 1951. There must be enough factual content to “nudge” the claim “across the line from conceivable to plausible.” *Id.* at 1952. However, “a well-pleaded [plausible] complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable and ‘that a recovery is very remote and unlikely’” because plausibility does not require probability. *Twombly*, 550 U.S. at 556. But, at the same time, the Court instructs courts to apply “judicial experience” and “common sense” to decide whether there are “more likely explanations” for the alleged facts than the defendants’ wrongdoing. *Id.* at 567; *Iqbal*, 129 S. Ct. at 1950-51.

Conclusion

The contours of the plausibility standard in practical application will take some time to develop. Meanwhile, defense counsel have more ammunition to try to terminate groundless claims before facing the costs and burdens of discovery, while careful plaintiffs’ counsel will do well to plead the factual details of the alleged wrongdoing “showing” that they are “entitled to relief.” Because application of the standard will be “context-specific” and subject to “judicial experience,” it will be more important than ever for counsel on both sides of a 12(b)(6) motion to research whether there are post-*Twombly* and *Iqbal* cases in their jurisdiction that are arguably analogous to their own.

Joseph P. Noonan III is an associate with Butler Rubín Saltarelli & Boyd LLP, a national litigation boutique based in Chicago. His practice includes reinsurance litigation and arbitration and complex commercial litigation disputes. The views expressed are personal to the author.



BUTLER RUBIN
excellence in litigation™