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SKINNER, *MATRIXX*, SOUTER, AND POSNER: *TWOMBLY* AND *IQBAL* REVISITED

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INTRODUCTION

The Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly et al.*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) invigorated motions to dismiss and gave new meaning to motions to strike affirmative defenses. Judges are continuing to define the contours of both decisions, but four recent opinions are filling in the blanks that some believe were created by *Twombly* and *Iqbal*. Two 9-0 decisions on pleading issues were authored by Justices Ginsburg and Sotomayor respectively in the Court's 2010-11 term: *Skinner v. Switzer*, 131 S. Ct. 1289 (2011) and *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011). For reasons explained below, both should calm the pleadings seas and may well have been intended, in part, to do so. Another decision authored by Justice Souter sitting on the First Circuit, and one authored by Judge Posner for the Seventh Circuit, provide to judges, lawyers, and litigants additional insights into the proper application of *Twombly* and *Iqbal*. After a brief discussion of *Twombly* and *Iqbal*, I discuss each of these significant decisions and their impact on pleading jurisprudence.

TWOMBLY

Twombly involved an antitrust claim. After the 1984 divestiture of the American Telephone & Telegraph Company, local telephone service was handled by the "Baby Bells," or, technically, "Incumbent Local Exchange Carriers" (ILECs). ILECs were prohibited, however, from offering long-distance telephone service. In the Telecommunications Act of 1996, Congress restructured local telephone service by requiring ILECs to share their local telephone networks to allow new entrants, called Competitive Local Exchange Carriers (CLECs), to compete with the ILECs. In return for opening up their networks for use by competitors, ILECs were allowed by the 1996 Act to enter the long-distance telephone market under certain conditions. 550 U.S. at 549.

Plaintiffs were subscribers of local telephone and high-speed Internet service seeking to represent a class of similarly situated individuals. They alleged that the ILECs engaged in parallel conduct in their respective service areas in their dealings with CLECs (e.g., providing inferior connections to their networks, overcharging CLECs) and that the ILECs' common motivation to thwart competition from CLECs led them to form a conspiracy, apparently on the theory that if one ILEC facilitated competition from CLECs then others would have had to do the same. The plaintiffs also alleged that ILECs failed to pursue attractive business opportunities in contiguous markets, which plaintiffs regarded as a conspiracy to refrain from competing against each other. Because of these practices, the plaintiffs alleged "on information and belief" that the ILECs had entered into a contract,

combination, or conspiracy in restraint of trade in violation of the Sherman Act, 15 U.S.C. Section 1. 550 U.S. at 550-51.

The district court dismissed the complaint because of a failure by plaintiffs to allege facts that tended "to exclude independent and self-interested conduct as an explanation for defendants' parallel behavior." 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003). The court of appeals reversed. 425 F.3d 99 (2005). The court of appeals held that plaintiffs must plead facts that "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," but, invoking *Conley v. Gibson,* 355 U.S. 41 (1957), explained that to sustain the dismissal a court would have to conclude that "there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Id.* at 114. In a 7-2 opinion written by Justice Souter, the Supreme Court explained that the sufficiency of the complaint to properly allege a conspiracy "turns on the suggestions raised" by the allegations of parallel conduct "when viewed in light of common economic experience." 550 U.S. at 565. Emphasizing the high cost of antitrust discovery, the modest success that judges have had in "checking discovery abuse," and how the threat of discovery expense "will push cost-conscious defendants to settle even anemic cases" before filing summary judgment motions, 550 U.S. at 559, the Supreme Court "retired" the "no set of facts" language of *Conley* in holding that "nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy." 550 U.S. at 566.

It was natural, the Supreme Court first explained, for each ILEC unilaterally to act in the same way to similar efforts by CLECs to undermine each ILEC's regional dominance.

> *The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a Section 1 violation against almost any group of competing businesses would be a sure thing.*

Id. (record citation omitted).

That same "common experience" also explained, by other than a conspiracy, Justice Souter continued, the reticence of the ILECs to enter each other's markets:

> *In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.*

Id. at 567-68 (citation omitted). In addition, ILECs in one territory would have had to become CLECs in another territory facing the same resistance that CLECs were facing around the country. Profitability in such a setting was not at all a sure thing. *Id.* at 568. "The upshot is that Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible." *Id.* at 569.

In reaching its decision, the Court emphasized that it was not broadening the scope of Rule 9 of the Federal Rules of Civil Procedure or demanding more particularized pleading under Rule 8:

> *Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.*

Id. at 570.

In deciding *Twombly*, Justice Souter drew on "common economic experience." Did that mean that *Twombly* was limited to antitrust complaints or other claims that would allow a judge to draw on "common economic experience" in deciding whether a claim was stated? At least five of Justice Souter's colleagues thought otherwise and, in *Iqbal*, introduced "common sense" into the sufficiency-of-the-complaint equation.

IQBAL

Iqbal involved a claim brought by a Pakistani Muslim. After the September 11, 2001 terrorist attacks, Iqbal was arrested on criminal charges of fraud with respect to his identification documents as well as a conspiracy to defraud the United States. He was imprisoned under maximum security conditions: he was kept in lockdown 23 hours per day and for the remaining hour was handcuffed and had irons around his legs while accompanied by a four-officer escort. 129 S. Ct. at 1943. Iqbal later pleaded guilty, served time, and was deported to Pakistan. He then filed a *Bivens* action (*Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388) against 34 current and former federal officials and a number of corrections officers. Two of the defendants were the former Attorney General, John Ashcroft, and the Director of the Federal Bureau of Investigation, Robert Mueller. In the complaint, Iqbal alleged that the FBI under Mueller's direction arrested and detained thousands of Arab Muslim men; that the restrictive conditions of confinement resulted from a policy approved by Ashcroft and Mueller; and that both men "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh conditions of confinement, as a matter of policy solely on account of his religion, race, or national origin and all in contravention of the First and Fifth Amendments to the United States Constitution. *Id.* at 1944.

The district court denied the motion to dismiss filed by Ashcroft and Mueller. Relying on the "no set of facts" language in *Conley*, the district court held that the complaint stated a claim. *Id.* By the time the district court's judgment reached the court of appeals for a decision, *Twombly* had been decided. The court of appeals upheld the district court's decision saying that the pleading was adequate to allege "petitioners' involvement in discriminatory decisions which, if true, violated clearly established constitutional law." *Id.* (citing 490 F.3d 143, 174 (2d Cir. 2007)).

As was the case in *Twombly*, discovery concerns also animated the Court's interest. The Court noted the concurrence of Judge Cabranes who "expressed 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. Reluctant to vindicate that concern as a member of the Court of Appeals, Judge Cabranes urged this Court to address the appropriate pleading standard 'at the earliest opportunity.'" *Id*. at 1945 (*citing* 490 F.3d at 178-79).

The Court accepted this invitation, and in a 5-4 decision written by Justice Kennedy (Justice Souter wrote the dissenting opinion) reversed. The discussion of the sufficiency of the complaint was first put into the following substantive context by the Court:

- While *Bivens* acknowledged an implied private right of action against federal officers for violating a citizen's constitutional rights, the Court has been reluctant to extend *Bivens* to any new context or new category of defendants. *Id.* at 1947-48 (citation omitted).

- Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior. Id.* at 1948 (citations omitted).

- Therefore, a plaintiff attempting to show vicarious liability must plead "that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.*

- Where a plaintiff claims invidious discrimination in contravention of the First and Fifth Amendments, "our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Id.* (citations omitted).

- "It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin." *Id*. at 1948-49.

- "In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities." *Id*. at 1949.

The Court then began its analysis by cobbling together quotes from pages 570, 556, and then 557 of Justice Souter's opinion in *Twombly*:

> *To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content*

> *that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"*

Id. at 1949 (citations omitted).

Over Justice Souter's dissent, the majority Court emphasized two "tenets" upon which the decision in *Twombly* was based. First, in considering a motion to dismiss, the requirement that a court accept as true all allegations in a complaint does not apply to legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949. Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950. To determine if a claim is plausible is a "context-specific task" that requires a reviewing court "to draw on its judicial experience and common sense." *Id.*

The Court held that the following allegations were conclusory and represented a formulaic recitation of the elements of a constitutional discrimination claim entitled to no heed: that petitioners "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh conditions of confinement as a matter of policy solely on account of his religion, race, or national origin; that Ashcroft was the principal architect of the policy; and that Mueller was instrumental in executing it.

The Court then considered the allegations that after September 11, 2001, under Mueller's command, the FBI arrested and detained thousands of Arab Muslim men, and that Ashcroft and Mueller approved the policy to detain these persons in highly restrictive conditions. It rejected as implausible the inference that these allegations represented "purposeful, invidious discrimination":

> *The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves as 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. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests,* Twombly, supra, *at 567, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.*

Id. at 1951-52.

Iqbal faced another barrier, Justice Kennedy explained. To meet his ultimate burden of proof, he had to plead facts that "plausibly" showed that the petitioners

"purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest,' because of their race, religion, or national origin." *Id*. at 1952. A factual allegation that petitioners adopted a policy approving restrictive conditions for the detainees until they were "cleared by the FBI" "plausibly suggests" no more than that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* And because the doctrine of "respondeat superior" is not applicable in a constitutional tort setting, the complaint had to contain allegations that petitioners individually acted "on account of a constitutionally protected characteristic," which it failed to do. *Id.* ("Yet respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind.").[1]

The Court then rejected three arguments advanced by Iqbal. It first held that *Twombly* was not limited to antitrust complaints. *Id.* at 1953.

It then held that case management (allowing the claim but then focusing discovery on the qualified immunity defense to mollify concerns about unlimited discovery) is not a solution to a complaint that fails to state a cause of action, and especially so when Government-official defendants are involved. *Id.* at 1953 (citation omitted). ("If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, 'a national and international security emergency unprecedented in the history of the American Republic.'")

Finally, the Court rejected reliance on Rule 9(b), which permits "intent" to be alleged "generally." While this provision of Rule 9 frees a party from pleading discriminatory intent under an elevated pleading standard, it "does not give him license to evade the less rigid-though still operative-strictures of Rule 8." And Rule 8 "does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Id*. at 1954.

The Court then left it to the court of appeals to decide whether to remand the matter to the district court to allow Iqbal to seek leave to amend without expressing any views on the merits of the claim with respect to the other defendants. *Id.* at 1952, 1954.

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1 Justice Souter's dissent took issue under Rule 8(a)(2) with the majority's interpretation of the allegations in Iqbal's complaint as conclusory and the majority's failure to consider what it called "bare assertions" in the context of the complaint as a whole. 129 S. Ct. at 1959-61. ("The fallacy of the majority's position, however, lies in looking at the relevant assertions in isolation. The complaint contains specific allegations that, in the aftermath of the September 11 attacks, the Chief of the FBI's International Terrorism Operations Section and the Assistant Special Agent in Charge for the FBI's New York Field Office implemented a policy that discriminated against Arab Muslim men, including Iqbal, solely on account of their race, religion, or national origin. (Record citation omitted). Viewed in light of these subsidiary allegations, the allegations singled out by the majority as "conclusory" are no such thing. Iqbal's claim is not that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" him to a discriminatory practice that is left undefined; his allegation is that "they knew of, condoned, and willfully and maliciously agreed to subject" him to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described. Taking the complaint as a whole, it gives Ashcroft and Mueller "'Fair notice of what the ... claim is and the grounds upon which it rests.'" *Twombly,* 550 U.S. at 555, (quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 (1957) (omission in original).). There was no quarrel over the obligation articulated in *Twombly* that Rule 8(a)(2) requires notice of a plausible claim; just a debate whether Iqbal asserted such a claim.

POSSIBILITY, PROBABILITY, AND PLAUSIBILITY

As a constitutional tort case involving the Attorney General of the United States and the Director of the FBI among numerous other defendants against whom the case was proceeding, and where (a) *respondeat superior* is not applicable, (b) plaintiff is required to demonstrate discriminatory animus with respect to each defendant, and (c) the alleged unconstitutional conduct involved the Attorney General and the FBI Director responding to an unprecedented national security emergency, to some, the outcome in *Iqbal* was not remarkable. That it was a 5-4 decision and Justice Souter, who wrote *Twombly* for the seven-Justice majority, was a dissenter suggests that the *Iqbal* majority decided they were not about to require the most senior of United States officials to be distracted by discovery in a lawsuit in which plaintiff had ample numbers of defendants against whom he could obtain relief if he was entitled to it.

As an antitrust case involving parallel conduct, *Twombly* also emphasized discovery-cost concerns where there were innocent explanations for the parallel conduct. But for the overruling of *Conley*, to some, the outcome in *Twombly* was also unremarkable.

Nonetheless, both decisions are on their way to becoming the most cited decisions in the federal reporter system. Whether they will lead to a change in Rule 8 or 9 or other of the federal rules of civil procedure any time soon is unlikely until the pleading jurisprudence in the lower courts coalesces into a coherent framework for evaluating the sufficiency—or plausibility—of a complaint.[2]

That coalescence process has arguably been made a lot easier by Justice Sotomayor's opinions in *Skinner* and *Matrixx* and two circuit court decisions: one by Justice Souter sitting on a panel of the First Circuit, *Sepúlveda-Villarini v. Dep't of Educ. of Puerto Rico*, 628 F.3d 25 (1st Cir. 2010) and the other by Judge Posner in the Seventh Circuit, *In Re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010).[3]

Skinner v. Switzer

The facts in *Skinner v. Switzter* that frame the pleading question are complicated.

Skinner had been convicted and sentenced to die for murdering his girlfriend, Twila Busby, and her two sons in the house that Skinner shared with his girlfriend. Skinner denied he was the murderer. He argued that he was incapacitated by alcohol and codeine and was physically unable to bludgeon and choke Busby and stab to death the children, the two methods of death. He suggested that Busby's uncle, an ex-convict with a history of physical and sexual abuse who himself was deceased, was the murderer. There was defense testimony that on the evening of the murder, Busby had resisted her uncle's "rude sexual advances." There were a number of bloody handprints at the crime scene. The State tested

2 In March 2011, the Federal Judicial Center released a report on "Motions to Dismiss For Failure to State a Claim After *Iqbal*." It can be found at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf. (FJC Iqbal Study). The study compared motion activity in 23 federal district courts in 2006 and 2010. It included an assessment of "the outcome of motions in orders that do not appear in the computerized legal reference systems such as Westlaw. Statistical models were used to control for such factors as differences in levels of motion activity in individual federal district courts and types of cases." The study excluded cases filed by prisoners and *pro se* cases. According to the authors, between 2006 and 2010, there was a general increase in the rate of filing of motions to dismiss for failure to state a claim but "in general," there was no increase in the rate of grants of motions to dismiss without leave to amend." There was also no increase from 2006 to 2010 in the rate "at which a grant of a motion to dismiss terminated a case." FJC *Iqbal* Study, Executive Summary, at. vii.

3 I express no views on the substantive outcomes of these cases. My focus is on making lawyers who have to evaluate the application of Rule 8 in litigation aware of the analysis and holdings in these cases so that they can properly serve their clients and the federal courts in which they practice. *Cf.* FED. R. CIV. P. 1.

two prints; one implicated Skinner and the other did not. A number of other prints were not tested initially. Some of them were later tested and according to a state appellate opinion, were "incuplatory." 131 S. Ct. at 1293-94.

Six years after Skinner's prosecution Texas enacted Article 64. Article 64 allowed Skinner to gain postconviction DNA testing if he could show that (1) he would not have been convicted if the DNA test results were exculpatory, (2) and he was not "at fault" in the first instance for the State's failure to do DNA testing. In 2001, Skinner moved for DNA testing but the motion was rejected by the Texas Criminal Court of Appeals (CCA) on a finding that there was no reasonable probability that he would have avoided conviction even if the DNA test results had been exculpatory. In 2007, he tried and failed again to obtain DNA testing. This time, the CCA found him to be "at fault" because his lawyer testified that he had not asked for more DNA testing for fear the results would have been adverse to Skinner. *Id.* at 1295.

Skinner then filed a Section 1983 action alleging that Texas had violated his right to due process under the Fourteenth Amendment by refusing to perform the DNA testing. The district court dismissed the action because Fifth Circuit jurisprudence permitted postconviction requests for relief only in *habeas corpus*, not under Section 1983. The Fifth Circuit affirmed on the same basis. 363 Fed. Appx. 302 (2010) (*per curiam).* The Supreme Court accepted Skinner's petition for certiorari. *Id.* at 1295-96.

The State argued that the Court should reject Skinner's claim because Skinner was seeking federal court jurisdiction merely to challenge the State courts' rejection of his motion for DNA testing under Article 64. The Court, however, regarded Skinner's claim as asserting that, as construed, Article 64 denied him due process and was unconstitutional.[4] *Id*. at 1297-98.

The case has *Iqbal/Twombly* significance for at least two reasons. First, neither decision was cited by the six-Justice majority in Justice Ginsburg's opinion. There was only a silent nod to *Iqbal/Twombly* in the Court's use of the adverb, "generally," and the modifier, "plausible," to describe Rule 8(a)(2)'s pleading requirement:

> *Because this case was resolved on a motion to dismiss for failure to state a claim, the question below was "not whether [Skinner] will ultimately prevail" on his procedural due process claim,* see *Scheuer v. Rhodes, 416 U. S. 232, 236 (1974), but whether his complaint was sufficient to cross the federal court's threshold,* see *Swierkiewicz v. Sorema N. A., 534 U. S. 506, 514 (2002). Skinner's complaint is not a model of the careful drafter's art, but under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory. Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible "short and plain" statement of the plaintiff's claim, not an exposition of his legal argument.* See *5 C. Wright & A. Miller, Federal Practice & Procedure Section 1219, pp. 277–278 (3d ed. 2004 and Supp. 2010).*

4 The Court also held that Section 1983 was available as a remedy for two reasons (1) success in obtaining DNA testing would not "necessarily imply" the invalidity of his conviction since the results might be inconclusive or inculpatory, and (2) in the circuits which have held that Section 1983 is available for DNA testing claims, there has not been "any litigation flood or even rainfall," and sufficient controls on "sportive filings in federal court" existed under the Prison Litigation Reform Act of 1995 which, among other provisions, required prisoners to pay filing fees, and if they lost, costs, out of their prison trust account. 131 S. Ct. at 1298-1300.

Id. at 1296.

In what might be read to suggest that judicial experience or common sense may not impose as great an obligation on judges facing motions to dismiss, the Court also accepted statements made at oral argument by Skinner's counsel as sufficient to explain the basis for Skinner's claim. Skinner had alleged that the State's refusal "to release the biological evidence for testing . . . has deprived [him] of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence.…" *Id.* Justice Ginsburg then explained:

> *At oral argument in this Court, Skinner's counsel clarified the gist of Skinner's due process claim: He does not challenge the prosecutor's conduct or the decisions reached by the CCA in applying Article 64 to his motions; instead, he challenges, as denying him procedural due process, Texas' postconviction DNA statute "as construed" by the Texas courts. Tr. of Oral Arg. 56. See also id., at 52 (Texas courts, Skinner's counsel argued, have "construed the statute to completely foreclose any prisoner who could have sought DNA testing prior to trial[,] but did not[,] from seeking testing" postconviction).*

Id.

While Justices Thomas, Kennedy, and Alito dissented on the merits of the Court's opinion, they agreed that Skinner had properly alleged a violation of procedural due process "despite the fact that his complaint is more naturally read as alleging a violation of *substantive* due process."[5] 131 S. Ct. at 1301, n.1. In other words, on the issue of the statement of a claim, the vote count was 9-0.

Second, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), not *Iqbal* or *Twombly*, was invoked by the Court to determine whether Skinner's complaint "was sufficient to cross the federal court's threshold." In *Swierkiewicz*, the Court upheld an employment discrimination complaint that "detailed the events leading to [plaintiff's] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." *Id.* at 514. The Court in *Swierkiewicz* relied on *Conley*[6] in holding that the allegations gave the defendant "fair notice" of plaintiff's claim and "the grounds upon which they rest." *Id.*

In *Twombly*, Justice Souter discussed *Swierkiewicz* by saying that it did not change the law of pleading. The Second Circuit had held that Swierkiewicz's complaint should have been dismissed "for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination." Justice Souter explained that the Court reversed because the court of

5 Their concern was that Skinner was allowed "to artfully plead an attack on state habeas *procedures* instead of an attack on state habeas *results*" which "undercuts" the restrictions on habeas relief established by the Court and Congress. 131 S. Ct. at 1303 (Thomas, J. dissenting) (emphasis in original).

6 "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. *See Conley, supra*, at 48, 78 S. Ct. 99 ('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')." 534 U.S. at 514.

appeals had "impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." In contrast, Justice Souter wrote, "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570.

While *Twombly* distinguished *Swierkiewicz*, *Iqbal* does not even cite it. As a result, several post-*Iqbal* decisions suggested that *Swierkiewicz* was no longer good law. In *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) the Third Circuit specifically referred to the "demise" of *Swierkiewicz*: "We have to conclude, therefore, that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*."[7] Some district courts reached the same conclusion. *See, e.g., Anoai v. Milford Exempted School Dist.*, 2011 U.S. Dist. LEXIS 1159, *13 (S.D. Ohio, Jan. 6, 2011) (criticizing counsel for "expressly" relying on *Swierkiewicz*, because it "was abrogated by *Iqbal* and *Twombly*. Again, the Court finds troubling Plaintiff's reliance on case law that is no longer instructive"); *Bacon v. Ga. Ports Auth.*, 2010 U.S. Dist. LEXIS 138934, *3 (S.D. Ga. Dec. 10, 2010) (relying on *Fowler* for the proposition that *Twombly* and *Iqbal* changed the pleading standards set forth in *Swierkiewicz*).

The reliance on *Swierkiewicz* by Justice Ginsburg in *Skinner* without any citation to *Iqbal* or *Twombly* and in other than an employment context seems more explainable by calculation than coincidence. The dissenter's acknowledgment that an "artful" pleading still can state a claim created a consensus on an approach to sufficiency that relied in part on what a lawyer had to say at oral argument. Rule 8(a)(2) seems alive and well as long as the short and plain statement of a claim is "plausible."

Skinner teaches that common sense and judicial experience do not preclude a less than natural reading of a complaint or the survival of an "artfully" pleaded complaint. This is not a restatement of *Conley's* "no set of facts" rule, but with the reinvigoration of *Swierkiewicz* and its application by the Court outside of an employment context, it ameliorates the concern of some that *Iqbal* somehow had morphed notice pleading into fact pleading.

Matrixx Initiatives, Inc. v. Siracusano

To the extent that *Skinner* did not make the point strongly enough, *Matrixx* puts *Iqbal* and *Twombly* very much into a context-specific framework.

The action was brought under Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission (SEC) Rule 10b-5.[8] Plaintiffs alleged that

7 To be fair, before *Skinner,* another panel in the Third Circuit questioned the wisdom of the dicta in *Fowler*. In *In re Ins. Brokerage Antitrust Litigation*, 618 F.3d 300, 320 n. 18 (3d Cir. 2010), Judge Scirica wrote that although the panel in *Fowler* said that *Swierkiewicz* had been repudiated by *Iqbal* and *Twombly,* "we are not so sure." He explained: "Clearly, *Twombly* and *Iqbal* inform our understanding of *Swierkiewicz,* but the Supreme Court cited *Swierkiewicz* approvingly in *Twombly,* see 550 U.S. at 555-56, and expressly denied the plaintiffs' charge that *Swierkiewicz* 'runs counter' to *Twombly*'s plausibility standard. *Id.* at 569-70. As the Second Circuit has observed, *Twombly* "emphasized that its holding was consistent with [the Court's] ruling in *Swierkiewicz* that 'a heightened pleading requirement,' requiring the pleading of 'specific facts beyond those necessary to state [a] claim and the grounds showing entitlement to relief,' was 'impermissibl[e].'" *Id.* at 319, n. 17 (quoting from *Arista Records v. Doe 3,* 604 F.3d 110, 120 (2d Cir. 2010) which was quoting *Twombly,* 550 U.S. at 570 (alterations in *Arista Records).*

8 Justice Sotomayor explained the applicable legal standard: "To prevail on a Section 10(b) claim, a plaintiff must show that the defendant made a statement that was '*misleading* as to a *material* fact.'" 131 S. Ct. at 1318 (emphasis in original; footnote omitted) (*citing Basic Inc. v. Levinson,* 485 U.S. 224, 238 (1988). She explained that in *Basic,* the Court held that the materiality requirement is satisfied when there is "'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *Id.* (*quoting Basic*, 485 U.S. at 231-32, *quoting TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976).

Matrixx (and three of its executives) touted its revenues and product safety at the same time that Matrixx had received undisclosed reports of a possible link between Zicam, a zinc-based cold remedy product sold by Matrixx that represented 70% of its revenues, and the loss of smell ("anosmia") by Zicam users. Specifically, plaintiffs alleged:

- In 1999, through its customer service line, Matrixx received reports from the neurological director of a smell and taste treatment center of a possible link between the use of Zicam nasal gel and anosmia in a cluster of patients.

- In 2002, a Matrixx vice-president contacted a researcher at the University of Colorado Health Sciences Center after receiving a complaint of anosmia from a person being treated by the researcher. The vice-president admitted that Matrixx had received similar complaints from other customers; that he was not aware of studies showing zinc's toxicity; and that he had hired a consultant to review the product. Subsequently, the researcher sent the vice-president abstracts from studies in the 1930s and 1980s that confirmed zinc's toxicity. The researcher was also asked if she would participate in animal studies Matrixx was planning, but she declined because her focus was on human research.

- In October 2003, another researcher at the University of Colorado, Dr. Jafek, observed 10 patients suffering from anosmia after Zicam use. The two researchers posted abstracts of these findings and later presented them at a meeting of the American Rhinologic Society after deleting references to "Matrixx" or "Zicam" in response to a warning letter from Matrixx not to use either name.

- After receipt of this information, Matrixx made public statements that it was "poised for growth in the upcoming cough and cold season" and that the company had "very strong momentum." It also expressed the expectation that its revenues would be up "in excess of 50%" and that earnings per share would also be up.

- In November 2003, product liability lawsuits were filed against Matrixx by Zicam users alleging anosmia. By February 2004, nine plaintiffs had filed four such lawsuits against Matrixx.

- In November 2003, Matrixx filed with the SEC a Form 10-Q warning of possible adverse effects on product branding and goodwill of product liability claims but failed to make disclosure of two suits that had already been filed.

- In January 2004, Matrixx raised its revenue guidance.

- On January 30, 2004, the Food and Drug Administration was reported to be looking into anosmia complaints by Zicam users.

- Matrixx's stock price fell about 12% after the report.

- Matrixx issued a press release discounting the connection between Zicam and anosmia. It explained that, based on clinical trials, there was no statistically significant difference between the adverse event rates from users of Zicam and placebos, adding that just having a cold affects the sense of smell.

- The day after the press release issued Matrixx's stock price bounced back.

- On February 6, 2004, a national morning news program highlighted the findings presented by the University of Colorado researchers (now 12 patients suffering from anosmia after using Zicam) and that four lawsuits had been filed against Matrixx. That day, Matrixx's stock price fell nearly 30%.

- On February 19, 2004, Matrixx filed with the SEC a Form 8-K stating that it had convened a panel of scientists and physicians to review the data on smell disorders; that in the opinion of the panel, there was insufficient evidence to determine if zinc glutonate affected a person's sense of smell, and that it would begin conducting animal and human studies.

131 S. Ct. at 1314-16.

On the basis of these allegations, plaintiffs claimed that respondents had violated Section 10(b) and Rule 10b-5 by making untrue statements of fact and failing to disclose material facts necessary to make the statements not misleading in order to maintain artificially high prices for Matrixx's stock.

Matrixx moved to dismiss the complaint. The district court granted the motion because plaintiffs had not alleged a statistically significant correlation between the use of Zicam and anosmia. Hence, the failure to disclose the product liability suits and the University of Colorado study were not material omissions. It also held that there were insufficient facts pleaded with particularity to give rise to a strong inference of scienter, an element of the claim. *Id.* at 1317.

The Ninth Circuit reversed. It held that statistical significance was not needed to establish materiality and that withholding reports of adverse health effects of Zicam and the lawsuits was an extreme departure from the standards of ordinary care particularly for a product that was responsible for Matrixx's "remarkable sales increase." 585 F.3d 1167 (9th Cir. 2009).

The Supreme Court affirmed. Before the Court, Matrixx contended that the complaint did not adequately allege the existence of a material misrepresentation or omission because there was no allegation that Matrixx knew of a statistically significant number of adverse events requiring disclosure.

> *Absent statistical significance, Matrixx argues, adverse event reports provide only "anecdotal" evidence that "the user of a drug experienced an adverse event at some point during or following the use of that drug." Brief for Petitioners 17. Accordingly, it contends, reasonable investors would not consider such reports relevant unless they are statistically significant because only then do they "reflect a scientifically reliable basis for inferring a potential causal link between product use and the adverse event."* Id. *at 32.*

131 S. Ct. at 1319.

The Court rejected the argument. It explained that medical professionals and regulators act on evidence of causation that is not statistically significant. "[I]t stands to reason that in certain cases reasonable investors would as well." 131 S. Ct. at 1321. The

Court explained that the question that must be asked is not whether data are statistically significant, but whether "a *reasonable* investor would have viewed the nondisclosed information as having *significantly* altered the 'total mix' of information made available." *Id.* at 1321 (citations omitted). The Court then held that materiality had been adequately pleaded because the allegations set forth above, which the Court pointed out must be taken as true, showed that "Matrixx received information that plausibly indicated a reliable causal link between Zicam and anosmia. That information included reports from three medical professionals and researchers about more than 10 patients who had lost their sense of smell after using Zicam." The Court added that the Colorado researchers had drawn "Matrixx's attention to previous studies that had demonstrated a biological causal link between intranasal application of zinc and anosmia." Matrixx's vice president of research and development "was seemingly unaware of these studies, and the complaint suggests that, as of the class period, Matrixx had not conducted any research of its own relating to anosmia." Hence, the Court held, "it can reasonably be inferred from the complaint that Matrixx had no basis for rejecting" out of hand the findings of the Colorado researchers. *Id.* at 1322.

The Court then invoked both *Twombly* and *Iqbal*:

> *We believe that these allegations suffice to "raise a reasonable expectation that discovery will reveal evidence" satisfying the materiality requirement,* Bell Atlantic Corp. v. Twombly, *550 U.S. 544, 556 (2007), and to "allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,"* Iqbal, *556 U.S., at ___ (slip op., at 14).*

Id. at 1323.[9]

Matrixx then argued that the complaint did not contain allegations "plausibly suggesting that it acted with the required level of scienter." 131 S. Ct. at 1323. Under the Private Securities Litigation Reform Act of 1995 (PSLRA), a plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. Section 78u–4(b)(2)(A). Justice Sotomayor explained that a complaint "adequately pleads scienter under the PSLRA 'only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.'" 131 S. Ct. at 1324 (citations omitted).

Matrixx argued that it did not know of statistically significant evidence of causation, so it could not have acted recklessly or knowingly, or at least that it did not so act is as compelling an inference as alternative inferences. *Id.* The Court was not persuaded. Based on the allegations, the Court explained, after hearing initially from the University of Colorado researcher, Matrixx hired a consultant to review the product, asked the researcher to participate in animal studies, and convened a panel of physicians and scientists in response to Dr. Jafek's presentation to the American Rhinologic Society. Matrixx also "successfully prevented Dr. Jafek from using Zicam's name in his presentation on the ground that he needed Matrixx's permission to do so. Most significantly, Matrixx issued a press release that suggested that studies had confirmed that Zicam does not cause anosmia when, in fact, it had not conducted any studies relating to anosmia and the

9 The Court explained: "The information provided to Matrixx by medical experts revealed a plausible causal relationship between Zicam Cold Remedy and anosmia. Consumers likely would have viewed the risk associated with Zicam (possible loss of smell) as substantially outweighing the benefit of using the product (alleviating cold symptoms), particularly in light of the existence of many alternative products on the market. Importantly, Zicam Cold Remedy allegedly accounted for 70 percent of Matrixx's sales. Viewing the allegations of the complaint as a whole, the complaint alleges facts suggesting a significant risk to the commercial viability of Matrixx's leading product." 131 S. Ct. at 1323.

scientific evidence at that time, according to the panel of scientists, was insufficient to determine whether Zicam did or did not cause anosmia." *Id.* According to the Court, taken collectively, these allegations "give rise to a 'cogent and compelling' inference that Matrixx elected not to disclose the reports of adverse events not because it believed they were meaningless but because it understood their likely effect on the market." *Id.* at 1324-25 (citation omitted). It concluded that a reasonable person "would deem the inference that Matrixx acted with deliberate recklessness (or even intent) 'at least as compelling as any opposing inference one could draw from the facts alleged.'" *Id.* at 1325 (citation omitted).[10]

In a post-*Iqbal/Twombly* environment, one cannot ignore the straightforward approach to the pleadings analysis undertaken by Justice Sotomayor and supported by her eight colleagues in the context of a claim of securities fraud. She set forth the elements of the claim, compared the allegations to the elements, and concluded on the issue of materiality that reasonable persons could conclude that Matrixx made material misstatements of fact or omitted facts that made a disclosure materially misleading, and on the issue of scienter that issuing a press release that suggested that studies had confirmed that Zicam does not cause anosmia could amount to deliberate recklessness or intent to defraud. Applying *Twombly* and *Iqbal*, the Court in *Matrixx* drew inferences that favored the pleader, allowing discovery to determine who is right and who is wrong. The fact that an inference may turn out not to be provable will not make it implausible. As we shall next see, Justice Souter offers the same advice in his reprise of *Twombly* and *Iqbal.*

Justice Souter's Revenge?

In *Sepúlveda-Villarini*, Justice Souter had another chance to comment on *Iqbal's* "common sense" gloss on plausibility, this time sitting on a court of appeals.

As presented on appeal, the issue was whether two teachers had adequately alleged a violation of Title I of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, both of which require reasonable accommodation of an employee's disability. One plaintiff, Sepúlveda, alleged that he had suffered a stroke and had had heart by-pass surgery; for several years he had been allowed to teach in a first-floor classroom with a reduced class size and scheduled rest periods; then his class size was, by fiat from the Department of Education increased from 20 students to 30 students and while a teacher was assigned to assist him the teacher was a "neophyte"; and giving him a larger class even with the assistance represented an unreasonable refusal to accommodate, "resulting in emotional consequences with physical symptoms requiring treatment." The other plaintiff, Velázquez, suffered from aphonia, a throat condition that resulted in coughing and shortness of breath. She was accommodated for four years with a reduced class size. When the Department of Education required class sizes to be increased, she alleged a failure to accommodate her condition claiming that, as a result of the burden of teaching a larger class, she "suffered emotional and physical stress" that required treatment and that her disability was aggravated by having to use her voice more with the larger number of students. *Id.* at 27-28, 29, n.6.

The district court dismissed both failure-to-accommodate claims, because, in the district court's view, there was no allegation explaining how maintaining a smaller class size would permit plaintiffs to continue teaching while a larger class size would not.

10 The Court added this cautionary note: "Whether respondents can ultimately prove their allegations and establish scienter is an altogether different question." 131 S. Ct. at 1325.

The First Circuit reversed. Justice Souter explained for the court of appeals that to state a claim under Title I or Section 504, a plaintiff "must allege a disability covered by the statute, the ability of the plaintiff to do a job with or without accommodation as the case may be, and the refusal of the employer, despite knowledge of the disability, to accommodate the disability by reasonably varying the standard conditions of employment." *Id.* at 28. It was the last element—the alleged refusal of the Department of Education to reasonably vary the conditions of employment—i.e., maintain smaller class sizes—that the district court seized upon to dismiss the claims.

Drawing liberally on quotations, Justice Souter first immediately gave this summary of *Twombly* and *Iqbal*:

> *"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."* Bell Atl. Corp. v. Twombly, *550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2) and* Conley v. Gibson,, *355 U.S. 41, 47 (1957)). The make-or-break standard, as the district court recognized, is that the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief.* Ashcroft v. Iqbal, *129 S. Ct. 1937, 1950-51 (2009) (citing* Twombly, *550 U.S. at 570);* see also Twombly, *550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (footnote and citations omitted)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."* Id. *at 1949 (citations omitted).*

Id. at 28-29. Applying these principles, and conceding that, "It takes more than nimble footwork" to determine the precise issue being presented by the plaintiffs (*id*. at 26), the court of appeals held that the district court had demanded "more than plausibility":

> *Each set of pleadings includes two significant sets of allegations. First, for a period of four or five school years the school administration provided the reduced class size in response to the respective plaintiff's request, supported by some sort of medical certification attesting to its legitimacy. In each complaint, those years of requested accommodation are put forward as establishing, in effect, a base-line of adequacy under the statute in response to an implicit acknowledgment that a statutory disability required the provisions that were made.*
>
> *Second, each set of pleadings describes changed facts beginning in the 2007-08 year, in which instructions from the defendant Secretary resulted in raising the class size to 30 (with a young team teacher to share the load with Sepúlveda). Each complaint alleges that the plaintiff's emotional and physical health subsequently deteriorated to the point of requiring treatment, and each concludes that assigning 30 pupils was less than reasonable accommodation under the statute. To be sure, this sequence of alleged facts does not describe a*

> *causal connection in terms of the exact psychological or physiological mechanism by which each plaintiff's capacity continues to be overwhelmed. But reading the allegations with the required favor to the plaintiff means accepting the changes in class size as the only variable, from which one would infer that there probably is some causal connection between the work of a doubled class size and the physical and emotional deterioration of the disabled teacher. After all, for years the school authorities themselves apparently thought the small classes were the reasonable and appropriate size; it does not seem remarkable that a teacher would be worn down by doubling the size, even with a young helper, who will need to be supervised.*

Id. at 29.

Then the court of appeals entered the arena of just what a district court is permitted to do to apply judicial experience and common sense in evaluating the merits of a complaint. It saw the district court's "call for allegations explaining 'how' class size was significant as a call for pleading the details of medical evidence in order to bolster the likelihood that a causal connection will prove out as fact." *Twombly*, however, "cautioned against thinking of plausibility as a standard of likely success on the merits; the standard is plausibility assuming the pleaded facts to be true and read in a plaintiff's favor." *Id.* at 30, *citing Twombly*, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct].").

In the First Circuit, and in text likely to be adopted in other circuits, Justice Souter had the last word on what the post-*Conley* world is supposed to look like. Without citing *Iqbal*, he explained:

> *None of this is to deny the wisdom of the old maxim that after the fact does not necessarily mean caused by the fact, but its teaching here is not that the inference of causation is implausible (taking the facts as true), but that it is possible that other, undisclosed facts may explain the sequence better. Such a possibility does not negate plausibility, however; it is simply a reminder that plausibility of allegations may not be matched by adequacy of evidence. A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss, and the fair inferences from the facts pleaded in these cases point to the essential difference between each of them and the circumstances in* Twombly*, for example, in which the same actionable conduct alleged on the defendant's part had been held in some prior cases to be lawful behavior.*

Id. at 30 (citations omitted).

Judge Posner's Probability Meter

In *Text Messaging*, the Seventh Circuit accepted an interlocutory appeal from providers of text-messaging services who were appealing the district court's determination that plaintiffs, a class of consumers, had properly alleged a Sherman Act violation. Invoking *Twombly*, defendants argued that the parallel conduct alleged in the complaint did not plausibly allege a conspiracy in restraint of trade. 630 F.3d at 624.

Explaining first why the Seventh Circuit accepted the interlocutory appeal, Judge Posner joined a chorus of others who have interpreted *Twombly* and *Iqbal* as a reaction to the burdens and cost of discovery. He explained that *Twombly*, "even more clearly" than *Iqbal*,

> *is designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand. When a district court by misapplying the* Twombly *standard allows a complex case of extremely dubious merit to proceed, it bids fair to immerse the parties in the discovery swamp-"that Serbonian bog ... where armies whole have sunk" (Paradise Lost ix 592-94)-and by doing so create irrevocable as well as unjustifiable harm to the defendant that only an immediate appeal can avert.*

Id. at 625.[11] He referred to the question presented as the meaning of "the federal common law doctrine of pleading in complex cases, announced in *Twombly*." That presumably was his way of saying that the Court in *Twombly* did not adequately explain its holding, and that *Iqbal* was no more illuminating. *Id.* ("But *Twombly* is a recent decision, and its scope unsettled (especially in light of its successor, *Iqbal* from which the author of the majority opinion in *Twombly* dissented; and two of the Justices who participated in those cases have since retired.)").

Judge Posner then addressed the sufficiency of the second amended complaint. According to the pleading, the four defendants sell 90 percent of U.S. text messaging services, and belonged to a trade association, where, at meetings, they exchanged price information. In addition, plaintiffs alleged that defendants and two other sellers of text-messaging services "constituted and met with each other in an elite 'leadership council' within the association." *Id.* at 628. The leadership council's "stated mission was to urge its members to substitute 'co-opetition' for competition." *Id.* Plaintiffs also alleged that even though costs were "steeply falling," defendants had increased their prices, and further that "all at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third. The change in the industry's pricing structure was so rapid, the complaint suggests, that it could not have been accomplished without agreement on the details of the new structure, the timing of its adoption, and the specific uniform price increase that would ensue on its adoption." *Id.*

In what was an exercise of either common economic experience or judicial experience and common sense, Judge Posner gave his views of these allegations. Given their

11 In his dissenting opinion in *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010) (*infra*, n.12), Judge Posner similarly identified asymmetric discovery and particularly e-discovery as a concern "lurking" behind *Twombly* and *Iqbal:* "With the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical. And the cost is not only monetary; it can include, as well, the disruption of the defendant's operations. If no similar costs are borne by the plaintiff in complying with the defendant's discovery demands, the costs to the defendant may induce it to agree early in the litigation to a settlement favorable to the plaintiff." 614 F.3d at 411. He acknowledged that district courts have the ability to limit discovery but said that "especially in busy districts, which is where complex litigation is concentrated," the tendency of the district court judges is to assign discovery issues to the magistrate judges who, because they are not making merits-based decisions or trying the case are "likely to err on the permissive side" of allowing discovery. *Id.* at 411-412. He offers this "structural flaw" as helping "to explain and justify the Supreme Court's new approach" in *Twombly* and *Iqbal*, adding, "It requires the plaintiff to conduct a more extensive precomplaint investigation than used to be required and so creates greater symmetry between the plaintiff's and the defendant's litigation costs, and by doing so reduces the scope for extortionate discovery." *Id.* at 412. He also offers allowance of limited discovery as an alternative to dismissal of a complaint: "If the plaintiff shows that he can't conduct an even minimally adequate investigation without limited discovery, the judge presumably can allow that discovery, meanwhile deferring ruling on the defendant's motion to dismiss." *Id.*

combined market share, Judge Posner explained, "it would not be difficult" for this small group of defendants "to agree on prices and to be able to detect 'cheating' (underselling the agreed price by a member of the group) without having to create elaborate mechanisms, such as an exclusive sales agency, that could not escape discovery by the antitrust authorities." *Id.* at 627-28. The trade association/price exchange information allegation "identifies a practice, not illegal in itself, that facilitates price fixing that would be difficult for the authorities to detect." Raising prices when costs were falling, "is anomalous behavior because falling costs increase a seller's profit margin at the existing price, motivating him, in the absence of agreement, to reduce his price slightly in order to take business from his competitors, and certainly not to increase his price." *Id.* at 628.

Judge Posner quoted from footnote 4 in *Twombly*, 550 U.S. at 557, to identify examples of parallel conduct that can be interpreted as collusive (a) conduct that would "probably not' result from chance or "mere interdependence unaided by an advanced understanding among the parties"; (b) conduct that "indicates" the sort of "restricted freedom of action and sense of obligation that one generally associates with agreement"; or (c) where 'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason' would support a plausible inference of conspiracy." *Id.* In the second amended complaint, he concluded, plaintiffs had alleged this kind of what he called "parallel plus" behavior. *Id.*

Judge Posner acknowledged that there was no allegation of direct evidence of a conspiracy among the defendants. For example, there was no allegation of a meeting of competitors to fix prices or of an admission by an employee of a conspirator. The pleading, however, alleged that the defendants "agreed to uniformly charge an unprecedented common per-unit price of ten cents for text messaging services." Calling this allegation an "inference from circumstantial evidence," Judge Posner explained that circumstantial evidence was sufficient to establish an antitrust conspiracy. *Id.* at 628-629. And the proof would have to determine whether the inference should, ultimately be drawn by the trier of fact:

> *We need not decide whether the circumstantial evidence that we have summarized is sufficient to* compel *an inference of conspiracy; the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint's "plausibility."*

Id. at 629 (emphasis in original).

Judge Posner did not put the word "plausibility" in quotes idly. He was articulating a probability meter that runs from the impossible (no claim) to anything greater than a nonnegligible probability (there is a claim):

> *The Court said in* Iqbal *that the "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." 129 S. Ct. at 1949. This is a little unclear because plausibility, probability, and possibility overlap. Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as "preponderance of the evidence" connote.*

Id. at 629.[12] The plaintiffs had established that "nonnegligible probability" and were entitled to pursue discovery to support their claim:

> *The plaintiffs have conducted no discovery. Discovery may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability. All that we conclude at this early stage in the litigation is that the district judge was right to rule that the second amended complaint provides a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery.*

Id.

CONCLUSION

The burden of discovery and its attendant costs lurk as the backdrop in both *Twombly* and *Iqbal*. Even *Conley v. Gibson* did not obviate the need for a plaintiff to plead the elements of a claim. The issue is what inferences can fairly be drawn from the well-pleaded fact allegations of a complaint. The inference of an agreement was too weak based on the parallel conduct alleged in *Twombly*, especially where, as Justice Souter tells us in *Sepúlveda,* the conduct in question "had been held in some prior cases to be lawful behavior." The inference of discriminatory animus was also too weak in *Iqbal* given the legitimacy, in the Court's eyes, of the FBI's response to the September 11 attacks.

The context of both *Twombly* and *Iqbal* cannot be ignored. Less-than-clear or artfully drafted complaints, illuminated by counsel at oral argument, can survive a motion to dismiss, as *Skinner* explains. *Swierkiewicz* is still good law; there is no "heightened" pleading standard in asserting a plausible short and plain statement of a claim under Rule 8. And, as *Matrixx* teaches, inferences from pleaded facts that are inconclusive or that may not be provable will not make a claim implausible. Rather, as Justice Souter also teaches in *Sepúlveda*, "a plausible but inconclusive inference from pleaded facts will survive a motion to dismiss."

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12 Judge Posner had earlier addressed the "opaque" probability language in *Iqbal* in his dissenting opinion in *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010). Swanson sued Citibank and the appraisers of her home, PCI, claiming that, under the Fair Housing Act, 42 U.S.C. Section 3605, they discriminated against her on the basis of her race when, respectively, her loan application was rejected and her home value was under appraised. The district court dismissed the complaint. The court of appeals' majority (Judges Wood and Easterbrook) reversed. *Citing* Rule 8 and *Swierkiewicz* they held that Swanson stated a Fair Housing Act cause of action: "Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home-equity loan). This is all that she needed to put in the complaint." *Id.* at 405. It also sustained the Fair Housing Act claim against the appraisers: "The appraisal defendants knew her race, and she accuses them of discriminating against her in the specific business transaction that they had with her. When it comes to proving her case, she will need to come up with more evidence than the mere fact that PCI (through Lanier) placed a far lower value on her house than Midwest Valuations did. (citation omitted). All we hold now is that she is entitled to take the next step in this litigation." *Id.* at 406-07. The court of appeals, however, sustained the dismissal of fraud claims because of a failure to plead this claim with particularity as required by Rule 9 of the Federal Rules of Civil Procedure. *Id.* at 406-07. Judge Posner felt that the Fair Housing Act claims should have been dismissed because the complaint contained allegations inconsistent with discrimination as the basis for the loan rejection (Citibank was the second bank to reject Swanson's loan application, and real estate valuation information set forth in the complaint suggested not only that the plaintiff knew that her house was worth less than she said it was worth in the loan application but also that there was not enough equity in the house to justify the loan amount being sought especially in the tight lending environment that existed in 2009 when the application was made). *Id.* at 409-10. The majority acknowledged the problem but viewed it as a matter for summary judgment. *Id.* at 406 ("She has not pleaded herself out of court by mentioning these facts; whether they are particularly helpful for proving her case or not is another matter that can safely be put off for another day.") Judge Posner then wove in the language from *Iqbal* that plausibility is not akin to a "probability requirement" but asks for more than a "sheer possibility." To explain his dissent, he wrote: "In statistics the range of probabilities is from 0 to 1, and therefore encompasses 'sheer possibility' along with 'plausibility.' It seems (no stronger word is possible) that what the Court was driving at was that even if the district judge doesn't think a plaintiff's case is more likely than not to be a winner (that is, doesn't think $p > .5$), as long as it is substantially justified that's enough to avert dismissal. (citation omitted.) But when a bank turns down a loan applicant because the appraisal of the security for the loan indicates that the loan would not be adequately secured, the alternative hypothesis of racial discrimination does not have substantial merit; it is implausible." *Id.* at 411.

A complaint that establishes a "nonnegligible probability" that a claim is valid will also survive. In mathematical terms, Judge Posner does not explain in *Text Messaging* how much more than zero the probability need be to become a "nonnegligible" probability, but *Twombly* teaches that a claim has to be more than "conceivable" and Judge Posner acknowledges that the probability can be something less than 50%.

So there you have it. *Conley's* "no set of facts" principle is out. Plausibility is in but heightened pleading is not. In antitrust cases where parallel conduct exists, it helps to have defendants with a large market share that belong to a trade association. But judges still have to figure out a way to draw on "common economic experience" against which to evaluate whether that conduct is the product of a conspiracy in restraint of trade. Common sense and judicial experience do not mean that the need for discovery makes a claim implausible. Inconclusive inferences from pleaded facts can be consistent with plausible claims. And the more that pleaded facts exceed 0% percent and approach 50% on Judge Posner's probability meter, plausibility sufficient to state a claim will be found under the existing rules of civil procedure, and persons asserting claims or affirmative defenses will be entitled to discovery to attempt to meet their burden of proof.