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**Civil Procedure—Pleading: The United States Supreme Court Revisits the Pleading Standard Under *Bell Atlantic Corp. v. Twombly*, Making Surviving a Motion to Dismiss More Difficult**

Benjamin J. Williams

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CIVIL PROCEDURE—PLEADING:  
THE UNITED STATES SUPREME COURT REVISITS  
THE PLEADING STANDARD UNDER  
*BELL ATLANTIC CORP. V. TWOMBLY*,  
MAKING SURVIVING A MOTION  
TO DISMISS MORE DIFFICULT  
*Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)

ABSTRACT

In *Ashcroft v. Iqbal*, the United States Supreme Court held Javid Iqbal failed to state a claim for *Bivens* liability against former United States Attorney General John Ashcroft and former Federal Bureau of Investigation Director Robert Mueller. Iqbal was arrested and detained in the United States as a person of high interest in the wake of the September 11, 2001, terrorist attacks. While in custody, Iqbal claimed he suffered both physical and verbal abuse. Upon his release, Iqbal filed a *Bivens* action against several United States officials, including Ashcroft and Mueller as the alleged architects of a policy to confine individuals based solely on their race, religion, or natural origin, rather than because of any connection with terrorist activity. Ashcroft and Mueller moved to dismiss Iqbal's claim for failing to state sufficient allegations connecting them to any alleged unconstitutional conduct. Extending the "plausibility" pleading standard devised in *Bell Atlantic v. Twombly*, the Supreme Court held Iqbal's complaint was inadequate to state a claim for *Bivens* liability against Ashcroft and Mueller because it did not contain enough nonconclusory factual allegations to suggest plausible entitlement to relief. The *Iqbal* decision makes clear the "plausibility" pleading standard applies to all federal civil actions, meaning all plaintiffs have to come forward with greater factual specificity in their complaints to survive a motion to dismiss. The *Iqbal* decision will likely result in fewer claims, meritorious or otherwise, finding redress in federal courts.

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## I. FACTS

In November 2001, respondent Javid Iqbal was arrested and charged by the Federal Bureau of Investigation (FBI) with possessing fraudulent identification documents and with conspiracy to defraud the United States.<sup>1</sup>

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1. *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at \*1 n.1 (E.D.N.Y. Sept. 27, 2005). At the district court level, the case name was *Elmaghraby v. Ashcroft*. *Id.* at \*1. Co-plaintiff Elmaghraby settled his claim for \$300,000 and was not part of the Supreme

Following his arrest, investigators considered Iqbal to be “of high interest” to the investigation of the terrorist attacks that occurred on September 11, 2001, and was held at the Metropolitan Detention Center (MDC) in Brooklyn, New York.<sup>2</sup> As a high interest detainee, Iqbal was subjected to the MDC’s restrictive conditions until the end of July 2002, when he was relocated to the general prison population.<sup>3</sup> Eventually, Iqbal pled guilty to the fraud charges and was deported to Pakistan in January 2003, which did not end his involvement with the United States’ judicial system.<sup>4</sup>

In May 2004, Iqbal filed a twenty-one count *Bivens* action against thirty-four current and former federal officials and nineteen “John Doe” federal corrections officers, challenging his confinement in the MDC as a high interest detainee on both constitutional and statutory grounds.<sup>5</sup> Iqbal asserted jailors “kicked him in the stomach, punched him in the face, and dragged him across” his cell floor without justification; subjected him to completely unnecessary strip and body cavity searches; and prohibited him from praying because there would be “[n]o prayers for terrorists.”<sup>6</sup> It was Iqbal’s allegations against former United States Attorney General John Ashcroft and former FBI Director Robert Mueller, however, that formed the basis of his Supreme Court appeal.<sup>7</sup>

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Court appeal. Brief for Respondent at 39, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015).

2. *Iqbal v. Hasty*, 490 F.2d 143, 147-48 (2d Cir. 2007). The case name at the court of appeals level was *Iqbal v. Hasty*. *Id.* at 143. Defendant Dennis Hasty was the Warden of the MDC during the time of Iqbal’s confinement. *Id.* at 147.

In the aftermath of the terrorist attacks of September 11, 2001, FBI and Department of Justice officials commenced a large scale investigation to identify those responsible and prevent any subsequent attacks. DEP’T OF JUSTICE, OFFICE OF INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1 (2003), available at [http://www.usdoj.gov/oig/special/0306/full.pdf?besi\\_scan\\_61073EC0F74759AD=0](http://www.usdoj.gov/oig/special/0306/full.pdf?besi_scan_61073EC0F74759AD=0). Within three days, more than 4000 FBI special agents and 3000 support personnel were assigned to the probe. *Id.* at 11. By September 18, 2001, the FBI had already received over 96,000 tips, resulting in more than 1200 individuals being questioned, 762 of which were detained on immigration charges. *Id.* at 1-2, 11.

Of those detained, 184 were considered to be “of high interest” to the investigation and held in high security federal prisons, such as the MDC. *Id.* at 111. The remainder of the detainees were considered to be “of interest” to the investigation and held in lower security facilities. *Id.* High interest detainees were held under the most restrictive conditions allowable under Bureau of Prisons (BOP) policy to prevent them from communicating with anyone until cleared by the FBI. *Id.* at 112. Conditions included twenty-three hours a day lockdown and continuous four officer escorts in handcuffs and leg irons when outside cells. *Iqbal*, 490 F.2d at 148.

3. *Iqbal*, 490 F.2d at 148.

4. *Id.* at 149.

5. *Id.*; First Amended Complaint ¶¶ 10-44, *Elmaghraby*, No. 04 CV 01809 JG SMG, 2005 WL 2375202. See *infra* Part IIA (summarizing a *Bivens* action).

6. Complaint ¶¶ 82, 113, 123, 143-45, 154, *Elmaghraby*, No. 04 CV 01809 JG SMG, 2005 WL 2375202.

7. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009).

Iqbal claimed he was classified as a high interest detainee solely based on his race, religion, and national origin, and not because of any link to terrorist activity.<sup>8</sup> Moreover, Iqbal asserted the classification was made according to an unconstitutional policy that Ashcroft created and Mueller oversaw.<sup>9</sup> Additionally, Iqbal alleged Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to [expose him to harsh] conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”<sup>10</sup> According to Iqbal, these purported indiscretions by Ashcroft and Mueller amounted to violations of his First and Fifth Amendment rights.<sup>11</sup>

In response, Ashcroft and Mueller moved to dismiss Iqbal’s complaint for failing to state sufficient allegations showing their involvement in the alleged unconstitutional conduct.<sup>12</sup> The district court denied their motion, and Ashcroft and Mueller filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit.<sup>13</sup> Affirming the relevant part of the district court’s decision, the Second Circuit held that Iqbal’s complaint adequately alleged Ashcroft and Mueller’s personal involvement in discriminatory decisions, which, if true, clearly violated the Constitution.<sup>14</sup> Ashcroft and Mueller appealed to the United States Supreme Court, which granted certiorari and reversed the Second Circuit’s decision.<sup>15</sup>

## II. LEGAL BACKGROUND

The First Amendment of the United States Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>16</sup> Additionally, the Fifth Amendment of the United States Constitution provides, “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>17</sup> In *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>18</sup> the Supreme

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8. Complaint, *supra* note 6, ¶ 45.

9. *Id.* ¶¶ 10-11, 47.

10. *Id.* ¶ 96.

11. *Id.* ¶¶ 232, 235.

12. *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at \*1 (E.D.N.Y. Sept. 27, 2005).

13. *Iqbal v. Hasty*, 490 F.3d 143, 147 (2d Cir. 2007).

14. *Id.* at 174. Although the decision was unanimous, Second Circuit Judge Cabranes wrote a concurrence in which he stated the Supreme Court’s pleading standard after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), is “less than crystal clear and fully deserve[s] reconsideration . . . at the earliest opportunity.” *Id.* at 178 (Cabranes, J., concurring).

15. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945 (2009).

16. U.S. CONST. amend. I.

17. *Id.* at amend. V.

18. 403 U.S. 388 (1971).

Court ruled that a federal agent acting under color of authority may be held civilly liable for unconstitutional conduct.<sup>19</sup> As the Court recognized in *Mitchell v. Forsyth*,<sup>20</sup> however, to avoid the distractions of unmeritorious litigation and the dissuasion from public service that such suits might cause, federal officials enjoy qualified immunity.<sup>21</sup>

To give effect to the qualified immunity doctrine early in the litigation, the complaint must either sufficiently allege the official violated clearly established law or be subject to dismissal.<sup>22</sup> According to the Court's most recent articulation of the pleading standard in *Bell Atlantic Corp. v. Twombly*,<sup>23</sup> a legally sufficient complaint states a claim that is "plausible on its face."<sup>24</sup> A claim is plausible when, without using legal conclusions, it allows the court to draw a reasonable inference the defendant is liable for the alleged misconduct.<sup>25</sup> An in-depth examination of these legal concepts is necessary to gain a complete understanding of the Court's decision in *Ashcroft v. Iqbal*.<sup>26</sup>

#### A. *BIVENS* LIABILITY

In *Bivens*, the Supreme Court for the first time held agents acting under color of authority faced civil liability for violating an individual's Fourth Amendment right against unreasonable searches and seizures.<sup>27</sup> *Bivens* involved a warrantless search and arrest for an alleged narcotics violation.<sup>28</sup> Federal agents entered Bivens' apartment and handcuffed him in front of his wife and children, while threatening to arrest the entire family.<sup>29</sup> Thereafter, Bivens was taken to a federal courthouse where he was interrogated, booked, and strip-searched.<sup>30</sup> Although such a claim had never been allowed to proceed, Bivens filed a lawsuit seeking redress for these alleged violations of his Fourth Amendment rights.<sup>31</sup> Based on the concept that

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19. *Bivens*, 403 U.S. at 389.

20. 472 U.S. 511 (1985).

21. *Mitchell*, 472 U.S. at 526.

22. *Id.*

23. 550 U.S. 544 (2007).

24. *Twombly*, 550 U.S. at 570.

25. *Id.* at 555-56.

26. 129 S.Ct. 1937 (2009).

27. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 389 (1971). A *Bivens* action is now regarded at the federal equivalent to 42 U.S.C. § 1983, where state officials can be sued for violations of individuals' constitutional rights. *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006). The difference is that section 1983 actions were statutorily created, while *Bivens* actions were judicially created. *Id.*

28. *Bivens*, 403 U.S. at 389.

29. *Id.*

30. *Id.*

31. *Id.*

having a constitutional right implies a remedy for its violation, the Court concluded *Bivens* stated a cause of action under the Fourth Amendment.<sup>32</sup>

Since *Bivens*, the Supreme Court has been reluctant to extend liability to other violations of constitutional rights by federal agents due to the Court's discomfort with implied rights of action and its belief that Congress is best equipped to devise new remedies.<sup>33</sup> While *Bivens* liability has been expanded to include violations of the Fifth Amendment's Due Process Clause and the Eighth Amendment's Cruel and Unusual Punishments Clause, the Court has expressly declined to do so in the First Amendment arena.<sup>34</sup> Nonetheless, even if *Bivens* liability applies to a given constitutional violation, a federal agent's qualified immunity serves as another hurdle for a plaintiff to overcome.

## B. QUALIFIED IMMUNITY DOCTRINE

All government officials enjoy at least qualified immunity, which protects them from civil liability to the extent their conduct does not impinge upon clearly established statutory or constitutional rights.<sup>35</sup> The policy behind qualified immunity is to protect both government function and individual rights.<sup>36</sup> Without such immunity, the concern is that litigation will divert attention away from official duties, cause second-guessing of official decisions, and deter otherwise qualified people from entering public service.<sup>37</sup> At the same time, the immunity is qualified, rather than absolute, to ensure there is adequate incentive to keep officials from violating clearly established constitutional or statutory rights.<sup>38</sup>

In keeping with the policy of protecting government function, qualified immunity is recognized as both a defense to liability and a limited right not to stand trial or face discovery burdens.<sup>39</sup> To give effect to qualified immunity early in the litigation, courts ask whether the facts alleged show the official violated a constitutional right that was clearly established at the time in question.<sup>40</sup> A court is to consider whether a reasonable officer in

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32. *Id.* at 397.

33. *See* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

34. *See* *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (First Amendment); *Carlson v. Green*, 446 U.S. 14, 25 (1980) (Eighth Amendment's Cruel and Unusual Punishments Clause); *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (Fifth Amendment's Due Process Clause).

35. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Some government officials enjoy absolute immunity from suit, including: legislators in their legislative functions, judges in their judicial functions, and the President of the United States in official acts. *Id.* at 807.

36. *Butz v. Economou*, 438 U.S. 478, 506 (1978).

37. *Harlow*, 457 U.S. at 814.

38. *Id.* at 819.

39. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

40. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001).

the defendant's position would have known his or her conduct was unconstitutional to determine if the right was clearly established.<sup>41</sup> It follows that an official is only liable for his or her own unconstitutional conduct and cannot be held responsible solely under a theory of respondeat superior, where employers answer for the wrongs of their employees.<sup>42</sup> Therefore, to overcome qualified immunity, the plaintiff seeking to hold a high-level official responsible must show the policymaker created, with a discriminatory purpose, a policy under which his or her subordinates acted unconstitutionally.<sup>43</sup> Accordingly, at the pleading stage of litigation, surmounting such a policymaker's qualified immunity means the complaint must allege sufficient facts, assumed to be true, that state a plausible claim of purposeful discrimination.<sup>44</sup>

### C. FEDERAL RULES OF CIVIL PROCEDURE PLEADING STANDARD

The Federal Rules of Civil Procedure (Rules) require a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>45</sup> Illustrating the "simplicity and brevity that these rules contemplate," the example complaint provided in Form 11 of the Rules' Appendix of Forms states only: "[o]n *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff."<sup>46</sup> The relaxed pleading requirement is only concerned with giving the defendant notice of the claim and its bases, reserving to discovery and trial the resolution of the merits.<sup>47</sup> Although the pleading standard may be lenient, a complaint may still be subject to dismissal if it fails to state such a claim.<sup>48</sup>

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41. *Id.* at 202.

42. *Robertson v. Sichel*, 127 U.S. 507, 515-16 (1888).

43. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

44. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

45. FED. R. CIV. P. 8(a)(2).

46. *Id.* at 84; *Id.* at app. form 11.

47. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-14 (2002). The modern Rules were fashioned in this way in response to the difficulties associated with the more technical Field Code. Jack B. Weinstein & Daniel H. Distiller, *Comments on Procedural Reform*, 57 COLUM. L. REV. 518, 522 (1957). The Field Code was developed in New York by David Dudley Field in 1848. *Id.* at 520. Under the Field Code, a plaintiff was required to plead facts constituting a cause of action, rather than conclusions, with the result being that the number of complaints was drastically reduced. *Id.* The problem with the Field Code approach was that it was difficult to distinguish between facts and conclusions. *Id.* at 520-21. In response, the drafters of the modern Rules purposely avoided using the words "facts" or "conclusions" in drafting Rule 8. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1216 (3d ed. 2009). Note that modified versions of the Field Code are still used in some states, including New York and California. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey on State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1378 (1986).

48. FED. R. CIV. P. 12(b)(6).



The foundational decision of what it means to state a claim under Rule 8(a) is *Conley v. Gibson*.<sup>49</sup> In *Conley*, African-American railroad workers claimed their union failed to represent them against discriminatory discharges by the railroad, thereby violating the Railway Labor Act.<sup>50</sup> The union moved to dismiss the complaint because it lacked factual specificity.<sup>51</sup>

Writing for a unanimous court, Justice Black rejected the union's argument, stating all Rule 8 requires is a "short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."<sup>52</sup> Justice Black also made the famous assertion 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 which would entitle him to relief."<sup>53</sup> A relaxed pleading standard is permissible, according to Justice Black, because of generous discovery and pretrial rules that can be used by either party to further refine and specify an opponent's claim or defense.<sup>54</sup> *Conley* has been cited as authority in at least sixteen Supreme Court opinions and by twenty-six state supreme courts in interpreting the states' own rules of civil procedure.<sup>55</sup>

One of the Supreme Court's applications of *Conley* is in the context of qualified immunity: *Crawford-El v. Britton*.<sup>56</sup> In *Crawford-El*, a prisoner sued a corrections officer in a section 1983 action for alleged First Amendment violations.<sup>57</sup> Recognizing the need to give effect to qualified immunity early in litigation, the Court stated a district court may require the plaintiff to "put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a pre-discovery motion for dismissal."<sup>58</sup>

Four years later, however, the Court indicated, in *Swierkiewicz v. Sorema N.A.*,<sup>59</sup> that *Crawford-El* did not impose a heightened pleading

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49. 355 U.S. 41 (1957); 5 WRIGHT & MILLER, *supra* note 47, § 1215.

50. *Conley*, 355 U.S. at 43.

51. *Id.* at 47.

52. *Id.* (quoting FED R. CIV. P. 8(a)(2)).

53. *Id.* at 45-46 (emphasis added).

54. *Id.* at 47-48.

55. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting).

56. 523 U.S. 574 (1998).

57. *Crawford-El*, 523 U.S. at 578-79.

58. *Id.* at 598 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)). In *Siegert*, Justice Kennedy specifically called for a heightened pleading standard in civil actions with malicious intent as an element of the claim. *Siegert*, 500 U.S. at 235-36.

59. 534 U.S. 506 (2002).

standard, which can only be accomplished by amending the Rules.<sup>60</sup> Nonetheless, the call for nonconclusory allegations in pleadings made a reprise a few years later in the context of an anti-trust claim.<sup>61</sup>

In *Bell Atlantic Corp. v. Twombly*, consumers sued the four main national telephone and internet service providers for alleged violations of the Sherman Anti-Trust Act.<sup>62</sup> Plaintiffs asserted the defendant companies agreed to avoid competing with one another and prevent competitive entry into the market.<sup>63</sup> In support of their claim, the plaintiffs' complaint cited the absence of upstart service providers in any of the companies' markets and the lack of competition amongst the companies within each other's markets as evidence of their parallel conduct.<sup>64</sup> Such parallel conduct, according to the plaintiffs, led to the conclusion that an explicit agreement to limit competition had been formed between the companies, in violation of the Sherman Anti-Trust Act.<sup>65</sup> However, the Supreme Court held these allegations insufficient to state an anti-trust claim under its new "plausible" pleading standard.<sup>66</sup>

Writing for the seven-two majority in *Twombly*, Justice Souter began with the concept that although Rule 8(a)(2) only requires a "short and plain statement of the claim," a plaintiff's grounds for relief must rest on "more than labels and conclusions, [or] a formulaic recitation of the elements."<sup>67</sup> Further, though all allegations in the complaint are assumed to be true for the purposes of a motion to dismiss, the Court did not have to accept legal conclusions as true.<sup>68</sup> Accordingly, the Court did not have to assume as true the "legal conclusion" that the companies had unlawfully conspired to restrain competition.<sup>69</sup> The Court then evaluated the remaining "nonconclusory" allegations in the plaintiffs' complaint under its "plausible" pleading standard.<sup>70</sup>

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60. *Swierkiewicz*, 534 U.S. at 515. Rule 9(b) is an example of a heightened pleading standard, which provides, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b).

61. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

62. *Id.* at 550 n.1. The four named defendants were Bell South Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (formerly Bell Atlantic Corporation). *Id.*

63. *Id.* at 550.

64. *Id.* at 550-51.

65. *Id.* at 551.

66. *Id.* at 570.

67. *Id.* at 555.

68. *Id.*

69. *Id.* at 557.

70. *Id.* at 565-70.

Retiring *Conley*'s "no set of facts" language, Justice Souter described that a complaint must contain sufficient "nonconclusory" factual matter, taken as true, to "plausibly" suggest illegal conduct.<sup>71</sup> Plausible entitlement to relief requires a complaint to provide enough facts to give a "reasonable expectation" of recovery.<sup>72</sup> Turning to the plaintiffs' allegations of parallel conduct, the Court held that while such behavior was consistent with an illegal accord amongst the companies, it was more likely explained by legal free-market conduct.<sup>73</sup> As such, because the plaintiffs failed to "nudge their claims across the line from conceivable to plausible," their complaint was dismissed.<sup>74</sup> Lower courts struggled to apply *Twombly*, with many wondering whether it applied to all civil cases or just to anti-trust and other large discovery actions.<sup>75</sup> In *Ashcroft v. Iqbal*, the Supreme Court took the opportunity to further refine and explain its new "plausible" pleading standard.

### III. ANALYSIS

In *Iqbal*, Justice Kennedy wrote the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined.<sup>76</sup> The majority held the allegations in *Iqbal*'s complaint were insufficient to state a plausible claim of purposeful discrimination by Ashcroft and Mueller.<sup>77</sup> Justice Souter dissented, joined by Justices Stevens, Ginsberg, and Breyer.<sup>78</sup> Justice Breyer also filed a separate dissenting opinion.<sup>79</sup>

#### A. THE MAJORITY OPINION

The issue before the Court was whether *Iqbal* pled sufficient facts, taken as true, to plausibly suggest Ashcroft and Mueller deprived him of his clearly established constitutional rights.<sup>80</sup> Before addressing the merits of the case, the Court determined it had subject matter jurisdiction over the interlocutory appeal under the collateral-order doctrine.<sup>81</sup> Next, the Court decided *Iqbal*'s "supervisory liability" theory was a "misnomer" for

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71. *Id.* at 556, 562-63.

72. *Id.* at 556.

73. *Id.* at 566.

74. *Id.* at 570.

75. *E.g.*, *Iqbal v. Hasty*, 490 F.3d 143, 155-58 (2d Cir. 2007).

76. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1941 (2009).

77. *Id.* at 1942-43.

78. *Id.* at 1954.

79. *Id.* at 1961.

80. *Id.* at 1942-43.

81. *Id.* at 1947.

respondeat superior liability, which is unavailable to *Bivens* plaintiffs.<sup>82</sup> As such, for Iqbal's complaint to survive, the Court required the complaint's factual allegations must plausibly suggest Ashcroft and Mueller created and operated a detention policy that purposely discriminated based on race, religion, or national origin.<sup>83</sup>

Turning to Iqbal's complaint, the Court determined many of the allegations were legal conclusions, which are not entitled to the assumption of truth.<sup>84</sup> Of the remaining nonconclusory allegations, the Court considered those concerning Ashcroft and Mueller to be just as consistent with lawful behavior as unlawful behavior, making intentional discrimination by Ashcroft and Muller not plausible under *Twombly*.<sup>85</sup> Thus, the Court concluded Iqbal's complaint should be dismissed for failing to state a claim with respect to Ashcroft and Mueller.<sup>86</sup>

### 1. *Jurisdiction Pursuant to the Collateral-Order Doctrine*

Part of Iqbal's argument was that the Supreme Court did not have subject matter jurisdiction to hear the case because Ashcroft and Mueller were appealing the denial of their motion to dismiss, which is a non-final decision.<sup>87</sup> Accordingly, as a preliminary matter, the Court had to decide whether it had jurisdiction to hear the appeal.<sup>88</sup> The Court explained limited types of district court orders are reviewable under the collateral-order doctrine, even though the matter out of which they arose is not yet final.<sup>89</sup> Orders that come within the collateral-order doctrine are those that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."<sup>90</sup> Further, the Court described orders denying qualified immunity are important and separate enough to implicate the collateral-order doctrine, so long as the denial was based on a question of law.<sup>91</sup> The Court stated evaluating the sufficiency of a complaint is a legal

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82. *Id.* at 1948-49.

83. *Id.* at 1949.

84. *Id.* at 1951.

85. *Id.* at 1951-52.

86. *Id.* at 1954.

87. Brief for Respondent, *supra* note 1, at 13. The courts of appeals are only granted jurisdiction over decisions that are final. 28 U.S.C. § 1291 (2000).

88. *Iqbal*, 129 S. Ct. at 1945.

89. *Id.*

90. *Id.* (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

91. *Id.* at 1945-47.

issue.<sup>92</sup> Therefore, since the denial of Ashcroft and Mueller’s motion to dismiss turned on a question of law and rejected their qualified immunity defense, it was a decision within the scope of the collateral-order doctrine, giving the Court jurisdiction to hear it.<sup>93</sup> With the issue of jurisdiction settled, the Court proceeded to the substantive issues of Ashcroft and Mueller’s appeal.<sup>94</sup>

## 2. “Supervisory Liability” Unavailable Under *Bivens*

The first merit-based issue the Court considered was the proper scope of *Bivens* liability against defendants with qualified immunity, like Ashcroft and Mueller.<sup>95</sup> The Court began by analyzing whether *Bivens* applied to Iqbal’s claim at all.<sup>96</sup> Citing past hesitance to expand *Bivens* liability to new areas and types of defendants, the Court noted it had previously refused to extend such liability to First Amendment Free Exercise Clause claims.<sup>97</sup> According to the Court, this observation alone may have been enough to dismiss Iqbal’s religious discrimination claim, but for purposes of the appeal, the Court would assume a free exercise claim was allowable under *Bivens*.<sup>98</sup> After tentatively establishing *Bivens*’ applicability, the Court evaluated to what and whom it applied.<sup>99</sup>

Starting with the concept that federal officials cannot be held liable under *Bivens* using only respondeat superior, the Court remarked a *Bivens* plaintiff must allege that each defendant individually committed clearly unconstitutional acts.<sup>100</sup> According to the Court, when claiming unlawful discrimination under the First and Fifth Amendments, a plaintiff must assert the defendant discriminated purposely.<sup>101</sup> Iqbal argued Ashcroft and Mueller could be held liable under the theory of “supervisory liability” for “knowing acquiescence” to the unconstitutional conduct of their subordinates.<sup>102</sup>

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92. *Id.* at 1947.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1948.

97. *Id.* (citing *Bush v. Lucas*, 462 U.S. 367, 390 (1983)). The Court noted that *Bivens* liability has been extended to include Fifth Amendment due process claims like Iqbal’s. *Id.* (citing *Davis v. Passman*, 442 U.S. 228, 228-29 (1983)).

98. *Id.*

99. *Id.*

100. *Id.* Iqbal conceded in his brief a *Bivens* plaintiff may not establish liability solely by respondeat superior. Brief for Respondent, *supra* note 1, at 46.

101. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

102. Brief for Respondent, *supra* note 1, at 45-46.

The Court disagreed, stating where a plaintiff seeks to hold high-level officials liable for an alleged unconstitutional policy, more than awareness of discrimination is required.<sup>103</sup> Rather, such a plaintiff must illustrate the policymaker implemented the decision “because of, not merely in spite of, [the action’s] adverse effects upon an identifiable group.”<sup>104</sup> “Supervisory liability,” according to the Court, was a “misnomer” for respondeat superior, which is unavailable to a *Bivens* plaintiff.<sup>105</sup> Thus, for Iqbal to prevail over Ashcroft and Mueller’s qualified immunity, he must “plead sufficient factual matter to show that [Ashcroft and Mueller] 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.”<sup>106</sup> The Court then evaluated whether Iqbal’s complaint met this standard.<sup>107</sup>

### 3. *Complaint Fails Twombly’s Plausibility Standard*

In determining the sufficiency of Iqbal’s complaint, the Court started with the proposition that Rule 8 does not mandate meticulous fact pleading, but it does require more than just “‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’”<sup>108</sup> According to the Court, a legally sufficient complaint must contain enough factual content to make it plausible, meaning the complaint permits a judge to make a “reasonable inference that the defendant is liable for the misconduct alleged.”<sup>109</sup> The Court then described it is a two-step process under *Twombly*. First, a court must parse out legal conclusions from nonconclusory allegations.<sup>110</sup> While legal conclusions can serve as the structure for the complaint, only nonconclusory assertions are entitled to the assumption of truth.<sup>111</sup> Second, a court must determine whether the remaining nonconclusory allegations “state[] a plausible claim for relief” by using its “judicial experience and common sense.”<sup>112</sup> The Court remarked if the nonconclusory statements do no more than illustrate the possibility of unlawful behavior, a plaintiff has failed to suggest entitlement to relief, and the complaint should be dismissed.<sup>113</sup>

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103. *Iqbal*, 129 S. Ct. at 1948.

104. *Id.* (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

105. *Id.* at 1949.

106. *Id.* at 1948-49.

107. *Id.* at 1948.

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

109. *Id.*

110. *Id.* at 1949-50.

111. *Id.* at 1950.

112. *Id.*

113. *Id.*

After outlining the two-step approach to evaluating complaints, the Court examined whether Iqbal's complaint met the requirements.<sup>114</sup>

Using the first part of the *Twombly* test, the Court began its assessment of Iqbal's complaint by separating his conclusory allegations from his non-conclusory allegations.<sup>115</sup> Iqbal claimed Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [him] to [harsh] conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."<sup>116</sup> Further, Iqbal stated Ashcroft was the "principal architect" of the discriminatory policy, and Mueller was "instrumental" in its implementation.<sup>117</sup> The Court compared these statements to the anti-trust conspiracy allegations in *Twombly*, which were no more than a "'formulaic recitation of the elements' of a constitutional discrimination claim."<sup>118</sup> As such, the Court reasoned these allegations were legal conclusions that are not assumed to be true.<sup>119</sup> With the first part of the *Twombly* analysis complete, the Court proceeded to consider whether Iqbal's remaining nonconclusory allegations established a plausible claim for relief.<sup>120</sup>

The Court commenced the second phase of the *Twombly* analysis by indicating which of Iqbal's allegations against Ashcroft and Mueller were nonconclusory.<sup>121</sup> One of the assertions the Court deemed nonconclusory was that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as a part of its investigation of the events of September 11."<sup>122</sup> Further, the Court also labeled as nonconclusory Iqbal's statement that "[t]he policy of holding post-September 11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001."<sup>123</sup> The Court concluded while these nonconclusory statements are assumed true and consistent with Iqbal's ultimate claim that Ashcroft and Mueller created a policy that purposely detained him on the basis of his

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114. *Id.* at 1951.

115. *Id.*

116. First Amended Complaint, *supra* note 5, ¶ 96.

117. *Id.* ¶¶ 10-11.

118. *Iqbal*, 129 S. Ct. at 1951.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*; Complaint, *supra* note 6, ¶ 47.

123. *Iqbal*, 129 S. Ct. at 1951; Complaint, *supra* note 6, ¶ 69.

race, religion, or national origin, a “more likely explanation[.] . . .” existed.<sup>124</sup>

The Court reasoned because the events of September 11th were committed by Arab Muslim members of Al Qaeda, it should be expected the investigation into those involved would have a disproportionate effect on Arab Muslims, even if such an impact was not intended.<sup>125</sup> Therefore, the policy created and implemented by Ashcroft and Mueller was “likely lawful and justified by [a] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.”<sup>126</sup> This “obvious alternative explanation” to Iqbal’s nonconclusory factual allegations made purposeful discrimination by Ashcroft and Mueller an unreasonable inference.<sup>127</sup> Thus, the Court held Iqbal’s claims against Ashcroft and Mueller did not pass the plausibility pleading standard under *Twombly*.<sup>128</sup> Before remanding the case to the Court of Appeals for a determination of whether Iqbal should be allowed to amend his complaint, the Court addressed his additional arguments.<sup>129</sup>

Iqbal posed three additional arguments to the Court, all of which were rejected.<sup>130</sup> First, Iqbal contended *Twombly*’s holding was limited to the anti-trust context.<sup>131</sup> The Court stated because *Twombly* was an interpretation of Rule 8, *Twombly* applied to all federal civil actions.<sup>132</sup> Second, Iqbal asserted his claim should be allowed to proceed because the district court could structure discovery in a way that would protect Ashcroft and Mueller’s qualified immunity defense until such protection was no longer warranted.<sup>133</sup> The Court replied just because discovery could be carefully managed did not mean an insufficient complaint should be allowed to proceed.<sup>134</sup> Finally, Iqbal claimed because Rule 9(b) allows a defendant’s intent to be stated generally, his nonspecific allegations of Ashcroft and Mueller’s discriminatory intent were sufficient.<sup>135</sup> The Court responded Iqbal’s assertions about Ashcroft and Mueller’s discriminatory purpose

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124. *Iqbal*, 129 S. Ct. at 1951.

125. *Id.*

126. *Id.*

127. *Id.* at 1951-52.

128. *Id.* at 1952.

129. *Id.* at 1953.

130. *Id.* at 1953-54.

131. Brief for Respondent, *supra* note 1, at 37-38.

132. *Iqbal*, 129 S. Ct. at 1953.

133. Brief for Respondent, *supra* note 1, at 27.

134. *Iqbal*, 129 S. Ct. at 1953.

135. Brief for Respondent, *supra* note 1, at 32.



were still conclusory, which Rule 8(a)'s pleading standard did not countenance.<sup>136</sup> With the three issues resolved, the Court concluded Iqbal's complaint failed to state a claim of unconstitutional discrimination against Ashcroft and Mueller.<sup>137</sup> Accordingly, the Court of Appeals' decision was reversed and remanded to determine whether Iqbal should be allowed to amend his complaint.<sup>138</sup>

## B. JUSTICE SOUTER'S DISSENT

Justice Souter dissented, joined by Justices Stevens, Ginsberg, and Breyer.<sup>139</sup> Justice Souter disagreed with the Court's opinion on two grounds.<sup>140</sup> First, Justice Souter contended the majority inappropriately eliminated all forms of supervisory liability from *Bivens* actions.<sup>141</sup> Second, Justice Souter argued the majority misinterpreted the *Twombly* pleading standard in determining Iqbal's complaint failed to state a claim.<sup>142</sup>

### 1. *Improper Elimination of Supervisory Liability*

Justice Souter's first disagreement with the majority concerned what he considered to be the Court's unnecessary exclusion of supervisory liability from *Bivens* actions.<sup>143</sup> Initially, Justice Souter explained the Court was not asked to decide viability of supervisory liability under *Bivens*.<sup>144</sup> The Court was asked whether a high-level government official may be held liable for having "constructive notice" of subordinate officials' discriminatory actions.<sup>145</sup> However, Justice Souter argued the theory of Iqbal's case was

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136. *Iqbal*, 129 S. Ct. at 1954.

137. *Id.*

138. *Id.*

139. *Id.* (Souter, J., dissenting).

140. *Id.* at 1955.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 1956.

145. *Id.* The Court granted certiorari on two questions:

1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*; [and] 2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

Petition for Writ of Certiorari at I, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015). Justice Souter noted the first question concerned the sufficiency of Iqbal's complaint while the second involved the standard for liability. *Iqbal*, 129 S. Ct. at 1955-56 (Souter, J., dissenting).

never “constructive notice[;]” it was “knowing acquiescence” by Ashcroft and Mueller to their subordinates’ unconstitutional behavior.<sup>146</sup> Moreover, Justice Souter pointed out Ashcroft and Mueller conceded they could be held liable under supervisory liability if they had “actual knowledge” of unconstitutional conduct by their subordinates and showed “deliberate indifference” to that knowledge.<sup>147</sup>

Despite the parties’ agreement on the appropriate supervisory liability standard, Justice Souter noted the Court nonetheless chose to determine supervisory liability’s proper scope.<sup>148</sup> According to Justice Souter, by choosing to ignore the parties’ concessions, the Court decided an issue without the benefit of full briefing.<sup>149</sup> As a result, Justice Souter argued not only did the Court unfairly deny Iqbal an opportunity to be heard on the issue, the Court made an uninformed decision by failing to appreciate the difference between respondeat superior and other forms of supervisory liability.<sup>150</sup>

Justice Souter claimed because the majority chose to decide the scope of supervisory liability under *Bivens* without full briefing, the Court improperly equated supervisory liability with respondeat superior.<sup>151</sup> Although officials cannot be held liable for the conduct of subordinates based solely on respondeat superior, Justice Souter described there may be some instances where supervisors should answer for the actions of their subordinates.<sup>152</sup> Justice Souter provided examples of possible tests for supervisory liability, including “where a supervisor has actual knowledge of a subordinate’s constitutional violation and acquiesces.”<sup>153</sup>

Nonetheless, Justice Souter ultimately concluded neither he, nor the majority, were in a position to implement or eliminate any given test for supervisory liability without full briefing and argument on the matter.<sup>154</sup> Finally, Justice Souter contended the Court’s examination of supervisory liability was unnecessary in the first place because it rejected Iqbal’s

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146. *Iqbal*, 129 S. Ct. at 1955-56.

147. *Id.* (quoting Petition for Writ of Certiorari, *supra* note 145, at 29). Again, in Ashcroft and Mueller’s brief, they admitted they could be held liable for having “actual knowledge of the assertedly discriminatory nature of the classification of [the] suspects . . . and they were deliberately indifferent to that discrimination.” Brief for the Petitioners at 50, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015).

148. *Iqbal*, 129 S. Ct. at 1955-56.

149. *Id.* at 1957.

150. *Id.* at 1957-58.

151. *Id.* at 1958.

152. *Id.*

153. *Id.*

154. *Id.*

“conclusory” supervisory liability allegations by using an “unsound” interpretation of *Twombly*.<sup>155</sup>

## 2. *Misapplication of the Twombly Pleading Standard*

Justice Souter’s second disagreement with the majority involved what he considered to be the Court’s misinterpretation of the pleading standard under *Twombly*.<sup>156</sup> Justice Souter remarked the relevant question under *Twombly* is “whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible.”<sup>157</sup> Justice Souter described how Iqbal’s complaint not only claimed Ashcroft and Mueller were aware of and consented to the use of discriminatory practices by their subordinates, but they were also responsible for creating the policy.<sup>158</sup> According to Justice Souter, Iqbal’s allegations were not “naked legal conclusions nor consistent with legal conduct,” unlike the parallel conduct asserted in *Twombly*.<sup>159</sup> Moreover, Justice Souter claimed the majority’s error in dismissing certain statements in Iqbal’s complaint as conclusory was the result of looking at them standing alone.<sup>160</sup> When taken in context with the other “nonconclusory” allegations in Iqbal’s complaint, Justice Souter considered it clear that Iqbal claimed Ashcroft and Mueller created and oversaw a specifically described discriminatory policy.<sup>161</sup> As such, Souter concluded Iqbal had stated sufficient facts to state a plausible claim for relief against Ashcroft and Mueller and had given them proper notice of the claim and its foundation.<sup>162</sup>

### C. JUSTICE BREYER’S DISSENT

Justice Breyer joined in Justice Souter’s dissent, but wrote separately to address the issue of unmeritous litigation interfering with government

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155. *Id.*

156. *Id.* at 1959. Note that Justice Souter was the author of the *Twombly* opinion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

157. *Iqbal*, 129 S. Ct. at 1959.

158. *Id.*

159. *Id.* at 1960.

160. *Id.* For reference, the Court considered the following allegations conclusory: (1) that Ashcroft was the “principal architect” of the discriminatory policy; (2) that Mueller was “instrumental” in implementing the discriminatory policy; and (3) that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to harsh conditions . . . as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” *Id.* at 1951 (quoting First Amended Complaint, *supra* note 5, ¶¶ 10-11, 96).

161. *Id.* at 1960.

162. *Id.* at 1961.

function.<sup>163</sup> Although Justice Breyer shared the Court's concern over unwarranted litigation, he believed trial courts are capable of managing discovery in ways that protect officials' qualified immunity until such protection is no longer necessary.<sup>164</sup> For example, Justice Breyer provided a court could subject lower-level officials to discovery first to determine whether to permit discovery against higher-level officials.<sup>165</sup> For this reason, and for those set forth in Justice Souter's dissent, Justice Breyer would have upheld Iqbal's complaint.<sup>166</sup>

#### IV. IMPACT

*Ashcroft v. Iqbal* is already being called “[t]he most consequential decision of the Supreme Court’s last term [even though it] got only a little attention when it landed in May.”<sup>167</sup> Indeed, although the *Iqbal* decision was just handed down on May 18, 2009, over 16,900 federal cases have already cited to it.<sup>168</sup> Thomas C. Goldstein, Supreme Court advocate and founder of SCOTUSblog, remarked, “Iqbal is the most significant Supreme Court decision in a decade for day-to-day litigation in federal courts.”<sup>169</sup> *Iqbal*'s impact on civil litigation has already been noticed by members of Congress, who have proposed new legislation to curb its effect.<sup>170</sup> Finally, it is unclear what influence *Iqbal* will have on North Dakota's state courts because the Federal Rules of Civil Procedure and the Supreme Court decisions interpreting them only govern proceedings in federal court.<sup>171</sup>

##### A. FEDERAL CIVIL LITIGATION

*Iqbal* will have a significant effect on everyday federal civil litigation.<sup>172</sup> For plaintiffs, *Iqbal* means greater difficulty in surviving a motion

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163. *Id.* (Breyer, J., dissenting).

164. *Id.*

165. *Id.* at 1961-62.

166. *Id.* at 1962.

167. Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10.

168. Shepardize Result, LEXISNEXIS, <http://www.lexisnexis.com> (follow “Shepard’s” hyperlink; then enter the citation “129 S. Ct. 1937” and follow “Check”) (last visited Dec. 13, 2010).

169. Liptak, *supra* note 167. Thomas C. Goldstein is a partner at Akin Gump Strauss Hauer & Feld in Washington, D.C. AKIN GUMP STRAUSS HAUER & FELD LLP, <http://www.akingump.com/tgoldstein/> (last visited Dec. 13, 2010). Goldstein has argued twenty-two cases before the Supreme Court. *Id.* SCOTUSblog is a website devoted to covering of the Supreme Court and is considered to be a premiere source of information on the Court. *See* SCOTUSBLOG, <http://www.scotusblog.com/wp/> (last visited Dec. 13, 2010).

170. *See* Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).

171. FED. R. CIV. P. 1.

172. Liptak, *supra* note 167.

to dismiss.<sup>173</sup> To avoid dismissal, complaints are now required to have more factual specificity, or risk having allegations be deemed conclusory or not suggestive of plausible entitlement to relief.<sup>174</sup> The potential problem for plaintiffs is that information necessary to make a complaint sufficient under *Iqbal* may be in the defendant's head, or otherwise in his, her, or its sole possession.<sup>175</sup> As Judge Posner described, this creates "a Catch-22 situation in which a complaint is dismissed because of the plaintiff's inability to obtain essential information without pretrial discovery . . . that she could not conduct before filing the complaint."<sup>176</sup> While *Iqbal* is problematic for plaintiffs, it is advantageous for defendants.

*Iqbal* represents a new device for defendants to curtail lawsuits before they reach expensive and time-intensive discovery.<sup>177</sup> For example, *Iqbal* has already been used to dismiss a major lawsuit against the pharmaceutical company AstraZeneca and an Alien Tort Claims Act suit against Coca-Cola.<sup>178</sup> The defense community regards *Iqbal* as a much-needed check on plaintiffs with scantily pled complaints being allowed to subject defendants to millions of dollars in discovery in hopes of leveraging settlement pressure.<sup>179</sup> However, *Iqbal*'s benefits to defendants may be short-lived because it has caught the attention of Congress.

## B. LEGISLATIVE ACTION

Individuals in the political arena have taken notice of *Iqbal* as well. On July 22, 2009, United States Senator Arlen Specter introduced legislation that would effectively reverse the Court's decisions in *Twombly* and *Iqbal*.<sup>180</sup> The Notice Pleading Restoration Act of 2009 provides "a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*."<sup>181</sup> In introducing

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173. Kendyl Hanks et al., *Supreme Court Update*, 19 BUSINESS LAW TODAY 43, 46 (2009).

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

175. Herman Schwartz, *The Supreme Court Slams the Door*, THE NATION (Sept. 30, 2009), <http://www.thenation.com/article/supreme-court-slams-door>.

176. *Emery v. Am. Gen. Fin., Inc.*, 134 F.3d 1321, 1323 (7th Cir. 1998).

177. Tony Mauro, *Plaintiffs' Attorneys Mobilize to Soften New Pleading Standard*, N.Y. L.J., Sept. 24, 2009, at col. 1.

178. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1270 (11th Cir. 2009); *Pa. Emp. Benefit Trust Fund v. Astrazeneca Pharm. LP*, No. 6:09-cv-5003, at \*7 (M.D. Fla. 2009).

179. Neal R. Stoll & Shepard Goldfein, *Defense for Twombly': Plausibility Standard Was Never More Plausible*, N.Y. L.J., Aug. 18, 2009, at col. 1.

180. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009). Senator Russ Feingold of Wisconsin has since been added as a co-sponsor. 155 CONG. REC. S9373 (Sept. 15, 2009).

181. *Id.*

the Act, Senator Specter remarked, “The effect of the Court’s actions [in *Twombly* and *Iqbal*] will no doubt be to deny many plaintiffs with meritorious claims access to the Federal courts and, with it, any legal redress for their injuries.”<sup>182</sup> The Act was referred to the Senate Judiciary Committee, where it awaits further action.<sup>183</sup> Congress is not the only group taking action, however, as the NAACP Legal Defense and Educational Fund has decided to undertake the cause of undoing the effects of *Twombly* and *Iqbal*.<sup>184</sup> As part of its strategy, the NAACP will push to amend Rule 8’s pleading standard through the difficult rulemaking process.<sup>185</sup> While *Iqbal*’s impact on the federal level is taking shape, it is still uncertain what effect it will have on North Dakota state courts.

### C. NORTH DAKOTA STATE COURTS

The Court’s decision in *Iqbal* has no direct impact on North Dakota state courts because state courts are governed by their own rules of civil procedure.<sup>186</sup> However, the North Dakota Rules of Civil Procedure, including the pleading rules, are modeled after the Federal Rules of Civil Procedure.<sup>187</sup> Moreover, the North Dakota Supreme Court has stated:

[W]hen we adopted the Federal Rules of Civil Procedure we did so with knowledge of the interpretations placed upon them by the Federal courts, and although we are not compelled to follow these interpretations, they are highly persuasive and, in the interest of uniform interpretation, we should be guided by them.<sup>188</sup>

Further, the North Dakota Supreme Court currently uses *Conley*’s “no set of facts” language to interpret its own pleading standard.<sup>189</sup> Accordingly, it is possible that the rationale underlying *Twombly* and *Iqbal* may influence how the North Dakota rules are construed in the future.

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182. 155 CONG. REC. S7891 (July 22, 2009) (statement by Sen. Specter).

183. THE LIBRARY OF CONGRESS (THOMAS), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s.01504>: (last visited Jan. 18, 2011).

184. Mauro, *supra* note 177.

185. *Id.*

186. N.D. R. CIV. P. 1 explanatory note.

187. *Id.* at 8(a) explanatory note.

188. Unemployment Comp. Div. v. Bjornsrud, 261 N.W.2d 396, 398 (N.D. 1977).

189. *E.g.*, Bala v. State, 2010 ND 164, ¶ 7, 787 N.W.2d 761, 764 (quoting Tibert v. Minto Grain, LLC, 2004 ND 133, ¶ 7, 682 N.W.2d 294, 296).

## V. CONCLUSION

In *Ashcroft v. Iqbal*, the United States Supreme Court further refined and explained the “plausibility” pleading standard devised in *Bell Atlantic Corp. v. Twombly*.<sup>190</sup> For all complaints in federal court to survive dismissal, they must contain sufficient, nonconclusory factual allegations that suggest plausible entitlement to relief.<sup>191</sup> The Court stated that while Iqbal’s nonconclusory allegations against Ashcroft and Mueller were consistent with discriminatory conduct, these assertions were more likely explained by lawful behavior.<sup>192</sup> As such, the Court held Iqbal’s complaint insufficient to state a plausible claim of purposeful, unconstitutional discrimination by Ashcroft and Muller.<sup>193</sup>

*Benjamin J. Williams\**

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190. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

191. *Id.* at 1949.

192. *Id.* at 1951.

193. *Id.* at 1954.

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