NOTES

NO SUIT FOR YOU! *IQBAL*'S EFFECT ON POTENTIALLY MERITORIOUS CASES AND THE "COMPOUND ALLEGATIONS" SOLUTION

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Introduction

> Just follow the ordering procedure and you will be fine. . . . As you walk in the place, move immediately to your right. . . . [K]eep the line moving. . . . [H]old out your money, speak your soup in a loud clear voice, step to the left and receive. . . . It's very important not to embellish on your order. No extraneous comments. No questions. No compliments.[1]

These were the instructions given to Jerry Seinfeld and his friends, in order to buy their lunches from the infamous "Soup Nazi."[2] They subject themselves to these draconian rules because it is the best tasting soup in the city. If the rules are violated, the offender is banished with the scathing admonishment: "No soup for you!"[3]

Our civil pleading system is beginning to resemble the Soup Nazi's lunch counter. A plaintiff must file her complaint with an increasing amount of specific factual allegations in order to move on to the pretrial discovery stage. Failing to adhere to these tougher standards will likely result in a granted motion to dismiss for failure to state a claim. No suit for you.

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1 *Seinfeld: The Soup Nazi* (NBC television broadcast Nov. 2, 1995).

2 *Id.*

3 *Id.*

This Note attempts to analyze this "brave new world" of pleading by applying the *Ashcroft v. Iqbal*[4] standard to cases that passed muster under the well-established *Conley v. Gibson*[5] precedent. Part I covers the history of notice pleading and highlights its intended role as a simplified method of initiating litigation. Part II discusses the recent changes wrought by *Bell Atlantic Corp. v. Twombly*[6] and *Iqbal* in creating a new two-pronged "plausibility" standard that also classifies complaint elements as being either factual allegations or legal conclusions. Part III analyzes the pleadings of *Swierkiewicz v. Sorema N.A.*,[7] *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,[8] and *Ledbetter v. Goodyear Tire & Rubber Co.*,[9] which were all sufficiently pleaded under the *Conley* standard, finding that they likely would never make it to discovery, post-*Iqbal*. Part IV proposes a potential solution for plaintiffs, by recommending that they draft their complaints using mostly "compound allegations" in order to inoculate their legal conclusions from *Iqbal*'s first prong filter.

I. A Brief History of Notice Pleading

Notice pleading arose out of a long history that evolved from the highly technical common-law pleading system inherited from England,[10] and the subsequent code pleading system adopted in about half of the states by the year 1900.[11] Pleadings traditionally fulfilled four major functions: (1) providing notice of the nature of a claim or defense, (2) stating the facts each party believes to exist, (3) narrowing the issues to be litigated, and (4) providing for the means of speedy disposition of sham claims and insubstantial defenses.[12] Fulfilling all of these policy goals led to a cumbersome system where cases

4 129 S. Ct. 1937 (2009).

5 355 U.S. 41 (1957).

6 550 U.S. 544 (2007).

7 534 U.S. 506 (2002).

8 507 U.S. 163 (1993).

9 550 U.S. 618 (2007).

10 *See* Charles E. Clark, Handbook of the Law of Code Pleading 12–17 (2d ed. 1947).

11 *See id.* at 21–23; *see also id.* at 23–31 (detailing the spread and extent of code pleading before the Federal Rules were adopted).

12 *See, e.g.*, Fed. Election Comm'n v. Fla. for Kennedy Comm., 492 F. Supp. 587, 598 (S.D. Fla. 1980) (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1202, at 59–60 (1st ed. 1969)); *see also* Clark, *supra* note 10, at 54 ("Under the common-law system the pleadings were expected to formulate the issue to be tried. The original code ideal was that the pleadings should disclose the material facts of the case.").

were just as often decided on the basis of technicalities and pleading defects as on their merits.[13]

The adoption of the Federal Rules of Civil Procedure significantly simplified the pleading requirements. Rule 8 states that a claim for relief requires "a short and plain statement" of the grounds for jurisdiction, "a short and plain statement of the claim showing that the pleader is entitled to relief; and a demand for the relief sought."[14] After Rule 8 was in place, most of the traditional requirements of pleading were delegated to other pretrial events.[15] With this change, "[t]he relevant facts may be determined by discovery. The issues likewise may be narrowed by discovery . . . or by 'partial summary judgment' under Rule 56(d). Moreover, cases in which there is no real controversy may be disposed of speedily, finally, and on the merits, by summary judgment."[16] In 1947, Charles E. Clark, the principal drafter of the Rules, defined the change as a simplified code pleading system primarily designed to promote fact pleading, which placed a "great emphasis" on stating the facts of the case.[17] He identified notice pleading as a relatively new perspective that had some support among legal scholars for universal adoption.[18] Ten years later, the Supreme Court embraced the concept of notice pleading in *Conley v. Gibson*.[19]

J.D. Conley worked in the Texas and New Orleans Railroad Company where, as a condition of employment, he was required to join a labor union known as the Brotherhood.[20] Because he was black, he was barred from joining the all-white lodge, Local 28, and instead was

13 *See* 5 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 88 (3d ed. 2004) ("Since the pleadings were expected to perform so many duties, it was natural that strict rules should develop as to them, which in turn meant that many cases were disposed of on pleading defects without regard to the merits of the controversy."); *see also* CLARK, *supra* note 10, at 31 ("Until 1938, federal procedure was one of the most difficult in the country, requiring the skill of trained specialists for the application of its esoteric principles."); FREDERIC WILLIAM MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1–7 (A.H. Chaytor & W.J. Whitaker eds., 1936) (describing the various forms of action where a plaintiff's injury needed to be "pigeon-holed" and the common procedural pitfalls that led to premature dismissals).

14 FED. R. CIV. P. 8(a).

15 *See* WRIGHT & MILLER, *supra* note 13, § 1202, at 89.

16 *Id.*

17 *See* CLARK, *supra* note 10, at 56.

18 *See id.*

19 355 U.S. 41, 47–48 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

20 Petitioner's Brief at 4, *Conley*, 355 U.S. 41 (No. 7).

"forced to maintain membership in Local 6051."[21] The two local union lodges were racially segregated but otherwise presumably equal.[22] On May 1, 1954, the railroad company eliminated forty-five paid positions, all of them belonging to Local 6051 members.[23] Advance warning was not provided as required by the union agreement, and none of the white employees from Local 28 lost their jobs.[24] The few black workers that did get rehired lost their seniority and were considered junior to their newly hired white coworkers.[25]

Conley (and his coplaintiffs) sued the Brotherhood for committing "a planned course of conduct designed to discriminate against petitioners and those similarly situated, solely because of their race or color."[26] The complaint also alleged that the Brotherhood "had failed in general to represent Negro employees equally and in good faith."[27] After the Fifth Circuit affirmed the district court's decision to grant the defendant's motion to dismiss (on jurisdictional grounds), the Supreme Court reversed the judgment and allowed Conley's case to proceed.[28] On the issue as to whether Conley's plea was sufficient, the Court unanimously held that it was adequate, explaining that a case cannot 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."[29] By establishing the "no set of facts" standard, the Court interpreted Rule 8(a) to demand only notice pleading. This interpretation usurped Clark's original idea that the Federal Rules merely established a simplified code pleading system. Over the next fifty years, the Supreme Court reaffirmed the *Conley* standard time and again[30] until the one-two punch of *Twombly*

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21 *Id.*

22 *Id.* at 5.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Conley*, 355 U.S. at 43 (1957).

28 *Id.* at 43–44.

29 *Id.* at 45–46.

30 *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–11 (2002) (holding that an employment discrimination complaint does not "require a plaintiff to plead facts establishing a prima facie case" since that is "an evidentiary standard, not a pleading requirement"); *id.* at 511 ("When a federal court reviews the sufficiency of a complaint . . . , [t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974))). Akos Swierkiewicz made several particularized allegations in his complaint, which provided sufficient notice to Sorema and the court of his racial and age discrimination claims. *See infra* Part III; *see also, e.g.*, Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 167–68

and *Iqbal* dramatically changed the rules governing the sufficiency of pleadings.[31]

II. *Twombly* and *Iqbal* Raise the Bar

A. Bell Atlantic v. Twombly

William Twombly was not the first person to complain about his high monthly bills for home telephone service and Internet access. As a former customer service representative for a *Twombly* defendant, the author of this Note personally received calls from thousands of customers just like Twombly that wanted to air their grievances. What those customers *did not* tend to do, however, was file nationwide class action antitrust lawsuits.

The days of each Incumbent Local Exchange Carrier (ILEC) being the exclusive provider of phone service in a given area ended with the Telecommunications Act of 1996.[32] In exchange for the anticipated increase in competition for local telephone service, the ILECs were allowed the opportunity to sell long-distance service.[33] The deregulation of local telephone markets did not result in increased competition for two reasons: first, upstart competitors were unable to meaningfully compete against the ILECs, and second, the ILECs themselves did not venture into each other's territorial strongholds.[34] Twombly's claim was that the ILEC Baby Bells had conspired to "engag[e] in parallel conduct" by stifling competition and "refrain[ing] from competing against one another," in violation of § 1 of the Sherman Act.[35]

The Supreme Court reversed the Second Circuit's decision to reverse the district court's dismissal of the case for failure to state a

(1993) (holding that a plaintiff's § 1983 complaint cannot be held to a heightened pleading standard because all civil claims must conform to Rule 8(a)'s notice standard, except for claims of "averments of fraud or mistake" which must be pleaded with particularity in accordance with Rule 9(b)). The specific *Leatherman* allegations and the defendant's motion to dismiss arguments are discussed in greater detail in Part III.

31 *But see* Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 Iowa L. Rev. 873, 891–910 (2009) (arguing that *Twombly* is generally consistent with the text and history of Rule 8(a)(2)).

32 Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); *see* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 549 (2007).

33 *Twombly*, 550 U.S. at 549 (citing 47 U.S.C. § 271 (2006)).

34 *Id.* at 565.

35 *See id.* at 550–51 (describing the particular activities that were labeled "parallel conduct" against upstart competitors and the limited evidence of refusal to compete).

claim.[36] The Court held that, while it was technically possible that the defendants' actions resulted from an illegal conspiracy, the plaintiff failed to allege "enough facts to state a claim to relief that is plausible on its face."[37] The claims did not cross "the line from conceivable to plausible" because the alleged activities were legal, so long as there was no actual agreement among the defendants.[38] Also, the defendants' behavior was perfectly rational in the absence of a conspiracy, considering the peculiar nature of the telecommunications industry.[39]

The Court insisted that *Twombly* does not create a heightened pleading standard nor does it collapse into the specified pleading requirements of Rule 9 claims of fraud and mistake.[40] By requiring that pleadings contain enough allegations to fulfill a "plausibility standard," *Twombly* departs from the idea of traditional notice pleading by allowing courts to dismiss "implausible" cases before discovery opens the door to skyrocketing legal expenses.[41] The possibility that the plausibility requirement was limited to antitrust cases[42] was dispelled by the following case, where the Court signaled its intent to eliminate pure notice pleading for *all* civil cases.

B. Ashcroft v. Iqbal

> Before I go to prison, the America that I know is a beautiful country and Americans are such beautiful, kind, humble people. When I go to prison, I see there a different face of the United States of America.
>
> Javaid Iqbal[43]

Javaid Iqbal found himself in the oft-clichéd "wrong place at the wrong time." He lived in Long Island as a cable repair technician for

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36 *Id.* at 566, 569–70.

37 *Id.* at 570; *see also id.* at 548–49 (requiring a complaint to include "some factual context suggesting agreement, as distinct from identical, independent action").

38 *Id.* at 566–70.

39 *See id.* at 566–69; *see also id.* at 568–69 (stating that the complaint itself contains factual allegations that argue against the plausibility of a conspiracy).

40 *Id.* at 569 n.14.

41 *See id.* at 559 (describing the practical benefits of weeding out meritless claims at the pleading stage, instead of depending on the ineffectiveness of "careful case management").

42 *See, e.g.*, Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. COLLOQUY 117, 121–22 (2007), http://www.law.northwestern.edu/lawreview/colloquy/2007/31 (arguing that courts were mistakenly applying *Twombly* outside of antitrust law).

43 Nina Bernstein, *2 Men Charge Abuse in Arrests After 9/11 Terror Attack*, N.Y. TIMES, May 3, 2004, at B1.

ten years before the September 11, 2001 terrorist attacks.[44] He was arrested in his apartment less than two months later.[45] Federal agents (on an unrelated investigation) entered his apartment and found a Time magazine with the burning Twin Towers on the cover.[46] They also found paperwork showing that he was in Lower Manhattan picking up a work permit that September morning.[47] Iqbal was one of 184 detained individuals classified as "of high interest" in the Department of Justice's (DOJ) September 11 investigation.[48] While housed in the Administrative Maximum Special Housing Unit (ADMAX SHU), he was among the detainees "kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort."[49] After nine months of incarceration, he was cleared of any links to terrorism by the FBI, but not before he allegedly suffered multiple episodes of physical and emotional abuse.[50] After he pled guilty to having false papers and checks—an agreement to expedite his release from ADMAX SHU—Iqbal served a prison term and was later deported to his native Pakistan.[51]

Iqbal filed suit in the Eastern District of New York, not to contest his arrest, but his treatment while incarcerated in the ADMAX SHU.[52] Iqbal's suit named thirty-four federal officials and nineteen unnamed federal corrections officers, based on an implied cause of action for the government's alleged Fourth Amendment violations.[53] Aside from suing for the abusive acts themselves,[54] Iqbal also filed a discrimi-

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44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1943 (2009).

49 *Id.*

50 *Id.* at 1943–44.

51 *Id.* at 1943; Bernstein, *supra* note 43.

52 *Iqbal*, 129 S. Ct. at 1943. Iqbal's lawsuit was combined along with another plaintiff, Ehab Elmaghraby, who was similarly detained in the ADMAX SHU during the DOJ's post-9/11 investigation sweeps. Mr. Elmaghraby later settled his case for $300,000 and Iqbal became the lead plaintiff. *See* Iqbal v. Hasty, 490 F.3d 143, 147 (2d Cir. 2007), *rev'd sub nom. Iqbal*, 129 S. Ct. 1937; *see also* Nina Bernstein, *U.S. Is Settling Detainee's Suit in 9/11 Sweep*, N.Y. TIMES, Feb. 28, 2006, at A1 (reporting on the case details and the settlement amount).

53 *See* Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–97 (1971).

54 Iqbal claimed he was "deliberately and cruelly subjected to numerous instances of excessive force and verbal abuse, unlawful strip and body cavity-searches, the denial of medical treatment, the denial of adequate nutrition, extended detention in solitary confinement, the denial of adequate exercise, and deliberate interference with [his]

nation claim against the federal officials because he believed he "[was] singled out for such mistreatment because of [his] race, national origin, and religion" and the defendants were liable for "creating, participating in, and endorsing Plaintiff['s] systematic mistreatment."[55] Among the federal officials sued were John Ashcroft, former U.S. Attorney General, and Robert Mueller, Director of the FBI.[56] The defendants filed a motion to dismiss under Rule 12(b)(6), based on qualified immunity grounds and failure to state a claim for supervisory liability.[57] The district court rejected the motion since Iqbal's complaint gave the defendants sufficient notice.[58] The court did acknowledge Ashcroft and Mueller's potentially valid qualified immunity, so it allowed them to file for summary judgment if Iqbal's initial discovery did not yield a sufficient claim for liability.[59]

On appeal to the Second Circuit, not only was the lower court's ruling on the sufficiency of the pleading affirmed, but it was done so under the more rigorous *Twombly* plausibility standard since that case was decided before *Iqbal*'s Second Circuit ruling.[60] The qualified immunity issue also gave the Second Circuit some cause for concern, but they supported the idea of allowing Iqbal access to some limited discovery.[61]

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rights to counsel and to exercise" his religious beliefs. First Amended Complaint & Jury Demand at 3, Elmaghraby v. Ashcroft, No. 04 CV 01809 (JG)(JA), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005).

55 *Id.*

56 *Iqbal*, 129 S. Ct. at 1942.

57 *Id.* at 1944.

58 *Elmaghraby*, 2005 WL 2375202, at *10. The district court's ruling predates *Twombly*, so it naturally applied the notice pleading standard commonly used at the time, without applying a plausibility standard.

59 *Id.* at *21 ("The issue of qualified immunity should be addressed at the earliest appropriate stage. Where, as here, there are factual disputes that bear on the availability of the defense, discovery may be structured accordingly." (citing Crawford-El v. Britton, 523 U.S. 574, 599–600 (1998))). Discovery was limited to whether each defendant was involved "in the creation and implementation of the policy or policies under which plaintiffs were detained, whether he or she had knowledge of the conditions under which plaintiffs were detained, and the defendant's involvement in or knowledge of the clearance process and the alleged bypassing of [Bureau of Prisons] procedures." *Id.*

60 Iqbal v. Hasty, 490 F.3d 143, 166, 178 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

61 *Id.* at 158 ("[A] district court might wish to structure such limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the need for [additional discovery].").

The Supreme Court granted certiorari, reversed the Second Circuit's decision, and remanded.[62] In short, Iqbal's complaint was not adequate to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim. The Court first established that the defendants' qualified immunity from their subordinates' actions raised Iqbal's burden of proof by requiring him to allege sufficient facts to show discriminatory purpose.[63] Facts alleging mere knowledge of the discriminatory actions would not be good enough.

The Court then focused its attention on Iqbal's complaint, where it characterized its *Twombly* pleading analysis as a "two-pronged approach."[64] While a complaint's allegations must be accepted as true when subjected to a Rule 12(b)(6) motion, a court does not have to accept those allegations it considers to be "legal conclusions."[65] Thus, a complaint's allegations must be classified as either an acceptable factual allegation, or a legal conclusion which the Court described as "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements."[66] After disregarding the legal conclusions, the remaining factual allegations should then be scrutinized to "determine whether they plausibly give rise to an entitlement to relief."[67]

The Court explained the mechanics of the two-pronged approach by using the *Twombly* pleadings as an example. The allegation that the defendant phone companies "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another" was dismissed as a legal conclusion, since it "flatly" pleaded the legal requirements under section 1 of the Sherman Act.[68] This left the Court with the factual allegation that the defendants' "'parallel course of conduct . . . to prevent competition' and inflate prices was indicative of the unlawful

62 *Iqbal*, 129 S. Ct. at 1942–43.

63 *Id.* at 1948–49 ("Where the claim is 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*." (emphasis added) (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–41 (1993))). Because of this, Iqbal had to sufficiently plead facts that the defendants "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 1949.

64 *Id.* at 1950.

65 *Id.* at 1949–50.

66 *Id.* at 1949.

67 *Id.* at 1950.

68 *Id.* (alterations in original) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 551 (2007)).

agreement alleged."[69] The Court concluded that because the allegation "did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior," the implausibility of an unlawful agreement was reason enough to sustain the phone companies' 12(b)(6) motion.[70]

The Court proceeded to apply the two-pronged approach to Iqbal's complaint, to determine whether the claim against Ashcroft and Mueller plausibly showed discriminatory purpose. The complaint included allegations that the two defendants each "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]" to abusive confinement within the ADMAX SHU, doing so "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[71] Iqbal also alleged that Ashcroft, in his position as the federal government's chief law enforcement officer, was the "'principal architect'" of the policy, while Mueller was "instrumental in the adoption, promulgation, and implementation" of the discriminatory policies.[72] Starting with the first prong, the Court decided that these allegations are "conclusory and not entitled to be assumed true," because they merely state "bare assertions" of the minimum requirements for a constitutional discrimination claim.[73]

For the second prong of analysis, the Court reviewed the remaining allegations deemed to be "factual," specifically that "the [FBI], under the direction of [Mueller] arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11."[74] It also considered the allegation that the policy to hold the detainees in "highly restrictive conditions of confinement" was approved by both Ashcroft and Mueller.[75] The Court held that while the above allegations were consistent with the plaintiff's claim of purposeful discrimination, the existence of "'obvious alternative explanations'" meant that imputing the defendants with purposeful

69 *Id.* (alteration in original) (quoting *Twombly*, 550 U.S. at 551).

70 *Id.*

71 *Id.* at 1951 (alteration in original) (quoting First Amended Complaint & Jury Demand, *supra* note 54, at 17–18).

72 *Id.* (alteration in original) (quoting First Amended Complaint & Jury Demand, *supra* note 54, at 4–5).

73 *Id.*

74 *Id.* (first and third alterations in original) (quoting First Amended Complaint & Jury Demand, *supra* note 54, at 10).

75 *Id.* (quoting First Amended Complaint & Jury Demand, *supra* note 54, at 13–14).

discrimination "is not a plausible conclusion."[76] The majority opinion went on to reject the lower court's order to allow staged discovery in lieu of dismissing the claim.[77]

Justice Souter's dissent rejects the two-prong approach. Despite *Twombly*'s plausibility requirement, *each* allegation must be taken as true when subject to a 12(b)(6) motion.[78] The allegations in a complaint should be judged as a collective whole, and not in isolation.[79] Also, attempting to filter out legal conclusions leads to inconsistent results since the line separating legal conclusions from substantive factual allegations is not always clear.[80]

III. Applying *Iqbal* to Meritorious *Conley*-era Pleadings

Iqbal's significance was readily apparent soon after the decision was announced in May 2009. The *Iqbal* Court insists that it merely reaffirms the plausibility standard established in *Twombly*.[81] Nevertheless, the early consensus is that *Iqbal*'s two-prong approach sets the pleading bar even higher.[82] The danger is that increasing judicial efficiency by enforcing a stricter pleading standard could result in the premature dismissal of "ugly duckling" claims that are relatively weak in the initial pleadings, but ultimately turn out to be meritorious.

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76 *Id.* at 1951–52 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 567 (2007)). The alternative explanation was that since the September 11 attacks were perpetrated by nineteen Arab Muslims from the Middle East, an otherwise lawful investigation can plausibly have a disparate impact against Arab Muslims in the United States. *Id.*

77 *Id.* at 1953. *But see id.* at 1961–62 (Breyer, J., dissenting) (arguing in favor of granting discretion to the lower courts to direct limited discovery).

78 *Id.* at 1959–60 (Souter, J., dissenting) ("The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.").

79 *Id.* at 1960.

80 *Id.* at 1960–61.

81 *Id.* at 1953 (majority opinion).

82 *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849, 852, 867–83 (2010) (distinguishing *Twombly*'s "thin screening model" from *Iqbal*'s "thick screening model" and concluding that the latter method potentially screens out meritorious suits); Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. Times, July 21, 2009, at A10 (reporting that "things started to change" after *Twombly*, but "[i]n the new world, after Iqbal, a lawsuit has to satisfy a skeptical judicial gatekeeper"); Editorial, *Throwing Out Mr. Iqbal's Case*, N.Y. Times, May 20, 2009, at A28 ("The court's conservative majority is increasingly using legal technicalities to keep people from getting a fair hearing. . . . When people with legitimate claims cannot get a hearing, the whole system of American justice is diminished.").

This Note will now delve into the inexact science of analyzing the pleadings of selected *Conley*-era complaints to determine their sufficiency under *Iqbal*'s two-prong approach. Before doing so, there are two caveats to keep in mind. First, because this analysis compares two sets of standards (as opposed to bright-line rules), there is inevitably a degree of uncertainty in deciding whether a complaint will satisfy *Iqbal*'s standard. *Conley*'s "no set of facts" method at least considered a complaint's allegations as a whole. An early criticism of *Iqbal*'s approach is that the results can vary widely, depending on which allegations a judge chooses to weed out in the first prong.[83] That said, one can extend the Court's own definitions and analogies to reasonably predict the sufficiency of a pleading under *Iqbal*.

Second, this analysis presupposes that the complaints drafted by the plaintiffs were as "well-pleaded" as possible when the lawsuits were filed. There is the possibility that attorneys filed complaints in the *Conley* era with fewer pleaded facts than they had at their disposal. In a notice pleading regime, with less worries of being susceptible to a 12(b)(6) motion, a plaintiff may have had legitimate reasons not to plead the full extent of facts at her disposal. That said, it is generally accepted that the opposite is true: attorneys typically *over*plead their cases for tactical reasons.[84]

This will not be a large-scale empirical statistical analysis. Instead, I will analyze the pleadings of two Supreme Court cases that prominently reaffirmed *Conley* in recent years.[85] I have also included the pleadings of a well-reported gender discrimination case that ultimately led to a Supreme Court ruling against the plaintiff, on unre-

83 *See* Bone, *supra* note 82, at 867–70 (explaining how a legal conclusion should be defined and the potential for district judges to overapply the first prong to make their decisionmaking easier).

84 *See, e.g.*, Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 723–24 (7th Cir. 1986) ("The idea of 'a plain and short statement of the claim' has not caught on. Few complaints follow the models in the Appendix of Forms. Plaintiffs' lawyers, knowing that some judges read a complaint as soon as it is filed in order to get a sense of the suit, hope by pleading facts to 'educate' (that is to say, influence) the judge with regard to the nature and probable merits of the case, and also hope to set the stage for an advantageous settlement by showing the defendant what a powerful case they intend to prove."); *see also* Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1840 (2008) (reasoning that the tradition to overplead may be "masking *Twombly*'s true effect" of strengthening 12(b)(6) motions).

85 Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

lated grounds.[86] Despite her loss, the issues brought to light by the Court's holding eventually led to a legislative response to abrogate that decision.[87]

A. Swierkiewicz v. Sorema

1. The Allegations

Fifty-year-old Akos Swierkiewicz was fired from his job.[88] He worked for eight years at Sorema N.A., a New York–based reinsurance company owned by a French parent corporation.[89] He was initially hired as a Senior Vice President and Chief Underwriting Officer (CUO).[90] Mr. Swierkiewicz filed a lawsuit, alleging that he was terminated on the basis of his Hungarian ethnicity in violation of Title VII of the Civil Rights Act of 1964[91] and on the basis of his age in violation of the Age Discrimination in Employment Act of 1967.[92]

Swierkiewicz submitted a nine-page amended complaint with the following list of detailed allegations, including the introductory facts listed above: In all respects, Swierkiewicz "performed his job in a satisfactory and exemplary manner."[93] In February 1995, Francois Chavel, a French national and Sorema's Chief Executive Officer, demoted Mr. Swierkiewicz and transferred the bulk of his CUO duties to another French national, Nicholas Papadopoulo.[94] Mr. Papadopoulo was thirty-two years old at the time, sixteen years younger and far less experienced than Mr. Swierkiewicz.[95] When he made the decision, Mr. Chavel told Mr. Swierkiewicz he took the action to "energize" the underwriting department, clearly implying he felt Mr. Swierkiewicz was too old for the job.[96]

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86 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). The plaintiff lost her case not because of her pleadings, but on statute of limitations grounds. *See id.* at 637–43.

87 Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

88 Brief for the Petitioner at 7, *Swierkiewicz*, 534 U.S. 506 (No. 00-1853), 2001 WL 1488046, at *7.

89 *Swierkiewicz*, 534 U.S. at 508.

90 *Id.*

91 42 U.S.C. § 2000e (2006).

92 29 U.S.C. § 621 (2006).

93 Brief for the Petitioner, *supra* note 88, at 5, 2001 WL 1488046, at *5 (citing Joint Appendix at 25a, ¶ 18, *Swierkiewicz*, 534 U.S. 506 (No. 00-1853)).

94 *Id.* (citing Joint Appendix, *supra* note 93, at 25a, ¶ 19).

95 *Id.* (citing Joint Appendix, *supra* note 93, at 25a, ¶¶ 19, 22).

96 *Id.* (citing Joint Appendix, *supra* note 93, at 25a, ¶¶ 22–23).

A year later, Mr. Chavel formally appointed Mr. Papadopoulo to the CUO position.[97] Mr. Swierkiewicz was relegated to a marketing and services position.[98] Meanwhile, much younger and less qualified employees were hired and promoted by Sorema to jobs that Swierkiewicz was clearly qualified to perform.[99] For example, Michel Gouze, another French national, was hired as Sorema's Vice President in charge of Marketing, but he had virtually no experience in the insurance or reinsurance business. He had to rely on Mr. Swierkiewicz to perform his duties.[100] Another employee, Daniel Peed, who was much younger than Mr. Swierkiewicz and who had previously reported to him, was promoted to the position of Senior Vice President of Risk Property.[101] Allegedly, these decisions had nothing to do with Mr. Swierkiewicz's performance; he was demoted on account of his national origin and age.[102]

Over the course of the next two years, Mr. Chavel continued to discriminate against Mr. Swierkiewicz on account of his national origin and age.[103] He did so by isolating him, excluding him from business decisions and meetings, and denying him any opportunity for career growth at Sorema.[104] Mr. Swierkiewicz tried to meet with Mr. Chavel to resolve the unsatisfactory working conditions to which he was subject, but his efforts were unavailing.[105] Finally, on April 14, 1997, after two years of ongoing discrimination, Mr. Swierkiewicz sent Mr. Chavel a memo outlining his grievances and requesting a severance package from Sorema.[106] Mr. Chavel did not respond to the memo.[107] Fifteen days later, on April 29, 1997, Mr. Chavel and Sorema's general counsel met with Mr. Swierkiewicz and gave him an ultimatum: either resign without a severance package or be fired.[108] Mr. Swierkiewicz refused to resign, whereupon Mr. Chavel fired him

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97 *Id.* (citing Joint Appendix, *supra* note 93, at 25a, ¶ 21).

98 *Id.* (citing Joint Appendix, *supra* note 93, at 25a, ¶ 19).

99 *Id.* at 5–6, 2001 WL 1488046, at *5–6 (citing Joint Appendix, *supra* note 93, at 25a–26a, ¶¶ 24–27).

100 *Id.* at 6, 2001 WL 1488046, at *6 (citing Joint Appendix, *supra* note 93, at 26a, ¶¶ 26–28).

101 *Id.* (citing Joint Appendix, *supra* note 93, at 26a, ¶¶ 24–25).

102 *Id.* (citing Joint Appendix, *supra* note 93, at 25a, ¶ 20).

103 *Id.* (citing Joint Appendix, *supra* note 93, at 26a, ¶¶ 29–31).

104 *Id.* (citing Joint Appendix, *supra* note 93, at 26a, ¶ 29).

105 *Id.* (citing Joint Appendix, *supra* note 93, at 26a, ¶ 30).

106 *Id.* (citing Joint Appendix, *supra* note 93, at 26a, ¶ 31).

107 *Id.* (citing Joint Appendix, *supra* note 93, at 27a, ¶ 32).

108 *Id.* at 6–7, 2001 WL 1488046, at *6–7 (citing Joint Appendix, *supra* note 93, at 27a, ¶ 33).

effective that very day.[109] There was no valid basis for the termination; rather, it was motivated by Mr. Swierkiewicz's national origin and age.[110] Moreover, unlike other Sorema executives who were fired for cause and who nonetheless received generous severance packages from the company, Mr. Swierkiewicz—who was not fired for cause—was denied severance pay and benefits by Sorema.[111]

2. Applying the *Iqbal* Two-Prong Approach

As explained above, the first step in an *Iqbal* analysis is to filter out all allegations classified as legal conclusions since they are "not entitled to the presumption of truth."[112] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[113] Once those conclusions are disregarded, the remaining "well-pleaded, nonconclusory factual allegation[s]" are addressed to determine whether the plaintiff is plausibly entitled to relief.[114]

The *Swierkiewicz* complaint includes several individual allegations that would likely be filtered out as "legal conclusions." Any and all allegations that describe the defendant executives' purpose or motive as *discriminatory* are potential red flags for courts looking for "threadbare recitals of the elements." This includes the allegation in paragraph twenty that Mr. Swierkiewicz was passed up for promotions on account of his national origin and age; the allegation in paragraph thirty-one that Mr. Chavel discriminated against Mr. Swierkiewicz for two years on account of his national origin and age, and the allegations in paragraph thirty-seven that his termination was motivated by his national origin and age.[115]

Even the allegation in paragraph twenty-three (Mr. Chavel explaining his desire to "energize" the department) arguably gets close to the "legal conclusion" borderline, if the language clearly implying that plaintiff was too old for the job is viewed by a judge as "a legal conclusion couched as a factual allegation."[116] The allegation

109 *Id.* at 7, 2001 WL 1488046, at *7 (citing Joint Appendix, *supra* note 93, at 27a, ¶¶ 34–35).

110 *Id.* (citing Joint Appendix, *supra* note 93, at 27a, ¶¶ 36–37).

111 *Id.* (citing Joint Appendix, *supra* note 93, at 27a, ¶ 38). Five former executives were named in the allegation. Joint Appendix, *supra* note 93, at 27a, ¶ 38.

112 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

113 *Id.* at 1949.

114 *Id.* at 1950–51.

115 *See supra* notes 102, 110 and accompanying text.

116 *Iqbal*, 129 S. Ct. at 1949–50 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

does contain several elements of factual content, such as the loss of the plaintiff's job title and the executive's stated reason for the change. But, it also alleges the "clear implication" that the decision was made for age-specific reasons, which may strike a court as an impermissible legal conclusion.[117]

The remaining allegations would then be judged on their plausibility. Here, Mr. Swierkiewicz benefits by alleging several individual episodes of conduct that may suggest discrimination. These include the allegations of the demotion, lost opportunities of advancement to younger employees with considerably less experience, and the lack of a severance package that other ex-executives enjoyed. While the remaining pleadings are consistent with Swierkiewicz's discrimination claim, *Twombly* and *Iqbal* are perfectly clear that consistency is not enough, if a more likely explanation exists.[118]

While it is possible that the remaining pleadings are convincing enough to pass *Iqbal*'s plausibility prong, a judge may choose to conclude that it is more likely that Swierkiewicz was simply a bad employee. It may find that the more likely alternative is that his unfortunate career at Sorema was due to lack of merit as opposed to outright discrimination. This would particularly apply to the Title VII claim, since there was no factual allegation supporting racial discrimination. The fact that Swierkiewicz is Hungarian, and the other executives were French does not automatically suggest discriminatory behavior. At least the "energize" comment is a fact that can be construed to refer to Swierkiewicz's age. Discrimination on the basis of being Hungarian is merely *conceivable*, and on that basis, it would not survive a 12(b)(6) motion. The ADEA claim seems stronger, but the entire claim likely turns on whether the "energize" allegation makes it to the second prong of analysis. Confirming this apparent uncer-

117 This example illustrates an issue unaddressed by *Iqbal*. *See infra* Part IV.
118 *See Iqbal*, 129 S. Ct. at 1951–52; *Twombly*, 550 U.S. at 567.

tainty, federal courts have already disagreed[119] as to whether *Swierkiewicz*'s pleadings are sufficient in light of *Iqbal*.[120]

B. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit

1. The Allegations

> Charlene Leatherman and her son, Travis Leatherman were stopped in the 8200 block of Cahoba Road in Fort Worth, Tarrant County, Texas, by law enforcement officers in a marked police car. Immediately after Charlene brought her vehicle to a stop, she was surrounded by several men, later discovered to be plain clothes police officers, who were armed with hand guns and other weapons. The plain clothes officers shouted a variety of instructions to Charlene and Travis and threatened to shoot each of them. The plain clothes officers proceeded to identify Charlene and Travis, and . . . informed them that law enforcement officers executing a warrant had shot to death two dogs belonging to the Leathermans [while searching] the Leatherman residence.[121]

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119 *See Access to Justice Denied: Hearing on* Ashcroft v. Iqbal *Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 17 nn.27–28 (2009) (statement of Arthur R. Miller, University Professor, New York University School of Law). *Compare* Gillman v. Inner City Broad. Corp., No. 08 Civ. 8909(LAP), 2009 WL 3003244, at *3 (S.D.N.Y. Sept. 18, 2009) ("*Iqbal* was not meant to displace *Swierkiewicz*'s teachings about pleading standards for employment discrimination claims because in *Twombly*, which heavily informed *Iqbal*, the Supreme Court explicitly affirmed the vitality of *Swierkiewicz*."), *with* Guirguis v. Movers Specialty Servs., Inc., No. 09-1104, 2009 WL 3041992, at *2 n.7 (3d Cir. Sept. 24, 2009) ("We have re-assessed *Swierkiewicz* in the wake of *Twombly*, *Iqbal*, and *Phillips* and have concluded 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*." (quoting Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009))), *and* Argeropoulos v. Exide Techs., No. 08-CV-3760 (JS), 2009 WL 2132443, at *6 (E.D.N.Y. July 8, 2009) ("[T]his kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old 'no set of facts' standard for assessing motions to dismiss. But it does not survive the Supreme Court's 'plausibility standard,' as most recently clarified in *Iqbal*." (citation omitted)).

120 After his case was remanded to the Southern District of New York, Akos Swierkiewicz settled his case with Sorema for an undisclosed sum. After suing his former employer, the backlash prevented him from working at another insurance firm, despite his years of experience. He currently manages his own insurance consulting company, and has served as an expert witness in over eighty civil actions. Telephone Interview with Akos Swierkiewicz, Founder, IRCOS, LLC (Nov. 30, 2009).

121 *See* Brief for Petitioners at 3–8, Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) (No. 91-1657), 1992 WL 511939, at *3–8.

When Charlene asked why the family dogs had been shot, the officer replied that this was "standard procedure."[122] "The search of the Leatherman's home was planned and carried out by law enforcement officers employed by or under the control of Tarrant County Narcotics Intelligence and Coordination Unit (TCNICU), Tarrant County, and the city of Lake Worth."[123]

After returning to their residence, Charlene and Travis Leatherman discovered "Shakespeare," the smaller of the two family dogs owned by the Leathermans, lying dead approximately twenty-five feet from the main doorway entrance to their home.[124] Shakespeare appeared to have been shot three times: once in the stomach, once in the leg, and once in the head. "Ninja," the larger of the two dogs owned by the Leathermans, was discovered on top of a bed located in a rear bedroom of the house. Ninja had been shot in the head at close range, apparently with a shotgun.[125]

Upon the conclusion of the search, after having discovered no items described in the warrant that could otherwise have provided a basis for a criminal prosecution, the officers verbally acknowledged to Charlene and Travis their mistake in having searched the Leatherman residence.[126] Instead of leaving at this time however, the officers removed lawn chairs from a truck and lounged about the driveway and yard of the Leatherman residence for approximately one and a half hours.[127] The officers were drinking beer, smoking, talking, and laughing.[128]

After Mrs. Leatherman filed her complaint, her case was joined with that of another plaintiff who had allegedly suffered similar mistreatment by Tarrant County law enforcement.[129] Four months earlier, Gerald Andert was in his home when the front door was forced open by Tarrant County officers.[130] Mr. Andert was knocked backwards and clubbed twice on the head by an officer without provocation, causing a severe cut to Gerald's forehead that would later require eleven stitches.[131]

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122 *Id.* at 6, 1992 WL 511939, at *6.

123 *Id.*

124 *Id.* at 6–7, 1992 WL 511939, at *6–7.

125 *Id.* at 7, 1992 WL 511939, at *7.

126 *Id.*

127 *Id.*

128 *Id.* at 7–8, 1992 WL 511939, at *7–8.

129 *See id.* at 4–5, 1992 WL 511939, at *4–5.

130 *Id.* at 4, 1992 WL 511939, at *4.

131 *Id.* at 4–5, 1992 WL 511939, at *4–5.

Gerald Andert and members of his family were required to lie face down on the floor at gunpoint.[132] Several requests for identification were made of the officers present. The officers responded by shouting obscenities and threats at the family members. The search of the Andert residence lasted about one and a half hours. No illegal items were discovered, and the officers left the premises without further explanation.[133]

As cited in the Respondents' Brief, each plaintiff further alleged:

> [Defendants] *failed to formulate and implement an adequate policy* to train [their] officers on the Constitutional limitations restricting the manner in which search warrants may be executed; and that in the light of the duties commonly assigned to officers who execute search warrants, the need for additional or different training was so obvious that the conduct of [Defendants], by and through [their] official policy maker[s] [Defendants Curry and Carpenter], demonstrates a deliberate indifference to the Constitutional rights of persons likely to be affected by such failure to train.[134]

Both families' claims were eventually joined into a single case, claiming that the searches were unconstitutional in violation of the Fourth, Fifth, and Fourteenth Amendments, and that the local government entities were liable under § 1983.[135]

2. Applying the *Iqbal* Two-Prong Approach

Just as with *Swierkiewicz*, the complaints in *Leatherman* definitely would not survive *Iqbal*'s first prong unscathed. Municipalities are not immune from § 1983 claims, but they "cannot be held liable unless a municipal policy or custom caused the constitutional injury."[136] In their appellate brief, the defendants (all of them municipal entities) pointed out that *all* of the plaintiffs' allegations were conclusory in

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132 *Id.* at 5, 1992 WL 511939, at *5.

133 *Id.*

134 Brief for Respondents at 4–5, *Leatherman*, 507 U.S. 163 (No. 91-1657), 1992 WL 511945, at *4–5 (alterations in original) (emphasis added) (citing Plaintiff's Amended Complaint ¶¶ 26–27, 31–33, *Leatherman*, 507 U.S. 163 (No. 91-1657)). Leatherman made an additional, similarly worded allegation with regards to a failed policy to train as to the proper response "when confronted by family dogs." *Id.* at 4, 1992 WL 511945, at *4.

135 *See* 42 U.S.C. § 1983 (2006). The municipal defendants were Tarrant County, the Tarrant County Narcotics Intelligence and Coordination Unit (TCNICU), the director of TCNICU and the sheriff (in their official capacities), and the cities of Lake Worth and Grapevine, Texas. Brief for Respondents, *supra* note 134, at 3–4, 1992 WL 511945, at *3–4.

136 *Leatherman*, 507 U.S. at 166.

nature, without factual support.[137] This argument did not mean very much in a *Conley* pleading system that was primarily concerned with providing notice.

In a post-*Iqbal* court, however, this argument is much more powerful. Because attaching secondary liability to municipalities requires a "policy or custom" that causes the injury, any such allegation made without additional facts would probably classify as a "bare assertion" to be filtered by *Iqbal*'s first prong. This includes the allegation stating that the "[p]laintiffs have reason to believe" that the officers "were acting in accordance with official policy usage and custom of the [defendants]."[138] The first prong would likely also filter both allegations claiming that the actions were caused by a failure to "formulate and implement an adequate policy."[139] Those allegations depend on an attenuated connection that conclusively links the officers' abusive behavior with an omission that results in liability to the municipalities.

It is unlikely that a court applying *Iqbal* would have any allegations left to consider for the second prong of analysis. That said, any surviving allegations would be considered for their plausibility, and courts would likely rule that the allegations make the claim merely conceivable. Because the remaining allegations speak only of the actions of the officers, there are a wealth of alternative explanations as to why the municipalities are not liable. The officers may have acted in *violation* of municipal regulations, or the officers' actions were unfortunate, but appropriate given the circumstances. Without a factual allegation to nudge the claim from conceivable to plausible,[140] the *Leatherman* claim today would easily be dismissed on a 12(b)(6) motion.

C. Ledbetter v. Goodyear Tire & Rubber Co.

Unlike the previous two cases, the Supreme Court did not grant certiorari in *Ledbetter* to settle a question on its pleadings. After win-

137 *See* Brief for Respondents, *supra* note 134, at 5, 1992 WL 511945, at *5; *see also, e.g.*, *supra* note 134 and accompanying text (detailing the petitioners' complaints).

138 *See id.* at 3, 1992 WL 511945, at *3 (quoting Joint Appendix at 6–7, *Leatherman*, 507 U.S. 163 (No. 91-1657)).

139 *Id.* at 4–5, 1992 WL 511945, at *4–5 (citing Plaintiff's Amended Complaint, *supra* note 134, ¶¶ 26–27, 31–33).

140 An example of this would be a specific allegation that a municipality trains its officers to act in violation of a constitutional right. To pass muster, this allegation should identify facts to make the allegation plausible (e.g., the existence of an internal memo or testimonials). The actual *production* of evidence is not necessary, since that task can be relegated to pretrial discovery. At the pleading stage, the least that is needed is a good-faith acknowledgement that plausible facts exist.

ning a verdict in district court,[141] the judgment was vacated in the Eleventh Circuit. The plaintiff lost on a statute of limitations issue that generated significant media criticism[142] and ultimately led to a legislative act that abrogated the Court's decision.[143]

1. The Allegations

Lilly Ledbetter was employed by Goodyear from February 5, 1979 until October 31, 1998, when Goodyear "forced her into early retirement."[144] She worked as an Area Manager in the Tire Room at the Gadsden Goodyear plant, and was the only female manager out of sixteen managers.[145] As an Area Manager, Ledbetter was similarly situated with her male co-workers and was doing equal work in the same establishment.[146] However, Ledbetter's male coworkers who were doing identical work were paid at a higher rate.[147] In the fall of 1997, she objected to the company's discriminatory pay practice by complaining to her supervisor, Jerry Jones.[148] She informed him that she was being paid unfairly compared to her male co-workers performing similarly in equal positions.[149] Shortly thereafter, Jones instructed Ms. Ledbetter that it was in her own best interest to interview for and accept the position of Technical Engineer.[150] Eventually, she was involuntarily transferred to the position of Technical Engineer in June of 1998. After her transfer, she was again paid at a lower rate than similarly situated male Technical Engineers doing identical work

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141 *See* Ledbetter v. Goodyear Tire & Rubber Co., No. 99-C-3137-E, 2003 WL 25507253 (N.D. Ala. Sept. 24, 2003), *rev'd*, 421 F.3d 1169 (11th Cir. 2005), *aff'd*, 550 U.S. 618 (2007), *superseded by statute*, Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

142 *See, e.g.*, Michael Selmi, *The Supreme Court's 2006–2007 Term Employment Law Cases: A Quiet but Revealing Term*, 11 EMP. RTS. & EMP. POL'Y J. 219, 221 n.8 (2007) (citing Editorial, *As a Matter of Justice Congress Should Correct Ruling on Fair Pay*, DALL. MORNING NEWS, June 5, 2007, at 14A; Editorial, *Court Bias Deadline Too Tight*, DENVER POST, June 4, 2007, at B7; Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18); *see also, e.g.*, Linda Greenhouse, *Justices' Ruling Limits Lawsuits on Pay Disparity*, N.Y. TIMES, May 30, 2007, at A1 (summarizing the Court's opinions and the case's immediate effect).

143 *See* Lilly Ledbetter Fair Pay Act of 2009, 123 Stat. 5.

144 Complaint ¶ 5, *Ledbetter*, No. 99-C-3137-E, 1999 WL 34804272, at *1.

145 *Id.* ¶ 6.

146 *Id.* ¶ 10.

147 *Id.* ¶ 11.

148 *Id.* ¶ 35.

149 *Id.*

150 *Id.* ¶ 36.

in the same establishment.[151] Goodyear willfully and maliciously discriminated against the plaintiff in pay because of her sex.[152]

Ms. Ledbetter performed work equal or substantially equal to that of the male Area Managers, but received less pay for a substantially similar job.[153] Goodyear had a practice of offering overtime work first to male Area Managers, then to Ms. Ledbetter only after each male turned down the offer, even though she expressed interest in working overtime.[154] In January of 1998, Ms. Ledbetter received a discriminatory evaluation in which she received a low score, while men performing the same job in the same manner as she received a higher evaluation score.[155] Also, Ledbetter's male supervisors and coworkers intentionally isolated her by excluding her.[156] For example, Jerry Jones, the Business Center Manager, regularly excluded Ledbetter from division meetings that he conducted with only the male Area Managers present.[157]

Ledbetter was involuntarily transferred from the position of Area Manager to that of Technical Engineer on January 5, 1998.[158] This position removed her supervisory responsibilities.[159] This transfer effectively prohibited the plaintiff from receiving more pay increases and reduced her retirement income.[160] She was the only one out of sixteen Area Managers transferred out of that position.[161] After transferring Ms. Ledbetter out of the Area Manager position, the company filled her position with a younger male named Steve Thompson, her former co-worker.[162] Afterward, the company promoted a male in his twenties into the Area Manager position vacated by Thompson.[163] After her removal from the Area Manager position, there were no female Area Managers.[164]

Goodyear's act of forcing Ms. Ledbetter to transfer to the Technical Engineer job was clearly intended to cause her resignation, as the Technical Engineer position required the plaintiff to do extensive

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151 *Id.* ¶ 12.
152 *Id.* ¶ 13.
153 *Id.* ¶ 14.
154 *Id.* ¶ 15.
155 *Id.* ¶ 16.
156 *Id.* ¶ 17.
157 *Id.* ¶ 18.
158 *Id.* ¶ 37.
159 *Id.* ¶ 19.
160 *Id.* ¶ 20.
161 *Id.* ¶ 21.
162 *Id.* ¶ 32.
163 *Id.* ¶¶ 22, 32.
164 *Id.* ¶ 23.

manual labor including lifting two hundred fifty tires weighing eighty pounds off of one truck and onto another.[165] She was the only woman in that position, and despite the grueling physical barriers the company threw in front of the plaintiff, Ms. Ledbetter did her job.[166] She received no training for the Technical Engineer position, and there was no job procedure manual or written job description available to her.[167] Ledbetter was suspended for three days for allegedly making an error that similarly situated men made and were not suspended.[168] Significantly younger Area Managers received substantially higher salaries than Ledbetter for substantially equal work.[169]

Goodyear further retaliated against Ms. Ledbetter by failing to rehire her. She properly applied for an Area Manager position at Goodyear on November 8, 1999.[170] The Employment Specialist, Don Gardner, told her that they were not rehiring for Area Manager positions.[171] However, there were five Area Manager positions available and at least one male Area Manager who retired was rehired.[172] As of the date the complaint was filed, Goodyear had refused to rehire Ms. Ledbetter.[173] Goodyear created an environment so hostile and abusive that Ledbetter suffered depression requiring medical treatment.[174] Eventually, the terms and conditions of her Technical Engineer job and the unwarranted discipline by the company forced her into resignation against her will.[175]

2. Applying the *Iqbal* Two-Prong Approach

What is immediately apparent in analyzing *Ledbetter*'s complaint is that it provides many more factual details than the preceding two cases. Most of the allegations are comprised of factual content that a post-*Iqbal* court would have to view as true when subject to a Rule 12(b)(6) motion. Nevertheless, there are certain allegations that would probably be filtered out as "legal conclusions." The barest of the "bare allegations" simply states: "The defendant willfully and maliciously discriminated against the plaintiff in pay because of her

165 *Id.* ¶ 24.
166 *Id.* ¶¶ 25–26.
167 *Id.* ¶ 27.
168 *Id.* ¶¶ 27–28.
169 *Id.* ¶ 33.
170 *Id.* ¶ 38.
171 *Id.*
172 *Id.* ¶ 39.
173 *Id.*
174 *Id.* ¶ 41.
175 *Id.* ¶ 42.

sex."[176] Because it is wholly conclusory, a correct application of *Iqbal* would disregard this allegation entirely.

Another suspect allegation states: "The defendant willfully discriminated against the plaintiff because of her age by transferring her to the position of Technical Engineer."[177] Whether Goodyear "willfully discriminated" against Ledbetter or not is precisely the issue that is being litigated. The fact that she was transferred to a technical engineer position is not an example of res ipsa loquitur. This allegation is roughly equivalent to the allegation in *Twombly* that the phone companies "entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another."[178] Both are allegations that attempt to explain a known and undesirable activity with a legally conclusory motive that imputes liability against the defendant. Despite the presence of additional factual allegations consistent with this claim, they cannot immunize a legally conclusory allegation from *Iqbal*'s first prong.

Other suspect allegations are more difficult to gauge. One in particular states that Ledbetter "received a discriminatory evaluation in which she received a low score while men performing the same job in the same manner as she received a higher evaluation score."[179] This one includes more factual content, including the month and year of occurrence. It asserts a discriminatory evaluation, but also includes a basis for making that determination. The problem is that the facts used to support the claim, that "men performing the same job and in the same manner" received higher scores, are not very specific. In fact, these are among the factors used in some Title VII cases to determine whether an employee is "directly comparable" to another for the purposes of employment discrimination.[180] A judge with an eye towards the prima facie requirements of a Title VII claim may view allegations such as this one as "a legal conclusion couched as a factual allegation."[181] This is essentially the same rationale the *Iqbal* Court used when explaining the two-prong approach in *Twombly*.

176 *Id.* ¶ 13.

177 *Id.* ¶ 31.

178 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 551 (2007) (quoting Complaint ¶ 51, *Twombly*, 550 U.S. 544 (No. 05-1126)).

179 Complaint, *supra* note 144, ¶ 16, 1999 WL 34804272, at *1.

180 *See, e.g.*, Dear v. Shinseki, 578 F.3d 605, 610 (7th Cir. 2009) (defining factors to determine a "similarly situated employee . . . including whether the employee (1) held the *same job description*; (2) *was subject to the same standards*; (3) was subordinate to the same supervisor; and (4) had comparable experience, education, and other qualifications" (emphasis added)).

181 *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (quoting *Twombly*, 550 U.S. at 555).

Because the plaintiff "flatly pleaded" the exact requirements needed to satisfy a § 1 Sherman Act claim, it was viewed as too conclusory and it fell victim to the first prong.[182] If a judge feels that the allegation mirrors the required claim elements too closely, an otherwise valid allegation such as this one may be unfairly hit with the "legal conclusion" label and summarily disregarded in the first prong.

This issue, along with the difficulty in conclusively determining an opposing party's state-of-mind, makes any allegation that imputes intent particularly difficult to judge.[183] The allegation that claims "a clear intent to cause her resignation" by describing the physically rigorous work of a technical engineer falls into this trap as well.[184] It may not be enough to compel a judge to filter out this comparatively fact-filled allegation,[185] but the intent element makes it more ambiguous than an equivalent allegation that does not impute intent.

No matter how many of the above allegations are stamped with the legal conclusion label, and thus, disregarded for the second prong's plausibility test, *Ledbetter* still has a better chance of surviving a 12(b)(6) motion than either *Swierkiewicz* or *Leatherman*. The complaint has relatively few allegations that serve as pure legal conclusions. The rest are sufficiently intertwined with detailed factual allegations that it may be problematic to dismiss them entirely. So far, the allegations in *Ledbetter* may give rise to a plausible allegation of discrimination.

Its biggest weakness, and one that may be exploited by a savvy opponent that will surely invoke *Iqbal*, is that many of its claims depend on the inference that Goodyear was a sexually discriminatory environment. Lilly Ledbetter was the only female manager throughout her years of employment, and this fact is alleged multiple times in her complaint. There are no facts that show that other women applied to those male-dominated positions, only to be rejected in favor of men. Hypothetically, Goodyear can assert in its answer that women never applied for those male-dominated jobs, thus suggesting that Goodyear did not discriminate against female applicants.

Because Goodyear possesses all of the relevant information, it may also include in the pleadings any favorable facts suggesting that

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182 *See id.*

183 *See* Bone, *supra* note 82, at 873 ("[F]acts that are difficult to verify objectively fare much worse in a thick screening model. Two notable examples are the types of factual allegations at issue in *Iqbal* and *Twombly*: descriptions of the defendant's state of mind . . . .").

184 *See* Complaint, *supra* note 144, ¶ 24, 1999 WL 34804272, at *1.

185 This is yet another example of a "compound allegation." *See infra* Part IV.

Ledbetter was a substandard employee.[186] The fact that Ms. Ledbetter was the only female manager then becomes a nonfactor. Any alleged unfair treatment of Ledbetter can then be attributed to the more typical business judgment reasons having nothing to do with gender. Even with the rule that a plaintiff's allegations should be taken as true, the defendant's ability to respond via the pleadings will inevitably influence a court's judgment as to whether the plaintiff alleges a plausible claim. This has the potential effect of turning 12(b)(6) motions into "pre–summary judgment" motions, making it even more difficult for plaintiffs to prevail.[187] It seems that given enough rationalizations, even the relatively strong claims in *Ledbetter* can eventually be whittled down to resemble the likes of *Swierkiewicz*, *Leatherman*, *Twombly*, or *Iqbal*.

IV. Using "Compound Allegations" to Circumvent *Iqbal*'s First Prong

If judges adhere to the text of *Iqbal*, they will have more discretion than ever when granting Rule 12(b)(6) motions. Aside from their ability to determine the overall plausibility of a claim, they also now have discretion over whether certain allegations are bare assertions or legal conclusions to be filtered out before applying *Iqbal*'s second prong plausibility analysis. A judge with a tendency for dismissing certain types of claims now has the ability to carve out particular allegations from a complaint, further ensuring that the claim as a whole fails the plausibility test. This is not to suggest that all judges

186 Examples include negative job evaluations, low standardized test scores, or below-average objective measurements (e.g., attendance records or productivity metrics).

187 *See* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 65–66, 98 (2007). This problem is further magnified in cases with significant information asymmetry between the two parties. Defendants essentially have a chance to dispose of a case à la Rule 56, without needing to give the plaintiff equal access to pertinent information via pretrial discovery. *See also Access to Justice Denied*, *supra* note 119, at 15 (statement of Arthur R. Miller, University Professor, New York University School of Law) ("The common law demurrer, the code motion to dismiss, and our prior understanding of Rule 12(b)(6) all focused only on the complaint's legal sufficiency, not on a judicial assessment of the case's facts or actual merits. Now, *Twombly* and *Iqbal* may have transformed the well-understood purpose of the motion to dismiss into a potentially Draconian method of foreclosing access based solely on an evaluation of the challenged pleading's factual presentation . . . . The transmogrification of this threshold procedure has pushed the motion to dismiss far from its historical function and, in my view, beyond its permissible scope of inquiry.").

would treat these claims equally, but the mechanism is in place for judges looking for an easier way to dismiss plaintiff claims.

One of *Iqbal*'s ambiguities may prove useful to plaintiffs trying to overcome this tougher pleading standard. When a single allegation contains both factual assertions and legal conclusions, which of these should be considered (or ignored) when applying the first prong? In *Iqbal*, the allegations were drafted so that each disregarded "legal conclusion" was self-contained in its own distinct paragraph.[188] The complaint was segmented enough so that the Court was able to identify allegations "wholly factual" or "wholly conclusory," and filter out the latter ones. How then should courts handle longer "compound allegations" that mix relevant factual material with legal conclusions?

Iqbal does not neatly answer this question. On the one hand, the first prong was fashioned to filter out "bare assertions." It is possible that, so long as an allegation contains factual content to accompany the legal conclusion, this should qualify it for the second prong of analysis. On the other hand, if the factual information is only tenuously connected to the legal conclusion asserted, how then should the allegation as a whole be treated? If the compound allegation is included in its entirety, then the embedded legal conclusion must be taken as true. If a court rejects it as "conclusory," does the embedded factual information also get disregarded? The *Iqbal* Court only filtered out *entire* allegations, not portions of them.

Not only does neither interpretation fit squarely into *Iqbal*'s holding, each carries significant drawbacks. Allowing courts to filter out *conclusory elements* within individual allegations would grant courts even more power to prefilter pleadings to their satisfaction. Not allowing courts to do so would invite plaintiffs to more carefully craft their pleadings to surround allegations containing favorable legal conclusions with significant factual assertions, even if they are tenuously related.[189] This kind of pleading tomfoolery is exactly what the Federal Rules were meant to do away with, but plaintiffs may find it necessary to engage in this classic dog-and-pony show to preserve their pleadings from *Iqbal*'s first prong.

188 *See supra* notes 71–73 and accompanying text.

189 There is already evidence that the Eighth Circuit is applying the latter interpretation. *See* Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) ("First, the court must take the plaintiff's factual allegations as true. This tenet does not apply, however, to legal conclusions or 'formulaic recitation of the elements of a cause of action'; *such allegations may properly be set aside*." (emphasis added) (citations omitted) (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009))).

Conclusion

Thousands of cases have already been affected by the introduction of *Iqbal's* two-pronged approach to determine the sufficiency of a complaint. Though this Note focused mostly on discrimination claims, *Iqbal* (as with *Twombly* before it) has been cited in cases encompassing several areas of substantive law.[190] If the pleading standard is not changed via precedent or an official amendment to the Federal Rules, it may continue to affect the substantive law in ways we have not seen since the adoption of the Federal Rules. The use of compound allegations may be a possible work-around to help plaintiffs withstand a Rule 12(b)(6) motion, but any rule that emphasizes form over substance is one we should probably avoid entirely.

190 *See, e.g.*, Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, 609 (6th Cir. 2009) (alleging consumer confusion regarding trademark and fair use); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009) (alleging Alien Tort Statute and Torture Victims Protection Act claims); Farash v. Cont'l Airlines, Inc., 337 F. App'x 7, 8 (2d Cir. 2009) (alleging negligence and assault claims under New York law).